Beyond Linguistic Surfaces

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In Ontario, a very fine Crown Attorney named Jimmy Stewart tells the following story and claims that it is absolutely true.

The Accused was the sort of person who shows up in provincial court now and again, charged with public disorderliness and still a bit disoriented as a result of revelries the night before. The judge—one imagines the sort of judge who would look down from a very high bench, peering over half lenses—said sternly, "Mr. Crawford, are you aware of the minimal mandatory monetary penalty for your offence?"

The Accused stared silently.

"Mr. Crawford," the judge repeated, this time more loudly, "are you aware of the minimal mandatory monetary penalty for your offence?"

Still no response.

The judge was nonplussed. "MR. CRAWFORD," he said, even more loudly, apparently on the verge of finding the Accused in contempt of court, "ARE YOU AWARE OF THE MINIMAL MANDATORY MONETORY PENALTY FOR YOUR OFFENCE?"

This time the public defender intervened with a timely translation. "He wants to know if you have any idea how much this is going to cost you."

In North America—both in Canada and in the United States—the judiciary has long been persuaded that it has a responsibility to communicate clearly with ordinary citizens, people not schooled in the language of the law. There is in something known as a "plain English movement," widely recognized in North America even among lawyers who cannot or choose not to practice it. People associated with this movement often admonish lawyers to avoid certain undeniably bad habits: passive voice, nominalizations, legalisms, and other stylistic baggage that can make prose turgid and impenetrable.

Sometimes, however, this advice does not reach beyond stylistic surfaces. There are other, more basic and more pervasive problems in legal writing that must be addressed before stylistic revision can have much of an effect. Beyond stylistic surfaces, there are questions of voice, of audience awareness, and of what I like to call the "architecture" of a legal document. In this paper I will argue that problems beyond linguistic surfaces cannot be neglected in attempts to make legal writing intelligible.

How Bad Can It Get?

A case in point: the following sentence appeared on ballots in the State of Alabama some years ago. It was a proposed amendment to an antiquated constitution. It was supposed to be read and understood and voted on by ordinary citizens.

> To amend the Constitution of Alabama of 1901 by authorizing legislation to permit municipalities and counties to provide for the redevelopment and revitalization of areas within their corporate limits or boundaries by creating tax increment districts; to provide for the payment of all increased *ad valorem* taxes resulting from such redevelopment or revitalization to the municipality or county which created the district until any indebtedness incurred with respect to such project has been paid; to provide that no such payment shall be made to the extent that it jeopardizes the payment of any bonded indebtedness secured by any tax applicable in the proposed district with respect to any such project; to provide that any such indebtedness shall not constitute a charge against any constitutional debt limit if it is payable solely from such increased *ad valorem* taxes; to ratify and approve legislation adopted in furtherance of the powers hereby conferred. (Proposed by Act No. 87-634)

Even if English happens to be your first language, the sentence is incomprehensible. Notice, however, that its incomprehensibility does not seem to result from an excess of passive voice or legal jargon beyond the ken of ordinary citizens. There is something fundamentally wrong with the "voice" implied. It is the language of a committee. It is not the sort of language any polite human being would speak to a friend or neighbor in sincere attempt to communicate.

That voice—the voice of friend to friend, neighbor to neighbor—has a counterpart in print media. It is the voice of skilled journalists. I call it the "generic journalistic voice"—a voice that conceals the opinions and the passions and the personal origins of the writer. It is the sort of voice that, in theory at least, is the news writer's attempt to convey information without bias or interpretation—the sort of voice that we like to find in news stories as opposed to editorials.

Examples of this voice occur daily on the front pages of competent newspapers. One example occurred in the *Tuscaloosa News* (newspaper in central Alabama) the day *after* the impenetrable amendment appeared on the ballot:

> Amendment Four would allow city and county governments to issue bonds to revitalize slum areas and recover the investment through increased property taxes.

I will not pretend that this synopsis of the amendment is synonymous with the original. I do contend, however, that it communicates to its intended audience more effectively than the original; that the difference between the two versions goes well beyond topical adjustments to style; and that legal writers in general would do will to adapt the practice of good journalists as their model when they are at all serious about communicating the law to ordinary people who are expected to abide by it.

For Whom Do Lawyers Write?

Perhaps the most common defect in legal writing is a total absence of audience awareness. Texts "work" when readers don't have to parse every other sentence or run to a dictionary every few words. Texts like the proposed amendment mentioned earlier do not work because the audience implicit in them is not just a fiction, but a chimera. Writing of this sort is unfit for human consumption.

It would be easy to add numerous examples, but I will limit myself to one—a jury instruction given in a Virginia murder trial resulting in a conviction that was upheld by the United States Supreme Court [*Weeks v. Angelone* (176 F.3d 249, affirmed)]:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt, at least one of the following two alternatives: one, that, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or two; that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhumane, in that it involved depravity of mind and aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death; or, if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment, or imprisonment for life and a fine of a specific amount, but not more than $100,000.

