The Promise of Plain Language Drafting

Ruth Sullivan*

The purpose of drafting legislative texts in plain language is to enhance democracy and the rule of law by making legislation accessible to the people whose lives it affects. But plain language drafting has some potentially more radical implications, as it reveals and challenges assumptions underlying current approaches to statutory interpretation and to law generally.

The author surveys various plain language initiatives, highlighting problems encountered by the plain language drafter as well as techniques for achieving more direct communication of the legislative message. A central problem for plain language drafting is identifying the legislature's primary audience. The author shows that it is impossible to write for everyone. After examining different ways of responding to this problem, she argues that ordinarily the drafter should write for the most vulnerable group affected by the legislation to be drafted.

The author concludes that plain language drafting will not make it easy for members of the public to read and understand legislation. Its chief value lies rather in the message it sends to the courts and official interpreters of legislation, namely, that legislation should be interpreted from the perspective of its primary audience. Instead of relying on judicial notice of meaning and their own common sense, courts should receive evidence about the audience for which the legislation was written. Judicial interpretation should be informed by an understanding of the context in which the legislation actually operates.

Another virtue of plain language drafting is that it challenges some of the untenable assumptions underlying a positivist view of law, in particular, the idea that law exists in advance of its application because it consists of rules contained in texts. The techniques used by plain language drafters tend to detach the law from particular texts and to blur the conventional distinction between text and context. In this way, plain language drafting draws attention to the malleable character of texts and the make-it-up-as-you-go-along character of law.

La rédaction de textes législatifs en langage simple vise à protéger la démocratie et l'état de droit en rendant la législation accessible à ceux qu'elle gouverne. Elle a cependant d'autres conséquences plus fondamentales, notamment en ce qu'elle permet d'identifier et de remettre en question les postulats sous-jacents aux principales approches de l'interprétation des lois et du droit en général.

L'auteure analyse divers projets de rédaction en langage simple et indique les problèmes qui leur sont liés ainsi que certains moyens permettant de communiquer le message législatif d'une manière plus directe. Il appert que le problème essentiel qui se soulève dans la rédaction en langage simple est l'identification du public principal puisque, comme le démontre l'auteure, il n'est pas possible de rédiger pour tous les groupes sociaux. À la lumière de l'étude de différentes solutions à cette difficulté, l'auteure suggère que le législateur devrait rédiger en fonction du groupe le plus vulnérable que la loi en question peut affecter.

L'auteure conclut que la rédaction en langage simple ne rendra pas en soi la lecture et la compréhension de la législation simples. Le principal avantage de ce type de rédaction se situe donc au niveau du message communiqué aux tribunaux et aux autres organes devant interpréter la loi : cette dernière devrait être interprétée à partir du point de vue de son principal public. Plutôt que de s'appuyer sur la connaissance judiciaire et leur propre raison, les juges devraient accepter la preuve du type de public auquel la loi était destinée, de manière à ce que l'interprétation judiciaire se base sur une compréhension du véritable contexte dans lequel la législation agit.

La rédaction en langage simple présente également l'avantage de remettre en question certains postulats de la conception positiviste du droit, notamment l'idée selon laquelle le droit préexiste son application puisqu'il est constitué de normes contenues dans des textes. Les techniques utilisées pour la rédaction en langage simple séparent le droit de textes particuliers et estompent la distinction classique entre le texte et le contexte. De cette façon, la rédaction en langage simple met en évidence le caractère malléable des textes et la nature foncièrement ad hoc du droit.

* Professor, Faculty of Law, University of Ottawa. The research for this paper was funded by a grant from the Social Sciences and Humanities Research Council of Canada.

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Conclusion

If one, settling a pillow by her head,
Should say: "That is not what I meant, not what I meant at all.
That is not it, at all."
T.S. Eliot, "The Love Song of J. Alfred Prufrock"[1]

Introduction

In nearly all jurisdictions, the role of legislative drafting in the creation and administration of law receives scant attention from legal educators and the practising bar. This neglect is a mistake, in my view. Given current conceptions of democracy and the rule of law, and given the way those conceptions are put into practice in parliamentary democracies like Canada, the work that drafters do warrants careful scrutiny.

The primary task of drafters is to embody proposed legislation in a fixed form—to "in-text" future law, in effect. Once established, the text is tabled in the legislature, where the elected representatives of the people decide whether to enact it, in whole or in part, with or without amendment. If this exercise in democracy is to be more than an empty formality, it is obvious that the representatives who vote for or against a particular proposal must understand what is being proposed.

Once a text is enacted, it is published in an official publication like the *Canada Gazette*. Publication is meant to ensure that members of the public, who are deemed to know the law, have access to the statute book and can come to know the law in fact as well as legal fiction. In keeping with the rule of law, it ensures that citizens have a means to identify their rights and obligations as set out in the enactments that apply to them. In keeping with democracy, it ensures that citizens are able to understand and assess the output of their elected representatives.

The rule of law and democracy also require that those who administer the law apply it equally to everyone, exactly as enacted, so as to prevent discriminatory effects or unauthorized outcomes. Law that has been appropriately "in-texted" facilitates equal, accurate application because the rules to be enforced and the powers available to enforce them are set out in a fixed form, which is accessible to all.

As this brief sketch suggests, democracy and rule of law as currently conceived in Canada presuppose the capacity of a legislative text to embody the law in a fixed form and to communicate the same law to everyone—the parliamentarians who will enact the law, the citizens whose rights and interests will be affected by it, and the officials

[1] T.S. Eliot, *The Complete Poems and Plays* (London: Faber & Faber, 1969) 13 at 16.

who will enforce it. The challenge of creating texts that fulfil these requirements falls to the legislative drafter.

Historically, drafters have focused on the first challenge, that of "in-texting" the law, and have paid little attention to the challenge of communication. The result is a statute book that declares the law in thousands of carefully written pages that are incomprehensible to all but a handful of legal insiders. This insider group includes judges and lawyers, as well as professionals, such as accountants, who deal with certain areas of the statute book on a regular basis. It may also include bureaucrats who administer statute-based schemes, especially those who prepare secondary materials that attempt to explain "their" legislation to the general public. Insiders become familiar with portions of the statute book and they may become adept readers of legislation in general. To the rest of the public, however, the statute book is a walled fortress, bristling with bizarre weaponry. Who would want to go there?

Much legislation is drafted in long, convoluted sentences and relies on obscure jargon. But this is the least of the public's problems. The first challenge faced by would-be users of legislation is getting hold of an accurate and up-to-date copy of the legislation, including not only the act, but also regulations and documents incorporated by reference.[2] The second challenge is to locate the parts of the legislation that are relevant. Users must then read those parts and make sense of them, a challenge that takes more than an ability to decipher badly written prose. Finally, and most importantly, users must appreciate the import of what they have read in terms of their personal circumstances and interests.

Given these multiple challenges, it is not surprising that access to law for most people is impossible without the assistance of lawyers or other professionals. These professionals not only locate the law and explain it, but also apply it in a way that benefits their clients to the greatest possible extent. They are both expected and obliged to use their knowledge and skills to develop interpretations that favour their client's position. For those who can afford a professional to look after their needs and interests, dealing with the statute book is not a problem: the professional acts as intermediary between the client and the text. For the rest of the public, however, the statute book remains an intimidating and impenetrable fortress.

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[2] Incorporation by reference is used frequently in federal legislation and creates significant access problems. Often the incorporated materials are in English only, are difficult to track down, and obtaining copies is prohibitively expensive. When documents are incorporated as amended from time to time (as occurs in a so-called "ambulatory" incorporation by reference), the problems are even greater. Incorporated materials may be revised on a regular basis and the revisions are not necessarily publicized. There are also interpretation problems. It is unclear, for example, whether incorporated materials should be interpreted in their own literary and operational context or in the literary and operational context of the legislation.

Most supporters of plain language drafting find this arrangement unacceptable. They believe that legislation should speak directly, without the need for intermediaries, to the very people whose lives it affects. This obviously is a worthy ambition, but it may not be a realistic one. In this paper, I review some recent practices of plain language drafting and I attempt to assess the assumptions on which they are based and the impact they may have on the various audiences for legislation, both professional and non-professional. I conclude that plain language drafting is an important initiative that deserves scholarly attention and support, not because it is likely to make law readily accessible to the general public, but because it reveals the false assumptions underlying prevailing notions of democracy and the rule of law and attempts to do something about them.

