

Truth and Proof in a Lawyer's Story

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Abstract

There is a distinction between commonly known truth and truth as established for legal purposes. The latter requires proof. This distinction between ordinary truth and legal truth is available to speakers as a discursive resource (although differently available in different cultures). In this paper, after a brief discussion of some matters relating to evidence, proof, and truth, I analyze a short, generic story told by a lawyer in the Federal Trade Commission, in which the representatives of companies allegedly violating the law say "You can't prove it." The violation is relatively minor and there is some controversy about whether to include the charge in the case. The story, I argue, provides a motivation which goes beyond the strictly legal. The company representatives capitalize on the distinction between "mere truth" and legally established truth. I conclude with a discussion of the place of proof---the word, its variants, and the things which constitute proof---in conversation, including a discussion of sequential placement, deniability, nonverbal signals and implicature, and a distinction between "official" and "unofficial" communication. It is the disparity between their official and unofficial stances that gives the company representatives' behavior its distinctive interactional force.

Keywords: Narrative; Truth; Proof; Implicature; Conversation analysis; Federal Trade Commission

1. TRUTH AND PROOF

Legal truth in modern societies is established through a formalized process, constrained by rules of evidence and court procedures, and filtered through lawyers' jargon. These legal levees secure the courtroom from the undisciplined flow of worldly chatter. Truth does not leak in from the outside; it must be internally produced. A claim that might be true for some or all other practical purposes may not be true for judicial purposes. "Mere truth" is legitimized and made official by being proven in a legally acceptable manner. The existence of this distinction between mere truth and legally-recognized truth presents speakers with a new discursive resource. They can now, if they wish, depict a state of affairs as factual and yet not true for legal purposes. Such a depiction has its interactional uses; among them, as we shall see, challenge and derision. That which is asserted but not yet true for legal purposes is that which must be proven. "You can't prove it" becomes the motto of the defiantly guilty,

the taunt of those sheltered safely behind the barriers of the legal system. At issue is not what is known but what can be proven in court.

There is a third category of truth—"actual" truth—that is worth mentioning as a point of reference. Actual truth is what is objectively, ultimately true. Some post-modernists, of course, have questioned the very notion of actual truth, suggesting that truth is always and inevitably culturally relative. There is no need to take a position on this matter here; the concept of actual truth is all we need for present purposes. The process of establishing legal truth is an ordered attempt to achieve actual truth. Mere truth is an assumption that what we "know" is indeed actual truth. So, I am not claiming that mere truth is (actually) true, but only that it is generally accepted as true.

My interest here is in discourse, interaction, and narrative. The formal relation between truth and proof is not my primary subject matter, nor is the legal relation between proof and evidence. Philosophy and jurisprudence lie outside my field of competence. Nevertheless, the story we will examine is intelligible only by reference to the abstract relations of truth, proof, and evidence, and so that is where we will begin.

We need first to specify certain logical relations between truth and proof. These relations are generally understood, and form the basis for our talk on these matters.

1. If a proposition, *p*, is proven, then it is true. It follows that, if *p* is untrue, it is not proven.
2. It does not follow that, if *p* is true, it is proven, although it may be. It does not follow that, if *p* is unproven, it is untrue, although it may be.
3. If *p* *might* be untrue, then it is necessarily unproven.

From a discursive point of view, these principles may be viewed as rules for speaking. So, one could not literally say "It is proven, but false." Of course, one could say "It is 'proven', but false." The scare quotes around "proven" suggest a nonliteral usage (something like "falsely thought to be proven") and would be expressed in speech by features of articulation and/or by further explanation. These logical principles are constantly invoked in proof talk, although usually not made explicit. Although they may be topicalized, as I have done here, they are ordinarily unstated conditions for intelligible talk.

The passage from "mere truth" to legally proven truth requires clear, irrefutable, and conclusive evidence that the proposition is true. "Conclusive" evidence is not merely demonstrably true in itself (i.e., irrefutable) but sufficient to establish that *p*, the central and crucial accusation, is true beyond a reasonable

doubt. One might, for example, be able to demonstrate, irrefutably, that Reverend Green was present at the scene of a murder without showing beyond a doubt that he was the murderer. After all, Colonel Mustard and Professor Plum were also present. In such a case, the evidence against Reverend Green in relation to the allegation that he is the murderer, is not conclusive. Argument from intuition, hearsay, personal experience, anecdote, or (sometimes) common sense will not do for purposes of legal proof.¹

Not all evidence which is legally dispositive (i.e., sufficient for purposes of reaching a legal decision), however, constitutes proof. In the American system, there are three standards of evidence, each sufficient for certain purposes. The least stringent standard is "preponderance of evidence." This is the standard which is often applied in civil cases. Evidence which is dispositive under this standard will not necessarily constitute proof in the usual sense of the word (i.e., a clear and reasonably certain demonstration of truth).² The next level is "clear and convincing evidence." The most stringent standard, for legal purposes, that which is applied in criminal cases, is the "reasonable doubt" criterion. Beyond that is absolute certainty (if such a thing is possible), but that has no application in the legal system. To say that something is proven would seem to require, both in common and legal usage, and in my own present usage, that its truth be demonstrated beyond a reasonable doubt.³ And when I say that proof requires conclusive evidence, I mean evidence that achieves this standard, as against evidence which might be legally dispositive under, say, a preponderance-of-evidence standard.

