Some dialogic aspects of monologic argumentation in the courtroom

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SOME DIALOGIC ASPECTS OF MONOLOGIC ARGUMENTATION IN THE COURTROOM

Although the summation phase of courtroom argumentation is fully monologic in nature, it has important dialogic implications for how well a jury will adhere to a given point of view during the deliberation phase. The most successful summations would seem to be those that invite the jury members to play an unspoken role (through their internalized responses) in the creation of a narrative that provides not only a credible explanation of events, but even more importantly emotional coherence as well. Narratives that are emotio-explanatory in nature seem to predict better jury adherence to their version of events, because they draw on the values, beliefs, and experiences of the jury and thus involve the jury more fully in their construction. Such stories also show a greater incidence of direct "you" pronouns used in addressing the jury, thus creating an identifiable role for the jury as a silent "dialogue" partner during the story construction. These "you" pronouns are also more fully bound up with "I" and "we" pronouns, thus creating a feel of inclusion in the whole courtroom experience for the jury. Such strategies thus give a "dialogic" feel to monologic discourse and thus help to shape the truly dialogic discourse that will follow during deliberation.

Keywords: summation phase, jury identification, jury adherence, narration, explanatory coherence, emotional coherence, pronouns of address.

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The well-known O.J. Simpson murder and civil trials, held in America in 1995 and 1997, have spawned over 30 books and have been the subject of hundreds of analyses and articles in fields ranging from legal forensics to dialogue analysis; from race relations to gender analysis; from questions about burden of proof even to studies in poetics. Such a large body of primary evidence – the trial transcripts alone number in the thousands of pages – has much to offer us in examining the purpose and shape of argumentation in the courtroom, both in its dialogues and in its monologues.

In 2000, Janet Cotterill used the Simpson transcripts to identify, among other concerns, the stages of monologic discourse and dialogic discourse and found that the closing summations were monologues. I would like to address here, however, the "dialogic" factors that shape these same closing arguments, or summations, and the relationship between both explicit and implicit invitations offered throughout to the jury to enter into a shared construction – however monologic on the surface – of a persuasive narrative. The more coherent this narrative for the jury, the more likely it is to predict jury adherence to its explanation of events throug the deliberation phase. And that requires skill in projecting a dialogic give and take in shaping the jury's responses and beliefs, without any dialogue actually ever taking place.

Just how this monologic building of a coherent narrative works as an implied dialogue, and in particular, how it functions both as an argument and as an invitation to the jury to take part in the construction of that argument, is the subject of this article. After extracting a paradigm from two of the Simpson closing arguments, I would then like to apply it to two other cases as a way of testing its hypothetical value. My purpose here is to construct one way of understanding how one kind of courtroom argumentation – the monologic summative phase – might work dialogically.

"Dialogic" Constructions of Identity

It is clear from the comments made by the various lawyers in the Simpson trial that they themselves conceive of the summation as a conversation in which the jury takes an active, if unspoken, part. For example, the Chief Prosecutor Marcia Clarke begins her jury summation as follows:

> I feel like it has been forever since I talked to you. ... at this moment in the trial I always feel the same. I feel like I want to sit down with you and say, 'And what do you want to talk about?' ... I want to sit down and talk to you and tell you, 'What do you want to know? What do you want to talk about?' Because that way I don't have to talk about stuff you don't want to hear, stuff that you don't want explained, stuff that you are not interested in. ... Please bear with me because I am not a mind reader and I don't know." (Walraven 26 Sept 1995: 16)

Or consider Prosecutor Christopher Darden's comments:

> This is my time to talk. Yesterday somebody said that you can't quiet a man's voice in a court of law. This is my time to talk and I want to talk to you ... this is my last opportunity to speak with you...." (Walraven 29 Sept 1995: 5)

> Let's talk about some of the evidence. (Walraven 29 Sept 1995: 9)

Clarke emphasizes the words "you" and "talk about" in "What do *you* want to *talk* about?" (italics mine). Furthermore, the phrases "talk about," "talk to" and "speak with" all imply give and take, interaction, dialogic turn-taking, rather than an insistence on a monologic interpretation. All summating lawyers will further the impression of dialogue as "talking to" the jury via a highly suggestive and simultaneously independent and inclusive "you," a form of address that in English can be both singular and plural. This personalized form of address not only invites the jury, right from the start, to take part in the construction of the narrative that will follow: it also legitimizes each jury member as a participant, a respondent, however silent and internalized their responses may be.

