Stories from the Jury Room: How Jurors Use Narrative to Process Evidence

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ABSTRACT

This paper analyzes the ways in which jurors use everyday storytelling techniques in their deliberations. It begins by reviewing the literature on how jurors receive and process evidence, emphasizing narrative and storytelling. It then presents some new, qualitative linguistic data drawn from actual jury deliberations, which shed light on jurors' standards of evidence and proof, as well as on the persuasive tactics they use in dealing with each other. Although these data are limited, they provide an interesting basis for assessing existing ideas about jury evidence-processing and thinking more broadly about the strengths and weaknesses of the jury system.

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I. Introduction

As we consider the past and present of the American trial and speculate about its future, there is one central constant: the jury. Whatever else may change, the muscular presence of the Seventh Amendment (abetted by state constitutional provisions that are often even stronger) continues to shelter the jury in the face of demands for efficiency, accountability, and rationality. In view of this, it is remarkable that, more than 200 years after the adoption of the Seventh Amendment, we still know very little about what actually happens in the jury room.

In 1981 Lance Bennett and Martha Feldman published *Reconstructing Reality in the Courtroom,* a compelling account of the stories that are told *to* jurors in the courtroom. In this paper we present an account of the stories told *by* jurors in the jury room. Using published excerpts of deliberations in a 1986 criminal case, some recently published partial transcripts of jury deliberations in several civil cases, and a previously unpublished linguistic transcript of the complete deliberations in a single civil case, we analyze the ways in which jurors receive, discuss, and evaluate evidence. The overarching point is that jurors use everyday conversational resources in their efforts to process the often-conflicting accounts that they hear.

As Bennett and Feldman demonstrated, lawyers try to frame their evidence so as to comport with the conventions of everyday storytelling, or narrative. Our data suggest that jurors attend to those same conventions as they co-produce the master narrative that will become the basis for the verdict. Judges routinely instruct jurors to use their

common sense and everyday experience in evaluating evidence. On a linguistic level, it is clear that they are doing so. This is consistent with the observation that Harold Garfinkel (1967:112) made 40 years ago after interviewing jurors about their deliberations: "The rules of everyday life, as well the rules of the official line, are simultaneously entertained."

It is also consistent with the conclusion reached by Nancy Pennington and Reid Hastie (1993), on the basis of experimental social psychology, that individual jurors "*impose* a narrative story organization on evidence" (ibid.: 194), and that "the story the juror constructs *determines* the juror's decision" (ibid.: 193). In their "story model," a juror composes different narratives based on the evidence and then tests them against one another to decide upon a final version. The story that displays the greatest coverage of the evidence and is most coherent is accepted as the best explanation, and in turn becomes the basis for the juror's decision.

A further piece of consistent evidence about the role of narrative in legal decision-making is Douglas Maynard's (1990) study of narrative structure in plea bargaining discussions among judges, prosecutors, and defense lawyers. Analyzing tape recordings of such discussions, Maynard (1990:66) identified such "narrative components" as background segments, action reports, and reaction reports, and documented some of the ways in which, through narrative, "participants bring to life such factors as the law, organizational 'roles', and even the identity of a defendant." He concluded (ibid.:66) that "[i]t is through narrative that actors make decisions and effect 'outcomes.'"

A. Listening to Real Jurors

The effort to get inside the jury room for research purposes got off to a very bad start. In the mid-1950s, during the research that led to their famous book, *The American Jury,* Harry Kalven and Hans Zeisel recorded five actual civil jury deliberations in Wichita, Kansas, with the consent of the judge and the lawyers but without informing the jurors. When this became public in 1955, the Attorney General of the United States censured them, a Senate committee conducted hearings, and Congress and a majority of states passed legislation forbidding "jury-tapping" for any purpose, including research (Kalven and Zeisel 1966:vi-vii). The Wichita data disappeared forever, and no researcher has been permitted back into a jury room (Diamond 2006:723)--until now.

There is at least one partial exception to that generalization. In 1986, the PBS *Frontline* series broadcast a one-hour program entitled "Inside the Jury Room," which was described as a recorded broadcast of the actual deliberations in a Wisconsin criminal trial. Sometime thereafter, the sociologists and conversation analysts Douglas Maynard and John Manzo obtained from the producer a tape of "almost the entire" 2 ½ hour original deliberation (Maynard and Manzo 1993:176). They analyzed various linguistic and sociological aspects of the deliberations and published their findings in several articles addressed to various law and social science audiences (Maynard and Manzo 1993; Manzo 1993, 1995, 1996). Manzo's individual publications also analyze a videotaped deliberation from an otherwise unidentified "civil case, a dispute over a home-building contract" (Manzo 1993:272). These various publications include extensive transcript excerpts; while not all are of the sort that conversation analysts and linguists use for their most technical analyses, they are highly detailed. Despite their unique access to actual jury deliberations, it appears that Maynard and Manzo's work has

never been cited in the legal literature. In part II.A of this article we resurrect this important work, in particular those aspects of it that bear on jurors' narrative practices.[1]

In 1994, a committee appointed by the Arizona Supreme Court issued a report that advocated a number of significant changes in jury trial procedure (Arizona Supreme Court 1994). The most controversial was a proposal to modify the traditional rule that jurors may not discuss the evidence until they are sent out to deliberate at the end of the case. As ultimately adopted, the new Arizona rule permits civil jurors "to discuss the evidence among themselves in the jury room during recesses from the trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence" (Arizona Rule of Civil Procedure 39(f); see Diamond et al. 2003:7).

Thereafter, the Arizona Supreme Court asked Shari Diamond and several social science colleagues to undertake an empirical assessment of the practical impact of this and other changes in Arizona jury procedure. As part of their work, Diamond and her collaborators conducted an experimental study of 50 trials in an Arizona county trial court, some of which used the new jury-discussion provision and some of which were randomly assigned to a "no-discuss" condition. Significantly, the Diamond group was permitted to videotape all jury discussions and deliberations in the 50 cases, from start to finish.

In 2003, Diamond and her colleagues reported the results of this study in the *Arizona Law Review*. The core of the report addresses such questions as how often and under what circumstances the jurors engaged in pre-deliberation discussions, what matters were discussed, whether the discussions improved the accuracy of jurors' recall,

and whether the jurors complied with their instructions not to prejudge to evidence. As part of the analysis, "[q]uasi-transcripts were created for all discussions and deliberation periods in order to capture the verbal interactions of the jurors"; these transcripts "allow detailed analysis of the content of juror discussions, that is, what jurors said, when, and in the presence of which other jurors" (Diamond et al. 2003:19-20). The principal evidence in the report is quantitative, but the authors do present numerous excerpts from the transcripts in order to illustrate their findings.

Although these transcripts were not prepared for purposes of linguistic analysis, we find them to be an intriguing linguistic resource. They were not created in order to make a complete record of every sound uttered in the jury room, and thus they are not suitable for some of the kinds of work that conversation and discourse analysts do—for example, studying overlapping speech, pauses, and phonological details. Nonetheless, as Diamond et al. state, they "are quite detailed in their reporting and in most instances quote directly or closely paraphrase what each juror said" (Diamond et al. 2003:19-20); in most instances the paraphrases are intended to prevent identification of a particular case.[2] Most importantly, despite the limitations of these transcripts from a linguistic perspective, they are far better than nothing, which is what has been available until now. Therefore, in part II.B of this paper we present a necessarily tentative analysis of some of the narrative practices that they reveal.

