

'Telling Tales': Exploring Narratives of Life and Law within the (Mock) Jury Room

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In a context in which current prohibitions under the Contempt of Court Act 1981 prevent research into the substantive content of real jury deliberations, the ways in which jurors in criminal trials in England and Wales approach the task of reaching collective verdicts remains the subject of considerable conjecture. This has necessitated the use of simulation studies to replicate as far as possible within the constraints of the experimental context the factors and dynamics that might play a part in informing and framing this process.

In a previous article, also published in *Legal Studies*, the authors described the findings of one such simulation study in which volunteer members of the public observed a real-time mini rape trial re-enactment before being streamed off into different juries to reach a verdict. Amongst other things, in that article, we highlighted a general tendency on the part of these juries to make very limited reference to the judge's directions about how to structure their analysis, to disregard or misunderstand pertinent legal tests and – particularly where there was an ineffective foreperson in place – to engage in discussions that were under-inclusive of

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all group members, lacking in logical structure and focussed on considerations informed by dubious socio-sexual stereotypes.¹

Having recently completed a further study using the same methodology, in this article, the authors re-visit some of these earlier themes in light of our new findings. More specifically, we explore the extent to which providing jurors with written judicial directions in the jury room improved the way in which they approached their task, in terms of ensuring more focussed, logically structured and legally-relevant deliberations. In what follows, we will suggest that, while the presence of these written directions did prompt some jurors to revisit the legal tests as the deliberations unfolded – which in some cases had a positive impact in re-focussing the discussion or clarifying a point of confusion – in the majority of cases, participants continued to make very limited use of these instructions, relying instead on their own recollections and (mis)interpretations of pertinent legal tests, as well as on their own evaluations of the evidential weight and credibility of the assertions put before them.

Previous research has indicated that one of the key reasons why jurors may be reluctant to afford too much attention to legal tests, including those contained within written directions, is that they may not properly understand the technical distinctions that they delineate and the legal jargon through which they are articulated.² As will be discussed further below,

¹ L Ellison and V E Munro, 'Getting to (Not) Guilty: Examining Jurors' Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial' (2010) 30(1) *Legal Studies* 74.

² A Elwork, B Sales and J Alfini, 'Juridic Decisions: In Ignorance of the Law or in Light of it?' (1977) 1 *Law and Human Behavior* 163; G Kramer and D Koenig, 'Do Jurors Understand Criminal Jury

there was certainly ample evidence in the present study of our jurors struggling to properly interpret, understand and apply the guiding legal tests, notwithstanding our efforts in drafting the trial re-construction to state these in as clear, concise and accessible a manner as possible. We will also suggest, however, that there is another, arguably more fundamental, obstacle that prevents jurors from engaging with judicial directions, and the tests that they contain, in the manner that legal professionals may hope for, and that justice for victims and defendants may require. More specifically, we will argue that there is a tension between law's often abstract, structured and compartmentalised approach to decision-making and the more holistic and fluid manner in which jurors engage with the entirety of the events that surround a given case in order to construct plausible and coherent narratives upon which to ground their verdicts. Whilst we direct jurors to be guided in their deliberations by the legal tests provided to them, drawing conclusions about the facts of a given case in light of those tests, the more natural inclination for lay decision-makers is to first construct (both individually and then collectively) an acceptable story about what happened, based on a combination of the factual information presented at trial, their evaluations of the credibility of the parties, and their pre-conceived assumptions about how life is; and only having done so, do they turn to the law selectively in order to bolster and confirm that narrative.³

Instructions? Analyzing the Results of the Michigan Juror Comprehension Project' (1990) 23 *University of Michigan Journal of Law Reform* 401.

³ There is a significant body of research literature which confirms this view. For general discussion, see, for example, A Moore, 'Trial by Schema: Cognitive Filters in the Courtroom' (1989) 37 *UCLA Law Review* 273.

In the latter stages of this article, therefore, we will explore in more detail the ways in which our jurors sought to construct such narratives, and will highlight the frustration that they often experienced in doing so in a context in which they are faced with two such starkly opposing and yet equally independently plausible accounts, as presented by the complainant and defendant. More specifically, we will examine the strategies that jurors often used in this context to assist them in reaching a verdict, including substituting personal experiences or expectations (for example about the likelihood of internal trauma being suffered by rape victims) in place of expert testimony or judicial instruction and 'filling the gaps' in evidence provided by inventing new dimensions to the case that would assist in creating a more coherent and compelling story. Whilst we will expose some of the dangers and difficulties associated with these strategies, we will also reflect on the extent to which reliance upon them by jurors (particularly, but not exclusively in rape cases) may be an understandable, human response to the serious consequences that attend upon their task and, to some extent at least, an inevitable result of our engrained, everyday cognitive and discursive processes.

Before we embark in more detail on this substantive discussion, it is first necessary, of course, to outline and defend the methodology used in the present study, and to draw attention to some of the limitations inherent within it that may impact upon its findings.

Getting into the Jury Room: On Simulation Methods and Methodological Limits

In close consultation with an expert panel comprised of criminal justice and victim support practitioners, the authors scripted a series of four mini rape trials, which were then reconstructed in real time in front of an audience of mock jurors, with key roles being played

by professional actors and experienced barristers. In line with the wider aims of the study, which were to explore the impact, if any, upon jurors of the complainant's use of special measures, the way in which she delivered her testimony varied across these trial conditions. Thus, in the first trial, the complainant gave her testimony by means of a live TV link, appearing in court on a plasma screen. In the second, she gave her evidence in the courtroom from behind an opaque partition which shielded her from the defendant but allowed her to be observed by the judge, legal representatives and the jury. In the third trial, a video recording of the complainant's pre-trial interview with the police replaced her examination-in-chief, and cross-examination was conducted via a live TV link. In the fourth trial, the complainant testified from the witness box, without the use of special measures.⁴

Beyond this, the basic trial scenario, and the substantive content of the parties' evidence, remained constant, and the performing actors and barristers were briefed to deliver the script in the same manner across the different re-enactments to support cross-comparison. The scenario involved a complainant (Jane Smith) and defendant (Peter Waite) who had been in an eight month relationship, which ended approximately two months before the alleged offence took place. The defendant called at the complainant's home (which they had previously shared) to collect some of his possessions. He and the complainant enjoyed a glass of wine and some coffee as they chatted. A few hours later, as the defendant made to leave, the two kissed. It was the Crown's case that the defendant then tried to initiate sexual

⁴ For discussion of the study's findings in relation to the impact of these trial conditions, see L Ellison and V E Munro, 'A Special Delivery? Exploring the Impact of Screens, Live Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2014) *Social and Legal Studies*, forthcoming.

intercourse, touching the complainant on her breast and thigh, and that she made it clear that she did not consent to this touching by telling the defendant to stop and pushing away his hands. The Crown alleged that the defendant ignored these protestations and went on to rape the complainant. When the defendant was questioned by the police, he admitted that he had had sexual intercourse with the complainant, but maintained that all contact was consensual, and this was the approach taken by the defence. A forensic examiner testified that the complainant had suffered bruises and scratches of a sort consistent with the application of considerable force, but had sustained no internal bruising. He advised that while intercourse had occurred between the parties, the evidence available following his examination of the complainant was neither consistent nor inconsistent with rape.

This scenario was not based directly on any one rape case transcript but was instead drafted so as to include a number of elements that research and experience have both identified as being common to many contested rape cases. Thus, for example, the complainant knew the defendant prior to the incident, the alleged attack occurred in a private place without witnesses, the complainant showed no signs of internal trauma, some level of alcohol was consumed by both parties prior to the alleged assault, some level of force was allegedly used against the complainant, although without the use of a weapon, and the defendant maintained that the complainant had consented to the intercourse. At the same time, the scenario was also designed to ensure an appropriate degree of ambiguity such that jurors could feasibly be swayed one way or the other in their verdict decisions. Thus, for example, jurors were offered some potentially corroborating evidence in the form of bruising to the complainant's body but this was limited in scale and severity to provide an opening for

competing explanations, such as inadvertent force during consensual intercourse, willing engagement in 'kinky' sex, or the incurring of bruising through an unrelated activity.

Each trial reconstruction lasted approximately 75 minutes. While this entailed that the sheer volume (though not necessarily substantive content) of evidence presented to jurors was streamlined and the usual periods of delay and disruption that typify court proceedings were absent, careful advice provided by experts in the scripting process was relied upon to maximise realism within these constraints. Each trial was observed simultaneously by between 38 and 42 participants, who - after receiving judicial instructions crafted from the latest Crown Court Bench Book guidance - were streamed into five different juries (with an average of 8 members) and asked to undertake verdict deliberations. Jurors were advised at the start of the process that they should identify a foreperson to guide discussions and to liaise with the research team when a verdict had been agreed upon. As will be discussed further below, they were also provided in the jury room with a brief written direction from the judge, which reiterated the key tests that jurors should consider when evaluating the parties' claims and determining their individual and collective verdicts. Deliberations lasted up to 90 minutes, although after 75 minutes participants were advised that a majority verdict would be acceptable.

