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Telling Tales in Court: Trial Procedure and the Story Model

Richard O. Lempert
University of Michigan Law School, rlempert@umich.edu

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*Richard Lempert**

OCCASIONS FOR STORIES

There are three ways in which stories may figure prominently at trials. First, litigants may tell stories to jurors. Not only is there some social science evidence that this happens,[1] but trial lawyers have an instinctive sense that this is what they do. Ask a litigator to describe a current case and she is likely to reply, "Our story is . . ."

Second, jurors may try to make sense of the evidence they receive by fitting it to some story pattern. If so, the process is likely to feed back on itself. That is, jurors are likely to build a story based on the evidence given them, and the evidence that best fits a juror's preferred story is likely to be given special weight while contradictory evidence is discounted or disregarded.[2]

Third, the jury as a group may try to arrive at a collective story in the process of reaching a verdict.[3] While no one to my knowledge has systematically examined mock jury deliberations to see if the process resembles an effort to arrive at a collective story of what occurred, this seems to be a plausible interpretation of what at least sometimes happens.[4]

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* Francis A. Allen Professor of Law, University of Michigan Law School. B.A., 1964, Oberlin College; J.D., 1969, Ph.D., 1972, University of Michigan. I would like to thank Phoebe Ellsworth, Reid Hastie, and Nancy Pennington for their helpful comments on an earlier version of this piece.

1 W. BENNETT & M. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981).

2 *See* Pennington & Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment,* 14 J. EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY, AND COGNITION 521 (1988).

3 Alternatively, the jury may evaluate the case of the party having the burden of proof as a story and find that it just doesn't hang together. *See, e.g.,* M. TIMOTHY, JURY WOMAN chs. 13-14 (1974).

4 *See, e.g.,* the mock jury deliberation reported in R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 151-58 (1983). More generally, the process of deliberation which Hastie, *et. al.*, call "evidence driven," *id.*, and Hawkins calls "deliberation in unity," C. Hawkins, Interaction and Coalition Realignments in Consensus-Seeking Groups: A Study of Experimental Jury Deliberations (1961) (unpublished doctoral dissertation, University of Chicago), seems to be aimed at establishing a consensus on the facts from which a common story can be constructed. Where jurors cannot agree on a story about *what happened* they may turn to legal definitions of verdict choices for guidance. *See* Ellsworth, *Are Twelve Heads Better Than One?* 52 J. LAW & CONTEMP. PROBS. 205, 218 (Autumn 1989).

I. PENNINGTON AND HASTIE'S RESEARCH

The research program that Pennington and Hastie summarize in the article they prepared for this issue[5] deals directly with only the second of these ways. Pennington and Hastie are concerned with processes of individual decision making; that is, with decision making at the level of the juror. Their hypothesis is that at least in trials where *what happened* is problematic (and in analogous situations in nonlegal contexts), individuals try to make sense out of the facts available to them by assessing how well the facts fit into some plausible story-like explanation of behavior. This hypothesis seems to be a natural extension of earlier psychological research which suggests that individuals often make sense of data by fitting them into culturally familiar and cognitively plausible explanatory patterns.[6]

Moreover, Pennington and Hastie explicate their hypothesis through a series of carefully drawn studies using different materials and methods which, taken together, indicate that the story model appears to explain much juror information processing, and where the story model applies it appears to provide a more accurate portrayal of juror decision making than other abstractions of rational decision making, such as the Bayesian model or the anchor and adjust model.[7] In my view Pennington and Hastie's research is well done and provides us with the most adequate portrait we have to date of how individual jurors assemble evidence in a form that allows them to determine legal consequences.[8]

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[5] Pennington & Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991).

[6] *See, e.g.*, F. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (1932); R. SCHANK & R. ABELSON, SCRIPTS, PLANS, GOALS AND UNDERSTANDING (1977); Nisbett & Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOLOGY REV. 231 (1977).

