The microformation of criminal defence: on the lawyer's notes, speech production, and the field of presence

Scheffer, Thomas

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

Research on Language and Social Interaction, 39(3), 303–342

The Microformation of Criminal Defense: On the Lawyer's Notes, Speech Production, and a Field of Presence

Thomas Scheffer
Freie Universität Berlin

In the following discourse analysis, I crisscross the realms of text and talk to follow the microformation of legal discourse. How, I ask, does a barrister put together the case for a Crown Court hearing? This representational project, I argue, involves assorted artefacts (marks, modules, maps, or lists) that are consulted as resources on succeeding stages. The various sites of the microformation are the brief, the barrister's note book, and some confidential and staged speech events. The offered trans-sequential analysis of legal discourse puts into perspective preparation and performance, file work and speech production, procedural history, and the field of presence. I explore, above all, the unknown region in between judicial talk and textuality. In this way, in the article, I account for the complexity, contingency, and craft of criminal defense.

According to the canon of qualitative methods, discourses are either made out of talk or text. Actors, members, or participants either seem to speak or write, listen or read. The legal sphere is understood as being driven by "two types of legal discourse: first the largely written discourse of judges, lawyers, and scholars about law and legal doctrine; and second,

This analysis was first presented in May 2004 at the Amsterdam workshop "From Talk to Text." I am grateful to the participants for their comments. I thank as well Don H. Zimmerman, Paul Drew, and Martha Komter for their struggle with the less developed versions. The members of my research group at the FU Berlin—Livia Holden, Kati Hannken-Illjes, Alex Kozin, Jan Schenk (see http://www.law-in-action.de)—deserve credit for their support during the early stages of this investigation.

Correspondence should be sent to Thomas Scheffer, FU Berlin, Emmy-Noether Gruppe am Sfb 447, Altensteinstr. 2–4, 14195 Berlin, Germany. E-mail: scheffer@law-in-action.org

what the participants in legal institutions are saying" (Conley & O'Barr, 1991, p. 2). Accordingly, it appears that defense lawyers, in English criminal cases, keep files or speak in court.[1] In jury trials, this conceptual separation is echoed in a professional division of labor: An instructing solicitor keeps the case file and gathers the material, whereas the instructed barrister or counsel performs the matter in court.[2]

In this article, I give a different picture.[3] In it, I explore the interplay of paper work and speech by consulting items that do not fit the dualism of text and talk. The analysis in between talk and text shows how the defense case—even in its final stages—is put together from various sources. The legal discourse comes into sight as a translocal accomplishment: as "microprocessing" (Latour & Woolgar, 1986, p. 151) or put differently, as microformation. This move toward a text–talk gradation—instead of their separation—is influenced by Goffman's (1981) late studies of language use as well as Foucault's (1972/1989) "archaeology of knowledge."

Goffman (1981), in his analysis of speech production, distinguished "three main modes of animating spoken words: memorization, aloud reading, and fresh talk" (p. 171). Most discourse studies, Goffman (1981) noted, treat speech on the whole as "fresh talk."[4] They rule out other (assorted) modes of speech production, and they do so in "intertextual fields" in which, as Lynch and Bogen (1996) put it, "talk was but one discursive register" (p. 201).

The following analysis accounts for various sources, modalities, and transformations involved in the barristers' speech production. To follow the work process, the ethnographer is confronted with a variety of data (Scheffer, 2005), social situations (Goffman, 1983), artefacts (Latour, 1996), tools (Latour, 2002), and production modes (Goffman, 1981). This complexity does not prohibit understanding but stipulates (a certain version of) what Goffman (1981) called "moment-by-moment analysis" (p. 131).

For this empirical case, I propose the analysis of sequences within production phases *and* between them. This *trans-sequential analysis*[5] comprises diverse modes and materials while (a) following the practical course, (b) sticking to the current state of the succession, (c) reconstructing the interim products that are (made) available to move on, and (d) accounting for the dynamic and local context as resulting from the formation. On this basis, I employ and link up the following terms for analytical purposes: *microformation* specifies the processes by which the legal discourse reaches certain states and each state represents a dynamic *field of presence;* I ac-

cess the microformation only partially through the *representational project* of putting together a defense.[6]

I selected the materials used in the following from the defense of a client I will refer to as Steve Striker. Striker was indicted with a serious offense: "WOUNDING WITH INTENT, contrary to Section 18 of the Offenses Against the Person Act 1861. PARTICULARS OF OFFENSE: STEVE STRIKER on the 29th day of February, 2002, unlawfully and maliciously wounded (victim's name) with intent to do him grievous bodily harm." My case study refers to materials and their specific becoming in time (Scheffer, 2004): the barrister's notes, the official transcript of the hearing, the "brief to Counsel," and the ethnographer's field notes. The barrister's notes are central because they give orientation to the order in which the so called "in-court lawyer" did in this case. The notes chronicle the details of the representational project and its completion in speech.

The trans-sequential analysis follows a series of discourse practices in their temporal occurrence. It sets off with (a) the barrister's work before the hearing, (b) continues with operations carried out during the witness examinations, and (c) finishes with the preparation of the closing speech. This tour reveals the practices by which the in-court lawyer assembles his case representation.[7] It reveals, in addition, a professional obsession with language and its minutiae plus the discursive artefacts that facilitate this professionalism: marks, modules, and lists.

The microformation is led toward and by inconspicuous (minimalist, decontextualized, multifunctional) modules, each of them seemingly incidentally extracted, processed, and arranged in the course of microformation. The modules play a key role because they

> can be swapped and changed as required. As a result they make possible a highly differentiated memory that can tolerate and indeed facilitate a rapid change of topic with the proviso of return to topics put aside at that moment. (Luhmann, 2000, p. 102)

The barrister invests considerable work into modulating both written and oral, old and new, friendly and hostile statements. From the process of modulation unfolds a homogeneous and analytical field of presence that the barrister can exploit to perform the defense in court.

All these occurrences across and in between text and talk mark out this discourse analysis as an ethnographic endeavour that is not restricted to the public exchange of the courtroom. It includes the routine creation and "mo-

bilization" (Scheffer, 2003) of artefacts that in return nourish the barrister's case representations in open court.

BEFORE TRIAL

I met the barrister around 9 o'clock in the court's entrance hall. Like all those mornings, I welcomed him in my dark-blue suit equipped with a note pad and pen. (My tape recorder was not allowed in.) My informant and target to shadow brought a number of implements to carry out his craft: (a) the barrister's outfit including the obligatory grey wig (kept in a hat-box), black robe, and white collar; (b) the classical manual "Blackstone's Criminal Practice" containing general and authorized rules, precedents, statutes, and commentaries for all practical purposes; (c) his notebook plus his fountain pen; (d) a briefcase with other briefs and manuals; and (e) the brief containing the particulars of the offense and the written statements by all witnesses to be called by the prosecution. The brief contains the following written documents:

> The indictment with the statement of offense, an evidence list announcing seven statements for the CPS,[8] named, dated, and page-numbered; a list of exhibits (proof photos of injuries, audiotape, record of police interview [with our client] and the "OUTLINE OF ALLEGATION AND ISSUES FOR JUDGE AND DEFENSE." Additionally it contained the following documents: the witness statements by Tim Victim (the complainant), by another club guest, a doorman, the police officers at the scene, the police constable who conducted the interview with the defendant, or the doctor who examined the wounds and a long "RECORD OF TAPED INTERVIEW" with the suspect.

The brief typifies what Luhmann (1989) called the "procedural history" available to the barrister but not to the judge and the jury. This history is not dead memory but enters the dynamic "intertextual field" (Lynch & Bogen, 1996, p. 201) or "field of presence" (Foucault, 1972/1989 p. 64) of the ongoing procedure. The barrister's case representation is meant to take into account not just the performances in court but more important, what in English Crown Courts is referred to as "the instructions" that the barrister receives from the "instructing solicitor." These instructions resemble the

pretrial case from the point of view of the defense and should not be confused with the judge's instructions given to the jury at the end of the trial hearing. The instructed barrister is not left alone with the precompiled papers but is accompanied by another importer:[9] the solicitor or caseworker from the instructing law firm who carries the complete defense file. The instructions, in the form of documents and files, pose another question on the legal craft of courtroom lawyers: How are these means made available for the actual trial, and how is the representational project bound to this filed past?

The brief was normal in terms of the evidence it contained. It carried the statements of all witnesses that were chosen to appear in court. The brief, however, seemed remarkable in other points that may qualify it as a natural crisis experiment. First, it reached the barrister the same morning of the trial. It was handed over by a colleague from the Chambers.[10] My barrister had no opportunity to consult the instructing solicitor or, what seems worse, the defendant himself. He came, one may think, ill equipped. All necessary work had to be attained during the day in court. This situation, however, is not as unusual as it seems. Tague (1996), for instance, reported that "in representing a criminal defendant, the barrister, in most cases, will not be briefed until very near the date of the trial" (p. 31). Second, the brief did not contain everything that one would expect.[11] There was no written statement taken from the client.[12] There were no accurate instructions either, only some scribbled notes by his barrister colleague. Even the pretrial groundwork—usually already completed by the instructing solicitor—was left to the barrister.

