

The Arrows in Our Quiver

By John F. Rohe

A book review of *Legal Language* by Peter M. Tiersma, University of Chicago Press, 1999, 314 pp., \$26.

When we grasp for the right word, explicitly or implicitly our reach extends into a rich and complex linguistic past. Even when searching for the down-to-earth, plain-English phrase, we necessarily invoke the chivalrous, the legendary, the elegant, the peculiar, the curious, the courtly, the elusive, the poetic, and the allegorical terms that mark our history. Amid this colorful heritage, it should come as no surprise that plain English remains an art, and not a science.

Culture and civilization become rooted in our daily routines. They are hinged, one generation to the next, by little more than a string of words. The language and choice of terms become a mark of the times. They have been used to maintain class distinc-

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the State Bar's Plain English Committee. The assistant editor is George Hathaway, chair of the Committee. The Committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901. For information about the Plain English Committee, see our website—www.michbar.org/committees/penglish/pengcom.html



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tions, and they have become weapons to break the barriers down. They are used to protect our Constitutional freedoms and to undermine our cherished liberties. And when future language historians evaluate our performance, we too will be judged by little more than the preserved record of our words and phrases.

With that at stake, linguistics might be a prominent subject of our attention. Yet we devote slight recognition to the history and evolution of our language. Peter M. Tiersma would hope to change that.

This is the first major work addressing the history of our chosen legal terminology since David Mellinkoff's landmark, *The Language of the Law*, published in 1963. The book bridges the gap between the legal professional and the professional linguistic historian. The two disciplines have proceeded on separate tracks for too long. Tiersma, a professor of law at Loyola Law School, merges a background in linguistics and law in bringing us face-to-face with our forebears. And as he peers into the future, Tiersma becomes an advocate for plain English on our edge of history.

In the opening sentence of *Legal Language*, Tiersma acknowledges the assistance of Joseph Kimble, a member of the Plain English Committee of the State Bar of Michigan and an outspoken critic of legalese.

The book highlights notable historic events affecting our speech. For example, alliteration was an Anglo-Saxon trait widely used in a form of poetry. This technique is found in *Beowulf*, the Anglo-Saxon epic from the Seventh or Eighth Century. It combines words beginning with the same sound, as distinguished from conventional poetry where ending sounds are phonetically similar. Alliteration had a utilitarian function among Germanic tribes: rhythmic phrases were easier to remember in preliterate societies. Remnants of alliteration can be found in many of our common phrases: *aid and abet, any and all, bed and breakfast, clear and convincing, fame and fortune, to have and to hold, house and home, new and*

novel, part and parcel, and rest, residue, and remainder.

The Anglo-Saxons drew on Scandinavian words. Even the word *law* originates with the Norse word for *lay* (as in "that which is laid down"). Tiersma points out that the phrase *to lay down the law* is a "repetitive redundancy" (the author's conspicuously clear and convincing, new and novel concession to alliteration, at the unfortunate expense of brevity).

For Tiersma, language becomes the spoils of war. A group of Scandinavians, the Normans ("northman"), conquered Normandy, now part of France. In 1066, William, Duke of Normandy, defeated the English king and was crowned king of England. As the Norman French overpowered the Anglo-Saxons, so did the French language come to subdue English. French became the language of power, while English was relegated to the subjugated Anglo-Saxon people. Thus, our words for meat on the table derive from French: *mutton, veal, beef, and pork*. Correspondingly, the language of the Anglo-Saxon peasants became the words for meat on the hoof: *lamb, calf, cow, and pig*.

The first signs of a "professional class of lawyers" appeared in about 1200 A.D. This became one of the early efforts to perpetuate a profession with inaccessible speech. French words in our legal vernacular often trace to this early bar association.

By wielding a language of their own, these movers in the legal profession prompted an early plain-English counter-movement. In 1362, the Statute of Pleading condemned the French hierarchy for "much unknown in the said Realm," since the parties to litigation "have no Knowledge or Understanding of that which is said for them or against them by their Serjeants and other Pleadors." Sir Edward Coke protested that laws were not being published in understandable English "lest the unlearned by bare reading without right understanding might suck out errors, and trusting in their conceit, might endamage themselves, and sometimes fall into destruction."

Tiersma finds the law of real property in England to have been influenced by feudalism. It came to England by the French Normans. Accordingly, much of our conveyancing terminology and law is derived from French. *Conveyance, dower, easement, estate, fee simple, property, remainder, rent, tenant, and trespass* are French terms.

The French influence also extended to the courts. The following words originated with this French-speaking hierarchy: *action, appeal, attorney, claim, complaint, counsel, court, defendant, evidence, indictment, adjudge, judgment, jury, justice, parol, party, plaintiff, plea, sentence, sue, summon, and voir dire.*

In the 14th Century, one-third of England's population was claimed by the plague. The epidemic exacted a particularly heavy human toll from the upper class. It disproportionately affected the French-speaking nobility. The use of English could then gradually reclaim a foothold in the land of the Anglo-Saxons, and in our legal heritage, before printing technology would revolutionize communications.

The Gutenberg Press was developed in 1455. By the 1470s, it was introduced to England. Before then, our legal rituals were oral. Writings, if used at all, were simply "evidence of the spoken event." Land conveyances and wills were confirmed orally, in the presence of witnesses. The symbolic exchange of a clod of dirt imparted a legal solemnity to a conveyance. Religious clerics created written records of property transfers as aids in remembering a prior legal event. These documents were merely of evidentiary value for the legally binding oral ceremony.

