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TEXTS IN ORAL CONTEXT

THE "TRANSMISSION" OF

JURY INSTRUCTIONS

IN AN INDIANA TRIAL

GAIL STYGALL

Modern rhetorical scholars exhibit a curious reluctance to examine legal texts. Although in the historical context, rhetoric and law have long been intertwined, current rhetorical studies have ignored the social dynamics of legal texts. Perhaps it is because we understand legal texts to be the quintessential "bad text—wordy, unreadable and incomprehensible—hardly models for a discipline that seeks, in its pedagogy, to improve students' writing. Yet there are clear lessons for rhetoricians in legal texts. With a centuries-old literate tradition, the legal community should be of clear interest to those who study written communication. Moreover, those who write legal texts are members of a well-defined social context, bound by their membership and participation in a discourse community. This community presents what we might call a prototypical case for our scrutiny of the influence of discourse community membership on texts.

Though the literate tradition and well-defined social context of the law present inviting opportunities for the study of written communication, two a priori assumptions about texts in professional communities cloud our analysis. First, our stance toward the incomprehensible legal texts is often pedagogical: we can correct or improve these texts. Second, we assume that the purpose of these texts is a straightforward information transfer between writer and reader. In this article, I want to complicate both of these assumptions. In the case of the first assumption, we risk ignoring the importance of professionals communicating primarily within their discourse community. Legal texts, for example, cannot be "improved"

without understanding why lawyers continue to write what ordinary readers consider unreadable texts. In complicating the first assumption, then, I am suggesting that the demands of the legal community's discourse conventions always take precedence over the needs of ordinary readers. In the case of the second assumption, we assume that the text has failed if a propositionally based information transfer has not occurred. That is, if an audience of a professional text cannot accurately report the "gist" of the text in propositional form, then we assume that the communication itself has failed. Here, I want to suggest that legal texts that fail in information transfer can still be successful in educating and socializing a nonprofessional audience. These complications of our assumptions provide a better explanation of why these so-called unreadable texts demonstrate a tenacious stability in the face of unrelenting criticism from readers outside the community.

I have chosen jury instructions as an appropriate example of a legal text that demonstrates the linguistic and rhetorical features thought to mark these legal texts as incomprehensible. Jury instructions usually contain nearly every impediment to comprehension known to language scholars. Words that have broad, ordinary uses constrict to narrow, specific meanings within the law. Highly convoluted, densely embedded sentences require jurors' careful attention (Charrow and Charrow, 1334-50). The word count of sentences grows astronomically. Rare or archaic constructions abound, odd prepositions connect difficult concepts, and subordinate clauses lose their relative pronoun heads. Sentence-to-sentence cohesion ties disappear, and all pretense toward global cohesion is abandoned (Elwork, Sales, and Alfini, 184-86). If jurors were examining the text of these instructions in a college classroom, they could easily spend weeks disassembling and examining the propositions, searching other legal texts for the right interpretive rules. But jurors don't have weeks: they must deliberate immediately after instructions are given.

It should be no surprise that the rhetorician's first impulse is to try to "improve" these texts. But it is also problematic to attempt to improve a text that serves powerful purposes within a community. In the case of jury instructions, the legal community demands that instructions be, first and foremost, an accurate statement of the law. Consequently, the form of instructions that advocates choose is the form that best serves this intracommunity audience, the trial, and appellate court judges, who may rule on what comprises an accurate statement of the law. Most appropriate for the appellate audience is a written document. The advocates submit, or tender, written instructions to the trial court judge. The judge, in turn, reads these instructions aloud to the jury, who may see the judge turn the pages of the written text while reading it to them. If the outcome of the trial is appealed, the appellate court judges read the entire trial

record, including the instructions, as a text, not as an oral presentation. Even in those jurisdictions in which the judge allows the jurors to have a copy of the written instructions, the jurors will first hear the instructions read. Thus, jurors hear the reading of a written text within a wholly oral context of a trial. Ultimately, to the legal community, improving the text of these instructions can only mean writing a better or more accurate statement of the law. Improvement does not mean writing a more comprehensible text for an ordinary audience.