Marking the Brief

The first steps in the process of case production seem banal. The barrister browses through the brief from start to finish. Although this browsing is quick and cursory, the reading leaves traces on the documents. These traces are used later to examine the reading as a step in the process in its own right. The barrister, while reading the brief, underlines portions and scribbles comments with a fountain pen. The barrister starts with the indictment followed by the trial's outline and the list of evidence. This way, the barrister works through the several witness statements taken by the police. They altogether embody the Crown's case and the "good reasons" to convict our client, Steve Striker.

To analyze the marks, I ask the following questions: What do barristers do with the texts? How do they alter them? I provide some general answers first before I specify them in regard to the actual marks made on this particular brief. Marks modulate the text's surface. They transform the future reading of the copy. The marks break the text's rhythmical flow of signs conventionally organized in intervals of lines, paragraphs, and pages. The text is interrupted and supplemented by marks as in the excerpt of Mr. Victim's statement shown in Figure 1.

Generally speaking, the marks add a new dimension to the given text. They divide the text into regular and exceptional fragments, into foreground and background. When a few words are underscored, others are set into the background by the very same operation. The same is true for whole lines: a few are flagged as significant, whereas the rest is set back as ordinary. The discrimination of important and trivial provokes selective rereading. The forecast of future reading includes another general effect: The marks make former reading activities observable (for the barrister and especially for the researcher who requested the notes afterward). The traces, technically speaking, inscribe invested work and in this way, enable a cumulative work process. The reader sees later how this memory by inscription is employed to deal with subsequent tasks.

Inside the club I was stood at the bar with my friends having a drink when a X

X male that I know came up to me and said "THAT LAD THERE HAS JUST BEEN GIVING ME SHIT," the male he was talking about was walking past us to go to the bar or toilet.

On his way back the male tripped over my foot as I was leaning on the bar, when I turned round the male called me 'DICKHEAD'.

At this point I walked over to this male and asked him what his problem was to which he shrugged me off so I put my hand on his shoulder to try and get his attention as he was walking away from me. At this point the male then turned round and swung at me with a glass bottle which hit me on the ear…

FIGURE 1 Interview protocol with barrister's marks.

What does it mean to mark this passage and not another, these words but not neighboring ones? To analyze the specific marks that I found in the brief, I propose two integrated analytical maneuvers. First, I identify the functions of marks for the ongoing representational project. Second, I preview the complete marking of the brief. As a result, I display the barrister's markings as a net of foci thrown over the seven police interviews (S1–S7). The net creates a trans-textual perspective. On this basis, I ask a series of questions: What passages are chosen and what are left aside? Are there systematic clusters? How does one cluster facilitate further steps in the project?

The foci serve the barrister's search and ordering strategies: a game of trial-and-error, a method to collect different versions of the same information. I suggest that each single mark responds to one of the following queries:

1. Who was involved?
2. When did all this take place?
3. Where did it take place?
4. What happened prior to the blow?
5. In what condition was the defendant at that point?
6. What injuries did he aim to inflict?

These concerns, I argue, create trans-textual units that can be described in Foucault's (1972/1989) terms as one "field of presence": a dynamic net of coexisting and interrelated statements, each of them deriving from certain procedural events (here, police interviews), meaning from junctions that are defined to supply the judicial process.

For a better orientation, I specify the source for each mark: S1 = statement by complainant; S2 = by the doorman; S3 and S4 = by police officers; S5 = by the medical doctor; S6 = by the defendant; S7 = [handwritten statement] by a club guest. I comment on each group by speculating whether they become proper foci for the representational project. Additionally, I give details about the other types of inscriptions left by the barrister's active reading.

Who else was involved? Each mark in the following group can be read as an answer to the "who was involved" question. The marked fragments derive from six of the seven interview protocols. The barrister added

some handwriting (here shown in *italics* in S1 and S3). The following marked passages fit to this implicit query ("Who else was involved"):

(S1) male that I know [*who?*];
(S2) one of the aggrieved friends; a friend of the aggrieved
(S3) 20 persons; 5 people standing around a male, who I know to be def [defendant]; the 5 people who had been stood around *~friends?~;*
(S4) volatility was being displayed by several people;
(S6) guy with long blond hair.

Other "copresent persons" (e.g., the defendant, the victim, or the bouncers) are mentioned in other sections of the statements. However, not all of these sections are actually marked. Only those fragments are highlighted that differ from what the main prosecution witness (S1) states. Apparently, the marking is partial (for the defense) and purposeful (showing discrepancies). It restricts the number of points to put forward.

When did all this take place?

(S1) 20.30

The barrister marked only one temporal preposition and this at the beginning of the brief. Other dates given, such as one at the end of the brief ("STRIKER says that he had been in a pub between 5.30pm and 10pm …") remain plain text. Why is the initial perspective not pursued any further, and why does this sole mark appear at all? It hints at the barrister's standard procedure for putting together a defense. Usually, the chronological order of events provides resources to destabilize the prosecution's case.

Where in the club did the events take place?

(S2) on the inside *~X 3m away~*;[13] a male stood in front of him; left hand staircase.

This issue, like the one before, does not produce any more marks in the other statements. It seems that the barrister's reading does not attend to the spatial specificities of the deed beyond the initial mention. This conclusion, however, would be hasty. The barrister, instead of marking such sections, prepares himself a map that displays some participants' positions in the

club. His map translates various propositions picked from the statements (and later testimonies).

What happened prior to the blow?

(S1) That lad there has just been giving me shit; tripped over my foot; I did nothing to provoke
(S2) a male stood just ~*getting up*~ on the inside of the door; his hand pulled back behind his body ~*X*~*;* a male stood in front of him; to which the male then went to grab the aggrieved friend; (one friend said) "I've got him!" ~*X*~;
(S4) "I was getting stamped on, the bouncers were grinning so I bottled him because they were coming after me again." This was recorded in my pocket notebook that he signed accordingly.
(S6) came up to me, punched me, I fell on the floor, and; "I was getting stamped on, the bouncers were grinning so I bottled him."; he ended up punching me; I turned round as I was getting up and just seen him and smacked him ~ *didn't realise* ~
(S7) I saw a young looking male run from my left to my right in front of me; lifting the bottle with his right hand before bringing it down on the right side of the man's head

Marked passages on "how it happened" can be found in nearly all witness statements. Most passages point at some sort of earlier quarrel and provocation. Most of these statements contain, from the barrister's point of view, clues that more did happen prior to the blow. Depth and distribution of the marks indicate a weighty focus. Quite early in the barrister's work, the marks seem to provide plenty of material to substantiate a line of inquiry.

In what condition was the defendant at that point? In this group, I collected marked fragments from three different interview protocols. In the police interview with the defendant (S6), the barrister crossed out a whole phrase (~~He agrees …~~). Scoring out is a different writing activity than marking. Whereas the marking extends the protocol's usability, scoring out restricts it.

(S2) had dried blood on his nose and a graze to the left side of his face ~//~; his words were slurred and his eyes glazed he was extremely drunk ~*V*~

(S4) in fact drunk; dried blood under his nose and graze to the left side of his left eye; [def.:] "Fuck off" ~*V*~ "C'mon you bastards" ~*V*~
(S6) drunk a small bottle of vodka and around 6 pints of lager; ~~He agrees that he has a short temper.~~[14]

Passages on the defendant's "poor state" appear in nearly all police interviews. Taken together, they indicate restricted accountability: Striker was described as drunk, provoked, hurt, and outraged. Also of interest is the crossing out of the bracketed phrase inserted originally by the interviewing police officer. This mark engages the barrister to actively doubt the admissibility of the phrase.

What injuries did he aim to inflict? In this group, are two more types of inscriptions. The barrister put question marks next to the marked phrase. The question marks, I suggest, point to inconsistencies in the protocol ("[…] basically correct"). Another new type of inscription appears with the doubly crossed-out phrase. This mark, I propose, accentuates the restricted usability of the phrase: The crossed out phrases must not be allowed to reach the jury.

(S1) 10 stitches to the cuts;
(S3; S4) … you've hit him intensively on the side of the head, obviously it creates a wound. NO. I WASN'T FINISHED; [what more?] I DON'T KNOW ~*Not GBH*~; I have to say you seem almost quite proud of what you have done. ; agrees that his statement is basically correct ~*??//*~.
(S5) He was hit on left side of face [*by a bottle*]

A number of passages and (other) secondary inscriptions provide answers to the query of intent. The first two are somehow circumstantial: They simply specify injuries presumably caused by the strike. Other phrases are crossed out as self-incriminating and not admissible.[15] Another "unfortunate phrase" is apparently harder to get rid of: the suspect's self-allegation. A comment on the margin suggests how the barrister aims to restrict its legal connotations: "Not GBH" (not grievous bodily harm).

This last segment was pointed out by the prosecuting barrister who sat, during the reading session, opposite the defense barrister in the barristers' lounge.[16] The following exchange comes from my field notes:

During the marking session, he demonstrated some amusement: "I like this bit *I wasn't finished*! Where was it again?" (No comment from my barrister. He does not even look up from his papers.) "Here it is: *Did you feel any remorse for what you'd done or anything?* And now listen: *No. I wasn't finished.* Isn't that grand? *Not finished!* (…) What were you[17] about to do? Killing him?"

