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## Mellinkoff: The Language of the Law

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## RECENT BOOKS

THE LANGUAGE OF THE LAW. By *David Mellinkoff*. Little, Brown and Co. 1963. Pp. xiv, 454. \$12.50.

The language of the law should be judged on the basis of its esthetics or its efficiency. David Mellinkoff's recent book, entitled *The Language of the Law*, is a massive examination of the failure of law language by either criterion. Directed against a profession which is so innately involved in the business of communication, this is a critical and serious indictment. The charge is supported by devastating scholarship and thoroughness.

*The Language of the Law* is partly an historical and encyclopedic etymology of law words, wordings, and clichés, and partly a running editorial commentary by the author on what is wrong with legal language. The book is written in numbered sections of separate thoughts with abundant and valuable footnotes (on each page). However, the author erratically alternates between a dullish, scholastic style and a staccato, jaunty, journalistic style. Consequently, while the idea of the book is important and interesting, its execution is often uneven, and at times the book is difficult to read. Nevertheless, one should enjoy and must respect this book.

In the early chapters, the author views the historical antecedents of modern American legal language. He begins his analysis of the history of legal words with Celtic, which was the first dominant language in England. The next influence was that of the Saxons and Jutes (450 A.D.), who came from Denmark and Germany and left a Teutonic influence on the prevailing speech. From then until the Norman Conquest in 1066, Old English prevailed, and from this we have taken such words as "manslaughter," "ward," "wife," "deed," and "guilty." The Norse and the Old English in the period from 700 to 1000 were not far apart, and the author cites a fascinating example of the derivation of one phrase from both sources. "Crook" in Old Norse and "hook" in Old English meant a bent piece of metal. Later, "crook" came to mean something wrong or dishonest. And, by the 14th century, "by hook or by crook" meant to steal.<sup>1</sup> Tidbits like this fill the book and will delight the reader who is curious about the sources of words and phrases.

With the rising influence of the Church on secular affairs, Latin became a part of the everyday language in England. The Church had a great impact upon the administration of justice, and the clergy composed a large percentage of the literate scribes and scholars. Before this, illiteracy was common and most legal transac-

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1. P. 55.

tions were oral. Latin was the universal language of medieval learning, and its residue is evident, both in legal language still in use (*res ipsa loquitur*, *habeas corpus*, *subpoena*) and in Latin derivatives (*debt*, *advocate*, *incorporate*). In this regard, the author's explanation of the derivation of "indenture" is delightful. Latin also combined with existing English and with French, which became the "language of learning and gentility"<sup>2</sup> after the Norman Conquest. French went through periods of rising and falling favor in England. Although its role was less obvious than that of Latin, French also played an influential part in molding our law language (*descent*, *justice*, *marriage*, *possession*). We still use some French phrases such as "cy pres" and "fee tail." Middle English in the period from 1100 to 1500 joined Anglo-Saxon with Latin and French. This combination gave us such phrases of mixed etymological genealogy as "breaking and entering" (Old English and French), "peace and quiet" (Latin and Old English), "will and testament" (Old English and Latin), and "free and clear" (Old English and French).

The author develops this history through such later developments as the invention of the printing press and the rise of literacy, written reports, dictionaries, law schools, and eventually he leads the reader into modern English and modern American law language.<sup>3</sup> Here he leaves etymology for criticism and appraisal, and, in so doing, Mr. Mellinkoff falls victim to some of his own perceptive criticisms of legal writing—most particularly repetition and redundancy. However, his thesis, "the language of the law should not be different without a reason,"<sup>4</sup> is more than adequately, and often interestingly, substantiated. Unfortunately, the author spends an inordinate amount of his time in showing why law language is not more precise, shorter, more intelligible, or more durable than general English.<sup>5</sup>

The public impression and prestige of the legal profession suffers as a result of the language of the law. The average person comes in contact with special legal language in one of several typical situations: he encounters a lawyer socially, or deals with one professionally; he reads a legal document or a law; or, he is in court in some capacity at a trial. Mr. Mellinkoff says:

"When the juror is told that he must follow the law as laid down by the judge, and he cannot follow the words—let alone the law—this frustration does not promote respect. When the harried businessman is overwhelmed with the lan-

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2. P. 70.

