

THE NATURE OF LEGAL LANGUAGE

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Peter Tiersma, *The Nature of Legal Language*,
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One of the great paradoxes about the legal profession is that lawyers are, on the one hand, among the most eloquent users of the English language while, on the other, they are perhaps its most notorious abusers. Why is it that lawyers, who may excel in communicating with a jury, seem incapable of writing an ordinary, comprehensible English sentence in a contract, deed, or will? And what can we do about it?

Consider, first, the eloquence of the legal profession. Daniel Webster was famed for his oratory skills. Called upon to assist the prosecution in a murder case, Webster addressed any hesitations the jurors might have harbored about their power to punish the guilty. In doing so, he provided a memorable defense of the theory of deterrence:

The criminal law is not founded in a principle of vengeance. It does not punish that it may inflict suffering. The humanity of the law feels and regrets every pain that it causes, every hour of restraint it imposes, and more deeply still, every life it forfeits. But it uses evil, as the means of preventing greater evil. It seeks to deter from crime, by the example of punishment. This is its true, and only true main object. It restrains the liberty of the few offenders, that the many who do not offend, may enjoy their own liberty. It forfeits the life of the murderer, that other murders may not be committed.

A very different picture of the deterrent effect of punishment was painted by Clarence Darrow, another great legal orator. Darrow sought to persuade a judge to spare the lives of his two young clients, who had pled guilty to a sensational murder:

What about this matter of crime and punishment, anyhow? ... Mr. Savage tells this court that if these boys are hanged, there will be no more murder.

Mr. Savage is an optimist. He says that if the defendants are hanged there will be no more boys like these.

I could give him a sketch of punishment, punishment beginning with the brute which killed something because something hurt it; the punishment of the savage; if a person is injured in the tribe, they must injure someone in the other tribe; it makes no difference who it is, but somebody. If one is killed his friends or family must kill in return.

You can trace it all down through the history of man. You can trace the

burnings, the boilings, the drawings and quarterings, the hanging of people in England at the crossroads, carving them up and hanging them as examples for all to see.

At the end of his long argument, Darrow had the judge in tears. Despite angry mobs lusting after a hanging, the judge sentenced the young men to life in prison.

Yet as mentioned, lawyers are also among the worst abusers of language. Contemplate the convoluted and redundant nature of the typical modern will, a document so important that it is effective only if signed in the presence of witnesses. The first problem is the title: Last Will and Testament. There is no difference between a will and a testament, so either term would suffice. And to label this the last will is absolutely ludicrous. Virtually every will traditionally bears this title, regardless of whether it is the first, the last, or somewhere in the middle.

The will produced by a modern-day Webster or Darrow would probably begin with the words:

I, HELEN HOOVER, of the Town of Goleta, County of Santa Barbara and State of California, do hereby make, publish and declare this as and for my Last Will and Testament, hereby revoking all wills and codicils thereto heretofore by me made.

More simply stated: I declare that this is my will and revoke any previous wills.

The next provision is normally the following:

I direct my Executor to pay my funeral expenses and all my just debts, except those secured by mortgage or otherwise, out of my estate.

This clause is almost always completely useless. Virtually every jurisdiction makes the estate legally liable for debts and funeral expenses, regardless of any directive in the will.

After some specific gifts comes the critical part of almost any will: the residuary clause. Once more, this example was taken virtually verbatim from an actual--and fairly typical--modern will:

I give, devise and bequeath all of rest, residue and remainder of my property which I may own at the time of my death, real, personal and mixed, of whatsoever kind and nature and wheresoever situate, including all property which I may acquire or to which I may become entitled after the execution of this will, in equal shares, absolutely and forever, to ARCHIE HOOVER, LUCY HOOVER, his wife, and ARCHIBALD HOOVER, per capita, to any of them living ninety (90) days after my death.

Again, the reader is inundated by a flood of convoluted and largely empty prose. All that need be said is I give the rest of my estate in equal shares to Archie Hoover, Lucy Hoover, and Archibald Hoover, assuming they survive me by at least 90 days.

