

Constituting Courtroom Space in Body and Speech*

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Introduction

In this essay I would like to address a few methodological issues that pertain to conducting empirical jury research. Namely, I wish to explore the possibility, moreover, feasibility and legitimacy, of doing such research from the courtroom benches designated for the general audience rather than by attempting to access jurors' experiences directly. My auxiliary goal is to test ethnographic semiotic analysis for its usefulness in analyzing juried proceedings, or any other phenomenon of the legal sphere.

This paper was spawned by two events: during my ethnographic research of defense casework in Mound City, North State, last summer, I attended jury trials in the State and Federal Courts.¹ While observing defense attorneys at work, I have noticed certain “ripples” of activity, or “ruptures” in the event. More specifically, I noticed that, in the course of the proceedings, during witness examinations, attorneys, on the points of “catching a witness on a lie,” in the words of an informant, would change their interactional stance by performing incredulity or disbelief accompanied by a change of their embodied position in the courtroom space. Further focused observations revealed the correspondence between this particular speech activity and its spatial localization as being relatively consistent. I marked this correspondence as meaningful and decided to investigate it as a locally produced--in the institutional context--phenomenon.

The other event of significance was attending two anniversary panels “Forty Years of Jury Research” as a part of the Law and Society Conference that took place in Chicago in May, 2004. The panelists dedicated their time to discussing the origins of empirical studies of

* This manuscript is under review in *Communication Reports*. Please do not cite unless with explicit permission

jury and jurors in the US and Great Britain focusing on the most significant and recent changes in the social legal climate. By trusting the authoritative voices that resounded during those discussions, I take them as representative of both the history and the latest trends in jury research.² Two trends struck my attention. First, it appears that over the last forty years, the problem of jury's decision-making has become the pinnacle of jury research. This trend was accompanied by a methodological shift from theorizing jury's decision-making based on speculations, generalized observations and preset sociological models to context-sensitive ethnographic methods. In turn, ethnographic applications guided jury research toward the midst of the jurors approached as an interactive group and a purpose-centered collective. However, the problem of access soon frustrated this movement: with actual, real-time jury deliberations being strictly off-limits to outsiders, the jury researcher could deal but with jurors' anticipations and memories collected from pre and post trial interviews, as well as re-performances of actual deliberations.

Given these developments, in this presentation, I propose that we might want to expand methodological preferences set for empirical observations of trial jury at work. I argue that even when conducted from the sideline, in a limited fashion, subjectively, ethnographic observations yield empirically significant findings. For my method, I turn to ethnographic semiotic analysis. I employ ethnographic semiotic analysis as both the theoretical ground and the formalizing procedure for my analysis. For my data, I utilize the results of legal fieldwork conducted in the Federal Court in Mound City, North State, in 2003 and 2004. I begin by outlining the key tenets of ethnographic semiotic analysis as a method and its import for the study of jury. I proceed by offering a preliminary analysis of my observations. I conclude by returning to the main thesis for confirmation and refinement.

On Method: Ethnographic Semiotic Analysis

I would like to introduce ethnographic semiotic analysis by way of problematics. In the introductory part of this presentation I mentioned two trends that have characterized recent jury research: a) emphasis on attaining jurors' own experiences and a) persistent attempts to minimize the distance between the researcher and his/her object of inquiry. I further stated that the latter trend resulted in privileging closely conducted ethnographic methods leading to an illusion that minimal distance connotes validity, and that its degree is defined by the amount of the expressible content available to the researcher. In the case of jury, such highly sought out content is formed by jury deliberations. The two emphases—collapsing distance between the researcher and his/her informants and focusing on the expressive side of the decision-making—appear problematic as they create, together with methodological privilege, empirical blind spots.