Part I of this paper is largely descriptive. It looks at the evolving theory of plain language drafting and mentions a number of initiatives undertaken in Canada and elsewhere to put the theory into practice. Part II considers some of the difficulties encountered by drafters in trying to communicate directly, without the benefit of intermediaries, to widely divergent audiences. It ends by suggesting that drafters should not try to write for everyone; rather, unless directed otherwise, they should write for the most vulnerable audience affected by the legislation. Part III considers some implications of plain language drafting for statutory interpretation and legal scholarship. It suggests that plain language drafting should lead courts and other official interpreters to adopt an audience-based approach to interpretation, and it should lead all of us to think more creatively about ways to enhance democracy and promote the rule of law.

I. Evolving Theory and Practice

There was a time when drafting in plain language meant adhering to a list of rules: keep your sentences short, use simple words, avoid the passive voice. However, this limited and mechanical approach has been discredited. The distinctive feature of plain language drafting these days is its pragmatic and empirical approach. Once the legislature's specific goals have been identified, the drafter looks for practical means to achieve them, relying on interdisciplinary research and empirical testing to ensure that those means are effective.

A. Direct Communication

If drafters want to communicate directly with their audience, so that legislation can be used without the help of intermediaries, then they themselves have to carry out the work that intermediaries do. In effect, the drafter must provide the services that legal professionals typically provide: finding the relevant provisions, translating them into comprehensible language, explaining them, and personalizing them. These services must somehow be carried out in the legislation itself.

The work of navigation and translation is relatively easy. Drafters structure the legislation so as to be meaningful to the audience, use manageable sentences and a familiar vocabulary, and explain unfamiliar terms. They use techniques that give the audience a bird's-eye view of the structure. They create method statements that set out the steps users must follow to achieve a particular goal. They include notes and other devices to draw users' attention to definitions and related provisions.

The work of explaining and personalizing the legislation is more daunting. Certain conventions currently used by drafters, notably preambles and purpose statements, can help an audience to relate the text to their own circumstances by supplying contextual information. Recently developed techniques, such as the use of metaphor, examples, or a question-and-answer format, are meant to further facilitate effective self-application. Because the discipline of legislative drafting is new, drafters have much to learn before achieving anything like a satisfactory set of techniques. But in principle, the knowledge necessary to develop those techniques can be acquired.

1. Access

The problem of access to the statute book is currently being addressed through electronic publication.[3] This approach makes the text of legislation available to everyone who has access to the Internet. More important, because the technology used in publishing legislation by electronic means resembles the technology used for other purposes, the skills developed by citizens in searching for good vacation spots or downloading music can be applied to locating and successfully navigating the statute book.

2. Understanding

Once users have located the statute book, they must be able to recognize the provisions that are relevant to them and the significance of those provisions. As traditionally drafted, a statute tells a particular kind of story within the conventions of a genre; like other literary texts it is laid out from left to right, from start to finish. Unlike other literary texts, however, legislation is not taught in school and readers are unfamiliar with the genre and its conventions. Most readers are unwilling to read it from start to finish, or even from left to right. They want to go directly to the bits that concern them, find the answers to their questions, and ignore the rest.

To respond to this reality, drafters try to lead users where they want to go while at the same time ensuring that they notice everything that is relevant to their circumstances and have enough context to appreciate the significance of what they notice.

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[3] See T. Scassa, "The Best Things in Law Are Free? Towards Quality Free Public Access to Primary Legal Materials in Canada" (2000) 23 Dal. L.J. 301.

For this purpose, drafters rely on tables and indexes, overviews and flow charts, explanatory notes, discursive cross-references,[4] and the like. Statutes that are published online should be able to take advantage of the multimedia and interactive dimensions of electronic communication to develop new aids. Through hyperlinking, for example, an audience can be given immediate access to provisions scattered through the statute book and to materials incorporated by reference. It can also be given access to resources like legislative history, legislative evolution, administrative guidelines, case holdings, or even academic comment.

3. Personalization

Most citizens read legislation not to discover the law for its own sake but to try to make the law work for them. This realization has important implications for both drafting and interpretation. Jorge Gracia writes that the function of all interpretation is to produce appropriate acts of understanding in relation to a text, but what is appropriate varies depending on the interpretation's purpose.[5] In "textual interpretation", as he calls it, the purpose is to understand the meaning intended by an author or a meaning that is warranted by the text. Understanding, or identifying a "correct" meaning, is an end in itself. In "non-textual interpretation", the purpose is to understand the implications a text has for something outside the text, that is, the import of the text for a matter of interest to the interpreter.[6]

When the official interpreters of legislation apply a statute to facts, they normally understand themselves to be engaged in what Gracia would call textual interpretation. Their goal is to understand the law by ascertaining "the meaning" of the text, in effect to "de-text" the law. When non-official interpreters apply legislation to facts, however, they engage in what Gracia calls non-textual interpretation. Their goal is not to understand the law for its own sake, but to personalize it, even colonize it, by ascertaining how it optimally relates to their own interests, needs, circumstances, or preferences.

To assist citizens in this form of interpretation, drafters rely on concrete language (in addition to, if not in lieu of abstractions), often in the form of examples and illustrations. In a paper-based format, the examples and illustrations must be set out somewhere in the statute—within a section or subsection, in a footnote, or possibly in a schedule or appendix. In electronic format, examples and illustrations can be offered in a variety of forms, including audio and video links. In either case, the drafter attempts to model the reasoning used by lawyers to personalize legal rules.

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[4] A discursive cross-reference tells readers what is in the text being referred to so they can judge whether it is worth their while to pursue the reference.

[5] J.J.E. Gracia, *A Theory of Textuality: The Logic and Epistemology* (Albany: State University of New York Press, 1995) at 159-63.

[6] *Ibid.* at 164-65.

B. Audience Assessment

Traditionally drafters have come to know their audience by reading reported judgments. However, since plain language drafters want to communicate with parliamentarians and members of the public as well as judges, they make an effort to expand these limited horizons. A plain language drafting project typically begins with an effort to systematically identify the anticipated users of legislation, followed by consultation with representatives of those users. Later in the process, successive versions of the draft are circulated among the representatives for comment or they may form the basis for a program of focus testing. The feedback received from these initiatives is analyzed and relied on in the preparation of each new draft.

For example, when the United Kingdom undertook a plain language rewrite of its fiscal legislation, it began with a series of consultations designed to include "all relevant private sector interests and, in particular, ... those who represent users of tax legislation."[7] The rationale for this approach was explained as follows:

> [S]ince the whole focus of the rewrite ... is to make tax legislation easier to use, an exceptionally high degree of user involvement is essential, making the rewrite, in effect, a joint venture. It is therefore particularly important to have arrangements, planned from the outset, to ensure that the user's perspective is fully reflected at every stage of the project.[8]

In Canada, Human Resources Development Canada ("HRDC") and the Department of Justice ("DOJ") have been working on a plain language rewrite of the *Employment Insurance Act*[9] ("*EIA*") since 1997. Early in the process a Plain Language Advisory Group was established, consisting of representatives of business organizations, labour organizations, and advocacy groups. This group has been meeting two or three times a year to review every aspect of the rewrite process, from restructuring the *EIA* and devising a new format to changing the terminology.

At the formal meetings, the consultants are asked questions about specific provisions or features of the text—what they think of drafting headings in the form of questions, for example, or whether a particular flow chart is helpful and accurate. Between meetings they are sent copies of work in progress and invited to comment on anything, from their general impressions of the draft to the clarity of particular words

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[7] D. Salter, "Towards a Parliamentary Procedure for the Tax Law Rewrite" (1998) 19 Statute L. Rev. 65 at 68.

[8] Inland Revenue, "The Tax Law Rewrite: The Way Forward" at c. 9, online: Inland Revenue <http://www.inlandrevenue.gov.uk/rewrite/wayforward/tlrc9.htm> (date accessed: 11 October 2001), quoted in Salter, *ibid.* at 67.

[9] S.C. 1996, c. 23. Unless otherwise indicated, information in this paper about the *EIA* Plain Language Project is based on my own participation in it as part of research funded by the Social Sciences and Humanities Research Council of Canada.

or sentences. The information gathered from this feedback is formally recorded, reviewed, and factored into subsequent drafts.

C. Reliance on Experts from Other Disciplines

Effective communication requires an understanding of how communication works and what tends to hinder it or help it along. For this purpose, knowing the law and the conventions of legislative drafting is not enough. Drafters need help from other disciplines, particularly psycholinguistics and document design. They need to see their profession established as a scholarly discipline. This entails investigating the premises of their practice, developing knowledge about the type of communication that is involved in using legislative texts, and proposing theories and carrying out research.