In addition, one of the present authors (RHC) assisted in the transcription and coding of the transcripts in the Arizona project. The principal investigators permitted her to make a full linguistic transcript of the jury discussions and deliberations in one of the cases they studied. In part III, we present a more detailed analysis of the narrative

practices that are evident in this transcript. It represents only a single case, of course, so we can say nothing about the distribution or frequency of linguistic phenomena. Nonetheless, consistent with the conventions of discourse analysis, we will offer it as qualitative evidence of the range of practices found in the speech of at least one real jury.

B. Stories and Narratives

Bennett and Feldman (1981:7) define stories as "everyday communication devices that create interpretive contexts for social action." As Patricia Ewick and Susan Silbey (1998:242) put it, "storytelling is a conventional form of social interaction, among the ways we come to know each other, encounter the larger world, and learn about its organization." More specifically, "[i]n everyday social situations people use stories as a means of conveying selective interpretations of social behavior to others" (Bennett and Feldman 1981:7). In form, a story typically "provides for the development, climax, and denouement of action in the context of a defined collection of actors, means, motives, and scenes" (ibid.). In effect, "a story not only focuses attention and judgment on certain key behavior (and the actors' relations to it), it also has the capacity to constrain a clear understanding about the significance of that behavior" (ibid.).

"Story" and "narrative" are often used interchangeably in what we shall collectively term "the discourse literature" (including the frequently overlapping fields of linguistics proper, linguistic anthropology, conversation analysis and related techniques rooted in sociology, and various forms of discourse analysis). For example, in an introductory section to *The Common Place of Law: Stories from Everyday Life,* the sociologists Ewick and Silbey (1998:28-31) use the terms as apparent synonyms. In that same section, which is headed "A Word about Stories," they make the important point

that they "adopted the concept of narrative because people tend to explain their actions to themselves and to others through stories" (ibid.: 28-29). They go on to point out that "narratives can enter scholarly research as either the object, the method, or the product of inquiry." That is, researchers can study narratives/stories as a form of social action, they can use stories as data in an effort to understand something else, or they can use the story "as a metaphor to represent what [they] have discovered" (ibid.). Our focus will be primarily on the first of these, with occasional digressions into the second.

A great deal has been written about the social, strategic, and rhetorical practices that characterize everyday storytelling. An early and still influential model of narrative structure is that of the sociolinguist William Labov (1972). Labov characterized a narrative as a sequence of "clauses" that match up with a sequence of "events which (it is inferred) actually occurred" (ibid.:360; see Johnstone 2001:637). The narrative clauses fall into several functional categories, including the abstract or summary; the orientation, or introduction of time, setting, and characters; the complicating action clauses, which recapitulate events leading up to the climax; the result or resolution; one or more evaluation clauses, which permit the narrator to comment on the story; and a coda, which announces the end of the story. Elaborating on the Labov model, the linguist Wallace Chafe (2001:677) has proposed "a ubiquitous schema for narrative topic development" that consists of summary, initial state, complication, climax, denouement, final state, and coda.

The discourse literature emphasizes the social aspect of stories. The anthropologist Charles Briggs (1996:14) writes that "the manner in which stories are presented and used is often contingent upon their being framed as embodiments of shared

beliefs and understanding." Relatedly, "narratives do not simply describe ready-made events; rather, they provide central means by which we *create* notions as to what took place, how the action unfolded, what prompted it, and the social effects of the events" (ibid.:23). Narratives, in other words, comprise a "process of social construction" (ibid.). In examining this process, it can be useful to think of storytelling as a metadiscursive practice, as the production of "discourses that seek to shape, constrain, or appropriate other discourses" (ibid.:19). Any given narrative, that is, is not only shaped by its own discursive context, but can build upon, incorporate, and reformulate prior discourses.

The discourse literature also stresses the social component of the *production* of stories, as "narration often takes the form of co-narration, involving a complex process of determining who tells what and how." (ibid.:14) The boundary between teller and audience may be elided because "beliefs, values, and attitudes are not so much transmitted from teller to audience as they are *collectively* and *dialogically* engendered" (Ochs et al. 1996:109). Indeed, "the audience may be allowed to say more about what went on than the one who uttered the original utterance(s)" (Duranti 1986:241). Specifically, "members of an audience have [conversational] resources available to them for (1) Analyzing the talk that is being heard, (2) Aligning themselves to it in a particular way, [and] (3) Participating in the field of action it creates" (C. Goodwin 1986:297). As a consequence, the very process of co-production may yield a story that is different in both form and content from the one that an individual narrator sets out to tell.

The interaction between teller and audience regularly involves the phenomenon of "second stories" (Sacks 1992 [orig.1968]), in which the hearer of an initial story produces "a systematic transformation" whose "parasitic organization displays a relevant analysis

of the prior story" (M. Goodwin 1990:251). In an example provided by Marjorie Goodwin (ibid.:93), the second teller "first analyzes [the first teller's] talk as providing a structured, coherent scene that links features of the setting, participants, and action to each other in a particular way, and then systematically transforms that framework to build a new, hypothetical scene that supports *his* claim rather than [the first teller's]."

All of these points are directly relevant to the stories that jurors presumably tell. If story structure is, as Chafe contends, "a ubiquitous schema," then we would expect jurors to follow it as they assemble evidence into a narrative of the case. Given the nature of their task, jurors must necessarily find and act on shared beliefs and understandings. Jurors are not provided with a script of "ready-made events" (Briggs 1996:23); instead, they hear fragmentary and often conflicting accounts of highly-contested events. Thus, in an important way, jurors have no choice but to "*create* notions as to what took place" (ibid.). And a jury narrative is by definition a metanarrative, necessarily building upon, incorporating, and reformulating the stories that witnesses have told in the courtroom.

As this process of "creating notions" unfolds, jurors lay claims to authority for their positions. A frequent tactic is to associate one's position with a "rule" drawn from experience. As we shall see repeatedly, an important device for positing rules is the *if/then* conditional. A juror states the general proposition that *if* a specified condition occurs, *then* a certain conclusion usually ensues, and applies that reasoning to the facts at hand.

A narrative constructed by twelve (or six) people is also likely to be a prime instance of co-production, with the interactive properties that have been documented in

everyday situations. An especially useful analogy is provided by the work of Ochs et al. (1996) on "detective stories" that are co-produced around the dinner table. Their description of the detective story offers a promising model for the development of a master narrative, or verdict, in the jury room:

> A story with a setting, an initiating event, and subsequent responses is presented and could be treated by those co-present as complete; however, the mark of the detective story is that somebody persists in examining the narrative problem beyond this point, eliciting or introducing the relevant information not provided in the initial version of the story. . . . The information that surfaces may lead to a reanalysis of the earlier story's central problem. Such information thus recontextualizes the earlier story not as *the* story but *a* story, that is, only one version of the narrated events (ibid.:99).

A final introductory point concerns a methodological premise common to most forms of discourse analysis, and significant to the data analysis in this paper: the importance of the fine-grained, qualitative analysis of actual speech, "particular utterances in a particular context" (Schegloff 1992:xxv). Organizing and conducting spontaneous, unrehearsed, and often un-self-conscious exchanges of speech—conversation--is probably the most common of human social activities, and certainly among the most complex. The analysis of this mundane yet elemental social process, a thus provides a unique window on the production of the emergent phenomenon we recognize as social order, in large part because the participants (unlike the authors of a written text) rarely expect it to be analyzed. As Monica Heller (2001:252) has vividly put it, it is "possible to uncover the normative order indexed by interactional routines by breaching those routines and watching all hell break loose." This premise, we believe, is as valid in an institutional setting such as the jury room as in a more everyday context such as the dinner table.[3]

We turn now to an examination of some of the available jury room discourse data in order to assess the role that such everyday storytelling conventions might play in the jury deliberation process.