[7] Pennington & Hastie, *Explaining the Evidence: Further Tests of the Story Model for Juror Decision Making*, 58 J. PER. & SOC. PSYCHOLOGY — (1990) (forthcoming).

[8] As Pennington and Hastie note in their article in this journal, the story model is unlikely to fit all trials equally well. *See* Pennignton & Hastie, *supra* note 5. It is likely to fit best those trials in which the elements of an offense or cause of action are, like motive and causality, elements that commonly enter into narrative stories. Thus it is not surprising that the story model provides a good fit for Pennington and Hastie's main hypothetical case, in which a man named Caldwell is stabbed during a fight by someone named Johnson. In the resulting homicide action there are a set of preexisting story templates (e.g., the "out to get him" story, the "self-defense" story, etc.) that mesh with the different legal outcomes that the jury must choose among. For similar reasons a juror's decision-making processes would probably be better explained by the story model if she were asked to determine whether supervisor *X* intentionally did not promote *Y* because of *Y*'s race, than if she were asked whether it was fair to assume from a pattern of promotion decisions that *Y* and people of *Y*'s race were discriminated against in the promotion process. Even in the latter instance, however, story-type thinking could figure since a defendant corporation faced with statistical evidence that suggested discrimination

Lawyers are, however, likely to be less interested in whether or how story construction affects individual juror judgments than in whether story construction affects jury verdicts. We need not, however, determine whether juries in fact construct (or seek to construct) a common story in order to conclude that juror story-construction affects verdicts. There is by now a large body of evidence that suggests that most often juries decide cases in the direction of their original majorities (if an initial majority exists).[9] Thus, if a lawyer can get a majority of jurors to accept a story favorable to her (i.e., a story that supports her theory of the case or a theory which carries the same legal implications), she is likely to prevail when the verdict is returned.

This brings us to the question of whether a lawyer's ability to present her case as a story influences the stories that jurors impose on the evidence. Here another study by Pennington and Hastie is directly relevant.[10] In this study the ease of story formation was varied. Some subjects received case information in *story order,* which is to say in the temporal and causal order that matched the occurrence of the original events, and other subjects received the same information in witness order, which is to say that witnesses "testified" in turn and each told the jury everything she knew about the events regardless of where that information fit into the unfolding story of the events that occurred. As hypothesized, the ease of story construction as determined by the order in which information was presented had a substantial effect on the verdict reached. Where the state's evidence was presented in story order and the defense evidence in witness order, seventy-eight percent of the college student mock jurors returned guilty verdicts. Where the situation was reversed so that the defense evidence was presented in story order and the state's evidence in witness order, the proportion of mock jurors returning guilty verdicts dropped to thirty-one percent.

These findings are consistent with the results of a later study by

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might feel that its only defense lay in telling a plausible nondiscriminatory story consistent with the data. (Although it is too much of a digression to pursue the matter here, thinking about the shifting of persuasion burdens and affirmative defenses might be advanced by considering how conducive different kinds of cases and defenses are to party storytelling and juror story-formation.)

[9] *See, e.g.,* R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 4, at 63-76; H. KALVEN & H. ZEISEL, THE AMERICAN JURY 487-90 (1966); Davis, Bray & Holt, *The Empirical Study of Decision Processes in Juries: A Critical Review* in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES ch. 26 (J. Tapp & F. Levine ed. 1977).

[10] Pennington & Hastie, *supra* note 2.

Pennington and Hastie[11] and with the earlier research of Bennett and Feldman.[12] Bennett and Feldman not only examined actual trials and found that the presentation of evidence often took a story form, but they also conducted an experiment with college students in which they asked some students to tell others a brief story about something that had happened to them or something they had done. Subjects whose student identification numbers ended in even numbers were told to relate a true episode while those whose identification numbers ended in odd numbers were told to make something up. Bennett and Feldman found that the truth of the story had no significant effect on whether a majority of the audience judged the story to be true. What did have an effect was story structure. The more coherent the story, which is to say the less ambiguous the story connections, the more likely the story was to be judged true, regardless of its actual truth.

