Michael Lynch's law and science studies: A context and foundation for understanding ethnomethodology

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Abstract

Michael Lynch's extensive body of scholarship is a lucid and powerful articulation of social order as practical action in a wide variety of workplace settings. Lynch's investigations of lay/common sense and technical/professional reasoning and activities and how these intertwine provide a context and foundation for a deeper understanding of ethnomethodology. His 'hybrid studies' of science and the law show how these two institutional domains interface and *collide*. This article reviews Lynch's examination of encounters between science, evidence, and the law, and explores how *expertise* is tied to the practical contingencies of presenting and contesting 'science' and 'evidence' in law courts and quasi-legal tribunals. The paper suggests what he found out by focusing on "the constituent features of the [legal] process" as "matters for empirical observation and discovery" (Lynch 1982, 285), and concludes with some reflections on Mike's intellectual clarity, generosity, and shared contributions to our academic community.

INTRODUCTION

This paper reviews the trajectory of Lynch's substantial body of law and science studies, and suggests what he found out by focusing on "the constituent features of the [legal] process" as "matters for empirical observation and discovery" (Lynch 1982, 285). In tracking the development of these studies up to the present time, at relevant points I will also briefly mention how my own socio-legal research has benefitted from the insights of his teachings and writings. In what follows, I discuss Lynch's investigations of plea bargaining and pre-trial argument, cross-examination of a defendant in a perjury trial, witness interrogation in the Iran-Contra Congressional hearings, judges' work, scientific expert witnesses and scientific disputes at trial, and expert testimony in police trials and related 'viral videos' of excessive force.

The criminal and civil law frequently rely on 'scientific evidence' and other technical expert testimony to make consequential decisions and resolve legal disputes. Common sense also brings everyday life into the courtroom in consequential ways, and Lynch's work demonstrates how the routine grounds of everyday life infuse legal reasoning and practices. Jurors are regularly called upon to use their common senses in deliberating and reaching decisions (e.g.,

deciding on pain and suffering damages in civil cases). The jury system relies on the wisdom of ordinary citizens to reason through the strictures and technicalities of the law. Jurors are also asked to use their common sense in deciding the credibility of witnesses, and whether their testimony is truthful, accurate, and should be believed. While standardized jury instructions refer to common sense, they do not define what it is, perhaps because it "goes without saying."

Tracing the history of ethnomethodology (EM) and legal study, Lynch points out that Harold Garfinkel in fact coined the term 'ethnomethodology' while he was conducting his (in)famous Chicago jury study (published as Garfinkel 1967, Chapter 4 [in collaboration with Saul Mendelovitz], and see Cornwell 2010). He explains that "Garfinkel proposed that 'ethnomethodology' would be a way to study these largely untutored methods of practical reasoning...the study of the ordinary 'methods' through which persons conduct their practical affairs" (Lynch 1993, 5). The Chicago jury study analyzed the deliberations of jurors to learn "how the jurors knew what they were doing in doing the work of jurors" (Garfinkel 1974a, 15). Garfinkel found that "jurors decide between what is fact and what is fancy; between what actually happened and what 'merely appeared' to happen; between what is put on and what is truth ... between what is credible and ... the opposite of credible" (Garfinkel 1967, 105). He came to the conclusion that jurors "were concerned with such things as adequate accounts, adequate description, and adequate evidence" and that "[t]hey wanted not to be 'common-sensical' when they used notions of common-sensicality... They wanted to be legal. [And] [a]t the same time, they wanted to be fair" (Garfinkel 1974a, 15–16). Lucidly summing up the significance of this research, Lynch notes that:

> jurors conducted themselves predominantly as practical reasoners with no professional credentials or technical expertise for collecting and assessing evidence, performing methodic demonstrations, or making judgements about matters of fact and opinion. Nevertheless, in their own ways, they addressed familiar 'methodological' concerns during their deliberations, and the way they did so was substantively related to the verdict they negotiated" (Lynch 1993, 4–5).

He examines how the everyday business of legal (and quasi-legal) settings is conducted, how assessments of witness credibility and veracity are made, and how evidence is parsed, shaped up, presented, disputed, interpreted, argued, and evaluated contingently and in substantive material detail to demonstrate for triers of fact things like 'science,' 'objectivity,' 'evidence,' and 'what anyone can see' (or perhaps just some of us). Lynch's wide-ranging ethnomethodological 'studies of work' see all social action as locally organized ordinary activities of practical action, and *members' practices*. In particular, his investigations of scientific expertise in legal settings "describe interactionally organized embodied performances of legal activities. They show in detail how the actions of lawyers, witnesses, judges, and juries draw upon ubiquitous interactional competencies while performing situated legal work" (Lynch 2015, 163). In each of Lynch's studies, and as dispositions of EM, attention is paid to how people in legal settings *do things*, such as assert legal arguments, make (or resist) disclosures, present, invoke, amend, and dispute items of 'evidence' and 'scientific evidence,' assess witness credibility, evaluate claims and defenses, make rulings, reach decisions, and sometimes settle and resolve disputes. His research explores how rules, procedures, statutes, and case law 'precedent,' and diverse

forms of 'evidence' are contingently shaped up, strategically deployed, and contested by the adversaries in a range of different legal contexts, in real-time and in material detail, and always with reference to the facts and circumstances of the concrete case at hand.

BACKGROUND

Lynch and I met when he was a post-doctoral fellow and I was a graduate student in Sociology at UCLA in the late 1970's. We shared our interest in ethnomethodology and Harold Garfinkel, who advised both of us. We attended some of the same seminars and professional conferences and Mike was aware that I planned to attend law school for my dissertation research in order to attain first-hand ethnographic access to the substantive knowledge of the law and the work-site practices of lawyers and judges. This was consistent with Garfinkel's ethnomethodological urging that students undertake 'hybrid studies' of work in an effort to master the contents and practices of the particular domain and local field being studied, with the aim of revealing its 'unique adequacy,' in my case, the material practices of law.

