

LAW IS A ‘FOREIGN’ LANGUAGE: AN ANALYSIS OF THE LANGUAGE OF LAW AND THE USE OF SECOND-LANGUAGE TEACHING PEDAGOGY IN AN UNDERGRADUATE BUSINESS LAW COURSE

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I. INTRODUCTION

Lawyers have long been and, to some extent, remain notorious for using language that the general public cannot understand. Some accuse lawyers of “poisoning language in order to fleece their clients.”¹ In light of the existence of and progression of the plain-meaning movement, it is at least equally possible that lawyers are more like Harry Potter speaking Parseltongue, speaking legal language without even realizing it. Either way, when the audience does not have a law school education, they may benefit from guidance relating to legal language and terms that may otherwise be ignored. As the plain language movement continues, the expression of law will become less archaic, but even so, the practice of law and the writing and teaching of legal concepts will continue to require terminology unique to the field. A brief review of the historic origins and other aspects of the language of law support the suggestion that law is like a second language. In light of this reality, students in undergraduate business law classes may benefit from teaching efforts to consider and borrow from the pedagogy of second-language teaching. Task-Based Language Teaching (TBLT), which incorporates goals that are at least reminiscent of those found in a practice-based undergraduate business law text, is useful, as is research relating to the use of vocabulary activities for students learning a second language. Moreover, a view of these options yields a ready list of practical considerations for those teaching undergraduate business law, or other lexicon-rich disciplines, interested in improving student fluency within the subject.

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¹ Julie Baker, *And the Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 UMKC L. REV. 287, 291 (2012) (quoting English jurist and philosopher Jeremy Bentham).

II: THE LANGUAGE OF LAW

A. *LINGVAE ORIGINE*:² A SNAPSHOT OF HISTORIC ORIGINS

Some scholars have referred to the Norman Conquest as “a catastrophe which determine[d] the whole future history of English law.” Whether or not it was a catastrophe remains a question too huge for this article, but nevertheless it is possible to see the influence of that and other historical events on modern law. Norman French was the “tongue” of the conquering rulers and eventually it became the language used in the courts as well. Interestingly, even centuries after Norman French had merged with Middle English to produce Modern English, one could still hear Norman French spoken in courtrooms. Law is rife with terms of art that express technical or specialized meanings, and many of these specific terms survive from Norman French. Examples include: “appeal, arrest, assault, attorney, contract, counsel, court, crime, defendant, evidence, judge, jury, plaintiff, suit, and verdict...allegation, cause of action, demurrer, indictment, party, plead...battery, damages, devise, easement, estoppel, felony, larceny, lien, livery of seisin, misdemeanor, replevin, slander, tenant and tort.”³ These words are all left over from the merger of a conquering language with another, but some words entered our use as an even more direct result of the Conquest. Property interest is commonly referred to as a kind of “fee” interest. This word “fee” does not connote an amount of money that needs to be paid, as we use that word otherwise in our English language today. Instead, various types of “fee” interests describe the interest in property. Specifically, we recognize fee simple, fee simple absolute, fee simple defeasible, fee simple conditional, and fee tail. These ownership interests and arrangements are “descended directly from the feudal enfeoffments that William introduced into England in order to distribute the country’s land among his followers” – the conquerors.⁴ The etymology of these words is still present in that the phrases appear and are used in the typical French (and Spanish) form of the noun, followed by an adjective. Many of the very words we use today to describe the ever-changing body of rules that govern our lives are actually foreign.⁵

The common law, a key element of the American legal system, establishes legal principles and meanings through *stare decisis* and resulting precedent. “Because earlier decisions are binding law, lawyers can anticipate what words mean by what they have always meant. [citation omitted]. Similarly, terms of art convey generally agreed-upon legal principles.”⁶

² (Google Translate “language origins” in Latin “linguae origine” January 24, 2018).

³ Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style*, Third Edition, 4-5 (1998).

⁴ *Id.* at 4-5.

⁵ *Id.* at 5.

⁶ Baker, *supra* note 1, at 290.

B. *QUOD PATET VERSUS “LEGALESE:” PLAIN-MEANING VS. LEGALESE*

For more than two decades, there has been an ongoing conversation in legal writing pedagogy about the “plain language” method of legal writing as an alternative to legalese. Within the debate, these two competing methods have been viewed as mutually exclusive. “Proponents of plain language demand the eradication of legalese; while proponents of legalese maintain that the lexicon is the law, and that simplification cannot be achieved without dilution of meaning and effect.”⁸ In her article, Julie Baker suggests that science in cognitive psychology can close the gap and help sway the debate, since scientists agree that cognitive fluency, which is the measure of how easy or difficult the mental process feels when the brain is receiving information, is a key indicator of both how well people understand what they are reading and how they judge the information. Further, “the more ‘fluent’ a piece of written information is, the better a reader will understand it, and the better he or she will like, trust and believe it. [citation omitted].”⁹

Legalese is defined as “[t]he jargon characteristically used by lawyers, esp. in legal documents <the partner chided the associate about the rampant legalese in the draft sublease>. Cf PLAIN-LANGUAGE MOVEMENT.”¹⁰

Legalese is the enemy of plain-language. Generally speaking, legalese is the stuffy, often pompous over-articulation in some legal writing. A document riddled with legalese is harder to read and understand, not because of the legal content, but because of the convoluted and wordy way the content is conveyed. In government, there is a movement toward plain language, in fact, the Executive Orders issued by Presidents Carter, Clinton and Obama discussed later in this article are all part of it. The movement however does not seek to eliminate or reduce the body of technical terms that comprise the language of law, instead it seeks to reduce the use of flowery outdated and confusing language often present in legal texts. The movement began in the private sector in 1974 when Nationwide Mutual Insurance Company and Sentry Life Insurance Company began using simpler language in their insurance policies.¹¹ In 1975, Citibank of New York introduced a new promissory note written in plain language. A short paragraph from the before and after versions highlights the difference between legalese and plain language:

⁷ Google Translate “plain meaning versus legalese” in Latin “quod patet versus legalese” January 24, 2018.