While both the Pennington and Hastie studies and the Bennett and Feldman experiment differ from trials in many important ways, I think their basic findings are likely to generalize to actual trial situations. In other words, I think it is safe to say (or at least the wise lawyer will proceed on the assumption) that the more coherent the story a party presents at trial, the more likely it is that jurors will accept that party's story independent of the informational content of the evidence. A trier presented with a jumble of facts is, in other words, less likely to find for the party presenting those facts than a trier who receives the same factual information presented not as a jumble but as a coherent story.

II. STORIES AT TRIALS

This conclusion will, no doubt, strike few trial lawyers as surprising. Litigators, as I have already noted, often speak of their client's cases as "our story," and they are aware of the need to present evidence in a way that does not confuse the jury. Nevertheless, evidence at trials is often presented in witness order rather than story order, and witnesses are not necessarily called at that point in the trial where the bulk of what they have to say fits nicely into an unfolding story. An arresting officer, for example, may be the first witness in a case. Is this a mistake? Not necessarily, for a trial has more opportunities for coherent story telling than the time devoted to the testimony of witnesses, and presenting one's witnesses in story order does not guarantee coherence. Some trial rules and practices promote, and others inhibit, the presentation of coherent stories. Taking the psychological

[11] Pennington & Hastie, *supra* note 7.

[12] W. BENNETT & M. FELDMAN, *supra* note 1, ch. 4.

research as establishing the importance of telling coherent stories, it is interesting to turn to the trial with the implications of the story model in mind.

III. VOIR DIRE

Story telling can begin as early as voir dire, for lawyers if given a chance may seek to use voir dire to instruct a jury in their theory of the case. A question from defense counsel like, "Could you believe that a 200-pound man who is a black belt in karate might fear for his life when faced with a 140-pound man with a kitchen knife?" serves two functions. First, it suggests to the juror that the defendant, despite his apparent strength, will tell a story of a knife attack and a killing (assuming this is a murder trial) in self defense. Second, it seeks to determine the kinds of stories the juror is willing to accept. The latter purpose is likely to be even more important than the former. There are other points in the trial where the defense (or prosecution) story may be told and told more coherently, but voir dire is the only point where the lawyers can assess the receptivity of jurors to particular stories and do something about it.[13]

It is, however, not easy to learn on voir dire what stories jurors are prone to accept. In many courts, particularly federal district courts, voir dire is a quick and shallow procedure. Judges ask most or all of the questions, and a judge's questions are often directed not to particular jurors but to the jurors as a group. Some judges allow lawyers to ask follow-up questions while others restrict them to suggesting questions which the judge need not ask. Even when lawyers confront prospective jurors directly, they may learn little, for jurors may not realize what stories they are prone to accept (or reject), or they may lie when asked crucial questions.[14]

Given the limitations of what can be learned on voir dire, lawyers often assume that jurors with certain backgrounds will be more willing to accept certain stories or types of stories (e.g., guilty stories) than others. Thus stereotypes seem to be widely used in jury selection and different trial manuals make different suggestions about the kinds of individuals who will be good jurors in particular cases. Where enough money is involved, social science research may be called upon to generate case-specific stereotypes, although there is reason to be-

[13] A lawyer might become aware that one or more jurors are not buying her story as the case proceeds, but by that point it is usually impossible to change her side's theory of the case.

