

LATIN IN LEGAL WRITING: AN INQUIRY INTO THE USE OF LATIN IN THE MODERN LEGAL WORLD

projicit ampullas et sesquipedalia verba [*Disdain bombast
and words half a yard long*]: . . . *speak effectually, plainly, and
shortly*

—Sir Edward Coke¹

INTRODUCTION

Considering the former central position of Latin in many areas of European life, its importance in American legal language of earlier centuries is unsurprising.² What is of interest is that Latin, at the end of the twentieth century, continues to exist in legal discourse. So, for example, first year law students still encounter Latin phrases in their classes.³ Judges still use Latin in their decisions.⁴ *Black's Law Dictionary* still begins with a Latin pronunciation section.⁵ Latin may be down but it is not yet out.

This Note presents a modern picture of how the legal community uses Latin and what Latin's current purpose is. At its core is an examination of the results of a LEXIS search on three courts' use of Latin. The search revealed that courts have not allowed Latin to slip quietly into obscurity. Rather, Latin in court opinions has experienced a revival over the past forty years.⁶ Reasons for this revival are not immediately obvious. Indeed, recent changes in the legal world might logically suggest the opposite result.⁷ In analyzing these results, therefore, this Note discusses various aspects of the legal profession, demonstrating how Latin fits into the legal world. It does not purport to be exhaustive,

¹ Quoted in DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 287 (1963).

² See *id.* at 71.

³ See, e.g., DAN DOBBS, *TORTS AND COMPENSATION* 574 (2d ed. 1993).

⁴ See *United States v. Burke*, 504 U.S. 229, 243 (1992) (Scalia, J., concurring). In *Burke*, Justice Scalia employed the maxim *noscitur a sociis* in concurring with the majority that the term "personal injury" in the Internal Revenue Code was limited. See *id.*

⁵ BLACK'S LAW DICTIONARY vii-x (abr. 6th ed. 1991).

⁶ See Graph on file with author.

⁷ For example, the study of Latin at schools and colleges has decreased over the past one hundred years. Furthermore, books on legal writing discourage the use of Latin in legal writing. See, e.g., BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 185 (1991).

but rather suggests some possible reasons for the continuing use of Latin.

Part I explains the methodology of the LEXIS search, including the rationales behind the selection of certain words and certain courts. It then gives the results of the study, showing how the use of Latin has changed. Part II briefly examines various influences, including history and education, that affect the language of the legal community. Part III weaves these influences on the law back into the courts' and the legal community's continuing use of Latin. It suggests how the various influences described in Part II could explain why the legal community continues to use Latin in its writing. Finally, it argues that Latin does have a valid role to play in the modern legal world.

I. A STUDY OF THE USE OF LATIN IN TWENTIETH CENTURY COURT OPINIONS

The core of this Note is an examination of the reasons for the use of Latin in modern legal language. First, however, this Note attempts to establish how Latin is used in modern legal language. This Note answers this question through the use of search engines on LEXIS. It thus grounds itself in empirical rather than anecdotal findings.

The Note concentrates on Latin in court decisions. It concentrates on the decisions of three courts, namely the United States Supreme Court, the California Supreme Court and the Massachusetts Supreme Judicial Court. Finally, it selects only certain Latin phrases to study. Subpart A is an explanation of why the study examines these areas. Subpart B describes the methodology and results of the study.

A. *Background to the Study*

Court decisions are a valid subject of inquiry into the legal community's use of Latin for two reasons. First, in opinions, judges are talking to both the legal and nonlegal communities.⁸ Judges' primary audiences are the attorneys working on the case, i.e., other people trained in the same profession as they are.⁹ Yet, judges in court opinions also speak to the nonlegal community—either parties to the litigation or observers.¹⁰ Judicial decisions thus exist at an intersection of intra- and extra-legal communication.

⁸ See JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 243 (3d ed. 1993) (stating that readers of legal opinions included "the public, media, law student, legal scholar, practitioner, or judge . . .").

⁹ See *id.*

¹⁰ See *id.*

Second, judicial opinions are influential documents in a wider legal arena than just the immediate courthouse.¹¹ Professors teach them and critique them, students study them, litigators argue with and over them and counselors structure transactions around them.¹² Because of this wide influence, judicial decisions can illustrate uniquely the legal community's use of language.

This Note focuses on the United States Supreme Court, the California Supreme Court and the Massachusetts Supreme Judicial Court. These courts were chosen because of their geographical diversity and long-standing records on LEXIS.¹³ LEXIS has records of the United States Supreme Court dating from the late eighteenth century.¹⁴ For the California Supreme Court and the Massachusetts Supreme Judicial Court, the records on LEXIS begin at the end of the nineteenth century.¹⁵

This Note concentrates on fifteen Latin phrases to determine how often they have been used in court opinions from 1900–1990. The legal community uses some Latin words and phrases that no particular area of law or procedure governs.¹⁶ Such phrases express ideas that a writer could easily express in English.¹⁷ They do not have a specific, technical function.¹⁸ Because they have no specific legal function, they are words that judges choose because those judges find them useful.