Taking Instructions From the Client According to the Record

So far, the marking brings a number of issues to hand. It generates initial doubts and concerns, strategies and hopes. One cannot yet, however, infer from the marking how the actual case will be presented in court. The latter requires further steps and modulations. First, the barrister needed a "representational" version authorized by his client. Immediately after the barrister worked through the brief, he rushed down to the cells to take his instructions from "our client." The instructions taken just before the trial not only set how the client wishes to plea, they also set what the definite case of the defense is. It is this case with all its details that the barrister is asked to represent in detail in open court. The barrister had little time to speak with the defendant because the hearing was scheduled to start the same morning.

The (marked) police interview played a central role during his visit with the client. The barrister, at this point equipped with a general idea of the brief and some ideas of vital issues, led the client through the police interview and took notes on his responses. To take instructions from the client, the barrister did not pose open questions ("what happened?") but simply asked him to confirm or correct the interview protocol. The questions thus act on the procedural history. Barrister and client, instead of breaking new ground, perform the original story that came out of the documented police interview as binding for the upcoming trial. The "scripted" client–barrister session results in the following notes:

… Guy bumped into me so I turned round + sd "sorry." He just punched me—I called him "dickhead" There was no need of punching me "cos I apologised."

He came up and punched me. I fell on the floor + he + another started stamping on me.

I had drink in my hand. When I got up it was empty. I got the chance to get up + I hit him with it. Smacked in his face (LHS of head). [i.e., left-hand side of head]
Pint glass.

The instructed version is the confirmed version of the interview. The case sticks closely to the original police protocol. The barrister can use this agreed-on version to cross-examine the witnesses of the prosecution and to examine the only available defense witness (the defendant). The resulting notes correspond with these lines of the official protocol of the police interview. The official protocol together with the barrister's marks looks as follows:

PC	What happened last night?
Striker	WELL I WAS OUT WITH MY BROTHER AND HIS MATE IN A NIGHTCLUB. JUST COMING BACK FROM THE TOILET, THIS GUY BUMPED INTO ME, SO I TURNED ROUND AND SAID "SORRY;" AND HE PUSHED ME … THEN I STARTED CALLING HIM … I DON'T KNOW EXACTLY WHAT I WAS CLALLING HIM, "DICKHEAT;" … "FAGGOT."
PC	He was calling you?
STRIKER	NO, I WAS CALLING HIM THAT … COS I THOUGH THERE WAS NO NEED FOR PUSHING ME … COS I APOLOGISED … AND THEN HE CAME UP TO ME PUNCHED ME, I FELL ON THE FLOOR, AND THEN HIM AND THIS OTHER LAD STARTED STAMPING ON ME. I HAD A DRINK IN ME HAND, SO WHEN I GOT UP IT WAS EMPTY, SO I JUST HIT HIM WITH IT. I GOT THE CHANCE TO GET UP AND THEN I JUST HIT HIM WITH IT.
PC	When you said "hit him with it," what do you mean by that?
STRIKER	WELL, I HAD IT IN ME HAND AND I JUST SMACKED IT IN HIS FACE.
PC	That's you right hand, is it?
STRIKER	ME RIGHT HAND.
PC	… What is it? A bottle? A glass?
STRIKER	IT WAS A GLASS, IT WASN'T A BOTTLE.
PC	What kind of glass?

STRIKER A PINT GLASS.
PC … So you've hit him on which side of his …
STRIKER HIS LEFT.
PC Left hand side of his head, or his face?
STRIKER IT'S HERE, I THINK.
PC His head …
STRIKER YEAH.

The instructions merge questions and answers to one short version. The instructions include most of the sections that the barrister underlined during his first reading of his client's police interview. They cover, furthermore, all foci that came up during the intertextual marking. However, the notes do not only repeat and condense what was already filed during the pretrial. They accomplish several other transformations that could be phrased as a recipe: turn the dialogue into a monologue,[18] stick to the documented story line, emphasize favorable claims, and ascribe authorship only to the client. The resulting text selects certain points *and* absorbs their production. It performs fully fledged (now translocal) statements and by doing so, replaces the (once local) utterances. These transformations from utterance to statement, however, should not be confused with a linear succession from orality to textuality. Utterances are not simply recorded or documented. Utterances in the "original" interview situation already perform or dictate the protocol to some degree. They are, although uttered locally, not inevitably innocent or naïve and unaware of any future utilization.

The notes stay close to the interview protocol as an original version, even where topics are repeated and information is doubled. The instruction notes are not primarily meant to collect information but to assemble discursive facts. Repetition, for instance, gains relevance because it is a marker for credibility. The barrister's notes continue accordingly:

I bumped into him. Turned + sd sorry. He punched me. I sd "watch what you are doing — dickhead." Had sd sorry.
His mate (shorter than me — long blonde hair) also there ended up punching me (?cheek) — came up to me, kicked me + started stumping on my head.
I turned round as I was getting up + just seen him + smacked him. Just getting up + I just turned round + smacked him. Twisted round — like a haymaker.
I didn't intent to hit him on head I just flipped.

I was angry.
Once o/s felt effects of alcohol. … Don't remember what happened when police arrived.

The instructions noted in the barrister's red book clearly accentuate the aspects of Striker's official answers to the police (S6) that may be beneficial to his defense. The "haymaker movement," for instance, implicates impulse rather than intent; the prior occurrences implicate provocation and so forth. The resulting instructions are partial and strategic and are covered by the discursive facts already in place. The partial character of the notes becomes evident again when tracing rather damning passages of the police interview. The following episode, among others, is kept out. It bothered the barrister already during his marking (Query 6 previously, what injuries …?):

PC	You've hit him intensively on the side of the head, obviously it creates a wound. When you did it, did you see the fact you'd cut him?
Striker	YEH.
PC	Did it start bleed straight away?
Striker	YEH.
PC	Did you feel any remorse for what you'd done or anything?
Striker	NO, I WASN'T FINISHED.
PC	What would you have done to him?
Striker	I DON'T KNOW
	PC continues to recap the interview.
PC	I take it from talking to you, you're not sorry for what you've done, are you?
Striker	NO.
PC	I take it as far as you're concerned he deserved it?
Striker	YEH.
PC	I have to say you seem almost quite proud of what you have done. Are you proud of what you've done?
Striker	NO, NOT PROUD ABOUT IT. I'M JUST NOT FEELING BAD ABOUT IT NEITHER.

This section can easily be taken as a self-allegation. The barrister keeps it out of the instructed case. In this way, the instructions suspend the entire "grilling" of the suspect. Although repeating vast sections of the (recorded,

documented, and marked) police interview, they exclude two thirds of it. The purpose of these "partial" instructions is to guide the barrister's appearances in court as well as his negotiations with the opposing barrister. They define the horizon for the representational project. They do so by picking and choosing portions of the procedural history. However, is the defense really able to dispense with the damning parts to reduce guilty action along with text?[19]

Pinpointing the Prosecution Case

The following pages of the red book document the barrister's efforts to pinpoint the adversary case. After the barrister takes the instructions from his client, he returns to the brief: its appropriation (and modulation) for all practical purposes. This time, he does not read through the evidence but takes notes on the grounds of the marked interview protocols. Specifically, he writes down short versions of the "hostile" witness statements as they are disclosed by his brief. In the barrister's notes, the police interviews shrink to abbreviated lists of modules that follow—like the noted instructions—the course of the interview. These lists of modules facilitate the representational project in noteworthy ways. The following list refers to the police interview with the alleged victim (S1):

a male who I know (?) came up to me + said that lad there has just been giving me shit'
on his way to bar/toilet
By coincidence! "tripped over my foot" on way back
walked over to male?! to ask what problem was
He shrugged me off!
put hand on shoulder to get his attention as he was walking away from me.
At that point he turned round + swung at me with a glass bottle

The notes provide both transferable modules and arrays of modules. The selection here seems to serve a line of inquiry that I revealed as focus for the marking: the "buildup before the blow" (Query 4 previously). Each module points out one act in the buildup. The arrayed modules implicate a repetitive and dramatic confrontation between the alleged perpetrator and the al-

leged victim. In fact, the collected modules cast doubt on this moral opposition by reformulating it as an interactive process.

The following pages in the red book are filled with similar lists offering two further transformations. The interview protocols are first cut into modules that are then put in line. Each module functions as a definite, transferable statement *and* as a moment in a story line. The doorman's account (S2) appears in the barrister's notes as follows:

> walking from DJ Box to[wards] front door
> male (Def) stood just on inside of door with bottle in hand pulled back behind his body as though going to strike
> saw u/t prior to this- no build up (?)
> At this point struck male stood in front of him
> I grabbed him + escorted him off premises (alone?) To LH staircase (?)

How are modules parts of the cumulative work process? How do they take up the previous work? The statement of the club guest (S7) gives a good example on how close the notes stay to the preceding marking. The notes are bound not just to the interview protocol (S7) but to the marks (Query 4 previously, "prior to the blow") left by the barrister's reading:

> stood on dance floor (on L. as you enter) facing bar area.
> saw young looking male run from L to R in front of me (walked past quickly)
> holding bottle by neck in RH
> saw him approach RS of male stand next to entrance of doorway to club.
> lifted bottle above R. shoulder + brought it down on RHS of man's head.
> Then saw him run out of door of club (?)