As a first step in achieving these goals, plain langnage projects sometimes adopt an interdisciplinary team approach in which specialists from other disciplines become part of the drafting team. The drafter still does the writing, but every aspect of the text reflects the ideas of the team.[10] More frequently, consultants are hired to address particular problems or issues.

For example, when it came time to develop a format for the plain language version of the *EIA*, the HRDC/DOJ project hired a firm of document designers who not only came up with an innovative format for the legislation but also gave presentations and prepared reports explaining the reasoning and research on which its recommendations were based. More recently, the English Legislative Langnage Committee of the Legislative Services Branch, DOJ, commissioned reports from two scholars in communications, one in English and the other in French, to assess the use of paragraphing in the English and French versions of federal legislation.[11]

D. User Testing

One of the most striking features of plain language drafting is the current interest in testing audience response. Historically, nearly all advice about effective writing was based on the intuitions of the advice-giver. Currently, drafters want evidence that the

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[10] This approach was used with success in Australia's rewrite of its corporations legislation. See V. Robinson, "Rewriting Legislation: Federal Australian Experiences" (Paper delivered to the Department of Justice Continuing Legal Education Scholar Series, "Making Laws Easier to Read: What's the World Coming To?" 8 March 2001) at 4-5 [unpublished].

[11] See M.P. Jordon, "Paragraphing in Legislative Writing: Linguistic and Pragmatic Foundations" (Research Report for the English Legislative Language Committee, Department of Justice, Canada, March 2001) [unpublished]; C. Beaudet, "La lisibilité des énumérations verticales" (Research Report for the Minister of Justice of Canada, December 2000) [unpublished].

techniques they are using actually do facilitate communication. For this reason, user testing is an important element of many plain language projects.

Probably the best known example of user testing was developed by Phil Knight and Joe Kimble in the course of their plain language rewrite of South Africa's human rights legislation.[12] The Knight-Kimble team developed two simulations, which were used to assess the ability of an audience to find, read, interpret, and apply the legislation. The first simulation was developed for professionals, who in this test were represented by 139 law students from four universities. The second was developed for a group of 96 "lay people". Members of this latter group were diverse in terms of gender, age, first language, education, and race.

Knight reported the following results. First, "[c]ompared to the original, the revised Act resulted in improved scores for every task involved in use of the text. The improvement was seen in the use of the Act by legal professionals and lay readers alike."[13] Second, in achieving this improvement, getting rid of legalese and improving sentence structure were important factors. However, the impossibility of eliminating essential legal concepts from the text was a major impediment. As Knight observes, "Unfamiliar legal concepts torpedo comprehension, and sink it without a trace."[14] Third, although both professional and non-professional users did better with the revised version, neither group did very well. Among professionals, only 50 per cent managed to score 80 per cent or better on the test. Among non-professionals, only 30 per cent scored 60 per cent or better.[15] As Knight concluded, "[T]he revised text made great gains over the original ... But clearly, there is a need for more work, more involvement with readers, and more study of their needs."[16]

As part of the plain language rewrite of the *EIA*, a consultant was hired to test user response to two plain language versions.[17] In one version, the legal subject was

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[12] The testing is reported in P. Knight, *Clearly Better Drafting: A Report to Plain English Campaign on Testing Two Versions of the South Africa Human Rights Commission Act, 1995* (Stockport, U.K.: Plain English Campaign, 1996).

[13] *Ibid.* at 39.

[14] *Ibid.* at 38.

[15] *Ibid.* at 40.

[16] *Ibid.*

[17] This program of testing was funded in part by a grant from the Social Sciences and Humanities Research Council of Canada, and was carried out by Vicki Schmolka and GLPi. A full description of the testing and analysis of results is set out in GLPi & V. Schmolka, *A Report on Results of Usability Testing Research on Plain Language Draft Sections of the Employment Insurance Act: A Report to Department of Justice Canada and Human Resources Development Canada* (August 2000) [unpublished]. Schmolka also conducted user testing on regulations made under the *Explosives Act* (R.S.C. 1985, c. E-17) dealing with the retail sale of fireworks. See V. Schmolka, *Consumer Fireworks Regulations: Usability Testing*, TR1995-2e (Department of Justice Canada, 1995) [unpublished].

addressed directly as "you/*vous*"; in the other the legal subject was referred to in the third person as "the claimant/*le demandeur*". Testing was done with groups in four categories: (1) General Public (English); (2) General Public (French); (3) Informed Users (English); (4) Informed Users (French). Each subject completed a self-administered questionnaire which tested ability to find and understand information in the legislative text. After completing the questionnaire, subjects participated in a focus group discussion.

Like Knight's testing program, the *EIA* test was designed to compare the experience of people using a plain langnage version to the experience of those using the current version. In all, 146 people were tested, 101 in the General Public category and 45 in the Informed Users category. Subjects in the General Public groups were employed persons who thought they might need to claim insurance benefits at some time in their lives, but they had no recent experience with the *EIA* nor had they read any type of statute or legal text within the past year. They included a mix of genders, ages, occupations, and levels of education and income. Subjects in the Informed User groups included Canada Employment Centre staff, human resource and benefit specialists, and professionals such as lawyers, employment advocacy groups, community assistant groups, and the like. All had experience advising people about employment issues and were familiar with the current *EIA*.[18]

Overall, the results were similar to those reported by Knight. Groups working with both plain language versions performed better than groups working with the current version. The former found information more quickly and were able to answer questions about it more accurately. They also reported less distaste and more confidence in their ability to use the legislation. However, they still found it frustrating to try to find things in the *EIA* and the text remained difficult to understand.[19] Their performance in the questionnaire part of the testing reflects this subjective impression. Neither the general public nor informed users did particularly well on any version of the legislation.[20]

On the question of direct address versus third-person reference, the results were largely inconclusive. While many people thought using "you" or "*vous*" was helpful and user-friendly, a significant number reacted strongly to it, finding it aggressive or patronizing. Others had trouble figuring out who "you" or "*vous*" was supposed to be. Moreover, those who worked with the third-person version performed slightly better in finding and understanding the answers to questions. For these reasons, the testers recommended the third-person approach.[21]

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[18] GLPi & Schmolka, *ibid.* at 2-3.

[19] *Ibid.* at 5-10.

[20] This is my own assessment based on reading GLPi & Schmolka, *ibid.*

[21] *Ibid.* at 8-9.

Given the small numbers involved, the results of this type of testing are not statistically significant. They do not permit analysts to explore possible correlations between features like gender or age and responses to the legislation. Generally, they do not attempt to assess the impact of particular features. The results do suggest, however, that plain language drafting is an improvement over traditional legislation, but if direct communication is the goal, plain language drafting has a long way to go.

II. Writing for Divergent Audiences

Although there are exceptions, legislation is generally addressed to everyone. The typical legislative sentence asserts a rule in the following form: "Any person who [comes within described circumstances or meets described conditions] is entitled to/obliged to/liable to [something]." Although the circumstances and conditions set out in the restrictive clause limit the scope of the rule, the subject of the rule is "any person", a description that encompasses all of us.

Even though legislation is *addressed to* everyone, historically it has not been *written for* everyone. It has been written for the legal profession with the primary focus on a somewhat idealized conception of superior court judges. This audience has above average intelligence and sophisticated reading skills; its members are highly educated and unusually well-informed. They have an extensive knowledge of law and legal values. Furthermore, they understand the conventions used by drafters in preparing legislation and they have mastered the rules and techniques of statutory interpretation. Most Canadians, including some lawyers and judges, would have trouble locating themselves in this group portrait.

But what are the alternatives? If drafters do not write for judges, for whom should they write? In this part, I canvass four possibilities: writing for everyone, writing for the audience targeted by Parliament, writing for the least experienced, and writing for actual readers. I express skepticism about the possibility of directly communicating the law to the general public and I consider whether it makes sense to write for an audience most of whose members will never read what is written. I end by urging drafters to write for the audience that has been singled out by the legislature, or in the absence of such an audience, for the most vulnerable groups affected by the legislation.