I attended Yale Law School where I pursued a law degree and was able to conduct a close and video-based participant-observation study of training in the legal profession focused on how students learn to think and talk like lawyers (Burns 1997), with the intention of returning to UCLA to complete my Sociology Ph.D. on this topic. After receiving my law degree, I practiced civil litigation in Los Angeles for ten years and eventually returned to the UCLA Sociology Department to complete my Ph.D. At this time, I published a chapter in a collection entitled *Law in Action*, to which Lynch was also a contributor (Burns 1997; Lynch 1997; Travers and Manzo 1997). Since then, we have met several times at professional conferences, and we both contributed to a recent collection on Harold Garfinkel edited by Philippe Sormani and Dirk Vom Lehn (Burns 2023; Lynch, 2023). In addition, from 2019-2020, we met regularly on Zoom (along with Albert Jay Meehan, Patrick Watson, Anne Marie Dennis, and Carmen Nave) on a project funded by the Social Science and Humanities Research Council of Canada that addresses police-involved fatal shootings of civilians which were captured on video that then became evidence in criminal trials against the officer or officers accused of excessive force (e.g., Lynch 2021a).

STUDIES OF PLEA BARGAINING AND PRE-TRIAL ARGUMENT

In an early paper entitled, *Closure and Disclosure in Pre-trial Argument*, Lynch (1982) examines plea bargaining discussions that took place in the prosecutor's office shortly before courtroom proceedings were set to begin in a Canadian criminal court. If the plea negotiations fail to produce a plea deal, the case would proceed to trial. Lynch focuses his analysis on 'disclosure' as central to plea negotiations. He addresses the arguments that ensue in the plea bargaining sessions between defense attorneys and prosecutors in which disclosures are elicited and made, which disclosures are relevant to the terms of plea deals reached and case dispositions.

Lynch notices that "the constituent features of ... 'negotiation' remain largely unexamined as they are not seriously treated as matters for empirical observation and discovery" (Lynch 1982, 285). While numerous legal code sections and procedures pertain to pre-trial 'discovery'

in the U.S. (i.e., rules for obtaining and exchanging evidence with the opposing side), nowhere do these explicit rules and procedures discuss what a 'disclosure' is, or how it is produced and recognized in actual cases. He thus addresses the practical contingencies, interchange, and reasoning in plea bargaining. By examining a corpus of tape-recorded plea bargaining sessions and transcripts of those sessions, Lynch finds that

> disclosure was a far more pervasive phenomenon than merely a name for a particular exchange of prepared information in pre-trial discussions... [Instead,] argument was a locus for discovery or disclosure ... beyond the fact that 'discovery' and 'disclosure' are names assigned ... by members and analysts of criminal justice systems (291).

His research shows that 'disclosure' in plea bargaining "was an 'emergent' feature of pre-trial discussions which had not been arranged in advance to be 'disclosure sessions,'" and it often served to move arguments and the negotiations forward (290, note 9).

An interesting instance of 'disclosure' that Lynch cites is a case where the prosecutor argues to defense counsel that the defendant has given a damaging statement to the police (293–94). The defense attorney challenges this claim, suggesting that his client did not give such a statement to the police. At this point in the exchange, the prosecutor converses with the police detective on the case who is also present in the room and confirms that the defendant did in fact make the damaging statement. This disclosure is then followed by defense counsel's own disclosure that his client told him that he did not make a statement to police. Lynch brings the analytic features of this exchange to life, noting that the practices of plea bargaining are not exclusively legal. Instead, they make use of common sense reasoning and practices of eliciting, resisting, and making 'disclosures,' and then making the disclosures *count*.

His studies of bargaining show that and how the retrospective-prospective elements of 'triability' pervade both formal and informal features of plea bargaining, noting how this feature is relevant as well to other forms of pre-trial negotiation (ibid.). Lynch considers instances where the litigants refer to and project 'what could happen' or 'what would happen' if the case did not settle and went on to trial, highlighting how the advocates use arguments that invoke the prospects and uncertainties of trial in bargaining (ibid.). Such projections involve a combination of technical law (e.g., citation of precedents), along with predictable and unpredictable 'situational' matters that would, or could, arise in a local court (see Burns 1998; 2000; 2001; 2004 on projections of trial in concession-seeking and 'making settlement work' in judicial mediation of large money damage disputes).[1]

Lynch's analysis of plea bargaining uses several concepts from Harvey Sack's early conversational analysis, suggesting that the devices of argument he explores "appear to have generic relevance to conversation..." (314). While interrogations in court routinely rely upon the

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1 I examined judicial mediations of large money damage tort cases conducted by teams of highly specialized attorneys and experts who asserted complex legal claims, defenses, and arguments. To produce movement and compromise, judges separated the parties and sequentially highlighted the weaknesses of each side's position (Burns 1998, 2000, 2004). In so doing, the participants relied on a range of skills and resources, including practical working knowledge of the details of statutes and case law precedent, local juries' typical decisions

sequential organizations of natural conversation (e.g., questions/answers; preferences, agreement/disagreement, first-person and third person reference, etc.), he suggests that neither plea bargaining nor courtroom interrogation are reducible to such structures. Conversational structures in themselves do not explain what plea bargaining consists of substantively, or on any actual occasion of its accomplishment.[2] He finds that plea bargaining participants displayed numerous generic conversational 'moves' that have been identified in other 'negotiation' settings, but emphasizes that in the plea bargaining context, these moves were infused with substantive legal knowledge. For Lynch, to the extent that the conversational moves were "detachable from the setting in which they occurred, they mark a failure of the present analysis to come to terms with any *specifically legal competencies* which may have produced the materials which were studied" (Lynch 1997, 315, emphasis added). His ethnomethodological investigations of legal settings nonetheless focus on the *task at hand* and the substantive matters at issue, not on how local participants manage their turns at talk or the consequences of this for the sequencing of conversational structures. For Lynch, this raises the question of how the sequential ordering of tasks and activities might otherwise be found and specified.

'CREDIBILITY' AS A CONTINGENT ACCOMPLISHMENT IN A PERJURY TRIAL

In 1978, when Lynch was a post-doctoral fellow at the Centre for Criminology and Socio-legal Studies at the University of Toronto, he pursued a study of 'discretionary justice' with Augustine (Gus) Brannigan. In a co-authored article based on tape-recorded and transcribed courtroom testimony and ethnographic interview data gathered in a criminal perjury trial, Brannigan and Lynch adopt a stance of 'ethnomethodological indifference' to consider whether the witness was in fact telling the truth, or was really lying in a trial where the "credibility of the defendant is a paramount issue" (Brannigan and Lynch 1987, 117).

