Notes & Queries

A Word Is Born: *Additur*, 1934 – .

In 1933, a plaintiff named Schiedt sued a defendant named Dimick for damages and, in the process, helped give birth to a new word that is now entrenched in the language of the law.

In *Schiedt v. Dimick*, a jury in Massachusetts awarded the plaintiff $500 in damages. While pleased to have won on the merits, Schiedt was so dissatisfied with the award that he moved for a new trial because he thought the damages were inadequate. The trial judge agreed and ruled that a new trial would be granted unless the defendant agreed to increase the award to $1,500. When Dimick, the defendant, agreed to the increase, the judge held that no new trial was needed and denied the plaintiff's motion.

Still dissatisfied, Schiedt appealed to the First Circuit, claiming error in the denial of his motion. Citing the Seventh Amendment, he also argued that the court had unconstitutionally reexamined a fact by a jury: "[N]o fact found by a jury shall be otherwise reexamined in any Court in the United States, than according to the rules of the common law." Neither party could cite a "rule of the common law" allowing such an action by a judge. The Court of Appeals, in a split decision, agreed that the holding was unsupported by common-law precedent and was, in the language of the Seventh Amendment, a "reexamination" of a fact tried by a jury, in a manner unknown at common law, and therefore unconstitutional.[1] The Supreme Court granted the plaintiff's petition for a writ of certiorari.[2]

Before the Supreme Court heard the case, however, it was discussed in a forum that Judge Cardozo had labeled "a court yet higher than" a court of appeals — a law review.[3] The comment was published anonymously, as was the custom of *Yale Law Journal* in those days. As a member of the editorial board at the time, however, I knew who the writer was: Charles R. Maxwell, Jr., the youngest, but possibly the brightest, member of the Class of 1935. Before he died, he saw his concept achieve legitimacy.

In supporting the decision of the trial judge and questioning the conclusion of the Court of Appeals, Maxwell cited precedents in England and the United States. He then cited many English and American cases sustaining judge-ordered "remittitur," a procedure widely held to be consistent with

the Seventh Amendment. Maxwell concluded:

> Even on the limited ground that no common law precedent existed for such a re-examination, the [appellate] court's conclusion seems questionable. Such an order, which by analogy may be termed *additur*, was entered in an English case decided in 1843.[4]

This is surely the first appearance of the word *additur*. It was soon legitimized when four dissenting Justices of the Supreme Court, in Schiedt's appeal, cited Maxwell's comment.[5] The majority of the Court, in an opinion by Justice Sutherland, held the practice adopted by the trial judge to be unconstitutional.

As in so many cases decided in the early thirties, the academic community thought the dissenters were on the right side, and history has borne them out. Additur, by name and concept, has been applied in dozens of later cases. The Supreme Court's holding seems to have been largely ignored.

Soon *Harvard Law Review* blessed the word, albeit with faint praise: "There is no convincing reason why the *additur* (for so it has conveniently been called) should not be governed by the same considerations as the *remittitur*."[6]

The law dictionaries have duly included *additur*. *Ballentine's Law Dictionary*, in its 1930 edition, skipped from *additionales* to *addled*, but in the next edition *additur* appears between *additio probat* and *addone*. The editions of *Black's Law Dictionary* evolved similarly. The 1933 edition skipped from *ad diem* to *ad effectum*; the fourth edition (1968), however, includes *additur* between *additionales* and *addled*.

Thus a word conceived by a Yale law student was officially legitimized after casual midwifery by the United States Supreme Court and *Harvard Law Review*.

—Michael H. Cardozo
Washington, D.C.

1. Schiedt v. Dimick, 70 F.2d 558, 562 (1st Cir. 1934), *aff'd*, 293 U.S. 474 (1935).
2. Dimick v. Schiedt, 293 U.S. 474 (1935).
3. Benjamin N. Cardozo, *The Game of the Law and Its Prizes*, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 160-62 (1931).
4. Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318, 323 (1934) (emphasis added).
5. *Dimick*, 293 U.S. at 490 (Stone, J., dissenting).
6. Robert W. Millar, *Notabilia of American Civil Procedure 1887–1937*, 50 HARV. L. REV. 1017, 1053 (1937).

Alliteritis

Elsewhere I have discussed effective and ineffective alliteration in legal writing, as well as the clink of unconscious alliteration.[1] What I had never before seen until recently is the conscious use of alliteration that seems callously flippant. Could that *possibly* have been what the writer intended? Surely not.

In *Boatright v. State*,[2] the Georgia Court of Appeals reviewed a trial involving aggravated sexual abuse of eight- and nine-year-old children. After a sober opinion affirming the defendant's conviction, Presiding Judge Deen wrote a separate concurrence. Rather than characterizing the concurrence or drawing conclusions for the reader, I set it out in full:

> While I concur fully with the majority opinion, additional comments are appropriate.
>
> The crimes of aggravated child molestation and enticing a child for indecent purposes, under the facts of this case, include infliction of both mental and physical pain and abuse of the two young children. A micro, modicum, or major part of motivational manipulation of the molestation modus, relating to the mental aspects, is the obvious operandi of obsession with the obscene magazines and other material evident in this case. Introduced into evidence and before the jury were books included in the lengthy transcript amounting to almost a thousand pages. These massive magazine materials include close-up pornographic photographs with stimulating and sensuous sexually suggestive titles, which will not be here enumerated.
>
> The production and providing of pornographic photography promoting permissiveness and perversion pointing to mental pain and abuse is no less pertinent than physical abuse portions and ingredients of the aggravated child molestation charges and enticing a child for indecent purposes, as perpetrated against the eight- and nine-year-old children in this case.[3]

—B.A.G.