While these restrictions on time and jury size were necessary to ensure the practicality of the study, and may have had an impact on verdict outcome, the discussions undertaken by our jurors give a significant and valuable insight into the key concerns and priorities informing their deliberations. Moreover, there is evidence that real jurors may not have needed much

longer to reach a verdict⁵ and the exact significance of group size in jury simulations is contested⁶ with previous research identifying no reliable differences in terms of jury deliberation processes as a result of jury group size in criminal cases where the evidence suggests something other than high levels of guilt from the outset.⁷ Indeed, some research suggests that groups of eight may be optimal in terms of maximising a range of substantive contributions,⁸ and that factions of the same *relative* size, whether in larger or smaller juries, are equally capable of attracting converts, with the time required for such shifts to occur being largely comparable, regardless of the overall jury size.⁹

⁵ See M Zander and P Henderson, *The Royal Commission of Criminal Justice: Crown Court Study*, Research Study No. 19 (London: HMSO, 1993), H Kalven and H Zeisel, *The American Jury* (Illinois: University of Chicago Press, 1966).

⁶ H Zeisel and S Diamond, 'Convincing Empirical Evidence on the Six Member Jury' (1974) 41 *University of Chicago Law Review* 281, L Mills, 'Six Member and Twelve Member Juries: An Empirical Study of Trial Results' (1973) 6 *Journal of Law Reform* 671, N Kerr and R MacCoun, 'The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation' (1985) 48 *Journal of Personality and Social Psychology* 349, M Saks and M Marti, 'A Meta-Analysis of the Effects of Jury Size' (1997) 21 *Law and Human Behaviour* 451.

⁷ A Valentini and L Downing, 'Differential Effects of Jury Size on Verdicts Following Deliberations as a Function of the Apparent Guilt of a Defendant' (1975) 32 *Journal of Personality and Social Psychology* 655.

⁸ B Latane, K Williams and S Harkins, 'Many Hands Makes Light Work: The Causes and Consequences of Social Loafing' (1979) 37 *Journal of Experimental Social Psychology* 822.

⁹ Kerr and MacCoun, above n 6.

Participants were self-selecting members of the public recruited on the basis of jury service eligibility by a market research company. That this may have influenced the composition of who participated in the study, and thus the views expressed, cannot be ruled out – particularly in a context in which some previous research has indicated that people who volunteer to take part in experimental studies display a particular disposition towards community activities, etc. that may influence their thinking, or a particular sensitivity to, or concern about, the specific subject matter.¹⁰ At the same time, it should be noted that our jurors were asked in advance of participation if sexual assault was an issue of particular concern to them and the vast majority answered negatively. Moreover, leaving aside the difficulties with assuming that a person's dispositions are linear and predictable, rather than permanently in flux in relation to divergent contexts and circumstances, the fact that jurors participated in this study in exchange for a fee (albeit not a large one) may mitigate against these concerns about dispositional bias. Further, given the reality that participants cannot be compelled to take part in jury research with the same force with which they can be compelled to take part in jury duty, and the low positive response rate associated with more random methods of recruitment, which suggests an inevitable element of self-selection, this approach was the most pragmatic option available, and certainly a significant improvement upon many previous jury simulation studies which have relied on student volunteers.

¹⁰ A Braunack-Mayer, 'The Ethics of Participating in Research' (2002) 117(9) *Medical Journal of Australia* 468.

Of course, in order to give suitably informed consent to participate in this study, our volunteers were aware of the fact that they were engaged in a form of role-playing and that, as such, their decisions did not have 'real' consequences for the trial parties. To the extent that this is an inevitable element of the simulation method, it entails that caution must be exercised in uncritically extrapolating from experimental studies to the context of the real courtroom. The possibility that this role-playing impacted upon participants' approach to the legal tests and evidence, and ultimately their verdict preference, must be borne in mind. At the same time, however, the significance of this should not be overstated, and certainly should not be seen to prevent well-designed simulation studies from yielding valuable insights. The vast majority of our participants appeared markedly engaged and animated throughout the simulation, taking their task as jurors very seriously, with several remarking on the stress that the process of deliberation and decision-making caused them.¹¹ In Jury A, for example, one male juror observed to another 'you won't sleep tonight, you'll be worried about this poor woman (the complainant)' whilst a female juror noted that 'it's hard, though, isn't it? Just sitting in there (the courtroom), it's intimidating'. Similarly, in Jury C, participants reflected on how hard it was to settle upon a verdict, noting that, in the words of one juror, 'it's somebody's life that we're dealing with, isn't it?' This suspension of disbelief was similarly illustrated in the following exchange amongst female jurors in Jury T:

¹¹ Other researchers report similarly high levels of engagement by mock jurors. See, for example, J Goodman-Delahunty, M Rossner and D Tait, 'Simulation and Dissimulation in Jury Research: Credibility in a Live Mock Trial' in (eds.) L Bartells and K Richards, *Qualitative Criminology: Stories from the Field* (NSW, Australia: Federation Press, 2011).

FJ: I'm unable to say that it can be proved beyond reasonable doubt. But I do have a nagging feeling that what if I'm wrong, a rapist is going to get let out.

FJ: It's a big responsibility, isn't it?

Moreover, previous studies testing for a verdict impact as a result of role-playing have produced inconclusive results;¹² and, to the extent that misinterpretation or misapplication of legal tests might reflect a lack of engagement with the process, research has suggested that real jurors make errors at a comparable rate to that evidenced in mock jury research.¹³

Given the random membership of real juries, no steps were taken to engineer demographic representation across socio-economic groups (although such information was matched to anonymised juror numbers for analysis).¹⁴ In regard to gender, however, a broadly even

¹² See, for example, D Wilson and E Donnerstein, 'Guilty or Not Guilty? A Look at the 'Simulated' Jury Paradigm' (1977) 7 *Journal of Applied Social Psychology* 175; H Zeisel and S Diamond, 'The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court' (1978) 30 *Stanford Law Review* 491; N Kerr, D Nerenz and D Herrick, 'Role Playing and Study of Jury Behaviour' (1979) 7 *Sociological Methods and Research* 337.

¹³ S M Kassin and L S Wrightsman, 'On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts' (1979) 37 *Journal of Personality and Social Psychology* 1877; L J Severance and E F Loftus, 'Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions' (1982) 17 *Law and Society Review* 153; c.f. A Reifman, S M Gusick and P C Ellsworth, 'Real Jurors' Understanding of the Law in Real Cases' (1992) 16 (5) *Law and Human Behaviour* 539.

¹⁴ J Hepburn, 'The Objective Reality of Evidence & the Utility of Systematic Jury Selection' (1980) *Law and Human Behaviour* 89, M Bonazzoli, 'Jury Selection & Bias: Debunking Invidious Stereotypes Through Science' (1998) 18 *Quinnipiac Law Review* 19, P Ellsworth, 'Some Steps Between Attitudes and

distribution of men and women within each jury was ensured, reflecting previous research on rape deliberation which indicates that gender is one characteristic which - particularly when mediated through attitudinal lenses of rape myth acceptance and self-defensive commitment to belief in a just world - may interact with case-specific aspects.¹⁵

Piercing the Jury's Veil: Analysing Participants' Collective Deliberation Data

The jury deliberations were video- and audio-recorded and subsequently transcribed. Jurors were additionally asked to complete a brief pre-deliberation questionnaire in which they rated their views as to the complainant's consent, the defendant's belief in her consent and their initial verdict preference, as well as a more extensive post-deliberation questionnaire in which they were asked to give their views in regard to – amongst other things - the deliberative process, the group verdict, and the mode of the complainants' evidence delivery. Many previous studies examining third party / mock juror attitudes to rape have

Verdicts' in R Hastie (ed.) *Inside the Juror: The Psychology of Juror Decision-Making* (Cambridge: CUP, 1993).

¹⁵ C Kleinke and C Meyer, 'Evaluation of Rape Victims by Men and Women with High and Low Belief in a Just World' (1990) 14 *Psychology of Women Quarterly* 345; L Foley and M Pigott, 'Belief in a Just World and Jury Decisions in a Civil Rape Trial' (2000) 30 *Journal of Applied Social Psychology* 935, D Ugwuebu, 'Racial and Evidential Factors in Juror Attribution of Legal Responsibility' (1979) 15 *Journal of Experimental Social Psychology* 133.

relied exclusively on the findings of such questionnaires.¹⁶ We have argued elsewhere, however, that – although capable of providing some valuable insights – sole reliance on the questionnaire method may be problematic.¹⁷ It does not allow jurors to provide justifications or explanations for their judgments, and nor does it allow for the examination of the emergence and resolution of disputes in social interaction. Moreover, the singling out of specific factors in isolation within questionnaires can distort respondents' more holistic approach to the subject matter, as evidenced within the deliberations, and presents the risk that participants will select their answers based either on what they consider to be the most socially acceptable option or what they anticipate to be the desired option by researchers. For these reasons, in what follows, we rely primarily on the deliberations. Such an approach allows a systematic examination of the nature and substance of jurors' comments, and the interrelation of case-specific aspects, together with the dynamics of juror communication.