As their summations progress, lawyers for both the prosecution and the defense link this constructed "you" to other pronouns as well, most notably "I" and "we" and their declined forms (see Table 1). By doing so, they create and recreate over and over again demarcations of identity that not only may shape the kinds of unspoken responses they are looking for, but also give the jury considerable freedom in making those responses. The "you" can mean the jury members either as individuals or as the jury group. As a group called "the jury," these 14 people (12 jurors and 2 backups) can be either set apart as a separate group, as in "you" versus

"we" others here in the courtroom. Or they can become part of a sweeping "we" that includes all the courtroom players. Furthermore, the "you" can evoke other subsets of identities as well: 9 members of the jury were black, a situation that Cochran especially would take full advantage of and that Clark would be hindered by, as we shall see.

Table 1: Constructs of Identity and Corresponding Pronouns

I, me, my, etc.	you, your, etc.	inclusive we, us, etc.	non-inclusive we, us, etc.
speaker refers specifically to self	speaker directly addresses the jury members	speaker includes jury members in an "inclusive" we	speaker refers to those in the courtroom other than the jury
Example: "While *I*'m talking about the constitution, think with *me* for a moment...this is the prosecution's burden and *we* can't let them turn the constitution on its head" (Walraven 27 Sept 1995, 27, emphasis mine)			

Armed with such flexible and fluid constructs of identity, the lawyers can go on to build a narrative whose coherence and cohesion depends in large part on the responses of the jury members as "dialogue" partners. Part of the skill of the lawyers at work is exactly to "read" the jury – using both their own skill and supraverbal cues – and to determine what the jury might reasonably need and want to hear at any given point. In short, to "author" the responses of the jury into the story construction, as surely as if the jury members were themselves speaking. The jury is thus further empowered as a "dialogue" partner: if what *has been said* accords with what they believe should be said, then what *will be said next* will seem as if it comes in response to their own ideas, thoughts, and concerns. Without this genuine connection between the summating lawyers and the jury members as partners in a narrative construction of the case at hand, the "I-we-you" triad becomes a limited and powerless grammatical construct, mere technique, a rhetorical frill.

The OJ Simpson Murder Trial

In the Simpson case, defense lawyer Johnnie Cochran was much more skillful than Marcia Clarke at "reading" the jury and creating a partnered, responsive role for the jury (implied dialogue). Through a skillful selection of evoked experiences, he created a collective identity for the jury that enabled them to see Simpson as but one more victim of the deep racism that still plagues America and divides blacks and whites, even today. Notice how the personalized questions here function to remind the jury members of the collective and individual suffering most of them have experienced, either personally or via a family member or friend, and to legitimize that experience as essential to understanding the case:

> Let me ask each of you a question? Have you ever in your life been falsely accused of something? Ever had to sit there and take it and watch the proceedings and wait and wait and wait, all the while knowing that you didn't do it? All you could do during such a process is to really maintain your dignity, isn't that correct? Knowing that you were innocent, but maintaining your dignity and remembering always that all you're left with after a crisis is your conduct during. So that's another reason why we are proud to represent this man who's maintained his innocence and who has conducted himself with dignity throughout these proceedings (Walraven, 27 Sept 1995: 27).

Furthermore, his rhetorical style resonated over and again with a "call and response" technique often used by black ministers when delivering sermons, another reminder to the overwhelmingly non-white jury of yet another black construct of identity.

If Cochran's verbal techniques here can also evoke not only an awareness of, but moreover an articulation of the values and beliefs at work here, so much the better. The greater the coherence of a set of values/beliefs that support narrative coherence, the more likely the jury is to "buy into" that narrative as not only the best narrative, but the only narrative that makes sense. The implied inclusiveness of the direct address "you" may well start out to be little more than a softening-up tactic, but it will end up playing a more genuine role than that: at its best, the inclusive "you" invites each jury member to bring his or her experiences and ideas into play in the construction of a particular reality.