⁸ Baker, *supra* note 1, at 287.

⁹ *Id.* at 288.

¹⁰ Black’s Law Dictionary (7th ed. 1999).

¹¹ Rachel Stabler, *What We’ve Got Here Is Failure to Communicate: The Plain Writing Act of 2010*, 40 J. LEGIS. 280, 283 (2013-2014).

1. No failure or delay on the part of the Bank in exercising, and no failure to file or otherwise perfect or enforce the Bank's security interest in or with respect to any Collateral, shall operate as a waiver of any right or remedy hereunder or release any of the undersigned...
2. You can delay enforcing any of your rights under this note without losing them.¹²

2 is shorter and clearer than 1. The tone of both is different, and aside from having more than twice as many words as the revision, 1 is unnecessarily complex. Plain meaning is an effort toward more writings like 2 and less like 1, in a discipline where traditionally, 1 has been accepted, 2 still seems radical and risky to some, and word choice regularly impacts rights and damages. However, this example also demonstrates the persistent need for knowledge of specialized vocabulary, because even in the plain version the writer and reader both have to understand legal terms like "rights" and "note."

It is argued that the "process of reducing certain terms to common language actually 'uncovers the ambiguities and errors that traditional style, with all its excesses, tends to hide.'"¹³ In the same way, plain language, arguably, more directly focuses the reader's attention to the ideas and analyses being conveyed, rather than forcing the reader to have to "ferret it out" for herself. Defenders of plain language stress that this style does not require elimination of terms of art from the legal lexicon; instead, its advocates push for writing that promotes comprehension, clarity and simplicity whenever possible, acknowledging that some "terms of art," the use of which does not support clarity or plain meaning for an average reader, are inevitable.¹⁴

On the contrary, in addition to guarding and protecting the legal lexicon because it is grounded and created by precedent, those who defend legalese also often argue that the level of precision required for law practice demands it.¹⁵ Further, defenders of legalese offer that it is the traditional way of creating legal documents and would not have persisted had it not worked. They argue time, a friend of no one, itself is evidence of the need for this alternate language spoken by lawyers in legal documents.¹⁶ But tradition itself is not always a compelling argument. U.S. Supreme Court Justices have expressed their dislike of legalese. In an interview covering the topic with author Bryan Garner, Justice Breyer responded, "[t]errible! Terrible! I

¹² *Id.* at 280.

¹³ Baker, *supra* note 1, at 288 (quoting Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 2; 293 (1997)).

¹⁴ *Id.* at 294.

¹⁵ *Id.* at 290.

¹⁶ *Id.* at 293.

would try to avoid it as much as possible. No point. Adds nothing,” Justice Kennedy responded in part, “[i]t can be pretentious,” and Justice Ginsberg said “I can’t bear [legalese]. I don’t even like legal Latin. If you can say it in plain English, you should.”¹⁷ If you are interested in following Justice Ginsberg’s advice and are willing to accept a slightly edited version of it, you might join their refrain with a loud cry of *Noli verbosus nimi!*

Some critics of legalese accuse lawyers of “poisoning language in order to fleece their clients”¹⁸ The term itself is so negative that it is often used when application of the language of law yields a perceived inequitable result, even when the language at issue is not unnecessarily wordy or overly cumbersome. For example, in *Midwest Family Mutual Insurance Company v. Wolters*, 831 N. W. 2d 628 (Minn. 2013), the Minnesota Supreme Court was in a position to interpret the “pollution exclusion” present in many insurance policies.¹⁹ Homeowner Bartz hired Wolters as the general contractor to build his cabin. Bartz requested that the cabin be equipped with a propane furnace. It was not in question that Wolters himself installed a natural gas furnace and not a propane furnace, and that the carbon monoxide detectors in the cabin were not connected to the AC power source and the batteries in each unit were inserted backwards.²⁰ On December 29, 2007, Bartz’ friend woke up in the cabin in the middle of the night feeling dizzy and nauseated and found Bartz unresponsive. She managed to call 911 and both were treated and survived the incident, but Bartz sued Wolters and Wolters sought to rely on his commercial liability insurance coverage. But, Wolters’ insurer, Midwest Family Mutual Insurance Co. denied coverage arguing that the damage resulted from a pollutant, which is excluded from coverage under the policy.²¹ But the trial court agreed with and found in favor of Wolters requiring Midwest Family to defend or indemnify Wolters under the policy. Midwest appealed, and the Minnesota Court of Appeals reversed, “holding that under the ‘non-technical, plain-meaning approach’ used in Minnesota to interpret pollution exclusions ‘carbon monoxide constitutes a pollutant,’ agreeing with Midwest’s argument that the damage was not covered by the policy because of the exclusion.”²² This time Wolters appealed, but the Minnesota Supreme Court affirmed the Court of Appeals decision.