A. Writing for Everyone

Many people assume that drafting in plain language means writing for everyone—in fact, writing for that broad, undifferentiated audience to which traditional legislation is addressed. Drafters who adopt this approach sometimes attempt to understand this audience in terms of "average" ability, "ordinary" knowledge, "typical" background, and the like. This is the approach of Dennis Murphy, an early advocate of plain language drafting. He writes:

> There has been much discussion over the years as to the differing needs of Parliament, lawyers, the judiciary, professional groups, special groups, or the public itself.
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> I submit that the correct principle is that, while all these stakeholders should be catered for according to the nature of the legislation, the overriding concern should be to ensure that the person in the street, the ordinary person, should be thought of as the ultimate consumer of legislation. Why shouldn't the ordinary person have full and real aecess to legislation? ...
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> Legislation should be written so that it is feasible for the ordinary person of ordinary intelligence and ordinary education to have a reasonable expectation of understanding and comprehending legislation and of getting the answers to the questions he or she has.[22]

In my view, conceptualizing the general public in terms of what is ordinary or average or reasonable is not an effective strategy. The "ordinary person" to whom Murphy refers does not in fact exist. The drafter is therefore obliged to make this person up on the basis of intuition and imagination. Although the average person made up by plain language drafters is not a lawyer, he is probably male, of European descent, middle-aged and mainstream in his thinking, and comfortably ensconced in the middle class. The differences between this person and the judge for whom traditional legislation is written are minimal. This so-called average person lacks legal knowledge and abhors legal jargon, but he could easily golf with the judge.

An alternative way of thinking about "everyone" is to survey the mass of people to which the term refers and classify them based on characteristics that are thought to be relevant. The virtue of this approach is that it acknowledges that real people differ from one another in ways that affect communication. Duncan Berry, who has done considerable research on audience identification, illustrates this approach. He writes:

> Audience is a broad concept. In order to understand audiences, legislative counsel must first aseertain who will read their legislation and how they will use it. ... [R]eaders may vary widely, so it is necessary to identify the specific characteristics of the various audiences in order to make the legislation accessible to readers. Similarly, legislative [counsel] must identify how their audiences will use the legislation.
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> Legislative counsel can identify [their] audiences if they think of all who will potentially read the legislation or whose activities it will control. When those audiences have been identified, the legislation's relationship to its readers should be considered. An audience may be friendly, that is, share interests

[22] D. Murphy, "Plain Englisli—Principles and Practice" (Paper delivered to the Conference on Legislative Drafting, Canberra, Australia, 15 July 1992) at 4 [unpublished].

> similar to the policy formulators, or hostile, that is, have interests that conflict or potentially conflict with those of the policy formulators.
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> Another factor to consider in identifying the audience is its education and experience.[23]

Berry suggests that the audience for most legislation would include judges and lawyers, the bureaucrats and officials who administer and implement the legislation, the persons affected by it, and the advisors of those affected. After canvassing several methods that can be used to analyze these audiences, he concludes:

> Audience analysis should include a comparison of the author and the audience and an assessment of their respective knowledge, values and beliefs about the subject matter. A comparative analysis can put legislative counsel in a more informed position to make visual and verbal decisions that may bridge the gap between themselves and their audience.[24]

Clearly Berry appreciates the difficulty of trying to write for real persons as opposed to "the average person". He repeatedly draws attention to the different assumptions, abilities, interests, and needs that different categories of audience bring to legislation—along with different reading strategies. He acknowledges that these differences operate as barriers to communication. Despite all this, he remains optimistic. At the end of the day he believes that drafters can get to know these different audiences well enough to communicate with them directly and effectively. He believes that the needs of these audiences can all be accommodated within a single document—not fully accommodated perhaps, but accommodated to an extent that justifies trying to write for them all simultaneously.

I myself do not think it is possible for drafters to bridge so many different gaps simultaneously. It may be possible to draft legislation that is easier for many different audiences to use—professionals and non-professionals, the highly literate and not so literate. User testing in South Africa, Hong Kong, New Zealand, and Canada supports this claim. However, it is important to notice the difference between drafting legislation that is easier for different audiences to use and *writing for* different audiences. If audiences in fact have different needs and interests, or bring a different knowledge base to the legislation, drafters must either shift back and forth among the several audiences, accommodating sometimes one group and sometimes another, or they must single out a primary audience whose needs become their primary (although not exclusive) concern. For reasons explained below, I think the latter approach is better.

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[23] D. Berry, "Audience Analysis in the Legislative Drafting Process" (June 2000) The Loophole: J. Commonwealth Ass'n Legis. Couns. 61 at 62.

[24] *Ibid.* at 67.

B. Writing for the Audience Targeted by Parliament

Having to draft legislation for audiences with competing interests, divergent backgrounds, and unequal power is a challenge that drafters face on a daily basis. The problem arises in virtually every statute that affects the general public, yet it is rarely noticed or discussed, even in the context of plain language rewrites. For example, Michael Jordan, commenting on a bill to replace Ontario's *Residential Rent Regulation Act, 1986*,[25] writes that the bill is "of great importance to the general public in Ontario—and specifically those who rent, rather than own, property."[26] He concludes that the new legislation "needs to be written in a form that renters can understand and act on, as they are directly affected by the provisions of the Act."[27]

As Irene Gendron points out, a rent regulation act sets up a scheme of rights and obligations for both renters and landlords. Why does Jordan assume that renters are the primary audience? Here is Gendron's speculation:

> Perhaps Jordan is making a judgment that renters are the "lowest [common] denominator" in the audience and that writing for their level of understanding will automatically allow landlords to understand the statute. I suspect, however, that it is more of a political decision—renters are viewed as being in a less favourable position than landlords and therefore are the "underdogs" ... The situation is equalized by writing the legislation for them rather than for the landlords.[28]

Gendron rightly characterizes the decision to make renters the primary audience as a political one. She goes on to point out how such a decision can affect the way the legislation is drafted:

> [S]pecifically directing the legislation to the renter is different than specifically directing it to landlords. For example, if we ... give prominence to the information that is of most importance to the renter (as the preferred audience), then those items would be placed first and items that are of more significance to landlords or bureaucrats would be placed in positions of lesser prominence. Also, headings and marginal notes would be written for the renter as reader. For example, "How much of a rent increase will I face each year?" If the Act were aimed at landlords, the heading might be: "How much can I raise the rent each year?" If kept neutral, perhaps so as to engage both groups of readers (as

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[25] R.S.O. 1990, c. R.29, as rep. by *Rent Control Act, 1992*, S.O. 1992, c. 11, s. 137(1).

[26] M.P. Jordan, "Plainer Legal Language: Definitions and Requirements in Acts" (1994) 24 J. Technical Writing & Comm. 333 at 336.

[27] *Ibid.*

[28] I.V. Gendron, "Can a Statute Be All Things to All People? The Reality of Audience-Based Legislative Drafting" (LL.M. Major Research Paper, University of Ottawa, 31 August 2000) at 36 [unpublished].

> well as tribunals and bureaucrats), the heading might read "Amount of allowable yearly increases" or "How much rent increase is allowed?"[29]

In commenting on the Jordan article, Gendron wonders whether the decision to single out and write for a particular audience can properly be made by the drafter, given its political character. In my view, drafters do not really choose the primary audience, but rather identify the primary audience chosen by Parliament. They do this by interpreting their instructions, a task that is central to a drafter's day-to-day job. Either they interpret the cabinet memorandum and the more detailed instructions supplied by department or agency officials or, in the case of a rewrite, they interpret the existing legislation. In either case they canvass the interests affected by the legislation and establish how these interests are balanced or ranked in the intended scheme in order to appreciate the political choices that Parliament will be making. Their job is to find ways to embody and communicate these political choices in the text, and one way of doing this is to signal the primary audience for which the legislation is written.

This is the approach adopted by Gendron herself, along with her co-drafter Philippe Hallée, in their initial plain language draft of the *EIA*. Here is her description of their early deliberations:

> We started by listing the current users of the legislation. Empirical research was not available but it was not difficult to identify the current users of the Act, at least in a general way:
>
> - Tribunals
> - Courts
> - Lawyers
> - Employers, employees (claimants) and their lay and professional representatives and advocates
> - staff of HRDC and Canada Customs and Revenue Agency
>
> ...
>
> We spent a great deal of time during the initial phase of the project analyzing the statute with a view to re-structuring it. We asked ourselves questions such as—which information should be put first? Which is the most important information in the Act? Which segments of information belong together? As we struggled with these issues, it became clear to us that the answers were different depending on the point of view we took ... that is, which ... audience we adopted. Although we did not analyze it in any depth at the time, it seemed to us that the common denominator throughout most of the Act was the "claimant"—a person who wants to claim, or is claiming, benefits under the legislation. The thrust of the Act is, after all, to provide a scheme of income replace-

[29] *Ibid.* at 36-37.

> ment for the claimant—the Act exists for that purpose ... although a portion of the Act is specifically aimed at employers.[30]

After consulting with other members of the team, Gendron and Hallée decided that the plain language version of the *EIA* should be written for claimants—that is, organized and presented from their perspective.