By leaning in on the key tenets of ethnographic semiotic analysis, I attempt to identify these blind spots, for I believe that much can be learnt from the researcher's minimal participation and distanced observations. I have chosen ethnographic semiotics for several reasons. First, as far as the relationship between semiotics and ethnography is concerned, ethnography supplies the researcher with first-person experiences, while semiotics is taken as "a complement to the descriptive and case-based orientation of most fieldwork" (Manning 1987, p. 43). This means that the researcher's embodied experiences form the basis for interpretation and that in interpreting these experiences, the researcher takes them as meaningful in at least three respects: a) as indicators of a series or set of signs; b) as indicators of social relations, and c) as indicators of social codes. Therefore (my second reason), as a formal method, semiotics tries to account for the principles and rules that allow for a certain pattern to emerge. Finally, in its union, semiotic ethnography avoids abstracting experience from its interpretation; it rather stabilizes this experience by formalizing it. It is in this respect then that distance is meaningful only relative to its systemic function, as a boundary.

Thus said, for the upcoming analysis, three foci become significant: a) body and speech; b) social space; and c) a specific enactment of embodied speaking within the social space. By decoding the relations among these components, I seek to investigate the rules that made the phenomenon of “catching one on a lie” appear as significant to me and to the jury as a happening that takes place not for us but before us. I emphasize before rather than for because, we (I and the jurors) share the courtroom space, and, although we experience and constitute this space differently, we do it from symbolically stable positions (jurors from the jury box and the researcher from the audience box). The stability of pre-established placements provides for the entry point into the system, expelling the need for the minimal distance and diffusing the temptation of taking the verbal montage of the courtroom proceedings for the proceedings themselves.

Turned into procedural steps, the above approach leads me to first describe those functional units that can be observed by the researcher. I proceed by locating the phenomenon of “catching one on a lie” within the symbolic space constituted by these units and their relations, namely, the courtroom. I finish by localizing the phenomenon of “catching one on a lie” as a set of coding rules that participate in its formation.

Courtroom Symbolics: Spaces, Participants, Functions

I would like to begin with the researcher’s position in the courtroom; this position is not unique yet distinguishable. It is from that position, from the bench, that he/she is offered to observe the trial and it is in that position that the researcher him/herself becomes a point of attention and a symbolic figure.³ The researcher does not blend in with the rest of the audience. He/she enters as someone, someone other than relatives and friends of the defendant, or uniformed members of the court. Depending on his/her outfit, the researcher might appear to be either a member of the press (casual or semi-formal outfit) or the species “attorney” (formal outfit). My experience, and I tended to dress up formally, was such that

most people (clients, attorneys, family members) took me for an attorney, although once I was indeed asked if I worked for the Capitol Journal, Mound City's local newspaper that featured a rather extended daily criminal chronicle. I tended to sit separately from family members (they used to sit on the left close to the defendant; sometimes, if an injured party was involved, the right side of the general public area would also have spectators; most of the time, it was empty, so I sat there) unless I would come to observe sentencings in which case I was also interested in the reaction of the audience to the proceedings. I presume that it is in this semi-official capacity that I might have appeared to other people in court. In the diagram below I represent the set up of the Main Courtroom of the Federal Courthouse.⁴ My position is marked by the triangle (See Figure 1).

As the diagram shows, the key (formal and legitimate) sitting positions are assigned to the following bodies: 1) judge; 2) judge's assistant; 3) court clerk; 4) bailiff; 5) defence and defendant; 6) sheriff; 7) prosecution; 8) jury; 9) audience; 10) member(s) of security. All of the "players" have their sitting space fixed; this is to say that it is not subject to change. This space is not distributed evenly but is marked by off-limits physical and symbolic barriers. The first barrier is the door (not everyone is allowed to enter the courtroom; dress, demeanour, as well as psychological state of the entrée are taken into account by the security); the second one separates the courtroom's arena from the audience; the third one separates the jury's box from the arena. These boundaries isolate space as "belonging" to various audiences.⁵