The fifteen phrases in this study come from *Essential Latin for Lawyers*, which is a collection of Latin phrases associated with the law.¹⁹ The author of *Essential Latin for Lawyers* has placed Latin phrases under certain headings, depending on their use. The phrases in the study come under the "General Terms" heading. They are: *ab initio* (from the beginning); *expressio* (the expression); *inter alia* (among other things); *jus tertii* (the right of a third party); *locus* (place); *malum in se* (bad in itself); *mutatis mutandis* (with the appropriate changes); *noscitur a sociis* (it is known by those around it); *nunc pro tunc* (now for then); *obiter dictum* (words said); *ratio decidendi* (reason for deci-

¹¹ See *id.* at 423.

¹² See generally *id.*

¹³ See STEVEN L. EMANUEL, *LEXIS-NEXIS FOR LAW STUDENTS* E1–E3 (2d ed. 1995).

¹⁴ See *id.* at E1.

¹⁵ See *id.* at E2–E3.

¹⁶ See RUSS VERSTEEG, *ESSENTIAL LATIN FOR LAWYERS* 111–18 (1990).

¹⁷ These are the phrases that were recently described in a dictionary of modern legal usage as "bombastic, vestigial Latinisms that serve no purpose but to give the writer a false sense of erudition." BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 501 (1995).

¹⁸ See VERSTEEG, *supra* note 16, at 119–62.

¹⁹ *Id.* *Essential Latin For Lawyers* is a collection of the "[l]atin words and phrases which lawyers, law students, and paralegals are most likely to meet." *Id.* at xiii.

sion); *res gestae* (things done);²⁰ *sua sponte* (of its own accord); *sub silentio* (in silence); and *vel non* (or not).²¹

B. *The Methodology and Results of the LEXIS Search*

A LEXIS search of the fifteen Latin phrases was conducted to determine the number of times each court had used them since LEXIS records began. The search was then broken into time-periods (decades) to determine how often each court used each phrase in a decade. In this way, the search showed how the courts' use had changed over time. The results of the searches were collated and put into graph form.²²

The graph reveals that these Latin phrases appear in court opinions more often now than prior to 1950.²³ Prior to 1950, in all three courts, the use of these phrases was constant, decreasing or increasing at a very gradual level.²⁴ Since 1950, in contrast, the courts' use of these phrases has increased dramatically.²⁵ In all three courts the most dramatic rise occurred in the 1960s. Moreover, a steady increase has continued since then in the United States Supreme Court and the California Supreme Court.²⁶ Even though the Massachusetts Supreme Judicial Court has shown a slight decrease in the use of these phrases over the past twenty years, that court still uses them more than three times as much now as it did prior to the 1950s.²⁷

The pattern is not uniform with all the phrases.²⁸ Only five phrases show a clear increase in use.²⁹ These phrases are *inter alia*, *vel non*, *sub silentio*, *sua sponte* and *ratio decidendi*. In fact, the majority of the phrases in the study demonstrate no discernible pattern.³⁰ The courts, however, use only three phrases—*obiter dictum*, *res gestae* and *mutatis mutandis*—less often now than before.³¹

²⁰ Although lawyers used this phrase in evidence, they do not do so anymore.

²¹ These translations come from *Essential Latin For Lawyers*. See VERSTEEG, *supra* note 16, at 119-63.

²² See Graph on file with author. These results were compared with the number and length of opinions that the courts produced each year.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See Graph on file with author. During the 1960s, the Massachusetts Supreme Judicial Court used the word "locus" 176 times, in comparison to 60 times in the 1950s and 84 times in the 1970s. Search of LEXIS, States Library, MA File (Jan. 1997).

²⁸ See Search of LEXIS, Genfed Library, US File (Jan. 1997); search of LEXIS, States Library, CA and MA Files (Jan. 1997).

²⁹ These phrases are *inter alia*, *vel non*, *sub silentio*, *sua sponte* and *ratio decidendi*. See *id.*

³⁰ See Results on file with author.

³¹ Those with no discernible pattern are *noscitur a sociis*, *locus*, *nunc pro tunc*, *ab initio*, *malum*

In sum, these results show an increase in all three courts in the use of short, easily translatable Latin phrases since the 1950s.³² In other words, no significant decrease in the use of general Latin words has occurred over the past one hundred years.³³ The remainder of this Note examines possible reasons for the revival, or at least the continued existence of Latin in modern legal language.

