

Notes & Queries

Colloquiality in Law

Within the bounds of modesty and naturalness, colloquiality ought to be encouraged — if only as a counterbalance to the frequently rigid and pompous formalities that generally pervade legal writing.

Many people, however, misunderstand the meaning of colloquiality. The term is not a label for substandard usages; rather, it means “a conversational style.” The best legal minds, such as Learned Hand, tend to look kindly upon colloquiality: “[A]lthough there are no certain guides [in the interpretation of a statute], the *colloquial* meaning of the words [of the statute] is itself one of the best tests of purpose”¹ Nearly 30 years earlier in his career, Hand wrote, as a trial judge: “The courts will not be astute to discover fine distinctions in words, nor scholastic differentiations in phrases, so long as they are sufficiently in touch with affairs to understand the meaning which the man on the street attributes to ordinary everyday English.”²

In formal legal writing, occasional colloquialisms may give the prose variety and texture; in moderation, they are entirely appropriate even in judicial opinions. Still, the colloquial touches should not overshadow the generally serious

tone of legal writing, and should never descend into slang.

Good writers do not always agree on where to draw that line. Some judges feel perfectly comfortable using a picturesque verb such as *squirrel away*: “This sufficed, in the absence of any record-backed hint that the prosecution . . . squirreled the new transcript away”³ Others would disapprove. Some, like Justice Douglas, would use *pellmell*: “The Circuits are in conflict; and the Court goes pellmell for an escape for this conglomerate from a real test under existing antitrust law.”⁴ Others would invariably choose a word like *indiscriminately* instead. Some, like Chief Justice Rehnquist, would use the phrase *Monday morning quarterbacking*.⁵ And some would use *double-whammy*.⁶

For my part, I side with the colloquialists. In a profession whose writing suffers from verbal arteriosclerosis, some thinning of the blood is in order.

But progress comes slowly. The battle that Oliver Wendell Holmes fought in 1924 is repeated every day in law offices and judicial chambers throughout this country. Holmes wanted to say, in an opinion, that amplifications in a statute would “stop rat holes” in it. Chief Justice Taft criticized, predictably, and Holmes answered that law reports are dull because we believe

“that judicial dignity require[s] solemn fluffy speech, as, when I grew up, everybody wore black frock coats and black cravats”⁷ Too many lawyers still write as if they habitually wore black frock coats and black cravats.

—Bryan A. Garner
Dallas, Texas

1. *Brooklyn Nat'l Corp. v. C.I.R.*, 157 F.2d 450, 451 (2d Cir. 1946) (Hand, J.) (emphasis added).
2. *Vitagraph Co. of Am. v. Ford*, 241 F. 681, 686 (S.D.N.Y. 1917).
3. *United States v. Chaudhry*, 850 F.2d 851, 859 (1st Cir. 1988).
4. *Missouri Portland Cement Co. v. Cargill, Inc.*, 418 U.S. 919, 923 (1974) (Douglas, J., dissenting).
5. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547 (1978).
6. *See American Bankers Ass'n v. S.E.C.*, 804 F.2d 739, 749 (D.C. Cir. 1986).
7. 2 HOLMES-POLLOCK LETTERS 132 (Mark D. Howe ed., 1941).

Teaching Legal Drafting

The practice of law is largely writing, and the American Bar Association has repeatedly urged law schools to strengthen their writing programs. Any good legal-writing

program will include a separate course in legal drafting. Sadly, though, legal drafting is required at only a few schools, and perhaps a third of the schools, at best, offer a legal-drafting elective.*

This situation will not change until law faculties recognize the following realities about legal drafting:

- Legal drafting is a major part of a lawyer's work.
- Legal drafting is a separate discipline, probably the most rigorous form of legal writing.
- Legal drafting involves thinking and policy. It is about solving conceptual problems, and not just manipulating language.
- Legal drafting is fundamental preventive law. Good drafting lays bare the gaps and inconsistencies in a client's ideas and ultimately clarifies the client's rights and duties.
- Legal drafting is not just a matter of knowing the substantive law; experts often draft poorly.
- Legal drafting cannot be effectively taught in the first-year legal-writing course.
- Legal drafting can be taught in large sections, and without the teacher having to comment on students' every paper.