Again, modules are brought into one story line. The barrister singles out modules that do not fit the instructed version: that the club guest "saw him run out of the door." There are more such modules in the notes that are question marked in light of the instructions: that a guy "that the complainant knew" got involved, that "the doorman did not notice any build up," that "he escorted him to the staircase."

The question marks do not signify questions to be solved. They highlight points that are exploitable to raise "reasonable doubt" during trial and thereby display first profits of the trans-textual perspective. The modulation enables the barrister to move around between, and to contrast across, the seven protocols. They enter and delimit one single (trans-textual) field of presence.

The analytical potentials of the modulations become apparent in another work step. The barrister, after having marked and condensed all the police interviews, draws a map with the positions and movements of those involved in the (buildup to the) assault (see Figure 2). The map construes—more plainly than the modules—one shared field to be entered by various statements.[20]

The map creates a two-dimensional space filled with measures (7m), persons (Pritchard, Bouncer), lines (for areas), crosses (for positions), and arrows (for movements). The map is based on information from various interviews. It prolongs the intertextual orientation rendered by marks and modules. The map, moreover, coenacts a single reality "out there." It implies that all former/separate statements somehow refer to the same incident in time and space. It implies that they are all versions of the same discursively constructed facts. Finally, it assists in accessing and managing the intertextual field. With it, the barrister can observe how the disconnected and numerous modules interrelate, particularly whether they support or contradict each other.

The map further marks the changeover from pretrial to trial activities. It connects the "cold" text analysis with the "heated," in-court probing of evidence. Further entries derive not just from written protocols but from

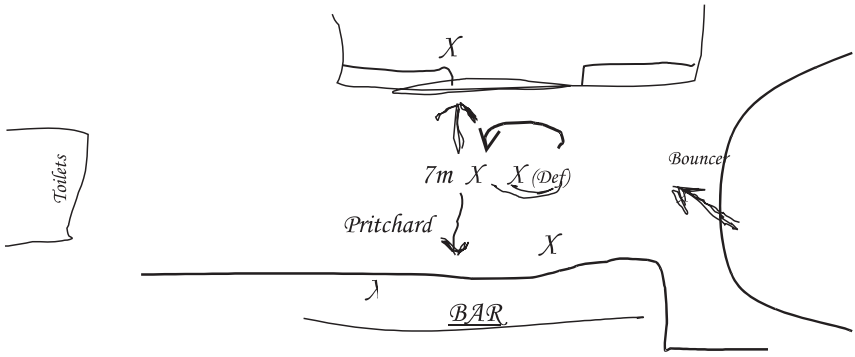

FIGURE 2 Barrister's map of the bar.

testimonies. The map guides the barrister's reception of the oral examinations to follow. The procedural past and the court event enter the map side by side. Pretrial and trial dwell within a single field of presence.

It is on this basis of marks, modules, lists, and a map that the barrister handles and pinpoints his own defense case in contrast to the prosecution case. Shortly before trial, the opposing barristers assess the relative score of their cases while sitting in the lounge, sipping a hot drink, and having small talk. Their exchange does not develop into proper plea bargaining. Minutes before they appear before the judge, the two note their agreement on most elements of the case and the one remaining area for negotiation (Prosecution Barrister = PB; Defense Barrister = DB):

PB: Is it a definite?
DB: Yes, I guess so.
PB: […] The only issue between us then is the question of intent.
DB: Yes. […] Let's get it done.

THE EVIDENCE IN OPEN COURT

So far, one could classify the barrister's work as preparation in expectation of a standard jury trial. Generally, preparation is ascribed to pretrial. The distinction, however, is not so clear cut. Preparation is instead a continual activity that includes both pretrial and trial activities. In court, the barrister goes on preparing his upcoming turn. During the time that, following the ritual order of speech, the prosecuting barrister explains to the jury the two counts of Section 18 (grievous bodily harm) and 20 (with intent), the defense counsel is still busy completing the map. He gains some time compared to the adversary who is expected to speak first.

The order of speech serves the defense in another sense. It provides some extra time to actually wait and see what the prosecution has to offer. The following is from field notes:

> While waiting outside the courtroom, barrister and instructing solicitor discussed concerns questions such as the following: "Will all witnesses turn up?" "How will they present themselves in the stand?" "Are they going to deliver their original written statements?" In light of these concerns, "our prospects" turned pretty dim. All six prosecution witnesses turned up, wearing suits, neatly ironed shirts and dis-

> creet ties. The prosecution case seemed well casted. My barrister whispered to me somewhat jokingly, "under normal conditions, such a case can't be won: not with my client brought in from custody in jogging trousers …"

These calculations, however, do not enter the barrister's notes. There is no mention of the appearance of witnesses, of absent ones, of bodies and their assessment. His notes relate only to the world of words and propositions. The barrister's notes at no point turn into a medium of artful description.

Taking Modules From Oral Testimonies

Once in court, the barrister prolongs his analytical stance, listening with his fountain pen and note pad. He receives the witness testimonies equally by taking notes and creating modules. This makes the barrister a distanced and analytical *listener.* His reception, inaccessibly for the public, captures only spoken words that are instantly and carefully modulated for later utilization. The notes harmonize disparate materials and representations. They translate disclosed texts as well as staged testimonies. Different times and places are folded into one format. Stable and unstable materials become altogether available in one shared discursive field.

Does it matter whether modules refer back to texts or talk? Does the modulation echo the respective source? The short answer is "no." One can not deduce the source from just the modules. The resulting modules take the same shape no matter the source. This, I argue, does not mark a lack of separating capability or overstandardization. The barrister's thin description is rather an accomplishment because it allows the development of the (intertextual) field of presence.

What notes do actually derive from the witness testimonies? The trial notes start with the friendly examination of the prosecution's main witness (see Figure 3), the alleged victim of intended bodily harm (t1).

Here we find patterns similar to the previous notes: Again, they single out acts and arrange them in an "and then" series. The diachronic order follows the story line as documented in the protocol.[21] In addition to this all-purpose modulation, the barrister underlines phrases that are concerned with spatial positions (2 yards, a foot) and phrases concerned with the buildup right before the blow (he swung round; no contact …). The mod-

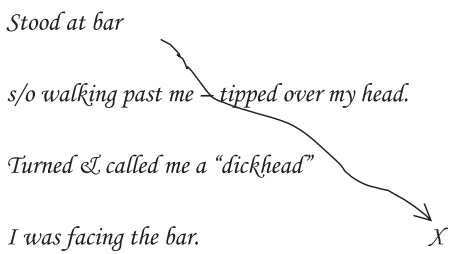

FIGURE 3 Barrister's line in the notes.

ules on positions and the buildup seem to continue some foci developed during the marking.

The next testimony (t2) makes the barrister to leave more notes in his red book. Again, the notes take up lines of inquiry that were laid out by the marking and drawn in the map. They are continued by the following notes:

LHS close to dance floor. 5-6 ft from bar.
Heard commotion over sh + saw ym. walk past me tow [toward] the bar
I heard a glass smash + girl screamed. — then man walking tow bar. over me rh – heading tow bar

Walked (4m) ahead of
Saw back of gentleman. Saw a gentleman strike ~ to side of head.
Man who walked past first was struck — carrying u/t. 2nd man carrying a bottle[22]
He hit gent. across side of head with it
bottle shattered
Distraction — another commotion — I went over + his face a lot of blood
Didn't see a/t to provoke blow.
No threat to man who hit him.
Disturbances o/s several

The modules gather more details on the spatial positions and movements in the club. To put it differently, the barrister simply collects more versions of the same foci. He adds crosses in his map. Modules and map unfold a detailed trans-textual analysis concerned with repetition and differences. What sounded reasonable in an integrated and fluent story line suddenly provokes doubts and confusion in a trans-textual perspective.

Modulating the Cross-Examination

The first time the defense barrister takes the floor in court is to cross-examine the main prosecution witness (t1). He is expected to speak out at this point and to know what case to represent.[23] The questions he is going to ask derive from the materials collected through the marking, noting, and mapping. The following questions contribute to an already instigated line of inquiry (Query 3 previously: the spatial positions). Here is the cross-examination as recorded in the official transcript:

Q. At that stage how far were you from the bar? — A. Probably about two yards.
Q. Right. It is relatively narrow the area in front of the bar, isn't it? — A. Very.
Q. And when I say that I think if you come into the main entrance I think there are double doors, is that right? — A. Yes.
Q. And you are facing the long bar, is that right? — A. Yes.
Q. And so at the time that this happened you say you might have been about a couple of yards away from the bar? — A. Yes.

Q. Might it have been a little bit further to the middle of that area? — A. Well, it was …
Q. Perhaps three or four? — A. It was to the left as you walk in.
Q. Yes. But was it between the entrance — the doors — and the bar? Roughly between the two? — A. Yes.

After having involved the witness in the "confusing" mapping of the scenery, the barrister turns toward another line of inquiry: Query 4, the buildup to the incident, that is, what did happen prior to the blow. The cross-examination turns to the prearranged modules several times.