3. Pp. 240-50.

4. P. 285.

5. Pp. 290-454.

guage confusions of the government he is taxed to support and of the professionals he pays to help him, his feelings for the law and for lawyers are not properly described as respectful.

"Respect for law is no mere matter of words; neither intelligibility nor precision nor ritual will sell bad law indefinitely. But bad language usage can hurt good law; good language usage can promote respect for good law. And for the rest of this language-conscious century, an important part of the layman's attitude toward the law will be determined by what the profession does with its language."<sup>6</sup>

The average lawyer talks and writes poorly about the law. As a result, what is intrinsically the most fascinating and dramatic profession is too frequently considered a technical, gimmicky, closed-door society. Legal language can be, and has been, criticized on two levels. First, its technical execution is poor, primarily because an alarming number of lawyers are not well educated in basic composition, spelling, and punctuation. This fact was aired recently when the dean of one major law school publicly criticized the low level of literateness of law students, and the dean of another famous law school complained about how unsatisfactorily lawyers write about the law for laymen. The improvement of early education plays a major part in the solution to this problem. More than any other profession, the law is particularly suited to a strong grounding in the liberal arts. I remember being surprised when a law school official advised me that the best college preparation for law school would be one that stressed English before other general liberal arts subjects. I am certain now that this advice was correct. Second, the profession has propagated a mysticism of cant which not only constitutes a poor choice of language, but also frequently does not accurately communicate. Mr. Mellinkoff devotes most of his criticism to this latter fault.

By either public or in-group standards, the language of the law is wanting. There is a vast potential audience that would like to know about the significant social issues being dealt with so often, of late, in our courts and legislatures. The legal profession should not relinquish to journalism the responsibility for telling this story. There is too much that journalists cannot know and therefore cannot tell. But few lawyers write well enough to do the job (and, in fairness, it should be added that some who do have an ability to write do not have the time). Accordingly, journalists have assumed the task by default. There is a critical need for mature and effective writing about such subjects as congressional investigations, censorship of movies and obscene "literature," publicity and trials, the

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6. P. 453.

ideological conflicts within the Supreme Court, divorce and adoption laws, and countless other social and political issues of our time about which lawyers often have special knowledge and experience. Yet, most of what the lay public sees of the law is bilge; quality work is rare. The proof of the value of good treatment is that when something of quality is done it is a roaring success. People love the stuff of the law. I often wonder why the most perceptive and sensitive writer about trials is Sybille Bedford.<sup>7</sup> Possibly it is because lawyers cannot resist personalizing the legal experience. Louis Nizer's deeds are fascinating and of real general interest; Louis Nizer is not. Perhaps there should be more concentration on training for legal writing. Lawyers could be trained specially for writing precisely as journalists are trained in the law by Harvard's Nieman program. Few law schools give any attention to this type of training in their curricula. The Yale Law School, however, does offer such a course; the students love it; and its graduates have published significantly.

Perhaps even worse than legal writing for laymen is the fact that the case books are full of examples of lawyers' professional writing failures in their own arenas. Mr. Mellinkoff cites abundantly from these. He shows that some of the words which lawyers use specially cause their clients problems and that following the formbook is not the safest route. This latter point was graphically displayed to me in a law classroom exercise. The instructor had each of us in my class draft a will. We all borrowed liberally from the formbooks. A standard formbook clause for wills (and one I have since seen colleagues use in wills) says something to the effect that "I direct my executor to pay all my just debts." This little gratuity is thrown in though few clients ever ask for it. It sounds good and lawyery. However, a New York court once ruled that this clause revived a debt which had been barred from collection by the statute of limitations. Mr. Mellinkoff offers many more striking instances where poor legal language or punctuation has caused litigation or brought about unwanted results. Legal formalities also cause trouble, and the author gives examples of archaic uses of words which are not only vague but wrong and troublesome (afore-said, forthwith, and/or, said).<sup>8</sup> Lawyers love to duplicate words. All they usually accomplish is to confound<sup>9</sup> when they use such words as "aid and comfort," "by and with," "cease and desist," "had and received," "fit and proper," and the all-time favorite, "give,

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7. Her books, *THE FACES OF JUSTICE* (1961) and *AN ACCOUNT OF THE TRIAL OF JOHN BODKIN ADAMS* (1958), are the most astute and brilliant perceptions of the trial process which I have ever read.