The purpose of jury instructions is to tell the jurors what law is relevant to the case they have heard, a relatively simple transfer of information from one community to another. Most analyses of instructions suggest that they fail in this primary purpose. Yet instructions succeed in a parallel purpose: socializing the jurors into the legal community. This parallel purpose replaces a proposition-based information transfer as purpose. Instructions to the jury are, of necessity, the bridge between the legal and lay communities. When analysis of the entire trial is included in attempting to understand how jurors process the language of jury instructions, we see that earlier sections of the trial both block and support different kinds of concept construction necessary to apply the instructions. These blocks and supports mirror the processes valued by the legal community and thus the trial becomes a kind of minimal legal education for the jurors through their socialization as temporary members of the legal discourse community. This socialization process does not require that jurors understand the law in the same way as attorneys, only that they adopt the legal perspective in their deliberations. Jury instructions actually provide some assistance for jurors in this socialization, notwithstanding the difficulty of the language. Jury instructions reconstruct roles by strictly delineating what each trial participant is allowed to do and provide common metaphors to bridge the law and the jurors' experiences. When the text of the instructions is considered as a part of the entire trial, the text becomes the formalization of the legal socialization process the jurors have undergone during the trial.

Methodology and the Case at Trial

In order to examine the complications of our assumptions about these legal texts, I chose to examine jury instructions in context, in an actual trial. The Honorable Betty Rarteau, Judge of the Marion County Superior Court, Civil Division, Room 3, agreed to participate. Though my data collection was primarily ethnographic, I included formal discourse theories in my analysis of the data I gathered. The form of my presentation here is what John Van Maanen calls a "formal talk,"

a construction of the events I witnessed within a preexisting theoretical framework (130-131). Thus, not only did I reconstruct the events of the trial from my own vantage point, but I also recognize that my decision to use formal discourse theories is a rhetorical choice, one made in order to challenge conventional assumptions about these texts (cf. Clifford and Marcus for a thorough discussion of the issue of textual representations of ethnographic fieldwork). In collecting the data, I attended jury pool procedures, watched trial proceedings, interviewed attorneys, the judge, the court employees, and jurors. Informal conversations were also a part of the field data, talking to attorneys and court employees while the jury was on a break or "out" for deliberations.

The case I selected for analysis in this study was one of four tried during the first four months of 1987 during which I collected data. There was nothing unusual about the case of Edith Masheck versus Capitol Drilling Supplies. The legal issues were not complex. All the attorneys were trial veterans, their skills well-matched. Most of the instructions read to the jury were from Indiana's book of standardized civil instructions to juries. All in all, the Masheck case represents a baseline from which to examine the assumptions about the comprehension and purposes of these texts from a professional community.

The case of Edith Masheck, Plaintiff, versus Capitol Drilling Supplies, Incorporated, Defendant, was tried on April 1 and 2, 1987. A personal injury suit, a case of "slip and fall" in the talk of civil trial attorneys, Edith Masheck sued a contractor, Capitol Drilling Supplies, for the injuries she received when she fell on a water-covered landing, breaking her ankle. Capitol Drilling Supplies' employees were supervising an area of minor construction, at St. Francis Hospital, Ms. Masheck's place of employment as a registered nurse. The jury returned a verdict of \$8,000 for the plaintiff.

Edith Masheck was a very credible plaintiff. She had been employed as a nurse at St. Francis Hospital since 1968. At the time of her fall, she was the Diabetes Coordinator for the hospital, an administrative nursing position. Married to a minister, she is the mother of four grown children. On November 2, 1984, on her way to lunch about 11:45 A.M., Ms. Masheck took her usual route down the stairs from the fourth floor of the Tower Building of the hospital. Encouraged by the "wellness" practices of the medical community, Ms. Masheck always used the stairs for exercise. Fifty-seven years old and in good general health, Ms. Masheck also walked one to three miles after work, several days each week. Wearing standard nurse's shoes, Ms. Masheck nonetheless fell at the water-covered third-floor landing, breaking her right fibula, injuring several ligaments and leg muscles. She was unable to work for the next two and one half months, her leg and ankle encased in a cast.

Capitol Drilling Supplies had been hired by St. Francis Hospital to drill through several concrete walls and landings to provide another contractor access for new heating and cooling ducts. The employees of Capitol Drilling were using a diamond blade, water-cooled saw to drill through the concrete. Normal operation of such a saw always meant water would be in the adjacent area. Capitol's employees had made arrangements for a water vacuum to be used in the area, but on this day, had apparently left for lunch without completing the cleaning of the area. No Capitol employees were in the stairwell when Ms. Masheck fell. Nor were there any warning signs to caution her.

