On the Sociology of Justice: Theoretical Notes From an Actual Jury Deliberation

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Despite the venerable place that "justice" occupies in social scientific theory and research, little effort has been made to see how members of society themselves define and use the concept when confronted with determining "what has happened" in some social arena, theorizing about why it happened, and deciding what should ensue. We take an ethnomethodological approach to justice, attempting to recover it as a feature of practical activity or a "phenomenon of order." Our analysis involves an actual videotaped jury deliberation. In his classic study of decision making by juries, Garfinkel observed that jurors changed their reliance on commonsense reasoning very little, even though they were instructed to adhere to official and legal criteria for guilt. The vacillation between commonsense reasoning and using official criteria creates a tension; in our data this tension is manifested as the choice between adhering to law and procedural rules and providing "justice." By articulating this tension as a puzzle, several of the jurors prepare the way for using "justice," and then use this concept in formal ways which, along with other discursive patterns and strategies, constitute the deliberation as a structured, concerted activity. We show four stages in the use of the term justice as it is embedded in jurors' practical reasoning.

This paper concerns a jury and how it develops and uses a notion of "justice" in the course of deciding whether to convict or acquit a criminal defendant. Because "justice," as a concern for a person's due allotment of benefits and burdens, has such a venerable history in law, philosophy, psychology, sociology, and other disciplines, we wish to review its traditional treatment, at least in the social sciences. Our purpose is to develop a proper theoretical understanding of justice in sociology, but our approach is very different from that of the tradition. We argue that sociology has not yet found justice as a real social phenomenon, but only presumptively has invoked the concept as an external, abstract guide to empirical investigation. Our investigation is an attempt to recover justice as a "phenomenon of order" or as an internal feature of practical social activity (Garfinkel 1988). As a meaningful and usable concept in a situation where members of society make decisions, justice can be found in the concreteness of their locally produced and naturally organized actions.

In sociology an explicit concern with justice, translated roughly as "fairness" or "equity," traverses various subareas including social psychology, the sociology of law, and studies of courtroom decision making. Justice also is an implicit theme in other areas where theories of inequality motivate the understanding and investigation of social phenomena.

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such as stratification (Rytina 1986). Whatever the approach, and however explicit or implicit, scholars characteristically employ or impute some model of justice in evaluating, or seeing how others evaluate, the fairness or equity of some specific social system. Several such models predominate. Distributive justice refers to the apportionment of scarce goods, such as wealth. Procedural justice concerns the means whereby parties resolve conflicts of various kinds. Finally, there is the distinction between formal and substantive justice, dating at least to Aristotle and articulated sociologically in Weber’s famous discussion of bureaucracy. Formal justice is embodied in the principle of equality before the law and is no “respector of persons”; it dictates that parties’ background and circumstances are relevant in decision making only insofar as they pertain to something specified by legal or other rules. Substantive justice is sensitive to the abstractness, the inflexibility, and the consequent distance of legal and other rules from particularities in concrete cases; it aims to make allocations on the basis of social values and all that can be known about an individual case.

Thus, with regard to both distributive justice (e.g., Homans 1961) and procedural justice (e.g., Deutsch 1975; Leventhal 1980; Thibaut and Walker 1975), researchers examine how subjects attribute justice to a situation by evaluating the relative disparity between what they (or others) receive and what they deserve. This process can involve power and control over decision making (a concern with procedure) or the content of the decision itself (distributive matters). Formal justice is used by students of criminal sentencing as a standard in determining whether defendants are convicted and punished for who they are or for what they have done. The supposition is that defendants should be treated according to the legal seriousness of their offenses and without regard to age, race, socioeconomic status, gender, or other “extralegal” attributes (see the discussion in Maynard 1984, chap. 7). Scholars concerned with substantive justice, on the other hand, have concentrated on plea negotiation, arguing that it embodies the attempt to tailor general laws and the penalties they stipulate to the specifics of acts, persons, and circumstances (Newman 1966; Rosett and Cressey 1976).

To repeat, in the pattern across these diverse subfields and studies, social scientists tend to impute some model of justice and to measure either actors’ conformity with this model or their use of such a model in perceiving a situation to be just or unjust. Here we can draw an analogy between “justice” and “rationality.” Both Schutz (1943) and Garfinkel (1967) argued that rationality has numerous meanings (e.g., reasonable, deliberate, planned, logical), any of which investigators can use as a template for assessing the rationality of human action. In traditional game theory, for instance, Von Neumann and Morgenstern (1947) define rationality as behaving, in actual conditions of choice, according to preestablished criteria. In Schutz’s (1943) and Garfinkel’s (1967) view, however, such approaches neglect how actors perform rationally in everyday life, where they seldom, if ever, follow an abstract definition or template. Rather they behave according to typifications, “recipes,” or pieces of commonsense knowledge, as supported by presuppositions to the effect that such knowledge is shared and is required for application to concrete choices. When people use typifications properly, it acts as a claim of rationality for which they expect to receive confirmation and ratification. Moreover, according to such commonsense reasoning and “everyday rationality,”—that is, from within their ordinary interactive and discursive experiences—participants search for the ways in which their choices will accord with a retrospective interpretation of the outcomes that such choices produce, as having a rational history. In other words, members of society have an orientation to rationality, but it cannot be separated from their temporal activities, whereby they initially adduce numerous criteria for some loosely adumbrated decision and later, under the auspices of the realized decision, selectively review and even recast the criteria
which produced that decision. In performing in this way, members again anticipate supporting other persons and being supported themselves. This perspective implies that rationality is not only an object of professional theoretical conceptualization and a means for specifying testable hypotheses, but also a phenomenon that society’s members administer. Sociological analysis therefore could concentrate on such member-produced practical orientations to and displays of rationality.

Like rationality, justice has been a model and a resource for sociological inquiry. Either social psychologists study judgments regarding justice hypothesizing that persons’ perceptions of justice are determined by varying attributions of cause and responsibility in concrete situations (e.g., Cohen 1982, p. 119), or students of criminal justice use formal and substantive criteria as metrics for determining the equitability of the processing of defendants. Accordingly, in traditional social science, justice is an archetype for both members and professionals, and therefore a phenomenal object as elusive as the collective sentiments on which it is based.

A different approach, as we have said, is to treat justice as a “phenomenon of order” (Garfinkel 1988), which, insofar as it is sociologically real, exists empirically in the workings—that is, in the talk and actions—of ordinary society. The ordinary society here is a jury; we analyze how its members strategically introduce and develop “justice” as a procedural part of determining the fate of a criminal defendant.1

BACKGROUND

Our approach follows Garfinkel’s (1967, p. 113) study of the “actual practices” of deliberation in investigating naturally occurring (rather than experimentally controlled) phenomena that traditional investigations of legal and other decision-making processes have largely ignored. For example, the overwhelming bulk of jury research examines the effects of exogenous factors, such as decision rules and social structural variables (gender, age, class, race), on deliberative outcomes. This is the case because of a preoccupation with causal analysis and a presupposition that social organization inheres mostly in the hypothesized relationship between external influences and some momentary interactive product, such as a decision for guilt or innocence. Our strategy, by contrast, is to analyze the deliberative process to capture the real social organization that is intrinsic to conversational and other aspects of the interaction. Perhaps social structural statuses of some sort eventually can be mapped onto the practices we identify (for discussion, see Maynard

1 Justice has been a topic of interest among philosophers for centuries, and they have made an important set of contributions to this legacy. Most famous of these is the work of Rawls (1971, 1985). Although Rawls’s position is not accepted universally (see, e.g., Nozick 1974), it warrants brief discussion as both a paragon and a paradigm in the contemporary philosophy of justice. Rawls maintains that the nature of justice will vary from society to society on the basis of what he calls the “original position” in which principles of justice are chosen to fit with a society’s political and social constitution:

The guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association (1971, p. 11).