By emphasizing over and over again the sufferings of blacks at the hands of whites, Cochran skillfully directs the "you" of the jury into the role that he wants them to identify with, that of the falsely accused black being railroaded by the police. I could fill pages here with statistics from various human rights groups about what it means to be black in America, but a few examples should suffice. In one report, blacks made up 79.2% of *all* police pullovers on one Maryland interstate, although blacks make up only 13% of the total population. The phenomenon is so common that it is called "driving while black," a play on "driving while drunk" (Lamberth: C1). A whopping 52% of the people on death row since 1976 are non-white (Death Penalty Information Center). This pattern of racial bias caused the death penalty to be briefly outlawed in 1972, only to be restored again in 1976. So many thousands of black men have been lynched in the last century that this phenomenon is called the African-American Holocaust by some. When Cochran exhorts the jury several times to "do the right thing," he is making a powerful reference to a Spike Lee movie in which four white policemen choke an angry young black ghetto man to death, simply for the crime of playing aggressive rap music too loud on his boom box. Such references remind the jury over and over again of their own experiences as victims, of what it means to be black in America today. And his strategy paid off: one juror was reported as saying, after the verdict, "We have to take care of our own."

Even the famous rap phrase "If it doesn't fit, you must acquit" that Cochran coined – surely not on the spur of the moment – when Simpson was asked to try on "the bloody glove" found behind his home right after the murders, has special implications for blacks. Well aware that rap is a "black" form of music, Cochran uses this phrase or a variant of it some 47 times in his summation. Why? According to Steven Best and Douglas Kellner, "much rap music provides a spectacle of self-assertion with images of black rap singers threatening white power structures, denouncing racial oppression and police violence, and celebrating a diverse realm of black cultural forms ... rap provides a spectacle of revolt and insurrection ..." (Best and Kellner: 5). Signifying a "great refusal" to submit to domination and oppression, rap represents not only black anger but also the power of blacks to bring about change Cochran's phrase surely both authorized and illustrated the need for just such a power, especially as the evidence grew of police misconduct, even to the planting of evidence (e.g. the bloody glove).

The "you" here not only enabled the jury members to position themselves within the larger and more capacious narrative of what it means to be a victimized black in America still today, it also empowered them to position Simpson in that same narrative as well and then to see themselves as his rescuers. This wasn't just a case of redressing a wrong: the jury must surely have seen it as a case of preventing a wrong from occurring, the wrong person being found guilty and thus being sent to the death chamber to pay with his life for a crime he did not commit.

In contrast to Cochran's highly personalized and seductive narrative style, chief prosecutor Marcia Clarke's style seems dry, uninvolved, and even disconnected from the jury, despite her opening and personalized plea. This difference shows up, right from the start, in her weaker "I-you-we" relationship, as can be seen in a comparison of her opening summation with Cochran's (two pages each). While she uses the "you" as much as Cochran does (92 to 93 times), she connects this personal address to herself and others far fewer times (see Table 2). Thus the jury is distanced from, rather than drawn into, the narrative under construction.

Table 2: Identity Constructs: Comparison of Summation Openings (about 2000 words each)

	I, me, etc.	you, your, etc.	inclusive we, us, etc.	non-inclusive we, us, etc.
Clarke	27	92	8	15
Cochran	56	93	26	17

In fact, Clarke takes pains to ask the jury to distance themselves from their own emotions and visceral reactions to the whole grisly case. She quite specifically asks them to *disengage* on the personal level, and charges them

> to use your logic and your common sense (Walraven 29 Sept 1995: 36),

thus emphasizing an intellectual role rather than an experiential and personal one.

> "Most important is that you base your decision on what is there, what is really there, not on what some lawyers tells you is there or not on what you wish was there, but what is on *really* there. I know you will do that." (36, italics mine)

Such a role may well fit Clarke's intellectualized notions as to what constituted proof in this case (extensive DNA testing, for example). But Clarke's heavily scientific approach was overwhelming in detail and she comes off sounding more like a school teacher than as a dialogue partner.