II. Published Transcripts

A. Maynard and Manzo

Maynard and Manzo's 1993 paper, published in a sociology journal, dealt exclusively with the criminal deliberation recorded by the PBS *Frontline* program. That case involved the doctrine of jury nullification, which permits a jury to ignore its instructions in order to avoid what it perceives to be an unjust conviction, and thus to acquit a defendant regardless of the strength of the evidence. The defendant was on trial for violating his parole by acquiring a gun. Although there was no question that he had done so, the case was complicated by the fact that the defendant had originally been attracted by an antique gun, that he had bought a gun as part of a "detective course" advertised in a magazine, and that he apparently had limited mental capabilities.

The authors focus on the jury's concept of "justice." Taking an ethnomethodological approach to the deliberations, they reject the notion of justice as a preexisting "template according to which deliberative outcomes could be measured for fit" (Maynard and Manzo 1993:174). Instead, they treat justice as a "phenomenon of order." Taking the jury to be an "ordinary society," they "analyze how its members strategically introduce and develop 'justice'" in their conversation (ibid.:173). They find that

> Jurors do not define justice and then determine whether the facts of the case and a decision on those facts fit their definition. Rather, in the course of posing puzzles, articulating the law, casting individual ratiocinations into narrative form, and persuading one another of proper procedure and

> outcome, jurors produce "justice" as something to be "done" as they solve their puzzles, attempt to follow the law, work collaboratively to ponder the case, and ultimately reach a unanimous decision (ibid.:175).

In the course of their analysis of how jurors "do" justice, Maynard and Manzo explore several narrative strategies that the jurors employ. The first is the "opening statement," in which each juror presents his or her initial analysis, and following which an initial vote is taken. These statements could be viewed as the equivalent of Ochs et al.'s initial version of the detective story. If these multiple initial tellings diverge, then the jury must "persist[] in examining the narrative problem" (Ochs et al. 1996:99) in search of a shared version. In this case the initial versions do diverge. A majority, open to the idea of nullification, frame the case as a puzzle or dilemma, a conflict between following their instructions to the letter and pursuing some greater moral imperative. A minority take what Maynard and Manzo (1993:177) characterize as a "hardline" and conclude that their instructions leave them no alternative to conviction. As one puts it, "I think the scope of a jury is to decide guilt and innocence, not to be the presiding judge, and uh so I think uh I have to follow the letter of the law" (ibid.: 182).

This juror's opening is typical of the majority (ibid.: 181):

Text 1[4]

I feel that the um defendant's mental abilities and reading level are not the crucial issue here. Uhm, I feel that he, he meets the criteria for us to find guilt. But I think we have a very philosophical argument on our hands in terms of, are we obligated as a jury to follow the letter of the law and find him guilty? Or are we obligated as a jury to use our special level of conscience, uh as the defense lawyer said--otherwise it, you know, could be decided by a computer--um and acquit him because of perhaps an injustice that has been done to him through the-the arrest.

As the deliberations continue, the majority jurors employ a variety of strategies in their efforts to persuade the hardliners to vote for acquittal. For example, the juror quoted in Text 1 states that "on a simple level it would be very easy to say that he is guilty, but we all feel I think that an injustice has been done" (ibid.). Characterizing how the other jurors "all feel" is a tactic described in the conversation analysis literature as "'speaking on behalf of' others who form a proposed collectivity" (ibid.).

The "discovery" of justice proves central to the process or persuasion, and its relevance or irrelevance to the verdict becomes the central issue. As the majority juror who introduces the concept puts it (ibid.:183), "If we [accept the evidence put in front of them], I don't think there is any argument. . . . But we're here to do a justice to someone, and my point is the way I'm trying to decide in my own mind, has justice been done here." A hardliner offers resistance in a statement that he might have taken out of Goffman: "you're pulling back from just looking at the—at the instructions and you're taking into a larger frame of is this justice" (ibid.).

The majority jurors then attempt to lead the hardliners—especially one final "holdout" (Maynard and Manzo's term; ibid.:177)--into acceptance of this "larger frame." Members of the majority "testify" (in the religious sense of "telling how one reached a point of enlightenment," ibid.:187) about the personal paths they took to favoring acquittal. Some of the majority's talk exhibits understanding of and sympathy with the hardline position. The majority jurors say, in effect, that they, too, can see the strength of the evidence, but have been led away from it by some more compelling consideration.

One juror who changed his vote from guilty to not guilty offers the holdout a way out that does not involve acceptance of the justice frame. He suggests that, "taking into account his mental ability and everything," maybe the prosecution failed to prove one element of the offense: "that he had ta know that he possessed a gun." In summation, he aligns himself with the holdout's legalistic approach, but suggests that it can lead to a different result: "I'm not sure acquitting him is doing him a justice, uh I I I personally don't think it is, but I can see your point and I can see a reason for somewhat of a doubt, however minor it may be" (ibid.:186).

The holdout finally capitulates. He is apparently not persuaded, but does not want to "hold up eleven people that are very strong in their feelings." Rather than simply accepting the holdout's acquiescence in acquittal, his fellow jurors now work to convince him of the validity of his vote. In Garfinkel's (1967:114) terms, they work to assign to the verdict a "legitimate history." Testifying plays a prominent role. Another former holdout emphasizes that "I walked into this room feeling exactly like you do. Maybe even more so." But then he had an epiphany, brought about by comparing the defendant to his six-year-old son, "which is in first grade, which is pretty near to what we're talkin' about here. Uh now he could easily be led to purchase something" (ibid.:187-88).

In Text 2, another juror tells a story of personal anguish that leads her to the "justice frame":

Text 2

I found myself feeling real down last night. I was aware of the weight that's on each of us as a juror, and I was aware of the facts y'know, all the evidence facts in the case, and I thought hey, this guy's guilty. Is there some way out of him being adjudged guilty . . .? Boy I mashed around with that for a while, and I said, if there's any justice really, it's in drawing attention to this man's personal situation and limitations (ibid.:188).

Maynard and Manzo see the jurors' notion of justice as an emergent and contingent construct, not an exogenous principle that guides them. Their evidence strikes us as inclusive at best, however. How can one conclude that, for example, the juror just quoted is developing justice as a strategic resource rather than being guided by it as a principle?

What does seem incontrovertible, though, is that the story form, and the everyday strategies that it implicates, are central to the deliberations. The examples quoted above illustrate the centrality of storytelling in several ways:

- The deliberations begin with "opening statements" from each juror, which are in effect initial stories about the evidence and its legal significance.
- As a result of the obvious divergence among these stories, the jurors must "persist[] in examining the narrative problem."
- In doing so, majority jurors do not directly confront the hardliners and their initial narratives. Instead, the tellers align themselves with the holdouts' original stories and then offer roadmaps to acquittal that do not require the hardliners to repudiate those stories.
- These roadmaps are presented as further (or second) stories, personal testimonies about the majority jurors' respective roads to enlightenment. They are metanarratives that build upon, incorporate and reformulate multiple prior stories, including those told in evidence, those initially told in the jury room, and those that are part of the jurors' life experiences. The testimonies implicitly invite the holdouts to rethink their own

experiences in similar terms—to see if a similar story might work for them as well.

- The storytelling does not end with the final vote in favor of acquittal. The testimonies continue in an apparent effort to produce, albeit retroactively, a "legitimate history" of the verdict, a final, co-produced master narrative with which everyone's original story can be reconciled.