In specifying the kind of justice that should obtain in a democracy, Rawls (1985) articulated the principle of “justice as fairness,” which differs from a strictly analytic definition and departs from metaphysical considerations because it refers to a specific form of society. Indeed, Rawls (1985), being concerned about historical and political context, incorporates sociological elements into his theory. In discussing what justice is or should be, however, Rawls’s works are ultimately speculative, rely on deductive principles, and miss the phenomenon with which we are concerned—that is, how justice initially inheres in the performances of people engaged in actual courses of action in real, ordinary society. Our analysis might connect with Rawls’s (1971, Chapter 8) theory in his specification of the origins of a person’s sense of justice. We do not account for such origins, but we wish to explicate aspects of that sense as they are manifested in actual, spoken conduct.
1988, p. 319; Schegloff 1987; West and Zimmerman 1985). The immediate invocation of social structural or other variables, however, obscures appreciation of forms of practical action that lie in the details of actual deliberative proceedings.

Our concern is expressed slightly differently by Pomerantz and Atkinson (1984), who point out that "ethnomethodological research sets out to describe how human behaviour works, rather than to explain why some particular type of behavior occurs" (p. 287). We might add that the "how" question might precede the "why" question, in that outcomes which are similar when separated from the paths of their production may be embedded in quite different forms of social organization that constitute these paths. Causal analysis, then, might benefit from investigations that treat outcomes as aspects of real rather than hypothesized social organizational relationships. Concern with actual, situated relationships, however, is not to be equated with simply identifying or describing the particularities of a decision (see Pomerantz and Atkinson 1984, pp. 295–96). It is meant to capture and analyze methods and practices of decision making that infuse those particularities as organizational activities (Garfinkel 1988).

We wish to make the following theoretical contribution to the sociological understanding of justice. In line with the discussion of rationality above, we dispense with the notion that justice can be a template according to which deliberative outcomes could be measured for fit. Instead we explicate the use of "justice" as part of the temporally situated, in-course, commonsense, lively, and contingent determinations of jury members. In keeping with the development of ethnomethodological theory, our investigation contains a heavy "empirical" component; if the intelligible features of society are produced locally through methods that are reflexive to real society, then theoretical analysis of members' achievements cannot be predicated through a priori means or deductive reasoning (Clayman and Maynard forthcoming). Ethnomethodological theory necessarily involves discovering, in the details of endlessly contingent member-produced actions, evidence of phenomena that are real in terms of members' ongoing accounting practices (Garfinkel 1988).

In concrete terms, this statement means that we wish to be analytically responsive to matters that other scholars at least have pointed out but have not incorporated into the theoretical understanding of deliberative phenomena. Apparently, for instance, jurors often enter the jury room with a more or less firm position regarding the defendant's guilt. As the deliberation proceeds, some of them may find, in and through their own and others' talk, precisely that argument which articulates the position to which they hold. Alternatively, because of the way in which a particular argument resonates with commonsense understandings, they may change positions and then may provide a narrative recasting that fits with instructions about legally relevant criteria for their choice. Then again, they may feel strongly about a position that is contrary to the majority opinion, may concede with protest for purposes of a unanimous vote, and then may yield to others' persuasion as to why such a course is morally and legally permissible. Our analysis aims to capture such phenomena, and the role of "justice" as part of them.

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2 We are referring to what appears to happen in our jury deliberation, but similar matters have been discussed in previous studies. As Kalven and Zeisel argue,

with very few exceptions the first ballot decides the outcome of the verdict. And if this is true, then the real decision is often made before the deliberation begins . . . The deliberation process might well be likened to what the developer does for an exposed film: it brings out the picture, but the outcome is predetermined (1966, pp. 488–89).

Garfinkel suggests,

In the material reported here, jurors did not actually have an understanding of the conditions that defined a correct decision until after the decision had been made. Only in retrospect did they decide what they
In a way, then, this study would seem to fulfill Furby’s (1986) call for research on how adults define justice, and on “what falls within people’s understanding of the domain of justice and what falls outside it” (p. 179). For interrelated empirical and theoretical reasons, however, the attempt to see how jurors define justice poses difficulties, if by that is meant how they stipulate its abstract properties. The jurors examined here never provide such a definition in their deliberations. Instead they employ the term justice in discrete conversational contexts, and their activities in these contexts determine its meaning. In this respect the jurors resemble the pre-Socratic Greeks who, states Havelock (1978, p. 37), never designated the term conceptually. Yet they were aware of justice and identified it as a rule of propriety or procedure “embedded in action.”3 The parallel between the early Greeks and the jury can be strengthened if we consider that the former constituted an oral society and that the latter accomplishes its deliberative task through primarily oral means. According to Havelock, the demands of memorizing cultural information in such societies are unfriendly to the expression of principle in abstract terms, whereas these demands are hospitable to information that is “represented as doings”:

In short, in order to frame a legal directive, a situation is conceived and stated, case in the form of an event or an action by a given agent, not in the form of a general principle within which a given case might fall (1978, p. 43).

Faced neither with a legal literary tradition (Galanter 1990, p. 256), with reading about the case, nor with rendering a verdict through written arguments, jurors, somewhat like the early Greeks, may be following a disputatious form that is intrinsic to orality. In the deliberation we examine here, the jurors do not define justice and then determine whether the facts of the case and a decision based on those facts can fit their definition. Rather, in the course of posing puzzles, articulating the law, casting individual ratiocinations into narrative form, and persuading one another of proper procedure and outcome, jurors produce “justice” as something to be “done” as they solve their puzzles, attempt to follow the law, work collaboratively to ponder the case, and ultimately reach a unanimous decision. Empirically in the deliberation, then, justice is also a propriety embedded in action rather than a principle (Havelock 1978, p. 181) whereby jurors handle the facts of a specific individual’s confrontation with the law. Such a phenomenon is consistent with Pitkin’s (1972) discussion of how to approach justice, in Wittgensteinian fashion, in terms of its use rather than its definition. Plato, says Pitkin (1972, pp. 305–306), “offers an ideal static picture of justice achieved; we do not see justice at work.” In our investigation, justice emerges in “working” and practical terms, not ideal and abstract terms, as it becomes a prominent feature of the deliberative process.

did that made their decisions correct ones. When the outcome was in hand they went back to find the “why,” the things that led up to the outcome, and then in order to give their decisions some order, which namely, is the “officialness” of the decision (1967, p. 114).

Finally, Simon (1967), in her study of insanity trials, conducted pre- and postdeliberation interviews with jurors. Among jurors who, during deliberations, voted differently from their predeliberation positions, she found that only 65 percent actually changed their minds in the course of discussions. Fully 35 percent did not change their position but apparently conformed publicly (changed their vote) in a mechanical way; that is, they went along with the other jurors while disagreeing privately about the defendant’s guilt or innocence.

3 Not until Plato’s dialogues in the Republic did Greek culture fully develop justice as a definition and as an abstract concept. In some precursors, such as Hesiod’s identifying “justice” and assembling examples of its occurrence in concrete situations (Havelock 1978, p. 230), justice itself is an agent that does something or experiences something. Hesiod, however, never said what justice “is,” apart from these particular instances of its agency, in the way Plato eventually does.
THE CASE AND ANALYTIC APPROACH

The jury deliberation for this study was videotaped by Professor Steve Herzberg of the University of Wisconsin Law School, who made the tape available to us. Herzberg’s work occurred in collaboration with the Public Television Service’s *Frontline* series, which showed a reduced and edited version of the deliberation in a one-hour program called “Inside the Jury Room.” The original deliberation lasted approximately 2½ hours; our research involves a videotape of almost the entire deliberation. The case was tried in a county courthouse of a major midwestern city. Just as the case was real, the jury was the actual set of citizens who deliberated the case and decided its outcome. Thus the deliberation was neither a simulation nor a scripted re-creation. In the analysis below, jurors are identified by numbers according to their positions at a table in this configuration (the foreman is J1):

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J2  J3  J4  J5
J1
J12
J11  J10  J9  J8
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In this case the defendant, whom we call “Larry Rex,” was tried for owning a gun. Larry had spent time in prison for a bank robbery 20 years before his present arrest. This was a felony violation; it is illegal for ex-felons to own guns in the state where Larry lived. When Larry inquired about registering the gun at the police department, he was asked to produce it. He went home, returned with the gun, and was arrested. According to the defense, the gun was purchased to comply with a requirement set forth in a mail-order “detective school” to which Larry had applied as a means of securing employment.