In the initial stages of analysis, and using NVIVO (qualitative data analysis software), the researchers each coded the same sample of deliberation transcripts on an open, grounded basis in order to generate a list of core nodes. This was then discussed, clarified and finalised before further, independent coding of the remaining transcripts was undertaken. In these latter stages of coding, the researchers maintained some flexibility in relation to the

¹⁶ For discussion see J Temkin and B Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (London: Hart, 2008).

¹⁷ L Ellison and V E Munro, 'A Stranger in the Bushes or an Elephant in the Room?: Critical Reflections on Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13(4) *New Criminal Law Review* 781.

emergence of additional nodes, but as coding progressed, we increasingly relied on a more thematically driven analysis based upon the core nodes identified and the study's overall aims and objectives. In addition, each of the researchers independently observed the video-recorded deliberations a number of times, taking detailed notes on aspects including patterns of voting behaviour, processes for foreperson nomination, timing of votes, dynamics of juror interaction, and body language.

In previous work, we have examined the study's substantive findings in relation to the mode of the complainant's evidence delivery,¹⁸ as well as our jurors' broader views and presumptions regarding sexual (mis)communication, resistance and consent in the context of intimate / acquaintance rape.¹⁹ In what follows, we focus more directly on our findings in relation to the processes through which the jurors approached their deliberative task, exploring the extent to which they were minded, and able, to rely on relevant legal tests, the use that was made of the additional written direction provided within the jury room, and the temptation that was often exhibited to eschew legal tests and 'inconvenient' evidence in order to engage in a process of story-construction out of which verdict conclusions emerged and were then justified. In relation to these latter considerations, there was little evidence in the present study that the substantive variables introduced by the complainant's use of

¹⁸ Ellison and Munro, above n. 4.

¹⁹ L Ellison and V E Munro, 'Better the Devil You Know? 'Real Rape' Stereotypes and The Relevance of a Previous Relationship in (Mock) Juror Deliberation' (2013) 14 *International Journal of Evidence and Proof* 299.

different special measures in the courtroom had any divergent impact upon the juries, and so, in what follows, we consider the patterns that emerged across the cohort of all 20 juries.

Whistling in the Wind? Jurors' Reliance on Legal Directions

Previous research with Crown Court jurors suggests that, while trial proceedings are often replete with legal jargon, complex definitions and technical tests, the majority do not consider that this causes them difficulties in terms of understanding the evidence or proceedings in question. Indeed, in Zander and Henderson's research, some 50% of respondents reported that it was not at all difficult to understand the evidence, whilst a further 41% said that they did not find it very difficult, and only 9% reported that they struggled to make sense of what had been presented to them.²⁰ In addition, 91% of the jurors responded that they had no difficulty understanding technical legal terms and, when asked about their impressions of the ability of their peers to deal with these, 73% stated that they did not think that anyone in their jury group had struggled, whilst 22% suggested that there had been some who had found it difficult, but that they were very much in the minority.²¹

At the same time, however, this research on jurors' own perceptions of their understanding sits somewhat uncomfortably alongside other research that has assessed jurors' actual, rather

²⁰ Zander and Henderson, above n 5 at 205.

²¹ Zander and Henderson, above n 5 at 212. See also L Trimboli, *Juror Understanding of Judicial Instructions in Criminal Trials* Crime and Justice Bulletin No 119 (NSW Bureau of Crime Statistics and Research, 2008).

than perceived, ability to make sense of the evidence, to identify the relevant legal tests, and to apply those tests in support of their verdicts. Such studies have indicated that as few as 31% of jurors fully comprehend the judicial instructions with which they are presented during a trial²². In addition, it has been argued that, while jurors may spend a share of their deliberation time discussing the law, only about half of the statements made are accurate, with around one in five statements being seriously in error.²³ Importantly, moreover, while such misinterpretations of the law are sometimes corrected by peers during deliberations, not all such erroneous assertions will be countered; and, indeed, there is evidence that some will have a significant impact on the direction and tone of the subsequent group discussion.

Against this backdrop, a number of suggestions have been put forward in regard to improving jurors' comprehension and application of appropriate legal tests. Several researchers, together with a number of criminal justice practitioners, have maintained, for example, that giving an additional written direction within the jury room will significantly increase the likelihood that jurors will be able to recall and rely upon the pertinent legal

²² In Thomas's case simulation study, mock jurors were asked post-trial to identify the two questions the judge explicitly directed them to answer to determine if the defendant had acted in self-defence (did the defendant believe it was necessary to use force and did he use reasonable force?) Only 31% of mock jurors accurately identified both questions. A further 48% correctly identified one of the two questions. The study did not examine how juror understanding of the legal questions affected deliberations. C Thomas, *Are Juries Fair? Ministry of Justice Research Series 1/10* (London: Ministry of Justice, 2010) 36. See also Elwork, Sales and Alfini, above n. 2.

²³ P Ellsworth, 'Are Twelve Heads Better than One' (1989) 52 *Law and Contemporary Problems* 207.

criteria, and approach their deliberations in a more structured and legally relevant manner.²⁴ Indeed, although the research evidence on the impact of such a practice is divided, it has become increasingly common courtroom practice in England and Wales.²⁵ In line with this, in the present study, at the close of the trial, the judge directed the jury, in accordance with the most recent edition of the Crown Court Bench Book²⁶, on the way in which they should approach their task, and the legal tests that were applicable. In addition, jurors were provided in the jury room with a short written summary of that direction. Reproduced in full below, this reiterated the key offence components and provided a three-step approach designed to guide deliberations, without usurping jurors' function as the arbiters of fact.

'Members of the Jury, in this case, the prosecution must make you sure of the defendant's guilt. Nothing less than that will do. If, after considering all the evidence, you are sure of the defendant's guilt, you must return a verdict of 'Guilty'. If you are not sure, your verdict must be 'Not Guilty'. A verdict upon which you all unanimously agreed is required.

²⁴ See, for example, N Madge, 'Summing up – a Judge's Perspective' [2006] *Criminal Law Review* 817.

²⁵ Thomas, above n 22, Reifman, Gusick and Ellsworth, above n. 12, L Heuer and S Penrod, 'A Field Experiment with Written and Preliminary Instructions' (1989) 13 *Law and Human Behavior* 409. A recent post-verdict survey of juries, conducted at Crown Courts in the London area, found that 70% had received written directions. Among this group every juror reported finding the written directions helpful - C Thomas, 'Avoiding the Perfect Storm of Juror Contempt' [2013] *Criminal Law Review* 483.

²⁶ Judicial College, *Crown Court Bench Book – Directing the Jury* (2010) www.judiciary.gov.uk/publications-and-reports/judicial-college/Pre+2011/crown-court-bench-book-directing-the-jury (last accessed 17 July 2013).

In the case before you, the defendant has been charged under section 1 of the *Sexual Offences Act 2003*. Under that section, a man commits rape if he has sexual intercourse with a person who at the time of intercourse does not consent to it; and if he knows or believes at the time of intercourse that the person does not consent, or he believes that she was consenting, but that belief was not reasonable.

First, the prosecution must prove that the defendant, Mr Waite, intentionally penetrated the vagina of the complainant, Miss Smith. This has not been disputed by the defendant in the case before you. Indeed, Mr Waite has agreed that he had sexual intercourse with Miss Smith on the night in question.

Second, the prosecution must prove that the complainant, Miss Smith, did not consent to the intercourse. A person consents only if she agrees by choice and has the freedom and capacity to make that choice. This means that it is not necessary to show evidence of any kind of struggle in order to establish non-consent. You must decide if Miss Smith had a choice and had the freedom and capacity to make that choice. You have been presented with conflicting versions of events and it is up to you to decide which account you find the most credible. If you conclude that Miss Smith did consent to intercourse – that is, that she agreed by choice, having the freedom and the capacity to make that choice – then, you must acquit Mr Waite of the offence charged. It is only if you are sure that Miss Smith did not consent, that you should turn your attention to the final aspect of the offence requirement.

Third, the prosecution must prove *either* that Mr Waite knew that Miss Smith was not consenting, or that his mistaken belief in her consent was not reasonably held. If the prosecution have convinced you, so that you are sure, that Mr Waite did not believe that Miss Smith was consenting to the intercourse, but carried on regardless, then you must find

him guilty. If however, you consider that the defendant believed that Miss Smith was consenting, then you must evaluate the presence or absence of reasonable grounds for such belief, in conjunction with any other relevant matters. If you conclude that Mr Waite's belief in Miss Smith's consent was reasonable in the circumstances, then you must acquit. However, if you are sure that his belief was not a reasonable one, then you must convict. In assessing the reasonableness of Mr Waite's belief in consent, you should take into account all the circumstances, including any steps Mr Waite took to ascertain whether Miss Smith was consenting. Again, the prosecution and defence have presented conflicting accounts. It is for you, members of the jury, to consider which version you find the most compelling and, on this basis, to assess the defendant's state of mind and the reasonableness of any belief in Miss Smith's consent that he may have harboured.'