[14] In cases where there has been pretrial publicity, jurors may come to court already knowing a story or primed to accept a particular version of what happened. Voir dire also seeks to identify such jurors, but is only sometimes successful.

lieve that such stereotypes are of little help in typical cases,[15] and they may not be much more helpful in complex or highly publicized cases.[16] There is, however, one juror attitude that does seem related to juror propensities to accept certain stories: the juror's attitude toward the death penalty in capital cases. Those jurors who report no qualms about sentencing murderers to death seem more prone to accept conviction stories than jurors who are opposed to the death penalty.[17] Indeed, the very process of death qualification seems to prime jurors to accept conviction stories.[18]

IV. OPENING STATEMENTS

Turning to the trial itself, we find that lawyers are invited to tell their clients' stories at the outset, for each side is given a chance to make an opening statement, which is, in effect, an invitation to relate a coherent story to the jury. These opening statements may condition everything that follows. Later testimony presented in witness order, which might be an unpersuasive jumble of facts without an opening statement, may be coherent and persuasive when a jury has heard an opening statement that sets the facts into context. For this reason, it would be interesting to replicate Pennington and Hastie's story order versus witness order research with mock jurors exposed to coherent opening statements.

Some students of the jury have claimed that a case is virtually resolved with the opening statement, meaning by this that if jurors could be polled throughout the trial their final verdicts would almost always be the verdicts they preferred after the opening statements. The story model tells us why mock jury data might suggest this even if no decisions are in fact reached on the basis of opening statements. If each party tells his or her story in the opening statement and the later evidence is consistent with each story, it is not surprising that the jurors' choices of stories to believe after opening statements is the same as their choices after all the evidence is in.

Opening statements may, however, have substantial effects on fi-

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15 *See* R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 4, at 123-50.

16 *See, e.g.*, Saks, *The Limits of Scientific Jury Selection: Ethical & Empirical*, 17 JURIMETRICS J. 3 (1976).

17 See the articles in the special issue of *Law and Human Behavior* on death qualification. *See, especially,* Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Thompson, Cowan, Ellsworth, & Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984).

18 Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984).

nal verdicts, and not just by making it easier for jurors to form a coherent whole out of the evidence that follows. Pennington and Hastie report[19] that their subjects were more likely to recognize information they had seen which was consistent with their preferred stories than information which was inconsistent, and they were also more likely to falsely recognize evidence they had not seen (i.e., think the evidence had been presented) if that evidence supported an inference that subjects were likely to have made in constructing their preferred stories than if it did not support such an inference. More generally, if one has a strong theory it can affect not only what information is remembered but how information is coded in the first instance.[20] Thus, winning the battle of stories in the opening statements may help determine what evidence is attended to, how it is interpreted, and what is recalled both during and after the trial. For example, a juror who regards the story offered in the prosecution's opening statement as more plausible than that offered by the defendant, may because of this see ambiguous information as consistent with a guilty story and preferentially retain information that favors the prosecution's case.

V. PRESENTING A CASE

If there is one piece of advice for lawyers which seems directly importable from the Pennington and Hastie research, it is that evidence should be presented to the trier of fact in story order rather than witness order. Witnesses, in other words, should not be asked to tell the fact finder everything they know about an event, but their evidence should be presented the way a story unfolds, which ordinarily means in chronological order.

Rule 611 of the Federal Rules of Evidence ("FRE")[21] and its state counterparts allow this to happen, for the rule gives the trial judge flexibility in determining the mode and order of interrogation. Thus, with the court's permission a lawyer can call a witness, have her tell part of what happened, allow her to step down, and then recall her at a later point when what she still has to say fits more nicely into the story.

Occasionally testimony is broken up in this way, but it is unlikely

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19 Pennington & Hastie, *supra* note 2.

20 R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 66-75 (1980).

21 "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." FED. R. EVID. 611(a).

ever to be a regular occurrence even if lawyers influenced by the work of Pennington and Hastie think it is desirable. First, lawyers need the cooperation of their witnesses. Many witnesses might find it sufficiently inconvenient to testify at several points in a trial that cooperation with a lawyer who insisted on this would be imperiled; so lawyers would not insist. Second, even if the lawyers regularly insisted, under Rule 611 the judge in exercising control over the order of interrogation should aim, among other things, at avoiding the undue consumption of time.[22] The interrogation of a witness who tells everything she knows when first called is likely to be less time consuming than the interrogation of a witness who is recalled on several occasions. Finally, lawyers and judges are simply accustomed to hearing everything a witness has to say at once. They might not be comfortable calling and recalling a witness on several occasions. Also, recalling a witness might suggest that she had not been completely frank in the first instance or might allow the opposing side to better prepare for cross-examination. If so, more ground might be lost with the jury than that which would be gained.

