Review Essay

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Peter M. Tiersma, *Legal Language*
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Peter Tiersma is a law professor at Loyola Law School, Los Angeles. He is trained in both law and linguistics — a combination that should pique the curiosity of this journal's readers. His new book, *Legal Language*, is designed to deepen our understanding of the odd strain of English used by lawyers, judges, and those who write laws and regulations in common-law nations. Professor Tiersma argues that legal English is oddly different from ordinary English, that legal English does a poor job of communicating information, and that we members of the legal profession know quite well how to communicate legal ideas in ordinary English when we want to (for example, in a lawyer's closing argument to a jury). Tiersma concludes that we should critically examine legal English. We should keep the parts that preserve useful links to the past, or that signal a switch from ordinary life to an important legal event. But we should shovel out the rest — for example, our affinity for the passive voice and for such words as *aforesaid.*

Part 1: Origins of Legal Language

Tiersma divides his book into four parts, the first of which sketches the language history of England. This is familiar territory to those who have read the late David Mellinkoff's classic, *The Language of the Law* (1963). But the story bears retelling, and Tiersma tells it more economically than Mellinkoff did.

At several points in English history, the language of governance differed from the language of the people. That happened first when the Romans spent 400 years trying to bestow their civilization on the Celts who inhabited England. Latin was the language of governance, but the Celts kept their native language and culture.

When the Romans gave up and went home in the fifth century, tribes from the north and from the continent invaded England and pushed the Celts to the far west. The popular language became Anglo-Saxon, also called Old English. Latin eventually returned, but this time it was brought by Roman Catholic missionaries rather than by soldiers. In time, Latin became not just the language of worship, but also the language of literature and learning. Later, Viking invasions influenced both English law and the language in which it was expressed.

In 1066, the Norman French invaded England. William the Conqueror became the King, the invaders became the governors, and the language of governance became Norman French. The language of the people remained Old English. During the first two centuries of Norman French rule, formal legal documents were more likely to be written in Latin than in French because the best educated people were the Norman clerics, who kept strong ties with Rome and who were accustomed to writing in Latin. By the early 1300s, however, French became the standard for the written laws that governed England. Gradually, reports of court decisions and commentary about the law came to be written in a variant of French called Law French. Ordinary French speakers could not understand Law French, but young barristers absorbed it as part of their training at the Inns of Court in London. Latin remained the accepted language for some kinds of legal documents, such as writs (written directives issued in the name of the monarch). As the centuries passed, the Norman French invaders melded into the general population, and French eventually died out as a living language in England. Lawyers, however, went on using some Latin and some Law French. Many words lawyers use today are from Law French — for example, *arrest*, *agreement*, *plaintiff*, *defendant*, *jury*, and *justice*.

Starting with the Puritan revolution in 1650, Latin and Law French began to wither as the language of the law. By 1704, the reports of court decisions were all written in English. Tiersma explains that these reports made possible the idea of judicial precedent, a major difference between our common-law system and

the civil-law system used in much of the rest of the world. In the common-law system, decisions in earlier, similar cases become a body of law that governs the resolution of the case at hand.

Tiersma goes on to explain how writing came to be paramount in our legal system, with land transactions offering a good example. During the first thousand years of English history, land transactions were accomplished by a physical and oral ceremony carried out by the parties to the transaction, commonly while standing on the land in question. Toward the end of that period, priests started recording land transactions, but the writing was done purely as an aid to memory of the physical and oral transaction. (A modern analogy is a wedding. The big event is the ceremony at which the partners orally exchange vows and are joined; the marriage certificate is only a dry record of the ceremony.) During the 1500s and 1600s, however, the English developed legal doctrines that made the written record of a land transaction all-important and made the physical and oral ceremony superfluous. The dominance of writing spread quickly to legislation and to private legal documents, such as wills and contracts. Tiersma argues that writing serves the law well because a written record provides stability and predictability, both of which are vital in law. Permanence does, however, have a downside: it preserves old verbiage after circumstances and ordinary usage have changed.

