

# Language and Law

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A resource book for students

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## Chapter A2

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### Historical Development of Legal English

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and social mobility. Code-mixing and code-switching are extensive, both among bilinguals who switch between languages and among monolinguals whose style repertoire includes code-switching between varieties, some of which might traditionally be thought of as regional or class dialects. All these kinds of variation may be reflected in legal language.

Complications associated with what language varieties signify also matter. Speakers' varying ease in switching in and out of a class or regional dialect, when they wish to, in order to fit in with or adopt some other stance in relation to given settings can affect professional success. Some linguists prefer the dynamic term **repertoire** to the more static contrast between dialect and register in order to emphasise such significance. The relative difficulty involved in acquiring legal language as a variety also matters, because law is not simply a semantic field such as the weather or geometry, but a professional practice steeped in tradition, subject to intense educational selectivity, and respectful of accentuated hierarchy. Law as a field exhibits complex shadings of language use among different institutions, topics, practitioners and purposes. Such semiotic micro-variation signals professional and social relationships both within law and between the legal system and the wider public who are subject to law in a given legal jurisdiction.

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**A2****HISTORICAL DEVELOPMENT OF LEGAL ENGLISH**

The four units that make up Thread 2 develop our exploration of legal language as a variety. In this unit, we outline the history of legal English; in Unit B2, we discuss specialised legal and social functions served by legal language; and in Unit C2, we consider arguments for and against reform of how legislation is written. The present unit introduces each of these themes by showing how the distinctive features of modern legal English are the result of sociolinguistic complexity during successive periods leading into the more stable situation of English, including legal English, from the late seventeenth century onwards. We suggest that modern perceptions of legal English are affected not so much by the variety's specific historical features (which are broadly consistent with the wider history of the language), but by the fact that historical substrata have persisted far more than in general usage, as collectively a marker of linguistic conservatism.

**Key moments in the history of English**

We begin by outlining key moments in the wider history of the English language, focusing especially on contact between different languages.

- 1 Although there is a complicated and interesting history of languages in the land mass that is now Great Britain prior to the eighth century AD, the impact of that linguistic history on modern legal uses of language was not significant. There is, for instance, little continuity between the Latin brought by the Romans in 43 BC

and later influence of Latin on legal English. When the Romans withdrew from Britain in AD 410, Latin almost died out and was only revived under the influence of St Augustine for use in Christian ceremonies after AD 597.

- 2 Almost immediately following the retreat of the Romans to defend Rome, Anglo-Saxons invaded Britain from north-west Europe, and introduced a Germanic language now known as **Old English** (alternatively, as **Anglo-Saxon**). This was the earliest, regionally varying form of 'English' in Britain. In contrast with the earlier period of Roman occupation, Old English existed in a predominantly oral culture.
- 3 Throughout the period AD 800–1050, another linguistic and political force contributed to the development of modern English, including legal English. Vikings from Norway and Denmark made incursions into north-eastern England and established a geographical jurisdiction known as the **Danelaw**: effectively a political and legal settlement dividing the country.
- 4 The most significant influence on legal English, however, follows the invasion of Britain by Normans from northern France in 1066. The Normans had themselves migrated to France earlier, as Norse-speaking invaders. But by 1066, they were speakers of Norman French. In England (but not Scotland), the language that then gradually developed was a contact language, **Anglo-Norman**. Norman French was the language of the aristocracy, used for government, administrative and military purposes. But it spread through intermarriage and adapted in response to the bilingual context. Latin was also in use as the language of scholarship and religion. Significant changes took place in Old English during this period, partly because the Normans became politically isolated from France during the thirteenth century, and partly as a result of increased mixing and trade between Normans and the Anglo-Saxon population. By the late thirteenth century, new forms of Old English, less inflected and more dependent on word order, were becoming prevalent and are now acknowledged as a distinct phase in the history of the language: Middle English.
- 5 **Early Modern English** is a name given to the language from the sixteenth century onwards. The Midlands (London) dialect had gradually emerged as a standard variety, especially following the introduction of printing in England by Caxton in the 1470s. Significantly, nevertheless, doubts continued into the early seventeenth century as to the status of English: whether the language was too impoverished for use in scholarship and other elevated purposes. English gained in prestige, however, because of several factors: the quality and popularity of literary writing (making it no longer seem inadequate compared to the humanist achievements of classical languages including Latin); reduction in the influence of Latin in the sixteenth century as a result of the Reformation; and hostility towards Latin during and following the English Civil War in the mid-seventeenth century.
- 6 These stages in the history of English emphasise invasion and colonisation of Britain by others, with **language contact** functioning as the main impetus to **language change**. Later phases involve a different direction of travel, quite literally. Britain invaded countries (including Ireland, from the seventeenth century onwards). American settlers who left Britain for religious and political reasons established English, initially alongside other languages, in what became, after

independence in 1783, the United States. Imperial expansion by Britain, at first commercially and then through settlement and political control, led to the imposition of English as the language of administration and education in the country's overseas possessions. The effect of such imposition during the nineteenth and twentieth centuries (along with Anglophone political, educational and legal institutions), combined with US political influence through the twentieth century, has resulted in worldwide influence of English as an international *lingua franca*, reflected in continuing use of the language in postcolonial national legal systems, as well as in international political and legal institutions and commerce.