Q. Now you have described putting a hand on to the shoulder in order to get his attention, is that right? — A. Yes.

Twenty questions later, the barrister objects to the witness's version of events to bring it into line with the defense version of "what really happened." On the official transcript, his objection looks like this:

Q. Now you say that he tripped over your foot. I am going to suggest that in fact it was shoulders that bumped, if I can put it that way, and that he perhaps bumped into your shoulder or you bumped into his shoulders and yours shoulders nudged as he went passed. - A. No.
Q. Perhaps because it was so crowded at that time in that place? — A. No.
Q. But it was crowded? — A. It was crowded.
Q. Yes. And that in fact he said "Sorry" to you? — A. He didn't say "Sorry" to me, no.
Q. And you then pushed him? — A. I didn't. I didn't push him.
Q. What did you hope to achieve by putting your hand on his shoulder? — A. I don't know. I was just trying to get his attention.
Q. To do what? — A. To ask him why he was being abusive.
Q. Well I suggest that you pushed him away and that he has then made comments to you such as "dickhead" and abusive comments to you but you deny pushing him away? — Yes.

The barrister suggests a different truth by putting his notes into use and thereby performing the instructions. This does not mean that everything was already "in the book." One cannot predict the hearing from simply studying the notes. Rather, this performance stresses the fact that the barrister's agency—the capability to actually form these questions and phrases—

is distributed. The use of modules emphasizes that his utterances are not simply interactively driven but reflect work processes that run through pretrial and trial.

The following extract originates from the cross-examination of the third witness. Here, the barrister uses what Lynch and Bogen (1996) called "the documentary method of interrogation" (p. 201). The barrister quotes phrases from the police interview. He repeats the same queries and by doing so generates repetition and variation:

> Q. Now, I know you made a statement to the Police and I wonder if you could have a look at that? (Handed) — A. Thank you. Which part do you want me to look at?
> Q. Well I would like you to have a look at Page 2, if you would, but if you would just confirm that it is your statement? — A. It is my statement, yes.
> Q. Dated the 20th of May of this year? — A. Yes.
> Q. And it is I think signed by you on each page, is that correct? — A. That is correct, yes.
> Q. Now, on the second page I think you begin to describe what happened because up to then you are describing where you had been. You say you stood on the dance floor, to the left as you enter the club. You were stood with your friend and his wife. You were facing the bar. Then you saw a young looking male run from your left to your right, in front of you, and this is the one who is holding the bottle is what you say in your statement? — A. Uh-huh, yes.
> Q. But you don't say there was another male who had passed you before that? — A. The male that passed me was the one that struck.
> Q. Well, we have heard evidence that two men walked past you in a hurry? — A. Yes, one that was struck. One walked past me that was struck followed by the man that struck him.
> PROSECUTING BARRISTER: If it is suggested there is a difference between what the witness said today and what he said in his statement, your Honour, then perhaps the whole of that block ought to be read out so the Jury can confirm?
> JUDGE: Yes, I will read it to him.

The barrister, although he is asked by the prosecution to read out "the whole of that block," does not do so, nor does he give a copy to the jury.[24] The (marked) protocol stays with the counsel while he puts it into motion according to his notes. I argue that this asymmetry, the "instructed" and

"briefed" barristers vis-à-vis the jury that simply listens, derives from the official version of the court's truth finding. Officially, truth emerges from first-hand knowledge, orally presented vis-à-vis the "judges of the facts" (jurors). The barristers' documentary method of interrogation works differently. It mobilizes the procedural past to provoke new and perhaps inconsistent versions of the events in question.

This strategic move, performed by both contestants, has some unexpected consequences. The invited repetition, first of all, produces something novel: another source to modulate and more modules to cross-compare. Although amassing more versions of (presumably) the same discursive facts, the resulting variations generate a mysterious third: a near but unreachable reality "out there." Something, it murmurs while the debate goes on, did happen. All these words in court, however imprecise, partial, and distorted, echo a single incident; all of them claim to be the truth.

Equipped with the lists of modules, the barrister does not simply jump back to early versions. Stimulated and oriented by the notes, the counsel moves horizontally and vertically in the intertextual field he has constructed. In this sense, the barrister's questions derive from different times and places. The underlying contrasts cut through the intertextual field in various ways: whereas a first group of questions stays within a single testimony (t1–t1′), the second group links "original" statement and "repeated" testimony (s1–t1). A third group crosses different testimonies (t1–t2): here, for example, claims on the spatial positions and the buildup. Two links remain unused and refer to the court's preference for orality: Neither written statements (s1–s2) nor diagonal versions (t1–s2) are contrasted. Both exceptions may exemplify the official talk bias of jury trials.

Conclusive Notes

To summarize, the representational project does not only reduce the amount of information but furnishes various comparative operations. The modulation leaves behind most specification that could jeopardize the play of repetition and contrast. The resulting modules open/enter an analytical and virtual sphere where everything is of the same kind.

Next, I show how the barrister makes use of the inferences drawn in the process of modulation to turn attention to the actions of the complainant (t1):

> put RH on RH sh [shoulder] to get att. [attention]
> he then swung round to hit with bottle in face. Happened to quickly to know sort of blow

admits D turned to walk away
about 7 pints
to find out why being abusive?
his nose was bleeding when he came in!
with friend Adam — long blond hair

The complainant states that he put his right hand on the defendant's right shoulder, admits that the defendant had already walked off, and that he himself was drunk. The list can easily be translated into reproaches. They are weak points ("admits") that came about during the proceeding. Conclusions of the same kind refer to the club guest (t2). The points once again mix descriptive and interpretive aspects to build the defense case with verbal ammunition:

commotion behind him — girl screaming, glass smashing
2 walk past — from dir of commotion — to toilets
no provocation/no threat
RHS of head — from behind
he ran out

The list referring to the bouncer's testimony (t3) seems even less descriptive. In fact, it denotes contradictions in the prosecution evidence. All points refer to discrepancies between the first (t1) and the second testimony in court (t2).

bottle hold by neck — body below
took 2 or 3 steps
took him out

The conclusions do not summarize what was said, nor do they stay close to the original version of the story. They rather invite the barrister to raise doubts in open court, to display weak links in the opponents' case, and to make the jury doubt the prosecution's version of the events. As pure analytical points, they are driven by equations such as $t1^{\text{no 1}} \neq t3^{\text{no 2}}$ (positions in the club) or $t2^{\text{no.5}} \neq t3^{\text{no.3}}$ (the defendant's way out). Such formalism is implied but not spelled out by the notes. As elements to guide oral contributions, they keep the links to the stories told. They specify sources (witness X said …) and content (that Y did …). These conclusions are, as a consequence, usable for both speech production and speech reception.

Managing the Friendly Examination

The friendly examination of the defense witnesses is the next opportunity for the defense to take the floor, which can become more a danger than an advantage. In this case, the barrister was uncertain whether to interview the defendant as the main witness in front of the jury. He was unsure about the impression this rather "shabby lad" would give the jury and whether he would manage to stay close to the instructed version. Could he stand being cross-examined? Would the prosecuting barrister take advantage of the statement "I was not finished"?

In the friendly examination, the instructed version reappears as an exchange of questions and answers. The notes play a vital role here, helping the barrister to guide his client to present the instructed case. Here, one faces an extra mode of speech production. Words are not simply formed according to Goffman's (1981) "script" or "memory" (p. 171) but through imaginative and supportive questions according to the modulated evidence and instructions. The trans-sequential analysis unravels a chain of representation.

Barrister and defendant were effective in staging the instructed version vis-à-vis judge, jury, and most important, the prosecution. The barrister used the list of modules to formulate questions; the defendant used the barrister's questions to tell his side of the story. In the transcript of the hearing, the narration unfolds as follows:

> Q. And how long were you on the floor for, could you say? — A. About a minute.
> Q. And who was involved in the stamping and kicking? — A. Jonathan Victim and his friend, the blonde one.
> Q. What happened then? — A. Well then, after they had been stamping on me, I stood up and I had the glass in my hand and I spun round and just — just went for him.
> Q. Right. Well, did you have any difficulty getting up? — A. Yes.
> Q. Why did you have difficulty getting up? — A. Because they were still stamping on me. I just managed to get up somehow.
> Q. And at what point did you start to swing the glass? — A. Well, as I got my feet on the floor I just spun round and lashed out as I was standing up - at the same time as I was just standing up. I was like crouched down.

The barrister provides the story line and cues for the defendant's responses. This guidance is similar prompting in a theater but happens without the aid

of a script and in accordance with the court's order of speech. The barrister's questions guide the interviewee through the documented account. They minimize the risk of losing track by giving details and setting the sequential order of events. Only a narrow range of responses are available to these directing questions by the interviewee.

The "impression control" (Goffman, 1974/1986) via notes and questions allows the barrister certain motions. A crucial one is enacted at the end of the friendly examination and reflects the defense's vulnerability. The barrister, instead of evading the case's most vulnerable point ("I wasn't finished"), raises it openly:

> Q. And then you were asked, "Did you feel remorse for what you had done, or anything?," and you say, "No, I wasn't finished." What did you mean by that? — A. I don't know. I was still very angry. I just — I don't know.
> Q. And, when you struck with the glass, what did you intend to do? — A. I don't know.
> Q. Did you think about the fact that you had the glass in your hand? — A. No.
> Q. Did you want to cause him really serious injury? — A. Not really serious injury, no.