VI. CROSS-EXAMINATION

Rule 611 also contains the basic rules that regulate cross-examination. But from a story-model perspective the problem might not be abusive cross-examination but the institution itself. Cross-examination can break up a story's coherence. While one side might try valiantly to arrange its case in story order, the other side may be able to disrupt the coherence of that story through cross-examination. Such disruption will not prevent jurors from constructing stories—Pennington and Hastie's original stimulus was a filmed trial reenactment with realistic cross-examination—but it may be that even a cross-examination which yields no important new facts results in jurors constructing stories different from or less firmly held than the stories that un-cross-examined direct testimony would otherwise have elicited. For this reason I think it is important to replicate Pennington and Hastie's story-versus-witness-order experiment with simulations involving vigorous cross-examination.[23]

If cross-examination does break up stories, this may be an argument that favors the preference in Rule 611 for cross-examination

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[22] *See id.*

[23] Bennett and Feldman's complementary story-telling research, W. BENNETT & M. FELDMAN, *supra* note 1 at ch. 4, also did not present subjects with stories disrupted by cross-examination.

that is limited to the scope of the direct examination.[24] *Wide open rule* cross-examination potentially allows far more disruption of a story and confusion of the issues. Indeed, in a wide open rule jurisdiction the strategy of having a witness testify as a story unfolds could be easily disrupted since the first time the witness testifies the cross-examiner might ask her about matters that the direct examiner does not wish to broach until a later time.

Cross-examination may, of course, have nothing directly to do with the witness's story but may instead go to the credibility of the witness. This too may disrupt a direct examiner's story, particularly if it is elaborate enough to constitute a story about the witness which is independently interesting to the jury. A juror who puzzles over whether a witness is a truth teller may recall less of what the witness said, regardless of how she eventually resolves the credibility issue.

Perhaps the most interesting aspect of the story perspective with respect to cross-examination is that it calls into question one of the most basic adages of trial practice; namely, cross-examination should be waived unless there is a particular point or points that the cross-examiner knows she can make. Breaking up a story temporally or logically might itself give some point to an otherwise empty and unhelpful cross-examination.

At the same time the story perspective strongly supports another bit of trial practice advice: that the cross-examiner should not simply take the witness over the story she has already told. A story heard twice is likely to be better remembered than a story heard a single time.

VII. EXCLUSIONARY RULES AND LIMITED ADMISSIBILITY

Another set of issues that the story perspective highlights is that surrounding the problems that are raised by gaps in evidence. Here all exclusionary rules of evidence are potentially implicated, for any of them may cause a gap which makes a story less credible. What is worse, an exclusionary rule may give rise to a spoliation inference. A juror may assume that because gap-filling evidence was not presented when a story clearly called for it, the evidence does not exist. Thus the juror may find the story less credible. Moreover, the nonexistence of excluded evidence may be consistent with the opposing story and so make that story more credible.

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[24] "Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." FED. R. EVID. 611(b).

This suggests one reason why it may be important that most of the nonconstitutional exclusionary rules of evidence (FRE 404(b) is an example)[25] exclude evidence only for particular inferences and not for others. Too many gaps would be created if evidence legitimately relevant and admissible for one point was barred because it was irrelevant and inadmissible on some other.