1. Bryan A. Garner, THE ELEMENTS OF LEGAL STYLE 165-66 (1991); A DICTIONARY OF MODERN LEGAL USAGE 34 (1987).
2. 385 S.E.2d 298 (Ga. Ct. App. 1989).
3. *Id.* at 305 (Deen, P.J., concurring).

How Not to Write Strong Active Verbs

Strunk and White, Wydick, and just about everybody else all say the same thing — the key to good writing is strong active verbs. But if I see another article on strong active verbs, I'll croak. Even if it's a good article, people will ignore it. And if there's anything I hate, it's a zealot on a personal crusade to get people to stop doing what they like to do.

Frankly, I think we all would have been better off if some troublemaker a long time ago hadn't started bothering everyone by promoting the wheel. Besides, it's far easier to confirm people's beliefs than to change people's opinions. Thus, since the traditional legal-writing style — legalese — consists of weak passive verbs, those who delight in legalese ought to have the key: how not to write strong active-voice verbs.

First, a little background knowledge: Verbs may be active or passive, strong or weak. Several combinations are therefore possible. A verb may be (in ascending order of mushiness):

- strong active;
- weak active;
- strong passive; or
- weak passive.

Allied to weak verbs are nominalizations. Books and articles often explain these terms in laundry-list definitions. This approach guarantees that you will forget each definition as soon as you read the next one. But a figure is worth a thousand words. Ergo the chart: the Hathaway Analysis of the Verb.

In the top left-hand corner we have the strong active verb *decided.* When you use this type of verb, you usually have a clear concise subject-verb-object sentence, such as "Judges decided it." But by adding a *be*-verb, you can easily change to the strong passive verb *was decided.* You can then add the preposition *by* and you have, "It was decided by judges."

With slightly more linguistic skill, you can change to the weak active verb *made* with the nominalization *decision*, and you then have, "Judges made a decision on it." Or you can go all out and do both, creating a weak passive verb. The result is, "A decision on it was made by judges."

Aim for the lower right-hand corner — passive-voice weak verbs with nominalizations — to increase wordiness without changing content. If questioned, rationalize with the erudite observation that passive voice is preferable when 1) the thing acted upon is more important than the actor, or 2) the

actor is unknown. You can fool some of the people all of the time with these explanations. Then follow up with the clincher — no verb is inherently weak, because the weakness of a verb depends on the way it is used. You can fool all of the people some of the time with this one.

Never mind that these rationales, learned and convincing as they may be, apply to your writing

It is imperative, however, that you never work backward on this figure, identifying a weak passive verb and then converting it into a strong active verb. If you do, you will inadvertently convert the weak passive traditional language of the law into strong active plain English. This change is verboten. Strong active verbs have a lean and hungry look; such verbs are dangerous. Weak passive verbs give

	Active Voice	*Passive Voice*
Strong Verb	Judges decided it.	It was decided by judges.
Weak Verb + *Nominalization*	Judges made a decision on it.	A decision on it was made by judges.

The Hathaway Analysis of the Verb

about as many times as a star has risen in the East. They confuse the issue because few will ever test them. We thus have the ideal perpetual circular-motion prestige machine. You can impress all of the people all of the time with your fine knowledge of writing. Yet you never have to venture outside your own cozy circle.

legalese its Prestige with a capital *P*. And deep in your heart you know that in the 400-year-old merry-go-round of legalese, the ring that everyone has been reaching for is Prestige, not precision.

—George Hathaway
Detroit, Michigan

Teaching Legal Research

Many law school graduates are unable to perform competent legal research. The legal profession has finally begun to recognize the need to teach legal research — in much the same way that the profession realized the importance of teaching legal writing. Of course, complaints about law students' poor writing skills are not new. Consider:

> Most members of law firms tell me that the young men who are coming to them today cannot write well. I think the situation has reached almost epidemic proportions . . . . I don't think the practicing Bar and the law firm can undertake to cure the deficiencies of the men that matriculate from law schools . . . . New York law offices are paying $7,500 per annum for a prospect just finishing law school.

The sexist language, not to mention the salary figure, gives away the fact that this is not a contemporary lament. It is from a speech by Dean William Warren of Columbia Law School in 1958. More than three decades later, we still don't have the answer to deficient legal writing — certainly a vital subject.