This brief discussion of the logical semantics of truth and proof and the legal standards of evidence, has been abstract, without context, and without

¹ This account is a somewhat idealized. In practice, common sense, in particular, often plays a part in court proceedings and deliberations. In fact, legal proof itself rests on a basis of common sense; this is implicit in the very concept of "reasonable" doubt (Gluckman 1963). Also, attribution of motive, frequently an important element in court cases, is pretty much a common sensical operation

² In law, proof is sometimes considered to be any evidence carrying probative weight; thus, perhaps, less certain than proof in the sense in which I am using the word. In such a case, it may be that the claim that an item of evidence is "proof" would not be equivalent to stating that the matter is proven.

³ Proof, according to Miriam Webster online, is "The cogency of evidence that compels acceptance by the mind of a truth or a fact."

interactional content. It provides only an initial basis for the analysis to follow, which is of an actual event, a story told by an attorney in the United States Federal Trade Commission. My interest is not in proof as a formal concept but in proof as an item of discourse, deployed as a functioning element of practical talk.

2. THE CHARGE

For three months in 1977 and five more in 1982, I studied, as an ethnographer, the life and work of a division of the U.S. Federal Trade Commission.⁴ I observed the lawyers and other staff at work, did interviews, helped with simple tasks, ate lunch with them and participated in social events, and, most importantly, attended and recorded meetings among the staff attorneys. On two occasions, I was present at meetings between staff attorneys and company representatives (also attorneys). I also interviewed various persons in other divisions and at higher levels of the FTC bureaucracy. This paper is, in large part, an account of a small section of a lengthy meeting among division lawyers. The participants are, in order of authority, Helen, the director of the division, Ben, the assistant director, Paula, the Equal Credit Opportunity Act "program director" in the division, and Mary and Judy, staff attorneys. They are discussing the draft of a memo charging the XYZ Loan Company with violations of the Equal Credit Opportunity Act and its associated regulations and outlining the case against the company. The memo will be sent on to the next level of the agency, the Office of the Director of the Bureau of Consumer Protection, and eventually, if it is approved by the Director and the Commission, form the basis of either a consent order with the company, involving penalties and prescriptions for future behavior, or, if no agreement can be reached, litigation.

The issue currently under discussion is the company's violation of a rule that states that "if an applicant applies for an individual, unsecured account, a creditor shall not request the applicant's marital status, unless the applicant resides in a community property State or property upon which the applicant is relying as a basis for repayment of the credit requested is located in such a State" (United States Federal Register 1978: 458). The division had recently carried out an investigation of XYZ, using dummy loan applicants (which they

⁴ For previous publications dealing with this work, see Bilmes 2008, 1995, 1985, 1981; Bilmes and Woodbury, 1991. I have also used data from this fieldwork in several other articles.

referred to as "auditors" or "testers"), that demonstrated that XYZ was violating this provision of the regulations, along with several other provisions. However, a controversy had arisen among the division attorneys working on the case as to whether to include this violation as a formal charge against the company in the case that the division was constructing.

The argument against including the charge was that it was merely "technical," that is, that there was no evidence that the violation had led to discrimination or any other harm to consumers. Various arguments were raised in defense of the charge. One was that there was in fact a kind of injury involved in that consumers who were asked about their marital status and subsequently denied credit would have no way of knowing that they were not discriminated against on this account, and that this uncertainty constituted a psychological injury. Another, perhaps more compelling, argument was that the provision against asking about marital status was included precisely because it is difficult to prove discrimination directly. The regulation is meant to relieve the FTC of the burden of showing actual harm, by depriving companies of the information necessary to discriminate.

In the discussion at hand (see Appendix), Paula points out that Tim Muris, the Director of the Bureau of Consumer Protection, had indicated that he was not averse to including "tagalong" issues, that is, charges that were not in themselves sufficient on which to base a case, because they do not generate clear and direct consumer injury, but which are not "irrelevant," "technical," or "picky." Helen agrees that the violation is "an important element of the case." It is important to prove because it is often difficult to detect. Paula then says that she has "another thought." She mentions that Ben, the assistant director of the division covered it last week.⁵ Paula goes on to say that "we have a lot of

⁵ Here is the relevant quotation:

Ben: the marital status is a little harder because we don't really have any evidence: at this point (1) that they're u:sing the marital status to discriminate but (1) but (1) w- y'know the question is why: are they asking the marital status (1) and the answer to that would be: if it's not for secured property they're either answer- asking it out of habit (1) or: they're asking it because there's they're going to factor it into their considerations (1) of the applicant.

Helen: Okay what if we looked at it in terms of um:

(5)

experience with circumstantial evidence" but that "this is a unique opportunity (.5) it's it's actually (.5) the only way we have of developing: irrefutable evidence that this has been going on". By "the only way," she is referring to the use of the testers, who called the company as loan applicants. Of the 35 "applicants," 24 were asked about their marital status.

As the party making the charge, the burden of proof lies with the FTC. This, in turn, requires that the agency produce evidence of the violation.⁶ In cases of this sort, the standard, if the case were to go to litigation, is usually preponderance-of-evidence (as against the more stringent clear-and-convincing or beyond-a-reasonable-doubt criteria).⁷ Nevertheless, Paula seems to be talking about actual, beyond-a-reasonable-doubt proof. It is not entirely clear to me why she should be speaking about proof rather than evidence here. Perhaps, in the case of minor charges with little or no apparent consumer injury, the standard of evidence is (informally and unofficially) increased. That is, one, in effect, compensates for the inconsequentiality of the charge by providing more certain evidence that the violation occurred.

Paula sets up a contrast between "circumstantial" evidence and "irrefutable" evidence. Although her meaning is clear enough, the terminology, as I have already suggested, is a bit imprecise. Circumstantial evidence can be irrefutable. To return to my earlier example, it may be irrefutably proven that X was present at the scene of a murder, but the evidence may be circumstantial as regards the charge that X committed the murder. In the terminology that I have suggested, Paula is making a distinction between non-conclusive and conclusive

Ben: Oh and the other thing is likelihood of detection on on marital status is real low.

