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Literacy and the Law

> The cognitive structures of the law have come to reflect written forms of consciousness.
>
> Jackson (1994)

Introduction

The language of the law can be broadly divided into two major areas – the codified and mostly written language of legislation and other legal documents such as contracts, which is largely monologic; and the more spoken, interactive and dynamic language of legal processes, particularly the language of the courtroom, police investigations, prisons and consultations among lawyers and between lawyers and their clients. I shall deal first with the codified written language of the law.

Tiersma (1999: 139–41) provides a helpful categorization of legal written texts, dividing them into three types. He proposes (Tiersma 1999: 139) that **operative documents** 'create or modify legal relations', in other words they establish the legal framework itself. This category includes legislation (acts, orders and statutes), pleadings and petitions, judgments, and private documents such as contracts and wills. A second class is **expository documents**, which explain the law, usually objectively. These might include a letter to a client or an office memorandum, and perhaps the huge volume of writing and educational material about the law. His third category is **persuasive documents**, particularly submissions designed to convince a court. Tiersma (1999: 141) notes that the latter two categories of legal writing 'tend not to be particularly formulaic or legalistic in language, although they do use fairly formal standard English'. Since we are interested in what is distinctive about the language of the law, I will concentrate mostly on operative documents here.

This chapter begins with an introduction to the oral legal systems that are the origin of all legal systems. It then tracks the changes produced in the language of the law by the move into literate systems, particularly the consequences of increased planning, decontextualization and

standardization. This is illustrated by examining the differences between a modern will and an Anglo-Saxon will that stands at the point of transition from spoken to written wills. The chapter then outlines the issues involved in converting speech to writing in modern legal systems, for instance the production of transcripts, either as evidence or as court records. It ends with some speculation about turning full circle to a future where audio and video recording of speech opens up the possibility of a return to more orate legal procedures.

Oral Legal Systems

Current legal systems have their origin in societies that existed before the development of literacy. Almost all current orate societies (i.e. those in which literacy is not part of the cultural tradition) seem to have highly developed systems for handling disputes or actions that violate community norms. Such oral legal systems have been studied in considerable depth by legal anthropologists. The legal systems that operate on an oral basis are often referred to as *Customary Law*. There is a wide literature on the coexistence of Customary Law and Common Law systems.

In most orate cultures, there are specific occasions or events when Customary Law is dispensed. It is normal for those involved to have specific speech roles, roughly corresponding to litigants, mediators, arguers for a particular view and sometimes an equivalent to judge (and jury). It is not uncommon for there to be staged procedures through which Customary Law proceeding take place (legal genres). It is common for there to be a set of memorized and quoted precepts or principles by which cases are argued. The use of precedent is also not uncommon in this type of argumentation. All these are the likely antecedents of the institutionalized legal processes found in literate societies.

Forensic anthropologists have traditionally argued that there are differences between Customary Law (often discussed in terms such as 'social control') and institutionalized law. They particularly note the following characteristics : absolute liability; sorcery; magico-religious beliefs; accident. Absolute liability is the notion that people have full responsibility for other persons present – so for instance if a hunter dies during a hunting trip, the fellow hunters must take responsibility for the death. This ties in to the notion of accident. It is said that in Customary Law, the intentions of a person are irrelevant, so if one kills a person by accident it is treated

in the same way as a deliberate murder (Common Law distinguishes manslaughter from murder, that is the accidentality concept is legally recognized and linguistically codified). The other area of postulated difference is in the area of sorcery and magico-religious belief. Sorcery, such as placing a curse upon a person or their possessions, is a common crime in Customary Law societies. This ties in with a range of magico-religious beliefs such as taboos, which are often also punishable. Goldman (1993, 1994) makes a very strong linguistic case for rejecting these distinctions. He documents the case of a Huli traditional trial where a wide range of arguments based upon accident and absence of liability are utilized. Since accident is part of intention, and intention is encoded in modality, it is possible to locate and reveal linguistic evidence for the use of accident as mitigation. Goldman (1994: 78) gives an example of an accidentality adverb (see figure 1.1) and goes on to discuss the use of ergative case marking to mark intention (see figure 1.2).

Goldman (1993) constructs very careful linguistic arguments based on an analysis of the legal discourse to show that the concept of accidentality is used in this Customary Law setting. There is a case for saying that Western anthropologists have been sufficiently ethno-centric to mistake

Evidence of a Huli concept of accident first emerged in the case of *Wanili* vs. *Ogoli* (Goldman 1986a: D.2). The dispute concerned an incident in which Wanili's teenage son Baro was drowned while out with another male friend. Wanili recounted her reactions in the following terms

[D.2. lines 140, 203]
Ibu **tiga tiga** *iba piyagoni lalu piru*
he straight straight (redup) water go-3ps-PST say-SUB2 go-1sg-PST
I said 'He (Baro) **straight** drowned' and I went off

Iya ilame iya kirali honowinidago **mememe** *iba piyadago*
we both + ERG we two people gave birth-RP **accidentally** water go-3ps-PST
We bore him together and he **accidentally** drowned

Of particular note is the counterbalance betwen the two adverbs *tiga tiga* (straight) and *mememe* (accidentally).