The practical impact of the decision is that the meaning of the word “pollutant” for purposes of the reading and interpretation of commercial and general liability insurance contracts litigated in Minnesota is now changed. The pollution exclusion

¹⁷ Baker, *supra* note 1, at 290 (quoting Bryan Garner, *Interviews with the United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING, 294-295, (2010)).

¹⁸ *Id.* at 291.

¹⁹ Andy Hofer, *Legalese to the Detriment of Small Business: Midwest Family Mutual Ins. Co. v. Wolters*, Vol. 41:4 WILLIAM MITCHELL LAW REVIEW 1528, 1542-1546.

²⁰ *Id.* at 1543.

²¹ *Id.* at 1543-1544.

²² *Id.* at 1544.

was created to keep insurers from bearing the financial responsibility for damages caused by insureds' own environmental pollution of the environment. Thus, before *Wolters*, "pollutant" meant traditional environmental pollution and included recognized contaminants like smoke or harmful byproducts. After *Wolters*, "pollutant" now means practically anything – any substance, in any form, that is irritating or contaminating. In other words, now, the exclusion is so broad that it arguably will not cover damages resulting from spilled paint on a work site, because paint is now a "pollutant." The impact of this new interpretation of a long-used exclusion in general liability insurance policies is that some consumers will be caught without coverage they thought they had. Unfortunately, this reality is not new in the practical application of insurance policies to individual claims. The language must control. It seems unfair to use the word "legalese" to describe what the *Wolters* court did, because it seems a simple matter of interpretation. But, at least one author has argued that this case demonstrates the worst kind of legalese—that which exploits consumers' understanding to their detriment.²³

**C. *LEX EST TAMQUAM IN ALIENA LINGUA:*²⁴
*LAW IS LIKE A FOREIGN LANGUAGE***

The President of the United States, more than once, has intrinsically recognized the complexity of legal language by issuing Executive Orders in part urging government agencies to "ensure that regulations are ...written in plain language, and easy to understand."²⁵ President Jimmy Carter issued Executive Order 12,044, and while it sought to make regulations "as simple and clear as possible," calling for use of plain English in new regulations and even review and revision of existing regulations to make them more understandable, it "provided no real guidance on what 'plain English' was or how to achieve it."²⁶ In the short time it was in use, that Order was not very effective and was revoked by President Reagan shortly after he took office.²⁷ In Executive Order 12,866, then President Bill Clinton announced that the then-existing regulatory system was not understandable, effective, consistent or sensible, and because of those failures (and perhaps others) the system needed improving.²⁸ The plain-meaning requirement is one of many outlined in the Order, to serve the greater goal of reforming Administrative Law. While neither Order, while still in effect, created a right for judicial review,²⁹ it squelched our ability to monitor an evolution of

²³ Hofer, *supra* note 19, at 1549.

²⁴ Google Translate "law is like a foreign language" in Latin "lex est tamquam in aliena lingua" (January 24, 2018).

²⁵ Exec. Order No. 13,563, 3 CFR 13563 (2011); *see also* Exec. Order No. 12866, 58 FED. REG. 51735 (Oct. 4, 1993).

²⁶ Stabler, *supra* note 11, at 283.

²⁷ *Id.*

²⁸ Exec. Order No. 12,866, 58 FED. REG. 51735 (Oct. 4, 1993).

²⁹ Stabler, *supra* note 27, at 316.

efforts toward plain meaning in the common law;³⁰ the inclusion of a plea for “plain” language highlights what lawyers and laypersons exposed to a lawsuit already know, and that is that the law often feels like a separate language.

Maybe lawyers *are* more like Harry Potter speaking Parseltongue, speaking legal syntax or jargon without even realizing we are doing it, but when the audience to whom we are speaking does not have any blood from the dark Lord running through their veins, they cannot always follow what we are saying without help.

Perhaps no one feels this foreignness more acutely than undergraduate business students learning about law in a business law or legal environment of business class. Textbook authors Sean Melvin and Michael Katz suggest that “[s]tudents studying business law face the task of learning legal syntax at the same time as they learn how to apply the legal doctrines in a business context.” Their conclusion is that for the undergraduate business law student, it is like “learning a complicated subject matter in a foreign language.”³¹

One author, Jens Bartelson, in a review of the book *The Status of Law in World Society* by Friedrich Kratochwil, suggests that the language of law is universal. Bartelson and Kratochwil describe the widely accepted need, in order to legitimize international laws, to tether a modern iteration to a historic international treatise or other law. But this quest for foundations has not successfully anchored international law. Thus, Kratochwil endeavors to explain the foundation of modern law through the continued practice of and use of the language of law across the world.³²

In short, it is suggested by Bartelson that if concepts exist independent of the language in which they are expressed, then we need to understand linguistic practices in order to accurately understand concepts when expressed.³³ The author further suggests that language and law are intertwined. Human society cannot operate without language and in human society there exist common concepts that allow us to discuss ideas like justice and responsibility.³⁴ If we can accept that law has its own language, “we must also be prepared to admit that language has its own laws,” and generally, that

³⁰ See *Michigan v. EPA*, 135, S. Ct. 2699, 2715 (In a dissenting opinion, Justices Kagan, Ginsburg, Breyer and Sotomayor reference Executive Order 12866 to observe that an Agency must systematically assess costs of a regulation, but make no mention of the plain meaning requirement also contained in the Order.

³¹ Sean P. Melvin and Michael A. Katz, *THE LEGAL ENVIRONMENT OF BUSINESS, A MANAGERIAL APPROACH: THEORY TO PRACTICE*, (2nd Ed.), (2015).