As someone who teaches legal drafting to 40 students twice a year,

I can offer a five-step system. First, get Barbara Child's *Drafting Legal Documents*, an ideal book to teach and learn from. Second, hire one or two teaching assistants (A+ students from earlier terms) and have them comment on two or three sets of papers during the term. Third, give an assignment every week. In class, use the overhead projector to review samples, good and bad, of each assignment and the typical difficulties. Fourth, have students keep all their assignments in a workbook. At the end of the term, grade students on the general quality of the workbook and on a final drafting project. Finally, have students sign a strict honors policy that they will not share the course materials or their work with other students, so that you don't have to prepare new assignments each term; otherwise, you'll kill yourself.

If we hope to reach large numbers of students, and if schools are unwilling to devote the resources that legal drafting deserves, this system offers a workable solution. You will teach students most of what they need to know; and they will never read law the same way again.

—Joseph Kimble
Lansing, Michigan

* See Jill J. Ramsfield, *Legal Writing in the Twenty-First Century*, 1 LEGAL WRITING: J. LEGAL WRITING INST. 123, 129 (1991).

Crimes Against Language and Nature

In many areas of the law, euphemisms allow writers to avoid directly discussing topics subject to cultural taboo. Nowhere are euphemisms more common than in the language that regulates sexual behavior between consenting adults. Unfortunately, these euphemisms are often obscure and ambiguous.

Perhaps the most ambiguous (and yet most common) euphemism in this area is *crime against nature*. When I first heard the term, I thought it might refer to environmental crimes. But of course this term — dating from the 16th century — refers to unconventional sex in its various forms.

Of the 25 states that still prohibit some form of unconventional sex, 10 have statutes that retain the phrase *crime against nature*. Only 3 of those 10 states — Idaho, Louisiana, and Nevada — actually define what specific activities are covered by the term.¹ A representative statute using the phrase is the cur-

rent Oklahoma sodomy statute, which reads:

Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years.²

One problem with using euphemisms to regulate sexual conduct is that it is not always possible to determine precisely what acts are prohibited. Indeed, the term *crime against nature* is so ambiguous that some courts have experienced difficulty in interpreting it. The Florida Supreme Court has even warned that the phrase "could entrap unsuspecting citizens and subject them to 20-year sentences Such a sentence is equal to that for manslaughter and would no doubt be a shocking revelation to persons who do not have an understanding of the meaning of the statute."³

To correct this problem, legislators ought to consider reviewing and rewriting statutes that now use outdated and ambiguous euphemisms, and defining more precisely what conduct is prohibited.

—David Abbott
Dallas, Texas

1. ARIZ. REV. STAT. ANN. §§ 13-1411-1412 (1989); IDAHO CODE § 18-6605 (1987); LA. REV. STAT. ANN. § 14:89 (West 1986); MICH.

COMP. LAWS ANN. §§ 750.158, 750.338-.338b (West 1991); MISS. CODE ANN. § 97-29-59 (1973); NEV. REV. STAT. § 201.190 (1991); N.C. GEN. STAT. § 14-177 (1992); OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 1993); R.I. GEN. LAWS § 11-10-1 (1981); VA. CODE ANN. § 18.2-361 (Michie 1988).

2. OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 1993).

3. Franklin v. State, 257 So. 2d 21, 23 (Fla. 1971).

A Drafting Story

While in law school, I clerked for a downtown Houston law firm. One day a lawyer shared with me his frustrations about a drafting assignment. He had been asked by his neighbors, say Mr. and Mrs. Smith, to draft a contract for an addition to their home. Johnson Construction, Inc. would be the builder. The lawyer was struggling over the terminology in the contract. He explained that he didn't want to use *contractor* and *contractee*; was dissatisfied with *obligor* and *obligee*; and would prefer to avoid *party of the first part* and *party of the second part*. So he was stuck.