II. AN EXAMINATION OF INFLUENCES ON THE LANGUAGE OF THE LAW

Explanations for the results of this study are not immediately obvious. Why, in this century, when the study of Latin in schools is decreasing and when the Roman Catholic Church has largely stopped using Latin,³⁴ does the legal community continue to use Latin? The answer could lie in the special position that legal language has in our society. This Part will thus discuss some of the influences that make language in the law different from language in other areas of society. Part III will explore how the results in Part I and the influences in Part II relate.³⁵

Explaining these results involves exploring what has an influence on legal language, what causes it to change or remain unchanged. Both internal and external influences affect the language people in the legal community use.³⁶ On the one hand, lawyers, judges and professors discuss subjects that only exist in the legal world.³⁷ On the other hand,

in se, *expression unius* and *jus tertii*. The phrases that have decreased in use are *obiter dictum*, *res gestae* and *mutatis mutandis*. See Search of LEXIS, Genfed Library, US File (Jan. 1997); search of LEXIS, States Library, CA and MA Files (Jan. 1997). A simple increase in the number of words the courts produce per year does not explain these results because the number of opinions that a court publishes each year has not greatly increased over the past eighty years. See generally LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 72-73 (1994) (indicating number of Supreme Court cases published each year). In addition, an examination of the reporters indicates that the length of the opinions has not increased threefold in the Massachusetts Supreme Judicial Court, the California Supreme Court or the United States Supreme Court. See Results on file with author. A survey of the lengths of the reporters showed an increase of approximately 50% since the beginning of the century. See *id.*

³² See Graph on file with author.

³³ See *id.*

³⁴ See R. KEVIN SEASOLTZ, NEW LITURGY, NEW LAWS 28 (describing 1967 instruction to use vernacular in various liturgies).

³⁵ This Note does not provide an exhaustive discussion of these influences—such a discussion is beyond its scope. Rather, this Note suggests a number of ways to approach Latin's role in legal language.

³⁶ See LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 259-61 (1975). Professor Friedman discusses the differing styles and languages of various countries, including France, the United Kingdom and the United States. See *id.* In discussing these differences, Professor Friedman states that "[j]udicial style does not remain immobile. It changes with society and the legal culture." *Id.*

³⁷ See generally PAUL W. KAHN, THE REIGN OF LAW 230-40 (1997); ROSCOE POUND, JUSTICE ACCORDING TO LAW 54-56 (1951).

also creates a barrier that prevents nonlawyers from easily entering the community.⁴⁹ To enter the legal world, nonlawyers must learn the language.⁵⁰ Thus, both efficiency and community identity influence the language of lawyers.

2. History

The history of the law affects legal language in two ways. First, because the American legal system is based on precedent, a discussion of past events or concepts is central.⁵¹ Second, how members of the profession see themselves as part of a tradition, as something that one generation hands down to the next, may affect their language.⁵²

Substantively, American law has its roots in "history" in the form of prior decisions.⁵³ A system based on precedent is by its nature backward-looking.⁵⁴ The legal community is thus constantly discussing ideas and concepts that began in the past, sometimes in a different language.⁵⁵ Some concepts in modern American law began with Anglo-Saxons, Romans or Normans, and the language of the law reflects these influences.⁵⁶ Other concepts—such as internet law—are relatively new, a product of later societies, and may bring new vocabulary to the law.⁵⁷ Thus, the language of the law may vary depending on where in legal history the substantive subject originated.

In a similar, though perhaps broader, way, legal philosophical theories that discuss the source of law may affect language. In the late eighteenth and early nineteenth centuries, for example, "natural law" played an important role in legal discourse.⁵⁸ Natural law is a complicated and unclear doctrine, and a full discussion of its manifestations is not possible in this Note.⁵⁹ Essentially, however, it holds that the

⁴⁹ See *id.*

⁵⁰ Although this barrier is not insurmountable, it is another barrier.

⁵¹ See generally FERNAND N. DUTILE, LEGAL EDUCATION AND LAWYER COMPETENCY 1-2 (1981).

⁵² See BOYD WHITE, *supra* note 45, at xi.

⁵³ See, e.g., DOBBS, *supra* note 3.

⁵⁴ See generally MELLINKOFF, *supra* note 1.

⁵⁵ See generally *id.*

⁵⁶ See *id.* at 12-16.

⁵⁷ The word cyberspace, and all the variations on the cyber-theme, are examples of a new vocabulary.

⁵⁸ See JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 64 n.11 (1990); see also MELLINKOFF, *supra* note 1, at 267-68.