At the same time, the story model helps explain the limited effectiveness of limiting instructions when evidence is admissible for one purpose and not for another, and it tells us why a jury may focus little direct attention on material it has been instructed to disregard yet still appear to be influenced by it.[26] Even if a jury does not inappropriately resort to limited admissibility evidence in its deliberations, the evidence may serve to fill a gap that otherwise would have made one party's story less credible. For example, in a particular case where the defendant appears generally middle class and attractive, a jury might find the defendant's persona inconsistent with the story of criminal behavior that the prosecutor tells. The protagonist and the actions simply do not fit. If, however, the prosecutor can introduce a defendant's prior crimes for a legitimate purpose, such as showing knowledge, the jurors without ever discussing or even being aware of the issue will no longer perceive any incongruity between the defendant's persona and the crime of which he or she is accused. Thus, if evidence of a prior crime is admitted for a legitimate purpose, no matter how slight its probative value for that purpose, the likelihood of a criminal conviction should rise.[27] If evidence works by filling story gaps that would otherwise be perceived, it is hard to see how any limiting instructions could change the situation. The jurors are not overtly relying on the limited admissibility information; rather, they are failing to see problems with the prosecution's story that would stand out had the information not been given.

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[25] FRE 404(b) disallows evidence that an accused has committed other crimes when this fact is relevant only insofar as it suggests that an accused has a criminal propensity. However, the rule allows evidence of other crimes when that evidence is relevant for some other purpose such as showing identity or motive. *See* FED. R. EVID. 404(b).

[26] *See, e.g.*, Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1958); Doob & Kirshenbaum, *Some Empirical Evidence on the Effect of S.12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L. Q. 88 (1972); Hans & Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L. Q. 235 (1976); Wissler & Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

[27] If these speculations about the implications of the story model where character is relevant to the stories jurors might construct are correct, the increase in conviction rates should be greater where the defendant appears to be middle class than where, even without the other crimes evidence, the defendant appears disreputable. This implication should be easy to test empirically.

VIII. JUROR QUESTIONS

The story perspective and the problems gaps pose also speak to the wisdom of allowing jurors to ask questions of witnesses. Since neither lawyers nor judges can anticipate the gaps that jurors will perceive, it seems wise to allow jurors to ask questions. If jurors cannot ask questions when they perceive gaps, they will puzzle over them nonetheless. They may make spoliation inferences or close gaps by assuming information consistent with their preferred stories. It is better that jurors receive accurate information, if it is available and admissible, than that they make up information based on where their stories would otherwise take them. Moreover, allowing juror questions may reveal to the attorneys the stories that jurors are prone to construct and so may let the lawyers better focus their arguments.

IX. CLOSING STATEMENTS

As the trial draws to its end, there are closing statements, instructions and deliberations. Closing statements, like opening statements, are a chance for lawyers to put together the material of a trial in the form of a story. They are the last chance for a lawyer to show how the evidence she has presented coheres into a convincing whole.[28] Closing statements also allow, and in practice require, a lawyer to deal with the opposition's evidence. The story model suggests several promising tactics. One is to assimilate the other side's evidence, or as much as can be accommodated, into one's own story or to reinterpret the other side's evidence to make it irrelevant. A second tactic is to point out gaps in the story the opponent attempts to tell. A third is to point to apparent facts which the opponent's story cannot accommodate. These are not mutually exclusive options, and the same closing statement may make an attempt at each of them.

X. INSTRUCTIONS

After the closing arguments come the instructions. These play a special role in the Pennington and Hastie story model, for they present the jury with the verdict categories into which the stories they construct must ultimately fit. It is also possible that instructions shape the ultimate stories that are constructed. Certain facts that were difficult to accommodate may appear irrelevant to the instructed juror while what were troublesome gaps may become less so. Or, the

[28] The party with the burden of proof must always do this. The defending party, as Bennett and Feldman, *supra* note 1, point out need not present a story because it can prevail by convincing the court or jury of the inadequacy of the opponent's story.

opposite effect may occur. A juror may realize that her story does not fit any verdict category very well, and it may be necessary to make sense of gaps or hitherto ignored evidence to arrive at a story that clearly implies one verdict. It may even be the case that a juror's strongest sense is that a particular verdict is correct, and that once the requisites of that verdict are known the juror adjusts her story with the verdict in mind.