This decision did not mean that every provision in the *EIA* would have to be written for claimants. Much of the *EIA* deals with the duties of employers or with administration of the scheme, and in drafting these parts, the drafter would try to communicate directly with employers or with administrators. It is only when conflict arises and the drafter must choose between competing interests or needs that prioritization becomes necessary. My argument is that when conflict does arise the drafter should favour the primary audience targeted by Parliament.

C. Writing for the Least Experienced

The problem of choosing among different audiences was handled in a somewhat different way by the drafters who did the plain language rewrite of South Africa's *Human Rights Commission Act, 1994*.[31] As Knight reports, they envisaged the audience for this legislation as including parliamentarians, judges and lawyers, commission members and staff, police and other enforcers, advocates, community service providers, business people, teachers, labour leaders, ministers, and ordinary citizens.[32] Like Berry, they believed they could draft a text that would improve readability and usability for all these groups; in fact, this was an important goal of the project. But they acknowledged the impossibility of writing *for* all these groups simultaneously.

The problem of competing needs and interests arose at the outset, when the drafters sat down to devise a new structure for the legislation that would reflect the logic and interests of the reader. This is an early and fundamental step in plain language drafting. Knight writes:

> Bearing in mind that there are different groups of readers, with different interests and purposes in reading the document ... [i]t is inevitable that they will not all share the same logical approach to arranging the subject matter.
>
> We resolve those competing interests in favour of the least experienced readers, and their primary interests, providing a logical transition [from one

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[30] *Ibid.* at 52-53.

[31] No. 54 of 1994, online: Parliament of South Africa <http://www.parliament.gov.za/acts/1994/act94.054> (date accessed: 23 November 2001).

[32] Knight, *supra* note 12 at 12.

> subject to the next] that [was meant to] reflect the hierarchy of interests of the most common readers, or at least the most frequent unofficial readers.[33]

Knight's solution to the problem of competing audiences, in this context at least, was to write for the least experienced readers. He does not explain why he chose to write for this audience, but the choice is intriguing.

Perhaps the deciding factor was the size of the group. Perhaps Knight meant to suggest that drafters should write for the audience with the largest number of readers. In the passage quoted above, he identifies the least experienced readers with "the most common readers" and "the most frequent unofficial readers". It is more likely, however, that the key factor was not the size of the audience but its members' familiarity with legislation or their level of literacy. Probably he meant to suggest that drafters should write for the readers who need the most help in dealing with a legislative text. If the text can be read and understood by the least experienced readers, then presumably it can be read and understood by more sophisticated readers as well. However, it is also possible that Knight and his team were thinking about power. The least experienced readers are probably the most vulnerable members of society and, coincidentally, the members least likely to have access to professional help. Perhaps Knight meant to suggest that drafters should write for the audience with the least power in the system. After all, this group most urgently needs the services offered by the plain language drafter.

In my view, writing for the most vulnerable groups that will be affected by particular legislation is the appropriate default position for drafters. I would suggest that, in the absence of instructions to the contrary, drafters are not only entitled to write for this audience but may even have a professional obligation to do so. As mentioned at the outset, a drafter's primary job is to transform the instructions received from Cabinet into legally effective legislation. An important part of this job is making sure that proposed legislation complies with formal constitutional constraints and with established constitutional values. Given the historical importance placed on equality and equal access to the benefit of the law, drafters are well within their mandate in attempting to minimize the power differences between those who have the benefit of professional intermediaries and those who do not.

D. Writing for Actual Readers

In the Canadian and South African projects described above, when drafters were forced to single out their primary audience they chose to write for a particular subcategory of the persons whose lives would be affected by the legislation. In other plain language projects, however, drafters have chosen to write for the audience that is

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[33] *Ibid.* at 9.

most likely to read the legislation. It is easy to see their point. What good does it do to write for people who will never read what you have written? Unless there is an answer to that question, writing for an audience of renters, or claimants, or the most vulnerable groups in society is a waste of time.

Writing for the actual readers of legislation is the approach taken in Australia, which has been on the cutting edge of plain language drafting since the mid-1980s. To date it has completed eight major plain language rewrites, beginning with social security legislation in 1989. Other rewrites have dealt with income and sales tax, offshore mining, care of the aged, export market development, corporate governance, and the public service.[34] Vince Robinson, who has been involved in several of these projects, explains the Australian approach to audience:

> Our rewrites have been pragmatic rather than ideological. We have aimed, by and large, to make the legislation more readable and easier to use for its actual current users. We have not tried to make the legislation accessible to people who, from a practical point of view, we believed were highly unlikely ever to read the legislation. ...
>
> The actual current user group is usually a challenging enough group to cater for. Often it will include not only high-powered legal advisers or accountants but also professionals with lower level skills, the government officials who administer the legislation and community advice bureau staff who give people advice on their rights.
>
> To some extent, you can, in aiming for an unrealistic audience, do a disservice to the actual users. For example, if your actual users are professional advisers who already have some familiarity with the area and you put in a lot of aids for the benefit of uninformed lay users, you may alienate or inconvenience the actual users.
>
> We have not aimed to make the legislation readable by the average citizen. It is unusual for the average citizen to encounter a scheme through the legislation itself. The average citizen is more likely to encounter the scheme through brochures, notices, forms or websites.
>
> ...
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> That said, the average citizen does get the benefit of the improvements to the legislation that are introduced for the benefit of the actual users. The things that make life easier for the actual users ... also tend to make life easier for other potential users.[35]

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[34] See *e.g.* the series of fiscal acts introduced in 1999 beginning with *A New Tax System (Aged Care Compensation Measures Legislation Amendment) Act 1999* (Austl.), No. 58, 1999 and ending with *A New Tax System (Tax Administration) Act 1999* (Austl.), No. 179, 1999.

[35] Robinson, *supra* note 10 at 8-9.

Robinson is certainly right when he suggests that writing for an audience of actual users, given its diversity, is challenge enough. He is also right to suggest that the needs of expert and non-expert readers often come into conflict, and that expert readers are probably better served by a text prepared to meet their needs. The differences between these categories of audience have been documented in other contexts. Karen Schriver writes:

> As audiences become more specialized and more educated in technical areas, they expect texts that are not designed "for everyone," but rather, are targeted to their particular needs. In many industrial and corporate document design contexts (such as the computer, electronics, and appliance industries), writers must tailor their texts to very particular audiences. The ability to adapt texts for audiences such as novices, intermediates, or experts is rapidly becoming a requisite skill in industry.[36]

Finally, Robinson is probably right to suggest that non-expert readers prefer to find out about the law through intermediaries rather than by reading legislation. As Schriver also writes, "What we know now is that most people choose to read and to keep reading only when they believe there will be some benefit in doing so and only when they cannot get the same information in easier ways (for example, by asking someone else)."[37] It is obvious that no one (not even a lawyer) reads statutes for pleasure. If members of the public who are affected by legislation can afford to hire a professional, they will do so. If they cannot afford their own professional, they will rely on the services provided by community workers or government bureaucrats in the form of brochures and pamphlets, advertisements, answers to inquiries, and the like.

Despite its many insights, there are problems with Robinson's analysis. For one thing, he is too quick to dismiss the possibility that some users of legislation may want to bypass the intermediaries available to them and read the legislation for themselves. At a meeting of the Employment Insurance Act Advisory Group, held on 8 March 2001, representatives of labour groups described two situations in which workers currently do read the *EIA* unassisted by intermediaries. The first was described by a representative of the British Columbia and Yukon Territory Building and Construction Trades Council, who explained that in the construction industry, and other industries like it, unemployment is recurrent and rooted in the circumstances of the local economy. In most localities, a particular worker becomes an authority on employment insurance law. That person has up-to-date copies of the *EIA* and the regulations, is familiar with their content, interprets the legislation, and dispenses ad-

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[36] K.A. Schriver, "Plain Language through Protocol-Aided Revision" in E.R. Steinberg, ed., *Plain Language: Principles and Practice* (Detroit: Wayne State University Press, 1991) 148 at 151-52.

[37] K.A. Schriver, *Dynamics in Document Design: Creating Text for Readers* (New York: John Wiley & Sons, 1997) at 166 [hereinafter Schriver, *Dynamics*].

vice to his or her peers, thereby becoming the main source of information in the particular subcommunity on the rights and obligations of workers under the *EIA*.