When compared with the findings of our previous study in which a very similar oral direction was provided, but without the additional use of a written direction within the jury room, there was indeed a slightly increased level of reliance upon, and reference to, judicial directions (and the legal tests that they articulate) in the present study (albeit that such comparison across studies must be done cautiously, given the different participants, trial actors and basic scenario involved). There were some juries in the present study who commenced discussion by reading aloud the written direction or who drew from it at key points in the deliberations, and there were some situations in which the use of the directions in this way had an observable impact in terms of re-imposing focus or drawing participants back from minimally relevant or inaccurate considerations. For example, in Jury I, group members made few references to the legal components of rape until, after 20 minutes of

debate, a group member read out legal guidance on the meaning of consent. Jurors then spent some time discussing the issue of consent, giving specific consideration to whether the complainant had 'the freedom and capacity' to make a choice in the circumstances she had outlined in her testimony. Similarly, jurors in Jury L were prompted to consider both the definition of consent and the reasonableness or otherwise of the defendant's belief in consent more thoroughly than they had previously when, after 52 minutes of deliberation, the foreperson read out pertinent passages of the judicial direction to the group. At the same time, however, as will be discussed further below, the majority of our juries in the present study continued to make very limited, if any, explicit references to the legal tests, or to the judicial direction in which they were explained and structured. Moreover, where such references were made, they often continued to exhibit significant substantive misunderstanding. This suggests, we would argue, that merely providing jurors with a written direction will in itself be unlikely to bring about a substantial change in jurors' approach to deliberation. In later sections of this article, we will argue, moreover, that a significant part of the difficulty lies not so much in jurors' inability to recall or follow the judicial direction but in the fact that they are disinclined to do so, preferring instead to rely on more instinctive and less circumscribed reasoning, often based on narrative construction.

4 of the 20 juries in the present study made no references at all to the judge's directions (whether written or oral); and in a further 11 of the juries, the references made to them were extremely limited. Though some individuals within these juries did, occasionally, read the directions to themselves during deliberations, they rarely shared the contents with peers and there was no clear indication that the process of referring to them brought about a shift in their personal contributions to, or the overall direction or tone of, the group's discussions. In

Jury E, for example, the judge's direction received only three brief references as the group deliberated. After 30 minutes, the foreperson read out the standard of proof requirement from the written summary, twenty minutes later he recited the definition of consent and finally, after a further 15 minutes – when the group had already agreed a majority not-guilty verdict - the same juror began to read out the *mens rea* requirement but failed to complete it. In Jury G, the foreperson opened the deliberation by reading from the direction but broke off after a few lines having recited the requirement for intentional penetration; and the judge's direction received no further mention. Meanwhile, in Jury J, the judicial direction was referenced by a juror after 27 minutes of discussion, but only briefly (two lines relating to the *mens rea* requirement), and thereafter was not referred to again by anyone in the group.

Partially as an extension of this trend, in the vast majority of these 15 juries, the attention paid by participants to the offence requirements for rape were also limited, with discussion tending to focus primarily upon expectations regarding the levels of injury which a genuine rape complainant would have sustained or the ways in which sexual 'signals' can be inadvertently sent and easily misinterpreted. Moreover, where reference was made by participants within these juries to the substantive legal tests, participants preferred to rely on their own paraphrasing of their content, notwithstanding the fact that the process of articulating and subsequently applying them in this way often indicated a significant degree of confusion or misunderstanding. Discussion within these juries was often marked by a lack of structure (often unaided by the presence of an ineffectual foreperson), and in particular by a lack of differentiation between what ought to have been sequential consideration of the prosecution's proof of the *actus reus* and *mens rea* requirements of the offence. There was typically a preoccupation with extraneous factors, which were often informed by jurors' pre-

existing expectations and assumptions regarding the 'normal' behaviour of rape victims and the 'abnormal' nature of men who rape. This was supported by, and supported in turn, a tendency within these juries to sideline certain key elements of the offence of rape as described by the judge, in particular those associated with the need for the complainant to have 'freedom and capacity' to make a choice, the need for the defendant's mistaken belief in consent to have been reasonable in the circumstances, and the appropriateness of taking into account any steps that the defendant took to ascertain the complainant's consent.

Indeed, the language of 'freedom and capacity to make a choice' was entirely absent from the deliberations of 9 of our juries, notwithstanding its frequent usage by counsel and in the judge's directions. Of the remaining 11 juries, 5 spent some time discussing the meaning of the terms and their potential applicability to the case in hand while 6 juries mentioned the definition but gave it no further consideration. As a consequence, far more prosaic and often questionable standards for determining consent were relied upon, as in Jury G, for example, where it was maintained by one juror that 'the point we need to decide is whether her removing her knickers or him removing her knickers proves consent'.

Likewise, the fact that the defendant's belief in consent needed to be reasonably held, or what it means for such a belief to be reasonable, was rarely dwelt upon by the majority of jurors, with a more strongly subjective test typically being deployed; and even where jurors occasionally spoke in terms of a reasonableness test, it was rarely seized upon by peers in a way that altered the tone of ensuing discussion, and often reflected a significant level of confusion or misunderstanding. In Jury M, for example, when a female juror made the first reference to the written direction on behalf of the group towards the close of deliberations

and admitted that she did not properly understand the requirements in relation to the reasonableness of the defendant's belief in consent, this provoked a couple of attempts at paraphrasing by other jurors - 'did he (the defendant) understand that no meant no or did he actually think that she was actually coming on to him, is there any doubt of that'; 'did he actually believe that she said "no" and he went ahead anyway, or did he think 'no means yes', so I'll go ahead anyway'. Though inaccurate and misleading in their emphasis on the defendant's subjective belief, these re-interpretations were not challenged. Similarly, in Jury O, one of the few juries in which the direction was read aloud in its entirety to peers, this reasonableness test again caused difficulties, being immediately reinterpreted by one juror who maintained - without challenge from peers - that 'basically, it is telling us that we need to look at it from his point of view, and did he think he was in with a chance'. And in Jury K, one juror radically misinterpreted the judge's direction on the defendant's belief in consent, suggesting that it is 'saying that if you reasonably believe what the complainant said is right, you must find the defendant guilty'; unusually, on this occasion, however, the mistake was then corrected by the foreperson.

Interestingly, and perhaps allied to this tendency to lose sight of, or misunderstand, certain key components of the pertinent legal tests that may have worked to impose a higher standard of responsibility upon the defendant, there was one specific area in which - in contrast to this general tendency to pay meagre attention to the substantive legal tests contained in the judicial direction - jurors were far more likely to invoke a reliance upon the judge's instructions. This arose specifically in the context of the standard of proof that was required in order to merit a conviction. Here, although the judicial direction merely stated that jurors had to be satisfied so they were sure of the defendant's guilt, a number of

participants seized upon this to bolster the case for an acquittal, (mis)interpreting this as requiring 100% certainty.²⁷ In line with the findings of our previous study, jurors regularly invoked an extremely demanding interpretation in this context, suggesting, for example, that ‘if there is one little bit at the back of my mind, I have to say Not Guilty’ (Jury C) or that ‘if you’re 99% sure he’s done it, he’s not guilty. It has to be 100%, no doubt in your mind at all that he has raped her’ (Jury N); and often such assertions came immediately after a reference to the contents of the judicial direction – either written or verbal. In Jury T, for example, though there was very limited discussion of the judicial direction and its substantive tests overall, the (self-elected) foreperson did look at the written direction during discussions in order to inform peers that it said that ‘if there is any doubt at all, you must acquit’. Strikingly, this interjection prompted a verdict poll to be taken, which evidenced a swing from a previously mixed jury, within which at least three jurors had articulated a prior preference for a conviction, to a jury in which all but one member now voted for an acquittal.

It is true that there were occasional jurors who refused to accept this logic, insisting that there was scope for convicting the defendant even where 100% certainty was not possible. In Jury C, for example, one female juror, holding out for a guilty verdict in the face of considerable pressure from her not-guilty-voting peers maintained that ‘there is always a doubt because you can’t guarantee that you’re making the right choice when you’re choosing between who’s telling the truth and who’s not’, but despite this insisted that ‘there is enough evidence there for me to be convinced that she’s the one telling the truth, not him’. Such views were, however, rare in the overall context of the study, and in juries where they were

²⁷ See J W Montgomery, ‘The Criminal Standard of Proof’ (1998) *New Law Journal* 582.

voiced, they typically failed to have a significant impact, with most jurors ultimately capitulating to the insistence from peers that nothing short of 100% certainty would suffice. Significantly, these findings sit at odds from the expectations of judges regarding how their directions on the standard of proof will be interpreted, with research revealing that judges, when asked to provide a numerical definition of what constitutes 'reasonable doubt', provide a median response of 90% certainty²⁸ and express confidence that jurors would employ a similar threshold.²⁹

Although the scale of our study and the limits of what can be gleaned from verdict outcome alone - both in general and in light of the study's experimental context - entail caution, it is interesting that in a study in which only 3 guilty verdicts were returned, two arose within juries in which - by contrast to the patterns outlined above - there was more extensive reference made to the judicial directions, and a more careful reflection upon the structural and substantive requirements of the legal tests. In Jury P, for example, which returned a majority guilty verdict, the written direction was read out in full at the start of the deliberation by the foreperson, who then returned to it at regular intervals to explore how it related to the discussion being undertaken. Other jurors in this group also played an important role in ensuring a structured focus on the legal tests - thus, juror P5, for example,

²⁸ C M A McCauliff, 'Burdens of proof: Degrees of belief, quanta of evidence, or constitutional guarantees?' (1982) 35 *Vanderbilt Law Review* 1260. See also M Zander, 'The Criminal Standard of Proof: How Sure is Sure?' (2000) 150 *New Law Journal* 1517.