One frequently suggested reform is to instruct the jury at the outset of a case. The story model suggests that this might help the jury make sense of a case. Rather than construct a story which in the end turns out to be poorly fitted to the decision-making task the jury confronts, the juror knows at the outset the requisites of that task and can construct a story with these requisites in mind. Pre-instructions can help jurors focus on the most relevant evidence the parties offer and may prevent them from giving undue weight to episodes that are of little importance from a legal standpoint. Pre-instructions do this by directing juror attention toward certain aspects of the parties' cases and away from others.

It is not clear, however, that this is a good thing. The jury system may function better if jurors confront the law's requisites (as given in the final instructions) with stories that have been constructed based on naive understandings of what is just and folk views about what is important evidence. Perhaps it is in the confrontation of law and story that the benign nullification—one might call it popular justice—which Kalven and Zeisel describe[29] resides. If there is this kind of trade-off, it might be wise to limit pre-instruction to those lengthy and complex cases in which an uninstructed juror may be prone to construct stories which, when confronted with the law's requisites, appear far off the mark. Where a juror is likely to be overwhelmed with information, pre-instruction may serve to limit the amount of largely irrelevant evidence that helps shape a story and increase the amount of relevant evidence that the story is designed to accommodate.

XI. DELIBERATIONS AND EXPERT TESTIMONY

Finally, there are the deliberations in a case. Pennington and Hastie note that jurors construct different stories and that jury deliberations often consist of a contest over which story is to prevail. Interestingly, jurors often find the story contest surprising because before deliberations begin, they find it difficult to perceive how any

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[29] H. KALVEN & H. ZEISEL, *supra* note 9.

story other than one similar to what they have constructed can be drawn from the evidence.

A major cause of different juror stories is the different background information that jurors bring to their deliberations. For example, in the mock trial which forms the basis for much of Pennington and Hastie's story model research, one evening the defendant, Johnson, carrying a knife, entered a bar frequented by a man, Caldwell, with whom he had quarreled that afternoon. Middle- and upper-class jurors were more prone than lower-class jurors to find the defendant guilty of first-degree murder. The reason was that they could construct no story which made sense of the fact that Johnson was carrying a knife other than the story that he planned a murderous assault on Caldwell should a confrontation occur. Working- and lower-class jurors on the other hand found it not only plausible but perhaps likely that a man like Johnson would carry a knife wherever he went for general protection. Indeed, in one filmed deliberation of this trial that I observed, a woman juror, arguing that the presence of a knife carried with it no sinister implications, stated that she probably had a knife in her pocketbook at that very moment.

Expert testimony on such background issues as whether people of the defendant's social class regularly carry knives is, in theory, allowed under FRE 702, because the rule provides that "specialized knowledge" from experts is admissible if it will "assist the trier of fact to understand the evidence."[30] In practice, however, the admissibility of such evidence is largely discretionary with the judge, and many judges are reluctant to allow experts to testify to "what ordinary people know." The problem is that ordinary people know different things about the same subject matter, yet they may believe that everyone "knows" what they do.

But even if judges were more willing than they are to admit expert testimony on such matters, there would still be many cases where potentially helpful testimony of this sort would not be presented to the jury. This would be not only, or I think even primarily, because lawyers and clients did not have the resources to hire such experts, but also because lawyers like individual jurors would think there was only one interpretation that could be put on the evidence. To continue with the Johnson example, a Legal Aid lawyer used to working with lower-class criminals might well think that her client's claim that he habitually carried a knife for protection was patently reasonable and should be seen as such by all jurors. The fact that she saw her

[30] FED. R. EVID. 702.

client's story as a "normal account" might lead her to underestimate the importance of proving and arguing this point.