Other categories of legal documents fare no better. Here is part of what is called a deed of trust:

Borrower covenants that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except of the encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

This is not a dusty old parchment from an obscure English archive. I signed this document seven or eight years ago when I bought my house. A mortgage or deed of trust is one of the most important obligations that a person can undertake. Yet how many homeowners have any idea what it means to be lawfully seised of anything, or what encumbrances of record are? How many would realize that this paragraph could require them to pay large amounts of attorneys fees if there turn out to be problems with title to the property?

Or consider the legalistic warning commonly contained on isopropyl alcohol, a substance some people might be tempted to drink:

FOR EXTERNAL USE ONLY

Will produce serious gastric disturbances if taken internally.

Does this mean that you should only drink it outdoors? Clearly that is not the intent. But if the message is do not drink, why not just say so?

Legal language has become so notorious that it has entered the realm of popular humor. To Will Rogers once wrote that "the minute you read something and you can't understand it you can almost be sure it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don't know just what it means, why then you can be sure it was drawn up by a lawyer." The Marx Brothers lampooned the language of the law in A Night at the Opera; Groucho and Chico successively lopped off portions of a contract relating to the party of the first part, party of the second part, party of the third part, and so forth ad nauseam.

Current lawyer jokes make a similar point:

After months of bickering, a divorce lawyer completes negotiations with the other side and calls his client with the good news.

"So what did you work out?" George asks the lawyer.

"Well, what it boils down to is that the party of the first part, to wit, George Smith, shall convey to the party of the second part and to her heirs and assigns forever fee simple to the matrimonial estate, including all property real and personal and all chattels appurtenant thereto."

"I don't get any of that," George muttered.

"That's right."

Even highly educated judges may be dumbfounded by legal prose. During oral argument regarding an insurance policy in 1969, Chief Justice Weintraub of the New Jersey Supreme Court confessed: "I don't know what it means. I am stumped." Justice Haneman admitted, "I can't understand half of my insurance policies," and Justice Francis suggested that the policies are kept "deliberately obscure."

Why can't lawyers write more clearly, concisely, and comprehensibly? We know they can communicate well enough when they want to. So why must so many important legal documents--documents that govern our rights and obligations as citizens, that allow a bank to repossess our house, or that determine who is responsible for damage to a rental car--be in virtually unintelligible legalese?

The Rise of Legal Language

Perhaps the language of lawyers is so convoluted simply because of the conservatism of the profession and its veneration of history and tradition. To some extent, legal English is indeed a product of its history. It is a story of Anglo-Saxon mercenaries, Latin-speaking missionaries, Scandinavian raiders, and Norman invaders, all of whom left their mark not only on England, but on the language of its law.

The English language can be said to have begun around 450 A.D., when boatloads of Angles, Jutes, Saxons and Frisians arrived from the Continent. These Germanic invaders spoke closely related languages, which came to form what we call Anglo-Saxon or Old English. Although the Anglo-Saxons seem to have had no distinct legal profession, they did develop a type of legal language, remnants of which have survived until today. Examples include words like *bequeath*, *goods*, *guilt*, *manslaughter*, *murder*, *oath*, *right*, *sheriff*, *steal*, *swear*, *theft*, *thief*, *ward*, *witness* and *writ*.

Besides vocabulary, an Anglo-Saxon characteristic that left traces in legal English is alliteration. As opposed to rhyme, where the ends of words are phonetically the same, alliteration requires that words begin with the same sound. Anglo-Saxon poetry strove to have two or three words in each line alliterate. Alliteration is not only poetic, but makes phrases easier to remember, an important feature in a largely preliterate society.

Most Anglo-Saxon alliterative phrases have disappeared from our language. One that has survived is *to have and to hold*, which is still part of many marriage vows. And an Old English poet could almost have coined the phrase *rest, residue and remainder*, a ponderous but poetic expression still found in many wills, as is *hold harmless* in contracts. Other illustrations are *any and all* and *each and every*, both beloved by lawyers. To some extent, this tradition may explain the penchant of the profession to concatenate long lists of words joined by *and* or *or*, with or without alliteration.