²⁹ R J Simon, 'Judges' translations of burdens of proof into statements of probability' (1969) 14 *Trial Lawyers' Guide* 29.

in reference to the three stage process that the judge had set out (1. Was there intercourse? 2. Did the complainant consent to the intercourse? 3. If not, did the defendant reasonably believe that the complainant was consenting?) emphasised: 'the question isn't overall do we think he's guilty and is it acceptable to convict him of rape, it's specifically the answer to those questions ...and then in answer to those questions ...and we come out with a verdict'. Similarly, in Jury Q, which returned a unanimous guilty verdict, the foreperson read the judicial instruction to himself at the start of deliberations and then read aloud selected extracts regarding the tests for consent and belief in consent at pertinent points in the discussion, in a (largely successful) effort to ensure a structured and focussed approach. Indeed, Jury Q was the only jury in which the notion that the defendant ought to have taken steps to ascertain consent was seriously reflected upon by participants, and this was at least in part as a result of the foreperson's direct reference to this issue in the written direction. Compared to juries P and Q, however, Jury M - the only other jury to return a guilty verdict - engaged in a less thorough discussion of the legal tests and, as noted above, displayed some confusion over requirements in relation to the reasonableness of the defendant's belief in consent.

There may, of course, be a number of explanations that could account for the apparent reluctance of many of our jurors to refer to the judicial directions, even when an abbreviated, written version of them was provided within the jury room. Amongst the most immediately obvious is the fact that, in line with the findings of previous research studies into mock and real jurors, they struggled to understand their substantive content. To some extent, this speaks to the difficulties in translating legal jargon in a clear and concise way to lay-persons, and of the inevitable distance between what someone trained in legal thinking believes they

are accessibly communicating, and what the non-specialist listener is able to comprehend. But our research suggests there may be an additional factor at play here, reflected in jurors' more general disinterest in relying on the legal tests in the way that counsel and judge have advised. This, as discussed below, speaks to wider tensions between legal and lay imaginaries and logics in the specific context of jury deliberation, and to the difficulties involved in seeking to construct and constrain the ways in which jurors naturally engage in decision-making, both individually and collectively, on a fact pattern put before them.

Constructing a Verdict – A Battle of Narratives?

A number of competing theories have been advanced to explain the process by which jurors – individually and collectively - settle upon a verdict preference. Mathematical / logic-based explanations suggest that jurors assess the meaning of each piece of evidence as it arises during the trial, attributing a scale value that corresponds to the level of its incrimination and a weight value that represents its importance for the determination of guilt.³⁰ Having done so, jurors combine these individual weightings to produce a summary estimate of the probability of guilt, which is then translated into a specific verdict preference.³¹ Though

³⁰ For discussion see R Hastie, *Inside the Juror* (Cambridge: Cambridge University Press, 1993), V Smith, 'Prototypes in the Courtroom: Law Representation of Legal Concepts' (1991) 61 *Journal of Personality and Social Psychology* 857.

³¹ M Kaplan and G Kemmerick, 'Juror Judgment as Information Integration: Combining Evidential and Non-evidential Information' (1974) 30 *Journal of Personality and Social Psychology* 493, T Ostrom, C Werner and M Saks, 'An Integration Theory Analysis of Jurors' Presumptions of Guilt or Innocence'

arguably comforting in their presentation of the juror's deliberation process as ordered, systematic and rational, such explanations have been increasingly challenged precisely because they 'do not correspond well to the subjective experience reported by jurors', according to which jurors 'bring expectations and preconceptions with them to the jury box, actively search for causal explanations to make sense of the events described'.³² In line with this, an alternative model has been suggested, whereby jurors make sense of the evidence presented to them by constructing a story of what has happened.³³ This story is based on the testimony of witnesses and on jurors' inferences about the evidence, which are influenced in turn by their pre-existing understandings and experiences, as well as by their general knowledge of the physical and social world: 'inferences are evaluated by simulating one's own behaviour in similar situations, by checking for contradictions with other plausible

(1978) 36 *Journal of Personality and Social Psychology* 436; for an alternative account see also D Schum and A Martin, 'Formal and Empirical Research on Cascaded Inference in Jurisprudence' (1982) 17 *Law and Society Review* 105.

³² D Devine, L Clayton, B Dunford, R Seying and J Pryce, 'Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups' (2001) 7 *Psychology Public Policy and Law* 622 at 624; see also N Vidmar and S Diamond, 'Jury Room Ruminations on Forbidden Topics' (2001) 87 *Virginia Law Review* 1857; see also V Smith and C Studebaker, 'What Do You Expect?: The Influence of People's Prior Knowledge of Crime Categories on Fact-Finding' (1996) 20 *Law and Human Behavior* 517.

³³ N Pennington and R Hastie, 'Explanation-Based Decision Making: The Effects of Memory Structure on Judgment' (1988) 14 *Journal of Experimental Psychology: Learning, Memory and Cognition* 521. See also L Bennett and M Feldman, *Reconstructing Reality in the Courtroom; Justice and Judgment in American Culture* (New Brunswick, NJ: Rutgers University Press, 1981).

conclusions, and by checking for inconsistencies with the current form of the story'.³⁴ As Pennington and Hastie explain, the story that the juror constructs and considers to be the most coherent (i.e. consistent, plausible and complete) thereby determines his or her verdict preference, and the deliberation becomes a forum in which competing stories are articulated, defended, negotiated and reconfigured into an emergent master-narrative accepted by all, or at least most, jurors.³⁵ In this deliberative process, then, the mechanics of narrative construction – which is inevitably a process of social construction, reliant upon shared beliefs and understandings – become visible in a way that is often masked at the individual level.

In our previous work, we have suggested that this story-based model provides a far more satisfactory account of how jurors approach their deliberative task (both individually and collectively) than that afforded by more detached, mathematical or logic-based accounts. Our findings in the present study continue to support this conclusion, as once again there was ample evidence across the juries of the ways in which participants performed an active interpretive role - evaluating competing accounts according to their pre-existing knowledge, experience and presumptions, selecting parts of the evidence for inclusion in the

³⁴ N Pennington and R Hastie, 'Evidence evaluation in complex decision making' (1986) *51 Journal of Personality and Social Psychology* 242 at 254.

³⁵A good story should not only be compatible with the evidential data but it should also be well-structured and correctly describe a general pattern of states and events one expects to come across in the world. N Pennington and R Hastie, 'The Story Model for Jury Decision Making' in R Hastie, S Penrod and N Pennington, *Inside the Jury* (Cambridge, MA: Harvard University Press, 1983). For further discussion see F Bex, *Arguments, Stories and Criminal Evidence* (London: Springer, 2011).

construction of what was considered to be a compelling narrative, creatively filling gaps in that narrative where necessary to render it more coherent, and thereby justifying a verdict. More specifically, in what follows, we will draw upon examples from the deliberations in order to illustrate the ways in which the strategies mentioned at the outset – namely, relying on personal experience and ‘common sense’ presumptions (even where it contradicts expert testimony or judicial instruction) and filling in perceived evidential gaps with hypotheticals – were deployed by our jurors to assist them in constructing a compelling narrative on the basis of which a verdict could be agreed. To the extent that – as noted in the discussion above - this process often occurred without prolonged concern over abstract legal criteria, rigid logical structures or technical distinctions, we will suggest that it reflects a reality in which, as Garfinkel puts it, ‘the rules of everyday life, as well as the rules of the official line, are simultaneously entertained’³⁶ in the jury room; and we will move on in the closing stages of this article to briefly reflect upon the implications of this for legal process and justice.

Setting the Scene: Narrative Openings and Deliberative Beginnings

According to Maynard and Manzo’s research drawing upon real jury deliberations, jurors engaged in a collective discursive environment employ a number of narrative strategies, the first of which is the ‘opening statement’ in which each juror presents his or her initial analysis.³⁷ In line with this approach, our jurors were typically keen to establish the views of

³⁶ H Garfinkel, *Studies in Ethnomethodology* (Englewood Cliffs, NJ: Prentice Hall, 1967) 112.