The authors explain that 'perjury' is not an innocent failure of recollection or an unintentional memory distortion. Rather perjury is "*culpable* deception ... defined as willfully misleading the court by not telling the truth under oath" (118, emphasis added). They analyze the cross-examinations of the defendant "in order to elucidate how credibility (or its lack) is established for all practical purposes" (115). Brannigan and Lynch find that assessments of truthfulness and credibility were the focus of the cross-examination and that credibility was "assessed in reference to the 'reasonableness' of *both* the witness's explanations of past events and his or her comportment on the stand when those explanations are challenged" (115, emphasis in original). The authors describe "how 'truthfulness' (or its lack) is reciprocally tied to legal practitioners' attempts to elicit testimony and expose its accountability" (117). They

about the "worth" of particular types of claims, and extreme case formulations, as discussed in "'Think Your Blackest Thoughts and Darken Them...'" (Burns 2001).

2 Conversational analysts of 'institutional talk' (or 'talk at work') seek to identify conversational structures in different formal settings involving non-conversational talk, such as law courts, medical offices, and other institutional settings, and describe how these structures are modified in such settings (Drew and Heritage 1992).

suggest that "[h]ow the witness responded to questions in the immediate situation, as much as what he said about past events, provided a basis for assessments of his credibility" (142).

Brannigan and Lynch describe some conversational practices utilized by the defendant to resist the prosecutor's accusation that he committed perjury at his brother's previous drug dealing trial. They propose that while these practices were not determinative of assessments of the witness' credibility, the defendant's "delayed responses, returning questions, [and] conditional formulations ... were dramatically framed in the interactional setting as indications of evasion" (142). By using a conversational Q-A format and "a sequence of suggestions for the witness's agreement," the prosecutor asserts that the defendant was motivated to lie in order to exculpate his brother from drug dealing charges (127). The authors note that "since the defendant's conversational 'devices' ... can be enacted by an 'innocent' and 'truthful' witness, the prosecutor's job is to highlight dialogically the possibility that they demonstrate a motivated resistance to reasonable suppositions of guilt" (129). They underscore the strategic import of the cross-examination and how prosecutor's interrogation practices contributed to the sense and meaning that the judge (as trier of fact) attributed to the defendant's responses, indicating that "the participants utilize standards of reasonable conduct not only as an interpretive resource for assessing the plausibility of stories, but as a basis for judging how such stories are delivered in an interactional context" (142).

I looked at similar issues related to 'impeachment work' in the Menendez Brothers' murder trial, where I observed "the interactional achievement of facticity, credibility and accountability" (Burns 1996, 2000), and found that "impeachment work involves claims-making contests in which the interrogating lawyer and the adverse witness compete to articulate, substantiate, and sustain (or defeat) a particular version of the facts, evidence, and witness' credibility in the face of a competing alternative account" (Burns 2000, 250).

PRELIMINARY NOTES ON JUDGES' WORK

In *Preliminary Notes on Judges' Work*, based on observations of hearings in a Canadian criminal court, Lynch investigates the judge as "a *social fact* in Garfinkel's sense" (Lynch 1997, 100, emphasis added). He describes the facticity of the judge as a public and highly consequential 'overhearing presence' at plea bargaining sessions, even when the judge is not actually present and/or says nothing (ibid.). Lynch details how the opposing attorneys "invoke the judge as an organizational principle that locally governs the presentation of the case at hand" (103). The judge's 'over-listening presence' "implicates the judge as a significant audience...in a distinctive, legally binding way" (101), as in the following sequence.

> Defense: I don't know, see I don't know the judges here.
> (0.4)
> Crown: I think it's Judge Moore this (morning),
> (0.5)
> Crown: and uh, I don- I don't know what he's like on these, I think, I think, he won't look upon it as a very serious (incident).
> (3.0)

> Defense: Well, basically, if you read in those facts.
> Crown: Emm hmm.
> (1.0)
> Defense: Ummm,
> (0.8)
> Defense: You know, I- I can't see why: he wouldn't, (want to give a) conditional discharge. (Lynch 1997, 102)

The lawyers invoke the over-hearing presence of the judge "with... an attunement to the... evaluations of the local court" (Lynch 1997, 125).

This study of judges' work relies in part on Melvin Pollner's research on "explicative transactions" in traffic court (1979). Both Pollner and Lynch highlight the order-production work of managing and articulating 'local precedence,' and other relations demonstrated across a series of cases (compare Burns 2008 on 'local precedent'). Lynch emphasizes the *continuity* between legal reasoning and discourse, and commonsense reasoning and discourse, and discusses how judges often articulate as rationales for their judgements and decisions their evaluation of the moral character of the accused and the offense they committed. In so doing, judges often include "vernacular maxims and other earthy references to moral wrongdoing and bad character" to justify "harsher sentences than those requested by defense attorneys" (Lynch 1997, 124).

These moral references and other commonplace rhetorics of justice sometimes invoke 'membership categories' (Sacks 1972) as discursive embodiments of practical wisdom (e.g., 'gang member' or 'honor student'), thereby bringing the law 'down to earth" in actual cases. Membership categorization links technical law with commonsense notions of what—and who—is right, reasonable, normal, and just (compare Sudnow, 1965 on plea bargaining work related to treating a case as a 'normal crime'" [or not], and the import of this in negotiating the terms of plea deals.[3] See also Burns 2000a, 2001, 2004 on how judges combine technical and commonplace resources and reasoning in judicial concession-seeking to produce movement toward settlement of large-money damage civil cases).