The trial presented a number of issues to the jury. They had to decide if Capitol Drilling Supplies was negligent in not cleaning up their construction area. They also had to decide if Ms. Masheck contributed in any way to her own fall. The jurors also had to find a direct link between Capitol's construction practices and Ms. Masheck's injuries. Having made these decisions in favor of Ms. Masheck, the jury would next assess damages to Ms. Masheck and award an amount of money to her.

Legal Discourse Conventions: Blocks to Ordinary Comprehension

For advocates, and even for trial court judges, the audience that finally matters is the appellate court. And appellate courts do not make jurors' understanding of instructions a priority for reviewing the instructions given by trial courts. As I have already suggested, the primary function of jury instructions is to provide an accurate statement of the law. One Indiana case, *Board of Commissioners v. Briggs* (1975) Ind. App. 337 N.E. 2d 852, illustrates the problem. The Court remarked:

While the instructions could possibly be confusing to the average juror, it is not any more confusing than many of the other Pattern Jury Instructions, and on the whole is certainly not misleading as to the issues of this case. We find no basis for this objection. *Board of Commissioners v. Briggs supra* at 868.

The court here asserts that making an accurate statement of the law takes priority over juror comprehension, even as the court acknowledges that a disputed instruction may have caused difficulties in juror understanding. Thus if jurors are to understand at all, it must be through the frame of the law's priorities. Attorneys consequently "protect the appellate record" by offering jury instructions that are at once an accurate statement of the law and a favorable view of their client's case. Judges "protect the appel-

late record by accepting instructions for the trial that are both accurate statements of the law and balanced representations of the parties' views, so as not to be reversed at the appellate level. Juror comprehension is a tertiary concern for the judge and the attorneys.

In this section, I want to detail how lawyers' use of discourse conventions for "good" legal communication results in blocking jurors' ordinary strategies for text comprehension. Legal discourse rules impose their own sense of order and coherence on jurors. Two conventions of legal discourse function to block these ordinary means of comprehending legal texts. First, instructions are coherent only by reference to extratextual information contained in legal reference works, such as case law reporters. What organizes and structures the jurors' instructions is found in legal texts and not in any particular utterance during the trial. A second discourse rule prevents attorneys from directly linking the names of legal concepts mentioned in the instructions with the testimony of witnesses. To improve the comprehensibility of these instructions, then, would mean violating two important discourse rules, rules that are clearly privileged within the legal community.

EXTRATEXTUAL COHERENCE

Beyond the level of the individual case, all attorneys inhabit a textual domain, created by legal training, maintained by participation in the legal community. Attorneys learn the law by reading cases, thousands of them while in law school. Attorneys maintain their knowledge by continuing to read cases, as appellate and supreme courts write new decisions. They are awash in a constant sea of new texts. Thus, even while participating in a particular case, attorneys remain aware of a set or superstructure of cases generally relevant to a class of cases or to a segment of the trial. Jury instructions represent a segment of trial for which a set of cases exist that frame and constrain how jurors are given their instructions. Even though the interests of advocates and judges may differ, each is aware of a coherence-generating algorithm from the governing set or superstructure of cases relevant to this trial segment. This superstructure of cases represents the second block.

None of this textual domain is revealed to the jury. As James Boyd White suggests,

. . . the most serious obstacles to comprehensibility are not the vocabulary and sentence structure employed in the law but the unstated conventions by which the law operates—what I call the "invisible discourse" of the law. Behind the words, that is, are

expectations that do not find expression anywhere but are part of the legal culture that the surface language simply assumes. (139)

In order to examine this unexpressed set of conventions, I surveyed the case law relevant to giving jury instructions. In doing so, I found that the instructions become coherent by virtue of an algorithm that may be applied to any set of instructions. Using the entries provided in *Indiana Digest*, under "Trial, Instructions to the Jury (VII), Subsection 242, Confusing and Misleading Instructions," I constructed a set of macrorules that apply to instructions from the information contained in each case listed in the category. I examined each of the cases listed for particular instances of the court's discussion of rationales for accepting or rejecting instructions. No single decision articulates all the rules for interpreting jury instructions. However, when the category is taken as a whole, these decisions represent four major rules, macrorules, and particular application rules, or microrules. These rules are displayed in figure 10.1.

Macroproposition 1: The trial court verdict is presumed to be supported by the evidence.

Macrorule 1: An instruction not supported by the evidence must be refused.

Macroproposition 2: Jurors apply the law as given by the instructions to the facts at hand.

Macrorule 2: The instructions must be a correct statement of the law.