If you skipped over the quoted material, hoping to glean its contents from what I am about to say, or even if you read it partially, giving up when your eyes glazed over with incomprehension, then you reacted the way most readers react. This in itself might be construed as evidence against the clarity of the instruction. Again, the problem is not with ordinary stylistic offenses. The problem is that the voice is not human. It is not the voice of a judge talking to members of his or her community—talking to friends and neighbors—in language they could be expected to understand.

At trial, the jury asked for clarification. They wanted to know whether they were *obliged* to recommend the death penalty if there were aggravating circumstances, or merely *allowed* to. The judge told them simply to read the instruction again—a tactic that makes about as much sense as repeating "minimum mandatory monetary penalty" with increased volume. It was, however, a tactic that made sense to the majority of the U. S. Supreme Court, which upheld the sentence because the instruction had been declared adequate in an earlier decision by the same Court (*Buchanan* v. Angelone, 522 U.S. 269, 277). The fact that the jurors asked for clarification was not sufficient to persuade the Court that the instruction was unclear.

It was a Frenchman, Michel de la Montagne, who is often credited with inventing a writing style that was both elegant and accessible to ordinary readers—"*parents & amis*" (family and friends). Centuries later, the Canadian novelist and essayist, Hugh MacLennan expressed virtually the same concept of audience in an essay in which he mused about the most effective voice for essayists. The successful essay, he tells us,

> depends . . . upon a relationship between author and reader so close that at times the author at his desk has the illusion that he is lounging in his library late in the evening of a well-spent day, a glass of beer at his elbow and a personal friend in the opposite chair.

This is the conception of an audience that lawyers and judges would do well to develop. It would do more to improve their writing than any number of stylistic prescriptions or syntactical spreadsheets. Let them read their work aloud and decide whether it would work as dialog in a play in which one neighbor is talking over a fence to another. Something like "If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt, either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the

defendant at death" would not pass muster as dialog, unless of course, the play were a farce, a satire upon the mannerisms of the legal profession.

Of all forms of legal writing, jury instructions are most in need of the sort of clarity that newspaper reporters seem to achieve without effort. But again, achieving that clarity is not just a matter of patching the style. It goes beyond style to a consideration of audience, and from the consideration of audience the creation of a suitable voice, normally a voice very much what the lawyer or judge would use in conversation to an actual friend or neighbor in a mood to swap stories about the business of the day.

The Architecture of Legal Writing

Before making any generalizations about the architecture of legal writing, it is necessary to distinguish between two very different genres. Some legal writing is intended to be read; other legal writing is intended to be consulted. The difference between these two genres is reflected in their architecture.

Writing intended to be consulted includes statutes, codes, contracts, charters, guaranties, and regulations. These documents are generally future in orientation. They contemplate various contingencies and stipulate how those contingencies are to be dealt with.

Because this sort of writing is intended to be consulted rather than read, the actual sequence in which it is presented is often inconsequential. What matters is that readers can find their way to relevant information when they need it. Ease of retrieval can be achieved in any number of ways, including the addition of a syllabus, or a table of contents, or even an index. Once an aid of this sort has been added, the sequence of the information may be associative or, in some instances, even random.

The second sort of writing, writing intended to be read, includes most genres associated with jurisprudence: arguments, briefs, factums, motions, judgments, and decisions. These documents are generally past in orientation and factual in content. But more importantly, they are argumentative or explanatory. The writer has reached certain conclusions at the end of what is supposed to seem like a logical process. This sort of writing, therefore, must be organized in a way that leads the reader logically from premise and facts to inferences. Random order will not work.

One of the great paradoxes of most judgments and pleadings is that although they can seem overwhelmingly complex, they are fundamentally very simple. The same simple structure can be unearthed in every one that is competently written. One party says X; the other party may say Y.

The easiest way to organize a legal argument, therefore, is to begin with the opposing party's position, indicate what is wrong with it, and then draw suitable inference. This pattern can be diagramed as follows:

OPP (Opposing Party's Position)
FLOPP (Flaw in Opposing Party's Position)
CONCLUSION

Nothing could be simpler. If the writer is a judge constructing a decision rather than an attorney constructing a brief, the only adjustment necessary is to change "Opposing Party" to "Losing

Party." The body of an effective judgment includes a statement of the losing party's position so clear and effective that even the losing party will admit that it is well phrased. Following this, however is the judge's clinically dispassionate diagnosis of the flaw in the losing party's position and a suitable inference or conclusion. In complex cases—cases involving more than one issue—this pattern is simply repeated as many times as there are issues.

Once the body of a pleading or judgment has been constructed, the writer is in a position to write an introduction and a conclusion. The conclusion in a pleading is simply a summation or recapitulation of the argument. The conclusion of a judgment may include a recapitulation of the argument, but it often need only include the final order.

The most effective introductions indicate, within this space of a single page, who did what to whom and what issues are before the court. Once the issues are expressed, they serve as predictors of things to come. By the end of the first page, the reader can guess both the topics to come and the sequence in which they will be treated.

Here, for example, is the beginning of a single-issue case:

> The Appellant entered a large retail store by the usual entrance during business hours for the sole purpose, as he later admitted to the police, of hiding until the store closed and then stealing a large quantity of clothing. He carried out his intention but was caught by store employees before he was able to leave the store. On these facts, can he be convicted of the offence that he did "break and enter . . . and . . . commit an indictable offence"?