The Anglo-Saxons used not only Old English as a legal language, but also Latin. Although Latin was introduced to England during the Roman occupation around the time of Christ, it became a major force only after the arrival of Christian missionaries in 597. Before long, Latin was the language not only of the church, but of education and learning. The association between literacy and the church became

so strong that the two were almost synonymous. The terms clerk (someone who can write) and cleric or clergy (priest) derive from the same Latin term. For centuries, English courts recognized a type of immunity for the clergy; to avoid the gallows, you simply had to read a verse from the Bible (sometimes called the "neck verse").

Latin was important for English law mainly as the language of court records. The practice of using Latin *versus* in case names (for "against") harks back to these times. English lawyers and judges were also prone to express sayings or maxims about the law in Latin. An example that has survived is *caveat emptor*.

A later influence on the language of the law was Scandinavian in origin. During the eighth century, Vikings began raiding the English coast and eventually settled down. The English borrowed from these Scandinavians the most important legal word in the English language: the word law itself. Law derives from the Norse word for "lay" and thus means "that which is laid down."

A couple of centuries later another group of Scandinavians had a far more profound and lasting impact on the language of English lawyers. These were the Normans, whose name ultimately comes from northman. The Normans were originally Vikings who conquered the region of Normandy during the ninth and tenth centuries. In the course of a few generations, the Viking invaders of Normandy became French both culturally and linguistically; the Northmen had become Normans.

William, Duke of Normandy, claimed the English throne and conquered England in 1066. Before long, the English-speaking ruling class was largely supplanted by one that spoke Norman French. As (over)stated much later by Sir Walter Scott in his novel *Ivanhoe*: after the Norman Conquest, "French was the language of honour, of chivalry, and even of justice, while the far more manly and expressive Anglo-Saxon was abandoned to the use of rustics and hinds, who knew no other."

In the beginning, the Normans wrote legal documents in Latin, not French. Around 1275, however, statutes in French began to appear. By 1310 almost all acts of Parliament were in that language. A similar evolution took place with the idiom of the courts. At least by the reign of Edward I, towards the end of the thirteenth century, French had become the language of the royal courts.

Oddly, the use of French in the English legal system grew at the very time that its survival as a living language was in serious question. The English historian J.H. Baker has observed that outside the legal sphere, Anglo-French was in steady decline after 1300. Even the royal household, the last bastion of French, switched to English by the early 1400s.

Unhappiness about this state of affairs led to what might be considered the first plain English law. In 1362 Parliament enacted the [Statute of Pleading](#), condemning French as "unknown in the said Realm" and lamenting that parties in a lawsuit

"have no Knowledge nor Understanding of that which is said for them or against them by their Serjeants and other Pleaders." The statute required that henceforth all pleas be "pleaded, shewed, defended, answered, debated, and judged in the English Tongue." Ironically, the statute itself was in French!

The legal profession seems to have largely ignored this statute. Acts of Parliament did finally switch to English around 1480, but legal treatises and reports of courts cases remained mostly in French throughout the sixteenth century and the first half of the seventeenth. Six hundred years after the Norman Conquest, and around three hundred years after French was virtually a dead letter in England, it was still being used as a professional language by English lawyers!

Complaints continued to mount. In 1549, Thomas Cranmer, first Protestant archbishop of Canterbury, recounted that "I have heard suitors murmur at the bar because their attornies pleaded their cause in the French tongue which they understood not." Roughly a century later, the Puritans took power, beheaded the king, and passed a law in 1650 that required all case reports and books of law to be "in the English Tongue only." The Puritans evidently had a zest not only for plain living, but also for plain language. But in 1660, after the monarchy had been restored, this "pretended act" was repealed and the old state of affairs returned. Lawyers rejoiced and resumed writing in Law French, at least for the next few decades.

Because it was the main language of the profession for so many centuries, French has had a tremendous influence on legal language. A vast amount of legal vocabulary is French in origin, including such basic words as *appeal*, *attorney*, *bailiff*, *bar*, *claim*, *complaint*, *counsel*, *court*, *defendant*, *demurrer*, *evidence*, *indictment*, *judge*, *judgment*, *jury*, *justice*, *party*, *plaintiff*, *plea*, *plead*, *sentence*, *sue*, *suit*, *summon*, *verdict* and *voir dire*.