The literature on legal writing has exploded recently; at least 20 texts were published just in the 1989–1990 school year. Browsing through their contents pages reveals no consensus on an appropriate curriculum for legal-writing courses. Representative topics include:

- Introduction to the law and the common-law system.
- Sources of the law.
- The court system.
- Legal method.
- Legal research.
- Format of an appellate brief.
- Advocacy and oral argument.
- Analyzing legal authority.
- Briefing cases.
- Writing law-school examinations.
- Drafting letters and contracts.
- Writing a legal memorandum.
- Organizing a legal discussion.
- Effective paragraphing.

Many professors who teach traditional first-year courses — torts, contracts, property, constitutional law — view skills courses such as legal writing and legal research as distractions from the real work at hand. Worse yet, in their view, skills teachers do not hide the ball. Legal education has historically engaged students in logic and reasoning; when this process is pierced by practical skills, the result can be an angry faculty and schizoid students. And, of course, the views and priorities of legal-writing teachers

often differ from those of legal-research teachers.

Whatever the merits on each side of that debate, a crisis equal to that of poor legal writing exists in the field of legal research: Many students and graduates are unable to perform competent legal research.

Legal-writing instruction has found a niche because law school deans, going all the way back to Dean Warren, listened when law firms complained about the writing skills of young lawyers. Now the same sort of groundswell is emerging over legal research. Stories proliferate about recent graduates who cite cases overruled decades ago, or who think the *Federal Reporter 2d* includes only federal cases from the Second Circuit, or who assume that if information cannot be retrieved on LEXIS or Westlaw, then it is unobtainable.

Joan Howland, a librarian at Boalt Hall (Berkeley) Law School, recently completed a national survey of law-firm librarians.* Howland reports a growing awareness among law librarians and practicing attorneys that the research skills of law students and recent graduates are quite inadequate, perhaps increasingly so. Particularly alarming is the dramatic decline in summer clerks' research skills over the past decade. Consider these comments from partners in two major firms:

> Our attorneys are smart and can spot issues in any assignment with little difficulty. However, when it comes to researching these issues they are really quite lost. They have no idea how to design a research strategy and usually just jump into a variety of sources without any direction. The inefficiency and waste of the clients' money is incredible.

> Legal research training programs at United States law schools are grossly inadequate. These programs should be an integral part of the curriculum throughout law school rather than just a few weeks each semester. Legal research is often crammed into a one-week or one-semester course. It ought to be spread over three years. Give the first year students the basics and, for example, don't cover administrative materials until they have had administrative law.

In response to the problem, The University of Texas Law Library has intensified its library education program. Librarians offer a seminar in advanced legal research, as well as one-credit courses in specialized research topics such as tax, bankruptcy, labor, and international law. These are in addition, of course, to

the required first-year program in legal research and writing. Librarians also present research instruction at CLE programs on topics such as tax, banking, and securities.

Rapidly developing technology provides the means to make legal research thorough and efficient. On-line and CD-ROM databases offer convenient access to more materials. Free-text searching of these databases provides an alternative to cumbersome, archaic digest systems and allows researchers to exercise greater creativity in their search strategies. But training is essential. Traditional research courses must be modified to teach students how to use these tools.

Teachers will no doubt continue to disagree about the content of the first-year curriculum. Someone in our profession must have the answers. Somewhere there must be the modern equivalent of a Christopher Columbus Langdell — of the Harvard law dean whose case system has molded legal education since the late 19th century.

Where is the next Langdell — a revolutionary whose ideas will guide us into the next century?

—Roy M. Mersky
Tarlton Law Library
The University of Texas

* *See* Joan S. Howland & Nancy J. Lewis, *The Effectiveness of Law School Legal Research Training Programs*, 40 J. LEGAL EDUC. 381 (1990).

Vocabulary-Building in the First Circuit

Any serious perscrutation of juridical sesquipedality must include more than a decurtate perlustration of the pronouncements of Judge Bruce Selya. Far from an exiguity or hypoplasia of the recherché, we find that his lexical armamentarium — inconcinnate in the view of some readers, perhaps perficient in the view of others — necessitates using a dictionary as an internuncio. Without circumambaging, let me vaticinate that his scumbled wordings may cause you to: (1) repastinate; (2) fall into paralogism — perhaps even depart the encincture of compos-mentis; or (3) suffer from dyspepsia, with a furculum lodged in your tracheal membrane. To avoid this last consequent, don't read the opinions postcibally.

Readers who fully understood that paragraph must be among the top vocabularians in the nation — deserving a place alongside Judge Selya himself, who has used most of those words in his opinions.

What are we to make of big words? What are we to make of their users? I once defended the use of unfamiliar words on grounds that they are sometimes the only ones available to convey one's precise meaning.[1] But in recent years I have retreated from

that position because an approximate meaning is usually much better than a wholesale failure to communicate.

That reasoning has never appealed to William F. Buckley, probably our best-known dabbler in difficult diction. As far back as a quarter-century ago, Buckley assailed what he called the "phony democratic bias against the use of unusual words."[2] He was defending one of his favorite words, *energumen*, meaning "one possessed by an evil spirit; a fanatic." You can easily guess the political bias of those whom Buckley brands energumens.