Figure 1.1 Extract from Huli traditional trial, illustrating an accidentality adverb
Source: Goldman 1994:78

[16]	NP(A)	NP(O)
	ERG	ABS
	Kenobi one biagome	*inaga ainya*
	Kenobi wife that + ERG	I + GEN mother + ABS
	V(tr)	
	delara	
	burn + CAUS-3ps-PRES	

In [16] the ergatively marked NP serves to emphasise the intential actor behind some action, the 'who' of a planned transaction. The causative dimension of a reported event is thereby in focus and in reference to Gegai's death is thus highly blame implicative.

Figure 1.2 The use of ergative case marking to mark intention
Source: Goldman 1994:88

the absence of overt codification for the absence of a concept. He also argues that sorcery closely parallels the Common Law notion of intentional infliction of emotional distress, and that magico-religious beliefs are found in both oral and literate systems – note for example the offence of blasphemy in European and Shari'ah legal systems.

What orate societies lack to a significant degree is a legal register. Legal disputation is handled mostly in everyday language. It is the development of writing which permits codification of legal systems.

The Move into Literacy

The development of literacy has an impact partly through its ability to standardize. Once legal actions are committed to paper, they can be consulted and relevant elements reproduced. This leads, over time, to standard ways of performing legal functions, such as drawing up a will. It can also lead to a standardization of the steps through which a legal function must pass for its completion – in other words to the development of the standard legal **genres** (Maley 1994) discussed in chapter 4. Literacy also helps to create a legal register, in that it encourages the development, recording and long-term use and standardization of specialist legal terms (see the next chapter).

The process of codification involved the language of the law moving from largely interactive oral dispute resolution, which operated with language drawn mostly from everyday speech, to a specialized technical style of language, using the full range of resources offered by writing. It is necessary to make a brief digression at this point into the manner in which the development of the written mode influences language. Written texts, because of their composing processes and durability, tend to be better planned and less dependent on context (see for example Chafe 1985; Chafe and Tannen 1987). These distinctions between the spoken and written language – context embedding and planning – are not absolute however. A note to oneself, despite being written, can be unplanned and spontaneous, and deeply context embedded and therefore highly inexplicit, if the writer assumes that s/he will remember the context of writing. On the other hand, we have free standing and well planned oral literature. Linguists, particularly Halliday (1985) have resolved this issue by noting that there is a continuum, running from least planned and highly contextualized to most planned and context reduced. Halliday refers to this as the 'mode continuum'.

Consequences of planning

Halliday (1985) notes that one important linguistic outcome when constructing long, connected texts is that, as an understanding or issue grows steadily through a text, that growing understanding may be summarized in a noun phrase, as the starting point for the next development of the ideas.

This cumulation within the noun phrase is an important aspect of written language. Halliday shows that when ideas are first introduced they generally appear in a simple 'congruent' form – things appear as nouns, processes as verbs, attributes as adjectives, logical connections as conjunctions like 'therefore', and so on. It could be said that parts of speech have an 'unmarked' semantics. However this unmarked relationship between form and semantics can be partly lost in the need to construct connected discourse by accumulating concepts. This skewed relationship Halliday calls 'grammatical metaphor'.

The diagram from Gibbons (1999) shown in figure 1.3 gives an illustration of how in English the change to written register leads to a skewing of the relationship between the underlying semantic concepts, in this case extending beyond nominalizations. It presents two sentences which have almost the same meaning, but the first is in a simple conversational style,

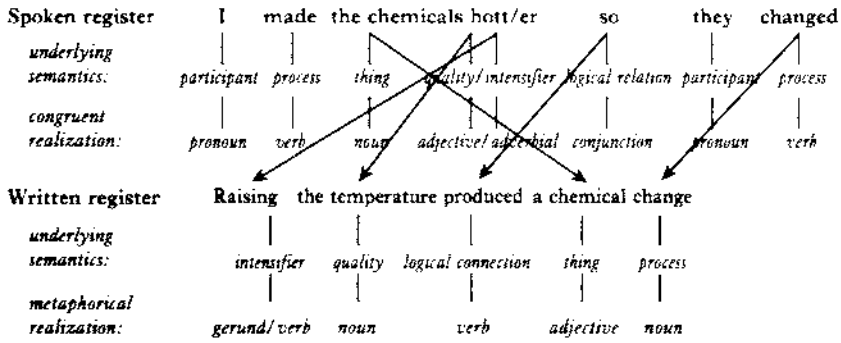

Figure 1.3 An example of grammatical metaphor in English

while the second is in a more written technical style. So in the first spoken sentence 'things' *chemicals* are realized congruently as a noun, but metaphorically in the written form as an adjective; the 'logical connection' appears congruently as a conjunction *so* in the first sentence, but metaphorically as a verb *produced* in the second, and a 'process' *change* appears as a verb in the first sentence, but metaphorically as a noun in the second. The notion of grammatical metaphor includes, but is much more powerful than 'nominalization', and the concept will be used repeatedly in this book.