The barrister's questions give the defendant an opportunity for repair in front of the jury. The directness of the question, moreover, reflects anticipation of the counterpart moves expected in the cross-examination. The prosecuting barrister will surely use this incriminating statement to provoke a self-damaging response by the defendant, one that reveals the true connotation of this "straightforward" comment to the police. Our barrister tried a forward defense.

The defendant's testimony enters the notes as well, and it does so in the known manner. The section about the instant when, according to the defense, the turmoil commenced, looks like this:

> I called him dickhead.
> Not called his mate a/t.
> Glass thinner than bottle.
> …
> I do lose temper easily. I lost my temper with him. I decided to lash out.
> …

I didn't know, not aware of glass in hand.
I forgot I had it in my hand.
Kept in my hand when on floor. Took it to toilette.

Again, the notes swallow the utterances' production. Everything is translated into the currency of modules. The court hearing, in light of the notes, turns into a record that can be read forward and backward: a quantity of points that can be rearranged for all practical purposes. In this way, notes organize both remembrance and forgetting. They are a powerful technology to receive (significant, supportive) as well as overhear (agreed on, useless) details of the competing case(s).

THE CLOSING SPEECH

So far, the trans-sequential analysis of the representational project has encompassed divergent moments of marking, noting, and mapping. On one hand, the practices supply viable tokens for subsequent steps in the process. On the other hand, the tokens or traces neither fully actualize the former steps of the barrister's work, nor do they fully anticipate what will occur in court. I note another aspect here: The preparation carried out in the barrister's notebook has contributed already to the oral exchanges. The modules have gone beyond the protected sphere of the book to direct the public examination of witnesses.

The coupling of the written and the oral appears again in the final stage. The closing speech is, as a line of argument, already prepared for in the barrister's notes. This stage of the representational project deserves certain attention because it is for the first time that the barrister can deliver some uninterrupted speech. So far, the barrister's oral contributions were short, restricted to questions and answers. He conveyed doubts, scepticism, guidance, or alternative versions in the form of questions.

In contrast to this limitation, the closing speech signifies an exceptional moment. Only here can the defense barrister present his line of argument and address the court by means of a full speech. The closing speech is the culmination of the representational project. In the last section, I examine how the barrister prepares for this event and how the prepared script is involved in the actual speech.

Drafting the Speech

The preparation takes time and demands attention. So far, the barrister could handle multiple tasks simultaneously and had to do so because of time pressure. He took notes while interviewing his client, marked the brief while chatting with colleagues, and collected points while cross-examining. Many of his private marks appear simultaneously with other public activities. At this final stage, by contrast, the barrister was granted some extra time outside of court to focus on preparing his closing speech:

JUDGE REF: … Mr. Law, would you prefer to make your closing address tomorrow morning?
MR. LAW: I would, your Honour. It won't be very long, but I would rather do it in the morning if that. …
JUDGE REF: Well in that case, then, we will conclude now.
MR. LAW: Thank you.
JUDGE REF: (to the jury): So, ladies and gentlemen, because we are moving into the next stage of the case Mr. Law is entitled to certainly be able to marshal his thoughts before he addresses you and thereafter I have to sum the case up to you and you will be retiring tomorrow morning. (…)

The closing speech is usually scripted during the trial. Defense barristers write final notes while the prosecution is delivering his closing speech, often considered an advantage in itself. The following notes reveal, however, the benefits of having time to do proper scripting. The barrister used his preparation time—actually on his way to work on the train—to scribble down arrays of points such as the following:

1. persons contact/trouble/commot./coincidence
2. lead up to blow
   -position/direction
   -contact
   - steps
   -

Yet these words were crossed out and rendered as a useless try. The second effort begins with the same order of testimony already encountered:

3. Ev. of Victim
4. Ev. of Short
5. Ev. of Big

However, again the barrister changed the order of the argument. His third attempt focused on a number of queries and inconsistencies:

6. Bottle glass — not of great importance …
7. P's friend with blonde hair may be significant …
8. Explanation of injuries of Def …
9. Why was he so angry …
10. Given the 4 versions of events you have heard it wd be nonsense to me to suggest you that any one of the versions would be entirely correct
11. Ev. Big & Short is in direct conflict with Victim
    →There was some physical contact before
    →The def. was right next to him when blow…
    →The def. did spin round + no time to aim the blow or to stop or to consider what he was doing
    →Blow came imm. after some physical contact from Victim
12. Clearly, the def has done wrong. Has admitted as much. Are you satisfied so sure that in split second before blow he had actually formed intention to do really serious harm?

The noted points are designed to direct the jury's attention toward certain issues and away from others. In this regard, they stand for assorted moves: Point 6 ("not of great importance") aims to get rid of one inconsistency in the defense evidence. Points 7, 8, and 9, in contrast, guide the court's attention to several "obscurities" in the prosecution case. They raise questions without providing answers. The Points 10 and 11 display specific inconsistencies resulting from the testimonies. Point 12 concludes with the gist of the debate: whether the defendant had the intention to do serious harm to the victim.

After he developed this line of argument, the barrister added a new introduction. The barrister-author offers the following initial remarks to the barrister-animator:

1. No part of my job to suggest that everything said by pros. witnesses is false to you must accept the ev. (evidence, TS) of defendant. I represent def. + propose to make a no. of points

2. Certain essential facts are agreed: Def. just struck one blow, using bottle/glass, he was extremely drunk, has pleaded g. to unlawful wounding …
3. He pleaded to serious offense but Crown ask you to convict of a far more serious offense …
4. May think extremely difficult to determine what going on in his mind at any given time (let alone 19 yr old). Even more difficult in … of this case > mind was adhd by drink.
5. Whilst fact extremely drunk no defense — are entitled to + must consider how it may have affected his perception of events + appreciation of what he was about to do in the moment before this blow was struck…

These remarks seek to set up the jury's point of view. They frame the reception of the overall speech and construe an audience. The notes both assist the jury's decision making and complicate it at the same time. They reduce the issues under debate and display the remaining ones as difficult to resolve. In fact, this framing offers questions that are impossible to answer. The court, in this version, does not require the jury to choose between two opposing versions of what happened but to reflect on all that remains necessarily unclear. The jury's attention, therefore, is directed to "reasonable doubts."

After this prologue, the script lists the decisive criteria and the key controversies. The defense, one may conclude, is narrowed down to conflicting accounts of what happened prior to the blow:

6. Circs at time of (and leading up to blow) are of crucial importance: consider: (1) had a/t occurred prior to the blow being delivered? (2) Did he appear to stop + consider what he was doing or did it appear to be a r. quick response to some physical contact? (3) Was there more than one blow? (4) Did he take a no of steps or simply turn & strike in one move?
   →prosecution ev. is in conflict with these issues.
   →pros. ev. is inconsistent in other respects + may cause you to stop & consider reliability.

This line of inquiry was encountered already along with several others in the barrister's marks of the brief. This concern endured through the several stages of preparation and trial, up to the closing speech, and turned out to be a fruitful focus of assessment.

Delivering the Speech

This list of points was visibly put to use during the closing speech and clearly made an important contribution to it. While facing the jury, the barrister-animator kept the red book open directly in front of himself. The notes were made available in a way that both practical foci—the jury and the book—could be attended to. The barrister turned pages with the progression of speech and script.

The notes were neither written nor used for reading aloud. Rather, they equipped the speaker with key words or, to put it differently, with lighthouses to guide the animator from point to point. Such assistance does presuppose a competent speaker capable of oscillating between two modes of speech production, partly reiteration and partly improvisation. The notes are too detailed to memorize but too fragmented for reading aloud. They direct the speaker from point to point, none of which should be left out. They furthermore provide, as distinct from memorization, external reminders and support in the case of disorientation or confusion. The lost animator could easily find his way back by consulting the notes.

Figure 4 shows how the notes enter, guide, and put into motion portions of the closing speech. The barrister-animator stays close to the notes by using key words as passage points. The *italic* words in the transcript exemplify the echoes of the notes. Around these, the speech involves fresh and additional formulations. The key words are embedded in a natural flow of orality. The barrister talks over a series of formulations without losing track. From the animator's point of view, the script may be well understood in terms of risk management. It serves as a web, not a straitjacket. It helps

Notes	**Speech**
Circs at time of (and leading up to blow) are of crucial importance: consider: (1) had a/t occurred prior to the blow being delivered? (2) Did he appear to stop + consider what he was doing or did it appear to be a r. quick response to some physical contact?	"You might want to consider the *circumstances* surrounding what happened, and in general terms, you might want to *consider* whether anything did happen *before the blow* was *delivered* was there any physical contact between Mr … and the defendant? Is it a case in which he did *appear to stop and consider what he was doing*? Or was it a *quick response to some*thing which just happened – perhaps a touching on the shoulder or perhaps, as he suggests, more physical violence?"