INTERROGATION IN THE IRAN-CONTRA HEARINGS: PRESENTING AND CONTESTING THE MASTER NARRATIVE

In an article and subsequent book co-authored with David Bogen and entitled, *Spectacle of History: Speech, Text and History at the Iran-Contra Hearings* (1996), the authors examine the interface of law and public spectacle in the production of a historically significant event. Lt. Col. Oliver North, a staff member of Ronald Reagan's National Security Council, testified on TV before the 1987 Joint Congressional Committee's investigation into the Iran-Contra program of covert arms sales to Iran in exchange for the release of the Americans hostages and

3 3. Lynch's study of judges' work is also reminiscent of Sudnow's analysis of formal and informal interpretations of what is an 'included offense,' for all practical purposes, in plea negotiations (Sudnow, 1965).

for funding the 'Contra' counter-revolutionaries in Nicaragua. As Doug Macbeth suggests in his cogent review of *Spectacle*:

> [t]heir Introduction announces several themes for the study, centrally the juxtaposition of theorized discourses on narrativity and deconstruction to the Iran-Contra hearings as a field of real-worldly narrative and deconstructive projects, played out on a surface of questions, answers, texts, tellings, and entitlements. It is these surfaces that hold their attention (Macbeth 2000, 425–26).

Starting their analysis "with a specific case of testimonial discourse," the authors' analyze video segments of testimony by Lt. Col. North before Congress and unpack the practical contingencies and historical work of this tribunal in a highly public and politically charged context. Lynch and Bogen show how its "import, or a version of that import, was extracted from that testimony, and from the often diffuse and fragmentary bits of documentary evidence which were brought to bear upon that testimony" (Bogen and Lynch 1989, 200 and see Lynch and Bogen 1996). Their study underscores the connection in testimony between common sense/practical reasoning and discourse and technical, quasi-legal reasoning and discourse. As the authors note, "everything we shall examine is, in its own field of production, a vernacular achievement ... organized by vernacular objects designed to be used and recognized by masters of the common language" (Lynch and Bogen 1996, 16).

Lynch and Bogen's analysis centers on the witness' practices of resistance to his interrogation and the indeterminacy that emerges from the questioning. The authors closely examine North's claims of failed recollection and how these claims shape his accountability to the interrogation. They show how 'recollection' is a contingently established, defeasible, and achieved structure of locally organized ordinary activities at the hearing. Describing the situated struggles over memory and the witness' accountability for his memory and the events in which he took part, Lynch and Bogen point out that

> [t]he effectiveness of these dialogical maneuvers does not depend on what in fact is in the witness's mind. Instead, the interrogator and witness engage in an antagonistic struggle in which both parties try to involve public standards of memorability ... to specify convincingly for an audience what could make up the contents of the witness' past (196).

In their analysis, the authors build upon several key concepts identified by Harvey Sacks in his early work on conversational analysis (e.g., stories, adjacency pairs, preference organization, etc.), although as Macbeth notes, "[w]hat they make of their data relies ... on topics and themes ... that are now less central in conversational analytic studies" (Macbeth 2000, 425). They expand upon Sacks' early work on 'story tellings' (Sacks 1992, vol. 2) "as a social-moral organization of turn-taking, and moral-scenic entitlements to the turns taken" (Macbeth 2000, 428). In a preliminary article to *Spectacle*, Bogen and Lynch (1989) discuss 'story telling' in the Congressional hearings as a kind of institutionally specified, interrogatively guided *co-telling* of the events in question. The authors note that the story-invitations to North project the testimony as an elaboration of his "'understanding and role' in the ... transaction 'at the time it happened,'" and thus project his "placement as a central character in the story... The

story is set up as though its present narration will be a simple readout of raw experiential data taken from these past events" (Bogen and Lynch 1989, 208 and see Lynch and Bogen 1996). Pointing to the difference between ordinary conversation and questioning that occurs in such a formal hearing or court proceeding, they suggest that a core feature of conversational storytelling is that tellers have rights to the self-initiation and self-direction of their own stories, "whereas in courtroom and related proceedings the self-initiated/self-directed character of narrative accounts is given over to the organizational order of investigative questioning" and witness responses are controlled and constrained (Bogen and Lynch 1989, 209, and see Lynch and Bogen 1996). The sequential organization of story-telling in ordinary conversation "indicates that prefatory components of stories are designed to secure the floor for extended turns at talk and to display topical relationships between a forthcoming story and previous stories in the conversation" (Bogen and Lynch 1989, 15, citing Sacks 1970–72, and see Lynch and Bogen 1996). Thus, in ordinary conversation, the placement and trajectory of a story is often the responsibility of its narrator. But in investigative or inquisitorial proceedings, "issues of placement and trajectory are highly constrained by the imperative that story-tellers should remain responsive to the specific queries of official investigators" (Bogen and Lynch 1989, 209, and see Lynch and Bogen 1996). Therefore, the authors find that "responses to investigative questioning will often need to be tailored to the twin demand of providing adequate testimonial evidence while at the same time protecting respondent's position as a teller of and party to the events in question" (Bogen and Lynch 1989, 203).

Lynch and Bogen's ethnomethodological investigation of the Iran-Contra hearings emphasizes not so much how local participants manage their turns at talk or the consequences of that for conversational structures and the sequencing of action, but rather how

> [t]he witness is ... enjoined to collaborate in the telling of a story that extends and elaborates his previous version in unknown and potentially hazardous ways ... and the witness' entitlement to *his* narrative becomes circumscribed by his becoming a recipient to a version purveyed by the interrogator and documented by the witness' own writings (Lynch and Bogen 1996, 226, emphasis in original).

As Macbeth distinctly sums up in his book review,

> [t]heirs is a production account of how the social technologies and resources of a televised Congressional fact-finding hearing attempted to assemble for anyone and everyone to see, an unavoidably collaborative, but not, in the end, consensual narrative history of a political scandal in the highest offices of government (Macbeth 2000, 424).

Just as 'deniability' is applied to the witnesses' and interrogators' formulations and characterizations of past events, Lynch and Bogen suggest that equivocality and deniability also are key to characterizations of present events and the giving of the testimony itself (Lynch and Bogen 1996, 144). The authors describe a collection of documenting techniques through which the participants to an event anticipate the potential historical significance of that event, and use (or edit or dispose of) available records and recording practices so as to leverage denials of their activities, or a particular interpretation of those events if the record is later subjected to hostile

scrutiny. This 'deniability' incorporates the retrospective-prospective relations between the documentary evidence and its invocation, use, and interpretation in the proceedings. But as the authors highlight, the documents used in Oliver North's interrogation are not self-explicating or unequivocal evidence of an intent to deceive and "[s]uch readings do not demonstrate that a text was originally written to facilitate plausible deniability. Rather, they leave the issue specifically undecidable, and thus *if* operative, effectively operative" (Bogen and Lynch 1989, 220–21, emphasis added).