Depending on the degree of participation in the trial, we may distinguish between *audience-of-the-proceedings*; this audience has its place in the general audience area, and it does not participate in the proceedings, except passively (the judge's ability to exclude an audience member or all of the audience also signifies its secondary place). The second kind is the jury, *audience-in-the-proceedings*. The relationship between the two audiences may be also defined with the help of the distinction member/non-member. A juror who could have been a member of the audience under other circumstances, becomes, upon his/her selection, a

temporary member of the proceedings. Despite their temporary status, the jurors are positioned at the head of the proceedings in the frontal position. They sit on an elevated platform. They enter and exit through a special “jury door,” and they arrive last while leaving first. These ritualistic “gestures” by way of prescribed movement imitate the position of the judge him/herself whose bench is also elevated and during bench trials form the front for the proceedings. This associative reversal of the judiciary decision-making power elevates the jury into a symbolic place of privilege. Privilege, at this point, is defined in the spatial terms as a special place that gives the person a vantage point for observing the proceedings but also, and, more importantly, for being attended to by the key actors.

This privilege is a restricted one. The jury are not allowed to speak to or with other participants or manipulate the proceedings in any way. Nor are they allowed to talk amidst themselves while in the jury box or leave the courtroom at will; even asking a clarifying question is allowed only during intermissions when the judge joins the jury in the jury room. The only time the jury speak during the proceedings is the time of the verdict, and even then, only the foreperson does the speaking. It is in the sense of these restrictions that the jury are *forced* into their place of privilege. They are restrained in that place in order to give their undivided attention to what is being performed in front of them. In turn, as *audience-in-the-proceedings* they are being attended to both in speech and in body by other parties.

These other parties form a different kind of audience. First, there are support positions (court clerk, bailiff, US Marshall, court reporter, security personnel, probation officer) identified as precisely supportive (jury instructions lists them and explains their functions). Men and women in support position form *audience-for-the-proceedings*. Their participation is limited to a specific function (e.g., recording, keeping peace, or ceremonial) and a specific place. As I have mentioned before, unless there is a breach in the proceedings, and the intervention of someone like bailiff is required, persons in the supportive position stay in their places to constitute a default audience whose observing is not prohibited or restricted but only

required as long as their specific functions are fulfilled. Their placements are clearly designated as adjacent (e.g., court reporter and bailiff to the judge's bench in the front; Sheriff to the defense desk).

The other, higher level of supportive participation is embodied by the role of the judge. The judge's bench is elevated to the same degree as the jury's box, he/she has his/her own chambers with a separate entrance that, among other symbolic expressions (e.g., judge's robe) in general, carry similar symbolic weight of decision-making power. However, in contrast to bench trials where the judge has the exclusive power of making a decision, in jury trials the primary function of the judge is to conduct, that is monitor, the proceedings. In this position, the judge may interrupt the proceedings (as in giving the jury an opportunity to stand up and stretch their legs or in explaining a legal or scientific term for the jury's benefit), manipulate them (as in asking an attorney how long it is going to take him/her to finish their examination or to make a point), or stop them for a designated break or other official adjournments. In relation to the jury, the judge supports the jurors in attending to them attending to the proceedings (it is then, if the judge catches the jurors at performing "being perplexed" that he/she may pause the proceedings for the sake of clarifying what is going on). The judge's space is rarely, if never, extended to the common area. Like the jury, he/she is a figure restrained by his/her status. Positioned between support figures and the jury, an ultimate insider, the judge forms a special kind of intermediary audience, *audience-inside-the-proceedings*.

The last kind of audience is represented by the adversarial sides of prosecution and defence. Still an audience, they are full participants in a sense that they address, move around, and communicate with each other to a degree that puts them in an exclusive status of *audience-within-the-proceedings*. In contrast to other kinds of audience, both prosecution and defence not only have designated places; they are also invited to use the common courtroom space for their respective purposes.⁶ It is this "use" that forms the main focus of this

presentation. Specifically, I would like to ask how this space is being coded by the attorneys' bodies and speech acts that I take as co-joined syntagmatic units in the paradigmatic context of a US Federal courthouse modified by the specifics of particular trial-related and local preferences.