In English, grammatical metaphor permits the dense packaging of information, particularly in the noun phrase. It can also entail some syntactic simplification – in the example in figure 1.3 a complex subordinating structure becomes a simple sentence. A related phenomenon in written texts is increased lexical density – there are more content words and less structure words. Other effects of planning include increased explicitness, more passives and longer sentences.

Increased explicitness in the logical structure

As a consequence of planning, and because links are made to other parts of the text rather than the outside world, the logical structure or argument is made more explicit, less of 'and' but more of 'therefore', less of 'next' but more of 'first, second, third' (see Biber 1988).

More passives

These enable us to reorganize the information flow in a text, and often works hand in hand with grammatical metaphor. One role of passives is to facilitate the placing of old information at the beginning of the sentence,

even if the old information is the logical recipient of the verb's action. An example is 'When the prisoner arrived at Court, he was jeered by a hostile crowd', where in the second half, the prisoner is old information, so he can be placed first by means of a passive, and the remainder of the clause adds information. The active version of this sentence is clumsier 'When the prisoner arrived at Court, a hostile crowd jeered him'. The unusual frequency of the use of passive constructions in legal language can be seen in the fact that the very rare construction *it is/was/has been said by . . .* for example 'it was said by Lord Justice-General Robertson' is found only seventeen times in the 100 million word British National Corpus, and of these, seven occurrences (41.2 per cent) were in legal contexts, although legal contexts constituted a very small proportion of the corpus.

Longer sentences

Another effect, which will be discussed in the next chapter, is that sentences in operative documents become very long. Indeed many operative documents cannot be read aloud with any likelihood of coherent pronunciation or adequate comprehension. They are simply too long and complex to be absorbed in speech, without the opportunities for referring to previous text that written language provides.

Consequences of decontextualization

Another major difference between face to face speech and written texts is that speech can refer to the surrounding context shared between the speakers, while written texts tend to refer to things within the text itself, or to other texts. The issue is the distance (in space time and abstraction) between the context referred to and the context of speaking, reading or writing, and also between speaker/writer and hearer/reader. As table 1.1 shows, there is a continuum between most context dependent language and abstract and decontextualized language.

The detachment from context that is a consequence of writing can lead to high levels of **autonomy** in legal texts. This is particularly important for the drafting and interpretation of legislation. A major target of legal drafters is to ensure that courts can interpret legislation on the basis of the wording of the legislation itself, without reference to the legislature or the debates that surrounded the creation of the legislation, or to any other source for judgment. This demands that the wording of legislation has a single clear meaning, and this meaning forms the basis for the interpreta-

Table 1.1 The linguistic consequences of contextualization

Contextualization	*Language used*	*Language factors*
Immediate/ context dependent		
In a courtroom, during examination, judge to counsel, an objection has just been raised	'sustained'	Inexplicit: who, what is sustained, the context (time, place), what is happening (short for the 'objection is sustained' – note tense)
Shared knowledge/ knowledge dependent		
In counsel's chambers, to another lawyer	'Judge May sustained my objection to a really coercive question today, thank heavens'	Tense changes to past as a consequence of distance in time. Some elements inserted, but others depend on knowledge Inexplicit: who is 'me' in 'my'; the context (place) and when 'today' is
No shared knowledge/ context independent		
Report	*31 October 2000* *Local Court Number 4* Counsel Hu's objection to a coercive question from Counsel Lipovsky during cross-examination was sustained	Highly explicit Note passive and past tense
Generalized/abstracted		
Legal text book	Coercive questioning during cross-examination may be subject to successful challenge	Note grammatical metaphor, particularly 'questioning' 'successful' 'challenge' (compare language above) Tense changes to 'timeless present'

tion and imposition of the law. Among lawyers this is known as the **plain meaning rule**, and this notion is central to the school of legal thinking known as **textualism**. To linguists this position is open to question, since they usually do not conceive language as a simple and unambiguous means of communication. I will return to this issue in the next chapter.

The other aspect of decontextualization has to do with the different resources provided by speech and writing. In face to face speech much of the speaker's attitude to what s/he is saying is communicated by intonation, voice quality, gesture and facial expression. Emphasis and information flow is communicated to a large degree by stress, pausing and pace. Decontextualized writing has few resources to represent these non-verbal features, so in writing we tend instead to use grammar and vocabulary choices to represent them. Another noticeable characteristic of written language is that it tends to be less personal and less emotional in tone (because it is not 'face-to-face'); notice in the text above the loss of 'really' and the emotionally neutral and impersonal tone, particularly in the abstract text.