Another example of French influence is that in that language adjectives normally follow the noun that they modify. Several such combinations are still common in legal English, including *attorney general*, *court martial*, *fee simple absolute*, *letters testamentary*, *malice aforethought*, and *solicitor general*. Also, Law French allowed the creation of words ending in *-ee* to indicate the person who was the recipient or object of an action (*lessee*: "the person leased to"). Lawyers, even today, are coining new words on this pattern, including *asylee*, *condemnee*, *detainee*, *expellee* and *tippee*.

The French of lawyers became increasingly corrupt, and its vocabulary more and more limited. By the seventeenth century lawyers were tossing in English words with abandon. Consider a famous case from 1631, in which a condemned prisoner threw a brickbat at the judge. The report noted that *he ject un brickbat a le dit justice, que narrowly mist*. The judge was not amused. He ordered that the defendant's right arm be amputated and that he be *immediatement hange in presence de Court*.

Parliament finally ended the use of Latin and French in legal proceedings in 1731. By then, however, it was delivering merely a coup de grâce.

Things were similar in the United States. Despite initial antipathy in the colonies towards the legal profession, the Americans soon realized that they needed to develop a system of justice. The only real model at their disposal was the English one. The fledgling American states adopted not only England's common law, but its language as well. Nonetheless, criticism of legal language continued. Thomas Jefferson complained about the verbosity of statutes, their endless tautologies, and "their multiplied efforts at certainty by *says* and *aforesays*." Yet American legal language ended up being very similar to its English parent.

Back in England, another critic pointed out that the simple phrase I give you that orange, when written out by a lawyer, would become something like the following:

I give you all and singular, my estate and interest, right, title, claim and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I the said A.B. am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp, and pips, anything hereinbefore, or hereinafter, or in any other deed, or deeds, instrument or instruments of what nature or kind soever, to the contrary in any wise, notwithstanding.

Unfortunately, the example is just as apt today. Witness the will and deed of trust reproduced at the beginning of this essay.

Clearly, the legal profession has tended to be quite conservative, especially in the past. But old habits and tradition cannot fully explain why modern lawyers persist in using archaic jargon passed down over the centuries. Actually, lawyers can be quite creative and innovative when it suits their purposes. They have readily coined neologisms like *palimony* (alimony paid to a "pal" or unmarried partner) and *hedonic damages* (money damages for loss of the pleasure of life). And, as we have seen, lawyers can speak eloquently and very understandably to jurors during trial. If legal documents are inscrutable--as many are--it is more than a matter of tradition.

A Conspiracy of Lawyers?

Some critics have suggested that the long retention of legalese is not just due to the profession's general conservatism, but comes from what might be called a "conspiracy of gobbledygook." As suggested by David Mellinkoff, who wrote a classic critique of the language of the law: "What better way of preserving a professional monopoly than by locking up your trade secrets in the safe of an unknown tongue?" Mellinkoff's reference was to Law French, but he could just as well have been writing about legalese today.

Bentham was one of the more ardent proponents of the conspiracy theory, referring to "lawyer's cant" as "an instrument, an iron crow or a pick-lock key, for collecting plunder." After all, he wrote, if you strip away all the jargon, "every simpleton is ready to say--What is there in all that? 'Tis just what I should have done myself."

That lawyers actually created legal English, or cling to old habits, to keep the public in the dark and protect their monopoly on legal services is surely exaggerated. Still, lawyers seem to trot out their most ancient, redundant, and convoluted phrases when writing documents directly for clients, particularly wills. The average will (for an estate without potential tax liability) is not conceptually all that complex, and most of the language is pure boilerplate. Yet lawyers are able to charge hundreds of dollars for drafting one. All too often, complexity of language masks simplicity of content.