I will begin with the prosecution side. In the Federal Court the US Attorney(s) is positioned right next to the jury, directly across the witness stand and at the far side from the defendant. The adversarial nature of the Anglo-Saxon legal system precludes the two sides, prosecution and defence, from sharing all the space in the courtroom but gives the parties their own private space. This space begins at the edge of the jury's box and extends all the way to the podium. Its zero point is the attorney's desk. My observations confirm that the attorney's desk is absolutely off limits for the other party. The other attorney can be invited to the desk of their counterpart but would not violate its sacred abode status on their own. Although the podium and the space around the podium can be conceived as a neutral zone, the space behind it explicitly and, to a greater extent than in the case of the prosecution, "belongs" to the defense (occasionally, the prosecutor approaches the defendant when making a person reference but, more often, would do that from his/her own home space). For the sake of formalization, I call this pre-assigned space "home base."

The notion of belonging needs to be clarified here. In speaking (as defined by conversation analysts), when a statement belongs to someone, it only means that they are positioned in such a way as to claim the right of first-hand knowledge or, in the institutional context of the trial, the right of first initiative. This right comes with the pre-assigned position and subsequent turn-taking mechanics as well as conversational structure of verbal arguments. The same definition applies to body movements. We can identify belonging visually judging by the ease and the frequency with which the parties utilize their "home" space for launching verbal or non-verbal actions. Action here is defined, with Goffman, as "activity that is consequential, problematic, and undertaken for what is being felt as its own sake" (1956, p.

185). In the context of the courtroom and in relation to the jury, actions initiated by the attorneys may include direct forms of address (as in delivering opening and closing arguments), semi-direct forms of address (as in discussing evidence), and indirect forms of address (as in cross-examining a witness). All the three kinds of address include a speaking and moving body that positions itself in the space thus being an activity in its own right. Below I further investigate those positions in their specific use. My ultimate goal is to find correspondence between the position of the attorney's body and a particular kind of speech activity--"catching the witness on a lie"--that tend to be launched from it.

How "Catching the Witness on a Lie" Is Made

I have selected "catching the witness on a lie" as an activity for my analysis for three reasons. First, as I stated before, it became noticeable to me by way of creating an interactional "rupture" during witness examinations. Second, from literature (e.g., Kressel and Kressel 2002) and from my informants I deduced that "catching the witness on a lie" is a skill and that this skill is taught in law schools and becomes one of the most important tools that helps trial attorneys undermine the other side. The significance of "catching the witness on a lie" is supported by the structure of the activity that allows for it, witness examining. This structure contrasts to that opening and closing arguments. The most obvious character of that contrast lies in the interactional and therefore flexible nature of witness examining versus relatively straightforward and orchestrated nature of opening and closing arguments. The flexibility of the first and the inflexibility of the second become visible through a particular use of space by the body.

Opening and closing arguments are most often produced from the podium that is moved to the central position in the arena as represented in Table 1. The podium, whether it is used in the Position 1 (facing the jury) or Position 2 (facing the witness), breaks the neutrality of the common space by reducing it to shareable fairgrounds. These grounds are not

negotiable, and although, technically speaking, an attorney will not be in violation if he/she refuses to go to the podium choosing instead to come up close to the jury box (as is often seen in feature films that portray an attorney at work in court), the practicalities of reading a prepared statement for opening and closing arguments make this move inefficient (an attorney can certainly memorize their speeches or render them extemporaneously; however, even in this case, there is a cap on duration for opening and closing comments).

In my observations of twelve trials, the podium in Position 1 was always used for opening and closing arguments, but only for those.⁷ For all other activities, the counterparts used the podium in Position 2. It is from this position that most witness examinations began. However, unlike opening and closing arguments, they were not restricted to those positions and, a lot of times, attorneys would leave the rostrum. They would often do so at the times of “rupture,” when a witness produces a statement that becomes problematized and thus made visible to all kinds of audience but especially, *audience-in-the-proceedings*. One such rupture is “catching the witness on a lie.” Below I would like to offer the rules for its production.