Effects of standardization

The spoken word can survive only in memory, but memory works on the basis of meaning not wording. The spoken word is usually only retained unchanged in ritualized circumstances (for instance religious rituals may retain earlier versions of the language, as in the survival of Sanskrit). Writing has the opposite effect, because written texts retain their form and wording – at a later date it is their meaning that may become open to doubt. Once something is written down, its form becomes accessible afterwards. This means that a particular wording can be reproduced exactly upon demand, in particular writing facilitates the retention of successful wordings.

In law the standardizing effect of literacy is magnified. If a form of words is admitted as adequately meeting a particular legal objective, for instance a particular wording is accepted in court as constituting a binding promise, this is a good reason to re-use the wording for subsequent promises, in fact it serves as a form of precedent. Once legal actions are committed to paper, they can be consulted, and relevant elements reproduced. In the law this has led to the development of Form Books, which provide tried and tested forms of words, which lawyers can piece together to construct operative documents. It is not in the interests of lawyers to produce

new wordings, because this may expose them to challenge – according to Mellinkoff (1963: 295), 'That is the fear that freezes lawyers and their language. It is precise now. We are safe with it now. Leave us alone. Don't change. Here we stay till death or disbarment.' This can also lead in time to standard ways of constructing whole legal operative documents, such as drawing up a will. It can also lead to standardization of the steps through which a legal function must pass for its completion – in other words to the development of standard legal **genres** (see Maley 1994 and chapter 4). **Consistency** and **conservatism** are therefore characteristic features of the written language of the law, and as we have seen there are good reasons for this. One less welcome consequence can be the persistence of archaic language: this may take the form of languages that were used previously in the legal system (Latin in most European legal systems, as well as Norman French in the Common Law), or archaic elements of the current language (see the next chapter for examples).

An illustration

The consequences of the move into literacy will be exemplified by two wills. The first is the will of Wulfsige (1022–43), written at the time of the transition to literacy in Anglo-Saxon England, that is the time when wills were first being written down rather than stated orally (see figure 1.4). The analysis here is based on that of Danet and Bogoch (1994). The second will is my own (with one provision and some names removed), providing a modern comparison document (it was drawn up in the 1990s) which exemplifies the changes that long-term literacy has produced (see figure 1.5). The initial impression given by the two documents is the way the English of the law has developed over the last millennium. The elegantly simple, direct, but somewhat inexplicit language of Wulfsige's will has been replaced by complexity, wordiness, archaisms and extreme explicitness.

Turning to the detail of the two wills, the will of Wulfsige varies in its use of person. In the first paragraph Wulfsige is referred to in the third person 'his possessions' 'his soul', and so is his wife Wulfwyn 'her life' 'her death'. However at the end of the first paragraph we see a change to first person 'us both', and thereafter Wulfsige refers to himself consistently using the first person 'I' and 'my'. The modern will by contrast is **consistent**, using only the first person. What we see in Wulfsige's will in the use of the third person is the notion that the oral will was the true will, and this document is merely a report of that oral act of bequeathing. Danet and

[H]er switelep on pise write wum Wlsi an his aihte. þat is erst fr his soule þat ond at Wiken into seynt Eadmundes biri þa tweye deles 7 Alfric Biscop þe þridde del. buten ane gride and.XII. swine mesten þat schal habben Wlwine hire day. and after hire day into seynt Eadmundes biri 7 alle þo men fre for vunker bother soule. And ic an mine kynelouerd .II. hors. and Helm and brinie. 7 an Swerd and a goidwrecken spere. and ic an mine lauedy huif marc goldes. an mine Nifte ann ore wichte goldes. And habbe Stanhand alle þinge þe ic him bicueden habbe. and mine brother bern here owen lond. 7.II. hors mid sadelgarun. and .I. brinie and on hakele. And se þe mine cuide awende god aimithin awende his asyne from him on domesday buten he it her þe rathere bete.

Here is this document it is made known to whom Wulfsige grants his possessions. First, for his soul, two-thirds of the estate at *Wick* to Bury St Edmunds and the third part to Bishop Ælfic, except one yardland and mast for twelve swine which Wulfwyn shall have for life, and after her death [it shall go] to Bury St Edmunds; and all the men are to be free for the sake of the souls of us both.

And I grant to my royal lord two horses and a helmet and a coat of mail, and a sword and a spear inlaid with gold. And I grant to my lady half a mark of gold, and to my niece an ore's weight in gold. And Stanhand is to have everything which I have bequeathed to him, and my brother's children their own land, and two horses with harness, and one coat of mail and one cloak.

And he who alters my will, may Almighty God turn away his face from him on the Day of Judgment unless in this life he will quickly make amends for it.