Bernard Jackson would call this kind of subcommunity a semiotic group, that is, a group of people who share a context that differs from the contexts of others in ways that may lead them to infer different meanings from the same legal text. Jackson writes: "[A] semiotic group is a group which makes sense (here, of law) in ways sufficiently distinct from other such groups as to make its meanings less than transparent to members of other groups without training or initiation."[38] To communicate directly and effectively with a given semiotic group, the drafter would have to receive training or initiation into the group; this is what consultations and user testing are all about. But of course it is impossible for a drafter to master the context of every semiotic group that will be affected by legislation like the *EIA*.

The peer interpreters described above offer an attractive solution to this problem. They are ideally placed to mediate between the government and a small subcommunity, and in particular to personalize the legislation for members of their group. The peer interpreter saves the group from being at the mercy of the bureaucrats who prepare government brochures and answer inquiries from the public. Unlike lawyers and accountants, government bureaucrats owe no duty of care or competence to those they serve; their first loyalty is to the government. This makes them untrustworthy from the point of view of most subjects. Even if government bureaucrats wished to act as effective intermediaries, they would not find it easy to personalize the legislation—to adapt it to the local group in a way that serves the latter's interests. Because peer interpreters understand local circumstances and share the interests and perspectives of their group, their efforts to adapt the legislation to their own situation have the effect of personalizing it for the entire group.

Other situations in which workers choose to avoid the services of intermediaries were described by a representative of the Canadian Labour Congress. He referred to workers whose claim for benefits has been denied or to those who find themselves in trouble because of an alleged fraud. Most workers in this position cannot afford a lawyer,[39] and they have every reason to distrust the information that issues from the government's intermediaries. In these circumstances, workers who want to determine

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[38] B. Jackson, "Legislation in the Semiotics of Law" in H. van Schooten, ed., *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Liverpool, U.K.: Deborah Charles, 1999) 5 at 6.

[39] This turns out to be a blessing in disguise. According to a representative of the Canada Employment Commission, the lawyers who appear before the commission on behalf of workers usually do little to assist their client's cause. They are unhelpful because they are unfamiliar with the legislation and they do not understand how the system works. It appears that the costs of acquiring the knowledge necessary to do a good job of personalization exceed any benefit that could be derived from this client base.

whether they are being treated legally are driven to the *EIA* itself. They may receive some help from a union advisor or a community worker, but because the ratio of helpers to persons needing help is extremely low, most of the personalization will have to be done by the worker himself or herself.

These examples suggest that within the category of people whose lives are affected by legislation, there will always be some who bypass intermediaries and go straight to the act itself. Although the number of such readers is small, they should not be discounted for they have the best claim to the services of the plain language drafter.

E. Conclusion

The problem with writing for the general public is that it is impossible to personalize the legislation for such a diverse audience. The communities and subcommunities that constitute the general public have different needs, interests, and expectations; they comprise different semiotic groups. This makes it impossible to communicate directly and effectively with all of them at once. By trying to be all things to all people, the drafter risks disappointing everyone.

The problem with writing for those who will actually read the legislation is that this audience consists of professional advisors. Drafters thus wind up writing for the very intermediaries whose services they are supposed to render unnecessary. Obviously there is nothing wrong with wanting to improve communication with those who must read legislation as part of their job. If the drafter is successful, professionals will be able to do their work more efficiently. An improved text has the potential to reduce uncertainty and improve compliance, and it is almost certain to save someone time and money. But it is not designed to help outsiders enter the walled fortress. In choosing to write for the people who are already inside, the plain language drafters are no longer providing free translation, navigation, and explanation services to those who cannot afford their own professional. They are now serving the audiences who need them the least.

The advantage of writing either for the audience targeted by Parliament or, in the absence of a clear target audience, for the most vulnerable groups affected is that it assists those who have the best claim to assistance. It also sends an important message to the official interpreters of the legislation, a message that in my view has significant transformational potential. I would argue that the message sent by writing legislation for the targeted audience or the most vulnerable groups is sufficient to justify writing for these audiences even if most of their members never actually read the legislation. This potential is explored in the following part.

III. The Impact of Plain Language Drafting

One of the major concerns in any plain language project is how the official interpreters of the legislation will respond to change. What will they make of the new

vocabulary, the shorter sentences, and novel features such as flowcharts, explanatory notes, and examples? Those who oppose plain language drafting emphasize the costly uncertainty that may result from changing the words of the text. They fear that matters long ago settled will have to be litigated again. They also fear that interpreters will see change where none was intended. An interpreter who is used to seeing "A person shall" in legislation may be troubled by the words "A person must" and may conclude that the legislature would not have changed such well-established wording if it did not intend to change the meaning.[40] In my view, this preoccupation with the meaning of particular words and expressions misses the subversive potential of plain language drafting.

I believe that an obvious attempt to communicate with non-professionals sends a novel message to official interpreters about whom the law is for and the perspective from which it should be interpreted. I also believe that several aspects of plain language drafting have the potential to undermine the positivist assumptions on which both drafters and interpreters rely to justify practices that serve the status quo. At the least, plain language drafting "problematizes" the text and interpretation. It suggests that there may be more to the business of interpretation than simply decoding legislative sentences. Potentially, it draws attention to the way law, including statute law, is made up on an ongoing basis through its personalization in the daily life of citizens.

Before exploring these potentials, I should explain why I think it is important to focus on official responses to plain language legislation. After all, the whole point of plain language drafting is to communicate directly with the subjects of legislation and to focus on *their* interests and needs. Why should we concern ourselves with judges and police officers and bureaucrats?

The answer, of course, is that official interpreters have more power than the subjects whose lives are affected by the law. If there is a dispute about how legislation relates to particular facts, the dispute is resolved in accordance with the views of those who have the most power in the hierarchy of interpreters. I may claim an entitlement to an insurance benefit based on my own highly plausible interpretation of the *EIA*, but if the bureaucrat who processes my claim has a different interpretation, that interpretation will prevail. Of course, the bureaucrat's interpretation is subject to the Commission, whose view is subject to the Umpire, and so on up to the Supreme Court of Canada. In matters of interpretation, he who laughs last definitely laughs best. Whatever one thinks of judicial review, given the reality of legal hierarchy in Western democracies, the interpretations of the courts cannot be ignored.

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[40] Although this illustration seems silly it is based on a case in which the judge held that "must" is more imperative than "shall". See *Lovick* v. *Brough* (1998), 36 R.F.L. (4th) 458 at para. 7 (B.C. S.C.), online: QL (BCJ).

A. The Plain Language Message

As noted above, the courts are the primary audience for which legislation has been written in the past, and current interpretive rules and practices are grounded in this assumption. If you are a judge who is called on to interpret legislation that has been written with *your* linguistic competence, *your* knowledge base, and *your* cultural background in mind, interpretation is a warm bath. Everything you need to interpret the legislation successfully is already inside your head. That is why statutory interpretation does not require evidence. Courts take judicial notice of everything, from the ordinary meaning of language to common sense, from the norms of justice and right reason to the preferred policies of the legislature.

Plain language drafting does not directly attack or criticize this reliance by judges on what they already know, but it is likely to get them thinking about it. By foregrounding issues of language and communication, the drafter invites interpreters to become self-conscious about their work. This foregrounding occurs in a variety of ways. First, and quite importantly I think, statutes drafted in plain language do not *look* like ordinary legislation. The plain language version of the *EIA*, for example, looks like a user's guide to a software program or instructions for assembling a bicycle. Judges are going to suspect right away that this legislation has not been written for them, that an attempt is being made to communicate with a non-legal, non-professional audience; in case judges might somehow miss the implicit message, the first paragraph of the plain language version, under the title "Guide—How to use this Act", is explicit on the question of preferred audience:

> The information in this Act is organised to help people who are claiming unemployment insurance benefits. The most important information for claimants is found at the beginning of the Act.[41]

In various ways a message is sent to interpreters: in this enactment the legislature is attempting to communicate directly with its audience, and that audience is not composed of judges and lawyers.

In my view, this message invites interpreters to reflect on their current practices and to question the assumptions on which those practices are based. In particular, it invites them to reconsider the assumption that ordinary meaning and common sense are the same for everyone, that we all belong to the same semiotic group. By writing a human rights act for the least experienced members of society or social welfare legislation for potential claimants, a legislature directs interpreters to a particular context and perspective, and suggests that interpretation should be grounded in that context

[41] Working draft of the *EIA* Plain Language Project. The project is described above, text accompanying note 9.

and perspective. It thus acknowledges the gap between official interpreters and those audiences and makes it the responsibility of the interpreters to bridge the gap.