In a second, linguistic paper, Manzo (1994) focuses on jurors' use of narratives of personal experience.[5] In addition to re-analyzing some of the data from the earlier paper, he presents several excerpts from the deliberations in the unidentified civil case, which involved a payment dispute between a homeowner and a contractor. He argues that jurors present personal experience stories as evidence of a "rule" and then establish the relevance of that rule to the legal and factual circumstances of the case. He defines "rules" as "formulations of the way things work, or ought to work" (ibid.: 274). In setting out their rules, jurors sometimes use variations on the if/then conditional form: *if* (or *when*) a certain predicate has occurred, *then* certain consequences usually or invariably ensue. The use of such conditionals will be an important theme in the case we analyze in part III.

In Text 3, for example, Juror 2, in interaction with Juror 5, posits a rule "that when the 'money' (the price of the home) is 'set', any further costs are the responsibility of the buyer" (ibid.).

Text 3

J2: See that's the trouble for the Gree:ns is that every time (clears throat) as soon as you've gotten your money set
J4: yeah
J2: anything else that comes up after that?

J5: is outta your [pocket
J2: [is outta your pocket and your stuck
[that's just the way it goes to bill]
J5: [right. Right]

Then, in Text 4, Juror 2 presents the story from which the rule emerged (this time in collaboration with Jurors 4 and 5)(ibid.:275).

Text 4

J2: yknow my wife and I bought a house and we had a set money uh:: the price was all set
J4: uh huh
J2: uh: FHA inspector comes out and says well but I want this and this and this do:ne and the bank says, well fine but that isn't what we yknow bid on you're gonna get the same amount of money period so it was strictly yknow it was extra thousand dollars out of pocket for us and there was nothing we could do you simply <u>had</u> to do it.
J5: right

Finally, in Text 5, Jurors 2 and 4 co-produce a concluding statement that applies the rule to the case. They actually embellish the rule as originally posited, adding the requirement that any exception be guaranteed in writing (ibid.:276).

Text 5

J4: and that's to be expected when you're building a house
J2: yeah it was unfortunate news for the Greens=
J4: yeah right y:es right exactly
J2: but it was certainly their responsibility yeah unless
uh: what's his name said he was gonna guarantee:=
J4: =right and had it dow:n. in writing.

Juror 2 subsequently presents another personal story, this time in response to other jurors' concerns about the contractor's delay in countersuing for his fee (ibid.:279). Whereas in Text 4 the story is presented to justify a rule that has already been posited, here the rule is derived inductively from the story. Juror 2 references "a number of situations where people would uh short [his company] in some fashion or another." In

these instances, the company decided whether to assert a claim by posing the question, "is it something that is going to have an adverse effect upon our reputation?" Juror 2 then focuses the story on one specific instance, "a case not too long ago where a—our customer had obviously screwed up." Applying the reputational algorithm to the situation, the company "ended up sending him money or actually deducting it from his final payment because it was worth it to us for reputation and yknow his good will." Other jurors then align themselves with the point of the story—one saying "oh yes yes I know that from my experience"—and Juror 2 concludes his telling by deriving a rule that is directly relevant to the case at hand: when there is a cost overrun caused by the homeowner, a contractor would not sue for the money until he had been sued himself.

In these examples, jurors bring common sense and everyday experience to bear on their deliberations, as their instructions permit them to. But they do not do it in some general or abstract way. Instead, they employ that most concrete of everyday practices, the story. The jurors' use of stories raises a serious question about their fealty to their instructions. They are adjured to apply the rules of law on which they have been instructed to the stories that comprise the evidence. Here, however, they produce stories from their own experience and use them to justify or derive their own rules for processing the evidence. In Manzo's first example, the jurors' rule—cost overruns are the homeowner's responsibility, absent a writing to the contrary--looks very much like a rogue rule of law that they will apply to the evidence. In the second, the jurors agree on a rule of human behavior—contractors do not sue homeowners over cost overruns unless they have been sued first—that will help them interpret the "official" evidence. While

the second may be nothing more than an unusually elaborate instance of applying common sense, the first would likely have shocked the lawyers and judge in the case.

B. The Arizona Transcripts

We turn next to an examination of the fragmentary transcripts that have been published by Diamond et al. (2003) as part of the Arizona Jury Project. Since they were not intended for linguistic analysis, they are a different kind of evidence than the excerpts published by Maynard and Manzo. Because they were selected to illustrate substantive legal points, not conversational practices, they are less likely to contain complete instances of stories and other units of linguistic analysis. But for the same reason, such linguistic evidence as they do contain cannot be questioned on grounds of selection bias, or cherry-picking. As it turns out, the Arizona evidence is entirely consistent with that developed by Maynard and Manzo, as well as with the general narrative literature.

Diamond et al. present the texts that follow to illustrate the nature of the pre-deliberation discussions that jurors are now permitted to have, to demonstrate the potential benefits of such discussions, and to assess whether jurors are faithful to the requirements that they conduct such discussions only when all are present and that they not reach premature conclusions. Most of the texts are not accompanied by an explanation of the cases or contexts from which they are taken.

Story Structure

Text 6 (Diamond et al. 2003:38) is a vivid illustration of Labov's model of story structure, in the specific context of a co-produced metanarrative. The evolving metanarrative concerns the credibility of the plaintiff's medical narrative, in light of the independent medical testimony that the jurors have apparently just heard.

Text 6

Juror 2: When did the independent medical exam occur?
Juror 7: July 1998
Juror 2: Right
[All jurors talking at once].
Juror 3: And [plaintiff] had all of those prior injuries he didn't disclose.
Juror 2: I thought that was weird. It wasn't like they had to go to different doctors. It was all in one file.
Juror 5: It's not unusual for doctors to disagree.
Juror 7: His [treating doctor's] ability to treat patients seems to just prescribe more drugs.
Juror 2: It is just my opinion but [the plaintiff's] doctor wasn't very good, and at least this witness today knew…
Juror 6: I would like to see [the exhibit about the plaintiff's medication] again. I just want to see what happened after the accident.

In Text 6, the jurors are co-producing a story about the plaintiff's story. More specifically, because this is a pre-deliberation discussion, it is a preliminary story about a part of the plaintiff's story. The Labovian complicating factor, presented by Juror 3, is "all of those prior injuries he [the plaintiff] didn't disclose." There follows a series of evaluations of the plaintiff's story. Juror 2 finds the non-disclosure "weird." Juror 5 is more sympathetic; this juror also makes a claim about how the world generally works ("It's not unusual") to lend authority to his or her position. (We use "authority" in its everyday sense of grounds, warrant, or convincing force; an "authoritative" statement lays claim to such influence.) Jurors 7 and 2 (again) then pile on the plaintiff's doctor. Note that, in contrast to Juror 5's generalizing and thus authoritative assertion, Juror 2 introduces his or her criticism of the doctor with an epistemological disclaimer ("It is just my opinion but"). Juror 6's request to reevaluate certain evidence implies that this narrative did not reach an immediate result or resolution, but was the subject of further development. (As Diamond et al. indicate, this is exactly the outcome that Arizona intended.)

Authority and Rules

We defined "authority" immediately above. We use "rules" in much the same broad, functional way that Manzo (1994:272) did, as "formulations of the way things work, or ought to work." This is consistent with Garfinkel's (1967:112) notion of socially defined "conditions of correct choice." Understood in this way, a rule can derive from a variety of sources, including the law, an expert pronouncement, or an observed pattern of social behavior. Depending on its source, a rule may be backed by coercive power, or may depend for whatever influence it has on a shared understanding among the participants in the relevant interaction. As we shall see, authority and rules are sometimes two sides of the same coin: rules require authority to affect "the way things work," while a claim to authority can sometimes be based on an appeal to rules.

In contrast to Text 6's modest assertion of authority, Text 7 (ibid.:26) illustrates a specialized claim to authority in the form of a strong assertion of expertise. This text is taken from a case assigned to the "control" condition in the experiment. In the control cases, jurors were instructed not to engage in pre-deliberation discussions, but did so in 42 percent of those cases; Diamond et al. presented Text 7 as an example of such discussions.