Figure 1.4 An Anglo-Saxon will

Bogoch (1994) provide other examples of this. Wulfsige's will also begins 'Here in this document' — in other words there is a reference to the act of writing. This self-consciousness about writing has long since disappeared. Another carry over from oral wills is the curse with which Wulfsige's will ends — indicating the comparative ease with which an oral will can be misrepresented, in comparison with the stability of the written word (discussed earlier).

The act of willing itself is 'Wulfsige grants his possessions', using everyday language and not a standardized formula. In the modern will the act of willing is referred to as 'the last will and testament' 'wills and testamentary dispositions' and 'give, devise and bequeath'. These expressions will be familiar to most English speakers as the standard wording of a will. They provide a clear example of the **standardization** and **conservatism** of the

THIS IS THE LAST WILL AND TESTAMENT of me JOHN PETER GIBBONS of ____ _____ in the State of New South Wales, Lecturer.

1. I HEREBY REVOKE all former Wills and Testimentary Dispositions heretofore made by me AND DECLARE this to be my last Will and Testament.

2. I GIVE DEVISE AND BEQUEATH the whole of my property of whatsoever nature and wheresoever situate and over which I have any power of appointment and not otherwise disposed of in the due administration of my estate to my dear wife _____ for her sole use and benefit absolutely AND I APPOINT her Executrix and Trustee of this my Will.

3. IN THE EVENT that my said wife predeceases me or dies within one (1) month of my death then I DECLARE that the following provisions shall take effect:

. . .

4. I DECLARE that if any of my beneficiaries shall die leaving a child or children him her or them surviving then such child or children shall upon attaining the age of twenty-one (21) years take the share his her or their parent would have taken had such parent survived me and if more than one of such children in equal shares.

IN WITNESS WHEREOF I have hereunto set my hand to this my Will this fifth day of July One thousand nine hundred and ninety four.

SIGNED by the Testator as and
for his last Will and Testament
in the presence of us both
present at the same time and
we at his request in his
presence and in the presence of
each other have hereunto
subscribed our names as witnesses:

Figure 1.5 A modern will (abridged)

modern language of the law. Furthermore, as Tiersma (1999) notes, every written will is a last will, and the word 'testament' is also redundant; so are two of the verbs in 'give devise and bequeath' (see 'doublets and triplets' in the next chapter).

Concerning **contextualization**, Wulfsige's will depends to a large de-

gree on assumed knowledge of the context of writing. The reader is not told who Wulfwyn is, and it is not clear whether she is the 'my lady' referred to later in the text. The modern will is totally explicit on this issue. There is a similar assumption with 'my niece' and 'my brother's children'. It is also likely that the various items left to Wulfsige's 'royal lord' were in fact specific items, not any sword, or spear inlaid with gold. Perhaps most dependent on shared knowledge is 'Stanhard is to have everything I have bequeathed to him'. The modern will is explicitly dated, while Wulfsige's and many other Anglo-Saxon wills are not. There is little grammatical metaphor in Wulfsige's will, and where it does exist the Anglo-Saxon nouns 'ainte' (possessions), 'write' (document), and 'cuiDe' (statement or will), are all strongly linked with their source verbs 'own', 'write' and 'say' (quoth) respectively. The modern will by contrast is full of grammatical metaphor: 'wills', 'testamentary', 'dispositions', 'testament', 'property', 'appointment', 'due', 'administration', 'use', 'benefit', 'executrix', 'trustee', 'beneficiary', etc. Indeed the majority of the content words are grammatically metaphorical.

Concerning **planning**, Wulfisge's will is comparatively well organized for an Anglo-Saxon will. The first part contains the 'major' provisions of the will, while the second part contains the minor legacies. Note, however, that this is not overtly signalled, making the organization of the text initially hard to grasp. By contrast the planning of the modern will is explicitly marked. First we have the numbering of the paragraphs. This is a common device in many modern legal documents. Perhaps more interesting is that the speech acts (see chapter 2) performed by each of the sections of the will are underlined and capitalized, making fully explicit the role played by each part of the document.

Legal Transcription – the Interaction of Written and Spoken Language

The move into writing is not just an historical phenomenon in the law. It is also a current reality, since most record keeping in legal settings is done in writing, while most proceedings in the Common Law system are spoken, as are proceedings in an increasing number of Roman Law countries, including Italy, Argentina, Chile and Germany. In both police stations and courtrooms, it is common for spoken language to be transcribed, and hence transformed into written language.

Legal transcription or reporting is an arena in which the issue of the differences between spoken and written language is important. It involves mainly typed police records of interview, and court records. A transcript involves the conversion of spoken language into written language. The fundamental problem is that speech and writing are different media, with different properties. As we noted previously, writing is not in general a good record of speech, since it does not conventionally include many of the features of speech, and its editing does not appear in the final version, unlike speech (see Halliday 1985, on this issue). Furthermore it is virtually impossible to accurately record in a single visual representation all the sound detail of speech, including pitch/intonation, breathiness, voice quality, accent, pausing and pace. If this were done, the transcript would in any case be virtually unreadable. Rather it is necessary to select and record those features of the oral medium which are needed to meet the particular purposes of the transcript. Sometimes an approximate representation, such as those typically found in courtroom and police transcripts, can be adequate. On other occasions the information that is lost is critical.