The jury was instructed to determine, beyond a reasonable doubt, three things: whether the defendant had been on parole when the violation occurred, whether the defendant had been in possession of a handgun, and whether the defendant knew that he had been in possession of a handgun. If the jury found that these things were true, that finding was to be grounds for conviction. We refer to these three matters as the jurors’ “hardline”: they provided the legal criteria for finding a verdict. The defense attorney’s strategy was to admit that the state had proved his client guilty according to these criteria, but that the defendant nevertheless was being “nailed on a technicality.” He told the jurors that they were empowered to go beyond the law to free the defendant. Indeed, the defense attorney asked the judge to advise the jurors that they had a right to ignore the law, but the judge refused to give this instruction. The prosecutor maintained that the state had proved its case and that the jury’s job was the straightforward application of their legal criteria for guilt. During the deliberation, the jury took three ballots: the first produced 10–2 vote, the second an 11–1 vote, and the third a unanimous vote for acquittal.

We approach the deliberation as a procedural, formal interactional occurrence that participants organize (as we have said) not because they are “influenced” to act according to pattern by exogenous factors (e.g., the procedural rules they have been given, their sociodemographic backgrounds, or even the conceptions of “justice” that they bring into the jury room), but because of the practical ways in which they structure the evidence

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4 Herzberg’s “Inside the Jury Room” was aired on *Frontline* on April 11, 1986.
5 The issue that the lawyer was addressing is known as “jury nullification,” whereby jurors would be instructed that they can refuse to apply a law if doing so would lead to an inequitable or unjust outcome (Scheflin and Van Dyke 1980, p. 54). As Gobert (1988, p. 305) notes, judges are under no legal obligation to inform jury members of their nullification power; when asked to do so, they rarely comply. See also note 9 below.
that they see and hear so as to fit a legally accountable or rational outcome. Our approach is to let the data "present themselves"; thus we derived no propositions beforehand as to what the deliberation would, should, or could contain as particular constitutive elements. In a way, we "discovered" justice as an analytic phenomenon because the jury members seemed to discover it as a way of handling puzzles and contradictions in the case before them. Thus our goal is not to calibrate pieces of talk and interaction into a priori categories, as in conventional content or discourse analysis. Rather, the aim is to represent the jurors' own manner of organizing their perceptions, decisions, and deliberations.

To be sure, this is a "single case" study. Although single cases have unique contours and tenors, nevertheless they are composed formally. As Sacks (1984) observed, "Social activities—actual, singular sequences of them—are methodical occurrences. That is, their description consists of the description of sets of formal procedures persons employ" (p. 21). Such description, however, and our inductive approach, are not oriented to idiographic ends. Our approach is analysis in the fullest sense of the word—a determination of the components of a complex phenomenon. Of course no analysis of a social event, such as the deliberation, can involve all of its elements, but with an appropriately limited investigatory scope, it can consider some class of phenomena that emerge and bear a relationship to other aspects of the event. In our focus on how jurors discover, specify, and exhibit the rational basis for their decision through articulating their senses of justice, we touch on orderly procedures that are also under detailed investigations (e.g., Manzo 1988, 1993, forthcoming). At certain points in this paper we refer to these other features of the deliberation. Our overall goal is to build something like a "natural history" of the deliberation by recovering the practical ways in which the jurors arrive at an accountable decision, or one that they regard as justifiable in terms of their legal conceptions.

Our concern with justice fits with this "natural history" orientation, in that we will be tracing the ways in which jurors' use of the concept of justice develops over the course of the deliberations. That it develops over the course is their phenomenon, not ours. In other words, unlike traditional studies, which impose a definition of justice on subjects' behaviors, our study concerns phenomena that the jurors construct themselves. They prepare the ground for using this concept and then use it in patterned ways which, along with other discourse patterns and strategies, constitute the deliberation as a collaboratively structured event.

THE DELIBERATION

For purposes of presentation, we show four stages in the use of the justice concept. These stages roughly follow the chronology of the deliberation and the jurors' sense of phasing as reflected in their temporal formulations. Their production of a temporal order to the deliberation is a topic in its own right, which we cannot address fully here. Our purpose in discussing these stages is to approximate roughly how "justice" as a concept emerges in and as part of the jurors' continual assessments (at any point) of what they have done so far, what they are doing now, and what they can project as subsequent discussion or action. The stages are a means for identifying points at which the concept of justice or its converse, injustice, arises or potentially arises as part of the reasoning practices the jurors employ. The four states are 1) making opening statements, in which jury members "pose a puzzle" or "maintain a hardline"; 2) discovering justice; 3) referencing the knowledge of the defendant, and 4) convincing the last "holdout."

* Notice such formulations as "right now" in excerpts 1 and 2 below, "at this point" in excerpt 5, and so on.
Opening Statements: Posing a Puzzle versus Maintaining a Hardline

As the first piece of business, jurors choose a foreperson. After this, each member of the jury regularly presents an opening statement. These presentations occur in “preallocated” turns of talk, starting with the juror immediately to the left of the foreperson and proceeding clockwise around the table; the foreperson speaks last. After each juror has spoken and an initial vote is taken, turn taking returns to a system in which next turns are not preallocated: after a currently speaking juror stops, anyone can speak next (Manzo 1993: chap. 3; see Sacks, Schegloff, and Jefferson 1974).

In the opening statements of the deliberation over Larry’s case, two positions regarding his guilt become evident. The first position is relatively elastic because the jurors pose a puzzle or dilemma and show reluctance to make a decision. Eventually several jurors take this position in making their statements. Jurors 2 and 3 (immediately to the left of the foreman, who is Juror 1) represent the position initially:7

(1) 12:59:01
1. J2: Okay, I find that the three points that the prosecutor hadda prove,
2. he proved. The defendant did possess the gun, the defendant knew
3. he possessed the gun, and that uh the defendant knew he was a
4. convicted felon at the time he uh possessed a gun. However, uhm
5. because of this case and because of um because of the record of the
6. defendant uh I’d have a re-, I’d have a real tough time uhm voting him
7. guilty on this, and uh I haven’t made up my mind yet. But I see both
8. sides of, both sides of, um both the cases- both of the cases they’ve
9. laid out, and uhm right now I haven’t made up my- my mind on what
10. I’m- uhh how I’m going to vote.

(2) 12:59:55
1. J3: Okay, I feel that the defendant is guilty uh on all three
2. accusations technically. But I guess I feel that we should also
3. take into consideration the fact that he does have a reading
4. disability, as well as maybe some other disabilities. I’m not
5. trying to play on your sympathies or anything but it is something
6. that I have to consider and right now I haven’t determined whether
7. I should name the defendant guilty or innocent . . .