⁵⁹ For a discussion of the history of American law, including its dominant philosophies, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1992) [hereinafter HORWITZ I] and MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1977) [hereinafter HORWITZ II].

source of law is ancient and that law has universal, enduring principles.⁶⁰ Judges used natural law as part of their attempt to forge a body of American law, based on the American Constitution.⁶¹ John Adams, in contrasting the corrupt customary laws of Europe with the laws of America, argued that classical, universal legal principles should be the correct basis for law.⁶² The early law schools often had natural law as a part of their curriculum.⁶³ Justice Story believed that natural law was the substratum of the legal system, the foundation upon which the law was built.⁶⁴ Thus, members of the legal profession at the beginning of the nineteenth century believed that natural law was an important part of the early American legal process.⁶⁵

One major source of the principles of natural law was Latin maxims because of their perceived ancient and durable qualities.⁶⁶ Some members of the legal profession considered maxims to be the distilled wisdom of law, stretching back to ancient times.⁶⁷ Coke, the English commentator of the early seventeenth century, had described maxims as a proposition "to be of all men confessed and granted without prooffe, argument, or discourse."⁶⁸ During the early nineteenth century, Chancellor Kent, who has been called one of the two most sig-

⁶⁰ See HORWITZ I, *supra* note 59, at 7.

⁶¹ See MCCLELLAN, *supra* note 58, at 108; see also HORWITZ I, *supra* note 59, at 7; MELLINKOFF, *supra* note 1, at 267-69.

⁶² See Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning and Legal Elitism*, in 62 PUBLICATIONS OF THE COLONIAL SOC'Y OF MASS., LAW IN COLONIAL MASSACHUSETTS 360 (1984). John Adams felt that learning the classics of the civilian law was a way to show that he was part of the elite legal community. See *id.*

⁶³ See MCCLELLAN, *supra* note 58, at 64.

⁶⁴ See *id.* at 65. Justice Story is widely considered one of the two most important influences on American legal literature. See LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 288 (1973).

⁶⁵ See, e.g., MCCLELLAN, *supra* note 58, at 64 n.11.

⁶⁶ The importance of Latin maxims to legal thought continued through the nineteenth century, as two books which were published during the nineteenth century demonstrate. See generally HERBERT BROOM, A SELECTION OF LEGAL MAXIMS (Philadelphia, T. & J.W. Robinson & Co. 1882); GEORGE F. WHARTON, LEGAL MAXIMS WITH OBSERVATIONS AND CASES (New York, Baker, Voorhis & Co. 1878). The authors were both barristers from London who had adapted books about legal maxims to suit the American legal market. See BROOM, *supra*, at vi; WHARTON, *supra*, at 1. Broom's book ran to eight editions through the nineteenth century in the United States. See BROOM, *supra*, at 1. He saw his book as a collection of first principles for the use of practitioners in the science of law. See *id.* at ix. Wharton expressed the view that the maxims he had collected were of everyday use and application in the study and practice of the law. See WHARTON, *supra*, at 7.

⁶⁷ See WHARTON, *supra* note 66, at 8.

⁶⁸ Jeremiah Smith, *The Use of Maxims in Jurisprudence*, 9 HARV. L. REV. 13, 13 (1895-96) (citation omitted). Coke stated that the term "maxim" signifies the dignity and authority of the phrase as the greatest ("maxime"). See *id.*

nificant figures in early nineteenth century legal literature,⁶⁹ argued that the majority of legal maxims in Anglo-American law were derived from the Romans.⁷⁰ Thus, members of the legal profession who believed in natural law used a language that reflected that belief. The philosophical beliefs of a member of the legal profession may thus influence that member's language.

The history of the law also includes the history of the legal community as a profession. The legal community's conception of its own history also affects the language that the community uses.⁷¹ History, however, is not a simple concept—its substance and meaning vary, depending on who is interpreting it. So the history of law, and the history of the legal community, is bound up with present conceptions of what the law is, or should be.

Two quotations show interestingly different attitudes towards the history of the legal profession. The first is from the 1930s, in which Professor Wilkin states:

That spirit which delivered the law from mystery and superstition and established the Twelve Tables in the public Forum, which wrested its administration from the pontifical caste . . . and has taught men generally to understand the virtue and the value of the law, if we trust it, still will prove sufficient for our every exigency.⁷²

This writer sees an unbroken line of men, refining the law through the centuries.⁷³ He and his colleagues are the latest in this line of constant improvement. Professor Glendon, writing in 1994, takes a significantly different view of the history of the legal profession, stating that "[t]he history of the legal profession, no less than the course of the law itself, has been a ceaseless process of discord, of gathering order here and deepening commotion there, of patterns emerging and dissolving as new ideas and practices nibble at the edges of old arrangements."⁷⁴

⁶⁹ See FRIEDMAN, *supra* note 64, at 288.