In the context of examining witnesses, examinations may fall into the main categories of requesting information (taken in the form of a question) and the category of providing information (given in the form of an answer). In that sense, structurally, witness examinations are reminiscent of interviews (one party requests, the other provides). The respective footings of the witness and the attorney can therefore be defined as those of the information solicitor and the information provider. Since the attorney’s job is to solicit “truth” from a witness rather than argue for it, he/she is not allowed (and some judges are very particular about that) to confront a witness with an alternative version of truth but rather to continue questioning him/her so that the “real” (preferable) version of truth would finally come out. Nor is the attorney allowed to supply this version in the form of a statement. Given these restrictions, however, the attorney is not prohibited to express doubt, and he/she tends to do so by

producing weak or sometimes strong disagreements. It is on this conversational phenomenon that I would like to focus further.

In conversation analysis, weak disagreement is considered to be preferred (structurally speaking, for the continuity of interaction) to strong disagreement as it lacks in confrontational force (Pomerantz, 1984). It is typically introduced by such tokens as “yeah, but..” or “I see your point, still..” etc. My observations showed that in the courtroom the following speech devices may be previewed in a similar fashion: “..saying this you would not deny that you...” (e.g., “..you were in the proximity of the defendant, so close, in fact that you could actually hear him..”); or “..be as it may, in your written testimony you, however, said that...” (“..you did not enter the premises..”). A lot of times, verbal indicators of weak disagreement are accompanied by pauses and content-free introductory material such “khm..”, “uhu,” “ahm.” These tokens not only introduce weak disagreements but mitigate the force of disagreeing by creating a space for consequent misalignment.

In the context of examining a witness, weak disagreements may help an attorney expose discrepancies and inconsistencies without, however, letting the respective footings of information solicitor and information provider get mixed in an open-ended argument. Once identified, witness inconsistencies would appear to prove that a lie has been uttered to the detriment of the witness’s credibility. From this perspective, such previews as “khm,” “interesting,” “I see” may function as tokens of insincere acknowledgment that create a space for a supposedly true contrary statement. An attorney tends not to rush into those statements. Precious and rare as these catches are, they are to be noticed. This is where the body’s motions become highly marked: straightening out and looking at the witness, picking up the file in order to read from it, taking a piece of evidence from the judge’s desk and/or approaching the witness stand with a document. What follows is a statement, an assessment that falls out of the information solicitor’s repertoire. This means that a change in the footing

occurred, from the information solicitor to the information provider. By assuming the witness' footing, the attorney performs a witness.

When these “rupturous” shift occurs, Position 2, or the home space, or the common space are utilized. The distribution for either attorney is not altogether clear; however, intuitively, I am willing to suggest that the rostrum is used in the beginning of questioning the witness, and its use is accompanied by the use of the prewritten questions; later, during crosses and re-crosses, the use of the rostrum is abandoned in favour of using the common space or the home base. Here, either side showed a preferred space from which they conduct their examinations and, since most surprises occur during crosses and re-crosses—which is also true when it comes to weak disagreements--this preference becomes meaningful in ways that might and I emphasize might affect the jury's perceptions. Below I mark these preferred places in red for the defence attorney and blue for the prosecuting attorney (See Figure 2).

As this diagram shows each attorney has their own independently constructed and individually used area that is directly adjacent to their desks. The overlapping circle indicates the commonly use space outside of these two areas. Unsurprising from the perspective of common sense, these findings indicate that there is a preference in the constitution of the common space developed around the respective home bases. Expansion of the home base is done differently in the two cases: while the prosecuting attorney “builds” his/her disagreement space in close proximity to the home base, the defense attorney has to move closer to the witness, the jury, and therefore away from his/her desk. Perceived as a unity of body in its symbolic placement and speech in its institutionalized form (weak disagreement as employed to undermine the truth value of oral testimony), the home base appears then to form a flexible category, an expressive conglomerate that allows attorneys to manipulate institutional space toward maximizing one's spatial advantages and/or minimizing one's disadvantages.