One benefit, perhaps the most important benefit, of the focus-group type presentations that some lawyers use in trial preparation is that the group's discussion brings home to the lawyer the different understandings that reasonable people can have of the evidence she intends to present. In such circumstances lawyers should, of course, try to put evidence in context and to present experts when they fear that their preferred interpretation of evidence will appear utterly implausible to jurors of certain backgrounds. However, considerable evidence may be open to divergent interpretations, and even if a lawyer is in every instance aware of the possibility, no court would tolerate a succession of experts telling a jury how to use its common sense. Thus protection against the class-biased discounting of unfamiliar, but in fact plausible stories must be found largely in the diversity of the jury. Reducing the number of jurors from twelve to six members, a "reform" that has been particularly popular in civil cases, entails a substantial cost in this respect.[31]

CONCLUSION

I have taken Pennington and Hastie's research and their story model quite seriously in this paper—perhaps too seriously. While I believe that their research provides us with our best insights to date on how jurors decide cases, extrapolating from their research to actual trials is a venturesome endeavor. Presenting evidence in story order may, for example, count for less in the courtroom than in Pennington and Hastie's story-versus-witness-order experiment because it is possible that cross-examination can make the coherent presentation of evidence seem less coherent and hence less persuasive. Moreover, procedures that have not been studied in the laboratory, like opening

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[31] *See, e.g.*, Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975). As I write, the twelve-member civil jury is in danger of being effectively abolished in lengthy cases in federal district court even if the judge or district prefers to try such cases to twelve-member juries. Proposed amendments to the Federal Rules of Civil Procedure that have been sent to Congress eliminate alternate jurors in civil cases and provide that all seated jurors who remain at the end of a trial will deliberate on the case. *See* PROPOSED FED. R. CIV. P. 48, 111 S. Ct. at ccxxxiii (1991). By itself, the latter policy is a worthy reform which should increase the effective size of civil juries in many courts from six to seven or eight. However, the amended rule also provides that no more than twelve jurors may be seated. In a lengthy case, where numbers are likely to be most important, even if twelve jurors are seated originally, fewer than twelve are likely to remain at the end of the case. Indeed, I expect that some particularly lengthy complex cases will have to be retried because seating twelve jurors at the outset will not prevent the jury from diminishing to fewer than six people, which will mean that without party consent a binding verdict cannot be returned.

and closing statements, may so profoundly affect how jurors respond to evidence that what Pennington and Hastie teach us is no guide to policy or practice.

The realities of trial practice may, in other words, render meaningless the lessons one might draw from Pennington and Hastie's reasearch. They may, but I do not think they will. Pennington and Hastie, assisted by Bennett and Feldman, have convinced me. I believe that thinking of jurors as story builders and of the trial as an occasion for story telling provides a useful perspective for both those who practice law and those who would reform it. Nevertheless, my extrapolations from Pennington and Hastie's research of implications for trials are no more than hypotheses. Almost all of them rest on empirical suppositions that can and should be tested.

Perhaps most importantly the normative status of the story model itself should be tested. As story model research filters into the world of practice, lawyers may work more self-consciously to tell convincing stories and the result may be that they are more persuasive. But will justice be enhanced thereby? My analysis has proceeded on the assumption that trial rules should promote coherent story telling, but perhaps certain trial rules, like the right to cross-examination, are valuable precisely because they interfere with the neat presentation of stories and sensitize jurors to the different interpretations that may be put on evidence. Perhaps jurors are more likely to discern the truth when presented with a jumble of unorganized facts that they must themselves arrange than they are when these facts have been self-interestedly organized into coherent stories. At some point in their research program I hope Pennington and Hastie, or someone whom they have inspired, will address these issues. Jurors may construct stories from the evidence they are presented with, and certain forms of evidence presentation may make the story construction process easier than it would otherwise be. But is the most easily constructed story the best explanation of trial evidence? This is an open question.