One possibility is to use wavelength spectrograms of speech sounds. These can be useful for speaker identification, but are useless for testimony concerning what was said, since no one other than an expert can read them, and even an expert acoustic phonetician can have problems in deciding what was said on the basis of a spectrogram. Another alternative is to do a phonetic transcription, which is capable of catching much of the pronunciation detail, although not the finer detail of pace, pitch movement and stress. Figure 6.1 shows a section of an interview with an Australian who migrated from Lebanon in adulthood. The transcription here is not as fine as is possible, but for a linguist it captures not only the words spoken, but many of the accent features of the speaker. The pauses are roughly timed in seconds.

ɔjʌs(1.5)ɒ(.3)dəmaˀn(.3) wɔsdiswɔsdis(.5)hisɛd(.2)dʌənwaridʌ
ənwaridʌənwari(.5)jənʌəə(.2)ɔisɛi(.2)kitstəumʌtʃapsɛt

Figure 1.6 Version 1: phonetic transcription

The problem with this transcription is that it uses symbols that are not well-known to non-linguists, and it is therefore uninformative to lawyers and lay persons, although a form of it is used in the *Oxford English Dictionary*. I have used one or two such symbols in court, where the fine detail of a pronunciation feature was necessary as part of the evidence, carefully

glossing them. However, as a means of transcribing whole interviews, it is not truly viable. The purpose to which one would put such a form of transcription is limited to details of pronunciation.

Another alternative is to use the type of phonemic transcription that is used in some dictionaries (see figure 1.7). This captures at least some of the pronunciation features lost in conventional spelling, where many of the sounds of English are not adequately represented (for instance there are more than twice as many vowel sounds as there are letters to represent them). In this case I have used the convention of using two full stops (..) for a short pause, and three (...) for a longer pause. I have also inserted gaps between words, even though these are not found in the pronunciation (although they are sometimes signalled in some of the finer detail of the pronunciation). All these render the passage capable of being pronounced with some chance of accuracy by a lay reader.

> oi ära ... ûr ,, də man .. wos dis wos dis wos dis .. hi sed .. dōn wuri dōn wuri dōn wuri .. yə nō .. oi sā kits tōō much upset

Figure 1.7 Version 2: *Chambers English Dictionary* transcription

This type of transcription loses the finer detail of the accent, but does show where one speech sound is substituted for another, so it could be used where there is some ambiguity in pronunciation that makes it uncertain what was actually said. It communicates more effectively to a non-linguist audience than a phonetic transcription, but it lacks the finer detail. If the issue is wording not pronunciation, then regular spelling would be more accessible. This type of transcription could be used when a broad indication of pronunciation is required.

Another form of transcription uses regular spelling, and punctuation, but retains the hesitation phenomena and repetition of the original wording (figure 1.8).

> I ask, er, the man, what's this, what's this, what's this. He said, don't worry, don't worry, don't worry, you know. I say kids too much upset.

Figure 1.8 Version 3: accurate wording, regular spelling

Such a transcript is difficult to obtain, and requires some kind of audio recording that can be listened to repeatedly, otherwise much of the detail of the wording is 'edited out' subconsciously. If one is interested in a full

and fairly accurate record of the wording, but not the pronunciation, of what was said, this type of transcript will serve the purpose. Transcripts of courtroom interaction or police interviews rarely target this level of detailed accuracy, and when a stenographer is producing a transcript during the language event itself, subconscious editing is likely to remove much of this detail, particularly if the stenographer is not trained. Many police records are produced during police interviews by police officers with little or no stenographic training – in my experience literally by an officer typing slowly with two fingers.

Another type of transcript that can be produced removes hesitation and repetition to arrive at a more readable (because it is more written) version (figure 1.9). Finally it is possible to produce a version in standard written language (figure 1.10).

> I ask the man, "What's this." He said "Don't worry." I say "Kids too much upset."

Figure 1.9 Version 4: More written

> I asked the man "What's this?" He said "Don't worry." I said "The kids will be very upset."

Figure 1.10 Version 5: Standard written

I have explored only a few of the full range of possible forms of transcription here. Another strong candidate is the type of transcription used in conversation analysis (Gardner 1994; Hutchby and Wooffitt 1998; Jefferson 1984), which provides clear transcription conventions for many meaningful elements of spoken language.