⁶ It is not required that the company know what its loan officers are doing, that it have what Hockett (1960), in another context, calls "total feedback." It is still responsible, through negligence, although actual knowledge might be taken as exacerbated bad faith and thus call for a greater penalty.

⁷If the company were being charged with contempt for violation of a prior order (civil contempt), the standard would be "clear and convincing," although sanctions would be based on preponderance. For illustrative cases, see FTC v. Tashman (2003), FTC v. Chierico et al. (2000), FTC v. Kuykendall (2004). I am, nevertheless, still somewhat uncertain. Paula has said that "we have a lot of experience with circumstantial evidence." This seems to suggest that preponderance of evidence is not sufficient in this matter. Proof is required.

evidence, that is, between evidence which merely suggests that a violation has occurred and evidence which proves (beyond reasonable doubt) that the violation occurred. The reason for including the charge is not merely that we have clear, irrefutable, conclusive evidence of the violation, but that we have not been able to produce such evidence in the past. (For the FTC lawyers, there is a special appeal involved in doing something for the first time, for example, successfully advancing a new legal interpretation or proving a charge that has not been provable in the past.)⁸ There are two contrasts here: between types of evidence and between then and now, as illustrated in Figure 1.

INSERT FIGURE 1 HERE

3. THE STORY

At this point, Paula tells her story:

(1)

1. Paula: ... we've been telling companies that have been
2. doing it (.5) for years⁹ and they keep saying
3. nyeh nyeh nyeh you can't prove it because it
4. could have been volunteered in ninety nine
5. percent of the cases.
6. ??: Um hm=
7. Paula: =You know we go c'mon it was'n't volunteered and
8. they go nyeh nyeh you can't prove it. (.5) well

⁸ From an earlier meeting:

Paula: ...we pursued it in this case because (.5) all –we've never alleged it (.8) we belie:ve that it's a common industry practice (.) it's very difficult to pro:ve (.) ... we have ((thumps table)) been able to prove it....

⁹ The expression "for years" is ambiguous. Have we been telling them for years or have they been doing it for years? Given the context, and the .5 second pause before "for years," I would favor the former interpretation, although nothing of analytical importance seems to ride on the distinction. At any rate, "we've been telling" implies that we told them on several occasions.

9. ahha we proved it.

On its face, this is a dramatization of the points that Paula has already made, summarized in Figure 1, but it adds new elements. Not only did we have circumstantial evidence but we have repeatedly told them that they were committing a violation (although, as noted in footnote 8, we have never alleged it, that is, included it in a consent order or litigation). This, in turn, provided for their response. The story is transparently untrue. The company representatives (lawyers) may have said "You can't prove it", but it is highly unlikely that they said "nyeh nyeh nyeh.". This is a derisive expression, used primarily by children, whose talk tends to be more primal, less polite and circumlocutionary than that of lawyers, less cautious, less littered with vague, noncommittal forms of indirection. It points to some weakness or inability on the part of the recipient in relation to the speaker.¹⁰ Paula is telling a generic story, capturing the essence of what supposedly occurred. The story is, so to speak, about what "really" happened (repeatedly), not what actually happened. The company representatives challenged and implicitly derided them. This adds an additional incentive for including the charge. Not only can we do something new, something that we have wanted but been unable to do in the past, but we can meet their challenge.

In the talk preceding the story, Paula mentioned "circumstantial evidence," suggesting that they have suspected this violation for some time. She says that now they have irrefutable evidence. The story adds interactional elements—this is what we told them and this is how they responded. It translates a set of bare facts into the realm of social relations, and this provides for a new set of motivations. But the story itself is abstract, in the sense that it is generic; it is a fictional representation of actual occurrences. Any accurate account of an actual occurrence would have certain disadvantages. First, it would be more equivocal,

¹⁰ Although this is a common expression, familiar to most or all speakers of (at least) American English, it is absent from most dictionaries, and a quick internet search turned up surprisingly few usages of the expression in its derisive sense. Here are a couple:

Michael Kinsley article in Slate (March 17, 2000) titled "Nyeh Nyeh Nyeh", repudiating Salon's negative claims about Slate, and claiming that Slate is in better financial condition than Salon.

An internet posting on Nuklear Power Forums, dealing with refusal to take pills that his Mom gives him, is titled "you can't make me! nyeh nyeh."

full of distracting elements and arguable meanings. The generic story strips away the inessentials and highlights the essence. Second, any actual occurrence is unique and possibly atypical. Paula's story, by contrast, represents a general state of affairs—"this is what they do" rather than "this is what some particular company representative did." Of course, the generic story has a particular weakness—it never happened.

The story is a part of "what is being done" (Sacks 1992, Stokoe and Edwards 2006) in this setting. It provides another motivation for pursuing this charge. Furthermore, it is designed for specific recipients (Sacks 1992, Schegloff 1972), with specific tasks and concerns, and for a specific setting. It is not the sort of story that we would expect to hear, e.g., from a lawyer in court. It does not occur as an isolated item but rather enlivens, as well as adding to, the prior exposition; which is to say, it is incorporated into a sequence of talk.

We might also note a change in Paula's rhetorical style as she tells her story. Instead of the more formal, lawyerly talk which precedes and follows, she uses a casual, even slangy style, including not only the "nyeh"s but also "you know we go," "c'mon," "they go," and "ahha". (It is also notable that "you can't prove it" goes with "nyeh nyeh nyeh" in a way that "you can't produce a preponderance of evidence" does not. "Nyeh nyeh nyeh, you can't produce a preponderance of evidence" violates what Ervin-Tripp (1971) has called rules of co-occurrence. Her own example is "How's it going, Your Eminence?") The story is thus marked as a special genre of talk. Perhaps this adds to the impression that we are talking here about something more personal than just law enforcement, something that involves our potency and dignity.