The structural similarity of body in motion and speech activity at the point of changing its modality collapses into a coded synthesis. The moving and relocating, expanding body fills the verbal pause, and, imitating the structure of weak disagreement, it does so without making any radical but only weak provisional motions. What is being marked or coded is a particular speech event, namely, weak disagreement. From the position of the jury (and the audience, to an extent), this coded speech/body event creates a particular anticipation. Fulfilling this anticipation or disappointing it is a matter of individual attorney's skills and readiness to roll the dice. However, the latter are not irrelevant for the space an attorney chooses to utilize. For example, close proximity of the prosecuting attorney to the jury box and his/her home during launching weak disagreements may project certainty and self-assuredness and, the other way round, the far away detached position of the defence attorney may create an impression of hesitancy and confusion. This is the point where observing from the sidelines outlives its usefulness. One may suggest that grabbing and holding one's attention is always easier from up close than far away; yet, the validity of such a suggestion cannot be tested by observations alone.

Conclusion

In conclusion, I would like to reiterate my theses. In the beginning, I stated that much could be learnt from analyzing courtroom space in the ethnographic semiotic register from the point of view of an audience member if the focus is on how this symbolically grafted space is constituted by adversarial parties in the course of a trial in body and speech activity. Preliminary observations demonstrate that there is indeed reason to accept this kind of distanced inquiry as useful in its own right and complimentary to other ways of doing empirical jury research. Concretely, the preliminary findings taken from this analysis exposed several important issues. One issue deals with the pre-assigned space for the two sides and its manipulability: not all the audiences but only the audience-within-the-

proceedings, or the adversarial parties are allowed to go beyond their assigned places and constitute the common space delimited by the boundaries set by other audiences and their spatial locations to their purposes. Thus, observing the in-the-course-of-the-trial use of the space by the attorneys (dis-posing themselves) showed preference for utilizing—relative to the “home-base”—the close-by rather than far-away space.

During a subsequent investigation of spatial and embodied properties of one way of dis-posing oneself, a “rupture” created by the event called “catching the witness on a lie,” certain structural preferences emerged. I resort to the word preference because the limited nature of my data does not allow me to use the word ‘rules.’ These preferences showed a synthesis of body motion and speech in performing a conversational device “weak disagreement.” Termination of questioning, pausing, and a production of an alternative version of the witness’s statement are synthesized with the change in the attorney’s current position, movement to the home-base and then repositioning oneself next to it. These two corresponding shifts—in the position of the footing and the physical position of the attorney—mark the rupture in the sequential production of questions and the witness’s testimony thus enhancing anticipation that a lie has been uttered. The vernacular name for this event, “catching the witness on a lie,” reflects this anticipation.

Notes

¹ All the identifying names that point to the identity of my informants are removed to protect their anonymity.

² Their arguments and comments are explicated in Musterman (1986), Levine (1986), Lloyd-Bostock (1988), Dann (1997), Simon (1999), Diamond (1996, 1998, 2001), Hans et al. (2001, 2002, 2003), Robbennolt et al. (in press).

³ According to Goffman (1956): “A body is a piece of consequential equipment, and its owner is always putting it on the line” (p. 167).

⁴ I use the bird-view schematic for the reasons of representational immediacy; obviously, the courtroom appeared quite differently to me, sitting in the back on the level with the rest of the participants.

⁵ By audience, with Goffman (1956), I understand a group of people who assemble precisely to watch or observe a certain event.

⁶ Here, I define purposes in terms of making persuasive arguments.

⁷ Occasionally, one of the parties would use a visual aid during their arguments. This use, however, does not seem to form much of a spatial deviance. Embedded within an argument, the use of a poster board or a TV set does not seem to isolate the juror’s

attention.

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