FIGURE 4 From barrister's notes to his speech.

the barrister-animator to avoid leaving out important points or confusing details. It stabilizes his case representation for the decisive moments when addressing the jury.

The barrister's address adds much to the script, which does not mean that the script falls short. The speech is supposed to translate the stiff line of argument into a smooth oration. As a result, his speech progresses line by line without turning into reading aloud. Speaker and script could not—to different degrees—do without each other.

The script and its handling allow the barrister to foster the impression that the case is not the outcome of time-consuming, meticulous preparation but a consistent and self-evident gestalt. This mode of speech production serves the official bias toward talk characteristic of jury trials and downplays the documentary basis of the representational project. During the closing speech, the barrister turns toward the jurors while the red book remains unobtrusively on the desk. The speaker's eyes only fleetingly touch the crucial lines. It seems as if the good reasons have emerged naturally as an inevitable outcome of courtroom discourse. The star during the closing speech is not the barrister (as animator) but the case (as a self-evident unity).

CONCLUSION

The careful reading through the barrister's brief and notebook provided some valuable insights into what it means to deliver a defense case in a Crown Court. Both sources offered an unexpected variety of prediscursive objects: foci of inquiry, modules, lists, a map, and so forth. I have tried to show that not all of them are directly connected to what Goffman (1981) called speech production. Not all may count as means to speak out for the case in court. However, the systematic marking, the note taking, the modulation, the mapping, and the drafting contribute altogether to what I referred to as the microformation and the representational project.

Although not directly congruent with "speech production," this study of microformation did benefit from Goffman's (1981) ethnographic orientation to everyday talk. It did so, first of all, because it made me realize the specificities of the analytical as well as practical scope of that perspective. Goffman (1981) was concerned with the various sources of speech (and their employment), whereas trans-sequential analysis takes notice of the formation of the legal matter and arguments as well. Goffman (1981), be-

sides, tightened "speech production" to a duality of source and completion, whereas trans-sequential analysis encapsulates a compound succession as shown in Figure 5. The succession involves various transformations of the "original" texts. By means of marking, modulation, and mapping, the fixed inscriptions gathered in the brief are turned into moveable units that are recombined into "good points" and "forceful arguments." In the course of microformation, the old and new, written and oral, friendly and hostile statements are guided into a single field of presence (the case).

Reading through the barrister's brief and notes put into the forefront certain achievements that one would easily disregard as such. The homogenization of dispersed sources is one of them. Diffused texts are by turns decomposed into modules and interrelated with one another into the map. The folding of process and event is another one. Procedural history, in the course of case formation, is no longer simply "archived."[25] What was stated earlier (often) returns as binding and (sometimes) as a resource for the representational project. The modules, as I called them, play a key role in these underlying transformations. They make the filed evidence available for the current dealings. They convert varied kinds of information and inferences into one shared currency. They shape statements and confront them in a unified field. The barrister's notes, hence, do not simply report speech production. In fact, they show the formation of legal discourse on the microlevel.

The field of presence is not a grid or a structure. It does not force the statements into fixed value positions. It rather forces them into an ongoing competition, into oppositions and contrasts. Once out there, the statements "never sleep" (Foucault, 1989). They stay awake until the verdict is entered. One would, in this line, misunderstand discourse formation when framing it as self-driven dynamics. The barrister's notes show the contrary. Statements do not just enter the discourse but are methodically guided into

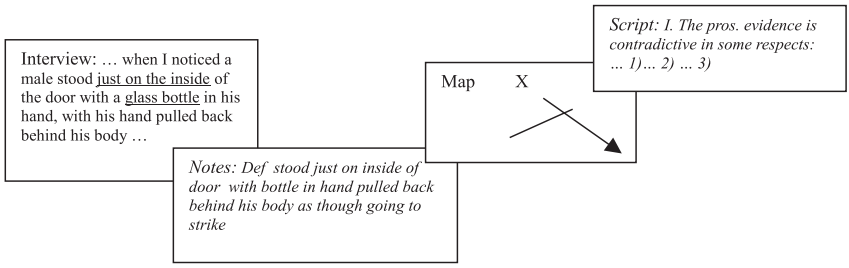

FIGURE 5 The succession across text and talk.

it. They do not interact automatically but are systemically confronted with one another. Statements are thus methodical achievements just like the field of presence that they populate. To put it more strongly: The microformation would not be possible without an obsession with words, their meaning, and their nuances. This obsession with words presumes that events can be reconstructed and disputes can be resolved by means of careful phrasing and reception.

This does not imply that microformation is the planned creation of lawyers. The barristers do not master the interplay of words, the arrival of new statements, and their ultimate strength. They do not control the effects of the discursive practices they are drawn into. Instead, the discursive practices call to mind the many investments, precautions, alignments, and alliances that enable a barrister to present a case in court.

What does all this mean for the theme "from talk to text"? The discursive practices explored here involve both text and talk. They do so not by jumping from one mode of existence to the other (from text to talk, from talk to text) or by sticking to one or the other. Microformation rather operates in between, invents intermediaries, and bridges gaps. This explains the unusual interest in minor entities such as marks, notes, a map, lists, drafts, and so forth. These minor units, I claim, allow the in-court lawyer to represent *the* case in light of the past and the present interaction, his instructions, and the adversary. For this reason, the marks, modules, and map are far more than just neutral links between text and talk. They bind the present performance to the archival past, the "fresh talk" to gathered facts.

Future discourse studies could fruitfully take on the microformation of legal, political, administrative, or other discourses. They may do so in the sketched trans-sequential manner, meaning they may account for the functions of transitory objects and the interplay of process and events. Such endeavor, however, opposes both talk bias and text bias. Instead, it demands careful attention for the units that operate in between text and talk. With this empirical study, I have introduced such data along with a method to examine it.

NOTES

1 Methodical branches are specialized along this line (see, e.g., Silverman, 2000). They are restricted to either documents or transcripts regardless of the entanglements of text and talk in discourse praxis. Additionally, there is a general preference for talk as the

genuine mode. "Voice becomes the metaphor of truth and authenticity, a source of self-present 'living' speech as opposed to the secondary lifeless emanations of writing" (Norris, 1988, p. 28). See for this argument Derrida's (1977) critique of Saussure and especially his notion of "phonocentrism." Texts seem poor supplements of embodied orality. In this line, legal filing is described as a "mode of dying" (Tuitt, 2005) that cools out the once heated human passions.

2 Langbein (2003) introduced this trial system to the point:

> The striking peculiarity of the Anglo-American trial is that we remit to the lawyer-partisans the responsibility for gathering, selecting, presenting, and probing the evidence. Our trial court, traditionally a jury sitting under the supervision of the judge conducts no investigation of its own. The court renders a verdict of guilt or innocence by picking between or among the evidence that the contesting lawyers have presented to it. (p. 1)

In English Crown Courts, solicitors and barristers collaborate along the text/talk and preparation/performance difference. In theory, the solicitor appears as the liable caseworker, whereas the barrister acts as the case's spokesperson. McConville, Hodgson, Bridges, and Pavlovic (1994) or Tague (1996) reformulated this division of labor in terms of several disengagements at the expense of the defendant.

3 See Acknowledgments.

4 > In the case of fresh talk, the text is formulated by the animator from moment to moment, or at least from clause to clause. This conveys the impression that the formulation is responsive to the current situation in which the words are delivered, including the current content of the auditorium and of the speaker's head, and including but not merely, what could have been envisaged and anticipated. (Goffman, 1981, p. 171)

5 This analysis in time shall not be confused with the sequential analyzes attained by text hermeneutics (phrase by phrase) or in conversation analysis (turn by turn). The task is different: The researcher specifies the moment-by-moment character within discourse practices and between them; the researcher specifies moreover when exactly semi-products of these practices are available, how they are put into use later on, and to what extent they accumulate. This double perspective characterizes what I mean by trans-sequentiality in this context. It is led by the "question of how a framed activity is embedded in ongoing reality" (Goffman, 1974, p. 250). See as well Archer (1996) and her notion of analytical dualism "to defend temporal separability" (p. 697).

6 At times, this partial view made me refer to the main informant as *my* barrister and the defendant as *our* client. I am particularly grateful to the defense barrister (or "defense counsel"). This study would not have been possible without his trust and support.

7 About 4 months later, the barrister e-mailed his recollection: I did things in the following order: 1. underlined important parts in the prosecution evidence (I normally do this the first time I read the brief) 2. noted the crucial points of evidence in my notebook (I normally do this, but not always), 3. met the client to take his instructions and confirm

what he said in police interview (In this case he had in fact made a comment in interview which implied that he wanted to do serious harm—but I can't remember exactly what it was. However, in conference he maintained that he did not intend serious harm.) 4. advised him to plead not guilty to the section 18. (…) 5. I think that I probably drew a plan of the club with the client shortly before trial began.

8 The Crown Prosecution Service (CPS) takes over from the police and decides whether to prosecute the case on the basis of the collected evidence. In case of a positive assessment, the CPS hires a barrister to represent the case in Crown Court on the basis of the instructions. The barrister may advise the CPS not to prosecute the case but needs approval from the instructing solicitor. The same is true in the case of a successful plea bargain. Any result needs the agreement by the CPS solicitor who consults the alleged victim before any definite decision.