I naively offered an alternative: Why not use the names of the parties, *Smith* and *Johnson*? He

immediately replied, "That's brilliant."

—Mark E. Steiner
Austin, Texas

Insane Committees

The word *committee*, in the sense "a person who is civilly committed, usually to a psychiatric hospital," is a splendid example of how lawyers take an ordinary English word and give it an alien sense and pronunciation (*com-i-tee*). The usage invites double takes from lawyers as well as nonlawyers: "The civil commitment hearing does not address whether the committee has engaged in conduct that constitutes the elements of a crime; rather, that hearing focuses on whether the committee is mentally ill and dangerous" ¹

Of course, those who have had the privilege of serving on more than a few committees (in the usual sense) may see this usage as a logical extension of meaning.

Some writers have used the spelling *commitee* to differentiate the legal from the ordinary use of the word. That spelling, however, violates spelling principles and

merely suggests that the writer possesses neither an ear for the language nor a computer with a spell-checker.

Confusingly, *committee* has still another legal sense — formerly common in British English — referring not to the psychiatric patient but to the guardian for the patient: "[T]he 'committee' of a person of unsound mind was a single person to whom the care of such person was entrusted by the court, the stress being on the last syllable. Committees are no longer appointed." ²

If everyone agreed to abstain from using *committee* in the two confusing senses here discussed, the language of the law would be a little better off.

—Bryan A. Garner
Dallas, Texas

1. *Benham v. Edwards*, 678 F.2d 511, 538 (5th Cir. 1982), *vacated sub nom. Ledbetter v. Benham*, 463 U.S. 1222 (1983); see *Allen v. Illinois*, 478 U.S. 364, 381 (1986) (referring to the civil committee's right to silence); *Hickey v. Morris*, 722 F.2d 543, 547 (9th Cir. 1983) (referring to the "differences between insanity acquittees and civil committees").
2. GLANVILLE WILLIAMS, *LEARNING THE LAW* 64 (11th ed. 1982).

Literary Lottery

Which fictional authors are referred to most frequently in American judicial opinions? Computer-aided research yields the following numbers (rounded off to the nearest multiple of 5):

Author	References
William Shakespeare	1590
Mark Twain	570
Franz Kafka	400
Charles Dickens	225
Henry David Thoreau	180
Walt Whitman	160
Arthur Conan Doyle	70
George Orwell	65
Ralph Waldo Emerson	55
George Bernard Shaw	50
Oscar Wilde	50
Edgar Allan Poe	35
Leo Tolstoy	35
William Faulkner	30
Rudyard Kipling	20
T.S. Eliot	15
Alfred Lord Tennyson	15
John Steinbeck	10
Herman Melville	10
Geoffrey Chaucer	5

—A. Darby Dickerson
Dallas, Texas

Sincerely Clarence

In *An Epistolary Essay* (1991 issue), Bryan Garner mentioned a number of legal and literary figures who signed off their letters with *Sincerely*, as opposed to *Sincerely yours* or *Yours sincerely*. One person he did not mention is Clarence Darrow, who more often signed off with *Sincerely* alone than with *Sincerely yours*.

I am now collecting Darrow letters for possible publication and would be grateful to anyone who could inform me where I might locate more of them. Please write Randall Tietjen, 2121 Penn Avenue South, Minneapolis, Minnesota 55405.

 Legaldegook Nominees

Once again, the Plain-Language Committee of the State Bar of Texas is looking for nominees for its annual Legaldegook Awards. If you have seen a delightfully atrocious passage in legal writing — ranging in length from a single sentence to several pages — please send it to Bryan A. Garner, LAWPROSE, INC., Sterling Plaza, 5949 Sherry Lane, L.B. #115, Dallas, Texas 75225-8008.