This directive has special implications for judges. It suggests that judges need to develop a non-textual, audience-based approach to interpretation that complements the plain language drafter's efforts to make legislation accessible to non-professionals. More precisely, it suggests that it is properly the business of judges to ensure that the legislation is appropriately personalized for its primary audience.

The approach recommended here entails significant change. Instead of relying on judicial notice of meaning and their own common sense, judges will have to receive and assess evidence about the audience for which the legislation was written. They will have to master an alien context and perspective. The evidence required for this purpose could come from experts in sociolinguistics or related fields; it could also come from the audience itself. A recent Ontario case, *Stewart* v. *Canada Life Assurance*,[42] illustrates the sort of thing I have in mind.

The issue in *Stewart* was whether a widow was entitled to be paid as beneficiary of her husband's life insurance policy. The insurance company alleged that the husband had made a material misrepresentation in the insurance application and on this ground refused to pay. The husband had suffered from ulcerative colitis since age thirteen. Asked on the insurance application whether he had ever been diagnosed as having "[d]iabetes, kidney or liver disease or any other disease of the stomach, intestines, rectum, bladder, prostate, or reproductive organ," he answered no.[43]

Medically speaking, Mr. Stewart was wrong—colitis is a disease of the lower or large intestine. From the point of view of persons suffering from colitis, however, this was not so obvious. An Angus Reid poll, commissioned by the widow in support of her claim, showed that most colitis sufferers think that they have a colon disease and that the colon is distinct from, rather than part of, the intestines.

The trial judge was hostile to this evidence. In his view the poll merely showed that "ordinary Canadians" have limited knowledge about the anatomy of the intestinal tract and he did not need evidence to tell him that. "I am perfectly entitled to take judicial notice of it," he wrote.[44] In my view, there are two things wrong with this response.

First, it shows how judicial notice permits judges to rely on their beliefs and impressions without having to test or justify them. Crucial assumptions are taken as established on the basis of personal conviction, which might be based on anything at all.

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[42] (1999), 14 C.C.L.I. (3d) 178, [2000] I.L.R. I-3792 (Ont. Sup. Ct.) [hereinafter *Stewart*], aff'd [2000] O.J. No. 2970 (C.A.), online: QL (OJRE).

[43] *Ibid.* at paras. 28, 30.

[44] *Ibid.* at para. 32.

Second, it confounds the response of colitis sufferers with the response of "ordinary Canadians". Although the poll was addressed to the general public and participants in the poll were randomly chosen, the evidence tendered by counsel focused exclusively on the response of people suffering from colitis. Colitis sufferers differ from "ordinary Canadians" in having a greater interest in and more information about the disease. That is what makes their response potentially more relevant. For purposes of understanding the question on the insurance application, colitis sufferers form a distinct semiotic group.

In tendering evidence about the understanding of colitis sufferers, counsel for the widow implied that the audience for which the question was drafted consisted of people suffering from the diseases mentioned. Since this was the primary audience, in the event of conflict its understanding should prevail over the understanding of other groups—such as doctors or insurance companies or the public at large. In effect, counsel was urging the court to take an audience-based approach.

My argument is that drafting legislation in plain language so as to single out a particular audience is at the least a justification to take an audience-based approach and, properly understood, is a directive to do so. In audience-based interpretation, the measure of correctness is whether the interpreter has personalized the legislation in an appropriate way.

B. The Death of Positivism?

Perhaps the most interesting dilemma arising out of plain language drafting is how to deal with the "bells and whistles" that are a prominent feature of many plain language statutes—the summaries and overviews, titles and headings, explanatory notes, process statements, flow charts, examples, and illustrations. These features clearly are part of the statute. But are they part of the law? Is the law co-terminus with the text? And if so, what counts as text?

At one time, the only parts of a statute considered to be enacted law were the words of the enacted provisions. Other parts—like headings and preambles—were inside the statute but external to the law. They were not text, but context. As such they could be relied on to assist interpretation, but only if the text itself was ambiguous or otherwise unclear. Finally, aids like marginal notes (and punctuation!) were neither text nor context but mere editorial gloss. They had neither legal force nor interpretive value.

Over the years these distinctions have blurred and their basis has been largely forgotten. However, they have never quite disappeared. Courts are still inclined to treat the numbered provisions of statutes as the text that declares the law and to give a lesser status to headings, titles, and marginal notes. Chances are they will respond in much the same way to the innovative techniques of plain language drafting. Is this response appropriate? Should drafters tell interpreters to adopt a different response?

There are practical reasons why drafters might want to treat certain features of plain language drafting as context rather than text and assign them an inferior status. Consider the use of examples illustrating the application of one or more legislative rules to a particular fact pattern. Examples of this sort are costly to prepare and costly to monitor and maintain. Whoever prepares them must fully understand the legislation and the context in which it will operate and must have sufficient imagination to see the ramifications of each example. And preparation is only the beginning. So long as the legislation remains in force, the examples must be monitored. Even a minor amendment of a provision may require adjustments to several examples. Similarly, changes in the operational context of the legislation may affect the import of an example. Someone has to assess the impact of any changes and prepare appropriate revisions. In all this work, there is significant risk of oversight and mistake.

Other concerns arise as well, having to do with uncertainty and loss of control. Because examples are vivid and emotionally engaging, they have the potential to hijack debate. The fear is that legislators and interpreters will be distracted by the examples and ignore the rules. Furthermore, examples can be misused. Based on *ejusdem generis* reasoning, they may be used to inappropriately narrow the scope of a benefit or prohibition that is set out in general terms in the numbered provision. Conversely, based on reasoning by analogy, they may be used to justify extending a benefit or prohibition to other analogous fact patterns even though these fact patterns are outside the language used in the numbered provision.

Underlying these concerns is a fundamental assumption about the nature of law. In nearly all discussions of examples and similar "aids", it is assumed that the law resides in the words of the numbered provisions, which are drafted in the form of general rules. These rules are drafted first, and once they reach their final form, the law is fixed: it is fully and definitively captured in the language of "the text". Everything the drafter does afterwards is then seen as an add-on extrinsic to "the text". It is no more part of the law than the explanations and advice a client might receive from his or her lawyer.

This way of looking at law and legislation rests on, and supports, a number of positivist assumptions: (1) law consists of general rules, (2) law achieves a material existence because it is embodied in texts, and (3) there is a sharp distinction between law and not-law, which corresponds to the distinction between text and context. On the basis of these assumptions, both drafters and interpreters have become accustomed to the following equation:

> [law] = [rule] = [the text in which the rule is declared] = [the meaning of the text as understood by the legislature] = [the meaning of the text as understood by the subject] = [the meaning of the text as understood by the official interpreter]

This equation is the basis for reconciling the current practices of drafters and interpreters with democracy and the rule of law. The law inheres in the text and the text is the same for everyone because meaning is the same for everyone.

Recent research by linguists and cognitive psychologists establishes that law cannot "inhere" in a text and that meaning is not the same for everyone—meaning derives from a particular context. A text is the sensory input that an individual takes in; its meaning is constructed by drawing inferences based on knowledge stored in the individual's memory, specifically knowledge that appears to be relevant having regard to the sensory input and the circumstances in question.[45]

Notice that the implication of this research is not that texts are meaningless, but rather that their meaning is incomplete. Although some texts are more constraining than others, *every* text has to be completed through numerous inferences that depend on knowledge not contained in the text. This is a modest claim, but if accepted it is enough to do serious harm to positivism. If meaning depends on the variable and unstable contexts that different readers (or different semiotic groups) bring to the text, then it is impossible to draw a bright line between text and context. The content of rules is shown to be variable and unstable, which is inconsistent with the very notion of a rule.[46]

The online publication of statutes promises to be equally destructive of positivist assumptions. The illusion of materiality created by ink on paper that is bound in heavy books is absent in electronic publication, which emphasizes the temporal, ephemeral, and subjective nature of knowledge. The impression of formality and special occasion created by a statute's distinctive appearance disappears in electronic publication, where everything is jumbled together. Online statutes do not look very different from other bits of information on the Web. As features like hyperlinks, sound, and video are added, it becomes ever more impossible to distinguish text from context.

Even if the online publication of legislation tries to conserve a recognizable text, users will bring to it the same expectations they bring to other online information. Online users already expect to be able to interact with a text and manipulate it by means of hyperlinks and other technologies so as to adjust it to their own interests and needs. They interpret this material non-textually. As the public becomes accustomed to new technologies, it will be increasingly difficult for legislatures to rely on a text-based vision of reality.[47]

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[45] This account is drawn from D. Sperber & D. Wilson, *Relevance: Communication and Cognition*, 2d ed. (Oxford: Blackwell, 1995) which reviews and synthesizes competing approaches to communication theory.