Microprocessing Rules for #2

1. Jurors must be given a single path of law.
2. Instructions must include all relevant law.
3. A correct instruction does not override the giving of an incorrect instruction on the law.

Macrorule 3: The instructions must not be confusing or misleading to jurors.

Microprocessing Rules for #3

1. An instruction is misleading if one-sided.
2. An instruction must not be ambiguous.
3. The charge should contain definitions for all legal terms.

Macrorule 4: The instructions are a unified, single piece of text.

Microprocessing Rules for #4

1. All nonmandatory instructions have equal weight.
2. No single instruction needs to contain all applicable law.
3. Jurors will match definitions with applications and judgment standard instructions, even if separated by other instructions.

Fig. 10.1. Algorithm for instructional coherence

The two macropropositions in figure 10.1 are higher level generalizations of the legal discourse. First, appellate judges assume that the trial

court's decision was supported by the evidence; and, second, appellate judges assume the jury tried the case on the facts, after receiving instructions on the law. The four macrorules following apply to any giving of instructions and are hierarchically arranged, applying in order.

I confirmed the algorithm in the context of the instructions given in the Masheck trial. A veteran of thirteen years on the bench, the judge rejected several submitted instructions on the basis of macrorules one and three. The plaintiff's attorney submitted a more elaborate damage instruction than the one the judge actually gave. She rejected two elements of this damage instruction for lack of evidence in the trial to support giving the instruction. These elements were impairment of earning capacity and disfigurement and deformity; she could deduce neither element from the testimony given. She refused a second plaintiff's instruction because it was a reemphasis of the concept that the acts of a corporation's employees are one and the same as the acts of the corporation. Her giving of this instruction would have contradicted the third macrorule, by giving undue prominence to the issue of the corporation's possible negligence.

The judge also refused instructions offered by the defendant's advocate. One instruction reiterated the necessity for jurors to remove sympathy for parties from their deliberations. Just as reemphasizing the possibility of corporate negligence was rejected when the plaintiff tendered that instruction, so, too, was this defendant's attempt at repetition, on the basis of the third macrorule. The judge also rejected a second cautioning instruction on damages, also on the basis of the third macrorule. The problem of comprehensibility of instructions, then, becomes more focused. The legal community can make sense out of the instructions. They have an extensive text world which provides coherence for the instructions. Jurors, however, have no such reference and are thus blocked from using it to make sense of the instructions. Catherine Pettinari notes a similar problem in surgical reports. New surgeons had considerable difficulty in separating what constituted shared surgical knowledge from what was not shared, a separation necessary to prepare the standard surgical report. What the new surgeons did not yet know was that the shared information could be moved to the background and deemphasized. Shared and nonshared information took different grammatical forms, but knowledge of the uses of those forms was at least partially a product of being a full member of the surgical community. Likewise, the lawyers in this case, being full members of the legal discourse community, have access to the shared knowledge necessary to make the text coherent, even when the text may be incomprehensible for jurors. Professional communities, with large bodies of knowledge, follow the conventions necessary for understanding inside the community. Generic standards of clarity and coherence may thus be difficult to formulate once a discourse participant achieves full professional status. And as Lester Faigley suggests in his text analysis

of a letter selling real estate masquerading as a "prize" announcement, the extratextual topic may be "more typical than exceptional" (140).

THE BAR ON ELABORATIVE INFERENCES

Though jurors have no access to the attorneys' text world, they do have access to the language of the text of the instructions throughout a jury trial. My tracking of instructional language throughout the course of the trial suggests that the actual words and phrases of the jury instructions are present at every step in the trial. (See the Appendix for a partial text of the jurors' final instructions.) However, because of a legal text convention barring elaborative inferences, the jurors do not hear the name of the legal concept directly linked with an exemplification of that concept. In this section, I will first briefly describe the points at which the jurors hear parts of the text of the instructions, and then illustrate how the bar on elaborative inferences functions. The effect of this second legal discourse convention is to prevent jurors from comprehending the text through any ordinary strategy.