"You can't prove it," I would argue, implicates (in this context at least) that "it" is true, that is, that the company did in fact ask applicants about their marital status. Rather than use the Gricean maxims (Grice 1975), I will make my argument using the notion of "response priority (Bilmes 1993)¹¹: If X is the first

¹¹ My reasons for preferring response priority are covered in Bilmes 1993. In short, the relevant Gricean maxim of Quantity ("make your contribution as informative as is required for the current purposes of the exchange; do not make your contribution more informative than is required") has two notable problems—the lack of specificity inherent in "the current purposes of the exchange" and the absence, in many cases, of criteria for deciding which of several possible "contributions" is most informative. The second of these problems is not relevant for what I am calling type 1 orderings (see below), and therefore not relevant in

priority response, then any response other than X (including no response) implicates that X is not available or is not in effect, unless there is reason to suppose that it has been withheld. When one makes a claim that is one of a series of possible claims of a certain type, the strongest or most extreme claim in the series gets first priority mention. Given the mention of some claim, it will be understood that more extreme claims are not available.

Here is an ordered set of responses to an accusation:

1. You can't prove it.
2. It might not be true.¹²
3. It isn't true.

This series constitutes what I have called a type 1 ordering (Bilmes 1993), in that (3) logically implies (2), which, in turn, logically implies (1). These responses are ordered by strength. The strongest (what Drew (1985) called the "maximal") response has priority.¹³ If that is not available, the second strongest

the present case, since each successive item is clearly more informative than the prior ones. "The current purposes of the exchange" proviso, though, presents a problem. It might be argued that, since the purpose of the exchange, from the company representatives' point of view, is derision, "you can't prove it" is as informative as is required; but the derisive nature of this response is based on its implicature. Thus, the Gricean analysis seems to produce a kind of logical circularity. If the company representatives have said as much as is required, but not more, there should be no implicature that more extreme or informative alternatives are not available. But, if there is no such implicature, then "you can't prove it" is not sufficient for the current purposes of the exchange, i.e., derision. Response priority, to some significant extent, avoids these pitfalls, in part by emphasizing cultural scales, and by the requirement to choose the most extreme item, although this may need to be scaled back in certain situations. What makes response priority different from Gricean implicature (including "Horn scales") is: 1. It is based in the use of actually occurring talk, rather than starting from theory and then inventing examples to support the theory. 2. It shifts the emphasis from informativeness to culturally-based notions of extremity or maximality. 3. It considers utterances within their sequential contexts.

¹² To be understood as meaning that the possibility that it is false cannot be nullified, i.e., that there is an actual possibility that it is not true.

¹³ On this point, we might note that, whereas "proof" implies preponderance of evidence, the reverse is not true. To say "we have a preponderance of

has priority, and so forth. So, for example, if (3) is available, if they know that the applicants volunteered marital status information, it is expected that they will say it. If, instead of (3), they say (2), they allow an implicature that (3) is not available, and, if they say (1), the implicature is that neither (2) nor (3) is available. It is to be noted that "you can't prove it" is an out-of-court response (as, of course, is "nyeh nyeh"); that is (and I am asserting this on the basis of intuition only), a defendant would not offer such a response in court precisely because the implicature might influence the judge or jury.¹⁴

But the implicatures consequent upon priority responses, like Grice's conversational implicatures, can be cancelled, and that is what the company representatives in the story proceed to do, by saying "it could have been volunteered".¹⁵ In other words, they "upgrade" their response from (1) to (2).¹⁶ (However, the "nyeh nyeh nyeh" seems to suggest that they do not really believe this.) Paula replies, "c'mon it wasn't volunteered.". "C'mon" proposes that they know perfectly well that it wasn't volunteered. At this point, the priority response is something on the order of "We think that perhaps it was." That is, when someone contradicts you, disagree, or risk the implicature that you can't, or, for some reason, won't.¹⁷ In this instance, they do not repeat their claim that the marital status information could have been volunteered. They reduce their

evidence" suggests that we do not have proof. Proof, therefore, gets first priority mention.

¹⁴ The legal profession constitutes a "community of practice" (Lave and Wenger 1991, Wenger 1998), with its own discursive usages. It is therefore conceivable that "you can't prove it" does not carry the same implicatures for lawyers as for laymen. However, I see no reason to think that this is so in the present case. The discursive context (especially "nyeh nyeh" and "c'mon it wasn't volunteered") supports my interpretation.

¹⁵ They mention ninety-nine percent of the cases. Presumably, a violation rate of one percent is insufficient to demonstrate either intentional flouting of the law or negligence. How many, then, does it take for the company to be held responsible? How many before Paula could say "we proved it"? There doesn't seem to be any formula for this.

¹⁶ Note that, in doing this, they come very close to explicitly stating the third logical principle: If *p* *might* be untrue, then it is necessarily unproven.

¹⁷ See Bilmes 1988, 1995. Also, Atkinson and Drew (1979) on denials in response to accusations.

response to "nyeh nyeh you can't prove it," thus allowing the implicature that even they don't believe it was volunteered. (They also reduce their "nyeh"s by one. The significance of this is not clear to me, but two is usually the minimum.) This adds to the derisive effect, especially since they could have at least pretended to believe that the information could have been volunteered. They have the luxury of not needing to dissimulate. They were willing, in effect to grant that they knew the charge was true, making the FTC appear ineffectual. They were, Paula is suggesting, mocking us.