³⁷ D Maynard and J Manzo, ‘On the Sociology of Justice: Theoretical Notes from an Actual Jury Deliberation’ (1993) 11 *Sociological Theory* 171.

other groups members at the start of deliberations, and they canvassed these either by means of an initial vote / show of hands (n = 10/20) or by suggesting in the absence of a vote that they 'go round the table' taking it in turns to give their thoughts and share opinions (n = 10/20). As might have been expected, these exchanges revealed a mixed picture in terms of jurors' preliminary assessment of the case before them (also reflected in initial verdict preferences recorded in a pre-deliberation questionnaire according to which 28% of jurors (n = 45/160) favoured a guilty verdict at this stage, 40% (n = 64/160) favoured a not guilty verdict and 32% of participants (n = 51/160) were undecided). Opening statements, in turn, reflected these various positions. Hence, some jurors gave opening statements which conveyed early commitment to a particular case outcome, in either direction. For example:

'I don't think he's guilty. I would say now, 'Not guilty.' That's my verdict; he's not guilty. She's offered him wine. She's willing to let ... I know you can have friends you can call and have round but if I was in that position, would I allow a man to come in and sit and have wine and coffee and spread it out and kiss him back, like you said? No is no, but she said no later on; she should have said no to the kiss. Don't lead him on and kiss him. No'. (Jury A)

'I'll start, I'm the one that's not guilty, I don't mind saying. The only thing that lends credibility to her story is the fact she's got bruising. The expert said that the bruising was non-conclusive and therefore I am that totally sure. I don't think that can convict someone, I'm sure, not guilty'. (Jury H)

'I found her believable and consistent in what she said. I was interested to note what she was wearing because I thought if she was wearing jeans or something it might be more difficult but she wasn't, she was wearing a skirt, no tights were mentioned, because it is May and I suppose summer, but the fact that she couldn't fight him off, very believable. Men are very strong, and women aren't. I think it is very believable that he could have pinned her down and raped her'.

(Jury L)

Other jurors, meanwhile, used their opening statements to 'pose a puzzle or dilemma'³⁸ or highlight items of evidence they regarded as being particularly significant or difficult to evaluate. For example:

'Well, at the beginning, when we first heard the claim, and her evidence I thought, yes, it definitely was a case of rape. And, then, you hear his evidence, and, again, they've lived together, he might have misread the signals. But, the one thing I kept coming back to was the bruise across her chest. I can see the bruise on the wrist. We're all grown up, so I can see the bruise on the inner thigh, and, maybe, even, the scratch. But, how do you get a bruise on your chest? So, that put some doubt in my mind. So, I don't know'. (Jury N)

'Well, I'm a bit, a bit unsure. They've had a relationship before, he came round, happy to see him, wine, coffee, and then kissing and then ... could be reasonable

³⁸ Maynard and Manzo, above n. 37, at 178.

to assume that he thought it was going further. Obviously, she said that she said no. He said that she didn't so, it's a bit unsure'. (Jury O)

In a context in which a collectively agreed upon verdict is required, the existence of these multiple and divergent initial tellings in the jury room inevitably, of course, signals the need for further discussion in order to negotiate a narrative that can be seen to reflect a shared version of events. Jurors who may have already formulated a preliminary view of the evidence presented at trial are, in other words, forced during the deliberation process 'to realize that there are different ways of interpreting the facts' and reminded 'that their perceptions are partly conjectural'.³⁹ In line with Ellsworth's research, we found that jurors typically became very involved with the task at this point; any initial jocularity or self-consciousness generally giving way to focused attention as soon as differing views of the evidence emerged. At the same time, opening discussions shifted from one topic to another in a typically random rather than systematic fashion with an early emphasis on piecing together key factual components of the rival accounts presented by the two parties in court and, as noted above, minimal reference generally made to legal tests. Divergences of opinion regarding the plausibility of one another's rendition of 'the facts' were, in the main, handled amicably, although our jurors displayed little reticence about voicing competing views and occasionally opted for a more confrontational approach lodging a direct challenge against the feasibility of a proposition advanced by a peer with an opposing perspective.

Constructing a Narrative Consensus: The Role of 'Common Sense' and Personal Experience

³⁹ Ellsworth, above n. 23, at 207.

When it comes to interpreting and evaluating trial evidence, jurors are directed by the judge to use their combined good sense, experience and knowledge of human behaviour and modern life. Whilst, as discussed above, there may be other aspects of the judicial instructions that jurors are less inclined (or able) to follow, the present study – and preceding research - suggests that this directive is readily embraced by jurors. According to Manzo, for example, in the process of constructing their initial narrative and engaging others in its defence or modification, jurors present personal experience stories as evidence of a ‘rule’ (or formulation of how things work) and then establish the relevance of that rule to the legal and factual circumstances of the case.⁴⁰ In this sense, then, it is personal experience or presumption that acts as the driving force, with a process of interpretation and construction at play in extrapolating from it to the legal controversy in question. As we explore below, whilst jurors in the present study invoked personal experiences of sexual assault infrequently,⁴¹ they were often quick to voice a range of ‘common sense’ presumptions about the nature of rape and the ‘normal’ or ‘typical’ behaviour of rape victims and rapists during discussions with peers. In addition, they often invoked views, which they attributed to personal experience, about ‘normal’ patterns of socio-sexual behaviour, as well as

⁴⁰ J Manzo, ‘Juror Narratives of Personal Experience’ (1993) 13 *Text* 267, 274. See also J Manzo, ‘“You Wouldn’t Take a Seven-Year-Old and Ask him All These Questions”: Jurors’ Use of Practical Reasoning in Supporting Their Arguments’ (1994) 19 *Law and Social Inquiry* 639.

⁴¹ One female juror disclosed that she had been the victim of a sexual assault during the deliberations. It is of course possible that other participants had direct experience of sexual violence that was not disclosed.

'appropriate' conduct towards ex-partners and their own anticipated reactions to unwanted sexual attention. These presumptions and views, once communicated, then often became a focal point for discussion and a key influence on jurors' credibility based pronouncements even where - troublingly - they ran counter to empirical reality, guidance delivered in the course of the judge's summing up and / or expert testimony proffered during the trial.

For example, having been advised by the trial judge that, 'it is not a requirement for establishing the offence of rape that any force has been used' and neither is it 'necessary to show evidence of any kind of struggle in order to establish non-consent', many jurors nevertheless indicated in their comments to peers that they harboured doubts about the complainant's account precisely because there was, in their view, insufficient evidence of the use of force by the defendant and struggle on the part of the complainant. Such comments were, in turn, premised on a frequently voiced - but nevertheless unfounded - expectation that the natural response of a woman to unwanted sexual advances would be to 'fight back' aggressively and, in so doing, to inflict defensive bodily injuries against her assailant, while in all likelihood sustaining serious injuries herself. Female jurors - whose views were regularly solicited by male jurors on this issue - were notably often at the forefront of these discussions, insisting that their own instinctive reaction to the defendant's alleged actions would have been, to quote, 'to poke his eyes out' (Jury B), 'pull his hair' (Jury O), 'scratch his face' (Jury D) or 'kick him in the bollocks' (Jury K). Though some participants occasionally challenged peers by arguing that women facing sexual assault may be too fearful or shocked to fight back physically - an empirical reality that is borne out by a wealth of research on

psychological and physiological responses to (sexual) trauma⁴² - this type of interjection rarely caused others to revise their opinion. Not-guilty votes and verdicts continued, therefore, to be frequently justified by reference to the absence of the evidence of more serious or extensive injuries to both trial parties.

Similarly striking was the response of a sizeable number of jurors to medical testimony regarding the likelihood of a victim of rape sustaining genital or internal injuries. Informed by a specialist in genito-urinary medicine with 15 years of professional experience that it is by no means the case that all persons subject to forced intercourse will display signs of internal injury during examination (testimony that was not challenged by the defence), across the juries, group members nonetheless regularly used the absence of such injury in the present case to raise doubt about the complainant's allegation; and indeed, on occasion, our participants displayed a marked willingness to take direct issue with the medical expert's professional assessment. For example, in Jury G, a female juror observed,

⁴² See, for example, L Bowyer and M Dalton, 'Female Victims of Rape and their Genital Injuries' (1997) 104 *British Journal of Obstetrics and Gynaecology* 617; J Du Mont and D White, *The Uses and Impacts of Medico-Legal Evidence in Sexual Assault Cases: A Global Review* (Geneva: World Health Organisation, 2007); N Sugar, D Fine, and T Eckert, 'Physical Injury After Sexual Assault: Findings of a Large Case Series' (2004) 190 *American Journal of Obstetrics and Gynaecology* 71; B Rothschild, *The Body Remembers: The Psychophysiology of Trauma and Trauma Treatment* (New York: W.W. Norton & Co, 2000). For further discussion of the tenacity of this force requirement in the minds of jurors in the present study, see also Ellison and Munro, above n. 19; and for similar findings in relation to a previous study, see L. Ellison and V E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) *British Journal of Criminology* 202.

'I know the medical guy said that it's inconclusive and it doesn't always happen, but the whole internal trauma, there wasn't any. And surely if you're that physically upset and that pulling away, there would be something there'.