In these and similar opening statements, jurors start by noting the defendant’s guilt according to the criteria they have been given. In the words of Juror 2 (1: lines 2–4), the “points” were that the defendant was in possession of a gun, that he knew he possessed the gun, and that he knew he was a “convicted felon” (technically, the last point should be that he was on parole). Then, after acknowledging this, each one introduces a contrasting position. Juror 2 does this with “however” in 1: line 4; and Juror 3 does so with “but” (2: line 2). Juror 2 then cites “this case” and the defendant’s “record” (1: line 5) as reasons for ambivalence as to how he would vote. Juror 3 also is undecided and suggests that the defendant’s reading and other disabilities be considered in relation to the “three accusations.”

The next juror to speak takes a different position from these two. Perhaps in response

7 Each excerpt has a time code that identifies its place on the videotape. Excerpts are verbatim and include speech perturbations. Underlining shows where a word or part of a word is emphasized. Ellipses indicate that several lines of transcript have been elided.
to Juror 3’s disclaimer of playing on sympathies (lines 4 and 5 in excerpt 2 above), Juror 4 proposes to discount the “sympathetic point of view” (line 3 below) as well as the defendant’s “intent” (lines 3–4), and urges that the group adhere to the rules or “points” that have been provided (lines 5–9):

(3) 13:00:43

1. J4: I feel that the uh plaintiff, the city has found him uh guilty
2. beyond a reasonable doubt to the three- three points that we are
3. to discuss. Uh the sympathetic point of view would be, what his
4. intent was, or what he did not intend to do, and that’s not for us
5. ta- to reason over. Ours are the three main points which we have
6. to find beyond a reasonable doubt and I feel that we did . . .
7. anything after that is up to the judge as far as the sentencing . . .
8. Our three points have been, in my mind, established beyond a
9. reasonable doubt.

After these three jurors speak, two contrasting positions have been set out. Further opening statements build on these positions. Rather than examining each statement, we show selections that exhibit patterns which hold through the jurors’ talk.

A majority of jurors (10 out of 12) take the position of ambivalence and articulate in further detail the dilemma that Jurors 2 and 3 adumbrated. Juror 6, after similarly acknowledging the “three criteria” (lines 1–3 below), and after the contrastive “but” at line 3, proposes that “the law” must come under scrutiny and that there are “a lot of questions” that they “need to talk about” (lines 3–13).

(4) 13:04:18

1. J6: I think that the way I feel is that it’s true, all the counts have
2. been met. By the law, this man is- he, he doesn’t have a case, and
3. he fits all three criteria, but I think there are some imp- there are
4. some important points from our standpoint. I don’t think any of us
5. as citizens have to sit around and, regardless of who it is, and
6. say the law is absolutely right because somebody made it for every
7. individual. I think it’s a tough position to be in to say, I am a
8. judge of the law. But I think that’s what the jury system is for,
9. it gives the people a chance in some- in some instances to make some
10. type of statement toward a specific law as applied to a specific
11. case. And y’know I think there are cases where it’s not clear and I
12. think in this case, there’s a lot of questions yet to be answered
13. that we need to talk about

Juror 10 (below, lines 1–2) notes her agreement about the defendant’s guilt (line 11) and states her belief in the law as “good” (line 2), but says next she believes that an “exception” is what they must “deal with” (lines 2–4).

(5) 13:11:07

1. J10: I agree that Mr. Rex is guilty based on the law. I believe that
2. the law is good. I believe that the idea that there can be an
3. exception made because of the particular defendant is what we have
4. to deal with here. I personally would vote him an acquittal at
5. this point.

All of these (and the other ambivalent) jurors, then, contribute to a developing contrast
between (on one hand) the facts of the case, which they do not question, and what these
facts dictate according to the law, and (on the other) what else can be considered in
determining a verdict. With Juror 2, it is the defendant’s record; with Juror 3, his
disabilities; with Juror 6, it is the law itself; with Juror 10, it is the particularities of the
defendant. Thus the use of contrast is a primary organizing principle or formal aspect of
these opening statements, although each juror offers at least slight differences as the
second part of the contrast. Thus the puzzle or dilemma they exhibit is in recognizing
both the factual guilt of the defendant and the exceptional nature of this case. Next they
seek a way of making the exception legally justifiable and accountable.

One further feature of these statements is that the jurors appear to be struggling with
the role and identity of the jury. This is evident in how Juror 3 (2: line 2) and Juror 10
(5: line 3) invoke the collective “we” and formulate the duty of the jurors. Juror 6 is more
expansive on this topic, in characterizing their role as citizens to be a “judge of the law”
(4: lines 4–8) and suggesting “That’s what the jury system is for” (line 8). This struggle
to define the jury and its role is apparent in another juror’s opening statement, which
embeds the formal contrastive principle. Juror 12 begins by minimizing the importance
of the defendant’s “mental abilities and reading level” (lines 1–2 below). This statement
may be a response to Juror 3 in excerpt 2 above, who first mentioned the defendant’s
disabilities.

(6) 13:13:19

1. J12: I feel that the um (eghh) defendant’s mental abilities and reading
2. level are not the crucial issue here. Uhm, I feel that he, he meets
3. the criteria for us to find guilt. But I think we have a very
4. philosophical argument on our hands in terms of, are we obligated as
5. a jury to follow the letter of the law and find him guilty? Or are
6. we obligated as a jury to use our special level of conscience, uh
7. as the defense lawyer said—otherwise it, you know, could be decided
8. by a computer—um and acquit him because of perhaps an injustice
9. that has been done to him through the- the arrest.

Juror 12 nevertheless draws a contrast, parallel to that made by Juror 6, between following
the letter of the law and using the jury’s distinctive role. She develops this contrast by
depicting a verdict according to the three criteria as “decided by a computer” (lines 7–8),
whereas the jury, using their “special level of conscience” (lines 6–7), could acquit him
because of the possibility that an “injustice” had been “done to him” (lines 8–9). This
excerpt, then, contains the first reference to justice, although it occurs indirectly through
Juror 12’s invocation of justice’s converse, “injustice.”

Immediately after this statement, Juror 12 develops a related contrast, between being
nonemotional in following the law and using one’s conscience:

(7) 13:14:09

1. J12: Y’know on one hand we are supposed to remain nonemotional and
2. nonsympathetic and just follow the letter of the law, is what
3. we’ve been instructed. But I wonder if there’s a special place
4. for a jury to use um y’know our- as people, as human beings, we
5. have a level of being able to think and uh use our conscience
6. to say that even though the defendant has met all of the uh
7. criteria to establish guilt—can we as a jury say even given
8. all those facts uhm is there a place for us to with reason
9. and not with emotion or sympathy but with reason say that there is
10. still- there is still a purpose or a reason to acquit him. And
11. (sigh) you know as I was thinking about this I think it comes down
12. to questions like what is a jury and what is a jury for, and what is
13. our purpose here.

Juror 12 marks the contrast by prefacing the acknowledgment of guilt (lines 6–7) with an “even though” phrase (line 6), and then asks if there isn’t a “place” and a way “with reason” for the jury “as human beings” to acquit (lines 7–10). She poses a further question about the “purpose” of the jury (lines 11–13).

So far, then, justice is being invoked as a lack, or a negative, that needs to be set right. Indeed, during a subsequent portion of her opening statement, Juror 12 says, “... on a simple level it would be very easy to say he is guilty, but we all feel I think that an injustice has been done to this man through his arrest.” Thus, now it is not only that a dilemma has been posed—a contrast between following the letter of the law, which in this scheme seems to demand finding guilt, and making an exception. Making an exception would correct an injustice. In addition, on behalf of the others, Juror 12 has explicitly formulated a quest for the place where the jury could exercise its special role.

Toward the end of her opening statement (not excerpted here), Juror 12 expands on what that place would be. Once more she concedes that the defendant is guilty according to the law, and then asks, “Do we rise above that somehow? Is there a place for us to then say, ‘Even though he meets the law, you know we cannot in good conscience find him guilty’?” Thus, perhaps the “place” where the jury can reasonably acquit the defendant is to be found by “rising above” the law. Throughout the opening statements of those who are ambivalent or favor acquittal, then, we see evidence of an orientation to a formal “rules, but . . .” contrast, and a search for a solution to the puzzle that this contrast evokes.