For all but energumens of the single syllable, hard words very occasionally — to the appropriate audience — prove irresistible. I think of *smellfungus*, meaning "a captious critic," or *ultracrepidarian*, meaning "one who pontificates about matters of which he or she knows nothing." We need such words if only because the meanings are so exquisite. (For another example, see the discussion of *mumpsimus* at pages 97-98.)

William Safire recently laid down a sensible rule. In answer to the question, "Should you ever use a word that you know most of your audience will not know?" he said:

> Fly over everybody's head only when your purpose is to teach or to tease. . . .
>
> . . .
>
> Overhead flying is . . . allowed, in my view, when the writer or speaker is dealing with an elite audience that will appreciate arcana and consider unfamiliar words and obscure allusions to be delicious inside stuff, caviar for the general. . . .
>
> I would not, however, use big words to a mass audience when my primary aim is to persuade rather than to educate. Lay off *sclerotic*, fellas, lest frustrated viewers become choleric.[3]

You might try applying Safire's test to Judge Selya's use of big words. Conclusions may differ. For myself, I'm grateful for the opportunity to add to my vocabulary, though I'll probably never want to use any of the words that follow. If I practiced in the First Circuit, of course, I'd consider it a professional obligation to learn them, so frequently do they appear in Judge Selya's opinions.

Here, then, are 30 of the more difficult words that Judge Selya has used. The definitions are based on those of the *Oxford English Dictionary*.

1. ***armamentarium***: a doctor's equipment; an array. "The cost of living provision was a part of this armamentarium . . . ." *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 523 (1st Cir. 1987).

2. ***decurtate***: curtailed; shortened. "A decurtate recital of certain crucial facts is, however, useful . . . ." *United States v. Puerto Rico*, 721 F.2d 832, 833 (1st Cir. 1983).

3. ***encincture***: an enclosure or encirclement. "[I]t is presently unclear to what extent (if at all) the framing of answers would invade the encincture of the Hague Convention . . . ." *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 24 (1st Cir. 1985).

4. ***eschatocol***: the concluding part of a protocol. "The matter before us is in a sense an eschatocol to an earlier, more complex piece of work." *United States v. Reveron Martinez*, 836 F.2d 684, 685 (1st Cir. 1988).

5. ***exiguous***: scanty; meager. "Faced with such an exiguous record, the trial judge concluded that the juror did not remember either Lucy or Paul Neron from what were (at most) casual encounters with them." *Neron v. Tierney*, 841 F.2d 1197, 1203 (1st Cir. 1988).

6. ***furculum***: a wishbone, or forked process or part. "The last furculum of the petitioner's challenge is not so facilely to be dismissed." *Puleio v. Vose*, 830 F.2d 1197, 1204 (1st Cir. 1987)./ "We hold, therefore, that on the most salient furculum of the *Cohen* paradigm, the appellant has fallen several leagues short of making out the requisite showing of urgency." *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 25 (1st Cir. 1985).

7. ***hypoplasia***: underdevelopment of an organ or other bodily part. "Such hypoplasia inhibits the careful evaluation needed in order to resolve the central inquiry which lies at the core of Fiat's entreaty." *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 25 (1st Cir. 1985).

8. ***imbrication***: an overlapping. "Given the imbrication between appellant's claim and those earlier advanced by his co-defendants, the doctrine of *stare decisis* bars relitigation of that issue." *United States v. Reveron Martinez*, 836 F.2d 684, 687 (1st Cir. 1988).

9. ***imprecation***: a curse. "The Sierra Club would have us extend this principle to the EAJA . . . . The imprecation asks too much." *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 524 (1st Cir. 1987). (Not since the 17th century has *imprecation* been current in the sense in which Judge Selya uses it, i.e., "an entreaty or petition.")

10. ***impuissant***: powerless; feeble. "[W]e judge appellant's contentions to be not only factually inaccurate, but legally impuissant as well." *United States v. Chaudhry*, 850 F.2d 851, 853 (1st Cir. 1988).

11. ***inconcinnate***: unsuitable; awkward. (Archaic) "When Erasmus mused that '[a] common shipwreck is a source of consolation to all,' he quite likely did not foresee inconcinnate free-for-alls among self-styled salvors." *Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1061 (1st Cir. 1987) (alteration in original).

12. ***internuncio***: a messenger between two parties; a go-between. "The third admitted that he was merely an internuncio; he did not know what decisions might or might not be made on such a subject." *Moores v. Greenberg*, 834 F.2d 1105, 1114 (1st Cir. 1987).

13. ***neoteric***: modern; recent. "[T]he request leapfrogs the district court, which has never been accorded an opportunity to consider the plaintiff's neoteric theory." *Northeast Fed. Credit Union v. Neves*, 837 F.2d 531, 534-35 (1st Cir. 1988).

14. ***ossature***: the skeletal framework. "The ossature of the workplace is fleshed out by job description forms . . . ." *Vazquez Rios v. Hernandez Colon*, 819 F.2d 319, 321 (1st Cir. 1987).

15. ***paralogism***: a piece of false reasoning. "[S]uch paralogism would disserve common sense as well." *Golemis v. Kirby*, 632 F. Supp. 159, 164 (D.R.I. 1985).