Meanwhile, in Jury N, a female juror explicitly laid claim to superior personal insight, insisting, 'most women, if it's what you call, rough sex, do show inside trauma. And, I'm telling you from working as a nurse when I was younger, they do show inside trauma, and she didn't have any'. Although other jurors sometimes contested this open disregard for expert medical opinion - as in Jury F, where a juror responded to negative speculation by peers by remarking 'the doctor said there's not always trauma or any sign of anything' - the absence of genital trauma remained a significant stumbling block for many jurors who continued to insist that the complainant's allegation would have been more convincing 'if she'd had some horrific internal injuries ... or some kind of internal injuries, bruising' (Jury K).

Elsewhere in the deliberations, jurors' comments betrayed further worrying misconceptions regarding 'appropriate' or 'genuine' responses to sexual violence. Notwithstanding the reality that victims of sexual assault will react in a variety of ways, jurors regularly suggested to peers, for example, that the complainant's behaviour in getting changed after the alleged attack, without having a shower, was 'a bit odd' and 'strange' (Jury L) - and by implication implausible - on the grounds that feeling 'dirty' (Jury P) or 'grimy' (Jury H) was a natural reaction to sexual violation and 'most normal victims go and get a shower' (Jury B). Similarly, the fact that the complainant had allegedly waited thirty minutes before contacting

the police was perceived as problematic and 'strange' (Jury G) by many jurors, despite research indicating that many sexual assault victims never report offences, and that many more will delay reporting, often for significant periods.⁴³ 'I can't get over why she didn't go straight to the phone when he went out of the door, she went and got changed' (Jury B) commented one juror, for example, while female jurors were often adamant that their own immediate response in such a situation would have been to telephone a close friend or family member.

All this suggests, therefore, that, in line with the findings of previous research, our jurors did not come to the deliberative process as 'blank slates'.⁴⁴ To the contrary, they observed the trial, evaluated the evidence and engaged in deliberations with pre-existing prototypes for crimes (specifically, in this context, rape) in mind; and these prototypes, even when based on invalid generalisations and stereotypical beliefs, operated powerfully in the process of individual and collective story construction, and often determinatively in verdict outcomes.⁴⁵

⁴³ J Du Mont, K Miller and T Myhr, 'The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women' (2003) 9 *Violence Against Women* 467, J Clay-Warner and C Burt, 'Rape reporting after reforms: Have times really changed?' (2005) 11 *Violence Against Women* 150, L Starzynski, S Ullman, H Filipas and S Townsend, 'Correlates of women's sexual assault disclosure to informal and formal support sources' (2005) 20 *Violence and Victims* 417.

⁴⁴ Smith, above n. 30, at 858.

⁴⁵ L Stalans, 'Citizen's Crime Stereotypes, Biased Recall and Punishment Preferences in Abstract Cases: The Educative Role of Interpersonal Sources' (1993) 17 *Law and Human Behavior* 451, N Finkel and J Groscup, 'Crime Prototypes, Objective versus Subjective Culpability, and a Commonsense Balance' (1997) 21 *Law and Human Behavior* 209; in relation to rape, see B Krahe, J Temkin and S Bieneck,

Bolstering the Narrative: 'Filling Gaps' by Creative Conjecture

When jurors work collaboratively to reach a verdict, as discussed above, they pursue a compelling and plausible narrative that corresponds to their shared common sense and personal experiences / expectations; but in order to support a verdict decision confidently, jurors are also driven to uncover a complete account of events – an overarching story that ‘has all its parts’.⁴⁶ In their research, Conley and Conley have, for instance, observed that jurors are often keen to identify specific missing pieces of the master narrative (forensic evidence, witnesses, etc.) that they seek.⁴⁷ Consistent with this finding, jurors in the present study were often quick to identify ‘gaps’ or ‘holes’ in the trial narratives presented by both parties in exchanges with peers. In particular, jurors frequently lamented the absence of more detailed ‘background’ information regarding the parties’ prior relationship, their sex life, the circumstances of their break-up and the degree of contact they had maintained afterwards, as though seeking missing fragments of a picture they were attempting to piece

‘Schema-Driven Information Processing in Judgements about Rape’ (2007) 21 *Applied Cognitive Psychology* 601.

⁴⁶ L Griffiths, ‘Narrative, Truth and Trial’ (2013) *Georgetown Law Journal* 281, citing N Pennington and R Hastie, ‘A Cognitive Theory of Jury Decision Making: The Story Model’ (1991) 13 *Cardozo Law Review* 519, 528.

⁴⁷ R Conley and J Conley, ‘Stories from the Jury Room: How Jurors Use Narrative to Process Evidence’ (2009) 49 *Studies in Law, Politics, and Society* 25. See also G Winship, ‘Jury Deliberation: an Observation Study’ (2000) 33 *Group Analysis* 547.

together. '[S]ome things were missing...' observed one juror, for example, before adding '...what happened in the past, there wasn't much said' (Jury A), while another juror remarked,

'If we knew more about their sexual relationship that they've had when they were together and a bit more information about them two, if we knew them more, then it might be a lot easier. But there's no evidence' (Jury C).

Previous research has suggested that the response from jurors to this perceived 'patchiness' is frequently to 'fill in the gaps' in their narratives, constructing what Conley and Conley refer to as 'powerful hypothetical mini-narratives'⁴⁸ that 'extend the discussion beyond what did happen by telling a story about what could have happened'.⁴⁹ Though often based on tenuous foundations, these creative embellishments by jurors can have a profound impact upon the tone and direction of deliberations, being received gratefully by peers who are similarly in pursuit of a more complete narrative and becoming accepted into the 'true' version of events without further complication. Indeed, as Conley and Conley observe, while '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 a metanarrative that will frame the verdict'.⁵⁰

⁴⁸ Conley and Conley, above n 47 at 50.

⁴⁹ Conley and Conley, above n 47 at 50. The story model posits jurors speculating about the facts external to the trial in order to complete the picture. See Pennington and Hastie, above n. 46, at 527.

⁵⁰ Conley and Conley, above n 47 at 50.

In line with this, in the present study, we uncovered striking evidence of jurors' willingness to construct hypothetical explanations for events when information presented at trial was deemed incomplete or otherwise deficient. Across the deliberations, for example, jurors frequently speculated about possible alternative explanations for the complainant's injuries - other than non-consensual sex - after observing that medical testimony adduced by the prosecution had only served to confirm the presence of bruising and scratches on the complainant's body but, crucially, had not - and could not - conclusively attest to their source. Amongst the most common suggestions put forward by jurors in this context were that the complainant had self-inflicted the injuries to bolster the credibility of her false rape allegation, that she had sustained them accidentally in the course of a separate sexual or other physical activity (including exercise), or that she was simply prone to bruising easily.

In addition, some jurors - noting an absence of information about the parties' prior sexual relationship - engaged in supposition about their normal sexual proclivities, suggesting to peers that the complainant and defendant might have commonly engaged in 'rough' (Jury E) or 'raunchy' (Jury B) sexual conduct that entailed an element of violence and that the complainant's injuries might accordingly be attributed to 'kinky' (Jury M) or 'violent lovemaking' (Jury D) on the night in question. As one male juror observed, for example, 'there are couples chucking each other all over the place isn't there...You don't know what them two are like when they're normally at it' (Jury E), while in the same vein another juror remarked, 'The way I see it as that could have been a normal routine for them to get quite violent during sex' (Jury C). The fact that the defence introduced no evidence along these lines - notwithstanding its potential value in providing an exculpatory explanation for the

complainant's injuries - was notably deemed of little relevance by many jurors who assumed that its absence was the result of evidential limitations rather than factual inaccuracy.

Speculation about the parties' relationship similarly came to the fore as jurors contemplated the complainant's possible motivations for making a false accusation of rape against her ex-partner. Having heard from both sides that the parties had remained on friendly terms following an amicable break-up, some jurors suggested to peers that the complainant may, in reality, have harboured a strong or 'clingy' desire (Jury G) to rekindle the relationship and then reacted angrily when, in accordance with the defence's version of events, the defendant announced immediately after intercourse that he had no interest in resuming their affair. In Jury E, for example, a female juror told peers that she was sure the complainant had fabricated the rape allegation because she was 'madly in love' with the defendant and devastated when her affections were spurned - 'I can imagine this girl's world crumbled' - while jurors in Jury O variously proposed that the complainant was 'a needy person' who 'was feeling used' and now lying in an effort to 'get her own back' on the defendant.

Overall, then, perhaps the most striking (if unsurprising) finding to emerge from this examination of the ways in which our jurors received and processed evidence is that they did not limit themselves to the evidential data they heard in the courtroom. Instead, they developed and considered a body of 'unofficial evidence'⁵¹ consisting of their own narratives derived from personal experience, 'common sense' knowledge and intuition, as well as 'what

⁵¹ Conley and Conley, above n 47 at 51.

they imagine to be the untold parts of the story'.⁵² In terms of the administration of justice, this carries with it obvious dangers associated with the potential introduction of bias, factual inaccuracy, and irrelevancies into jury decision-making. At a human level, however, it is arguably understandable that jurors should rely on these cognitively and communicatively familiar narrative strategies, and that they should engage in a collective process of bolstering what is agreed upon as the 'real story' so that they can feel more confident in the verdict they ground upon it, with its inevitably serious consequences for the trial parties. In the following section, we reflect further on the dilemma that this presents to the criminal justice system, and briefly pose the question of whether there might be strategies available that can reduce the gap between lay and legal imaginaries to ensure jury decision-making that is more appropriately bounded by pertinent legal tests without usurping its unique contribution.