Part 1 closes by noting how the language history of one small, rainy island has affected other places around the world. The British Empire brought the English language and the common-law system to many other lands. For better or worse, legal English came along. Thus, the same peculiar legal expression that puzzles a lawyer in Denver could easily be puzzling a lawyer in Singapore or Calcutta, in Sydney or Vancouver, or in Hamilton or Johannesburg.

Part 2: Nature of Legal Language

In Part 2, Tiersma catalogues the oddities of legal English. Lawyers spell and pronounce some words strangely. Lawyers are

addicted to long, long sentences. Lawyers are quick to add new clauses to cover new problems, but they are slow to delete old clauses that deal with bygone problems. Lawyers relish clusters of three or four words to do what one word could accomplish. Lawyers often use pairs of near-synonyms — often one from Old English and a counterpart from Norman French — to express a single meaning. Lawyers are fond of multiple negatives, sometimes stringing four or five negatives together in a single sentence. Lawyers tend to write impersonally, in the third person, avoiding the intimacy of the first and second persons. Similarly, lawyers overuse the passive voice, especially the truncated passive, in which the subject of the sentence is acted upon and the identity of the actor is hidden. (Instead of "Ben flew a kite," a lawyer would write, "A kite was flown.")

One reason for the oddities of legal English, Tiersma says, is — paradoxically — the lawyer's quest for precision. For example, lawyers often shy away from pronouns, preferring to repeat the noun rather than risk ambiguity. That makes sense if there is more than one possible referent, but lawyers do it even when there is not. Another example is the common cluster of definitions in statutes stating that the masculine includes the feminine, the singular includes the plural, and the present tense includes the past and future tenses. Those definitions are intended to produce precision without wordiness, but they can produce foolishness instead, as when the employee entitled to pregnancy leave is called "he."

Legal English includes many words that are not in the ordinary English lexicon (like *res* and *corporeal hereditament*) and many ordinary words that have unusual meanings when used in a legal context (like *complaint* and *fixture*). Some legal terms are unknown to the ordinary reader simply because they are fossils. For example, in drafting contracts, some present-day lawyers end the introduction with *Witnesseth*, sometimes printed on its own line in big black letters. In truth, contracts work just as well without *Witnesseth*, and enlightened drafters just leave it out. In his lexicon chapter, Tiersma explores dozens of other examples of outmoded legal

terminology, and he evaluates several reasons lawyers offer for not tossing out the relics.

One of the best chapters in the book is devoted to the interpretation and meaning of legal English. Tiersma begins by explaining different types of definitions, and he explains the relationships among meaning, sense, and reference. Next, he discusses the ways that interpretation of legal language differs from interpretation of ordinary language, explaining "word meaning," "sentence meaning," and "speaker's meaning." In interpreting ordinary language, we look beyond the facial meaning of the words and sentences. We search for the speaker's meaning, to find out what the speaker wanted to tell us. Word and sentence meaning are only starting points. To discover the speaker's meaning, we must decide whether the speaker is using irony, sarcasm, imagery, overstatement, understatement, implication, or any similar device to convey a meaning other than the one that appears on the surface of the words and sentences (for example, "Lovely weather!" spoken through driving sleet).

Interpreting legal language is a different game. The law has rules, such as the "plain meaning" rule (if a document seems plain on its face, we cannot look beyond the document itself to find out what it means) and the parol-evidence rule (if the parties to a contract put their whole agreement in writing, we cannot look beyond the writing for terms that add to, vary, or contradict the writing). Rules of this kind force us to concentrate on word and sentence meaning and not to search for utterance or speaker's meaning. In theory, these rules of legal interpretation apply when judges interpret statutes. During most of the 20th century, however, American judges became willing to examine the "legislative history" of statutes to find out what the legislators thought they were doing. Recently, though, Justice Scalia has led some of the other United States Supreme Court justices back to "textualism," in which word and sentence meanings control. Only when those meanings are ambiguous, Justice Scalia says, can one look elsewhere to discover what the legislature intended.