Likewise, Lynch and Bogen observe that it is very hard to establish that North's claims to lack of recall about an event constitute 'evasion', as suggested in the following data, where the witness' failures to recall "interrupt the progressive development of an interrogative line":

> Questioner: And I take it what you're saying now is that you—you had, with respect to that- the use of that million dollars for the [C]ontras, (0.2) you (0.4) you had not sought or received any approval from people higher in the U.S. Government. (3.5)
> North: (hmm:) (2.0) I don't know that I did, I- I'm not saying I didn't. (1.2) uh, I think I may have apprised uh Admiral Poindexter at some point that I'd done that. (0.2) but I did not uh, (1.4) I do not have a specific recall of that at this time point, no" (Lynch and Bogen 1996, 184).

By not affirming or denying knowledge regarding the matter at issue, the witness impedes the admission being sought by the interrogator that either North or his superiors approved the diversion of funds from the arms sales to the Contras.

Lynch and Bogen's research remains highly informative and relevant today, and specifically to the testimony recently given at the hearings of the Congressional Select Committee to Investigate the January 6th Attack on the United States Capitol.

'TURNING A WITNESS'

The First Amendment of the US Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In the case of *Edwards v. Aguillard*, 482 US 578 (1987), the US Supreme Court ruled that teaching creation science in the public schools violates the Constitutional separation of church and state. Lynch (2015) discusses the widely publicized trial of *Kitzmiller v. Dover Area School District*, a civil lawsuit brought by a group of local parents and teachers and supported by the American Civil Liberties Union (ACLU) against the local school board in Dover, Pennsylvania. The school board was sued for passing a rule that mandated a statement be read to students in ninth grade biology classes stating that evolution "is a 'theory', not a 'fact,' and that ID [intelligent design] is an alternative theory to Darwin's" (Lynch 2015, 166). At the time, the case was the most recent in a "series of court rulings [that] progressively restricted the teaching of creationist doctrines in publicly funded schools" (165).

In his paper, *Turning a Witness*, Lynch explores the "Textual and Interactional Production of a Statement in Adversarial Testimony" (Lynch 2015). He analyzes the cross examination of an expert witness, Steve Fuller, a science studies scholar retained by the defense in *Kitzmiller*. In the interchange, the plaintiffs' attorney focuses the questioning on the witness'

opinion concerning the relationship between ID and creationism. Plaintiff's counsel seeks to press Fuller to confirm that he equated ID with creationism and control Fuller's efforts to resist that claim.

In particular, Lynch considers how plaintiffs' attorney works to 'turn' this expert witness against the defense side that hired him, and emphasizes how 'turning' this witness "was accomplished texually, citationally, and in the turn-by-turn exchanges of courtroom interrogation" (Lynch 2015, 166). Textual resources, such as quoting the witness' own testimony, were turned back against the witness during cross-examination. He highlights how these textual resources were cited and deployed in the questioning by the plaintiffs' lawyer to obtain the witness' confirmation that he "equated ID [intelligent design] with creationism" (173). The interrogator "quotes from Fuller's direct examination...and two prior texts," and these "textual passages are read out loud and explicitly subjected to interpretation. The interrogator *leads the scholarly exercise*, using the present occasion to clarify what the witness meant when he authored the quoted passage, and also holding the witness to account for what he said in the past" (173, emphasis added).

The analysis illuminates the practical management of the testimony and how plaintiff's counsel tries to link the current case with the prior precedent of *Edwards v. Aguillard*, which holds that teaching creationism in the public schools violates the constitutional separation of church and state. The questioning attorney uses his interrogation "to draw links between locally organized exchanges and prior statements attributed to the witness" (Lynch 2015, 163), which makes the witness struggle to resist the statement that "ID is creationism." The witness and interrogator vie to *manage the continuity* between the current case and the precedent set in *Edwards v. Aguillard*. The following is an example of their exchange:

> Q: If you could go to the next page..., and starting at line 21, the question is, intelligent design is creationism... And then your answer... It is a kind of creationism, it is a kind of creationism...
> A: Well it looks like that is what the sentences say. But, I mean, if I may, let me just have a look here. Well it seems to me that what I'm talking about here is that there is some sort of historical connection between creationism and intelligent design. And so in that sense, there is a genealogy that goes back to that. But that's all I'm saying at this point. I'm not saying that to practice intelligent design, one has to be some kind of creationist (Lynch 2015, 176).

The "difficult task, and apparent achievement, of the cross-examining attorney ... was to get the witness to acknowledge that the statement was his. The difficulty had to do with establishing for the overhearing court that the witness had confirmed the statement, and that what he confirmed was that statement" (Lynch 2015, 179). However, even assuming that plaintiff's counsel succeeded in establishing that "ID is creationism," the witness amends his response to say that "ID is a kind of creationism." As Lynch points out, "there remains some doubt about just what that statement meant or means. Does 'is' mean absolute identity or, as 'a kind of' may suggest, can 'ID' be an offshoot of creationism that no longer promotes established religion in the way that concerned the court majority in *Edwards v. Aguillard*?" (179).

He underscores "how an ironic 'fact,'—a statement attributed to a defense [expert] witness that seemed to support the adversary position—was extracted from testimony" (178), and the

"very struggle to get the witness to *say* or confirm that 'ID [intelligent design] is creationism,'" would produce confirmation that would tie the current case to the prior legal precedent of *Edwards* (179), supporting plaintiffs' position that the Dover public school mandate violates the separation of church and state. Lynch concludes that the

> witness's evident struggle to avoid saying just that points to its relevance... The oral recitation of prior writings, the dialogical struggle to confirm and contest what has been written, just in the way written, and/or to qualify or revise the terms for the record, *constitutes* the testimony" (179–80, emphasis in original).

These practices facilitate "the *re-contextualization* of a statement that helped to link the case to a legal precedent" (*Edwards*), precedent that was favorable to plaintiffs and adverse to the defense on whose behalf the witness had testified (179–80, emphasis in original).