9 See Scheffer (1998) for a microsociological application of the metaphor of import and export plus the regulations used locally to deal with them. The metaphor assumes relatively stable material things that cross the boundaries of social events. It counters the postulation that "everything is locally accomplished" without playing down the efforts necessary to utilize the imports locally.

10 Barristers are organized in Chambers to share the overheads for clerks, secretaries, library, and so forth. In this case, the barrister's Chamber hosted around 30 barristers, all instructed at times by the defense and at times by the prosecution. Thus, it happened regularly that barristers from the same chamber met in court on different sides.

11 See Morris (1991) on what qualifies a "good brief" from the barrister's point of view.

12 The barrister's client is, formally speaking, the law firm represented by the solicitor in charge. The solicitor instructs the barrister to represent the case in court. The solicitor, in turn, receives instructions by the defendant. In our case, the solicitor did not provide any instructions for the barrister. The usual excuse ("He never turned up in the firm!") cannot satisfy here, because Steve Striker was available for legal visits during the pretrial. He sat in prison.

13 These portions (~ … ~) refer to comments that the barrister places on the margins of the pages.

14 The striking out and bracketing derives from the barrister's inscriptions as well. The same is true for the double lines following.

15 These phrases determine what shall be "left to the jury": that the defendant hit intensively, that he was proud about it, and that the injuries were caused by hitting with a bottle.

16 The barristers' lounge is an important site for representational projects. It is used to get ready for trial, to study the brief or the law books, to wait for hearings to start or continue, to negotiate with opponents, or to chat over a coffee or tea about this and that with colleagues. Here, agreements are discussed and drafted. The lounge is the place where the barristers can discuss their issues directly (meaning without being mediated by the judge and observed by the jurors).

17 This second-person form seems tempting. It characterizes the barristers' deliberations in the lounge: "You" instead of "He," "yours" instead of "his." The shift implicates an advanced kind of role-playing. The barristers act "as if" they were their clients. They "symbolically" and "playfully" take their clients' positions—and by doing so, test arguments and simulate the debate.

18 The same movement toward a strong author guides the documentation of interviews with asylum seekers (Scheffer, 1998). A dialogue is turned into a monologue and transmits a higher degree of accountability and transportability. Although questions are shortened, cut down, and summarized, the interviewee's answers are echoed in detail. Interestingly, this tendency is turned around in the confronting parts of the interviews where the official makes aware of apparent flaws, incoherency, and illegitimacy through the compositions of strong questions.

19 Plea-bargaining sessions, similar to client–barrister conferences, are structured by interview protocols. The counsels negotiate up to which point the text is acceptable for both parties (Scheffer, 2003). Guilty pleas often go together with cut backs of documented admissions. The pleas are, in this manner, entered on reduced bases. The written statements play a prominent role here; they dictate the weight of cases despite, one could state in the light of the official "truth finding," the principle of orality.

20 My brief contemplation on the barrister's map borrows from patterns named by Kitazawa (1999) in his article on hand-drawn maps: "retention of the three-dimensionality of real space; formal resemblance with intertextuality; and identification of space by means of words" (p. 299). Our case, however, is distinct in one central regard: The map is drawn for internal use only. It is not made to be shown and to convince but to enable the barrister to ask questions and give a speech in open court.

21 Sacks (1978) called this "the canonical form of stories."

22 This extract refers to the following passage in the friendly examination:
Q. Mr. Strict: The man who walked past you first, was he the striker or the struck in this second incident? — A. He was the struck.
Q. Mr. Strict: So, the man who walked past you second was he carrying anything. — A. Yes.
Q. Mr Strict: What was he carrying? — A. A bottle.

23 This is different to German procedural regimes where lawyers may receive several interviews by the judge until they take the floor. They can wait and see, whereas in the Crown Court, the barrister has to act on the prosecution case comparatively early. This carries implications for the role of preparation and the moment until when the representational project can be kept open.

24 The Auld Report (2001) acknowledges a tension between official orality and actual textuality:

> But it is common place for juries, having retired to consider their verdict, to return to court to ask the judge to be reminded of what a witness has said and, often, for a copy of his written statement. In most instances they know that there is such a

> statement because the advocates and the judge were plainly following their copies of it as he gave his evidence, the witness may have referred to it, or the advocates have cross-examined and re-examined him by reference to it. All the leading players in the courtroom have one, but not the jury. (p. 520)

The report (Auld Report, 2001) defends this rule: "(…) even with a proper warning and further reminder by the judge of the witness's oral evidence, they [the jurors] would be likely to give the statement more weight than their recollection of what he said" (p. 520)

25 For a dynamic and practical description of archives, see Lynch (1999).

REFERENCES

Archer, M. (1996). Social integration and system integration: Developing the distinction. *Sociology, 30,* 679–699.

Auld Report. (2001). *Review of the criminal courts of England and Wales.* The Right Honourable Lord Justice Auld, September. Retrieved August 15, 2004, from http://www.criminal-courts-review.org.uk/).

Conley, J. M., & O'Barr, W. M. (1990). *Rules versus relationships. The ethnography of legal discourse.* Chicago: The University of Chicago Press.

Derrida, J. (1977). *Of grammatology.* Baltimore: Johns Hopkins University Press.

Foucault, M. (1989). *The archaeology of knowledge.* New York: Routledge. (Original work published 1972)

Goffman E. (1974). The anchoring of activity. In *Frame analysis: An essay on the organization of experience* (pp. 247–300). Boston: Northeastern University Press.

Goffman, E. (1981). *Forms of talk*. Phildelphia: University of Pennsylvania Publications.

Goffman, E. (1983). The interaction order. *American Sociological Review, 48,* 1–17.

Goffman, E. (1986). The theatrical frame. In *Frame analysis: An essay on the organization of experience* (pp. 123–155). Boston: Northeastern University Press. (Original work published 1974)

Kitazawa, Y. (1999). The accountability of hand-drawn maps and rendering practices. *Human Studies, 22,* 299–314.

Langbein, J. H. (2003). *The origins of adversary criminal trial.* New York: Oxford University Press.

Latour, B. (1996). On interobjectivity. *Mind, Culture, and Activity: An International Journal, 3,* 228–246.

Latour, B. (2002). Morality and technology: The ends and means. *Theory, Culture, Society, 19,* 247–260.

Latour, B., & Woolgar, S. (1986). The micro-processing of facts. In *Laboratory life. The construction of scientific facts* (pp. 151–187). Princeton, NJ: Princeton University Press. (Original work published 1979)

Luhmann, N. (1989). *Legitimation durch Verfahren* [Legitimisation by procedure, TS]. Frankfurt am main: Suhrkamp. (Original work published 1975)

Luhmann, N. (2000). *The reality of the mass media*. Cambridge, England: Polity.

Lynch, M. (1999). Archives in formation: Privileged spaces, popular archives and paper trails. *History of the Human Sciences, 12,* 65–87.

Lynch, M., & Bogen, D. (1996). *The spectacle of history: Speech, text and memory at the Iran-Contra hearings.* Durham, NC: Duke University Press.

McConville, M., Hodgson, J., Bridges, L., & Pavlovic, A. (1994). *Standing accused. The organisation and practices of criminal defense lawyers in Britain.* Oxford, England: Clarendon.

Morris, A. J. H. (1991). Briefing barristers: Ten ways to make the experience a happier one. *Queensland Law Society Journal, 21,* 261–272.

Norris, C. (1988). *Deconstruction: Theory and practice.* London: Methuen.

Sacks, H. (1978). Some technical considerations of a dirty joke. Studies in the organization of conversational interaction. In J. Schenkein (Ed.), *Studies in the organization of conversational interaction* (pp. 249–269). New York: Academic.

Scheffer, T. (1998). Übergänge von Wort und Schrift: Zur Genese und Gestaltung von Anhörungsprotokollen im Asylverfahren [Bridging talk and text: On the foundation and creation of interview protocols in asylum hearings]. *Zeitschrift für Rechtssoziologie, 20,* 230–265.

Scheffer, T. (2003). The duality of mobilization: Following the rise and fall of an alibi-story on its way to court. *Journal for the Theory of Social Behaviour, 33,* 313–347.

Scheffer, T. (2004). Materialities of legal proceedings. *International Journal for the Semiotics of Law, 17,* 365–389.

Scheffer, T. (2005). Courses of mobilization—Writing systematic micro-histories on legal discourse. In M. Travers & R. Banakar (Eds.), *Theory and method in socio-legal research* (pp. 75–89). Oxford, England: Hart Publishing.

Silverman, D. (2000). Analyzing text and talk. In N. Denzin & Y. Lincoln (Eds.), *Handbook of qualitative research* (pp. 821–835). Thousand Oaks, CA: Sage.

Tague, P. W. (1996). *Effective advocacy for the criminal defendant: The barrister vs. the lawyer.* William S. Hein & Co., Inc.

Tapper, C. (1999). Hearsay in general. In *Cross and Tapper on evidence* (pp. 529–562). London,: Butterworths.

Tuitt, P. (2005). Legal practice and modes of dying. *Law and Critique, 16,* 113–129.