Text 7

Juror 9: The reason the [defendant] is there is because he's going to have to pay whatever damages there are.
Juror 8: At least [the defendant] didn't take off from the scene. He tried to get out of the car.
Juror 9: He admitted right away it was his fault…The purpose of the case is to see if her injuries are the result of the accident and therefore he is liable for damages, or if they are a result of all her previous life.
Juror 5: We decided we weren't going to talk about it.

Juror 9: That's right we're not going to talk about it.

Juror 9 begins with an unequivocal statement about the defendant's position, phrased in what might be termed lay language. Juror 8 responds with a statement that shows some alignment with the defendant. Juror 9 then repeats the substance of his or her initial statement, but this time in language that is more legal-sounding and thus stakes, or at least implies, a claim to legal expertise. "The reason the [defendant] is here" has become "The purpose of the case," while the phrase "therefore he is liable for damages" lends a legalistic aura to the statement. Juror 9's authoritative stance is underscored by the frankly ironic response to Juror 5's reminder of the rules of deliberation.

In Text 8 (ibid.:39) , a juror asserts authority—if only temporarily--by proposing a general rule of human behavior that can be applied to the evidence.

Text 8

Juror 1: He [plaintiff] sped up when he saw the yellow light and then it was red. I didn't get that straight--was it a yellow or a red light [the plaintiff] saw [the defendant] going through?
Juror 7: It was red and he had to go because he was stuck in the middle.
Juror 1: But another time he [plaintiff] said he saw the other person see the light changing so he [defendant] sped up, or maybe that is what the [other witness] told him. There was no left turn arrow.
Juror 7: 'Cause if you see someone speeding up, what do you do? I sit there.
Juror 1: Yeah, you are not supposed to be in the intersection.
Juror 6: That's why we have to wait for the judge to talk…what are the laws in this state?
Juror 1: Well, there was no turn signal, right? No arrow? What was he doing in the intersection?
Juror 7: We need witnesses to tell us if he ran the light.

At the outset of Text 8, Jurors 1 and 7 identify a factual issue that needs resolution—the condition of the traffic light when the defendant went through it. Juror 7

proposes to frame the issue in terms of a general (or perhaps universal) rule drawn from experience. To establish the rule, Juror 7 uses the rhetorical device of a general question ("if *you* see . . . what do *you* do?") followed by a personal answer ("*I* sit there") in which the co-participants are invited to acquiesce. Juror 1 does so explicitly ("Yeah"), and then offers collateral support for Juror 7's proposed rule with a generalizing "you are not supposed to." But Juror 6 resists Juror 7's authority, insisting that they need to wait for the judge's legal instructions. Juror 1 again aligns with Juror 7 through a series of rhetorical questions, but then Juror 7 backs down, acknowledging a need for more evidence.

Text 9 (ibid:42) provides another example of the promulgation and application of rules.

Text 9

Juror 5: I don't know if anyone else thinks the same, but they said the bruises and abrasions were below the knee. Right? And it's usually instinctive if in the fall you catch yourself like this [juror puts hands in front to illustrate]. Am I right? Then how could it could have happened the way [plaintiff] claimed?

Juror 5 begins with a modest disclaimer of knowledge ("I don't know . . .") and then sets up the problem by reporting what "they" said about the location of the bruises—a foreshadowing of a hoist-by-their-own-petard argument. Juror 5 then makes a pointed shift to the authoritative statement of a rule of behavior that is not only universal, it is "usually instinctive." The rule itself is phrased as an if/then conditional that seems to admit of no exceptions: if you fall, then you catch yourself like this. Juror 5 brings the rule bear on the case with a dramatic flourish, a pair of rhetorical questions that need no answer.

The Evolving Master Narrative

To return to Text 8, one other issue deserves comment: what it reveals about the structure of the evolving master narrative that will underlie the verdict. Note that the jurors are able to identify specific missing pieces (legal instructions, witnesses) of the master narrative, which implies that they have in mind a template or model of the case from which those pieces are missing. We are not told how far along in the case this discussion occurs, but it is clear that at least an early version of this template has emerged before the completion of the evidence, well in advance of the final arguments and judges' instructions. An underlying question is where the template has come from.

Text 10 (ibid.:39-40), a discussion of the plaintiff's pre-accident medical condition, illustrates similar phenomena.

Text 10

Juror 4: The witness started to say something about her insurance and then dropped it. So there a lot of things we may never find out about.
Juror 5: That was a lot of force [that struck plaintiff].
Juror 8: Oh yeah, that's what I was thinking.
Juror 4: And you know how hard her work is. I have no doubt this woman has pain.
Juror 8: That whole issue of degenerative disc disease. She probably has it but it should not factor in…and if she was in the type of pain she was in yesterday…[referring to a "day in the life of the plaintiff" videotape.]
Juror 2: Yes if that was really her level, geez…
Juror 8: I have a friend who is going in for back surgery and his pain varies from day to day. I mean it will be interesting to watch the whole videotape. Are we going to watch the whole thing?
Juror 3: A lot of people go to work with fused backs.
Juror 1: Doesn't this degenerative back disease really hurt her chances? I mean they have not really proved to me that this was just one instance that caused her back problem.
Juror 8: Well, I think that at the end the judge will instruct us on what to consider and what not to, we haven't seen the whole thing yet.
Juror 1: I thought the doctor's testimony was most useful. I mean, [another witness] could never have seen what actually happened.

Juror 4's initial comment in Text 10 refers to missing pieces of evidence that may never be provided—information about insurance and "a lot of things." As in Text 8, the remarking on missing pieces implies something from which the pieces are missing. The jurors are apparently developing a conception of an overarching story—"the whole story," as it were--and are able to distinguish the elements that will be provided to them ("the whole videotape"; "the whole thing") from those that may not ("a lot of things").

As part of this process of development, and again as in Text 8, these jurors also propose and justify rules that they deem relevant to the interpretation of the evidence. Juror 8, for example, cites the experience of a friend with back problems whose "pain varies from day to day"; the implication from the context is that this is a general rule that will be relevant to their interpretation of the videotape. Juror 3 follows with an unequivocal and uncontested empirical rule: "A lot of people go to work with fused backs."

Summary

Many of these issues come together in a complex way in Text 11(ibid.:43). Although Diamond et al. provide no context, it appears that the jurors are discussing a party who has no written records of a medical problem.

Text 11

Juror 1: [M]aybe she is telling the truth and just didn't write it down…if she had written everything down, they wouldn't have a case.
Juror 6: But you have to think in her eyes and mind, and what she thinks at the time.
Juror 1: I agree, but she didn't document it.
Juror 3: A lot of time in medical stuff you think things but you don't write it down.
Juror 8: But you know, if it's not written down, it was never done, it was never thought, everything has to be documented, that's the biggest part.
Juror 7: You think something and you don't necessarily write it down. You don't write down what you think, you write down what you see.

Juror 8: I'm just saying that documentation counts, as [opposing expert witness] said. She speculates a lot but doesn't have anything documented.

As Labov's model would predict, the embedded, co-produced narrative in Text 11 begins with an abstract, or statement of the problem, by Juror 1: the absence of an expected writing. The abstract concludes with an if/then conditional ("if she had written everything down, [then] they [presumably the opposing party] wouldn't have a case") that emphasizes the importance of the omission. As in previous texts, the reference to a missing piece of the story suggests that the jurors are evaluating the evidence against a shared template, a model of what a "proper" case would look like.