### **Development of legal English as a variety**

Surprisingly little reference to law is made in general histories of the English language, perhaps reinforcing a view that the language of law is somehow separate from more general processes of linguistic variation and change. However, the history of legal English calls for historical understanding that engages with wider sociolinguistic considerations as well as with language practices in legal institutions. A continuing need for interdisciplinary work on legal English emphasises the significance of pioneering historical studies such as Mellinkoff (1963) and Tiersma (1999), as well as earlier treatment of language in histories of English law (e.g. Pollock and Maitland 1895: 80–7).

Here are some of the main points in the history of legal English (inevitably greatly simplified):

- 1 Anglo-Saxon England was an oral culture and had no distinct legal profession. The society's ways of defining and enforcing social order involved practices many of which would now be considered superstitious or magical (e.g. trial by ordeal). Those practices included attributing special powers to words, requiring both those administering the law and those subject to law to remember legal phrasing exactly. The language of this ritualistic legal culture has contributed a large number of words to modern legal English (e.g. *bequeath, guilt, manslaughter, murder, oath, right, sheriff, steal, swear, theft, thief, witness* and *writ*), words that in many cases have narrowed or altered in meaning. Besides vocabulary, the Anglo-Saxon characteristic of giving significance to word-initial sounds, using **alliterative phrasing** to create memorable formulae, also left traces in legal English, especially after the shift in other varieties (including literary English) towards verbal devices such as rhyme: we still have *to have and to hold* (in marriage vows), *rest, residue and remainder, hold harmless* (in contracts), etc. In addition, Anglo-Saxon use of Latin after widespread adoption of Christianity in the seventh century forged an important connection between Latin as the principal language of religion and as the language of scholarship, with Latin emerging as the important language for legal thinking.
- 2 Far more important for legal English than the influence of Anglo-Saxon (or the minimal impact made by the Vikings' Old Norse) was the impact of French. The Norman Conquest in 1066 resulted in French-speaking Normans occupying virtually all positions of power in England. This made French the language of influence, despite Latin being, at least initially, the language of law. Two dates stand

out in what was historically a complex process. Around 1275, statutes began to appear in French, and by the early fourteenth century almost all Acts of Parliament were in French. In 1362, Parliament enacted the Statute of Pleading, which condemned the fact that parties in most legal actions could not understand the proceedings and required pleas to be made in English (Mellinkoff 1963: 111–12; Baker 2002: 76–9). However, since statutes in English only appeared later, from the late fifteenth century, ironically the Statute of Pleading requiring use of English was itself written in French.

- 3 Gradual resolution of the trilingual situation of Anglo-Norman Britain in favour of English gave rise to a much-debated anomaly in the development of legal English. Adoption of French in the legal system took place precisely when Anglo-French outside the legal system was in decline, yet at a time when a new legal profession was taking shape. So French became **Law French**, already a rarefied variety at the time it was adopted. This specialised variety survived successive efforts to abolish it (including a 1650 act for ‘turning the books of the law, and all process and proceedings in courts of justice, into English’, an act repealed at the Restoration in 1660) through to the final demise of French in law in the 1730s, nearly 300 years later. Features of Law French, which itself underwent changes during its long period of use, can be found in modern legal English, including: adjectives that follow rather than precede nouns (e.g. *attorney general*, *court martial*, *malice aforethought*) and a large amount of technical terminology (e.g. *appeal*, *bailiff*, *bar*, *claim*, *complaint*, *counsel*, *court*, *defendant*, *evidence*, *indictment*, *judge*, *jury*, *justice*, *party*, *plaintiff*, *plead*, *sentence*, *sue*, *summon* and *verdict*).
- 4 During the extended period of bilingualism and trilingualism, Latin also remained important for English law. Latin was used as the language of court records (as well as of writs, such as **habeas corpus**) long after it had been displaced as the language of legislation. Latin *versus* between the names of parties in cases (meaning ‘against’, and abbreviated as US *v.* or UK *v.*) dates from this period. Because Latin was the principal language of scholarship of the period, learned English judges and lawyers incorporated literary quotations and maxims about law in Latin into their discourse (e.g. *caveat emptor*, rendered with Old English-style alliteration as ‘buyer beware’). In view of the socially restricted proficiency in Latin of the period, however, such **Law Latin** began to include legal terms of French origin, as well as English words, whenever clerks and scribes were unfamiliar with the Latin they needed.
- 5 Three further characteristics should be noted from this transitional period:
  - Use in modern legal English drafting and documents of long and grammatically complex sentences continues a practice of composing (and cultivated skill in reading) Latin prose from earlier periods, which had already influenced written French but was uncommon in Old English.
  - **Binomial pairs**, or phrases consisting of two words linked by ‘and’ (e.g. *null and void*, *peace and quiet*, *breaking and entering*, *cease and desist*), which may be as much as five times as common in legal English as in other prose styles, typify a practice through which speakers responded to the existence of two simultaneously available streams of vocabulary: Anglo-Saxon or French in

origin. Whereas the general effect on English vocabulary was for nuances to emerge between such terms (e.g. between *lawful*, *rightful* and *legal*), in law such phrases seem to have functioned more as formulae: they remained chained together as rhetorical synonyms, especially where they alliterated or showed some distinctive rhythmic effect (in a manner resembling Old English sound patterning, e.g. *last will and testament*).