This lack of connection with the jury shows up as a diminishing "I-you-we" triad. As the summations progress, Clarke's use of the "you" and the triad further deteriorates, indicating a loss of any deeper dialogic aspect. Compare, for example, two passages of similar length about the same subject, the significance of barking dogs on the night that Nicole Simpson Brown was murdered. Cochran uses personal pronouns 75 times, Clarke only 39 times. Her use of the "you" is the weakest of these, at only 9 instances total.

Table 3: Identity Constructs: Barking Dogs Passage (approximately 1000 words each)

	I, me, etc.	you, your, etc.	inclusive we, us, etc.	non - Inclusive we, us, etc.
Clarke	12	9	5	18
Cochran	11	47	0	17

As the "you" begins to disappear from Clarke's "dialogic" monologue, she starts emphasizing the "I-we" relationship, at times to the exclusion of the you, as in the following comment:

> I want to stick with the timing right now so *I* don't get distracted. (Walraven 26 Sept 1995: 26, italics mine)

It is almost as if she is talking to herself, and the jury is no longer there. Surely such verbal exclusion would make the jury feel distant and disempowered, especially in comparison to Cochran's more encompassing and participatory forms of address.

Finally, however, Clarke's fact-based approach fails because the same facts that point to Simpson's guilt can, in this case, equally encompass a narrative in which Simpson was framed by the police and hence is innocent. Given a choice of competing courtroom narratives that are equally logical and rational, a narrative that is emotionally coherent for the participant will always win out over one that has only explanatory coherence, according to Paul Thagard (forthcoming), because the emotional not only includes explanatory coherence, but also interweaves the wishes, beliefs, attitudes, experiences and values of the jury into the narrative as well. In short, Cochran's story makes more sense than Clarke's, *in light of the jurors' individual and collective experiences.* Hence an "emotio-explanatory" coherence activates a broader range of potential responses, ones that may be unspoken at the time but which are nonetheless real. Because such a narrative calls forth more responses from the jury, they become more emotionally involved in the unfolding narrative. As a result, such a narrative will always seem the richer and fuller one, the more complete narrative, and thus the more compelling narrative. The more extensive and suggestive "you" in Cochran's narrative is simultaneously both a signal of the successful construction of just such an "emotio-explanatory" narrative underway and a means to just that end.

A Paradigm and the Case of the Disputed Inheritance

Such "dialogic interactions" during the essentially monologic summation phase, as I have described above, need to be tested against a great many cases, if we are to be able to extract any useful and paradigmatic ideas about how they work. At this point, however, it seems reasonable to hypothesize the following characteristics as operational:

1) A defined and limited audience (a jury, or a judge) is addressed as "you," a direct and personal form of address that creates flexibility of purpose and identity and allows for a range of participatory but unspoken responses, the sum of which will become spoken at some point in the proceedings (for example, during the deliberation phase).

2) This "you" form of address involves its recipients (the jury as a whole or as individual members, a judge) to take part in creating a courtroom narrative whose coherence, and hence credibility, depends on their acquiescence to the role in which the "you" casts them, because...

3) this co-constructed narrative legitimizes their own role in the proceedings precisely because it makes sense out of their own values, beliefs, experiences and ideas, thus legitimizing both their emotional and intellectual understanding.

4) Finally, the narrative so constructed fits into an even larger, more convincing social narrative that justifies and supports the immediate, case-bound narrative, and thus one that further binds the jury to its interpretation of events.