Legal Fictions and Lay Stories: When Two Worlds Collide?

Over the previous sections, we have highlighted the limited use made by our jurors of the structured roadmap to decision-making that was provided to them in judicial instructions, both oral and written, and have illustrated the existence of a significant degree of confusion and misinterpretation, as well as a measure of disinterest, in the application of pertinent legal tests. Of course, as was noted above, the fact that our participants were involved in a mock study, and as such were aware both that the trial was a performance and that their collective verdicts would not have 'real' consequences, should be borne in mind. Although there was evidence in the present study of our jurors taking their task seriously and suspending

⁵² Griffiths above n 46 at 310.

disbelief significantly, it is also possible that their role-playing acted as a disincentive for some jurors from fully engaging with the trial proceedings or the deliberation process, and from paying as much attention as they otherwise might have done to the judicial instructions and associated legal tests. In the absence of being able to observe the dynamics and content of 'real' jury deliberations, as a result of the provisions of the Contempt of Court Act 1981, we cannot currently assess this possibility, and are left to surmise that the findings uncovered in this mock context may well give cause for some concern in relation to what is going on behind the closed doors of jury rooms in courts in England and Wales (and indeed, potentially, elsewhere). Moreover, the existence of previous research attesting to high levels of self-reported confidence in real jurors' understanding of legal tests does not ameliorate the grounds for this concern; instead, it points as much to a disjunction between jurors' actual understanding and their retrospective perception thereof, particularly when they may feel compelled to defend their group's deliberative processes and outcome to a probing researcher at the end of a trial.

In the absence of the kind of sequential and detached reasoning that the law typically demands and presumes of those who apply it, we have turned in later stages of this article to explore the more fluid and grounded manner in which our jurors – in line with the findings of much previous research – appeared to approach the task of verdict deliberation, highlighting the extent to which at the heart of this process lies narrative construction. Relying heavily on presumptions drawn from either personal experience or 'common sense' (even, at times, in direct contradiction of expert testimony or judicial instruction) and frequently opting, in pursuit of a more 'coherent' account, to fill perceived gaps with hypotheticals (often markedly without grounding in the surrounding evidence), there was

ample evidence in this study of jurors' use of story-telling techniques, both to construct a narrative that lent itself to a particular verdict preference at an individual level and to convince peers of the feasibility of that account (and verdict) in collective discussions.

That this process of constructing narratives of events should play such a prominent role within jury deliberations – though somewhat at odds with the formal legal imaginary - is perhaps unsurprising.⁵³ As Ewick and Silbey have observed '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 organisation'⁵⁴; and as Bennett and Feldman put it 'in every day social situations, people use stories as a means of conveying selective interpretations of social behaviour to others'.⁵⁵ Moreover, as Conley and Conley have more recently observed, jurors 'hear fragmentary and often conflicting accounts of highly contested events' and as such 'have no choice but to create notions as to what took place'.⁵⁶ Indeed, this reality is widely acknowledged by legal counsel who will often quite deliberately present their case in a way that lends itself to being received and constructed by jurors as a narrative, in competition

⁵³ Griffiths above n 46, at 281.

⁵⁴ P Ewick and S Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago University: University of Chicago Press, 1998) 242. See also E Ochs, *Living Narrative: Creating Lives in Everyday Storytelling* (Cambridge, MA: Harvard University Press, 2002).

⁵⁵ Bennett and Feldman, above n 33, at 7.

⁵⁶ Conley and Conley, above n 47, at 31.

with alternative accounts.⁵⁷ At the same time, however, it has significant ramifications in terms of the process, and potentially the outcome, of verdict deliberations, and in terms of the prospects for judicial instructions - whether oral or written - being heeded and complied with in the manner that is intended. Indeed, as Conley and Conley have expressed it, '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.'⁵⁸ Thus, unofficial rules - informed by personal experience and / or hypothetical supposition - may rival official, legal ones in the jury room, and jurors' drive to uncover a compelling narrative may lead them to 'fill the gaps' with schema-based inferences that may be false or misleading.⁵⁹

So, is this an inevitable impasse that cannot be overcome? Based on a meta-analysis of 45 years of jury and mock jury research, Devine et al observe that, in contrast to the model of decision-making endorsed (at least implicitly) by the courts, jurors do not suspend judgment until all the facts are in, discarding and weighing information in accordance with judicial instruction, but instead base their decisions on past experience, personal values, and cognitive mechanisms such as scripts, schemas and stereotypes. They conclude that 'this inability of jurors to control their fundamental, 'hardwired' cognitive processes should not

⁵⁷ For discussion see C Heffer, 'Narratives in the Trial: Constructing Crime Stories in Court' in M Coulthard and A Johnson (eds.), *Routledge Handbook of Forensic Linguistics* (Oxon: Routledge, 2013).

⁵⁸ Conley and Conley, above n 47 at 38.

⁵⁹ Griffiths, above n 46.

come as a shock. What is surprising is that judicial instructions are still relied on as the primary corrective measure'.⁶⁰ In previous research, we have evidenced the potential for well-crafted judicial instructions to have a positive influence on (mock) juror decision-making, with information designed to challenge dubious stereotypes regarding 'typical' rape victim behaviour being received by jurors in ways that promoted fairer, and more open, deliberations.⁶¹ What we suggest in the current context, therefore, is that greater consideration needs to be given not only to the content, but also to the design of judicial instructions. It seems clear from the present study, alongside a substantial body of previous work, that more conventional judicial instructions, which focus primarily upon communicating the pertinent legal tests, providing a staged sequence for the deliberative task and guiding jurors through the relevant evidence presented at trial, though clearly necessary, may not adequately speak to or engage jurors, and may do little to encourage them to adopt the kind of legalistic reasoning that sits at odds from their everyday cognitive processes. In the future, greater efforts could usefully be dedicated to research that explores differing modes of judicial instruction (e.g. question trails/flow charts, audio/visual presentations to supplement oral summing up⁶²), in order to assess whether an alternative

⁶⁰ Devine et al, above n. 32, at 699.

⁶¹ L Ellison and V E Munro, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) *British Journal of Criminology* 363.

⁶² The NSW Law Reform Commission recently concluded that question trails and visual aids (e.g. computer animations) could potentially be of considerable value in assisting juries to understand the issues they need to decide and to apply the law to the facts of cases. NSW Law Reform Commission, *Jury Directions* (NSW, Australia: NSW Law Reform Commission, 2012). For further discussion see, N

approach, structure or contextualisation might assist in reducing the gap between legal and lay imaginaries. This, combined with a greater appreciation amongst the judiciary of the ways in which real jurors actually go about their deliberative task, and the difficulties that they face in disregarding what may be legally irrelevant but narratively pivotal considerations, will doubtless help in promoting more effective communication in the courtroom. Finally, in a context in which jurors in England and Wales receive almost no guidance about how to perform their role prior to embarking upon it, we would suggest that further research is merited in order to explore the potential for improved juror preparation to assist not only in the creation of more focussed, structured, and inclusive discussions (chaired more appropriately by effective forepersons) but in encouraging the abandonment of some of the more problematic cognitive shortcuts jurors currently rely upon, as well as their pursuit of perfectly complete narratives, which typically cannot be achieved in contested trial environments.

The elimination of jurors' reliance on narrative, and the cognitive processes that underpin it, is not only an impossible task, it is also an undesirable one, for it is precisely the jury's non-legalistic, common sense, every day rationality that justifies its place at the centre of the criminal justice system. At the same time, however, turning a blind eye to the ways in which

Brewer, S Harvey and C Semmler, 'Improving Comprehension of jury Instructions with Audio-visual Presentation' (2004) 10 *Applied Cognitive Psychology* 765, C Semmler and N Brewer, 'Using a Flow-chart to Improve Comprehension of Jury Instructions' (2002) 9 *Psychiatry, Psychology and Law* 262. The New Zealand Criminal Bench Book also contains example of question trails for use by judges, New Zealand Institute of Judicial Studies, *Criminal Jury Trials Bench Book* (New Zealand Institute of Judicial Studies, 2006).

the processes relied upon in jury decision-making risk unjust outcomes in individual cases, and / or ignoring the evident disconnect between the idealised instructions given by judges and the realities of jurors' engagement, or lack thereof, with legal tests, is no longer tenable. Research of the sort outlined here provides important glimpses behind the closed doors of the jury room, but more work is needed – including with 'real' juries – in order to properly uncover the dynamics, drivers and processes of jury deliberation and to explore the ways in which more tailored instructions and improved jury preparation could assist in bringing the legal and lay imaginaries into a more constructive dialogue in the pursuit of justice.