Juror 12’s proposing how the jurors “all feel” (that an injustice has been done) is a device that has been described elsewhere as “speaking on behalf of” others who form a proposed collectivity (Sacks 1992, pp. 333–40; see Maynard 1986, p. 269). As we saw in Juror 4’s opening statement (excerpt 3), not everyone on the panel accepts the idea of going beyond the judge’s instructions and rising above the law. The jury contains one other “hardliner,” who urges that the group should adhere to the rules that have been provided. This is Juror 1, the foreman, and the last to produce an opening statement:

(8) 13:16:15

1. J1: My personal opinion, uh I think differs from a lot of the ones
2. that I’ve heard around the table here, and in that being, that
3. our instructions were to decide whether beyond a reasonable doubt
4. is he guilty of this crime. I think those three elements have been
5. met, that yes he is guilty of this crime. All the reasoning that
6. I’ve heard around the table for uh each person’s decision as to
7. how they’re leaning has been speculation, which we were all
8. instructed not to use speculation, we have to use the testimony.
9. Uh my opinion is that even though there might be facts in this
10. case that weren’t brought out, that we weren’t allowed to hear or
made aware of, uh we can’t even assume those facts, we can only
use to make our decision what was testified in court, the physical
evidence and the testimony as evidence, and we can’t use uh what we
think his mental ability is or what we think he understood or what
he didn’t understand or what he- we think we- he knows and what
he doesn’t know. We can’t use that. We have to use what was brought
out, the statements that were made in the courtroom and were
allowed . . . I think the scope of a jury is to decide guilt and
innocence, not to be the presiding judge, and uh so I think uh I have
to follow the letter of the law.

In countering prior arguments and announcing himself as favoring conviction, Juror 1 reminds the others of their instructions concerning reasonable doubt and the “three elements” (lines 3–5), and charges that they are using “speculation” (line 7–8), which they were instructed to avoid. Furthermore, the jury is only to use testimony and evidence (lines 12–13); its role is not to be the “presiding” judge (lines 17–19). In these ways Juror 1 displays a concern “to follow the letter of the law.”

In short, the contrasts displayed uniformly in the statements of Jurors 2, 3, 6, 10, 12, and others do not appear in those of Jurors 4 and 1. Moreover, rather than joining the quest for some way or place to transcend the hardline, the two latter jurors embrace it in a way that their instructions have provided. Formally their argument involves invoking the relevance of the jury’s instructions, taking only physical evidence and testimony into consideration, and consigning other determinations to the realm of sympathy or speculation about “extenuating circumstances” whose significance it is in the judge’s purview to decide. Consequently, in the talk of Jurors 1 and 4, the desire for further deliberation appears minimal, whereas the other jurors explicitly invoke a “need to talk” (4: line 13). Alternatively, by raising questions and initiating a search, they imply that further deliberation is necessary.

In summary, two positions have emerged in the jurors’ opening statements. The majority holds the first position, which allows for the reasonableness of applying the law while taking special circumstances into account, encouraging the discovery of an accountable alternative to following the law, and exhorting the jury to fulfill its special role by finding this alternative. A minority adheres to the second position, which entails following the legal criteria, viewing the evidence and the testimony, finding the defendant guilty, and leaving the consideration of special circumstances to the judge. Thus, where the majority seeks an expansive version of the jury’s role, the minority proposes a narrow version.

The Discovery of Justice

Even if members of the minority do not wish more talk, nonetheless they engage in bolstering their perspective. Thus Juror 1 addresses the argument that an “injustice” has been done to the defendant:

(9) 13:58:20

1. J1: From what I gather everybody is afraid- is afraid of doing an
2. injustice to this man and uh uh, I don’t think by uh our
3. decision, that either way we’re going to do an injustice to this
4. man, and in fact my personal opinion is I think that if we uh would
5. acquit him uh I feel that he’s met the three points and, and I feel
6. that if we would acquit him we’d be doing him an injustice. Uh I
think it’s the judge- judge’s job to uh uh see that this man
either gets the required training, help et cetera, sentence,
whatever it may be. I think it’s his job and uh uh by that I don’t
think we’re doing him an- also doing him an injustice to convict
him uh I don’t feel an injustice either way, and uh maybe more so f-
one way than the other, but I think we’re here to decide the law,
and not to be the judge and that’s my standing. It’s- I don’t think
we should decide his- his uh intent or his uh uh, uh y’know, what
he understood and what he couldn’t understand an’ everything. I
think that’s, uh although some of you are experts in- in your
respective fields, and I can appreciate that but uh uh I don’t- I
think that’s beyond our scope.

At first this juror suggests that acquitting the defendant would be doing him an injustice
(lines 5–6), but after going once more over the judge’s role (line 6–9), he professes that
the issue of injustice is essentially irrelevant (lines 10–11). He next repeats the point that
the role of the jury is to “decide the law, not to be the judge” (lines 12–13). This statement
means that considering the subjective issues of the defendant’s intent (line 14) and
understanding (line 15) is “beyond our scope” (line 18).

Juror 6 immediately counters Juror 1, especially with regard to the role of the jury. At
lines 2–7 below, he claims that the jury has more of a duty than simply to determine
whether the three criteria have been met. In this context he makes the first reference so
far in the deliberation to the concept of justice (lines 11–12).

(10) 13:59:49
1. J6: I disagree with that. I still disagree. I’m not saying I’m making
2. a s- decision but I think we have more capabilities than to say
3. one two three, these are met on a very simple level, cut and dried
4. guilty. I don’t think that we as jurors, that is necessarily our
5. role. We are here to do more than that, we’re here to sit and talk
6. about the- the whole- the case as it is, not just to accept
7. everything that’s put in front of us. If we do, I don’t think
8. there is any argument. We could argue about semantics, about the
9. words in this case, what does possess mean, what does know mean, what
does felon mean, we could argue about this from now until, you know
11. we no longer exist in this particular world. But we’re here to do
12. a justice to someone, and my point is the way I’m trying to decide
13. in my own mind, has justice been done here. I don’t care what the
14. law says, has justice been done? (group laughter) And in my
15. mind I’m still trying to decide that. And that’s my basic point,
16. that’s what he- we’re here to do, it’s not to just say the law
17. says this, the judge says that, but I don’t think that’s what he
18. means. And you can say I’m speculating but I think there’s a
19. purpose for us beyond just saying that he met the criteria or
20. not. There’s a lotta- we could argue, like I say, semantics, and
21. we could do that forever and I could- I think we can make a point
22. for saying it’s not beyond a reasonable doubt, based on just what
23. we’ve argued here, but I’m not sure that’s what we need to do. We
24. need to assess in our own mind, is- are we doing justice to this
25. man.
Juror 6 also seems to avow the futility of arguing "semantics," or the meaning of fact characterizations such as whether the defendant possessed a firearm, whether he "knew" he possessed a firearm, and whether he was a "felon" (lines 8–11). Using the "but" marker at line 11, he then asserts a contrast; here the contrast is between "accepting everything that is put in front of us," where that would mean that there is no argument (lines 7–8), presumably with the three criteria, and the proposed task of the jury "to do a justice to someone" (lines 11–12). In their opening statements, jurors who favored acquittal had posed the divergence from following the rules as a puzzle, in terms of its accountability. That is, they broached a search for some grounds on which perhaps to find the defendant not guilty, but did not find such grounds except in the sense of correcting an injustice. In this excerpt, "justice" is offered as a solution to that puzzle. Indeed, in asking whether justice has been done (lines 13–14), Juror 6 raises the possibility that not following the letter of the law and making an exception would be "doing justice." It is as if the place for transcending the law or the "hard line" is where justice resides.

