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Law as Language (Reviewing Peter M. Tiersma, Legal Language (1999))

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by Francis J. Mootz III

Legal Language
Peter M. Tiersma
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The jacket of Professor Peter Tiersma's book illustrates the problem inherent in a linguistic study of legal language. The jacket features a legal document in fine print, with an overlay of a magnifying glass that brings some of the indecipherable words into focus. The problem, of course, is that a scholar conducting a linguistic study of language does not have access to a distinct "magnifying glass" that can posit language as an object; he can study language only with language.

Tiersma attempts to avoid the most difficult problems of self-reference that follow from the "interpretive turn" in social studies by pursuing a carefully delimited project. He argues that legal language has diverged from ordinary language, and therefore can be assessed by comparing it to ordinary language. His thesis is that "legal language can and should be much less arcane and ponderous, and much more understandable, than it now is." (6) In other words, he argues that legal discourse should employ ordinary language to a much greater extent if law is to serve its social purposes.

On its own terms, the book is a success. Some legal documents (standard form contracts, statutes, formulaic wills and trusts, etc.) are easily lampooned for their verbosity, redundancy, complexity and archaisms. Tiersma's book provides an accessible and helpful reminder of this fact by identifying some of the worst examples of legal language and providing general explanations of how these examples are sustained in modern legal practice. But this theme is old news. I can't imagine that there is a lawyer, judge or law professor today who would *advocate* using cumbersome and archaic language instead of so-called plain English, even if their *practice* involves all too frequent relapses. Legal language is like an ornate pastry: we know that often it is impressive in appearance but disappointingly lacking in substance, yet we can't help reaching for it again and again.

Tiersma's effort to avoid certain topics in the interest of simplicity and focus is not entirely successful. In his Acknowledgments, he admits that his linguistic approach necessarily leaves out the important insights of literary theory, rhetoric and semiotics, and he concedes that he gives only brief attention to the important linguistic topic of the pragmatics of meaning. At the risk of appearing to be a spoil sport by reviewing the book that he expressly chose not to write, I want to identify how his uncontroversial plea for a renewed commitment to using plain English in legal discourse uncovers more difficult and subtle problems.

Origins of "Legal Language"

Professor Tiersma's first three chapters trace the tangled history of Anglo-American legal language. He attributes some, if not many, of the bizarre characteristics of legal language to historical contingencies, such as William the Conqueror's triumph at the battle of Hastings that resulted in the ascendency of Law French in the English courts. This historical recounting is succinct and interesting, but of course every language is a product of historical contingency and social pressures. Tiersma's point is that the history of legal language reveals that it is particularly subject to "inertia and linguistic conservatism" and that it "foreshadows the resistance that the profession has shown -- even today -- to reforming its language." (28)

To his credit, he rejects the "conspiratorial" explanation of the distinctiveness of legal language as the sole factor in this historical development, concluding that legal language is not just an "argot," or special code, to hide meanings from the general public. (107) It is convenient to believe that lawyers have invented and maintain a strange and baroque language solely to ensure that only initiates to the profession can participate in their dialogue. "Reality, as usual, is more complex," (87) Tiersma rightfully concludes, even if lawyers do have a "penchant for setting themselves apart." (53) He proceeds from a discussion of historical origins to an examination of the nature of legal language and an analysis of some of the sources of "linguistic conservatism" that cause legal language to diverge from ordinary language.

The Nature of Legal Language

Professor Tiersma makes clear that he regards "legal language" as a "sublanguage" rather than a language distinct from ordinary English. (142-43) Moreover, he emphasizes that this sublanguage is not unitary, but rather is diverse and fluid in response to different cultural contexts, as revealed by the particular uses of legal English in India. (4, 135) Nevertheless, his guiding premise is that the sublanguage of legal discourse diverges from ordinary English in "far more" ways "than the technical languages of most other professions." (49)

In my view, Tiersma does not offer a convincing demonstration that legal language is linguistically conservative in unique ways. He expressly compares the retention of Law French in England long after French ceased being spoken, to the retention of Latin by the Roman Catholic Church, but this brief allusion is never explored. Additionally, he does not convincingly demonstrate that legal language exhibits particular deficits that can be identified and corrected by simple recourse to ordinary language. The legal profession uses language to demarcate its membership, to create an aura of mystery, and to require a certain degree of educational initiation as a barrier to easy entry by outsiders, but Tiersma alludes to the similar social purposes served by dialects in ordinary English. I'm not persuaded that the deployment of the Queen's English against someone speaking cockney is dramatically different from a lawyer's bluster.