Such a paradigm raises, of course, questions about jury/judge manipulation, particularly when there is serious dislocation between narrative trajectory of the summation and the questions at issue that center the trial, as there was at the Simpson trial. How could the jury "'stop' police brutality or racism in America by finding O.J. Simpson not guilty?" asked poet and critic Marjorie Perloff afterwards in a biting commentary in which she called the courtroom proceedings, and especially the summations, "a complicated network of language crimes" (Perloff: 2). By "language crimes," I think she means exactly the kind of verbal tactics that I am hypothesizing are at the heart of the "you" formulation in addressing the jury, ones that led them to accept things as true, in her opinion, "without the slightest resort to logic or simple common sense." Such truths depend, however, on the perspectives at work. Perloff believes the real question needing to be asked was "If Mr. Simpson didn't commit these murders, *then who*?" But once the jury was led to formulate a different question as the essential question at issue – "Was Simpson framed by the police?"–and come up with the answer "yes," the "then who"question loses relevance. It wasn't the jury's job to find out who committed the murder, but only to determine whether the man sitting before them, Simpson, was the one who did or not. In that regard, they performed admirably as a projected dialogue partner put through the paces of decision-making orchestrated by a brilliant monologic performance by Cochran, among others of the defense.

I'd like now to look at another case in which the resulting decision also shows a "dislocation" from one perspective, but a perfect "location" when the deeper implications of the direct "you" address is taken into account (CH No. 96-67, Circuit Court of the County of Westmoreland). Here the audience is a judge who alone will make a decision. The judge has been asked to change his mind about his own prior ruling in an inheritance dispute. The side that favors the ruling (Brown) speaks first. As Brown replays the previous hearing and ruling, he lays the groundwork for the narrative in which the judge has already brilliantly resolved a messy quarrel in a true Solomonic fashion. Using a direct "you" address and dialogic techniques in a monologic situation, Brown's quite blatant goal here is to delineate a role for the judge in which the judge can stand by his previous ruling.

Brown begins by reviewing the previous hearing and ruling:

> I was instructed by my client at that point (the first hearing) to take a (different) position. (p. 7)
>
> But you in your wisdom, Your Honor, saw right through the arguments of both plaintiffs and defendants and cut to the quick. (p. 9)
>
> Both sides "tried to bring you down ... we also tried to use the rules of construction to get you to see it our way." (p. 9)
>
> But "you were able to look at it as a big picture. Look at the big picture. Find the big, overriding – the shining star, the overriding intent, the general principle of that will." (p. 9)
>
> But, Your Honor, you've ruled now. You didn't rule exactly the way my client wanted; you didn't rule exactly the way defense counsel wanted. But what you did is you followed the law. (p. 10)
>
> That's what you did, Your Honor. You went straight to the big picture in the previous hearing. ... We complicated it, Your Honor, and you simplified it. And you found that there was a key. (p. 11)
>
> Although it wasn't what I would have preferred, it isn't what the other side would have preferred, but what you've done is what a judge is supposed to

> do, is to rule the way the law is without any bias towards either party (pp. 14-15).

Brown's arguments clearly position the judge in a strong and favorable light. Interestingly, Brown's use of the inclusive "I" and "we" suggests that all of the lawyers in this case (there was an Ad Litum lawyer present as well) were mistaken in their prior arguments and that only through the judge's great insight has a middle ground been found that cuts through the messy quarrel and that should satisfy both sides – although it does not–, as the new hearing indicates. The inclusive "you" thus strengthens the narrative, because it is positioned above a non-inclusive "we" that is being deliberately cast here as having been mistaken.

At first, it seems as if the judge will in fact concur with Brown's interpretation. At the end of this monologue, he turns to the opposing lawyer and says, simply:

> Thank you, Mr. Brown. Mr. Smith, he says I'm right. That's a right [i.e. very] powerful argument, I think (p. 16).

Smith's task here is now made doubly difficult by the successful construction of a "we-you" narrative that has implications not only for the immediate case at hand – this particular judge could see clearly when others could not – but also for the position and wisdom of judges in general. This is a neat verbal turn that results in another verbal and dialogic turn: Smith is now forced to challenge the judge directly, rather than the other side. As a result, Smith makes a near fatal mistake, by accusing the judge of sloppiness of thought couched in a direct "you" address:

> "And so when you ruled, you said that each of them get [x], and then almost as an afterthought, it seemed to me, you said oh, and [y] will be applied toward the forty percent" (p. 18).