16. ***paralogical***: illogical; unreasonable. "To suggest that early foot *ipso facto* carries the 'substantial justification' day . . . would be paralogical." *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 519 (1st Cir. 1987).

17. ***perficient***: effective; actual. (Archaic) "Congress must not have believed that the perficient enforcement of state standards required, ipso facto, a non-federal forum." *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983).

18. ***perfrication***: thorough rubbing. (Archaic) "The test consisted of rubbing Real's hands and fingernails with filter paper and, after this perfrication . . . , applying certain chemicals . . . to the filter paper." *Real v. Hogan*, 828 F.2d 58, 60 (1st Cir. 1987).

19. ***perlustration***: a thorough survey. "Putting the novel issue presented for our consideration in proper perspective necessitates . . . perlustration of the proceedings below . . . ." *United States v. Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983).

20. ***perscrutation***: thoroughgoing scrutiny. "The court summarily dismissed *Habeas II* on initial perscrutation . . . ." *Lefkowitz v. Fair*, 816 F.2d 17, 19 (1st Cir. 1987); *see United States v. Mejia-Lozano*, 829 F.2d 268, 271 (1st Cir. 1987) ("four issues for our perscrutation"); *Puleio v. Vose*, 830 F.2d 1197, 1203 (1st Cir. 1987) ("perscrutation of the full record"); *Moores v. Greenberg*, 834 F.2d 1105, 1108 (1st Cir. 1987) ("careful perscrutation of the record"); *United States v. Chaudhry*, 850 F.2d 851, 856 (1st Cir. 1988) ("close perscrutation of the record"); *Mele v. Fitchburg Dist. Court*, 850 F.2d 817, 823 (1st Cir. 1988) ("closer perscrutation of the ALOFAR").

21. ***postcibal***: occurring after a meal. "Hunger, food-poisoning, postcibal illness and the like are apparently not the problem . . . ." *Chase v. Quick*, 596 F. Supp. 33, 34 (D.R.I. 1984).

22. ***prescind***: to withdraw the attention from. "The petitioner's argument prescinds in the first instance from *Tinder* . . . ." *Lefkowitz v. Fair*, 816 F.2d 17, 21 (1st Cir. 1987)./ "[H]e presented it to the jurors as an accomplished fact, a fact prescinding from the collaborative 'check[ing of] the record.'" *United States v. Argentine*, 814 F.2d 783, 787 (1st Cir. 1987) (second alteration in original).

23. ***pruritis***: itching. "The plaintiffs' pruritis cannot be scratched [Why not *perfricated*?] by the federal judiciary . . . ." *Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983).

24. ***repastinate***: to dig again. "We see no need to repastinate that familiar soil." *Chappee v. Vose*, 843 F.2d 25, 26 n.1 (1st Cir. 1988).

25. ***resupination***: a turning upside down. (Obsolete) "[B]y some thaumaturgical feat of resupination, NEFCU seeks magically to transmogrify itself from a neutral into a belligerent." *Northeast Fed. Credit Union v. Neves*, 837 F.2d 531, 534 (1st Cir. 1988).

26. ***scumble***: to render (as a painting) less brilliant by spreading a thin coat of opaque color over the surface. "On this scumbled record, it remains entirely possible that the substantive question which Fiat urges us to reach may not, in the long run, require appellate resolution . . . ." *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 24 (1st Cir. 1985).

27. ***struthious***: resembling an ostrich. "[T]he law is not so struthious as to require courts to ignore the obvious." *Onujiogu v. United States*, 817 F.2d 3, 5 (1st Cir. 1987).

28. ***trichotomous***: divided into three parts or categories. "Their appeal is trichoto-mous . . . ."

Sierra Club v. Secretary of the Army, 820 F.2d 513, 515 (1st Cir. 1987).

29. *vaticinate*: to prophesy; to foretell. "[S]ince no Maine court of record has spoken to certain of the issues before us, it becomes our duty to vaticinate how the state's highest tribunal would resolve matters." *Moores v. Greenberg*, 834 F.2d 1105, 1107 (1st Cir. 1987)./ "[S]o many 'ifs' dot the landscape that such a prediction can only be woven of the gossamer strands of vaticination, conjecture, surmise, and speculation." *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 24 (1st Cir. 1985).

30. *zoetic*: living; vital. "The dispute remained zoetic as to the $13,750 of EHA-B funds, more or less, which had been rerouted to Franklin, Greenfield, and Franklin County . . . ." *Massachusetts Dep't of Educ. v. United States Dep't of Educ.*, 837 F.2d 536, 540 (1st Cir. 1987)./ "Ochoa . . . maintains . . . that its claims for prospective relief are nevertheless zoetic." *Ochoa Realty Corp. v. Faria*, 815 F.2d 812, 816 (1st Cir. 1987).