[46] Critical legal scholars have made a similar claim on many occasions; it is a major tenet of their critique. However, my analysis is based on empirical research by psycholinguists and communication experts and potentially is demonstrable in a court of law.

[47] See D. Howes, "e-Legislation: Law-Making in the Digital Age" (2001) 47 McGill L.J. 39.

While plain language drafting does not require interpreters to abjure their positivist beliefs, it does create occasions of doubt. For example, when traditional legislation is rewritten in plain language, interpreters are told that the words of the text have changed, but the law is the same. This directive presupposes that law is different from the text, that law is what is communicated by the text rather than the text itself. When legislation is published electronically, the boundaries of text start to disappear. On the Internet, everything is linked to everything else.

Detaching law from the text and blurring the boundaries of text lead to new ways of understanding both text and law; this suggests new equations. The text is no longer the law, but that which communicates the law. Accordingly, the law becomes that which is communicated, a disturbingly chameleon conception. These new equations have some noteworthy implications.

For example, if text is that-which-communicates, then it must include techniques like notes and examples, for they are relied on at least as much as numbered sections to communicate the law. There is no principled basis on which to identify the text with numbered sections while excluding headings or examples, and there are reasons why any attempt to do so would be unacceptable. The most important reason is fairness. The plain language drafter adopts new techniques in order to communicate the law directly to those whose lives and interests are affected. These techniques appear in published copies of the legislation and subjects are invited to rely on them. In my view, given this invitation to rely, official interpreters are estopped from suggesting that non-conventional forms of communication presented as part of the statute are context rather than text—that they do not declare the law, but merely gloss it. The whole point of plain language drafting is to try to bridge the gap between insiders and outsiders by writing for the outsiders. To deem that the techniques designed especially for this audience are less reliable communicators of the law than the numbered provisions is like removing the bridge to the fortress when the outsiders are halfway across.

When text becomes that-which-communicates, law becomes that-which-is-communicated. On this understanding, law becomes ephemeral and difficult to locate. When we refer to the content of a communication, do we mean a pre-existing notion in the mind of the communicator? Or do we mean the message that a person in fact receives as a result of interacting with the text? Clearly, there are problems with both views. The only certainty is that law is not a thing. It is not housed inside the statute book and taken out for a public showing when the book is opened; it is not literally embodied in the text. Law is best understood, or at least most accurately understood, as a relationship rather than a thing. It is a relationship initiated by individuals at moments of application—including self-application—of the text.

Plain language drafting is fundamentally a conservative effort, in the sense that it seeks to shore up and conserve our current conceptions of democracy and rule of law. It does not set out to undermine positivism and in truth it is unlikely to alter our basic

understanding of law and its relation to legislative texts any time soon. It does, however, invite a different way of looking at this relationship. Specifically, it draws the attention of drafters and interpreters to the malleable character of the text and the make-it-up-as-you-go-along character of law.

C. Remaining Issues

I have argued that if plain language drafters are serious about enhancing democracy and promoting the rule of law, they must write for the audience that has the best claim to their assistance, which is not necessarily the audience that is most likely to read what they have written. I have argued that the chief virtues of plain language drafting lie in the messages they send to official interpreters about the nature of law and the proper way to interpret statute law.

Many other issues raised by plain language drafting have not been addressed in this paper. For example, how should the government deal with pilot projects like the *EIA* rewrite? Should they become the prototype for a new format and set of drafting conventions so that all legislation will come to resemble the prototype? Or is the idea to do away with fixed formats and conventions and leave the drafter free to develop different texts that respond to the purposes and needs of particular audiences?

The expectation of many plain language drafters is that once they have discovered the techniques that facilitate direct communication with the general public, they will use these techniques to establish new conventions and a new format and style. In my view, this expectation is unrealistic. If effective communication is the goal, there are no universals and endless adaptation is unavoidable. Statutes that confer benefits on vulnerable groups in society must be drafted differently from statutes that deal with corporate tax. Codes of conduct for specialists must be drafted differently from statutes like highway codes. Monster acts like the *Criminal Code*[48] or the *Income Tax Act*[49] should probably be reorganized into a series of smaller acts that can be written for different audiences. And all acts must undergo frequent revision. What works for a given audience or subject matter is unlikely to remain static. As communication technologies change and evolve, as audiences develop new expectations, drafting will have to change and evolve in tandem.

In my view, plain language drafters must resist the temptation to turn the walled fortress into a public housing project in which every unit is the same. A commitment to direct and effective communication entails constant experiment and change in the service of maximum personalization.

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[48] R.S.C. 1985, c. C-46.

[49] R.S.C. 1985 (5th Supp.), c. 1.

Another unresolved issue is how plain language drafting relates to the growing harmonization of law across national borders and with international law. Harmonization is urged on legislatures not only in the service of global markets and the global economy, but equally to encourage the recognition of universal human rights. I have presented plain language drafting as a desirable law reform because it acknowledges that the general public consists of people with variable capacities, interests, needs, and assumptions, and it attempts to accommodate these differences using evolving technologies.

Globalization, on the other hand, appears to move in the opposite direction, toward greater abstraction and an indifference to local community. Instead of encouraging official interpreters to adopt the perspective of their local audience, it directs them to look to the interpretations of other countries or of international courts and agencies. Its strategy for dealing with difference is to obliterate it over time so that eventually we may all live in Esperanto heaven and constitute a single semiotic group.

This tension between plain language drafting and globalization illustrates the tension being played out on the Internet between preserving local difference and forging a global identity. On the one hand, the Internet encourages development of a global language and culture, yet at the same time it has fostered the creation of new localities and new semiotic groups. There is really no predicting what may emerge from this dialectic.

Conclusion

If the account of plain language drafting offered here is accurate—admittedly it is somewhat idealized—there is a good chance that it will end by destroying the statute book as we now know it. In its place we will have something new, something less stable and homogenous, something less easy to delimit and define. Instead of a book we will have "documents". Here is how Schriver describes the transition from books to documents:

> Computers, consumer electronics, and technologies for multimedia are radically modifying definitions of documents and books. Document designers who have spent their careers crafting documents such as hardback textbooks are finding themselves challenged by advances that allow them to break conventions and cross genre lines to design hybrid documents (for example, computer-based learning environments in which a traditional book may or may not play a part).
>
> No longer constrained to static and linear formats, document designers can now employ hypertext technologies to design "information landscapes" for practical use. And with the growing affordability of integrating text, animated

> images, and digital sound, it appears that within this decade, most consumers will get hands-on experience with documents that have a decidedly different look and feel than those they grew up with. Such developments ... put professionals in the auspicious position of being able to reinvent themselves and their documents, leaving the word "document" as a placeholder for a text-like artifact composed in print or in mixed media.[50]

Plain language drafters are the document designers of legislation. They currently find themselves, in Schriver's words, "in the auspicious position of being able to reinvent both themselves and their documents." This is an occasion to be seized. I am not reckless enough to imagine that plain language drafting will actually achieve direct and effective communication with the subjects of legislation—not in my lifetime. But the goal is worth pursuing and a number of benefits are likely to flow from the attempt.

First, the plain language projects undertaken in Canada and elsewhere engender research and discussion that contribute to the emerging discipline of legislative drafting. If nothing else, plain language drafting is valuable because it recognizes that the design of a legislative document has important political and legal implications. It is not just a matter of fooling around with the form.

Second, plain language drafting makes legislation easier to read and use—both for professional readers and those who wish to bypass the professionals and go directly to the statute itself. Testing to date suggests that most people find it better—easier, less frustrating—to work with plain language legislation. And whether or not they prefer it, people working with plain language legislation tend to make fewer mistakes.[51]

Finally, plain language drafting is an invitation to the official interpreters of legislation to adjust their view of what they do. By undermining the simple equation of [law] = [rule] = [text] = [meaning of the text], it draws attention to the improvisational character of law. By attempting to communicate directly with the persons affected by the legislation, it encourages interpreters to adopt an approach that favours the most appropriate audience. These modest improvements are obviously not sufficient to produce instant democracy or genuine rule of law, but they draw attention to the problem; they make a start.

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[50] Schriver, *Dynamics*, *supra* note 37 at 4-5.

[51] For a summary of the practical benefits of plain language drafting, see J. Kimble, "Answering the Critics of Plain Language" (1994-95) 5 Scribes J. of Legal Writing 51.