Through this range of types of transcription one can observe a tension between two incompatible and competing criteria for transcription. The first is its ability to communicate by being a 'good' written text – in a word 'readability' is a critical factor. If a transcript cannot be understood as readily as the oral language that it represents, then it is failing in its primary task of communicating what was communicated in the primary context. Furthermore less readable transcripts make greater demands upon readers, which many in the legal profession would regard as an unwarranted extra demand upon their time and energy.

The second and competing criterion is that legal transcripts purport to

be 'verbatim', that is they are intended to be an exact and detailed record of the language used: in a word its 'accuracy' is a critical factor. In Versions 1–5 of the transcript (figures 1.6–1.10) there is a move from accuracy to readability. The impossibility of simultaneously meeting these criteria in a single version is demonstrated in the common practice among linguists of presenting spoken language in a detailed and accurate transcript on one line, whilst a more written and far more readable gloss is presented beneath. Speech is thus presented in two forms to meet the two criteria. This is not normally done in legal transcription.

In reality most of the transcripts produced in courtroom and police contexts, although they purport to be 'verbatim', are heavily weighted towards readability. The process of transforming speech into a readable written form can involve radical change. As Walker (1990: 204) remarks 'the written record of trials continues to be something more and something less than what happened'. In police records of longer interviews, it is common for transcripts to be far shorter than the time given to the interview. For example, in one case in which I was involved the transcript of an interview purported to be a record of 30 minutes of interview, but took less than 5 minutes to read aloud slowly. In another case two hours of interview could be read aloud slowly in less than 20 minutes (these facts when stated in court undermined faith in the fidelity of the transcripts). In many cases at least 70 per cent of the interview seems to have disappeared.

The changes that are made can be explained by reference to the factors mentioned previously: standardization, decontextualization, planning/editing and impersonal tone. Looking first at **editing**, the guidelines of the National Shorthand Reporters Association (NSRA 1983: 26) state explicitly 'To edit or not to edit is not the question; every reporter does it in greater or less degree'. Spoken language typically contains a range of features not found in written language, such as false starts, hesitations, pausal phenomena ('uhms' and 'ers', and also expressions such as 'you know'), repetition, and overlapping or simultaneous speech by two speakers (see 'Version 3' in figure 1.8 above for examples of some of these). False starts, which are common in both speech and writing, are generally edited out in written text. **Hesitations**, which occur in the process of both speech and writing, are generally not recorded in writing, because written communication normally does not take place in real time. Gibbons (1995) gives examples which compare a police record of an interview with a careful transcript of the same information from the same witness: the very frequent hesitations found in the careful transcript are almost absent in the police record. **Repetition** is generally frowned upon in writing, but in speech is an

important form of emphasis. In Gibbons (1995) repetition, which is common in the careful transcript, is not found in the police record of interview. **Overlapping** is not usually possible in the written mode, since whole texts are exchanged. (However, recent developments in electronic communication such as chatrooms are leading to written communication in real time, which is breaking down such differences). In legal transcription the editing conventions of writing and readability generally predominate. Walker (1990: 223) quotes US Federal guidelines for reporters which state 'In the interests of readability, however, false starts, stutters, uhms and ahs, and other verbal tics are not normally included in transcripts' (Greenwood et al. 1983: 143). All of this reduces the amount of language that is transcribed, and deletes the information contained in pausing and in other 'verbal ties'.

In the area of **standardization**, little effort is generally made to represent dialectal or sociolectal pronunciation features. Walker (1990: 219) writes 'there is a professionwide reluctance to put into a transcript any of the features of speech that might mark a person's origins'. This of course reduces the information about the speaker available in the oral form. Weak and abbreviated forms which occur in the speech of all native speakers (Brown 1990) are generally restored to full forms, so 'gonna' becomes 'going to', and 'joo' becomes 'do you', etc. When judges or lawyers make 'grammatical errors', recorders generally correct them, while for witnesses they may not do so. The Federal guideline for reporters notes that they are expected to correct the 'ungrammatical and carelessly phrased remarks' of lawyers and judges, while 'the testimony of ignorant or illiterate witnesses should be literally rendered'. Walker (1990) argues that this can affect the impressions of witnesses gained from written transcripts, and hence the outcome of appeals. In police transcripts it is similarly noticeable that the transcription of police officers' language is more standardized than that of interviewees.

Some of this standardization is unintentional. This is particularly true when native speakers transcribe the language of second language speakers. For instance when second language speakers omit past tense endings (*-ed*) or determiners (*the*, *a*), native speakers tend to supply them in their comprehension, and insert them in their transcription, as shown in Gibbons (1995). This type of grammatical correction can be more far reaching and intentional however. In the same paper (Gibbons 1995: 176), the witness's limited syntactic range is greatly extended in the transcript by the use of subordination and coordination that were not part of his proficiency, replacing his pattern of strings of clauses not related by grammatical means. A solicitor, referring to police record of interview, wrote 'we would deduce

from this that much of what our client had verbally stated in this interview was conveniently transcribed into better English. The Constable admitted as much.'