⁷⁰ See Ward E. Latin, *Legal Maxims and Their Use in Statutory Interpretations*, 26 GEO. L.J. 1, 1 (1937). In his *Commentaries*, James Kent based his descriptions of various legal principles on Roman law, quoting extensively from Cicero, the Roman lawyer and philosopher. See JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 7 (New York, William Kent 1848).

⁷¹ See generally BOYD WHITE, *supra* note 45, at 41. The author discusses the nature of judicial opinions. See *id.* He argues that judicial opinions should be construed as statements of individual minds, rather than only expressions of rationality. See *id.*

⁷² ROBERT N. WILKIN, *THE SPIRIT OF THE LEGAL PROFESSION* 165-66 (1938).

⁷³ See *id.*

⁷⁴ MARY ANN GLENDON, *A NATION UNDER LAWYERS* 285 (1994).

So Professor Glendon, in examining the history of the legal profession, sees more discord than Professor Wilkin sees. For her, it is not a simple matter of refinement. If Wilkin's line is straight and unwavering, Glendon's weaves and turns, fraying at the edges.

How does the legal profession's self-conception influence its language? The two passages above show two possible views of the profession—views that differ as to the connection they see between the present and the past. A member of the profession who views the connection between generations of lawyers as important may use language that draws upon that tradition.⁷⁵ Conversely, a member who sees the connection between the present and past legal community as false or unimportant may use different language.⁷⁶

3. Education

A legal education focuses on language.⁷⁷ It involves studying arguments, examining the meanings of words and finding arguments persuasive or non-persuasive.⁷⁸ What the members of the legal community learn, and how they study it, also affects the language that they use.⁷⁹

The education of the legal profession has changed throughout its history. Indeed, law schools only began to rise in importance at the end of the nineteenth century.⁸⁰ Large numbers of immigrants arrived in the United States at this time, many of whom were eager to become involved in the law.⁸¹ The new law schools began to develop casebooks containing English and American case law.⁸² So, through the beginning of the twentieth century, formal training at law school increasingly became the norm for trainee lawyers, although differences in approaches to teaching existed.⁸³

The formal, legal education that students now receive is relatively uniform.⁸⁴ Since the 1950s, indeed, the American Bar Association has

⁷⁵ See generally BOYD WHITE, *supra* note 45, at 41.

⁷⁶ See generally *id.*

⁷⁷ See, e.g., DOBBS, *supra* note 3, at 112–13 (discussing the meaning of standard of care).

⁷⁸ See *id.*

⁷⁹ See generally DUTILE, *supra* note 51.

⁸⁰ The number of accredited law schools has reached over 170. See FRIEDMAN, *supra* note 64, at 526 (chronicling the number of law schools until the beginning of the twentieth century). See generally 1997 HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS (stating that the number of law schools in association has risen from 32 in 1900 to 160 in 1997).

⁸¹ See FRIEDMAN, *supra* note 64, at 538, 550, 553.

⁸² See generally *id.* at 534.

⁸³ See *id.* at 537–38. The number of law schools rose from 15 in 1850 to 102 by 1900. See *id.* at 526.

⁸⁴ See generally DUTILE, *supra* note 51.

been attempting to standardize nationally the requirements for entry to the bar.⁸⁵ In 1950, the American Bar Association adopted six years of education as the official bar admission standard, and a year later the Association of American Law Schools did the same.⁸⁶ At the same time, the presidents of state and local bar associations from forty-six states met and formed the Conference of Bar Association Presidents.⁸⁷ The purpose of the conference was to develop a spirit of unity among the bar associations.⁸⁸ In 1949, the American Law School Association was first organized with the purpose of acquainting students with the national and local bar associations.⁸⁹ Thus, through the 1950s, the Bar Association made a consistent and conscious effort to homogenize and professionalize the bar and its education.⁹⁰

This relatively recent attempt to standardize legal education contrasts sharply with past legal education. During the eighteenth century, legal training took place through apprenticeships with practicing lawyers, and the only formal schooling lawyers had was during college.⁹¹ For example, John Adams, who received a good education, was eager to join the bar in Suffolk, Massachusetts in the late eighteenth century.⁹² At that time, a member of the bar had to recommend a person's entry to the bar.⁹³ Adams's sponsor at the Suffolk Bar in 1758 moved that Adams be accepted because his reading of Cicero showed that "he is qualified to study the Law by his scholarship"⁹⁴ The subject matter of his college education thus determined, at least in part, his perceived ability to study and practice law.

Knowledge of Latin is no longer a prerequisite for entry to the bar. Education at an approved law school is a prerequisite in most states.⁹⁵ The background of people entering the legal profession is more varied now than it was prior to the middle of this century.⁹⁶ The

⁸⁵ See, e.g., GLENN R. WINTERS, *BAR ASSOCIATION ORGANIZATION AND ACTIVITIES* 89-90 (1954).

⁸⁶ See *id.* at 90.