'HYBRIDITY' AND DISPUTES OVER SCIENTIFIC EXPERTISE AND SCIENTIFIC EVIDENCE IN COURT

My own research in legal setttings has adopted Garfinkel's recommendation that students of ethnomethodology pursue 'hybrid studies' in various domains of technical and professional work (e.g., Garfinkel 2002). These studies exhibit 'hybridity' in a perhaps familiar sense which follows from 'unique adequacy', i.e., that of being able to understand and analyze the legal issues, strategies, and arguments in a given case, and how to address the practical partisan tasks at hand with the skills of a competent legal professional.

The 'hybridity' of Lynch's law and science studies is written in a different key and does not follow from 'unique adequacy.' Rather, his studies are 'hybrid studies' in the sense that they explore how the institutional domains of science and the law interface and *collide* with each other. And, for that reason, such settings are sociologically interesting. In a co-authored book on DNA evidence entitled, *The Truth Machine: The Contentious History of DNA Fingerprinting* (Lynch, et al. 2008), Lynch, Cole, McNally, and Jordan explore the intersection of science and law, and treat scientific expertise and the production and use of scientific evidence in court as core topics. Their examination of testimony by scientific experts on DNA evidence extends Lynch's previous interest in issues of evidence and techniques of adversarial practice. The authors attend to the practical and historical contingencies in a case-specific way, to consider how courtroom 'deconstruction' is a "practical and circumscribed" (19) situated accomplishment. This characterization fits across his body of law and science studies.

When science and the law intertwine, law is often at the center of the fault line, determining what is science, objectivity, evidence, and what anyone (or maybe just some of us) can see. Lynch, et al. address what counts as 'scientific' evidence and 'expertise' in court and how scientific controversies and circumstantial judgments are brought to the fore, disputed, and resolved in the hybrid legal-scientific field of court proceedings (e.g. Lynch 2015, 2020, and 2021A; Lynch and Cole 2005; Lynch, et al. 2008). The authors trace the technical/legal history of DNA testing, and how the court "relies upon, incorporates, and translates scientific evidence" (Lynch, et al. 2008, 22). They describe practices of introducing, rendering, and contesting DNA as probative evidence, and track the evolution of DNA testing and how it

became "emblematic of a level of objectivity, and certainty unmatched by any other mode of criminal evidence, including fingerprinting" (2).[4]

Lynch, et al. suggest that despite fewer and fewer civil and criminal trials, the jury remains an important institution of justice and imports the community's wisdom and common sense reasoning into courtroom activities, thereby tempering the formal strictures of the law. When cases settle short of trial, the authors indicate, the jury serves as a projected 'virtual presence,' as "litigants frequently argue about how a jury would or could react to elements of the case at hand" (Lynch, et al. 2008, 21, citing Burns 2001). For Lynch and his co-authors,

> 'common sense' is a wonderfully protean concept—sometimes upheld as a valuable public resource, and at other times, condemned as a source of illusion and superstition—and in adversary courtrooms 'science' and 'common sense' are discursive categories that are actively worked into arguments and counter-arguments (Lynch, et al. 2008, 19).

They investigate how expert evidence relates to ordinary 'commonsense,' noting that in trials and pre-trial admissibility hearings "in which no jury is present, the presiding judge takes the role of the common sense fact-finder" (Lynch, et al. 2008, 19).

Their book demonstrates that the history of admissibility of DNA evidence is governed by standards and procedures of law, and that the opportunities, obstacles, and constraints of this evidence emerge in an adversarial legal system in practice. As Lynch et al. insightfully observe, "[t]he lesson that 'DNA' does not transcend mundane organizational practices or the possibilities residing in stories of a crime becomes increasingly important as 'DNA' becomes reified as a machinery of truth for determining guilt or innocence" (346).

'VIRAL VIDEOS' AND INTERROGATING EXPERT WITNESSES IN POLICE EXCESSIVE FORCE TRIALS

A helpful way to understand the adversarial uses of viral videos in Lynch's studies of excessive police violence is by considering Harold Garfinkel's notion of the 'documentary method of interpretation' (DMI). Garfinkel suggests that DMI is essentially *situated work* and constitutes an ignored orderliness or 'missing what' that is fitted to the local particulars, practices, and contingencies. Where the more general work of 'questioning and answering' is concerned, he notes that his purpose:

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4 The authors find with respect to fingerprinting and DNA evidence, "[t]he relative credibility of these two technologies seemed to be undergoing inversion. The unquestioned credibility once assigned to fingerprinting was now assigned to 'DNA,' and the credibility of fingerprinting suffered by comparison" (Lynch, et al. 2008, 13). However, they [also] note that while "high profile misattributions raised questions about latent fingerprint identification's status as science" (Lynch, et al. 2008, 33), both techniques are still in use and "the arrival of DNA has not annulled the dogma that fingerprints are unique or the claim that such uniqueness is discernible" (338).

> is to call your attention to ... some things that might be witnessed in an exchange of questioning and answering ... which [Karl] Mannheim [1936]... called the Documentary Method of Interpretation... That method of searching ... consisted of treating something actually heard, something actually witnessed, ... [i.e.], the particulars of the world, ... as standing proxy for ... an underlying pattern (Garfinkel 1974b, 23-24, and see Garfinkel 1967).

Garfinkel proposes that DMI is not restricted to any particular context or circumstance. Rather, it is a *situated* practice, malleable and adapted in its usages, depending on the detailed circumstances and material particulars, as he explains:

> The features of the method will be found in many, many different places, ... in fact it is immensely widespread, [so] that what we have here is a kind of generalized description, which is both its power and its weakness (Garfinkel 1974b, 5).

Lynch's exploration of viral videos in police excessive force trials exhibits a unique variation of the DMI and shows how video evidence becomes parsed, presented, and pressed as evidence by the prosecution and defense attorneys in ways oriented to achieving their particular partisan aims. Use of the DMI draws attention to how the opposing lawyers render certain features of the video noticeable and significant and do so in ways that 'amend' the video document to support (or defeat) a particular interpretation (and reflexive seeing) of the events in question. The Rodney King beating trial, as analyzed by Charles Goodwin, is emblematic (Goodwin 1994). There, the use of force by the involved police officers was assembled and interpreted by the defense as a reasonable response to King's purportedly aggressive bodily movements in repeatedly trying to rise from the ground and incipiently threatening the officers. According to this defense account, King was in control of whether the police would escalate or de-escalate force, and the video fragments were presented as inspectable evidence (along with other evidence) to be used by the jury in finding the officers' conduct to be reasonable, justified, and consistent with police officer training and standards.