What Paula actually says in lines 7-9 is:

(2)

7. Paula: =You know we go c'mon it wasn't volunteered and
8. they go nyeh nyeh you can't prove it. (.5) well
9. ahha we proved it.

There is an issue here, in this case somewhat theoretical, in that Paula does not provide end quotes. In some farfetched grammatical sense, the company representatives could have said "well ahha we proved it.". Of course, no competent member would understand it this way, but sometimes where a quotation or other discursive unit ends and the speaker's present voice resumes is problematic. This may be why we supply children with end markers, such as "They lived happily ever after," to let them know that the story is over and the next thing said is not to be heard as part of the story. In a recent paper (Bilmes 2009), I mentioned how difficult it was for me, with my limited linguistic/discursive competence, to make out the boundaries of quotations in Northern Thai villagers' reports. In the case at hand, though, there is no ambiguity. This is due primarily to the semantic content. It would make no sense for the company representatives to say "well ahha we proved it," whereas it makes perfect sense for Paula to say it. We might also note the preceding .5 second pause. In addition, there may be a subtle change in voicing, although I will not try to describe or analyze that here.

Paula's "well ahha" sets up "we proved it" as a counter to "you can't prove it," a meeting of the challenge. "Well" is a multifunctional discourse marker; one

of its functions is to preface contrasts and disagreements (Pomerantz 1984).¹⁸ Paula's "ahha" is more or less the equivalent of Archimedes' "eureka," an exclamation of delight at a new and noteworthy achievement, a solution to a previously intractable problem. It marks the climax and conclusion of the story. It can also be understood as a triumphal retort to the company lawyers' taunting, and more specifically to "nyeh nyeh."

4. STORY STRUCTURE

Paula's story is not placed in the sequential environment described by Sacks (1974). There is no preface and no uptake, except for "huh huh" at line 71 (see appendix). It also does not fit into the dichotomy proposed by Schegloff (1997) between stories "which themselves launch a sequence and those which are 'responsive' " (103). The story is not marked as such; it is simply a part of, embedded in, her ongoing talk. It is connected to the previous talk by "and," as though it was just another point she was making. When she completes the story, there is a .5 second pause but no uptake, although the "huh huh" seems to anticipate the ending of the story. (The lack of more elaborate or expressive uptake may be due to the fact that the climax—"we proved it"—is not news to the recipients.) She then goes on to continue the argument she was in the course of constructing before she began the story. So, although she leaves open (but does not pursue) the option of having the story appreciated as a story,¹⁹ she also has the option, which she ultimately takes, of treating it as simply another point in her argument.

The story has, roughly speaking, a five-part structure:

1. We said....
2. They replied....
3. We said....
4. They replied....
5. We proved it.

¹⁸ On prefatory "well," see also Owen 1981, Schegloff and Lerner 2009 and references cited therein.

¹⁹ She could, but did not, have pursued this option by, e.g., offering an evaluation (Jefferson 1978), or, more directly, by addressing a question to the recipients.

Item (1) is an allegation, and (2) is a response to that allegation. In the conversation analytic literature, accusations are paired to acknowledgment of guilt or denial (Atkinson and Drew 1979). "You can't prove it," however, is neither. It is, nonetheless, a response that is properly and typically paired to an accusation. By "typically," I mean not that it is the typical response but that, if it occurs, typically it is in response to an accusation. Thus, if we hear "you can't prove it," we can ordinarily infer that the preceding utterance has been understood as an accusation. Like silence (i.e., no response), "you can't prove it" may, if nothing further is added, be taken to implicate that the accusation is accurate, but as refusing to make that stance "official." But the two--no response and "you can't prove it"--are not equivalent. The latter is defiant; while it implicitly acknowledges that the allegation may be true, it explicitly denies that the allegation has, or will ever have, legal standing as a fact. "You can't prove it," in effect, bifurcates truth--it implicitly accepts the "ordinary" truth (what I have called the "mere truth") of the claim that they have been committing a violation, while explicitly denying that the claim is legally true. It is not a legal fact until it is proven by means of conclusive evidence.

Item (2), the response, has two subparts--"you can't prove it" and "it could have been volunteered." The second part is an assertion, the first item in what turns out to be a disagreement sequence. (3) is the disagreement. As I have already suggested, the first priority response to disagreement is further disagreement. If one fails to argue with a disagreeing response, it may be understood that one cannot disagree, that is, that one cannot come up with a credible counterargument (Bilmes 1988, 1995). Or, perhaps, that one can but is deliberately allowing the previous assertion to stand. That is what happens here; the company representatives, for whatever reason, decline to contradict the assertion that the information was not volunteered, as well as the suggestion that they are aware that the information was not volunteered. Thus, in (4), they merely reassert that "you can't prove it."

Item (5) is the denouement of the story. It is different from the rest of the story in that it does not recount what we said to them or they to us. It goes beyond "mere words." The story is one of conflict and resolution. We made a claim; they defied us; we were triumphant. They said "you can't," but we did. "We proved it" is matched to their words ("you can't prove it") in a perfect contrast. The story ends with a clear and conclusive victory. It is complete. There is nothing more to be said.

10. marital status [(**)²⁰
 11. B: [Doesn't mean that they asked marital
 12. status. It means that at some point somebody told
 13. them °marital status°.

.
 .
 .

32. M. But not ninety-five percent of them.
 ((At this point, Ben changes the topic.))

In this segment, Ben insists that the information on marital status that appears on the application forms could have been volunteered. It would, presumably, not be incredible if the company lawyers made the same claim (but see M's comment in line 32). But my interest here is in Paula's story, not in what actually happened or could have happened. The story is "better" if they implicitly admit that the applicants were asked about their marital status. It is better in the sense that there is a clear line between the mere truth and what is provable, and this gives an edge to their derision. We all know it is true, and still you can't prove it. At the same time, by leaving the companies' admission of guilt at the level of implicature, P avoids the explicit (and obviously untrue) claim that they have admitted their culpability.