Professor Tiersma's book is at its best when he abandons the theme that legal language diverges from ordinary English in unique ways and concentrates instead on explaining how the institutional and social role of legal discourse shapes this professional idiom. He should have spent more time explaining, for example, that judges use passive constructions in order to bolster their claim to objectivity and to generate maximal rhetorical force within the guiding ideological constraints of the legal system, (76) and that linguistic conservatism is a natural result of a text-oriented practice that is legitimized by an ideology of following the rules laid down prior to the dispute in question. (95-97) At these points in his discussion, his experience as a linguist and law professor helps shed light on the particular contours of legal discourse, opening lines of inquiry into the role of legal language in securing legitimacy for the legal system. Unfortunately, these investigations do not play a central role in the book.

The weakest part of the book is Tiersma's brief discussion of the interpretation and meaning of legal texts. He adopts soft versions of intentionalism (texts mean just what their authors intended them to mean) (125) and positivism (texts are autonomous documents and so ambiguities and gaps in meaning can be overcome only by moving beyond interpretation). (132) Ironically, these ideological commitments that he appears all too ready to accept as a background institutional fact have played important roles in shaping our baroque and verbose legal language. The wrongheaded commitment to "fixing" meaning in

"autonomous" texts naturally results in lengthy, formal documents that all too often prove to be inadequate to the unrealistic demands placed on them at a later date.

Legal Language and Social Norms

In truth, Professor Tiersma's book is not about the *nature* of legal language; rather, he makes a normative claim about the social *function* of legal language. Because he treats this claim as an assumption, though, it remains unexplored and undefended. Most broadly phrased, he contends that members of the public should be able to understand legal texts, and he postulates this norm as a sufficient criterion for assessing legal language. (241) If legal documents such as contracts and wills can readily be understood by members of the public, lawyers will not be able to do what is "best" for the client without the client's complete understanding and assent. Unlike "teenagers obscuring discussion of sex or alcohol so that their parents will not understand them, lawyers should have nothing to hide from their clients," he insists. (138)

Tiersma's plea for using ordinary English in legal texts is grounded in common sense, rationality and democratic sentiments, and so hardly can be considered objectionable. His argument draws on foundational aspirations that clients who retain lawyers and members of the public subject to statutes and regulations should be empowered to exercise their individual autonomy rather than being subjugated by a specialized discourse that they do not understand. But this is where a subtle discussion of the role of lawyer as advisor is necessary. There is no standard baseline of "ordinary English" that can adequately convey the meaning of commercial contracts, regulations regarding welfare benefits, constitutional rights and land conveyancing to the diverse persons affected by these legal documents.

The principal role of a lawyer, at least in my experience, is to translate the relatively uniform language of law to the particular language used by the client. My clients included small trade contractors, large construction companies, and professional firms. Even within the relatively narrow world of commercial clients I discovered that the most demanding part of my job was to speak to each client effectively. When my wife (also a lawyer) and I purchased our house, we retained a lawyer to walk us through the closing documents and explain their purpose and effect. Documents written in plain English would require some explanation even for highly educated lawyers who are unfamiliar with the specific commercial and social context in which the documents operate. Lawyering cannot be reduced to drafting clear texts that literally speak and act for themselves.

Tiersma is mindful of this reality. "The hope that every man can be his own lawyer, which has existed for centuries, is probably no more realistic than having people be their own doctor. . . . In fact, as our society and laws become ever more complex, lawyers will be more essential than ever." (213) He concedes that "it would be foolhardy for most people to represent themselves in a complicated legal matter, even if legal language were as straightforward as it could be." (97) But he still argues that the reform of legal language is an important goal. "Aiming at full comprehension by every member of the public may be overly optimistic, but there is every reason to make statutes and other legal documents clearer than they have been in the past. This benefits not just the public, but the legal profession itself." (213) If his normative plea boils down to the principle that, at a minimum, lawyers should be able to understand the meaning of legal documents so that they may serve as effective translators for the public, then to that I can only offer an "Amen."

