

THE PLAIN ENGLISH MOVEMENT

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JUDGE: The charge here is theft of frozen chickens. Are you the defendant?

DEFENDANT: No, sir, I'm the guy who stole the chickens.

(Thanks to Robert Patterson, esq., of Santa Barbara)

The premise behind the plain English movement is that legal documents ought to be plainer--and more comprehensible--to the average person. It's probably fair to say that the modern movement began in the 1970s. But people have objected to the obscurity of lawyer's language for many centuries.

The first major struggle in England was to get legal texts into English, the language of the people, rather than French or Latin. The problem largely arose when William, Duke of Normandy, defeated the Anglo-Saxon king Harold at the Battle of Hastings in 1066 and became king of England. William and his followers spoke a type of French. And their legal documents were mainly in Latin, and later also in French. English, in contrast, was the lower-class language of a subjugated people.

The vast majority of the English people had always been English speakers. Nor surprisingly, by 1422, the new king, Henry VI, was a native English speaker. Yet French did not die out among English lawyers. Au contraire, it thrived. Unhappiness about this state of affairs led to what might be considered the first plain English law: the [Statute of Pleading](#), enacted in 1362. The law, written in French, recited that French was much unknown in the realm; it therefore required that all pleas be "pleaded, shewed, defended, answered, debated, and judged in the English Tongue."

An even sterner critic was Jeremy Bentham, who excoriated the language of lawyers as "excrementitious matter" and "literary garbage." Bentham advocated codification, in which all of the law would be systematically divided into codes on various topics. Individual parts of each code should be small enough for people to remember, and

written clearly enough for citizens to know the "exact idea of the will of the legislator." Bentham argued that plain legal language is essential to proper governance. "Until, therefore, the nomenclature and language of law shall be improved, the great end of good government cannot be fully attained."

At about the same time, the newly independent American states were also engaged in trying to achieve the great end of good government. Some of the founding fathers were well aware of the problems with legal language. John Adams criticized English legal language and the "useless words" in the colonial charters. He hoped that "common sense in common language" would become fashionable. Likewise, Thomas Jefferson lambasted the traditional style of statutes,

which from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty by *said*s and *aforesaid*s, by *ors* and by *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to lawyers themselves.

Unfortunately, the revolutionary fervor of the early Americans did not extend to overthrowing the language of the law. They ultimately imitated the ponderous style of his Majesty's statutes, if not their substance.

A modern plain English movement did not really arise until the 1970s. David Mellinkoff's book, *The Language of the Law*, pointed out the many absurdities of traditional legalese. On a more practical level, Richard Wydick's *Plain English for Lawyers* has been widely used to teach law students the art of legal writing. In fact, plain English principles have been incorporated into the writing curriculum of most law schools.

The crusade to make legal language less convoluted and more accessible to average citizens has also resonated outside the academy. In the United States, some of the earliest efforts to improve legal language directed at consumers were initiated by the Federal government, beginning rather modestly in the 1940s. In 1978 President Carter signed an executive order that required that Federal regulations be "as simple and clear as possible." Federal law now requires clear, conspicuous, accurate, or understandable language in many types of consumer transactions, including the Truth in Lending Act, the Fair Credit Reporting Act, and the Magnuson-Moss Warranty Act.

Egged on by the consumer movement, the states also responded. New York enacted America's first general plain language law in 1978, and several states have followed. Most states now require straightforward language in specific transactions, especially insurance policies. Click here for a [sample](#) of state plain language laws.

After slowing during much of the 1980s, the movement has recently picked up steam. Some states are in the process of making their jury instructions more understandable, or have recently done so. The Securities and Exchange Commission has begun to require that the summary and certain other portions of prospectuses be in ordinary

language. And the Clinton administration mandated in 1998 that federal regulations be written in plainer prose; in fact, it was part of their "reinventing government" initiative.

Statutory drafters have not remained oblivious to these developments. American legislative drafting manuals now advocate the use of plain language principles. One such manual recommends avoiding elegant variation, as well as legalistic terms such as *such*, *said*, *aforesaid*, and *to wit*. It also favors the active voice over the passive. These are, of course, standard guidelines for clear writing.

