

With all due respect to legalese by Christine Mowat

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Could we wage a war against three recalcitrant examples of legalese: with *respect to*, *thereby*, and *shall*? I think of them as pop-up cartoon characters who sprout legs and hike back into final drafts, even after committees have cut them out.

With respect to

With respect to acts as a kind of lawyer's crazy glue. "I want to talk *with respect to* the terms of your separation." (I want to talk about the terms of your separation.) "We're arguing *with respect to* two different interpretations." (We're arguing over two different interpretations.)

About is a straightforward Anglo Saxon word that is easier to read (or listen to) than *with respect to*. Yet legal writers regularly reach for the clichéd with respect to. Granted *with respect to* will quickly, though awkwardly, glue words together to show a connection between ideas. However, the phrase blurs more specific relationships.

More exacting writers and speakers choose better connectors. The suggestions below demonstrate that small precise connectors or adjusted syntax make reading easier:

We were provided with copies of the hospital records *with respect to* Ann and George Redmonds. (Substitute *for*.)

With respect to her course of treatment, she wore the cervical collar for 10 days after hospital discharge. (Substitute *As part of her treatment...*)

Enclosed are copies of the invoices and substantiating documents *with respect to* Fred Striker's special damages. (Substitute *detailing* or *about*.)

There is little information *with respect to* the plaintiff's injuries. (Substitute *on*.)

Mr. Tinderbox's main physical problem is *with respect to* his shoulder. (Delete *with respect to*.)

Common sense tells us to eliminate the clumsy superglue, *with respect to*, and search in a broader canvas of words and expressions for appropriate substitutes.

Thereby

Another common example of legalese is *thereby*. Even the writers of the Oxford English Dictionary couldn't resist using it:

In cases where the editor has some evidence that a word is used as a proprietary name or trademark, this is indicated by the letter **P**, but no judgement concerning the legal status of

such words is made or implied **thereby**.

This last line in the dictionary's introduction is the first time that legalese is used. When non-legal writers turn to legal topics, they often unconsciously mimic the sound of old legal language. Perhaps authors feel that the writing will have more force and resonance if the ancient formal language is inserted. In fact, the bulk of text is usually written in plain modern English and writers are usually unaware of the inconsistency. Legal writers, however, have had their brains so steeped in legalese that it's unsurprising they continue to spew it out.

The Oxford Dictionary editors could easily have dropped the redundant *thereby*. (The logical connection which the writers wanted to refer to is already present in the phrase, *of such words*.) The use of *thereby* for *as a result of that* can be a practical choice. For example - *and thereby hangs a tale*. However, like *hereby*, *thereby* is overused in legal writing. But would we want to get rid of the sonorousness of *I hereby pronounce you husband and wife*? Context for the language, as well as users of the document, are the significant factors to consider when determining suitable vocabulary.

Shall

Newcomers to the plain language movement and its literature may accept the basic philosophy, yet continue to use *shall* in agreements or legislation. In the movement itself, the fate of *shall* has provoked lively debate.

In her 1992 article entitled "Shall Must Go"¹, Michele Asprey, an Australian plain language writer and lawyer, says lawyers have used *shall* as a crutch for too long. She presents two arguments against *shall*:

1. *Shall* is hardly ever used outside the legal community, and non-lawyers don't understand the traditional mandatory nature of the legal *shall*.
2. *Lawyers regularly misuse shall*. Cases which conclude that *shall* means *may* are bewildering to non-lawyers. This happens because the drafter got it wrong, and the court had to do its best to correct the mistake.

Asprey's plain language substitutes for *shall* below achieve greater precision and consistency:

1. Use *must* for the imperative *shall*.
2. Use *will* for the simple future.
3. Use the *present tense* for just about everything else.

Alberta's 1994 *Freedom of Information and Protection of Privacy Act* is an example of recent legislation which has completely eliminated *shall*. For example:

16(1) The head of a public body *must* refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

40 A public body *may* disclose personal information for a research purpose, including statistical research, only if . . .

90 This Act *applies* to any record in the custody or under the control of a public body regardless of whether it comes into existence before or after this Act comes into force. This discussion on *with respect to*, *thereby*, and *shall* represents the kind of scrutiny of legalese in which plain language proponents engage. We should respect the history of legalese, understand why writers are reluctant to divest themselves of its usage, and then resolutely extricate it from legal writing.

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¹Michele Asprey, "Shall Must Go", in *The Scribes Journal of Legal Writing*, West Publishing Co., 1992.