Tiersma explains why Justice Scalia's approach cannot be dismissed. When two speakers talk face-to-face, they get many clues to meaning from tone of voice, appearance, gestures, and the like. Further, they often share common knowledge of the surroundings and context of their discourse. The writers of statutes have few face-to-face links with their readers. Limited time, limited resources, and other constraints prevent them from having much shared knowledge of surroundings and context. Further, statutes frequently have many authors, and different legislators sometimes have different intents that find expression in the same statutory words. How can we decide which legislator's intent should govern? If a statute is not ambiguous on its face, can't we assume that its authors intended it to mean just what its words and sentences mean? Can't we assume that statutes are straightforward and do not employ literary devices such as irony, humor, sarcasm, and figurative speech? So viewed, Justice Scalia's approach obviously has merit.

Tiersma also observes that lawyers use more legal English when they write than when they speak. A general practitioner might deliver a jury summation in the morning, using the same colloquial English that the jurors would use in addressing their neighbors. But that afternoon, the same lawyer might return to the office and draft a mortgage using phrases and word patterns that have not been in ordinary use since the seventeenth century. A lawyer's choice of language depends partly on the nature of the task. In "persuasive" writing, such as a brief to a court, a lawyer would probably use a formal writing style, but mostly ordinary English. In "expository" writing (for example, a memo of fact or law prepared for another lawyer in the firm), a lawyer would probably be less formal and would freely use technical legal expressions, but not heavy legal jargon or complex syntax. When writing an "operative" legal document (which Tiersma defines as one that changes the legal relationships between people, such as a contract, a will, or a trust agreement), a lawyer would be more inclined to use an antiquated structure, complex syntax, archaic terms, and other features that set legal English apart from ordinary English.

Tiersma ends Part 2 by concluding that legal English is not "jargon" (which refers mostly to odd vocabulary), nor is it an "argot" (which is a code designed to exclude outsiders), a "dialect" (which suggests geographic diversity), or a "style" (a vague term that usually refers to habits of construction rather than a distinct vocabulary). Rather, legal English is a "sublanguage," meaning a language used in a body of texts on a limited subject, whose authors share a common vocabulary and common habits of word usage. Calling it a sublanguage suggests that legal English differs from ordinary English not just in vocabulary, but also in morphology (structure of words), syntax (structure of sentences and parts of sentences), semantics (meaning of words, phrases, and sentences), and other linguistic features.

Part 3: Legal Language in the Courtroom

Part 3 of Tiersma's book is an intriguing collection of insights about the use of language in various phases of litigation — in drafting pleadings, in taking testimony, in arguing to a jury, and in writing jury instructions. For example, a trial begins with formalities that set it apart from ordinary life and that emphasize the seriousness of the event and the court's power and dignity. Some of these formalities are verbal, such as the traditional call to order that begins, even today, with the Law French equivalent of "hear ye":

> *Oyez! Oyez! Oyez!* All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!

Other formalities include the distinctive costume of the judge (and in some nations the lawyers as well), the central position and elevation of the judge's bench, and the insignia of authority (such as flags and the judge's gavel).

Trial lawyers will enjoy Tiersma's explanation of "code-switching," a linguistics term that applies to people who can speak more than one language or more than one variety of a language, and who switch from one to the other depending on the situation. For instance, San Francisco Mayor Willie Brown is an African-American lawyer who ordinarily speaks elegant standard English, but he can switch seamlessly to Black English when the occasion calls for it. Lawyers in the courtroom code-switch, often quite unconsciously. A lawyer who rises to make a hearsay objection is addressing primarily the judge and incidentally opposing counsel, so she can use legal jargon that is gibberish to a lay audience:

> Your Honor, the answer to that question would be material only if it's offered to prove the truth of the matter asserted, and nothing in either 803 or 804 would let it in. It's inadmissible hearsay, Your Honor.