³² Jens Bartelson, *The Language of Law and the Laws of Language*, *MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES* Vol. 44(2) 250-257 (2016).

³³ *Id.* at 252.

³⁴ *Id.*

both must be absorbed for a concept to be understood.³⁵ And, if law and its lexicon, riddled with “terms of art” can be accepted as a “language,” then we must at least be mindful of the way it is expressed if we are to have any hope of effectively communicating concepts.

Laws do not exist in a vacuum. Instead, they are interrelated but also require interpretation. The rules themselves lack guidance as to their range of applicability and actual interpretation. Thus, there is an additional step needed to clarify how we proceed when we use rules. Rules influence action by providing reasons and or justifications that the actors use or disregard. These are communicated in a language, which itself is intersubjective, and when put into use they may read differently as impacted by different fact and or circumstance.³⁶ There is always an arbitrariness in law than cannot be overcome by appealing to some ultimate foundation or principle, but which has to be handled through the practice of legal reasoning.³⁷ If not, we would have no need for lawyers.

In exploring the existence and expression of law, the author struck upon the observation that “the language game of law” seems to require that there exists a group of authorized persons deciding what the law is, whose decisions are accepted and recognized as binding on those receiving the pronouncement of what the law is.³⁸ At its heart, law is indeterminate, but, the author observes, this indeterminacy is its very *raison d’être*. If it were as simple as writing down a rule for everything and every situation having a specific rule, there would be no more, new or additional legal reasoning,³⁹ which is not our reality. Perhaps there is a universal rule of law that lives under the political, economic, and social constructs, but the only way we understand it is by some means of expression, which may impact its meaning, use, and value. Being mindful of this context is essential.⁴⁰

It is not just law, after all. Each profession has its own jargon or lexicon, depending on whether it is perceived negatively (perhaps as overly complex) or positively.⁴¹ Regardless of the name used to describe it, law, like other professions, requires knowledge of a robust body of technical terms. In an undergraduate business law classroom, where students are learning new content and encountering it in what sometimes feels like a foreign language, can we as instructors help by being aware of issues and methods relevant when teaching a second language?

³⁵ *Id.*

³⁶ *Id.* at 253.

³⁷ *Id.*

³⁸ *Id.* at 254.

³⁹ *Id.* at 255.

⁴⁰ *Id.* at 255.

⁴¹ Bryan Garner, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES*, 34 (2d ed. 2001).

Like the language of law, medical English functions like a separate language facilitating communication in medical fields. Medical English and terminology is based in science and is used to accurately describe the human body and its components.⁴² Regardless of what language the learner speaks, the medical professional requires knowledge of discipline-specific terms, and all learners, regardless of language, learn and use the same terms in the same way to facilitate medical care and communication. Research studies have shown a significant, positive relationship between the use of strategies by students and English academic achievement.⁴³ Strategies, as used here, are practices students use to help them understand and memorize vocabulary, like memorization, repetition, and note-taking.⁴⁴ Research also shows that there is no one specific strategy that will outperform all others, instead, students use a variety of strategies to build their knowledge.⁴⁵

Researchers began with and confirmed their supposition that they would find the same correlations and relations between Medical English and terminology “acquisition” and the students’ use of vocabulary learning strategies and general self-efficacy, as that recognized between foreign language acquisition and students’ use of vocabulary learning strategies.⁴⁶ Further, it is axiomatic that in order to understand terminology, one must use it, but students’ use of terminology is impacted not just by knowledge, but also self-efficacy, or the student’s perception of their own understanding. Students with a strong sense of self-efficacy, tend to more actively participate in the learning process and thus achieve better outcomes.⁴⁷

Admittedly, Wang, Kao and Liao’s results did not demonstrate a significant correlation between vocabulary learning strategy and self-efficacy.⁴⁸ In other words, merely using vocabulary strategies is not enough to bolster self-efficacy where it is

⁴² Ya-Hwei Wang, Pan-Fu Kao and Hung-Chang Liao, *The Relationship of Vocabulary Learning Strategies and Self-Efficacy with Medical English and Terminology*, PERCEPTUAL AND MOTOR SKILLS, Vol. 122(1) 47-66 (2016).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 49.

⁴⁶ *Id.* at 60.

⁴⁷ *Id.*

⁴⁸ *Id.* at 56.

lacking in students. However, they found a significant relationship between a student's level of self-efficacy and their performance.^{49 50 51 52 53 54 55 56}

For anyone who has taught in a classroom, these findings are logical. Students who study, in general, outperform those who do not. Also, students who have the confidence to practice, again generally, outperform those who need the practice to sharpen their skills yet lack the confidence to practice. These findings are thus not ground-breaking. However, they are helpful when the question being asked is how to better help undergraduate business students understand concepts. Instructors of foreign language, as reflected by the presence of the issue in their pedagogical literature, seem acutely aware of student confidence and the impact it has on practice and, eventually, performance and understanding. At the very least, this research shows a strong connection between learning in a lexicon-rich discipline and confidence in students.

Wang, Kao and Liao offer as implications of their study, the suggestion that teachers introduce and encourage strategies and give explicit instruction to students regarding their use.⁵⁷ It is also recommended that teachers somehow make sure that students are self-aware of their own responsibility in vocabulary learning and be active in choosing and cultivating learning strategies that work for them.⁵⁸

II. STRATEGIES FOR SECOND LANGUAGE ACQUISITION

A. TASK-BASED LANGUAGE TEACHING

Task-based language teaching, which is referred to as TBLT, is a phrase that was coined by second language acquisition (SLA) researchers and scholars. It was coined in response to empirical accounts of teacher-dominated, form-oriented second language class-room practice. In their "seminal" writings, Long (1985) and Prabhu (1987) supported an approach to language education in which students are given functional tasks that invite them to focus on meaningful exchange for real-world non-linguistic purposes. Much of the research in this area is focused on determining how

⁴⁹ *Id.* at 57.