⁸⁷ See *id.* at 30.

⁸⁸ See *id.*

⁸⁹ See *id.* at 91.

⁹⁰ See WINTERS, *supra* note 85, at 30, 90-91.

⁹¹ See generally Coquillette, *supra* note 62, at 360-63. John Adams, for example, read many legal books while an apprentice. See *id.* at 362-63. Indeed, he found the reading more useful than anything he had learned from the attorney to whom he was an apprentice, because the attorney never spoke about the law to him. See *id.* at 362.

⁹² See *id.* at 360.

⁹³ See *id.* at 363.

⁹⁴ *Id.* at 366; see FRIEDMAN, *supra* note 64, at 276-77 (discussing admissions to colonial bars).

⁹⁵ See SIMON & SCHWARTZ, *supra* note 41, at 637.

⁹⁶ See *id.* at 480, 493.

similarity in their education, however, and in the texts they read, may produce a similarity in their language.

4. Legal Writing

One area of legal education that affects the language that students use is the study of legal writing.⁹⁷ Legal writing is an increasingly important part of the curriculum in most law schools.⁹⁸ In the last twenty years, a number of books on legal writing have been published that discourage the use of legalese in legal writing.⁹⁹ This is concurrent with the Plain English movement, which has been attempting to simplify the language that lawyers use.¹⁰⁰ While many in the legal field support the simplification of legal language, others disagree.¹⁰¹ For example, a recent issue of *The Scribes Journal of Legal Writing* published a point-counterpoint discussion on the use of legalese in legal writing.¹⁰² Walter Armstrong argues that lawyers used language that is incomprehensible to nonlawyers because of the lawyers' need to be precise.¹⁰³ So the lawyer uses archaic words because they have settled meaning.¹⁰⁴ Stanley Johanson, on the other hand, argues that legal language should be comprehensible to nonlawyers, and legal writing should be directed toward nonlawyers rather than toward others in the legal community.¹⁰⁵

A lawyer's position in the debate over the need for simplicity in legal language may affect the language that the lawyer uses. Lawyers who believe in simplicity will use simple language. In contrast, however, those of the legal profession who believe in archaic language may, *pro tanto*, use archaic phrases in their writing.

⁹⁷ See Christopher Simoni, Note, *The Pedagogy of Legal Writing*, 2 SCRIBES J. LEGAL WRITING 156, 156-58 (1991).

⁹⁸ See *id.*

⁹⁹ See, e.g., NORMAN BRAND & JOHN O. WHITE, LEGAL WRITING 121 (2d ed. 1988) (students have problems with overuse of Latin); GARNER, *supra* note 7 at 187 (use foreignism only as a last resort); GEORGE, *supra* note 8, at 131 ("What good is it to be learned, if no one can understand what you are trying to say?"); DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 7 (1981) (tradition is not enough justification for the use of Latin); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 57-59 (3d ed. 1994) (do not use Latin needlessly).

¹⁰⁰ See George D. Gopen, Essay, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 346 (1987).

¹⁰¹ See *id.*

¹⁰² See Walter P. Armstrong, *In Defense of Legalese*, 3 SCRIBES J. LEGAL WRITING 33 (1992); Stanley M. Johanson, *In Defense of Plain Language*, 3 SCRIBES J. LEGAL WRITING 38 (1992).

¹⁰³ See Armstrong, *supra* note 102, at 35.

¹⁰⁴ See *id.*

¹⁰⁵ See Johanson, *supra* note 102, at 37-39.

can possibly provide service at a lower cost than the hypothetical fully-efficient network upon which the FCC's pricing regulations are based.²⁰² In addition, the RBOCs argued, not only will competitors not build new facilities, but also the incumbent LECs will not upgrade their existing networks because the LECs will never be able to recover their costs under the FCC's pricing regulations.²⁰³ Consequently, the petitioners argued, the end result will not be the multiple technologically improved networks that Congress envisioned, but rather a single network with outdated technology.²⁰⁴

5. The FCC's Pricing Rules Violate the Constitution

The petitioners next argued that the statute cannot be construed to permit the FCC's pricing regulations because doing so would constitute an unconstitutional taking without compensation.²⁰⁵ They pointed to established principles of statutory construction that require a statute to be interpreted to avoid an unconstitutional result.²⁰⁶ The RBOCs argued that under the FCC's pricing regulations, carriers would be unable to recover not only their actual current costs, but also the millions of dollars in assets that are un-depreciated because of the previous scheme of strict regulation of asset depreciation schedules.²⁰⁷ They further argued that the carriers would not be able to recover these costs through higher rates in other non-regulated businesses because competitive pressures will drive rates in those businesses close to the carrier's costs.²⁰⁸ Thus, the petitioners argued, the TCA cannot

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See Brief for Petitioners Regional Bell Companies and GTE at 43, *Iowa III* (No. 96-3321).