Although the judge is not a true dialogue partner here, he is nonetheless personally piqued enough by this accusation to interrupt Smith's monologue here to say "That definitely was not an afterthought" (p. 18), and to cut immediately to the heart of the hearing with a sharp question, "Is that the main issue here?" (p. 18). You can almost hear his thinking: if so, then there is no reason to proceed.

Against all expectation, the judge does rule to rehear the case because, in his own words,

> Well, I think we can reconsider. I have a pretty liberal policy, and I don't want to encourage that, but I recognize that sometimes – this is a consequential matter. I don't have any problem reconsidering. I will do that, and you don't need to respond if you don't want to (p. 31).

Although such a decision would seem to dislocate the constructs of identity and line of reasoning that Brown used to evoke participation and agreement with from the judge, another way of reading this decision is that it accords quite well with Brown's arguments: a wise and Solomonic judge *will* decide to reconsider his decision, precisely because he is so wise and considerate. And ultimately, altough he did reconsiders the judge stood by his initial decision, thus siding with Brown.

As to be expected, these participatory, "dialogic" relationships show up in a more present and tighter "I-you-we" triad as well:

Table 4: Comparison of Identity Constructs in the Inheritance Dispute

	I, me, etc.	you, your, Your Honor, etc.	inclusive we, us, etc.	non-inclusive we, us, etc.
Brown	24	57	5	29
Smith	38	26	0	17

Conclusion: The Emmett Till Trial

I'd like to conclude with a case that played a small but symbolically significant role in the Simpson trial, the Emmett Till murder trial. Till was a 14 -year- old black boy from Chicago who was visiting relatives in Mississippi in the summer of 1955. On a dare, he expressed his admiration for a white woman, a store clerk, to her face. Her husband and brother heard about his comment, and two days later they dragged Till from his uncle's wooden shack and so brutally tortured him before mur-

dering him that his face and entire body were virtually unrecognizable when found. His mother insisted on an open casket funeral, so "all the world can see what they did to my boy." Stomach-turning photographs were also nationally circulated. The whole affair was shocking to America, but especially the trial. The husband and brother had bragged to their friends and relatives about what they had done. There were multiple witnesses to their actions. Yet the jury unanimously found the two men "Not Guilty," using the slimmest of reasons: "the state failed to prove the identity of the body."

This decision would surely qualify as jury nullification. The trial transcripts were not preserved, they were destroyed after the trial. Yet it is commonly acknowledged that the jury's decision was a foregone conclusion, that given that particular culture at that time in America, it would have been impossible to send two white men to their deaths for killing a black. Blacks were still considered subnormal in that part of the world, not quite human, and definitely threatening. The boy had "attacked" one of their women: not to kill him would have been like not killing a wild cougar that had attacked a human. Even without the transcripts, we can well imagine the kinds of things the defense lawyers said. And, in fact, a few comments from the trial are still on record via newspaper reports, including the following from the defense's summation:

> *Your* fathers will turn over in *their* graves if [Milam and Bryant are found guilty] and *I*'m sure that every last Anglo-Saxon one of *you* has the courage to free these men in the face of that [civil rights] pressure (Williams 1987: 44).

What is most interesting here, however, is the way in which the "conversation" of one trial (the Till trial) shows up in the "conversation" of another, the Simpson trial. Cochran made a point of saying to the jury:

> one of you is from Missouri ... who's from Missouri here ... (Walraven 27 Sept 1995, 27).

I can see no other reason for him to do that, other than to remind the jury members of the Till murder and the horrifying history of lynchings in that part of America.

To conclude, it is just such submerged "dialogues" that determine what is said in a summation. What lawyers say in a summation has much to do with the kinds of responses they want to activate, the submerged and invisible "dialogues" that they want to energize (create). How successful they are determines, in the end, whether a court case will be won or lost. Cochran's "dialogic" moves during his summation were so extensive that one could easily write a book on the realities that existed behind his web of references, all intended to draw forth a response. Even in the much more simple case of the inheritance rehearing, the judge was responding to a sophisticated nexus of ideas, both personal and professional, about what judges do and how they should do it. As we seek to understand how arguments work in the courtroom and how court cases are won and lost, it seems essential to look at these "hidden" dialogues.

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