As diagrammed in figure 10.2, jurors will hear fragments of the language of final instructions even before the trial actually begins, in their introductory session with the entire jury pool. Instructional language is indeed woven into the text of the trial. The evidence portion of the trial is bracketed by instructions, specific to the case. Additionally, in opening statement, both attorneys made reference to particular instructions, attempting to link certain testimony with certain instructions. Each attorney concentrated, of course, on interpretations of instructions most helpful to his case. The plaintiff's attorney stressed negligence and preponderance of the evidence linked to certain witnesses; the defendant's attorney stressed conflicts in the evidence and contributory negligence. But the linkage was subtle, as attorneys may not directly argue or interpret during opening statement. In closing argument, references to instructions were even more explicit. Both sides made reference to instructions by saying, "the judge will tell you that . . ." and "that means . . ." Thus, though rarely does the most abstract form of instructions surface in other parts of the trial, instructional language is present throughout the trial, primarily in embedded clauses. Though I would not argue that the references to key terms and language of instructions were extensive in other segments of the trial, I would suggest that repetition and association do create a broader base for juror comprehension than they would have if instructions were assumed to stand alone. From jury pool meeting to final argument, the language of instructions is present.

Trial Sequence	What Jurors Hear
Jury pool slide presentation	Burden of proof language
Voir dire in particular court	Instructional language embedded in question form
Preliminary instructions	Issues instruction General instructions on burden, credibility, preponderance of evidence court's rulings on admissibility of evidence, negligence, resolving conflicts in evidence proximate cause
Opening statement	Instructional language linked to events of case
Plaintiff's case	Events
Defendant's case	Events
Closing argument	Instructional language linked to events of case
Final instructions	Repetition of general instructions, how to deliberate instructions, instructions on the law pertinent to the actual evidence of the plaintiff's and defendant's cases; no repetition of issues instruction
Verdict	Three hours of deliberation

Fig. 10.2. Opportunities for jurors to hear language of instructions

If jurors indeed hear the language of the instructions throughout the trial, why don't they become more easily socialized to it by the end of the trial? I would like to suggest that the reason can be found in the bar on elaborative inference. Because of this bar, disallowing simultaneous naming and exemplifying, jurors have no opportunity to hear the language of instructions directly linked with what they are told to "count" as evidence, the direct testimony of witnesses. This bar is maintained because

to directly link the terms found in the instructions with the evidence given would be to allow witnesses to draw legal conclusions, an act forbidden to nonlawyers. The attorneys function as advocates in the trial, not as witnesses, and thus are not available to offer legal definitions as a part of the evidence. Unfortunately, this lack of explicit connection between the evidence and what the evidence means in the terms of the instructions leaves jurors without the rules for elaborative inferences necessary for a more complete understanding of their instructions.

Let me offer an example from this trial of an implicit attempt to exemplify one of the terms of art, specifically contributory negligence. Questioning the plaintiff, Mr. B probes for illustrations of Ms. Masheck failing to act reasonably cautious. He inquires if she had noticed any construction, if she had hurried, if she normally took the elevator, if she was wearing wedge heels, all of which might indicate that she was less than cautious. The following interchange is a continuation of Mr. B's exploration of Ms. Masheck's possible contributory negligence:

Mr. B: Were the materials and the wheelbarrow and other items there on the landing as you were coming down there blocking your intended route of travel or was there a way to get around them?

Ms. M: Oh, you could get around them. You could get around them. . . . it was not blocking, no.

(several questions later)

Mr. B: Did you slow down in any manner or become more cautious? What did you do?

Ms. M: I just saw and walked, I mean, the normal. I was aware there was a hose and that stuff was there, yes I slowed down.

Though with little assistance from Ms. Masheck, Mr. B is attempting to illustrate a number of possible ways in which Ms. Masheck may have been less than reasonably cautious. By his questioning, Mr. B suggests that a reasonably cautious person would have stopped walking down the stairs when she saw hoses and a wheelbarrow on the landing. But Mr. B cannot directly ask Ms. Masheck if her actions were negligent. Ms. Masheck asserts that the passage was not blocked. Though Mr. B tries several strategies, he is unable to move Ms. Masheck toward admitting her own negligence.

The significance of this passage of testimony lies in the difficulty of jurors' connecting the testimony to the final instructions. Mr. B's case required that he demonstrate that Ms. Masheck contributed to the cause of her injury, by an act or omission on her part. The most effective way

to do this would be to announce "I will now present evidence that Ms. Masheck contributed to the cause of her injury" and then proceed to question her. However, he is not allowed to do this and so he is forced to hope that he can jog the jurors' memories in final argument that Ms. Masheck was not particularly cautious for the circumstances. Because Mr. B is barred from explicitly making the connection during the presentation of evidence, Mr. B can only plan to make the link explicit in final argument.