²⁰⁵ See *id.* at 43-44. The Fifth Amendment provides, in pertinent part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

²⁰⁶ See Brief for Petitioners Regional Bell Companies and GTE at 44, *Iowa III* (No. 96-3321). A utility must be allowed to recover its costs, as well as to provide returns to its investors. See *id.* (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989)).

²⁰⁷ See Brief for Petitioners Regional Bell Companies and GTE at 45-47, *Iowa III* (No. 96-3321).

²⁰⁸ See *id.* at 47-48. The FCC argued that the regulations do not constitute a taking because as an overall pricing scheme, the regulations allow the carriers to achieve a fair rate of return. See FRO, *supra* note 18, at n.737. The petitioners claimed that the FCC's claim is based on its assumption that the carriers will be able to receive higher rates in other non-regulated businesses. See Brief for Petitioners Regional Bell Companies and GTE at 47-48, *Iowa III* (No. 96-3321). The petitioners claim that existing Supreme Court precedent refutes the proposition that a partially regulated entity may be forced to operate at a loss on the theory that its non-regulated businesses will compensate for the confiscatory rates. See *id.* (citing *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 399 (1920)). Furthermore, the FCC does not guarantee that these non-regulated businesses will compensate for the carriers' losses due to the regulations. See *id.* at 48.

be interpreted to allow the FCC's pricing regulations because this would result in an unconstitutional taking.²⁰⁹

A second constitutional argument made by the petitioners was that the regulations violate the Commerce Clause and the Tenth Amendment.²¹⁰ According to the petitioners, the regulations violate the Commerce Clause because the FCC is attempting to regulate purely intrastate matters and also because they strip the states of their power to regulate by forcing compliance with federal regulations.²¹¹ The petitioners also argued that the regulations violate the Tenth Amendment because they turn the states into federal field offices by imposing the choice of either following federal regulations or relinquishing their power to regulate intrastate matters.²¹²

B. FCC's Arguments

The FCC, along with a coalition of long-distance carriers, argued against the petitioners. These parties' arguments mirrored those of the RBOCs and state commissions.²¹³ First, they argued that the FCC *did*

²⁰⁹ See Brief for Petitioners Regional Bell Companies and GTE at 48, *Iowa III* (No. 96-3321). The petitioners also argued that the regulations requiring carriers to allow competitors to use their networks and operations effectively cause the nationalization of the carriers' private property because the carriers will be forced to invest in their networks for the benefit of others without receiving adequate compensation in return. See *id.* at 69.

²¹⁰ See Joint Brief for the State Commission Parties at 36, *Iowa III* (No. 96-3321). The Commerce Clause provides that: "Congress shall have power . . . to regulate commerce . . . among the several States . . ." U.S. CONST. art. I, § 8. The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

²¹¹ See Joint Brief for the State Commission Parties at 36-37, *Iowa III* (No. 96-3321).

²¹² See *id.* at 37-38 (citing *New York v. United States*, 505 U.S. 144, 176 (1992) (holding that a federal statute requiring states to take title to low-level radioactive waste is unconstitutional because it violates the Tenth Amendment by forcing a state to choose between two unconstitutional choices, effectively turning states into federal field offices)). The petitioners also made several other arguments. Among these is that the FCC regulations are contrary to Congress's intent by requiring the following: an expanded definition of "network element" which includes software and operators; carriers to unbundle *all* network elements that are capable of being unbundled, not just those elements that the requesting carrier requires; and carriers to unbundle and then re-bundle all network elements, thus allowing competitors to avoid the resale of retail products pricing guidelines. See Brief for Petitioners Regional Bell Companies and GTE at 49-52, 53-56, 64, *Iowa III* (No. 96-3321). In addition, they argued that the pricing regulations as a whole would discourage the facilities-based competition that Congress desired and would displace the system of private negotiations that Congress intended to create. See *id.* at 49, 73.

²¹³ See Brief for Respondents Federal Communications Commission and United States of America, *Iowa III* (No. 96-3321). In the FCC's view, the relevant issues involved were:

Whether the [TCA] authorizes the FCC to adopt regulations implementing the [TCA]'s pricing provisions Whether the FCC's pricing rules reasonably and lawfully implement the [TCA]'s pricing provisions in a manner that achieves the [TCA]'s procompetitive objectives Whether the FCC's rules reasonably define

lack of simple equivalent phrases in English cannot be the sole reason for the continued use of Latin.

Furthermore, the Latin phrases that judges continue to use are not just technical shorthand.¹²³ They are short phrases that do not have a strong link to any area of law.¹²⁴ An explanation based on the need for technical language alone does not satisfy this inquiry.