8. Pp. 305-20.

9. Pp. 330-60.

bequeath, and devise," which sometimes has appended to it a "grant" and a few other nuances just to be sure. As Mr. Mellinkoff points out:

"The drafting lawyer thinks big and fast. He wants to cover it all, and the quickest way to do it is in the manner it has most often been done before, in the manner he is most familiar with. Include! Don't select. Adopt and multiply! Don't choose between 'inhabitant' and 'resident.' Make it 'inhabitant actually resident.'"<sup>10</sup>

Even the advent of written law reports did not bring about the stability, durability, or precision which might have been expected. Every lawyer can find a case going the opposite way on the interpretation of "accidental," "proximate," or even "never" or whatever word is in issue. All the effort of legalese is lost.

The only compensating aspect of the imprecision of legal words is in the area of developing constitutional law where intended flexibility is valuable. The words "reasonable," "freedom," "equal protection," and "due process of law" need constant redefinition in light of changing times and morés. The story is told that after Solon wrote the ancient Greek constitution he left the country for several years so that he would not be called upon to say what he meant by this word and that. This kind of interpretation is better left to the Frankfurters and Blacks and to the inspiration of the times.

This does not, however, carry over to statutory language. Mr. Mellinkoff gives an excellent illustration of the differences between good and bad language explaining a law.<sup>11</sup>

<p>"Penal Code section 384 makes it a misdemeanor for any person who shall willfully refuse to immediately relinquish a telephone party-line when informed that such line is needed for an emergency call. . . . Also, any person who shall secure the use of a telephone party-line by falsely stating that such line is needed for an emergency call shall be guilty of a misdemeanor."</p>	<p>"State law requires you to hang up the receiver of a party line telephone immediately when told the line is needed for an emergency call. . . . It is unlawful to take over a party line by stating falsely that the line is needed for an emergency."</p>
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If most statutes are hard for lawyers, let alone the lay public, to read, the language which is descriptive of legal arrangements is

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10. Pp. 363-64.

11. P. 430.

worse. I have never understood what is and what is not covered by my Blue Cross insurance contract.

Courtroom talk is also more baffling than it needs to be. The anecdotes are legion of straight-talking witnesses destroying pompous-sounding trial lawyers by translating legalese into common sense in uproarious or embarrassing ways. I will always remember a Kentucky judge telling a jury in one case I tried that he wished he did not have to give them long-winded technical instructions. Instead, he said, he would prefer to tell them what Andrew Jackson told a jury when he was on the bench in Tennessee: "Go out and do right by these people." This is what juries do most of the time anyway—when they aren't so confused that they do the wrong thing for the right (or wrong) reason. As Mr. Mellinkoff states: "[M]any of these instructions are not designed for the quick understanding of listening laymen, but rather for more or less intelligible reading by appellate judges."<sup>12</sup> He cites an example:

"During the course of these instructions the term 'burden of proof' will be used. By 'burden of proof' is meant the duty resting upon the party having the affirmative of an issue to satisfy or convince the jury to a reasonable certainty of the truth of the contentions of that party. . . .

"By 'preponderance of the evidence' is meant the evidence which possesses the greater weight or convincing power. It is not enough that the evidence of the party upon whom the burden of proof rests is of slightly greater weight or convincing power; it must go further and satisfy or convince the minds of the jury before the burden of proof is discharged.

"What a letdown! The judge would have done his job much better telling the jury: 'Jones brought this case to court and it is his job to satisfy you that Smith hit him.'"<sup>13</sup>

So, we can conclude that in style and in function legal language is in need of improvement. This theme is not new; in fact, much has already been written about this subject, and Mr. Mellinkoff's bibliography is an excellent collation of these materials. However, the theme is worth stressing and repeating, and this book does both well. In the early part of this century a group of European artists began a reform movement from which we are all still benefiting. Such famous men as Ludwig Mies van der Rohe, Walter Gropius, Paul Klee, Vasily Kandinsky, and Marcel Breuer began their own school in Germany, and many of the future's form-givers and taste-makers developed a new form for artistic expression which was their own. Essentially they showed that meaningless expression should play no part in art and that art should reflect the mode of

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12. P. 434.

13. P. 433.

its time. Perhaps the legal profession should include in its modern schooling something of the Bauhaus philosophy.

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