These elaborative inferences are necessary for jurors' full comprehension of the text of the final instructions in relation to the evidence presented in the trial. Elaborative inferences occur "when the reader uses his or her knowledge about the topic under discussion to fill in additional detail not mentioned in the text, or to establish connections between what is being read and related items of knowledge" (van Dijk and Kintsch, 51). Without the advocates' explicit use of elaboration during the presentation of evidence or in final argument, jurors may not be able to make the appropriate matches. In this case, advocates were only partially successful in creating elaborative inferences, leaving the jurors to make their own constructions.

Without elaborative inferences and without reference to the lawyers' text world, jurors must relinquish their ordinary means of processing new texts and information. We should expect that these types of professional discourse and text conventions operate in a number of professional communities. The legal texts here only stand as a representative of the situation in which the nonprofessional audience is most fully disassociated from the ordinary strategies. A layperson reading an engineer's report, a doctor's diagnosis to another doctor, or an advertising executive's marketing plan might experience the text in similar ways. In the case of jurors, however, a decision must be reached. If lawyers replace ordinary text strategies with community-specific strategies, then what can jurors, who have no access to the legal conventions, use in their place?

Initiating the Novice into the Process of the Law

If the possibility of jurors' ordinary comprehension remains elusive by virtue of the legal conventions, the literal transfer of propositions from the final instructions may not be the goal, either of the jury or of the legal system. In this section, I would like to suggest that the blocks to ordinary comprehension are replaced with three supports, definitively shaping the jurors into the rational perspective demanded by the law. The first support is found in the distinct delineation of duties presented in the final instructions. The second is the metaphoric relations

of law and people underlying the instructions. Finally, the trial process mimics and accelerates the actual type of education would-be attorneys undergo. Each of the three guides of the jurors into new channels of organizing and understanding legal information. In short, socialization replaces information transfer.

One of the necessary elements of initiation would seem to be knowledge of the duties and permissible activities of participants in the trial. Figure 10.3 displays the analysis of the actors and permissible acts taken from the Masheck final jury instructions. These categories and the permitted acts are consistent throughout the jury charge. Moreover, the categories are mutually exclusive. Jurors do not instruct; witnesses do not compensate. Each category of actor has a particular set with which to act and no others. Though it is tempting to analyze the much-remarked occurrence of performative verbs evident in this classification scheme, these verbs and their actors have more importance in how they divide ordinary activities into new structures of reality.

One markedly different division demonstrated here is the complete deletion of the advocates from the actors' categories. A fiction of the law, the advocate becomes the party for the duration of the trial, not just the representative of the party. The parties speak only if they are called as witnesses. Although ordinarily one might think of the advocate as the person doing the suing, defending, introducing, and complaining, the jurors are presented with a strict conflation of advocates into the parties bringing and defending the case being tried. This strict division of acts in the instructions provides confirmation to the jurors that the legal view must dictate the new reality. By providing no acts for advocates, the instructions also emphasize that opening statement and closing argument are not evidence. Those two segments of the trial are presented by virtual non-entities. Thus, a first aspect of the litany of acts and actors is to delete the advocates.

A second important aspect of initiation through the recognition of roles is the focus on rationality of the jurors' activities. According to these final instructions, jurors must work hard at thinking activities: finding, crediting, weighing, determining, basing, holding, and construing. Other than believing, which can result in yielding after listening, jurors do not harass, cry, feel, guess, sympathize, speculate, or any other set of more emotionally marked, intangible mental acts. Instead, many of these mental acts have physical aspects connotated. "Credit" and "reconcile" have their associations with accounting and mathematics, as does "compensate." "Weigh" and "find" have possible associations with real mass, physical objects, as do "hold" and "base."

The judge and the witnesses have limited roles, both in the instructions and in the trial. Jurors hear the judge ruling on motions, reading instruc-

Actor	Permitted Actions		
The Law	contains contemplates embodies bars requires		
The Judge	instructs means rules controls sustains says		
Witnesses	testify state give evidence have interests, biases, prejudices		
Jurors	find credit consider reconcile believe agree listen hold	weigh determine compensate have duties base construe yield	
Parties	sue defend introduce perform support recover attack rely injure damage	complain convince contract recognize escape act ask produce omit exercise	intend prove assume wrong interpose have burdens fail offer cause

Fig. 10.3. Actors and permissible acts:
Masheck final jury instructions

tions, and controlling the introduction of exhibits, but not taking a direct part in the presentation of evidence, the heart of the trial. Thus by paralleling the limited activities of the judge, the instructions confirm, one last

time, that the jurors' focus should be primarily on the acts of the parties. Witnesses, as I suggested in the analysis of the bar on elaborative inferences, also have limited roles. The acts permitted witnesses in the instructions reflect this limit. This limit, restricting witnesses to the "facts," those items to which they testify, focuses attention on the limited set of items the jury can consider. These two actor categories, then, also provide further and final confirmation of the boundaries of the trial process jurors have just experienced.