Justifying fees is not the only reason for the persistence of legalese. Their distinctive language allows lawyers to mark themselves as members of the profession. Law students soon learn how to "talk like a lawyer." Use archaic words like *aforsaid*, *herein* and *to wit*. Embed them in convoluted syntax. And never use one word where a longer phrase is available.

Perhaps the best way to sound like a lawyer is to throw in as much legal vocabulary as possible. There are literally thousands of technical terms from which to choose. Words of Latin and French origin are particularly impressive. No one will doubt that you are a real member of the bar if you can convincingly bandy about phrases like expunging a *lis pendens* or quashing a subpoena *duces tecum*.

Lawyers may also have strategic reasons for favoring legalese and the obscurity it engenders. For instance, an outfit that rents hang gliders to the public may be legally obligated to warn of the dangers of the sport, but at the same time would not want to discourage potential customers. Or a department store might wish to give out credit on one-sided or even oppressive terms, but might fear that consumers would balk if they realized the truth. Convoluted and incomprehensible legalese is the obvious solution.

Perhaps a more legitimate justification for the longwindedness of the profession derives from its adversarial nature. Virtually any legal document is liable, at some point in its existence, to be picked apart by an opponent eager to exploit a loophole or ambiguity in hopes of wiggling out of an agreement or contesting a will. Legislation is no exception; almost any statute will be subjected to intense scrutiny by lawyers trying to poke holes in it on behalf of their clients. Those who draft such documents must anticipate these attacks. Therefore, they obsessively try to cover every base, plug every loophole, and deal with every remotely possible contingency. The result is ever longer, denser, and more complicated prose.

"Covering all the bases" is no doubt the explanation for a highly contorted definition of buttocks in a Florida ordinance aimed at reducing the amount of exposed flesh in public places. To require dancers to cover their buttocks, without more, would only invite them to skirt the rule by wearing the skimpiest covering possible. The county thus deemed it prudent to define buttocks as precisely as it could:

the area at the rear of the human body (sometimes referred to as the gluteus maximus) which lies between two imaginary lines running parallel to the ground when a person is standing, the first or top of such lines being one-half inch below the top of the vertical cleavage of the nates (i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg) and the second or bottom line being one-half inch above the lowest point of the curvature of the fleshy protuberance (sometimes referred to as the gluteal fold), and between two imaginary lines, one on each side of the body ...

The basic intent of the drafters is clear. The result is far from it.

Economics is yet another factor that helps explain the persistence of legalese. For one thing, the realities of a busy practice encourage lawyers to make abundant use and reuse of forms. Large corporations mass-produce preprinted standardized forms for similar reasons. In each case, legal professionals can save time (and hence, money) by recycling old verbiage, rather than having to reinvent the wheel for every transaction. An unfortunate consequence, however, is that the language of decades and centuries past is continually revived.

The legal system as a whole also has goals that may conflict with the goal of clear communication. For example, it endeavors to state the law as authoritatively as possible. Formal, archaic and ritualistic language helps accomplish this goal by conveying an aura of timelessness that makes the law seem almost eternal, and thus more credible and worthy of respect. Courts enhance their sense of legitimacy by depicting themselves as virtually unchanging institutions of ancient lineage. Ritualistic language (such as the *oyez, oyez, oyez* or *hear ye, hear ye, hear ye* that opens a court session) separates legal proceedings from ordinary life, marking them as being special and important.

Furthermore, the legal system desires to have the law appear maximally objective. Court orders are typically in the passive voice (the writ of certiorari is granted), creating the impression that such acts are accomplished without the intervention of a fallible human agent. The objectivity of the law is reinforced by judges' use of the third person, referring to themselves as *the court*, rather than *I*. Broad and impersonal statements of legal rules (Any person who does X shall be guilty of a misdemeanor) make the law seem supremely impartial. Of course, such impersonal statements once again reduce clear communication. Broad and sweeping generalizations are far less effective than warnings that if you do the following, I will throw you into prison.

Much more could be said about legal language, and to those who are interested, I

recommend beginning with my book, [Legal Language](#), as well as the additional resources listed below.

ADDITIONAL RESOURCES

On the history of legal language

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