⁵⁰ *Id.* at 57.

⁵¹ *Id.* at 57.

⁵² *Id.* at 58.

⁵³ *Id.* at 50.

⁵⁴ *Id.* at 59.

⁵⁵ *Id.* at 60.

⁵⁶ *Id.* at 60.

⁵⁷ *Id.* at 63.

⁵⁸ *Id.* at 63 (internal citation omitted).

students learn a second language, rather than on whether or how task-based learning is useful. It is helpful to gain a footing of what the goal is in language classrooms, and that is almost universally, “to develop learners’ ability to use the target language in real communication.”⁵⁹ It is important to define what is meant by “task.” It is a broad term applied to almost any learning activity. The key is to create an assignment that requires students to “do” something in furtherance of a named goal.⁶⁰ Interestingly, this goal is also reflected in the learning objectives in Melvin and Katz’s *Legal Environment of Business* textbook, which incorporates “theory to practice” exercises, which expose students to real-life hypotheticals and require application of the concepts of the relevant chapter.⁶¹

There is research that supports a conclusion that people do not learn isolated terms one at a time, but instead of a linear fashion, people learn terms together as parts of form-function relationships.⁶² “Task-based syllabi do not chop up language into small pieces, but take holistic, functional and communicative ‘tasks’ rather than any specific linguistic item, as the basic unit for the design of educational activity.” Thus, in a task-based learning environment, “people not only learn language *in order* to make functional use of it, but also *by* making functional use of it.”⁶³ It is also useful, according to research, for the tasks to be closely linked to the tasks performed by language learners in the outside world. In the same way, the measurable outcomes should be written or at least viewed with the goal of this student performance in mind. In other words, learning outcomes, or at least one of them, should reflect the specific expectation of how students will be able to use the content in the real world, and the learning activities and assessment of same should be adjusted to align with this view. When classroom tasks facilitate meaningful interaction with the content in “real” ways, the learner has ample opportunities “to process meaningful input and produce meaningful output.”⁶⁴

The idea is that the assigned tasks are supposed to require the kind of action or behavior that naturally flows from performing the equivalent in “real-life.” It is believed that this mode of learning fosters language acquisition.⁶⁵ The learner will make these connections in the exercise instinctively to accomplish the goal of the assignment. The teacher is thus able to infuse form subtly into the learner’s practice, which may eventually bolster confidence as well. It is suggested by the author, that “task designers manipulate tasks in such a way as to enhance the probability that

⁵⁹ Kris Van den Branden, *Introduction to TASK-BASED LANGUAGE EDUCATION: FROM THEORY TO PRACTICE 2* (Kris Van den Branden ed., 2006).

⁶⁰ *Id.* at 4.

⁶¹ Melvin and Katz, *supra* note 31.

⁶² Van den Branden, *supra* note 59, at 5.

⁶³ *Id.* at 6.

⁶⁴ *Id.* at 8.

⁶⁵ Van den Branden, *supra* note 59, at 9.

language learners will pay attention to particular aspects of the language code in the context of a meaningful activity; because this is believed to strongly promote second language acquisition.⁶⁶ In other disciplines, this process may be described differently, but at its core, the concept is the same, and its application allows teachers to design in order to meaningfully accomplish learning objectives. There are no suggested “magic” tasks that will always yield positive results. In fact, some researchers acknowledge that the effectiveness of any task is “often the result of interactivity between the teacher and the learners, as much as the result of careful construction and manipulation by task designers.”⁶⁷ Rather than the teacher taking the dominant role as is in-keeping with tradition, in task-based second language teaching (TBLT), the learner assumes the central role: she is given freedom and responsibility when it comes to negotiating course content, choosing linguistic forms during task performance, and even takes part in choosing options for evaluating performance and outcomes.⁶⁸

B. BALANCING STUDENT INVESTMENT AND OVERCONFIDENCE

In addition to providing insight and new tools for instruction, “[a]n understanding of second language acquisition can improve the ability of mainstream teachers to serve the culturally and linguistically diverse students in their classrooms.”⁶⁹

Continuum learning is a concept endorsed by “most current theorists” and is a system of predictable and sequential stages of second language development.⁷⁰ The first stage is the “receptive or preproduction” stage in which students may recognize up to 500 words and can understand new words as they are introduced and explained. This stage, described by Hong, often includes a “silent” period in which students are able to nonverbally point to a picture or otherwise identify vocabulary words but are not comfortable speaking.⁷¹ The second is the “early production” stage which follows sequentially for the student after the first stage (although the length of each stage is determined by the individual learner’s progress). In the second stage, the student may recognize 1,000 words, can speak in one word or two-word phrases, and can typically demonstrate comprehension of new material by giving short answers to simple yes or no or of who, what, where questions.⁷² The third stage is the “speech emergence stage” in which students have usually developed a vocabulary of 3,000 words and can use

⁶⁶ *Id.*

⁶⁷ *Id.* at 10.

⁶⁸ *Id.*

⁶⁹ Yang Hong, *On Teaching Strategies in Second Language Acquisition*, U.S. – CHINA EDUCATION REVIEW, Vol. 5, No. 1 (Serial No. 38), Jan. 2008, at 61.