As part of the specification of this model, the jurors debate a quasi-legal rule that is implicit in Juror 1's opening and then made explicit by Juror 8, once again in the if/then form: "if it's not written down, [then] it was never done, it was never thought, nothing, everything has to be documented." Other jurors contest the rule, both before and after Juror 8's statement. Juror 6 admonishes the others to "think in her eyes and mind," Juror 3 proposes an exception to the rule for "medical stuff," and Juror 7 seeks to limit its application to "what you see" as opposed to "what you think." In summation, Juror 8 acknowledges these arguments with a self-deprecating "I'm just saying," but quickly shifts gears to claim the support of an expert witness. Juror 8's final remark is almost dismissive, relegating that which is undocumented to the realm of speculation. The text ends here, but if Juror 8 has prevailed, then this jury's interpretation of the evidence will be guided by a strict rule that is legal-sounding but of unknown provenance.

A final example, Text 12 (ibid.:46), illustrates the relevance of Ochs et al.'s detective story model to jury deliberations.

Text 12

Juror 8: I'm saying the letter wasn't signed until the 12th. How could they notify him or fax him until after they knew it?
Juror 2: What would they have said to him on the phone? I would think…
Juror 6: [interrupting] They said working days, so I'm wondering if it was a Tuesday or a Wednesday.
Juror 3: Well I remember when [Witness X] was testifying, they asked if she remembered what day it was, and she said it was a Thursday, so that means there must have been a weekend in there, too.
Juror 3 [*sic*]: Well, that must be why the letter didn't get signed. That seems so confusing.
Juror 6: [referring to her notes] It was during the week, so there were five days…
Juror 8: Well the other calls were on a Friday, so that is more than five days they had to read it.
Juror 1: But they didn't use the mail; they faxed it.
Several jurors: The letter was faxed but the contract was returned on Monday.
Juror 5: They faxed the letter but the contract was returned on Monday. That was a reasonable amount of time.
Juror 9: The critical time is how long after the letter was received. That's the critical information.

Diamond et al. provide no context for Text 12 (they were, of course, presenting the text for a purpose unrelated to ours), and it is difficult to infer the background from the text itself. Nonetheless, it appears that "they" learned something and notified "him" by faxed letter; there seems to have been a delay in the signing of the letter. Sometime after the letter was faxed, a contract was returned, though it is not clear by whom.

Juror 8 presents a story in summary form. Emphasizing his or her personal responsibility for this account ("I'm saying"), Juror 8 posits that the letter was not signed until the 12th, a conclusion that, it appears, would resolve a lot of the confusion. Juror 8's rhetorical question ("How could they . . .?") offers a reason for this particular timing. In Ochs et al.'s (1996, 99) formulation, this version of the story could be treated as complete

by those who are co-present. However, "somebody persists in examining the narrative problem beyond this point, eliciting or introducing the relevant information not provided in the initial version of the story" (ibid.). Juror 6 interrupts to introduce the issue of working versus weekend days, and Juror 3 immediately follows with remembered testimony that bears on the issue. Another juror connects the dots and offers a tentative resolution of the dilemma ("that *must* be why"), but then undercuts that conclusion ("That seems so confusing"), which invites others to continue the probing. Juror 6 introduces written notes as a new source of authority, and all "persist[] in examining the narrative problem." Finally, Juror 5 offers a resolution, passing judgment on the lapse of time between the faxing of the letter and the return of the contract—it was "reasonable." The butler did it, as it were. Juror 9, who has not yet spoken, impliedly endorses at least the outline of this approach by twice characterizing the lapse of time as "critical."

To summarize, even these fragmentary texts offer significant clues to the everyday discourse strategies that jurors use to process the evidence:

- Jurors frame even brief discussions of particular issues as co-produced narratives that reflect the structure originally described by Labov. Although this evidence is limited, it does suggest that Arizona's pre-deliberation discussions may consist of a series of storytelling sessions.
- The jurors also make reference, at least indirectly, to an evolving master narrative, the "whole" or "real" story. Its existence is suggested by the jurors' repeated references to missing pieces—if they are missing, they must be missing from something. Its content, while emergent from the

deliberations, also appears to contain elements from personal experience and other extrinsic sources.

- Jurors regularly assert or disclaim authority for their assertions. The former may involve empirical claims such as "it is not unusual" or the use of legal-sounding language. Disclaiming authority may be accomplished through epistemological distancing from a statement, such as when a juror says "it is just my opinion but . . ."
- As Maynard and Manzo found, jurors propose, justify, and argue for the relevance of all kinds of rules. Some are rules of human behavior whereas others are quasi-legal. They appear to play a vital role in the assessment of evidence.

III. A Complete Arizona Case

In this section we analyze excerpts from a complete linguistic transcript of one civil case that was videotaped for the Arizona Project. It involves an automobile accident. The jurors spend a large part of the deliberations debating whether post-accident ailments (and thus, medical bills) are due to the accident or to the plaintiff's previous medical conditions.

A video camera was activated any time the jurors were in the jury room, so both pre-deliberation discussions and formal deliberations were recorded and transcribed in their entirety. The transcript follows modified conversation analysis conventions (Jefferson 1984); we have deleted or altered potentially identifying references.

The excerpts that follow illustrate how jurors use narrative to pose puzzles about the evidence, how they make judgments, and how they begin to frame an overarching

story that will serve as the basis for their verdict. Our analysis reveals many of the same themes that emerge from the published transcripts analyzed in previous sections, as well as some new issues. In particular, we will emphasize the capacity of narrative to form temporal and causal relations between events. Narrative can be used to configure past, present, future, and hypothetical experience (Ochs and Capps 2001), a quality that is prevalent in everyday interaction and that appears to be especially useful in jury deliberations. With respect to causation, we will see, following Mattingly's (1998) paraphrase of Aristotle, how narrative "imitates action and experience through clarification and condensation, revealing causal connections between motive, deed, and consequence which also allows a moral reading of events."

The use of narrative to frame hypothetical experience is especially salient here. In reaching a judgment, jurors compare that which happened, as narrated in the trial, with what *could* have happened, as explored in their own narratives. Their judgment is thus influenced by interactionally constituted notions of the possible. Jerome Bruner (2002) argues that culture is a constant navigation of the possible and the ordinary, and narrative is a primary cultural medium through which we establish, contest, renegotiate and reify what is possible and what is ordinary. Jurors are not legal specialists, so they presumably rely on lay notions of the possible and ordinary, using narrative to develop those notions.

In the case we analyze, the jurors do not immediately seek a complete account of events. Instead, they begin by collaboratively deconstructing the narratives that were presented in the courtroom. They then "pass around" and discuss different versions of pieces of the courtroom narratives. Over the course of discussing and deliberating, they reconstruct a metanarrative composed of a selection of the deconstructed parts. Elements

of this emerging composite narrative are scattered throughout the discussions and deliberations, distributed across turns and speakers and often disjunctive. Accordingly, passages of discourse that contribute to the composite need not be narratives in their own right.

A. Deconstructing and Reconstructing the Evidence

The jurors begin their analysis by presenting and evaluating deconstructed pieces of the courtroom narrative. In parts II.A and II.B, we saw instances of jurors using if/then conditionals to derive behavioral rules that they used to assess evidence. In this complete transcript we see that same practice in greater depth. Here, the use of if/then propositions involves 1) mooting different hypothetical propositions concerning the evidence and 2) accepting or rejecting those propositions according to commonsense standards of plausibility, the law's evidentiary standards, and personal experience. The ongoing objective is to further the construction of the overall story.

This process is illustrated in Text 13.