5. THE PLACE OF PROOF

Paula's story leads us to some general observations about proof as a socially organized, discursive object. Proof--that is, the word and its variants, as well as the discursive and other demonstrations that constitute proof--has its place, not just any place, in stories, in conversation, and in realms of social activity. Since I am unable to locate in the literature studies of the sequential aspects of "proof" and its variants in conversation, I will base my observations in this regard on a general, conversation analytic derived knowledge of how conversation works, and on my own data. Although this paper is not primarily about proof in conversation generally but about how the notions of proof and truth are deployed in a particular story, the following discussion can be read as an opening of the topic for further examination.

²⁰ Each asterisk represents approximately one-half second of untranscribable talk.

We must distinguish between scientific and legal proofs, since they are, in interactional terms, and in other ways as well, very different kinds of phenomena (which is not to deny that scientific proof, or at least assertion based on scientific proof, has come to play an increasingly important role in legal cases). In science and mathematics, a proof is simply a validation of the truth of an assertion. That is, one makes a still unproven assertion about the nature of things or the implications of an axiomatic system, and then one attempts to prove that assertion to be true. In the legal context, a proof is also a demonstration of the truth of an assertion, but not just any assertion. A legal proof demonstrates, beyond a reasonable doubt, the truth of an allegation, an assertion that someone did something illegal, or the truth of an assertion that supports the allegation. (The defendant need not prove anything, since the burden of proof lies with the accuser.) So, a (legal) proof follows an allegation, which, in turn, is based on the existence of a law.²¹ Twenty-four of thirty-five testers were asked about their marital status, but, if this were not a violation of the law, the inquiry might not be notable or mentionable. The law "constructs" the violation. Moreover, a fact does not constitute a proof until someone takes it as such. Proof, that is, is a member's phenomenon. More generally (if I may, for a moment, wax philosophical), nothing is true or false until there is some reason for declaring it true or false.

At any rate, in legal as well as certain other contexts, a proof follows an allegation. When a lawyer speaks of a possible violation of the law, particularly in connection with a court case, the word "proof," or one of its variants, is likely to occur. Here are some illustrations:

(4)

1. P: ...we're gonna keep the information out of the ha:nds of the creditors (1)
2. where they don't need to know it (2) and (1) by: um (1.5) so the plaintiffs
3. a:nd the government aren't put to the test of trying to prove that it was
4. considered.

²¹ Sometimes, in order to avoid "giving away the game," a proof will precede the assertion that it proves. This, however, will never be the case with the central allegation, since that is, to begin with, the occasion for the legal proceeding.

In this case, it is known that a violation has occurred. The question is whether it is necessary to prove that there was injury to consumers in order to impose civil penalties.

(5)

1. B: All we have is the company's admission that they have a (1) fo:rm that
2. they don't have any procedure for dealing with the situation if it ever arises
3. and we have to prove (1.5) that it has arisen.

(6)

1. L: Y'mean no examples have ever happened?
2. J: Not no none to my knowledge.
3. L: How yo gonna prove it in a district court. (10) Y- balls in your court. How
4. are you gonna prove it in a district court I repeat.

(7)

1. L: what I would do: (,) in that section is just to make real sure you don't (1)
2. seem to be suggesting that we can prove a violation: by inference. (1)
3. Make it real clear that (,) what we would do: is: go out and get (.) instances
4. in which (1) that's happened.

These cases deal with the problem of weak evidence that a violation of a particular regulation has occurred at all. The company has admitted inadequate procedures but there is no hard evidence that these inadequacies led to actual violations. In all of these examples, the existence of a violation or possible violation leads to a mention of proof.²²

When a lawyer offers a proof, someone is in trouble. Proofs do not, however, always and necessarily follow allegations. A proof is occasioned by a denial or refusal to admit the truth of the allegation by the accused party. This arrangement is based on the assumption that people do not normally confess to wrongdoing or illegal action unless they know themselves to have done wrong or

²² These extracts are drawn from legal conversations, in which references to proof and evidence are more likely to occur than in "ordinary" conversation. Nevertheless, these are conversations, as opposed to more constrained variants of verbal interaction, such as courtroom talk.

broken the law.²³ Therefore, a free and voluntary admission of guilt is ordinarily sufficient to establish guilt, and there is no need to offer proof following such an admission.

Proofs have their proper place in conversation as well as in courtrooms. There are inappropriate times to offer proofs, as well as times when proof is demanded. If, for example, a speaker attempts to offer a proof after an uncontested assertion, his recipient may cut him off simply by pointing out that no one has contradicted him. There are also inappropriate times to ask for proof. This is easily enough demonstrated by asking people to provide evidence in support of their most commonplace assertions. Garfinkel (1964) performed a series of related "exercises," calling into question "what everyone knows," the results of which were invariably confusion and disruption, even anger. In both legal and everyday settings, the occasion for proof is that the relevant assertion has not been accepted, and there are some assertions that must be accepted, even if they are not common knowledge. If, for example, one were to ask a person in a store for service and that person replied "I don't work here," one would not ordinarily ask for proof.

²³ An exception: in conversation, persons might falsely "confess" to illegal behavior as a form of boasting, a way of claiming daring, for instance, but they would not be expected to do so if such confession would subject them to serious negative sanctions. Of course, there is ample evidence that sometimes, frequently under pressure, people will confess to crimes that they have not committed (Leslie 2011).