The movement has also taken root in English-speaking countries outside of the United States. At about the time that Citibank released its promissory note, the Australian Sentry Life Insurance Company, responding to a survey of its customers, produced a plain language insurance policy. The United Kingdom has the Plain English Campaign, started by a Liverpool woman who was fed up with unintelligible government forms. She took hundreds of the offending documents, proceeded to Parliament Square, and publicly shredded the lot. Her Majesty's government seems to have been sufficiently embarrassed; it soon began systematic revision of its forms. In addition, in 1999 the English court system implemented new rules of civil procedure. They received a fair amount of press attention because they had abolishes some time-honored legal terms for modern equivalents. A *subpoena* is now a *witness summons*, an *in camera* hearing is now a *private* hearing, and a *writ* is now a *claim form*. Even the venerable term *plaintiff* has been replaced by *claimant*.

Anyone who pages through a book of statutes will realize that we still have a long way to go. A statute is not something that the average person can readily understand. In fact, requiring that all statutes be understandable to the lay public is almost surely an unrealistic goal. As the world around us becomes ever more complex, statutes inevitably are becoming longer, denser, and more specialized. Arguably, many statutes--such as those relating to bankruptcy, civil procedure and evidence, corporations, public utilities, the structure of government, and the military--are not directed to the general public at all, but are rather addressed to a subcommunity of experts. Few of these specialized subjects lend themselves to ready explanation to a lay audience. And often ordinary people may not care all that much, anyway.

Yet there are statutory areas that are of intense interest to the public. Examples include the criminal law, as well as laws relating to the family, divorce, community property, inheritance, employment, civil rights, landlord-tenant relations, and consumer protection. Surely ordinary citizens ought to be able to understand the rights conferred and obligations imposed by such statutes. At the same time, it may be that the law cannot or should not be stated too plainly. Lawyers often argue that important nuances would be lost if the law were stated in plain English. In addition, legal language facilitates communication within the profession; it might be very time-consuming the try to explain the entire law in fully understandable language.

One solution has been proposed by Paul H. Robinson, Peter D. Greene, and Natasha B. Goldstein, in an article entitled *Making Criminal Codes Functional: A Code of*

Conduct and a Code of Adjudication , 86 J. Crim. L. & Criminology 304 (1996). They note that most criminal statutes have a dual audience: members of the public and adjudicators. They suggest that adjudicators can tolerate the complexity that is inherent in most current criminal codes, but that members of the public have a right to a criminal code that they can understand. In essence, there ought to be two criminal codes, one for the public and one for judges. The authors then proceed to offer a draft code of conduct that explains to the public, in plain English, what they can and cannot do, as well as a draft code of adjudication in legalese for judges and other professionals.

The interesting thing about this proposal is that it recognizes quite explicitly that legal language and ordinary English are, in a sense, two different languages. It suggests that perhaps the job of lawyers, who are essentially bilingual, is to translate legal language into ordinary speech. At the same time, I am somewhat reluctant to embrace the bilingual view, because it largely removes the pressure on the system to speak more clearly. A consumer about to sign a lease or to purchase a refrigerator on credit should not have to pay a lawyer to explain what the legalese in the relevant documents means.

I suppose that in the end, there are certain categories of legal documents--particularly those that affect the rights and obligations of ordinary consumers--that should be stated as plainly as possible. On the other hand, it is far less of a problem if agreements between large multinational corporations which are all represented by lawyers are impenetrable to the average consumer, although even these agreements can often be drafted much more clearly than they currently are.

It is more difficult to decide what to do with statutes. Realistically, I doubt that we will be seeing a plain English Internal Revenue Code in our lifetimes. On the other hand, it seems to me that it should not be that terribly difficult to improve the language of the criminal codes. Several American states have managed to craft relatively plain jury instructions, which explain the criminal law to jurors in ordinary language. If we cannot express the criminal law in ordinary English, how can we expect ordinary citizens to obey the law?

Overall, the language of the law is definitely better than it was twenty or thirty years ago. But there remains much room for improvement.

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