You never can tell how readers will react to unusual words. The editors of the *Texas Lawyer* not so long ago came upon the word *burglarious* in a judicial opinion and, in the "Inadmissible" column on the second page, reported the word as a "novelty" and "invention." Of course, the word is listed in all the unabridged dictionaries and in the better collegiate dictionaries. Blackstone used it more than 200 years ago. In calling this fact to the attention of the newspaper's editor, I jokingly suggested that the news item "was itself inadmissible, though probably infelonious."

At first, I thought I had coined a word, but an entry in the *Oxford English Dictionary* shows that George Eliot used the phrase *infelonious murder* in 1876. That's an oxymoron: Murder is by definition a felony.

But I have digressed. There are more English words than most of us have ever dreamt of; to get an inkling of just how many more, I suggest either browsing the *Oxford English Dictionary* or scanning a few of Judge Selya's opinions in the advance sheets.

—B.A.G.

1. Bryan A. Garner, *Learned Length and Thund'ring Sound: A Word-Lover's Panegyric*, 10 VERBATIM 1 (Winter 1984).
2. William F. Buckley, *The Hysteria about Words*, in THE JEWELER'S EYE 284 (1969) (essay first printed in 1963).
3. WILLIAM SAFIRE, TAKE MY WORD FOR IT viii–ix (1986).

The Pedagogy of Legal Writing

One frequently hears that form follows function. If this adage is as true in legal publishing as it is in architecture, recently published legal-writing texts may tell us something about the state of writing instruction in law schools.

In the last decade, legal writing has assumed a more important position in law schools. Responding to alumni complaints that recent graduates write poorly, law schools have devoted more staff, hours, and resources to first-year legal-writing courses; some have hired writing specialists — often freshly minted Ph.D.s in English — to assist the legal-writing instructors. The Legal Writing Institute was founded to improve the teaching of the subject.

Recently published textbooks demonstrate the increasing importance of legal-writing classes. After several decades in which only a few books on legal writing appeared — aimed at practitioners — legal publishers now recognize the importance of the legal-writing market and publish books tailored to first-year writing classes.

How much of this increased attention translates into actual writing instruction in law schools? If the books' contents are any indication, the answer is, Not as much as you might think, but enough to be beneficial.

How much, though, can writing instruction help the neophyte law student? A decade ago, E.D. Hirsch described a study in which students wrote essays on familiar and unfamiliar topics. As might be expected, the essays on unfamiliar topics were not as well written as those on familiar ones. If by "well written" we mean only more felicitous, this observation is not surprising. But the study showed that the writing problems went beyond style. They found

> that when a topic is unfamiliar, writing skill declines in all of its dimensions — including grammar and spelling — not to mention sentence structure, parallelism, unity, focus, and other skills taught in writing courses. . . . Part of our skill in reading and in writing is skill not just with linguistic structures but with words. Words are not purely formal counters of language; they represent large underlying domains of content. Part of language skill is content skill.[1]

Hirsch's point bears directly on the pedagogy of first-year writing courses and the need for students to achieve basic "legal literacy" before they can become effective legal writers. The most salient finding in the study was that the

students' grammar and spelling — skills that might seem to be independent of content — declined in the essays on unfamiliar topics. Legal-writing teachers confront this phenomenon almost daily when working with first-year students.

Douglas Laycock admits once mistakenly believing that the goal of first-year writing courses is "to turn mediocre writing into good writing." After spending a year evaluating the first-year writing program at The University of Texas, Laycock concluded that

> the first-year writing program can do very little in direct pursuit of this goal. My conceptual mistake was to assume that students entered law school with the basic skill, which is general writing, and that we could immediately begin to improve on that skill. But that is wrong. The basic skill is *legal writing*, and students do not have it when they enter.[2]

The conventions, skills, and vocabulary that students must master, ranging from legal analysis to citing authorities, distinguish legal writing from other types of writing. And, of necessity, much time in first-year writing courses is devoted to teaching students these special traits of legal writing. Without some legal literacy, students have nothing to draw upon and cannot reasonably be expected to show more than basic facility with legal materials.

Considered collectively, recently published textbooks support Laycock's point that much of the first-year writing course is devoted to teaching students things other than writing per se.[3] These books stress legal literacy. Only a small percentage of each is devoted to writing skills that might help students turn mediocre writing into good writing.

What little writing instruction there is addresses the peculiarities of legal writing — the arcane formulation of the Question Presented and large-scale organizational matters of the office memorandum. Students using these books may become adept at working with legal materials, but they will not necessarily become better writers. Although the books admonish students not to adopt the worst traits of legal writing, specific writing instruction is clearly of secondary importance.

So where does this leave us? First-year coursebooks confirm that writing is but one of many skills covered. So it must be. Anyone who has taught first-year law students knows that the learning curve is incredibly steep during the first semester. Yet, once the students start to be legally literate, their writing rapidly improves.

This improvement comes not from additional training in writing — although there may be some spill-over effect — but from the students' greater command of basic legal materials.

If law schools are to teach their students to be better writers, they must strengthen writing courses in the second and third years. Preferably, these writing courses would not entail merely the usual seminar papers so common in most law schools. Faculty who teach upper-division seminars are generally more interested in the substance of their courses than in their students' writing abilities; and students, knowing that their grades depend primarily on mastering the substantive law, concentrate on the law, not on their writing.