- The period was marked by a complex shift in relation to **linguistic medium**. The advent of printing (Harvey 2015) resulted in wider dissemination of an increased number of uniform versions of legal texts, and legal proceedings changed in the balance they demanded between oral and written pleading. That seemingly small procedural change acquires far greater significance when it is remembered that oral pleading was conducted in French while the written forms from which ‘counters’ or ‘narratores’ made oral submissions were in Latin (Baker 2002: 76–9). Crucial for issues of legal authority, too, the shift from oral to written involved a change from viewing written documents as mere reports of an oral event or ceremony through to seeing written documents as the authoritative statements. Deeper still, fixation of discourse in writing consolidated the legal doctrine of precedent and introduced a textual and more interpretive, ‘legalistic’ dimension into adversarial litigation.
- 6 It would be simplistic to say that legal language has had a less eventful history since English became the language of law in Britain, with Latin and French merely persistent substrata. Legal English has been affected by massive expansion of vocabulary arising from its use in modern, industrial society, as well as by other factors. From the point of view of the variety’s distinctiveness, however, the main, defining changes had already taken place. Many characteristics of modern legal English noted in synchronic studies (e.g. use of *hereinafter*, or complex prepositions such as *in the event that* rather than simply *if*) relate less to linguistic innovation than to persistence of features as archaisms. Legal language as a variety accordingly had a slightly anomalous relation to eighteenth-century arguments about ‘ascertaining’, ‘fixing’ or even ‘purging’ the English language. Its specialisation as a technical, professional language set it apart from other uses because of its conservative doctrinal values (especially treating prior judgments as authority on the meaning to be given to legal terminology). This characteristic may have made legal English resistant (though not immune) to further changes even in the face of criticism and almost continuous agitation for reform.

### **Past and present language?**

The greatest influence on changes in legal English over the last three centuries has been massive geographical expansion in the spread of its use. English colonisers introduced legal English as part of introducing common-law institutions throughout the British Empire, and English became the language of law in the United States. English has also remained the language of law (or one language of law; see Thread 10) in many anglophone countries following decolonisation. Arguably, by comparison with the scale

of variation evident in the general formation of New Englishes (e.g. Indian English, Nigerian English, etc.), the linguistically conservative tendency of legal English has acted as a brake on divergence. Perhaps as influential, however, as regards the footprint of legal English has been the extraterritorial reach of the English **common-law** system as the way to arbitrate international commercial cases, as well as the twentieth-century development of international legal bodies (the EU, UN, WTO and others) that use English as spoken or written and interpreted by non-native speakers who have no historical connection with Anglo-American common-law traditions.

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## LEGAL GENRES

A3

In this unit, we explore another important kind of linguistic variation in legal discourse: variation by text type, or genre. Each different genre consists of interlocking elements that together allow it to fulfil a particular purpose. While genres can be found across all domains of discourse, in law specific genres serve precisely defined roles: they may prohibit something; impose duties or obligations; make promises; impose an order; advocate a course of action; or report the reasoning or findings of a court. Below, we outline the concept of genre and illustrate the most common legal text types. In Unit B3, we analyse how genres in law have developed historically, taking the example of the law report; and in Unit C3, we analyse generic features of a statute (what are sometimes called in legal skills courses ‘the anatomy’ of a statute; Finch and Fafinski 2011: 65–73). Our Unit D3 extract summarises some detailed empirical research into what is found to be a hybrid legal genre: that of jury trial.

### Aesthetic and professional genres

To begin, it is necessary to clarify what we mean by **genre**, especially because the term carries connotations of aesthetic choice and artiness that seem out of place in the company of legal texts. Such associations may suit fiction and ballet but to many people seem inappropriate in relation to professional, especially legal, kinds of discourse.

In its most general sense, *genre* simply means sort, or type, of text. The word comes from Latin *genus*, meaning ‘kind’ or ‘type’ of anything, not just literary or artistic works. (*Genus* is still used in a technical sense to describe ‘type’ in the classification of species; and *generic* means ‘broad’ or ‘with properties of a whole type or class’, being related in this meaning to *general*.) In our discussion of legal language, we prefer the term *genre* to *text type*, since the latter seems to highlight formal rather than functional differences between texts.

### Genre and register

In Thread 2, we discuss the concept of register as stylistic variation that applies across legal text types. By contrast, genre is concerned with the distinctiveness of legal text types within the overall class of texts that all display legal register.