Moreover, by requiring that jurors rely on rational perspectives in their acts, the instructions point the jurors toward relying on their own sense of narrative sequence. Jurors, by this analysis, have been given license to construct, albeit rationally, a story of the trial. Civil trials reconstruct and narrate the ordinary events of life. Coherence for ordinary events of life is already present in jurors' discourse processing. No new professional discourse must be thoroughly studied and internalized. Instead, jurors may use narrative episodes from their own experience, into which the evidence of the trial flows. By measuring the acts of the parties against their own experience, jurors indeed use rational means for making their decision. But, in no way is this discourse strategy the same as the text world algorithm of the professional legal community.

Concurrent with the development of roles and narratives assigned to those roles, the instructions also contain "the law" as a separate actor. Research in both linguistics and psychology in the past ten years has linked metaphor with dynamic cognitive structuring of thought and comprehension (Dirven and Paprotte, ix). Consequently, the appearance of an abstract concept in full human personification, as the law is presented in these instructions, should elicit further examination. These metaphors are, by my analysis, the second support socializing jurors into the process of the law. Consider the following representations of the law in the instructions.

In deciding this case you must determine the facts from a consideration of all the evidence in *light of the law* as it is contained in these instructions.

All the law in the case is not *embodied* in any single instruction.

You are instructed that *the law contemplates* that all six of your minds shall agree in pour verdict.

Lakoff and Johnson suggest that when we wish to highlight particular aspects of a concept that we will use consistent metaphors for that concept (92). Two metaphoric concepts of law are presented within these instructions. First, jurors have a structuring metaphor of law as an entity. The law has a bodily presence and it produces light. Second, as these

examples from the instructions suggest, the law is not just an entity, but a rational entity. In discussing this process of metaphoric personification, Lakoff and Johnson also suggest that particular aspects of the personification will be emphasized (33). The law contemplates, controls, and requires. In short, it thinks. This conceptualization of the law provides the jurors with further emphatic demonstration of the primacy of reason in the trial setting. The "law is a rational entity" metaphor structures the jurors' perceptions of the law.

A further elaboration of the hierarchical relations present in the roles of participants in the trial is provided by the combined metaphors of "the law is up" and "the law is light." "The law is up" metaphor provides a key to the hierarchy operating within the trial setting. Through its ability to require and bar, the "law is up" metaphor combines with the "law is a rational entity" to become the governor of the trial. Further, "the law is light" metaphor puts reason once again at the top of the list of human abilities. The associations with light are potentially endless, but this particular use is clearly associated with reason and insight.

Certainly the recent research in metaphor has continued to explore specifications of the relations between metaphor and cognition. Elizabeth Closs Traugott suggests use of parameters to categorize the aspects of metaphor contributing to understanding. Two of those parameters are relevant here, reference and conceptualization. By Traugott's proposed analysis (22-23), "the law is a rational entity" metaphor is low in reference; that is, its use is fairly common and we typically have little trouble connecting the reference with the literal sense. The consequence is that this metaphor is probably perceived as a convention. On the conceptualization parameter, however, perceiving the law, a nonanimate abstract concept, as an animate entity, specifically a rational entity, probably requires a somewhat higher degree of reconceptualization. As contact with the legal community is somewhat more limited to the average person than, for example, a religious group, to imagine the law as animate necessitates more distance than imagining the church as a living body. With low reference value and a higher conceptualization value, these parameters suggest the continuing usefulness of the metaphor in the instructions. If initiation does demand some limited reconceptualization, then these metaphors, appearing in the instructions, function to move the jurors closer to an unconscious understanding of the trial proceedings from a legal perspective.

With both the strict division of roles and the metaphoric conceptualization of the law, jurors move toward a legal perspective. A final support for this movement toward the legal perspective is found in the similarities between the abbreviated legal education that jurors receive during a trial and the actual legal education of an attorney.