The influence of history on language may explain part of the continuing use of Latin. Certainly, courts continue to rely on precedent in making decisions.¹²⁵ Because the courts use the reasoning of the prior courts in their decisions, they also sometimes use their language.¹²⁶ Thus, the use of precedent involves the use of prior language. Again, however, the results of the test show that courts are not only using technical phrases, they are also using nontechnical phrases. Thus, the use of precedent does not fully explain the results.

The influence of legal philosophy does not explain Latin's continuing existence. The dominant philosophy of the law is no longer natural law.¹²⁷ Lawyers do not use Latin maxims with the same frequency, or indeed reverence, as in previous times.¹²⁸ Current popular theories of the law, such as critical theory or law and economics, explain the sources of law as being in present power structures rather than the influence of higher laws.¹²⁹ Thus, this change in legal philosophy is incongruous because it would logically lead to a decrease in Latin use.

The two passages on the history of the profession illustrate two ways that the legal community continues to examine its own origins and development.¹³⁰ Using Latin demonstrates one attitude towards that history. Latin reaches back beyond the beginning of this country, through medieval Europe into Roman times.¹³¹ A member of the legal community who believes that the law and the legal community spring from such sources may find Latin more persuasive than a member who does not see the same tradition.

¹²³ Indeed, the phrases in this study were deliberately chosen because they do not relate to one particular area of the law. See *supra* text accompanying note 16.

¹²⁴ See VERSTEEG, *supra* note 16, at 119-63.

¹²⁵ See, e.g., *United States v. Burke*, 504 U.S. 229, 243 (1992) (Scalia, J., concurring) (citation omitted).

¹²⁶ See *id.*

¹²⁷ See generally HORWITZ II, *supra* note 59.

¹²⁸ See Results on file with author.

¹²⁹ See KAHN, *supra* note 37, at 41.

¹³⁰ See GLENDON, *supra* note 74, at 285; WILKIN, *supra* note 72, at 165-66.

¹³¹ See generally MELLINKOFF, *supra* note 1.

The change in legal education through this century may account for the continuing use of Latin in legal writing. Its use has declined from the days of Samuel Adams, when knowing Latin as a language was important.¹³² In the latter half of the twentieth century, attendance at an accredited law school is normally necessary for entry to the bar.¹³³ In the law schools, the casebook method dominates in which a student is led through from the beginnings of a concept until its modern general application.¹³⁴ This method introduces students to Latin in legal writing at an early stage in their development as lawyers. The casebook method may explain why lawyers continue to use Latin after leaving law school.

The homogeneity of legal education may explain the rise in Latin use in the late twentieth century.¹³⁵ As legal education has become more standardized across the nation, so the language of lawyers also may be more standardized. A part of this standardization may be Latin phrases because students across the country encounter them in their books. This increasing standardization may account for the rise in Latin use.

Moreover, the symbolic importance of Latin, both within the legal community and to society at large, is a clear reason for Latin's continued existence.¹³⁶ Latin is a symbol of the age of the legal structure, a reminder that what we do now is essentially what people did for many years before us. As such, Latin can make us realize that we may commit the same errors as past generations. Alternatively, it could be a reminder of the continuing *mort main* of centuries of white, Western male dominance. It is thus a symbol of the underlying continuation of the same power structure that always existed.

It is also a symbol of a profession. Latin adds to the mystery of the law.¹³⁷ It adds to the difficulty in accessing the law. It keeps the profession separate from other parts of society, perhaps more now than it ever did. As such, it may be as important now, when the profession is purportedly under attack, as it ever has been.

¹³² See Coquillette, *supra* note 62, at 360-66.

¹³³ See SIMON & SCHWARTZ, *supra* note 41, at 637.

¹³⁴ See, e.g., DOBBS, *supra* note 3.

¹³⁵ See WINTERS, *supra* note 85, at 89-90.

¹³⁶ See GOODRICH, *supra* note 109, at 231.

¹³⁷ See FRIEDMAN, *supra* note 36, at 263.

CONCLUSION

Whatever the reasons for courts' continuing use of Latin, it is clear that it still has a number of roles to play. It makes the language of the law richer, more flexible. The various explanations in this Note, and they are only a few of many that are possible, demonstrate the utility of Latin.

The Latin phrases that show an increase in usage are not crucial to the understanding of a person's argument. They are a rhetorical tool. A person using Latin may intend a certain nuance, may intend to affect a reader a certain way. He or she cannot be sure that the reader will take it that way. This malleability of meaning can make it a useful and flexible tool for a member of the legal profession to use.

Latin adds to the richness of writing. Using a Latin word is not necessarily more accurate than using an English word. Neither is it necessarily redundant. Its significance, how a reader takes it, varies with the reader. A writer should use it, but use it with care.

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