We have given an interpretation of Juror 6's talk, but evidence for our interpretation derives from the immediately subsequent turn of Juror 2, who provides a "formulation" (Garfinkel and Sacks 1970) of the sense to be made from that talk (lines 1–7 below). Juror 2 proposes that Juror 6 is "pulling back from looking at the instructions" (lines 3–4), an idea that Juror 6 seems to confirm with his own version of what he is doing (line 5).

(11) 14:06:41

1. J2: Okay there's a couple o' things I wanna say that are governing  
2. the- the way I'm thinking now and it's uh, it's a good time to bring  
3. it up y'know because you are pulling back from looking at the  
4. instructions and-  
5. J6: I'm not, at this point, I'm not arguing the instructions.  
6. J2: Right, that's what I'm saying, you're pulling back from just  
7. looking at the- at the instructions and you're taking into a larger  
8. frame of is this justice. Okay and uh a couple thoughts on that. I  
9. look at the- look at the defendant and I think is he a threat to  
10. society, and if what we decide here, if we decide if he's guilty, is  
11. that just? And uhm a couple things I'd like to point out. He  
12. originally went to the store and was fascinated by an antique gun.  
13. I think that says something. You can- everyone can take that to mean  
14. s- uh uhm whatever but I think it means something to this case.  
15. Again is he a threat to society? And also, if he- if he is dangerous  
16. to society, what would the detective tell him, allow him to bring the  
17. gun in, transport it on a public bus, y'know and uh ask him and  
18. request for him to bring it down to uh to his office if- if he felt  
19. that he was a dangerous felon?  
20. J1: I'm- I must admit that puzzled me too.

In lines 6–7, Juror 2 agrees with Juror 6 and further characterizes the latter as distancing himself from the instructions by invoking the "frame" of justice. With regard to justice, Juror 2 also has a "couple of thoughts" (line 8), and asks whether the defendant is a threat to society and whether finding him guilty is just (lines 9–11). In the rest of his turn, he suggests ways in which the defendant would appear as unthreatening: he was fascinated by an antique gun (lines 11–12), and the "detective" asked the defendant to bring this gun in on a "public bus" (lines 16–17). Therefore it seems that Juror 2 uses the concept of
justice to “pull back” from the official criteria of guilt, in the way that he characterizes
Juror 6 as doing, in order to examine the relevance of convicting a man who is arguably
harmless.

“Justice,” in short, is a potential resource for those jurors who have sought to solve the
dilemma of following the rules versus making an exception. Ten of the 12 jurors believe
that justice can be invoked to explain how they can transcend the law and consider other
issues surrounding the case. We shall see, however, that these jurors do not rely fully on
the concept of justice. Moreover, because two jurors expressed a commitment to following
the instructions and to applying three criteria for finding guilt, we might predict that they
would be likely to disavow the relevance of the justice concept. In the view of the
majority, “justice” is contrasted with following the three criteria. To be sure, as we have
seen already, Juror 1 argued that at least the question of doing an injustice to the defendant
is irrelevant. Furthermore, the instructions provided for the legal accountability of these
two jurors’ position; thus they need no other recourse for making their vote to convict a
rational one. In fact, however, as the deliberations continue, the two holdouts eventually
agree to form a unanimous decision. Yet they continue to hold to their formal position,
in which following the official criteria is paramount.

Referencing the Knowledge of the Defendant

One of the two holdouts for conviction changes his mind about the conviction, but he
does not do so on the grounds of doing justice. We examine his arguments to demonstrate
two interrelated points. First, although jurors may arrive at a unanimous decision, they
need not do so on unanimous grounds. Second, the concept of justice is not used uniformly
in this deliberation. Juror 1, the one who changes his mind, does so within the framework
of the three criteria that had been provided to the jury; he does so, in other words, by
adhering to what we call the hardline. In excerpt 9 we saw how he asserted the essential
irrelevance of the concept of justice, or at least “injustice,” to the determination of guilt
or innocence. Accordingly, although he changes his mind to favor a verdict of innocence,
he does not alter his attitude with regard to the irrelevance of justice and injustice in
reaching that verdict.

An argument made by Juror 5, a member of the majority in favor of doing justice, is
instrumental in Juror 1’s change of vote. Juror 5 follows various jurors who, at several
points in the deliberation, have expressed doubt about the issue of “possession.” In
introducing his considerations of this issue, Juror 5 responds to Jurors 2 and 6 (see excerpt
11 above):

(12) 14:16:25

J5: Apropos what was suggested before, I think by uh by at least uh uh
two of you, I’m having a lot of trouble with that larger frame too.
I’m starting to ask some of these bigger questions about where is
justice? . . .

Subsequently J5 suggests that the question of justice need not be divorced from issue of
reasonable doubt. With regard to “possession,” Juror 5 draws a contrast between how an
ordinary adult might go out and buy a gun and how Larry bought a gun in order to fulfill
the requirements of a detective course as advertised in a magazine. After he articulates
this contrast, the following exchange occurs:
(14) 14:52:53

1. J1: I now I've changed my mind. I uh I have somethin' to say and
2. an' I kinda umh, what you said 'n, 'n my few comments I made and
3. I- it's started to make me think. And uh I believe that what you
4. said, y'know uh taking into account his mental ability and
5. everything, that it's just possible he purchased an item of this
6. course. Now those first two points you could uh uh define them
7. y'know, uh it says that he had ta know that he possessed a gun.
8. He mighta knew he possessed a piece of this course. Uh and an'
9. when you brought that up it made me think. And maybe he just
10. was simply following instructions, had no uh relationship, like
11. you or I or anybody else does in this room, between a gun and
12. bang bang. Uh y-know uh uh I'm sure at his age he's watched
13. plenty o' TV being uh uh whatever you see detective movies on, on
14. shows on TV, and every detective has a gun—his detective book,
15. he's now gonna be a detective, I'm gonna be a standup citizen
16. and be a detective, and the course says something about a gun,
17. he's gonna do everything he can to do it right and and I- I
18. kinda- I'm not sure acquitting him is doing him a justice, uh
19. I I I personally don't think it is, but I can see your point
20. and I can see a reason for somewhat of a doubt, however minor
21. it may be.

After announcing his change of mind and projecting that he has "something to say" on this (line 1), Juror I provides a justification that incorporates the argument made by Juror 5 (lines 3–12). He substantiates this reasoning by hypothesizing how watching detective movies might inform Larry's reading of the detective book (lines 12–18). Even if Juror I has decided to vote with the majority, however, he clearly disaffiliates from their position in regard to justice (lines 18–19). His "somewhat of a doubt" comes from seeing Juror 5's "point" (lines 19–21).

At this juncture, Juror 6 takes a turn, claiming that an acquittal does not mean that the "justice system" will abandon the defendant; indeed, the defendant's parole officer would have better insight into Larry as a result of the trial. Although Juror I then acknowledges that he can see "a little bit of what you're saying," he still disassociates himself from the relevance of justice. He concludes his narrative by returning to the question of whether the defendant really knew what he was doing:
J1: Did he know that that uh y’know uh a gun was purchased or did he purchase an item of his course? Uh so that’s my reason for changing my mind.

In short, Juror 1 manages to change his vote while retaining the primacy of the hardline or the judge’s instructions, and he orients himself to these instructions as the way to render his vote accountable.