Proof may be offered to show that what might be the case is so or that, as in our story, what everyone already knows to be the case is so. There is a culturally specific ordering in this arrangement. That which is informally known to be true may not be true for all purposes. However, that which is formally proven is true for all purposes²⁴ I say that this ordering is culturally specific because we have evidence that it is not universal. Among the Dou Donggo of Indonesia, it is possible to prove, for formal, legal purposes, that what everyone knows not to be the case is so. Just (1986) describes a case in which a woman proves that she was attacked by presenting as evidence a torn blouse and a heavily medicated face. Everyone knows that there was no attack, that the accused did not tear the blouse, and that there are no injuries under the medication. Nevertheless, the evidence stands as proof, and the accused is forced to apologize and pay a fine. Proof here is a way of establishing a "fact" for some particular purpose or arena. In philosophical terms, an assertion is either true or false (or, in some logics, indeterminate), but, in social terms, it may be true or false for some particular purpose. It is our notion, but not the Dou Donggo's, that matters that are proven are true for all purposes. For the Dou Donggo, "You can't prove it" may not have all the same implications that it does for us.

The relationship between proof and occasion is a reflexive one. Proofs are appropriately demanded or offered under certain circumstances, on certain occasions; on the other hand, the fact of such a demand or offer may be significant in the definition of the occasion. However, a proof (except perhaps a scientific/mathematical proof) has few if any formal characteristics by which it can be identified. Rather, it is identified by its place in a sequence of talk. A statement or set of statements gains its character as proof, unless explicitly represented as such, only by its relation to some previous or subsequent utterance, and any appearance or statement has the potential to be claimed as proof in relation to some particular assertion. (The same is true of other conversational objects, such as answers; an answer is identifiable as such only by its relation to a question.) A proof properly occurs only in certain sequential environments, and its occurrence in such environments is what makes it identifiable as proof. The same might be said for evidence in general, a proof being merely that subset of evidence which is conclusive. A fact is evidence

²⁴ This is not entirely accurate. A formal proof may be negated for legal purposes if the evidence used was illegally obtained.

when it is interpreted and accepted as supporting an assertion. And, of course, one can argue, as in segment 3, about whether a fact counts as evidence.

In segment 3, Ben says twice that Mary's proffered evidence "means nothing." He is clearly not claiming that what she said has no interpretable meaning. Rather, he is saying that the facts she offers, while they may be true (he does not dispute them), do not constitute evidence of a violation. Ben's objection is contingent on his seeing Mary's assertion as (claimed) evidence, and this understanding is in turn reliant on the fact that her assertion is made in relation to an earlier claim (not included in the transcript) that the company committed a violation.

In the story, Paula says "we proved it" in response to the challenge posed by the company lawyers. There is another occurrence of (a slight variant of) "we proved it", quoted in footnote 8. Paula is talking to the staff attorneys, who are actually writing the memo, about how the discussion of this violation should be presented:

"...we pursued it in this case because (.5) all –we've never alleged it (.8) we believe that it's a common industry practice (.) it's very difficult to prove (.) ... we have ((thumps table)) been able to prove it...."

Here, too, "we have been able to prove it" has a triumphal feel. Note the emphasis on "have" and the thump, which might be compared to "ahha" in her story. And, again, "we have been able to prove it" is presented as a contrast (to "it's very difficult to prove"). But the challenge is purely a legal one—proving something despite the difficulties. There is no interactional element and no derision. What I especially want to note, though, is the way in which proof in each of these cases is sequentially motivated. In the story, proof is occasioned by the fact that we have been telling them that they are committing a violation. In the second case, it is occasioned by mention of our belief that they are committing a violation. And, "we proved it" is occasioned, in each case, by a kind of challenge to our ability to prove it.

The situation, as presented in Paula's story, is that both parties know that the allegation is true, but, since the companies refuse to admit to it, the FTC will have to produce proof in order to make the fact of the violation legally actionable. And proof requires evidence which is explicit and unambiguous. This state of affairs has its parallels in other sorts of situations. During the congressional hearings on the Iran-Contra affair, Vice-Admiral John Poindexter made famous

the phrase "plausible deniability" (see Bogan and Lynch 1989 for extended discussion). The notion was that, although the President may well have known the details of the affair, Poindexter refrained from discussing it with him, so that his (the President's) knowledge could not be proven. Another example: Bateson (1972) suggests that messages communicated nonverbally are more believable than verbal messages, because nonverbal behavior is less subject to conscious control. "When boy says to girl, 'I love you,' he is using words to convey that which is more convincingly conveyed by his tone of voice and his movements; and the girl, if she has any sense, will pay more attention to those accompanying signs than to the words" (412). There is no doubt some truth to this, but it is also the case that sometimes only a verbal declaration will do. No matter how deep and passionate one's gaze, one may be required at some point to say "I love you" in so many words. This puts one "on record." Nonverbal messages are deniable in a way that explicit words are not. Words are more easily reproduced and their meanings more easily defined than gestures, facial expressions, or voice quality.²⁵

The same can be said for implicature. Implicature is, generally, or at least frequently, not adequate for official purposes.²⁶ To say "You can't prove it" is to suggest guilt, yet it is not a statement of guilt nor even a statement of probable guilt. "You can't prove it" suggests guilt through certain understandings we have about the way people behave. He did not say that he was guilty, but he did not say that he was innocent either, which is what would be relevant and expectable if he were in fact innocent. In the end, if he turns out to be innocent, we cannot say that he lied but merely that he said less than or other than what was relevant and expectable under the circumstances. There is a sort of violation here, but it is one of convention and sociality.