Ordinary English as Consumer Protection

Professor Tiersma admits that lawyers and judges have made productive strides recently to use ordinary English, although one unfortunate side effect of clearer expression may be a tendency to increase the complexity of the statute or contract, thereby exacerbating the need for lawyer-translators. (215) Even if lawyers unavoidably must act as translators, Tiersma remains dissatisfied with legal language. The application of the norm that he defends most strenuously is that "consumers should understand the most important provisions of the documents that they sign." (241) Unlike other legal documents, consumer

documents such as mortgages, financing agreements, and insurance policies continue to be complex and barely decipherable by lawyers. More important is the fact that a team of lawyers at a large corporation drafts the standard form agreement that is signed by a consumer who has only a general understanding of the document and who acts without the advice of a lawyer. Because consumers have no realistic access to the services of a lawyer-translator, the use of ordinary English appears to be a plausible method for ensuring full and voluntary consent to the standardized terms of such transactions.

Even here I question whether the use of ordinary English is the optimal solution. The insurance industry has faced regulatory initiatives designed to make policies easier to read, but there are costs to this approach. If "ordinary English" means only clarity of expression, then the insured is still faced with a document dealing with a complex and sometimes technical topic. If "ordinary English" includes a requirement of simplicity, then insurance carriers will feel aggrieved when a clever lawyer for an insured is able to exploit an "ambiguity" that will be construed against the non-drafting party.

There are solutions to this dilemma, but they move beyond the goal of requiring the use of plain language. A state regulatory body could mandate policy language and the state courts could develop a body of law interpreting this mandated language. Alternatively, the courts could further develop the doctrine of reasonable expectations to override even unambiguous policy language when enforcement would disrupt the insured's reasonable expectations. Both of these proposals would amount to substantive regulation of the transaction. Tiersma agrees that a "truly effective remedy" would be a substantive rule of law that people are not bound by form language that an average consumer could not understand. (223)

On the more specific topic of jury instructions, Tiersma mounts a devastating attack. Unlike consumers with reasonable expectations who enter a transaction with merchants seeking to build market share by pleasing them, jurors enter the bizarre world of the courtroom with little protection against confusion. Particularly in death penalty cases, there is a strong need for linguists to assist state and federal bodies to create comprehensible instructions that provide reasonable guidance to jurors. Even here, Tiersma realistically admits that instruction written in ordinary English will not be able to educate jurors completely, but matters of degree can be quite important when lives are at stake. (239-40)

Jury instructions, car leases and wills should be easy for ordinary citizens to understand. Linguists can play an important role in the democratic project of reforming legal language. Yet, the fact remains that the evils identified by Tiersma are best countered by effective legal counseling or by substantive public regulation that mandates or overrides overreaching form language. As to reforming jury instructions, though, he is on target.

Persuasion and Performance in Legal Language

I should end on a positive note, because I enjoyed reading Professor Tiersma's book and learned a great deal from it. He powerfully demonstrates the difference between legal language when it is used as a performative (creating contract rights or enacting a statute, for instance) and when it is used to persuade an audience (in oral arguments to a court or jury, for instance). In the latter case, lawyers show a tremendous level of creativity, flexibility and nuance. The "persuasion" that occurs when lawyers advise their clients and deliberate with them provides the best example of the virtues of legal language, because it is this persuasion that most dramatically brings the archaic legal performatives to life. Tiersma recounts Johnnie Cochran's rhetorical strategies for earning the confidence of the jury in the O.J. Simpson case, concluding that lawyers have the ability to break the bonds of archaic and cumbersome legal language when pressed to do so. However, I am not convinced by Tiersma's claim that a similar use of ordinary English in legal documents would have a significant impact in real life, which is perhaps one reason why lawyers and legislators remain unmotivated to change.

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