*Convincing the Last “Holdout”*

Juror 1 therefore reconciles himself closely enough to the majority to vote for acquittal, but differentiates himself in terms of the grounds for doing so. Juror 4 also eventually votes for acquittal. How he comes to vote with the majority is a complex phenomenon in its own right; here we can only provide a brief sketch. When Juror 4, who has been a “hardliner” all along, says that he will vote with the majority, he suggests that he does so because he does not want to be the one to “hold up eleven people that are very strong in their feelings.” With evident emotion, Juror 4 says, “I will change and vote along with you to give a unanimous vote, but I will never feel right about it. I feel it was pushed by the jury on psychological and other feelings that I do not agree with. But I will go along with a unanimous verdict.”

Although the jury is willing to accept Juror 4’s vote, they are bothered by his affect and his claim that he was coerced. Accordingly, in a variety of ways, they attempt to convince him of the validity of his vote. For example, they engage in what Manzo (forthcoming) calls “testifying.” This term is meant not in a legal sense but in the more basic sense of telling how one reached a point of enlightenment. Thus, if the phenomenon has a point of comparison, it is to a religious rather than a legal event.

Testifying has three components. First, the testifier declares some commonality with others in the group and with the reality of the situation they face, including their legal mandate and the facts of the case. Second, the testifier narrates some personal experience that caused a change of attitude in relation to the legal criteria or hardline. Finally, the testifier contends that his or her decision is correct as to legal accountability. These procedures are evident in the testifying of both Juror 1, the other hardliner, and Juror 10, who favors acquittal on the grounds of doing justice. In responding to Juror 4, their turns occur in tandem with each other. We take them up in order (the brackets at lines 20–21 below indicate overlapping talk):

(16): 12:21:54

1. **J1:** Now I- I walked into this room feeling exactly like you do. Maybe even more so. Exactly like you do. And and some- a certain degree
2. of me still feels that way. Okay, but the only, how should I say it,
3. uh I take this situation, this second item. Second item. Now I-
4. I’m using, my making my decision purely by these three items. I
5. don’t care what was said in here today, I’m still trying’ to
6. rationale with these three items. And uh applying ’em to my six-
7. year-old son, which is in first grade, which is pretty near to what
8. we’re talkin’ about here. Uh now he could easily be led to purchase
9. something- Now I- I’m relating this with toys, every kid watches
10. TV, sees commercials on TV, they they- y’know there’s a lotta
12. shows that are nothing more than n- uh uh half-hour commercials,
13. they don't have a concept, they don't know what they're buying.
14. They- all they know is, they're buying a name. And that's why when
15. we started talking and- and mentioning that he bought a picture
16. and it's possible, son of a gun it is possible, you know, an' that's
17. that's sorta- it rang a bell that damn, it just could be, y'know
18. it- it uh it's possible, okay? I'm not saying it is, I'm not
19. saying it is, that that is out-and-out what went on. I'm not
20. saying that it wasn't. But what I am saying is that, it
21. J12: [You have a doubt]

The components of testifying here are as follows. In lines 1–3, Juror 1 proposes an identification with Juror 4 in feeling how the latter feels; indeed, in his opening statement (excerpt 8), he clearly favored conviction. Next, in lines 3–7, Juror 1 reasserts the primacy of the legal criteria for guilt in relation to his decision. Then he invokes his experience with his son (lines 7–10) and uses this experience to propose what “every kid” does as a result of watching television commercials (lines 10–15). Finally, this experience and this proposal are cited as a reason for accepting the possibility that the defendant “bought a picture” (lines 15–18). This is what “could be” (line 22); according to Juror 1’s earlier talk (excerpt 8, lines 3–4), it may raise a “reasonable doubt” as to whether Larry knew he possessed a firearm. Indeed, Juror 12’s interpretation (line 21) of Juror 1’s narrative is that he has a “doubt.” Thus Juror 1’s testifying suggests that a vote for acquittal can be consistent with the judge's instructions and with a hardline orientation.

Juror 10’s testifying turn of talk, following on Juror 1’s, has a similar organization but a different rationale.

(17) 15:24:13
1. J10: Uh I found myself feeling real down last night. I was aware of
2. the weight that’s on each one of us as a juror, and I was aware
3. of the facts y'know, all the evidence facts in the case, and I
4. thought hey, this guy’s guilty. Is there some way out of him
5. being adjudged guilty by us, could I live with, by writing guilty,
6. for this particular person? Boy I mashed around with that for
7. a while, and I said, if there’s any justice really, it’s in drawing
8. attention to this man’s personal situation and limitations.
9. Getting rid of the firearm is okay too. But judging him not
10. guilty, then I can believe in jury. I mean, that’s where I find
11. myself.
12. J1: Ah but, let’s say- let’s say we take a vote.
13. J8: (to J4) Do you feel better? worse? Y'know I think we have to
14. really consider how he feels.
15. J1: I don't think he really feels good about the decision.
16. J8: No no no but he- y'know he said he would vote guilty even though
17. he would feel bad and wouldn’t, y'know- and I- I don't feel good
18. about that.

In lines 1–2, Juror 10 identifies with the other jurors, presumably including Juror 4, because of the “weight” that is on each of them. She also reports her awareness of the facts, the evidence, and the defendant’s guilt (lines 2–4). Her personal experience includes
asking whether there was “some way out” of this judgment, wondering whether she could live with such a judgment (line 5), and “mash[ing] around with that” (line 6). Finally, in a respecification of a position that originated in embryonic form in the jurors’ opening statements, she concludes (lines 6–9) that justice would draw attention to the defendant’s situation and limitations. Thus she reintroduces the kind of extralegal factors that the hardliners considered irrelevant. In addition, Juror 10 implies that justice would permit “judging him not guilty” (lines 9–10), which in turn would permit her to “believe in jury” (line 10). Juror 10 thereby once more fits the giving of justice to the role of the jury; it is something they can do, given the circumstances of the case.

To depart briefly from our concern with the concept of justice, it is relevant to consider how this case was resolved. In the above excerpt, after Juror 10’s turn, Juror 1 (in line 12) proposes that they vote again. Jurors 8 and 1, however exhibit concern about Juror 4’s “feelings” (lines 13–18). Indeed, after this, the jury makes further efforts to convince Juror 4 of the legitimacy of his decision to vote. Ultimately Juror 4 admits to having a “very weak reasonable” doubt; it concerns the link between the defendant’s being a felon and the buying of the firearm:

(18) 15:29:42

1. J4: I think he knows that he was a felon, and I think he knew that he
2. bought the firearm. The possibility of the two together would be
3. the weakest point for me.
4. J2: Okay and I think- and I think that is for everyone- is uh one of
5. basic problems everyone’s having.

We do not wish to explicate the “real” reason for Juror 4’s doubt here. Rather, the jurors’ efforts to obtain some display of a “rational” rather than a “coerced” vote from him illustrate Garfinkel’s (1967, p. 114) argument that deliberative outcomes precede the actual decision in the sense that members of the jury, having achieved a verdict, work to assign that verdict its “legitimate history.” The jurors in this case could have voted an acquittal much earlier than they actually do; that they do not largely reflects their efforts to achieve unanimity in process after reaching the potential for a unanimous vote. Note also another feature of the above exchange: Garfinkel (1967) maintains that on the basis of the ways jurors determine “what actually happened,” they can expect “social support” for the verdict they choose; such an expectation does not waver even when the grounds for a decision change. On the contrary; when Juror 4 here exhibits the possibility of a “reasonable doubt” after “holding out” so long for the defendant’s guilt, Juror 2 proposes that his reasoning is shared by “everybody.” He suggests, in other words, that Juror 4 now is a part of the majority, not only because of his willingness to vote with the other members, but also because he shares a reservation they all have. Finally, Juror 4 nevertheless does not show the same concern for justice as do some members of the jury; his position remains closest to Juror 1’s in calling into question whether all three criteria for the defendant’s guilt have been met.