Conversation analysts use the word "official" to designate that which is actually and explicitly said. This use of "official" does not refer to the legal or bureaucratic status of the message but simply to the denotations of the uttered

²⁵ Conley (1982: 43-44, cited in Brannigan and Lynch (1987) points out that appeals courts do not consider paralinguistic features of testimony, since such features are not recorded in court transcripts.

²⁶ So, for instance, juries are specifically enjoined from drawing the obvious implicature from "taking the fifth." Nevertheless, this is a complex matter, about which, I have discovered, even legal scholars are uncertain. Apparently, though, much depends on a determination of intention.

words, as against what may be implicated or connoted or otherwise suggested. An official message is palpably factual; it is quotable. It is one's word and not one's tone, wink, or grin, not what one may be hinting at or leaving out, which is one's bond. As Drew (1984) points out, though an inquiry, such as "What are you doing?", may, in certain circumstances, project an invitation, officially it is an inquiry and nothing more. If an accused says "You can't prove it," implicating guilt, and then turns out to actually be innocent, the accuser has no grounds for protest. If this distinction between official and unofficial messages allows for the promotion of such sociable goals as face-saving,²⁷ it also allows for deception and derision. It allows the companies in Paula's story to imply that they know very well that they have committed a violation and yet to refrain from actually admitting to one. It is this disparity between their official and unofficial stances that gives their behavior its distinctive interactional force.

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²⁷ So, for example, a "preliminary," such as "What are you doing?", may allow one to avoid the embarrassment of having an invitation rejected. "...the most common potential trouble of a projected adjacency pair-based sequence which pre-sequences seem built to anticipate and to circumvent is rejection or disagreement..." (Schegloff 2007: 58).

1 **APPENDIX**

2 P: He: um (2) he made the poi:n:t (.5) Tim made the point that (1) uh he didn't
 3 mind (1.5) u:m (.5) tagalong issues I agree that this sentence (.5) gives two c-
 4 contradictory messages `hhh but the idea here was to say: (.5) this is (1) this
 5 is not the essence of the case (.5) this is not the reason: (.5) the sole reason
 6 why we're suing or even the principal reason (.5) why we're proposing to sue
 7 (.5) XYZ ((loan company)) (.5) and Tim sai:d (.5) that he: di- (.5) that it was
 8 fine not to drop those issues (.5) that is (.5) if he says he doesn't want any
 9 more form cases in kay oh ((KO)) three (.5) David's question to him (.5) was:
 10 (.5) what if (we) ha:ve (.5) a goo:d (.5) uh: (.5) uh: harrasment a third party
 11 contact which (.5) the kind of case you do wa:nt (.5) and it also happens that
 12 they had lousy forms (.5) and Tim said leave the form counts in: `hhh but just
 13 (.5) you've gotta be sure that in your presentation to the Commission you
 14 don't confuse the Commission and the Bureau Director into thinking this is
 15 just yet another forms case (.5) `hhh applying (.5) and and that seemed to
 16 make a lot of sense applying that to this situation (.5) I felt that it was
 17 important that we no:t (1) that we distinguish between (.5) the seriousness of
 18 the allegations: (.5) um (1) and I: (.5) in looking at this sentence again I (.5) I
 19 agree that there's a bit of a problem (.5) we're (.5) trying to (.5) to both (1)
 20 anticipate the argument tha:t (1) this isn't (1) the sort of thing that generates
 21 the kind of really clear consumer injury (.5) that we should sue XYZ (.5) or
 22 that we should bring this case for that reason (.5) but at the same time (.5) we
 23 think it's: no:t (.5) irrelevant (nor) technical (*) picky:

24 H: Um hm

25 P: or whatever I[ts

26 H: [(I think) we should say is that although this this kind of violation
 27 does not result in (1) uh: the (.5) consumer injury (1) that: um: (1) occurs: in:
 28 (.5) the other (1) u:m (1) items in this case (1) uh:

29 ?: Clear consumer injur[y

30 H: [(Yeah) cle[ar consumer injury

31 P?: [Direct consumer inj[ury

32 H: [Direct consumer injury
 33 (.5) u:m (.5) that nonetheless (.5) is: a: (1) uh: (.5) an important (.5) uh: (.5)
 34 element of the case (3)

35 P: Do you think tha:t (.5) sufficiently relegates it to the second (1) tier: of (.5) kind
 36 of a tagalong issue (*) (.5) (*) (.5)

- 37 H: Then you explain why: (.5) why we think that it's important to (.5) uh: be able
 38 to prove uh (.5) this kind of violation [because we think it's=
 39 ?: [Um hm
 40 H: =it's (.5) it's like (*) as a practical (*) we often have difficulty (detecting it)(3.5)
 41 P: But I had another (.5) (*) thought (.5) on that one paragraph i- (1) u:m (1.5)
 42 this is basically (1) Ben covered it (.5) last week and that is that we need (.5)
 43 in my view: and I guess (**) to develop (1) uh: (.5) more fully: (1) why: we
 44 think it's important (.5) that (.5) we have a lot of experience with circumstantial
 45 evidence (1) thk (.5) th comp- basically just expanding your argument here
 46 and I have notes on (.5) additional facts you might put in (1) and that instead
 47 of (.5) this is a unique opportunity (.5) it's it's actually (.5) the only way we
 48 have of developing: irrefutable evidence that this has been going on and
 49 we've been telling companies that have been doing it (.5) for years and they
 50 keep saying nyeh nyeh nyeh you can't prove it because it could have been
 51 volunteered in ninety nine percent of the cases
 52 ?: Um hm=
 53 P: =You know we go c'mon it wasn't volunteered and they go nyeh nyeh you can't
 54 prove it (.5) well [ahha we proved it=
 55 ?: [huh huh
 56 P: =(5) but then the problem is is that we don't talk about the auditing evidence
 57 which is what proves it

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