Text 13

1	Juror 4:	Um, I, we have a lot of patients that have, that take codeine, and, T
2		T3s and T4s.
3	Juror 6:	Do you think that could be why he fell, when he lost his balance at
4		the machine?=
5	Juror 4:	=You know, I'm wondering *why* he fell, cause the only thing I can
6		*think* of is, if you fall backwards you get light-headed and,
7	Juror 2:	( ) he coulda gotten up too quickly.
8	Juror 4:	And, that could be a possibility, I would think that that would be if
9		he took too ma:ny, and was drowsy in the *first* place, leaning over
10		to *deal* with this thing, and just got a rush when he got up and got
11		dizzy=
12	Juror 8:	=I've gotten a rush getting up, I mean, uh, without any medication,
13		you know? ((laughs)) You know, you stand up fast=
14	Juror 4:	=That's true, yeah…
		[text deleted]
15	Juror 4:	…I guess we'll have to wait to see what that doctor says about that

16 [preexisting medical condition]. Why it's ( )=
17 Juror 7: =I'd be really curious to see if he sued anyone else, and what
18 happened as a result.

The jurors first pose a question about an evidentiary issue: "Do you think that could be why he [the plaintiff] fell?", "I'm wondering *why* he fell" (lines 3-5). The questions are followed by a pair of conditional propositions that suggest resolutions to the quandary. Juror 4 states the rule that "if you fall backwards you get light-headed" (l. 6; the "if" is explicit, the "then" implicit). Juror 2 then applies this rule to the evidence to propose an answer: this might have happened to plaintiff, "and he coulda gotten up too quickly," which presumably caused the fall in question. (The plaintiff had apparently fallen immediately before the fall they are discussing.) Juror 4 acknowledges that "that could be a possibility" (l. 8) and then immediately proposes another conditional that assumes the prior rule, adds an additional hypothetical fact ("if he took too many [painkillers] and was drowsy in the first place," ll. 9-10), and concludes with a plausible resolution of the evidentiary dilemma ("just got a rush when he got up and got dizzy," l. 13). Despite expressing some support for this resolution, the jurors decide that they must wait for more evidence.

This text also illustrates the collaborative nature of the narrative-building process. Juror 6 (l. 3) poses the basic question, "Do you think that could be why he fell?" Juror 4 repeats Juror 6's question (l. 5), then begins the process of answering it, first by proposing a general rule in if/then form. Juror 2 appropriates Juror 4's turn to apply the rule to the evidentiary narrative (l. 8). Juror 4 then propounds a more elaborate conditional (ll. 8-11), and others make evaluative comments before deciding to defer

judgment. Turn by turn, jurors build on each others' utterances to deconstruct the evidentiary narrative and begin the process of co-producing the ultimate metanarrative.

B. Navigating Temporality

A more detailed examination of Text 13 reveals the process of navigating among past, present, future, and hypothetical experiences in evaluating and reformulating evidentiary narratives. In lines 3 and 5, Jurors 6 and 4 respectively state and restate the question about a past event and, straightforwardly, use the past tense to refer to that event ("why he *fell*"). Juror 4 then uses a present conditional construction (l. 6) to introduce the general rule that may lead to a judgment about this past event ("if you fall backwards you get light-headed"). The present tense marks this statement as being in the category of law-like timeless truths. The second-person pronoun, the impersonal "you," serves a similar function in that it is understood generically (as "one") rather than as referring to a particular co-present juror, further generalizing the rule being discussed. Implicit in all this is an invitation to judge the historical particulars of the case against such rules. The implied invitation is taken up immediately by Juror 2, who interrupts Juror 4 to offer just such a judgment. It is a tentative judgment, however, as Juror 2 uses the past conditional ("he coulda gotten up too quickly") to connect Juror 4's general rule to the past event of the plaintiff's fall.

Taking back the turn, Juror 4 introduces a more elaborate hypothetical that might explain the whole situation (ll. 8-11). The logic is that of the if/then conditional, along the lines of "*if* he took too many [painkillers], and was drowsy in the first place, and was leaning over, *then* he could have/might have just gotten a rush. . . ." That is not the way Juror 4 structures it, however. Instead, everything is under the umbrella of the initial *if*—

including the ostensible conclusion. In contrast to Juror 2's conditional *coulda* in line 7, Juror 4 renders the conclusion here in the simple past ("just got . . ."), connecting it more strongly to the actual past event that is in question. Through this simple syntactic expedient, Juror 4 has blurred the boundary between hypothetical and history and invited judgment on the meaning of that history. Finally, note also that Juror 4 introduces both conditionals with mental verbs ("I can think," ll. 5-6; "I would think," l. 8), which index judgment and thus further mark these as passages in which judgment is being invited.

C. An Alternative Evidentiary Universe

Text 14 further illustrates this structure, with some additional wrinkles. The jurors are discussing whether the plaintiff's injuries were caused by the accident or a preexisting condition, as well as the credibility of his claimed symptoms.

Text 14

1	Juror 5:	I'm also wondering how heavy those files were (using when we
2		do) that same day.
3	Juror 7:	Right.
4		(2)
5	Juror 5:	(Seeing us) moving filing cabinets, I know how *heavy* they can
6		get. If he used his pick-up truck he could load it up pretty good.
7	Juror 9:	And no (inclination) to, um, having had a son with so many
8		back problems, it isn't what you do. You don't feel it immediately
9		if he, if he claims it swells.
10	Juror 1:	No you don't. And was, was he on medication at the time of the
11		accident? And if that's the case he wouldn't have felt it
12		anyway=
13	Juror 9:	=He wouldn't have felt it.

Juror 5 (l. 1: "I'm wondering how heavy these files were") and Juror 1 (ll. 10-11: "was he on medication at the time of the accident?") raise factual questions about the evidence, both presented in the past tense. Various jurors then offer related statements about general truths, all in the present tense (ll. 5-6: "I know how heavy they can get"; l.

8: "it isn't what you do. You don't feel it immediately"; l. 10: "no you don't"). These statements are further generalized by use of the impersonal "you" pronoun. (Juror 9's statement that "it isn't what you do" is especially interesting in this regard, as it follows an announcement of relevant personal experience: "having had a son with so many back problems.")

Against these truth-statements, Jurors 5 and 1 juxtapose if/then constructions that are based on the evidence rather than on general knowledge or experience (l. 6: "If he used his pick-up truck he could load it up pretty good"; ll. 11-12: "if that's the case [if he was on medication] he wouldn't have felt it anyway"). These constructions therefore function as especially powerful hypothetical mini-narratives: they extend the discussion beyond what *did* happen by telling a story about what *could* have happened. In the two quoted instances, the jurors know that the plaintiff had a pick-up truck, but not whether and how he used it; they also know that he was on medication, but not when. In the former instance, Juror 5 extends the facts to posit a situation in which the plaintiff *did* use his pick-up truck, and thus might well have loaded it up "pretty good" and perhaps injured his back. In the latter, the condition posited by Juror 1 is that the plaintiff was on medication at the relevant time, in which case he would not have felt the back pain. In the short term, these hypothetical past worlds are offered as a basis for evaluating the particular pieces of evidence that are being considered. In the long term, they may play a vital cumulative role in developing the metanarrative that will frame the verdict.

These hypothetical retellings of evidentiary stories, and the audience reactions to them, embody criteria for possibility that are based on notions of "real-world practical plausibility" (Lakoff 1990:126). These criteria are subtly negotiated and renegotiated as

the jurors evaluate evidentiary narratives against the background of their own narratives of what could have happened. A retelling that meets the evolving plausibility standard will have a chance to influence the developing metanarrative, whereas one that does not is likely to be dropped.