The Gutenberg Press advanced the rate of literacy. On the heels of this development, the Statute of Wills was adopted in 1540 and the Statute of Frauds in 1677. These statutes converted the written record from a mere matter of evidence to the operational legal document. Accordingly, the legal system transferred its attention from the spoken to the written word, and the parol-evidence rule was born.

At much the same time, "reporters" compiled information on court proceedings. Near the middle of the 15th Century, the legal profession treated these compilations as sources of law. The Gutenberg Press made *stare decisis* possible.

Expansion of the written word again placed lawyers in a unique position to create a monopoly on legal information—and

ushered in a new era of public contempt. In Jonathan Swift's *Gulliver's Travels*, from the early 1700s, "there was a Society of Men Among Us bred up from their Youth in the Art of proving by Words multiplied for the Purpose that *White is Black* and *Black is White*, according as they are paid. To this Society all the rest of the people are slaves." Swift begrudgingly spoke of the need to hire lawyers that "hath a peculiar Cant and Jargon of their own, that no Mortal can Understand and wherein all their Laws are written."

In his quest for linguistic origins, Tiersma offers personal speculation on a curious, and relatively recent, innovation to the word "defendant." In some circles, "defendant" no longer rhymes with "strident." Rather, it sounds like "defend ant," as though the profession were defending invertebrates. The author postulates that this recent development may have originated with law-school professors. The word "defendant" has often been misspelled as "defendent" by law students. To extinguish

this persistent error, law-school professors may have emphasized the last syllable in "defendant."

It worked. The pathological spelling defect was cured. But the professor's erudite pronunciation of "defend ant" could not be shrugged off. The speech pattern was carried into the courts by the rehabilitated law students. And TV dramas have curiously transformed it into acceptable speech.

After discussing our past, Tiersma advances on to the present. His role shifts from reporter to advocate. He abandons the role of a passive historian of legal terminology and becomes an activist for much-needed reform on the frontiers of plain English.

The arrows in our quiver co-evolve with the social setting. We will continue to mold the legal system, as it shapes us. In Tiersma's powerful and well-timed study, he reveals a passion for the process. The book calls for a modern-day raid on legalese. Tiersma becomes an active participant in fashioning our language, perhaps much



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like the French Norman invaders and Scandinavians left their mark several centuries ago. With engaging scholarship, Tiersma dissects our anachronistic, idiosyncratic speech patterns. And he offers a more intelligible alternative with plain-English technology.

Legalese has been wrongly defended for its predictability and precision. Yet, in tracing the origins of this arcane speech, Tiersma reveals that it not only is off-putting and stilted, but also lacks clarity. It is neither crisp nor clean, but rather rough and unruly. It is not post-modern, but rather pre-Gutenberg.

Tiersma finds another "conspiracy theory" afoot: "highly stilted, formal, and redundant legal prose... create the impression that drafting legal documents is far more complex than it really is."

In 1596, legalese was already becoming unfashionable. In *Mylward v Weldon*, the plaintiff, represented by his son, submitted a 120-page pleading. The court claimed "all the matter thereof which is pertinent"

could have been expressed in 16 pages. Annoyed by the pleader's verbosity, the judge ordered a hole be cut in the offending document. The pleader's head was inserted. He was paraded "round about Westminster Hall, whilst the Courts are sitting." The Court ordered that the Warden "shall show him at the bar of every of the three Courts within the Hall."

Tiersma also confronts and illuminates some of the unresolved contradictions in our speech. For example, he identifies impersonal constructions, such as *party of the first part*. He also notes our detached reference to a human "judge" as the non-human "the court." This nurtures an appearance that the judge resides well beyond the fray of human emotion and bias.

Tiersma exposes the inescapable polarity between precision and flexibility. We strive for accuracy in legal documents and in verbal communications, yet we would also hope to impart resilience for the future. The scrivener's product inescapably becomes a compromise between these two

inversely related properties: precision and flexibility.

"The lawyer's most important drafting tool," Tiersma cynically points out, "is an extensive thesaurus." Accordingly, our strings of redundant words become "silly." Our love of synonyms has become an obsession. At times, it might be necessary to "cover all the bases," but there is no reason to say *give, devise, and bequeath, null and void, right, title, and interest, or true and correct*.

The reader of a legal document has the right to assume that words are being used consistently. Tiersma cautions the legal drafter against using different words to describe the same idea. He calls this "elegant variation." It is treacherous in legal writing.

Tiersma also takes us into the courtroom in his quest for plain English. He quotes Justice Holmes for imposing the constitutional requirement in criminal statutes that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." Jury instructions, even those used in the O.J. Simpson criminal trial, are subjected to Tiersma's critical plain-English scrutiny. They did not fare well.

The book adds a new level of appreciation to our daily routines. For example, the author identifies differences between direct and cross examination. When asked a broad, narrative question, fewer facts will be recounted than if a series of specific leading questions are asked. Psychological studies reveal that leading questions elicit more facts, but the details will be reported with less precision than under a narrative question.

Anachronistic speech patterns remain a defining rite of passage for young lawyers. And plain English is still low on our list of priorities. Legal intricacies and the need for professional legal services are not likely to dwindle in our increasingly complex world. Tiersma points out that the complexity of laws will persist, but needless verbal complexity is another matter entirely.

Who might have a use for this book? This is for anyone interested in legal writing and legal communications, and for those hoping to speak with greater precision. It is for lawyers, legal professionals, historians, scholars, professors, students, and clients. If you have an interest in history, in words, or in the associations between them, then you will find this book timely and informative. ■

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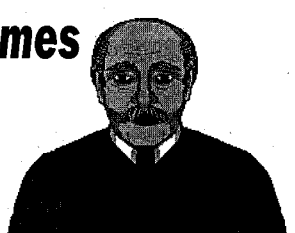
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