We can briefly summarize what we have heuristically called the stages of the deliberative process and the role of justice in those stages. First, in their opening statements, jurors took either of two positions. On the one hand, most jurors were elastic regarding the defendant’s guilt and posed a puzzle or dilemma, which involved searching for an account or a reason to acquit the defendant in the face of legal guilt. According to one of the

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8 Such explication could only be speculation at best. Juror 4 provides an account for his change of vote; we consider such an account not as a cause for his action but as a constitutive feature.
jurors’ opening statements, this search would entail invoking the role of the jury as having a conscience and not being a computer. Acquittal might mean correcting an “injustice.” On the other hand, two jurors maintained the hardline by being legalistic and favoring conviction. The role of the jury, in their view, was to decide the law in terms of evidence and testimony, not to speculate about the defendant’s intentions or understandings. Those matters were for the judge to decide. A second stage in the deliberation involved the discovery of justice, whereby jurors could find the place for making an exception or for reaching a solution to the puzzle. A third stage, referencing the knowledge of the defendant, involved remaining legalistic but finding grounds within the legal criteria for acquittal. One of the jurors who embraced “justice” was the first to articulate this position, which a hardliner came to adopt so that he could change his vote. A fourth stage, convincing the last holdout, did not entail obtaining agreement on the grounds of acquittal; it consisted of reaching a unanimous verdict while retaining an orientation both to the law and to justice.

CONCLUSION

We have suggested that “justice” is an archetype in social science, an inherited idea that investigators have found functional in assessing the merit of whole social systems, their specific arenas, such as criminal processing, and the relationships among people in small groups. Thus social science is replete with attempts to determine whether these systems, arenas, and relationships are just in terms of some model. Investigators seldom inquire into how members of society themselves might administer the concept when confronted not only with deciding the “facts” of “what happened” in some past event, but also with theorizing about why they occurred and, correspondingly, what the proper sequela are (see Garfinkel 1967, p. 111). This tendency to view the actualities of concerted activity through a stipulated model might be the product of a society and its professions, in which the “abstractive habits” of literacy have essentially “remodeled” (Havelock 1978, p. 337; our emphasis) those actualities into forms which would suggest that structure and organization are to be found elsewhere than in the concreteness of that activity itself. Thus, in measuring behavior according to their models, investigators not only presume the latter to be more organizationally real than the former; they also examine outcomes as structured according to exogenous variables (instructions, procedures, and sociodemographic statuses), which are anchored abstractly in purported relationships and happenings outside members’ own mundane talk and activity.

In Pitkin’s (1972, p. 274) terms, justice is something with which social scientists have “fiddled” in order to make it useful to their investigations. In approaching justice as a phenomenon of order, we wish to recover the concept at work in the activities of a jury’s own members. This does not mean that the social scientist is made hostage to ordinary people and to what they might say about justice; instead the strategy is to analyze the produced regularities of conduct (see Pitkin 1972, pp. 16–18). As Garfinkel and Wieder (1992) suggest, every possible “topic” of order, such as justice, is capable of respecification as a phenomenon of order. From this standpoint we can develop a sociology of justice that accords primacy to actual, formal practices of discourse and action.

Consequently our starting point is not with what people presumably find relevant. That is, we did not approach this jury deliberation with the assumption that we could investigate how well its participants administered “justice” or that any other construct was germane to their conduct. Neither were we concerned with what members thought about “justice” and related concepts. Rather, we asked how people act in concert with one another, and sought to discover what concepts emerge in and as their as the orderliness that constitutes
NOTES FROM AN ACTUAL JURY DELIBERATION

their everyday activities. Justice became part of the talk and activity of these jury members; it emerged formally as what they would do as a contrastive performance to following the facts of the case, observing a strict interpretation of the judge’s instructions, and finding the defendant guilty. For these jurors, injustice was what was done to the defendant under the circumstances in which he was arrested and tried; thus justice is also something the jury could do to counteract or offset this prior activity of the police and the prosecutor. Accordingly, doing justice is finding the defendant not guilty in spite of the strict interpretation of the facts and because of particular circumstances, which both provide a particular texture for the case as a whole and in turn receive their texture from the overall case. Finally, for these members, doing justice is how they find themselves as jurors. “Justice” is what jurors do. Formally, then, justice as a phenomenon of order in and as actual activity can have both a relational component, when it exists in contradistinction to other modes of activity, and a functional component, when it is the manner in which a group, in performing in a certain way, thereby defines itself.

Two complexities exist in regard to the formal employment of the justice concept in this deliberation. First, among at least some of those who felt they were doing justice, there remained a concern with the legal criteria. Juror 5, even though he held the position that a finding of not guilty would be providing justice, argued for having a “reasonable doubt” about the third of the points that would establish guilt. Second, not all of the jurors were sympathetic to the idea that they were doing justice. When the two holdouts changed their vote from conviction to acquittal, nevertheless they adhered to the “hardline.” This is not to say that they were unconcerned with justice, but that they proposed it as irrelevant to the decision. Accordingly justice was neither a strict alternative to being legalistic nor an all-pervasive concern of the jurors; more fundamental was the legal accountability for their verdict.9 For the two holdouts, the judge’s instructions provided such accountability. For those who were dissatisfied with the outcome which those instructions otherwise might dictate, doing justice provided them with a “place” to simultaneously admit and transcend the validity of the instructions, according to a principle (justice) that is also embedded in the legal system. In all, then, the jurors never lost sight of the legal framework and worked consistently to fulfill the image of the “good juror” that this framework provides (Garfinkel 1967). This finding suggests that their deliberations also contained a strong moral component.10

Finally, we propose that a sociology of justice necessarily starts with what Garfinkel (1988) discusses as phenomena of order; in the actualities of concerted activity, in the particularities of conduct, a society exhibits how it is organized with respect to such a concept. The sociological quest for justice, rather than being guided by abstract models

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9 Therefore the jurors’ actions in this case do not fit the category of jury nullification, whereby jurors acquit defendants in spite of the state’s technical proof of guilt. This practice has been noted throughout much of Anglo-American legal history (see Scheflin and Van Dyke 1980), as in English jurors’ unwillingness to convict defendants in cases where the death penalty would be prescribed for minor offenses (Hay 1975), jurors’ refusal to convict for violations of Prohibition (Sinclair 1962), and juries’ rejection of decisions of guilt in Vietnam-era political trials (Scheflin 1972). Some members of this jury who favored acquittal on the basis of doing justice may have been oriented to nullification. More characteristic, however, was the adherence to legal rationales and procedure, even among those who invoked justice as a resolution to the dilemma of seeing factual guilt and yet feeling ambivalent about conviction.

10 This observation brings into question the orthodox sociological view of jurors’ expertise and ability to provide “legally valid” decisions (see Reskin and Visher 1986), which suggests that jurors do not display much expertise in legal reasoning. That view, along with charges of racial or gender-related bias, has cast a cloud over the jury system. (For a more thorough discussion and critique of the so-called “amateurism” of the jury, see Galanter 1990, pp. 201–202). Our research suggests that jurors display a profound appreciation for legal accountability even in the course of aiming to transcend it. Our point here, however, is not to defend the jury but to suggest that analyzing actual deliberations reveals an orderliness in the deliberation process that may be missed in other types of investigation.
and definitions, can involve further uncovering of the "grammar" of the concept. In Wittgenstein’s (1958) terms, this process entails analyzing the patterns and regularities with regard to its use—the practices of perception, talk, and action which are known in terms of their employment but which do not necessarily operate at the level of discursive awareness (see Pitkin 1972, pp. 82–83). Our study has scratched the surface of such a grammar. In examining deliberative discourse, we study the yield from jurors’ own perception and analysis of a trial, and the events within the trial. Further phenomenal elucidation of “justice” would involve understanding its role in that more primary perception and analysis.

REFERENCES