D. Broader Implications

The process just described suggests several larger points about the way that the jury receives and processes evidence. First, in deciding "what happened," these jurors do not limit themselves to the narratives they hear from the witness stand. Instead, they develop and consider a body of unofficial evidence consisting of their own narratives about what *could* have happened—an alternative evidentiary universe, as it were. Second, discussions such as that found in Text 14 shed new light on the process of truth-testing by jurors. The individual jurors in this case do not simply run evidence through some idiosyncratic credibility black box. Nor do they rely directly on preexisting external criteria for what is possible, plausible, and thus credible. Rather, at least in part through the mooting of multiple hypotheticals, they negotiate their own standards of plausibility. The negotiations are ongoing, yielding standards that are specifically tailored to individual pieces of evidence. As Maynard and Manzo (1993) found with respect to justice, credibility is emergent, not exogenous. In conversation analysis terms, these jurors "do" credibility. Importantly, they do it collaboratively.

Finally, our linguistic observations shed some additional light on the significance of the Arizona trial reforms that Diamond et al. studied. These hypothetical narratives appear most often in this jury's newly-allowed discussion sessions, before the formal deliberations begin. The structure of narrative tolerates things like the conflation of tenses

and moods, and the mingling of real and hypothetical experiences. Because of this inherent flexibility, narrative offers a vehicle for discussing and evaluating the evidence throughout the trial while "reserv[ing] judgment about the outcome" until the formal deliberations begin, as the Arizona rule requires. Thus, these jurors have hit upon a linguistic strategy that seems ideally suited to the task at hand and—not surprisingly—it involves narrative.

Nonetheless, these observations also raise questions about whether it is possible to engage in ongoing discussions while truly "reserv[ing] judgment about the outcome." The purpose and effect of the hypotheticals seem frankly judgmental. Perhaps they are not judgments about the ultimate outcome, but they do seem calculated to begin shaping that outcome at an early stage of the case.[6] Moreover, as just noted, because they are *hypothetical,* they necessarily invoke considerations beyond the scope of the evidence. One wonders whether jurors generally are likely to lose track of the boundaries.

V. Conclusion

We began this paper with Garfinkel's (1967:112) observation that in the jury room, "The rules of everyday life, as well the rules of the official line, are simultaneously entertained." Even this brief report of data from actual jury deliberations confirms that this is especially true with respect to the *linguistic* rules of everyday life. We have focused on one subset of those linguistic rules, those pertaining to narrative, or stories. Bennett and Feldman showed how lawyers use the story form in presenting cases to jurors, presumably because narrative is the elemental form in which we package and process complex information about human behavior. It is not at all surprising to find that

jurors rely on those same everyday narrative practices in talking to each other about the human behavior at issue in the cases they hear.

Some of the details of these practices are far less self-evident. Maynard and Manzo's demonstration of "doing" justice, for example, suggests an independence and resourcefulness that trial lawyers might not have expected. Likewise, the use of "opening statements" by jurors demonstrates that they come to their deliberations having already made considerable progress in transforming the evidence into a metanarrative. And the practice of "testifying" to persuade fellow jurors indicates that narrative practices can be readily transferred across presumably stark contextual boundaries—in that case, from the church to the jury room.

As we consider our linguistic re-analysis of the published Arizona transcripts, we are struck by the consistency between what we observed and what the general narrative literature would have predicted, in particular the prevalence of the Labovian model of story structure. We also note the similarities between our observations and those of Maynard and Manzo with respect to the prominence of common-sense interpretive rules. Limited as it may be, this evidence suggests that such unofficial rules may rival the official legal ones in their influence on the outcome. Additionally, the jurors' references to missing pieces of an evolving metanarrative show, in the same way as Maynard and Manzo's "opening statements," that the template or outline of a metanarrative may emerge well before the formal deliberations begin.

Finally, even the brief excerpts from our own Arizona transcript hint at the potential significance of studying the structural details of jury language. In the apparent arcana of verb tense and mood, for example, we discover a world of hypothetical

evidence that seems central to the jury's evaluation of what the law thinks of as the "real" evidence. At a more abstract level, this discovery prompts a rethinking of the possibility of a meaningful distinction between discussion and judgment.

Most previous research about juries has relied on experimental studies of how mock jurors process information and reach decisions, or statistical analysis of actual results, or interviews of real and/or mock jurors. The qualitative linguistic approach we take here is fundamentally different. Because of the necessary detail of the analysis and presentation, only a few instances can be considered at a time, and there is no quantitative evidence of patterns or cause and effect.

To those of us who do this kind of work, these distinguishing features are its essential strength. The traditional forms of jury research presume that the investigator can pose an appropriate question. We indulge no such presumptions. Rather than trying to answer preexisting questions, we have looked to real jurors to frame new ones, to teach us what has practical significance for them. Rather than trying to quantify the distribution of known phenomena, we seek to expand our knowledge of the range of possibilities in the social behavior of real people. Even at this very early point in the linguistic study of jury deliberations, we have no doubt that the examination of how jurors "do" deliberation will lead us in new and unexpected directions that are likely to have significant practical and policy implications.

ENDNOTES

[*] We would like to thank Shari Diamond for reviewing the Arizona excerpts that co-author Robin Conley transcribed in order to ensure that our presentation of the data was consistent with the confidentiality promises made to the court, litigants, attorneys, and jurors.

[1] We thank one of the anonymous reviewers for pointing out that on April 19, 1997, *CBS Reports* broadcast an episode called "Enter the Jury Room" that contained snippets of actual jury deliberations from several cases.

[2] In another of their publications, Diamond et al. (2006:1935 n. 31) explain this process as follows:

> Supreme Court of Arizona Administrative Order 98-10 reads in part:
>
> > [T]he materials and information collected for the study, including audio and videotapes may be used only for the purposes of scientific and educational research. The Court shall take all measures necessary to ensure confidentiality of all materials. All tapes shall be stored using appropriate security measures. The materials and information collected for the study, including audio and videotapes, shall not be subject to discovery or inspection by the parties or their attorneys, to use as evidence in any case, or for use on appeal.

[3] An anonymous reviewer noted that much is lost when one works from a written transcript rather than, say, a videotape—tone of voice, inflection, gaze, etc. This is certainly true, although it should be pointed out that conversation analysts have tried to capture much of this information in their transcribing conventions. The study of the non-verbal aspects of interaction is itself an elaborate field; see for example, Haviland's

(2004) and Charles Goodwin's (2000) work on gesture. While we recognize the potential significance of such communication features in the jury room, analyzing them is well beyond the scope of this relatively short paper.

[4] We have reproduced texts from published sources as they appear in those sources. Maynard and Manzo (1993) and Diamond et al. (2003) present "cleaned-up" texts that contain, for the most part, only actual words and that follow the spelling and punctuation conventions of standard written English. The texts from Manzo (1994 and 1995) follow many of the conventions of conversation analysis, in which an effort is made to capture all the utterances of the speakers, both verbal and non-verbal, and to record some of the pauses in the conversation. The particular conversation analysis symbols that appear in Manzo's and our transcripts are = to indicate interruption, aligned brackets to indicate overlapping speech, one or more colons (:) to indicate that the sound of the preceding letter has been extended longer than is usual, parentheses to indicate that the text contained within could not be fully heard by the transcriber, italics to indicate a stressed word, and numbers within parentheses to indicate a pause measured in seconds ((2) indicates a 2-second pause).

[5] Similar linguistic evidence is also adduced in Manzo (1995), which appeared in the interdisciplinary journal *Law & Social Inquiry*.

[6] On the basis of their quantitative analyses, Diamond et al. (2003:67) conclude: "Although our ability to trace the impact of early verdict statements [expressions about ultimate issues that will be included on the verdict form to be completed by the jury] on juror behavior during deliberations and on the jury verdicts is limited, there is little

evidence of a systematic distortion in trial outcomes due to the views that jurors expressed during the discussions."

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