Garfinkel proposes a research policy of ethnomethodological 'indifference' to any and all lay or professional theories about the structure of social action and ordinary activities, arguing instead that "every feature of sense, of fact, of methods, for every particular case of inquiry without exception, is [to be treated as] the managed accomplishment of organized settings of practical actions" (Garfinkel 1967, 32). As Lynch explains it, 'indifference' has "to do with devoting extraordinary care to the examination of detailed constitutive actions, regardless of any theoretical or pre-theoretical conception of their social, ethical, personal, or political significance" (Lynch 2015, 167). EM indifference is demonstrated by Lynch, et al. 2008 in their approach to disputes that occur in court over DNA evidence (not video), noting that they do "not take up the empirical question of what jurors actually understand, or can be brought to understand. Instead, we address how actions and pronouncements by court participants (principally attorneys, judges, and expert witnesses) implicate what a silent jury can understand or appreciate" (Lynch et al. 2008, 21). The DMI is directly on target of 'what jurors actually understand, or can be brought to understand,' and the first analysts are the legal advocates.

Ironically, defense counsel in Lynch's viral video materials have adopted the same 'indifference' by writing into relevance partisan 'ways of seeing', interpreting, claiming sequential organizations, purported gestalts, 'things only some of us can see', etc. to complicate the mix of 'interpretation'. The opposing lawyers in effect high-jack the 'documentary method of interpretation' to build support for their adversarial interpretations and do so in the specific detail and materiality of just this particular case. How they do it, in real time, becomes the EM question, identical to the 'managed accomplishment of organized settings of practical actions' (Garfinkel 1967, 32). Viral videos are a novel (and uncertain) form of material evidence to be un-packed, more than they are a methodological device. It is not their character as 'data' or 'method' that is at issue, nor what EM or ethnomethodologists make of the video tapes. Instead, what is of interest is what is done with the videos by *others* (e.g., defense attorneys and prosecutors, the public) to yield interpretations, and what *others* (including expert witnesses and the jury) make of them. With viral videos, we are dealing with what can be *said* of the 'everyday activities that occur *on videotape*,' as the opposing parties argue the interpretative relevance of the 'shards' of tape presented. Viral videos were not collected or first put to use by ethnomethodologists, but instead were already in the stream of public consciousness and discourse before we ever set eyes on them.

Although Rodney King testified as a witness at the trial of the officers who beat him, he "could not testify about whether the police officers beating him were using unreasonable force since he lacked 'expertise' on the constitution or use of force" (Goodwin 1994, 625). By carefully *re-visioning* the actions of the police officers as 'reasonable' and reconstructing the video display frame-by-frame as a series of frozen images relieved of their real-time temporal production, the defense expert was able to re-interpret the violence shown on the video and experienced by Mr. King in a way that instructed the jury on how to view the videotape and persuaded jurors that the defense interpretation of events was the correct version that should count as credible and factual in the case. The defense expert's testimony re-framed the visual evidence of the beating, leading jurors to re-interpret the 56 metal baton blows visible on the courtroom (and viral) video to conclude that the officers' conduct was a reasonable, appropriate, and lawful response to Mr. King's purportedly aggressive behavior,[5] and was in line with appropriate police use-of-force training and practices. Notably, however, this testimony was given in the absence of any expert testimony from a competing expert witness for the prosecution to alternatively interpret the video evidence. As Lynch describes Goodwin's analysis, "[t]he Rodney King police trial provided a vivid demonstration of how evidence, which vast

5 The 'reasonable officer' standard of conduct is used by triers of fact to assess criminal responsibility in police excessive force cases. Of central importance to the defense strategy is establishing the *reasonableness* of the officer's conduct and belief in the need to use deadly force because, at the time the force was used, the officer/s feared for his/her/their life, or the life of another at the scene. Until recently, juries routinely accepted the police officer's account and found the officer 'not guilty.' Demonstrating the reasonable belief of a police officer in the need to use force is similar to the work involved in asserting and demonstrating 'reasonable fear' as a defense to the crime of murder (Burns 2008).

numbers of viewers took to be unassailable, could be 'de-constructed' in a formal proceeding" (Lynch 2019, 14, later published as Lynch, 2021a).[6]

Akin to Goodwin's work on 'professional vision' in the Rodney King trial, Lynch's recent investigations of expert evidence in police use-of-force trials find that video evidence is a strong source of leverage for re-specifying the actions portrayed on video in a way akin to the 'documentary method of interpretation.' He considers 'viral videos' that document use-of-force by on duty police officers. These videos are publicly "disseminated internationally with great rapidity through the internet" or TV, and challenge the popular notion that "seeing is believing" (Lynch 2021a). By being so widely shared and viewed, viral videos prompt widespread public commentary and reactions, and sometimes result in legal inquiries and prosecutions. Lynch emphasizes that conflicts often arise between lay and expert interpretations of the videos, whereby the video images that are treated by the public as *transparent evidence* of police use of excessive force are 'deconstructed' and rendered equivocal by experts at trial.

He also suggests that viral videos of police violence present the occasion for a distinctive kind of 'reality disjuncture' (Pollner 1976), in which "one party insists upon an experiential account that is incommensurable with another's equally insistent account" (Lynch 2019, 8, later published as Lynch 2021a). Lynch observes that conflicting accounts of the video images are interpreted by the lay public, alongside highly technical and professional (legal and scientific) accounts and treatments of these records as legal evidence (Lynch 2021a). He finds that expert evidence may not trump lay accounts and that "as a legal matter, it is not a foregone conclusion that 'professional visions' will take precedence over 'popular vision'" (Lynch 2019, 1). Rather, these divergent accounts amount to competing 'documentary methods of interpretation.' Often the defense side prevails in use-of-force trials because, "legal standards, control over the collection and release of evidence, and organizational features of the criminal justice system [all] mitigate against the ... conviction of police officers" (Lynch 2019, 1).