The **decontextualization** of written transcripts is most noticeable in the limited representation of non-verbal information. Walker's (1990) survey shows that around 90 per cent of the professional court reporters in her sample would not record laughter or tears. There are means of representing such behaviour, usually by a comment in square brackets, for example [shakes head], [turns to jury], but this is rarely done. Only when such information is needed for the interpretation of spoken language is it normally included. Little of the information carried by stress and intonation is included. Question marks are generally used when they would be expected in written language, rather than to represent a rising final tone. Emphasis may be conveyed by the use of conventions such as capitals, underlining or italics, but this is also rare. Once more, substantial information is lost. This lack of emphasis is also related to a reduction in the emotive charge that is common to written language. In Gibbons (1995: 180) there are many colourful, augmentative expressions in the comparison transcript, but almost none in the police record of interview.

Of the two competing criteria mentioned previously, it is clear that readability tends to win out over accuracy in legal transcripts. As we have seen, there are good reasons for this. There are also considerable dangers, particularly of misrepresenting the intentions of speakers, some of the information they have encoded in spoken forms, and the nature and character of both witnesses and lawyers.

Tiersma (1999: 175–9) argues that the transformation from spoken to written language means that the transcript may be regarded as having the qualities of an autonomous written text, rather than being a representation of contextualized spoken language. In court this means that the normal conventions that apply to spoken language may be ignored, and the normal implications that one would make concerning the implicit coherence of spoken language do not apply. Tiersma presents an example from a court case where the common sense conversational understanding of a transcript is replaced by a decision based on the rules of interpretation used for legal documents (see chapter 2).

Another issue that arises is that Common Law courtroom procedures are almost entirely spoken, unlike Roman Law procedures. However, the move into literacy means that the spoken language of the courtroom is often towards the written end of the mode continuum. Stygall (1994: 186–8) makes just this point about jury instructions in Indiana courtrooms, in

particular that they use the storage capacity of the written language. In the case that Stygall was observing, following normal precedent, the judge read aloud the final jury instructions once only, and the jury were not provided with the written form. Yet these instructions contained seven listed considerations on which the verdict should be based. The possibility of the jury remembering these on a single hearing was remote. Furthermore, looking at grammatical metaphor, each consideration was presented in the form of a complex nominalization such as 'the value of lost time and earnings' and 'the reasonable value of each spouse's loss of society, companionship and services in the injured spouse' (*sic*) Stygall (1994: 187). This mismatch between an oral channel and a written style carries an obvious risk of poor communication.

Philips (1985) describes judges' efforts to turn the written language of their 'Bench Book' back into spoken language so that it can be understood better as speech. They reverse the move to literacy we have seen in this chapter by making the following changes: (1) recontextualization – they turn the third person language of the constitutional rights '**his** right to a jury trial' into the second person '**your** right to a jury trial', and the language becomes more interactive, using checking questions; (2) replanning – the judges break up an extremely long syntactic structure. This theme is further developed in chapter 5.

The Future

Technological changes such as the development of paper, and later of printing, played a major role in the development of literacy (Ong 1982). Recent technological developments have reduced our dependence on these technologies for recording language (for instance this book was written on a computer, and stored digitally). Even more important for the language of the law is the recording of speech on audio and video tape, and digitally on a computer. There is an increasing tendency for wills, court depositions (statements), and police interrogations to be video or audio recorded. This may form part of a societal trend towards more visual and less linguistic forms of communication, involving in particular film, television and illustrations. In the legal arena this has had the consequence of reversing some of the earlier effects of written language, of leading a movement into post-literate communication. Danet and Bogoch (1994) describe the development of the video-taped will, and mention the literate residue left in the

oral will. In one example a testator points to objects and asks the camera to zoom in on them, thereby replacing a linguistic description with a contextualized visual record, making full use of the technology, and using language that is highly contextualized. Pearson and Berch (1994) describe the increasing use of video-taped depositions (sworn statements) to replace written depositions and court appearances as evidence in the American legal system. They mention specifically the usefulness of video evidence which uses charts and models, and in a medical context skeletons, and images from X-ray machines and immovable machinery. Facial expression, gestures, pausing and intonation, lost in written depositions but available in video depositions, may assist communication, although they are also more vulnerable to misinterpretation and cross-cultural misunderstanding. For example, failure to make eye contact may be seen as indicative of an evasive or unreliable witness among Westerners. In some Asian cultures, however, too much direct eye contact is viewed as aggressive and impolite. Pearson and Berch (1994) note research that shows that visual evidence is more easily remembered by jurors than linguistic evidence alone. The disadvantage over written depositions is that the witness's ethnicity and social background become more apparent, which may activate social or ethnic prejudice among jurors. In general a change to more oral and more graphic forms of communication raise hopes that communication in legal contexts can be improved – although as we shall see in chapter 5, such communication can be problematic.