⁷⁰ *Id.* at 61.

⁷¹ *Id.*

⁷² *Id.*

short phrases to communicate. Also in this stage, “[s]tudents may produce longer sentences, but often with grammatical errors that can interfere with communication.”⁷³

In the business law course, in the process of developing a writing assignment to comply with a university-wide enhanced writing program, a few faculty created a rubric which includes language measuring students’ ability to communicate in terms of not just how many errors, but when those errors impact understandability of the writing. By looking closely, some elements of these teaching concepts may already exist within the discipline, but may be underdeveloped or inconsistent. In stage four “[i]ntermediate language proficiency” students’ vocabulary has typically grown to include 6,000 words and they can state opinions, ask for clarification and share thoughts.⁷⁴ Finally, in stage five “[a]dvanced language proficiency” students have gained knowledge of some specialized vocabulary and can speak [the second language] comparable to same-age native speakers.⁷⁵ While the comparison is not exact, these stages provide useful insight into the possible characteristics of comparable stages of the depth of understanding of, in particular, scaffolded material in a business law class.

As an example, I teach students to use a structure for analysis and writing, which can be applied to reading cases or “solving” a hypothetical. The structure was not created by me, but it helps students concretely separate, for example, relevant facts from relevant law. Before they are ready to use the structure, we talk in class about at least one case, its holding and the facts that are dispositive. The word “dispositive” is new to most sophomores in the service class, and discussion of it works magic to help them fit the judicial system puzzle pieces together, at a time in the course when they are still learning the shape of the pieces.

Traditionally, the teacher bore all responsibility for educating students within the classroom, but in a language classroom Hong suggests the student and teacher should share this responsibility. In this model, the student is the one ultimately responsible for his or her own learning.⁷⁶ Students must decide themselves that they want to learn.⁷⁷ Hong describes Stephen Krashen’s established and widely accepted theories of second language acquisition, and in that discussion describes his idea that there are two “systems” of language learning, what he calls “acquisition” which is most like how children learning to talk at home and in early learning environments learn their native language, and what he calls “teaching” or learning which is the school-based second language instruction which typically comprises a “conscious process that results in conscious knowledge of the language” which knowledge eventually

⁷³ Hong, *supra* note 69, at 62.

⁷⁴ *Id.* at 61.

⁷⁵ *Id.*

⁷⁶ *Id.* at 64.

⁷⁷ *Id.*

facilitates speaking the language. The teaching system fulfils the role of what Krashen calls the “monitor” or the inner voice controlling the second language use when the learner has sufficient time, focuses on form and knows the applicable rule. According to Krashen, there are language learners who use the “monitor” all the time, those who rarely use it and those who use it appropriately. Krashen suggests that evaluating a student’s psychological profile can help to determine in which group the student identifies. “Usually extroverts are under-users, while introverts and perfectionists are over-users. Lack of self-confidence is frequently related to the over-use of the ‘monitor.’”⁷⁸

With regard to acquisition-learning, Krashen theorizes in his “input hypothesis” that the learner is able to improve and progress at his or her own pace according to a natural order of interaction with those from whom the learner is acquiring language knowledge. Specifically, Krashen suggests that the learner continues to learn even when she receives input that is beyond her knowledge.⁷⁹ Intrinsically, Krashen’s approach seems to favor this natural learning environment, which seems logical as anecdotally it feels and appears easier to “pick-up” another language through interaction. There are, however, limitations when “teaching” is the method of learning, since not all learners will comprehend at the same time, thus making it difficult in the traditional mold to stay one-step ahead of comprehension for all. Krashen suggests a way to overcome the limitation is to design a syllabus that incorporates “natural communicative input.”⁸⁰ It seems what is meant here is that assessment and performance should be measured in part by personal one-on-one interaction with the student, and that at the conclusion of this one-on-one interaction, the instructor should/could pose a next step challenge to the student, appropriate to his or her own level of acquisition. It seems plausible to incorporate this interaction into a legal environment of business class with a writing assignment that requires a draft and revised version. In individual feedback as part of the discussion of that particular student’s shortcoming or success, the instructor could focus some comments on the student’s discipline-specific language acquisition.

Notably, Krashen concludes that learners “with high motivation, self-confidence, a good self-image, and a low level of anxiety are better equipped for success in second language acquisition.”⁸¹ “Low motivation, low self-esteem, and debilitating anxiety can combine to ‘raise’ the affective filter and form a ‘mental block’ that prevents comprehensible input from being used for acquisition. In other words, when the filter is ‘up’ it impedes language acquisition. On the other hand, positive affect is necessary, but not sufficient on its own, for acquisition to take place.”⁸²

⁷⁸ *Id.* at 65.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Hong, *supra* note 69, at 66.