Some observers tout law review as a writing experience that can help improve legal writing. There is good reason to question this assumption, for law reviews often reflect the excesses of legal writing. Moreover, even if law-review writing were worthy of emulation, it is a type of writing that most students will never do again once they leave law school.

If law schools cannot stress writing more in the second and third years, when it will do the most good, the responsibility must fall on the legal profession to develop writing programs for attorneys. Some law firms, recognizing how valuable strong legal-writing skills are, have hired full-time writing specialists who are responsible for developing in-house programs, while others have drawn on the expertise of writing consultants to provide specialized writing training. Perhaps, indeed, the most effective training in legal writing is offered not in law school but in law firms.

—Christopher Simoni
Northwestern University
Law Library

1. E.D. Hirsch, Jr., *Cultural Literacy*, 52 AM. SCHOLAR 159, 164 (1982).
2. Douglas Laycock, *Why the First-Year Legal-Writing Course Cannot Do Much About Bad Legal Writing*, 1 SCRIBES J. LEG. WRITING 83, 83 (1990) (emphasis added).
3. *See, e.g.*, HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW (1989); RICHARD K. NEUMANN, LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE (1990); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH (1989); CHARLES R. CALLEROS, LEGAL METHOD AND WRITING (1990).

The Illegality of Bad Grammar*

Although it is commonplace to decry the growing illiteracy of the American population and to view the law as an instrument capable of remedying a variety of social ills, no one until recently attempted to use the law to deter and punish bad grammar. The National Labor Relations Board (NLRB) has now corrected this omission.

Section 7 of the National Labor Relations Act guarantees employees the right to join labor organizations and participate in collective bargaining. In addition, in language not well known to the general public, it protects employees, acting with or without a union, who "engage in other concerted activities for the purpose of . . . mutual aid or protection."[1] For example, if one employee demands a raise, the employer violates no law by firing the employee for such insolence. If, however, two employees jointly seek a raise and the employer discharges them for their conduct, the employer has committed an unfair labor practice because the employees engaged in "concerted activity" for their mutual protection. To demonstrate that an employer has interfered with this right, the NLRB's General Council must prove that the employer believed that the conduct giving rise to the employer's threat or discharge was the act of more than one employee.

In two recent cases, the NLRB found satisfactory proof of this belief in the employer's use of plural pronouns, even though the context suggested that the employer's fault was not one of labor relations but rather one of grammar. In *Certified Service, Inc.*,[2] an employer was concerned about an OSHA inspection that had uncovered several safety violations in the plant. The foreman hollered onto the shop floor that if he heard who had called OSHA, "they was gone." The NLRB found that, because this language could reasonably be perceived as a "threat to retaliate against employees for jointly filing complaints with OSHA," it was an unfair labor practice — even though only one employee had submitted the complaint.[3]

In *Oakes Machine Corp.*,[4] an employee had sent to his employer's parent company a letter asking that the president of his company be removed from office for incompetence and mismanagement. The letter-writer was discharged. At issue was whether the employer believed that the letter-writer acted with fellow employees in making the complaint. The Board found evidence of such a belief in the employer's remark that "he wanted

to learn who sent it so he could 'get them out of the building.'"[5]

One must conclude from these cases that the NLRB has determined that employers must take care to ensure proper noun-verb agreement in their communications. Poor grammar has now become an unfair labor practice.

More recently, the NLRB has indicated that it does not intend to confine its grammatical concerns to noun-verb agreement. It is now also concerned with correct verb tense. In *American Linen Supply Co.*,[6] the employer delivered to striking employees a memorandum telling them to return to work by 7:00 a.m. The memorandum continued, "If you have not, you are permanently replaced." The NLRB held that the letter was an unfair labor practice because it suggested an implemented decision to discharge. Had the employer merely told the employees, "If you do not, you will be permanently replaced," the memorandum would have been lawful.

—Laura J. Cooper
School of Law
University of Minnesota

* Adapted with permission from 6 CONSTITUTIONAL COMMENTARY 5-6 (1989).

1. National Labor Relations Act, § 7, 29 U.S.C. § 157 (1988).
2. 270 N.L.R.B. 360 (1984).
3. *Id.* at 360.
4. 288 N.L.R.B. 456 (1988).
5. *Id.* at 456.
6. 297 N.L.R.B. No. 18, 1989-1990 NLRB Dec. (CCH) ¶ 15,899 (Oct. 23, 1989).

On the Name of the *SJLW*

From an interested reader — 23 May 1990:

I've read some of the articles and was particularly fascinated by Richard C. Wydick's "Should Lawyers Punctuate?" Wydick's liberal and correct use of the apostrophe to show the possessive case made me wonder why the founding editors did not consider using the apostrophe in the title of their new journal. All the dictionaries and usage manuals I have in my office confirm my impression that your title should read "The Scribes' Journal of Legal Writing." To have omitted the apostrophe puts your learned journal in a class with "Moms Cafe" or "Clydes Service Station." Or does the absence of an apostrophe after Scribes denote a meaning I've overlooked?