A few minutes later, the same lawyer will switch to standard English when questioning an intelligent layperson who saw the auto crash. Then, in closing argument to the jury, the lawyer may switch to a folksy, down-home variety of English without a trace of legal mumbo-jumbo. This final switch is important to one of Tiersma's main themes: lawyers can express even complicated legal ideas in easy-to-understand English when they need to.

After the lawyers make their arguments to the jury, the judge instructs the jury about the applicable law. Most of the time, the jury instructions come straight from a book of standard instructions, prepared by a drafting committee of judges and lawyers. During the past 20 years, federal-court drafting committees have vastly improved the standard jury instructions used in the federal courts. Sadly, many state courts still use antiquated jury instructions that are written to be legally accurate but not to communicate effectively. As an example, Tiersma quotes the jury instruction on "discrepancies in testimony" given in O.J. Simpson's murder case:

> Discrepancies in a witness' testimony, or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness

> should be discredited. Failure of recollection is a common experience and innocent misrecollection is not uncommon. It is also a fact that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.[1]

That jury instruction does not concern a complicated legal doctrine — it concerns some obvious points about human nature. What gives it the smell of musty law books? For one thing, the vocabulary is too fancy for oral delivery to an average jury. For another, the instruction is not aimed at the jury — it is aimed at some distant galaxy. The judge is talking to 12 human beings; why not address them personally, calling them "you," as in, "You may be tempted to disbelieve a witness because he contradicted himself while testifying, but . . ."? Moreover, the jury instruction suffers from the legal profession's futile quest for precision. For example: "It is also a fact that two persons witnessing an incident or transaction often will see or hear it differently." That sentence would be shorter and clearer if it said: "People who witness an incident often remember it differently."

Part 4: Reform of Legal Language

Jury instructions are only one place where legal English needs reform. Tiersma's Part 4 brings the book to a close with chapters devoted to reform of jury instructions, the history of the plain-English movement, and specific features of legal English that need to be changed. He sees two paths toward reform. First, one could try to clean up legal English, bringing it as close as possible to ordinary English. Second, one might preserve legal English for communications among people who can understand it, but translate it into ordinary English in documents that the public needs to read

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[1] For a new and better version, see CALJIC 2.21.1 (2000). For an even better revision, see Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L.J. 1306, 1345–46 (1979).

and understand. (An example of this second approach is the SEC's requirement that a stock prospectus must include a plain-English summary of the vital information, written clearly enough for the ordinary investor to understand.)

Tiersma predicts that real reform will require both approaches. The translation approach can be used in the relatively small number of situations for which it is suited. But whenever possible, legal writers should try to clean up their approach altogether. We should teach ourselves to avoid long sentences, redundancies, sentences that express the action in nouns rather than verbs, overuse of the passive voice, pointless abstraction, impersonal forms of address, strings of negatives, and the other bad writing habits that Tiersma discusses. We can, however, retain the relatively small number of legal expressions and formalities that supply important links to the past and that signal a legal communication as important, setting it apart from the daily routine. For example, the short title "Will" is just as effective under modern law as the traditional title "Last Will and Testament." But it is legitimate to continue using the longer traditional title, for the same reason that lawyers usually present the will to the client in a distinctive colored cover. Both the traditional title and the distinctive cover warn the client that this is an important document. It is not to be signed without thought, it is not to be stored in the kitchen drawer with the grocery coupons, and it is not to be thrown away in a careless housecleaning. In closing, Tiersma states:

> If lawyers wish to be truly professional in their use of language, they need to reconsider old habits and concentrate on how well their speech and writing attains the paramount goal of all language: clear, concise, and comprehensible communication.