Lynch's interest in police violence captured on video was pursued in a recent collaborative project involving criminal trials of police officers charged with excessive force in the killing of

6 In "Sociologists on Trial: Theoretical Competition and Juror Reasoning," (Peyrot and Burns 2001), Mark Peyrot and I considered the work of expert witnesses (sociologists) for the prosecution and defense who presented contrary sociological arguments of criminal responsibility and excuse in their testimony at the trial of two defendants accused of brutally beating truck driver Reginald Denny, an incident recorded live by local LA news stations and captured on videotape. The article relied heavily on my legal training to explicate the legal grounding of the expert testimony in the adversarial context of the trial. We analyzed the 'theoretical competition' in the testimony of these sociologist expert witnesses, contrasting the defense sociologist's excuse/diminished responsibility interpretation ('contagion theory') with the prosecution expert's criminal responsibility theory ('rational choice'), which asserted that misbehaving people in riot situations such as the defendants make choices and are culpable and responsible for their conduct. My most recent work (Burns 2023) also considers the adversarial use of video at trial, this time of crime scene evidence collection in the famous OJ Simpson double murder case. Specifically, the paper addresses the cross-examination conducted by defense attorney Barry Scheck of a criminalist who collected forensic evidence at the murder scene. The questioning makes use of videotape of the evidence collection process recorded at the crime scene. Through this interrogation, Scheck attempts to establish that the forensic evidence has been tainted and contaminated.

civilians, where video footage was available and used as evidence at trial to establish the reasonableness (or unreasonableness) of the officer's conduct (the other participants were myself, Albert Meehan, Patrick Watson, Anne Marie Dennis and Carmen Nave). In a paper presented to the American Sociological Association in 2021, Lynch discusses "how expert analysts re-specify social actions documented on video by ascribing reasonable or unreasonable intentions to police officers and others depicted in the scene" (Lynch 2021b, 2). The assertion by a police officer that he or she reasonably believed their life (or the life of another on scene) was in imminent danger is pitched as key to making a determination of criminal intent and assessing blame and responsibility (or the lack thereof) in such cases.

Lynch offers some preliminary remarks on the work of the attorneys and expert witnesses in the trial of Jason Van Dyke, the Chicago police officer who shot and killed 17-year-old black teen, Laquan McDonald. At first, the police reported that the teen was refusing to put down a knife he was carrying and had lunged at police, and Officer Van Dyke was not charged with any crime. The incident was recorded on dash-cam and body-cam video and initially the Chicago police refused to release the video, but over a year after the incident, a court ordered the release of the video, which showed Mc Donald walking away from police when he was shot 16 times. At trial, the defense "deployed reconstructed body-cam video from two police officers to reconstruct crucial moments in the crime scene" (4). Like Goodwin's earlier analysis of the Rodney King beating trial, this study highlights the difference between 'professional vision,' i.e., the professional analysis of the video evidence, and common sense reaction to the video recording of the encounter that was publicly disseminated on social media and conventional media. The 'reconstructions' of the video recordings at trial may be the most significant innovation to come out of the King trial, underscoring that it is not only that police have expert witnesses in their defense, but that the viral video itself can be 're-visioned' to shape the partisan interpretation.

The widespread common sense reaction, according to Lynch, was "[p]opular outrage expressed through numerous forms of public protest and media criticism of racial injustice [that] was exacerbated by official exonerations" (Lynch 2019, 16–17, later published as Lynch 2021a). He notes that "after the video was made public the immediate threat posed by McDonald at the time of the shooting was widely questioned" (16). In the end, the raw video evidence made a crucial difference in the outcome of the Laquan McDonald trial and helped prosecutors obtain a second-degree murder conviction and almost 7-year prison sentence for Van Dyke. Lynch suggests that events outside of the courtroom, especially the brutal killing of George Floyd, as well as events inside the courtroom, impacted the decision-making and led to the almost unprecedented murder conviction of Officer Van Dyke.

CONCLUSION AND IMPLICATIONS

Over his career, Michael Lynch has offered new settings, studies, and intersections for ethnomethodological research, as a context and foundation for a deeper understanding of ethnomethodology. He provides readers with access to the shared histories, common ties, and divergent interests of ethnomethodology and conversational analysis, making it possible to locate and revive the umbrella of 'ethnomethodology.' Through Mike's wide-ranging studies and his

conceptual acumen we find an abundance of analytic clarifications, instruction, and inspiration for investigating 'the routine grounds of everyday life' in various technical, professional and quotidian settings.

In the studies discussed in this paper, Lynch seeks "to open up questions about the relationship between lay and professional analysis (a relationship in which ethnomethodologists ... are hopelessly embedded [Garfinkel and Sacks 1970])" (Lynch 2021a, 183, and see Garfinkel, 1967, 104–15). He addresses the practical and the technical *intertwining* of legal and commonsense reasoning, resources, and competencies in legal and quasi-legal settings, and suggests that work in these sites often turns on the use of non-legal, common sense reasoning, alongside technical legal and scientific knowledge, resources, and practices. Legal rules and mandates cannot fully account for the reasoning or decision-making in legal settings; they *collaborate* with other professional and community wisdoms. His 'hybrid studies' of science and the law show how these two institutional domains come up against each other and *collide*. In the context of police excessive force cases where the violence is captured on video, Lynch shows how expert analysis and testimony "militate against prosecution and conviction" (Lynch 2019, 1), and contingently "*respecify* social actions documented on video by ascribing '*reasonable*' or '*unreasonable*' intentions to the police officers and others depicted in the scene," often surpassing "popular vision" (Lynch 2021b, 2, emphasis added).

Mike's studies situate and explicate members' methods of practical action and practical reason in law courts and related workplace settings. More broadly, we learn from Lynch to see all social activity and experience as *members' practices*. He offers glimpses into how the everyday world *comes into being* and displays itself in the emergent and locally organized material detail of practical action and practical reasoning. The work of Michael Lynch directs attention to the intricate ways that people locate one another within orders of morality, reason, fact, truth, credibility, intelligibility, accountability, and consequence.

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