Mr. Garner's response — 5 July 1990:

Thank you for your recent letter; I'm sorry for the delay in responding, but I left for Japan just after receiving it and only now am getting caught up in correspondence.

I'm glad you allowed the possibility that "the absence of an apostrophe after *Scribes* [could] denote a meaning" you overlooked. It does.

No, the name of *The Scribes Journal of Legal Writing* is not in the same class as "Moms Cafe" or "Clydes Service Station." If Clyde's last name were Jones, and he named his business "The Jones Service Station," *Jones* would be entirely correct as a proper noun acting as an attributive. The article (*the*) is important to the construction.

I have never heard anyone complain about the attributive *New York* in the name of *The New York Times*; *New York's Times* strikes us as silly.

Scribes, though plural in form, is the alternate name of the American Society of Writers on Legal Subjects. Like *General Motors*, it takes a singular verb:

> Scribes now has more than 600 members.
>
> General Motors is a large corporation.

Scribes is not ordinarily understood to be a plural denoting the individual members of the organization. I would never describe myself as a Scribe, but as a member of Scribes.

If we had called the journal *The Scribes' Journal of Legal Writing*, the name *Scribes* would take on a significance other than its usual one, as if referring to the collection of members and not to the single organization.

If the organizational sponsor had been General Motors, the name might correctly have been *The General Motors Journal of Legal Writing*. (The phrasal attributive works less well than the single word *Scribes*.)

Of course, the other way to handle the title would have been to drop the definite article and treat the organizational name as a possessive instead of as an attributive: *Scribes' Journal of Legal Writing* or *General Motors' Journal of Legal Writing*. But then we might have been wrongly criticized for not making it *Scribes's Journal of Legal Writing* on the same principle that would have us prefer the phrase *Jones's lawyer* over *Jones' lawyer*. *See* rule 1, page 1 of W. Strunk & E.B. White, *The Elements of Style* (3d ed. 1979).

The justification of *Scribes* as an attributive is quite apart from another exception that usage critics have made for possessives in titles. This exception merely protects the slipshod:

> Sometimes in titles, on letterheads, and on signs, the apostrophe of a possessive is omitted, as in *Teachers College, Womans Suffrage Headquarters, Mens Department.* The omission of the apostrophe often improves the appearance [!] of the printing in titles, signs, etc., and what determines its omission is therefore not grammar but the effectiveness of the design. So also in names like *Pikes Peak*, in which *Pikes* is no longer felt as a possessive, the apostrophe may be omitted.

2 G.P. Krapp, *A Comprehensive Guide to Good English* 642 (1927; repr. 1962). Fowler does not address the question, but several other reputable writers do. *See, e.g.*, Wilson Follett, *Modern American Usage* 435 (1966); J.M. Walsh & A.K. Walsh, *Plain English Handbook* 82 (5th ed. 1966); T.M. Bernstein, *The Careful Writer* 357 par. 2 (1965).

I'm with you in disapproving what Mom and Clyde are doing to the language. In *A Dictionary of Modern Legal Usage* 423 (1987), I say: "It seems that possessive apostrophes are increasingly omitted nowadays. This sloppy habit is to be avoided." Then I give two examples (*Governor Edwards signature* and *expert witnesses testimony*). The latter example might properly have been made attributive by writing *expert-witness testimony.* In my entry on *attorney's fees* and its variants (p. 75), I write: "The only form to avoid at all costs is *attorneys fees*, in which the first word is a genitive adjective with the apostrophe wrongly omitted."

Because two or three other readers have raised the very question you raise, I intend to include a short discussion of it in the Notes & Queries section of the 1991 issue.

From the interested reader:
11 July 1990

You're right. I'm wrong. There's no justification for *Scribe's* or for *Scribes'*. And The Scribes are not in the same class as the ignorant Moms and Clydes of the world. You belong with the New York Times and General Motors and the rest of the elitists.

I think your readers' interest would be piqued by a short discussion of the rationale for lack of an apostrophe. As for quoting the letter of an untutored, unlettered law librarian, I hardly know what to say. My secretary is on vaca-

tion and I can't locate the file copy of my ill-conceived letter. So I don't know what I said that would be worth quoting. Certainly nothing you say could add to the humility I already feel.

Scribes Student Essay Award

For the best student essay on any facet of legal writing, the *Scribes Journal of Legal Writing* will award $300 and publication in the 1992 issue. Entries, to be 30 or fewer double-spaced pages, are due by June 30, 1992. In addition to the manuscript, please send a WordPerfect diskette if possible. Write Beverly Ray Burlingame, Executive Editor, c/o Thompson & Knight, 3300 First City Center, 1700 Pacific Ave., Dallas, Texas 75201.

Legaldegook Awards

Each year, the Plain-Language Committee of the State Bar of Texas gives "Legaldegook Awards" for delightfully atrocious pieces of legal writing. If you wish to nominate a passage — ranging in length from a single sentence to several pages — please send it to Roy J. Grogan, Jr., Grogan & Brawner, P.C., 2311 Cedar Springs Road, Suite 150, Dallas, Texas 75201.