⁸² *Id.*

It is well-established by psychologists that people, in general, and students, in particular, tend to overestimate their abilities.⁸³ Faculty members have observed this overconfidence exhibited through what scholars have identified as “nonsequentialist reasoning” which is characterized by an “inability to think through the elementary conclusions one would draw in the future if hypothetical events were to occur.” In other words, students, after failing the final exam communicate that they nevertheless expected a course grade of an A or at worst a B+ when, in actuality such grades (the students’ expected A or B+) were higher than the student would have received even if they had done well on the final exam. There is specific evidence of overconfidence in Economics courses, which was the discipline focused on in the article, but as a concept it feels universal and relevant. Not only does student overconfidence influence students’ evaluations of professors, it also “may result in [students] advocating less time to studying than would be the case if their grade expectations were more accurate.”⁸⁴

It is fascinating to read in the article that instructors may be contributing to student overconfidence simply by using certain classroom and grading policies. Nowell and Aslton found that increasing the importance of high stakes assignments, especially mid-terms, reduced the likelihood of student overconfidence.⁸⁵ Interestingly, assigning papers and homework had no impact on student overconfidence. A policy of curving grades and generally being likeable (which is suggested by the positive correlation between student overconfidence and positive student evaluation of the instructor) increased the likelihood of overconfidence.⁸⁶

“Given contemporary theories of academic motivation, reliable and accurate student grade expectations are of paramount importance to efficient time allocation for study decisions. For those students who are achievement oriented, accurate grade expectations will result in a reallocation of study time to achieve academic goals.”⁸⁷ Grimes, an earlier researcher in the economics field, found: less overconfidence in older students and greater overconfidence in students who were likely to be absent.⁸⁸ Nowell and Alston built upon those findings to add: overconfidence is greater for male students and those who study longer hours; students are more overconfident in lower level courses than higher level ones, there was a positive correlation between positive

⁸³ Clifford Nowell and Richard M. Alston, *I Thought I Got An A! Overconfidence Across the Economics Curriculum*, JOURNAL OF ECONOMIC EDUCATION, 2007, at 131.

⁸⁴ *Id.* at 132.

⁸⁵ *Id.* at 141.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

instructor evaluation and student overconfidence and that curving grades increased the likelihood of student overconfidence.⁸⁹

C. VOCABULARY LEARNING STRATEGIES

“Vocabulary is central to language....”⁹⁰ Words are the “building blocks” of language since they label objects, actions, and ideas that are necessary to convey intended meaning.⁹¹ In the last decades there has been an increasing interest in vocabulary teaching and learning strategies because they facilitate second and or simply foreign language vocabulary learning.⁹² Successful vocabulary learners are active strategy users who are conscious of their learning and take steps to regulate it, whereas poor learners demonstrate little awareness of how to learn new words or how to connect new words to an existing knowledge. Thus, learners “need to be given explicit instruction to become more aware of and proficient with the broad range of strategies that can be used through the learning process.”⁹³

The results of Heidari’s study indicate that student success in vocabulary achievement and reading comprehension can be positively impacted by instruction in language learning strategies.⁹⁴ Promoting vocabulary learning strategies not only contributed to improved student vocabulary achievement and reading comprehension, but it also “improved [student] confidence, decreased their anxiety, increased their motivation, interest and success in learning English language and consequently, [] made students independent and autonomous in learning.”⁹⁵ The types of vocabulary strategies used in the study included self-testing after meeting words for the first time as well as guessing the meaning of unknown words.⁹⁶ Most students in the study observed that they have trouble remembering terms, and that if they do not see the word in a sentence they forget the word easily.⁹⁷ Further, by providing students instruction and guidance with regard to learning strategies, teachers have the opportunity to make learning an autonomous process.

Generally, studies on vocabulary learning have confirmed the benefit reading with a vocabulary task in mind, which is greater than that of reading without such a

⁸⁹ *Id.*

⁹⁰ Farokh Lagha Heidari, Fatola Karimi, and Aliakbar Imani, *Vocabulary Learning Strategy Instruction: It’s Impact on English for Specific Purpose Vocabulary Achievement and Reading Comprehension*, MIDDLE EAST JOURNAL OF SCIENTIFIC RESEARCH, 12(11), 1488-1496 (2012).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1488.

⁹⁴ *Id.* at 1490.

⁹⁵ *Id.* at 1491.

⁹⁶ *Id.*

⁹⁷ *Id.*

task.⁹⁸ However, researchers have not been able to agree as to whether “blank-filling” tasks or composition tasks are more effective.⁹⁹ Short-term benefits of a written vocabulary task are greater than other tasks, but without the long-term recollection results accomplished with other vocabulary tasks.¹⁰⁰ Lu explored these disagreements and other factors, like student perception of the effectiveness of vocabulary tools and the amount of time for task completion in her research. The different types of vocabulary tests measured included: “single-blank filling, triple blank filling, blank filling of a summary, and summary writing.”¹⁰¹

Overall, the four vocabulary tasks supported positive effects on vocabulary learning, but the triple-blank filling produced the highest scores.¹⁰² Interestingly, while students who wrote summaries spent more time on the vocabulary task, they still scored lower than the students who completed the triple-blank filling vocabulary task.¹⁰³ Thus, just spending more time, is not an indicator of better understanding of vocabulary terms and content. As a result of the survey completed by students, very few students recognized any value in writing a summary as a vocabulary task, and a majority indicated that blank-filling tasks are more effective.¹⁰⁴ Lu’s research results suggest that a blank-filling exercise in a summary yields better vocabulary learning than blank-filling within isolated or incoherent sentences.¹⁰⁵ This result is consistent with the TBLT view expressed by Kris Van Den Branden such that learners benefit from in-context form-function exposure to terms rather than isolated linear exercises.¹⁰⁶ While summary writing was not most effective for vocabulary learning, Lu emphasized its potential when used with blank-filling incorporated, as a scaffolding exercise to prepare students to write a summary.¹⁰⁷ “The use of a summary for the blank-filling exercise is a practical approach to preparing students to use the target words in a coherent context. Another approach is to incorporate single words in the blanks for beginner learners and gradually increase the length of the blanks requiring phrases and then sentences.”¹⁰⁸

⁹⁸ Minhui Lu, *Effects of Four Vocabulary Exercises on Facilitating Learning Vocabulary Meaning, Form, and Use*, TESOL QUARTERLY, Vol. 47, March 2013, at 167.