Lawrence Friedman, in *A History of American Law*, devotes a chapter

to history of legal education in the United States. He pinpoints a change from teaching by lecture and hornbook to teaching by case law in the late nineteenth century, originating from Harvard. Friedman notes:

This method cast out the textbooks, and used casebooks as teaching materials; these were collections of reports of actual cases, carefully selected and arranged to illustrate the meaning and development of principles of law. The classroom tone was profoundly altered. There was no more lecturer, expounding "the law" from received texts. The teacher now was a Socratic guide, leading the student to an understanding of concepts and principles hidden as essences among the cases. (571).

In concluding this section, Friedman observes that every accredited law school eventually used the casebook approach.

The importance of this teaching method to procedures observed by the jurors in trial rests in the inductive nature of such a teaching approach. Friedman defines the casebook method as scientific and inductive in nature (531-32), and insofar as jurors are triers of fact, the process of the trial mirrors the inductive method of the law classroom. Socratic method in the law classroom prompts students to elaborate the holding in each case studied toward an inductively reasoned conclusion. Law students in their first year often find the process disconcerting, after years of college courses such as "Principles of Accounting" or "Principles of Economics." Searching for the general principle in a casebook is fruitless; the general principle emerges from skilled questioning in the classroom. Similarly, the lack of explicit elaborative inferences in the trial itself may be considered a sign of the typical legal education's forced attention to "scientific" or inductive reasoning. Moreover, jurors are clearly not to question matters of law; hence, instructions on the law may not necessarily evoke understanding of the legal concepts so much as they focus attention on the most highly valued process of legal thinking: rationality.

Conclusion

To ignore the intracommunity demands of a professional discourse is, in some ways, to trivialize the nature of language and text in a professional community. In the case of jury instructions, a written text surfacing within an oral speech event, two legal discourse conventions require the legal participants to produce a "good" legal text at the same time they produce a "bad" generic text. Knowledge about the importance of certain topics remains hidden to ordinary readers, masked by implicit references to professional texts beyond the view of the out-

siders. Knowledge about the relationship between naming and exemplification also remains within the professional community. The two legal discourse conventions function to block jurors' access to normal strategies of discourse processing. Is this situation unusual? I think not. Membership in a professional community inevitably means learning a new semantic system — not just words or technical terms— but new connections and new relationships. What this suggests is that pedagogy alone cannot diagnose or correct faulty communication between professional and nonprofessional or between professional communities.

Moreover, instead of looking for a simple information transfer, we may have to examine what does take place, even when information transfer has failed. No one expects jurors to become members of the legal community as a result of a single turn serving on a jury. But that is precisely what we are saying if we expect the information transfer to occur. In the case of *Masheck v. Capitol Drilling*, we do have communication that is successful in its own way: privileging rationality and socializing the jurors into "thinking like lawyers."

Few discourse communities provide the kind of written record of decisions found in the legal community. By examining a community in which these discourse conventions are recorded, we may be able to further describe the discourse practices of other less formal professional communities. In short, we need to explore professional discourse communities, outside the experimental setting and into the normal arena of their practice. With the legal community providing so rich a resource of the intersection of text and orality, a cultural artifact so deeply embedded in this society, we have only just opened the door to understanding the functions of text in this discourse community.

APPENDIX

Partial Text
Final Jury Instructions
Edith Masheck v. Capitol Drilling Supplies, Inc.

When I say that a party has the 'burden of proof' on any issue or use the expression, 'if you find from a preponderance of the evidence,' I mean that you must be convinced from a consideration of all the evidence in the case that the issue which a party has the burden of proving is more probably true than not. You are the sole judges of the weight of the evidence and of the credibility of witnesses. In giving weight and credit to the testimony of any witness, you may take into consideration any interest a witness may have in the result of the trial, any bias or prejudice of the witness disclosed by the evidence. You may consider the oppor-

tunity of lack of opportunity of the witness observing or knowing the things about which he has testified and the reasonableness of the testimony considered in the light of all the evidence in the case. The term 'preponderance of the evidence' means the weight of evidence. The number of witnesses testifying to a fact on one side or the other is not necessarily of the greater weight. The evidence given upon any fact in issue which convinces you must strongly of its truthfulness is of the greater weight. If there are conflicts in the evidence, it is your duty to reconcile the conflicts, if you can, on the theory that each witness has testified to the truth. If you cannot so reconcile the testimony, then it is within your province to determine whom you will believe and whom you will disbelieve.

NOTES

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