⁹⁹ *Id.* at 168.

¹⁰⁰ *Id.* at 167.

¹⁰¹ *Id.* at 168.

¹⁰² *Id.* at 171.

¹⁰³ *Id.* at 172.

¹⁰⁴ *Id.* at 173.

¹⁰⁵ *Id.* at 174.

¹⁰⁶ Van den Branden, *supra* note 59, at 5.

¹⁰⁷ Lu, *supra* note 98, at 175.

¹⁰⁸ *Id.*

III. SUMMARY OF SELECT PRELIMINARY RESEARCH RESULTS AND PRACTICAL OBSERVATIONS

A. SUMMARY OF SELECT PRELIMINARY RESEARCH RESULTS

In search of a way to effectively help students manage and master the language of law in an undergraduate business law course, we created an experiment and collected data, which we are now in the process of analyzing. A complete report of our project, data and conclusions will be published separately.

Using pre and post surveys we measured student self-efficacy, confidence, perception and study strategies. Further, by comparing various student participation and performance data, we evaluated relationships (or lack thereof) between “good” or higher performance or participation and utilization of glossary quizzes and student self-efficacy, confidence and perception.

Specifically, we used a control group method and created a “glossary quiz” accessible online through the Desire2Learn (D2L) platform. For two of the four sections, the quiz was required, and for the other two it was voluntary. These chapter vocabulary quizzes were open from the first day of class, and students had unlimited access to complete each quiz as many times as they wanted, but each quiz closed right before the lecture class for the relevant chapter.

The data shows a positive moderate relationship between the quiz attempt and quiz score and a small relationship between the quiz score and final grade according to Cohen’s guideline (1988). As we expected, the data shows that in a Legal Environment of Business class, there is a relationship between scoring well on a learning activity designed to reinforce content, and completing the learning activity more than once as well as a relationship between the value students perceive in a learning activity and their completion of the activity. Even though very few students who were not required to take the vocabulary quizzes, several students from both groups wrote on their surveys that they found the vocabulary quizzes beneficial for learning the material.

Preliminarily, the data supports my view after the fact that students benefitted from having access to vocabulary learning strategies online and specifically having unlimited access to those strategies. The moderate relationship between the quiz attempt and quiz score perhaps demonstrates that generally, students who took the quizzes more often, presented higher scores on the quiz. It seems possible that the mere repetition of an assignment such that students can “master” it, may instill in them some confidence in their understanding of the material. Moreover, delivering the learning activity online made it possible for students to have unlimited attempts without overburdening resources such as paper and time.

The small relationship between the quiz score and the overall grade makes sense, but I expected a stronger correlation between these variables or between the

number of attempts and the overall grade. In my research after the experiment, I came across some scholarship that sheds some light on why the results were not what I expected.

McKenna and Robinson discuss the value of introducing students to discipline-specific vocabulary, but explain that selecting the words to highlight for students should be a careful process.¹⁰⁹ Their suggestion is that these reinforced words should be “key” words or ones that students will encounter more than once. In other words, these “key” words should build upon and form concepts that are at the heart of the content students are expected to understand in the course. Looking back on the glossary quizzes we used in our project, the questions were not scrutinized to cover “key” concepts, and some questions included somewhat obscure vocabulary words, which was not optimal and may explain, in part, the small relationship between the quiz score and overall grade.

Finally, the survey data supports the preliminary conclusion that students in the Legal Environment of Business (undergraduate Business Law) course demonstrate some signs of overconfidence, comparable to those uncovered in economics courses by researchers Nowell and Alston.

B. PRACTICAL OBSERVATIONS APPLICABLE TO TEACHING IN BUSINESS LAW AND OTHER LEXICON-RICH DISCIPLINES

1. Translate jargon or “legalese” for students
2. Design task-based learning activities
3. Introduce students to vocabulary learning activities and encourage students to seek out strategies that yield the greatest benefit (increased understanding) for them
4. Use real-world examples and tasks when possible
5. Consider taking steps to foster student autonomy
6. Avoid curving grades
7. Consider using triple-blank filling within a summary as a vocabulary-building activity

¹⁰⁹ Michael C. McKenna and Richard D. Robinson, *TEACHING THROUGH TEXT: A CONTENT LITERACY APPROACH TO CONTENT AREA READING* (1992).

8. Do not select or design an assignment based on the false assumption that spending more time with the material, by itself, will benefit students
9. When possible, design assignments for and deliver them online
10. Consider allowing students unlimited attempts for vocabulary learning tasks

IV. CONCLUSION

As the plain-meaning movement continues, the expression of law will continue, to some extent, to become less archaic, but even at the cutting edge, the practice of law and writing of legal concepts will continue to require terminology unique to the field, including terms of art, foreign phrases that sound like spells Harry and his pals would cast about at school, and obscure rarely used words. In light of this reality, students in undergraduate business law classes may benefit from teaching efforts that consider and borrow from the pedagogy of second-language teaching. TBLT, which incorporates goals that are at least reminiscent of those found in a practice-based undergraduate business law text, is useful, as is research relating to the use of vocabulary activities for students. Moreover, a view of these options yields a handy list of practical considerations for those teaching undergraduate business law, or other lexicon-rich disciplines, interested in improving student fluency of the subject