Notice that the reader knows who did what to whom and what the court is expected to decide. A beginning of this sort provides the context in which all subsequent arguments and details will make sense to a reader, even to a reader unfamiliar with the case in advance.

Here is an example of a beginning in a more complex case:

> Mr. Smith has been convicted of selling marijuana to college students. The Crown asks the Court to have regard to the following codified sentencing objectives in sentencing Mr. Smith:
>
> - denunciation of unlawful conduct
> - deterrence of the offender and other persons where necessary
> - promotion of a sense of responsibility in offenders and acknowledgment of the harm done to *victims* and the community.

This *might* have been an excellent beginning. It states who did what to whom. It foreshadows three distinct issues. These issues could serve as headings, dividing the pleading into logical parts. Unfortunately, the writer followed this beginning with ten headings rather than three, several of them repetitive. These were the headings:

1. Breach of Trust
2. Acknowledgment of Harm to Victims and Community
3. General Deterrence
4. Denunciation
5. Consecutive Sentences and Totality
6. Crown Position as to Sentence

7. Unfitness of Conditional Sentence
8. Breach of Trust
9. Denunciation and General Deterrence
10. Proportionality

Verbosity is not just a stylistic flaw. It is a structural flaw as well. In this example, the writer made several arguments more than once. If he had been more attentive to the structure of the text—its architecture—he would have noticed the repetition, eliminated it, and thereby reduced the argument to half its length without omitting a single essential point.

Motives for Obfuscation

The motive for obscurity in legal writing is almost always the same: the desire to be perfectly clear. As any linguist knows, natural language is rotten with ambiguity that no one, not even the *Académie Française*, can control. While this ambiguity is a source of richness in literary texts, it is a source of headaches in legal documents. Lawyers can be incredibly naïve about their belief in "plain and ordinary meaning" when they interpret texts; but as writers they seem intuitively aware of the inherent ambiguity of language. This awareness accounts for the definitions commonly included in contracts and statutes. Lawyers define terms to colonize them, hoping to limit their ambiguity at least within the precincts of a particular legal situation. They know they cannot rely on ordinary dictionaries to provide the meanings they want their words to convey.

For example, in writing a contract or a statute about aircraft, "aircraft" might well need to be given more precision than a dictionary would provide. Are weather balloons aircraft? Are toy balloons aircraft if carry small packages or messages aloft? Are satellites aircraft? Are space stations aircraft? Are airplanes aircraft when they are on the ground? Are they aircraft when they have been mothballed and mounted on pedestals as military monuments in public parks? Are hovercraft aircraft? Rockets? Missiles? Hang gliders? Parasails? All these are questions that would have to be answerable in the context of a statute regulating, say, licensing or insuring aircraft, or establishing liability in accidents involving aircraft.

It is understandable, then that in writing such a statute, legislative drafters in Ottawa included the following sentence to make the definition of aircraft perfectly clear:

> "aircraft" means any machine, including a rocket, capable of deriving support in the atmosphere from reactions of the air, other than a machine designed to derive support in the atmosphere from reactions against the earth's surface of air expelled from the machine.

Unfortunately, this definition probably creates more confusion than clarification. Because Canada is Canada, this definition is accompanied by a French version that is certainly faithful to the English, even to the extent of achieving virtual incomprehensibility:

> " aéronef " Tout appareil, y compris une fusée, qui peut se soutenir dans l'atmosphère grâce aux réactions de l'air, à l'exclusion d'appareils conçus pour se maintenir dans l'atmosphère par l'effet de la réaction, sur la surface de la terre, de l'air qu'ils expulsent.

Here again is a problem that is not to be remedied by stylistic revision. The definition needs to be reconceived entirely, with due consideration both to the potential reader and to the intention of the legislative assembly. After a bit of study, it seems that Parliament did not intend for certain

sorts of flying equipment to be included in the statute. The remedy, therefore, would have been simply to say so: "For purposes of this statute, hovercraft are not considered aircraft." That would have done it.

There are, of course, other motives for obscurity in legal writing. One might be called the Law-Review Editor's Syndrome. It occurs when students of the law learn the lingo of one obscure legal subspecialty and speak it or write it with an air of self-satisfaction, suggesting, perhaps, that "if you don't understand this, it's because you're just not as smart as I am." Of course, professors of linguistics and literature can also be enamoured of jargon that no one understands but themselves. But lawyers are as good as anyone when it comes to astonishing the bourgeoisie with the claptrap of scholarship. One of my favorite examples occurs in a U. S. Supreme Court case, *Keeney v. Tamayo Reyes,* 504 U.S. 1, (1992):

> Again addressing the issue of state procedural default in Coleman v. Thompson, 501 U.S. (1991), we described Fay as based on a conception of federal/state relations that undervalued the importance of state procedural rules, id. at (slip op. 35), and went on to hold that the cause-and-prejudice standard applicable to failure to raise a particular claim should apply as well to failure to appeal at all.

Whoever wrote this—it could have been Justice Byron White, to whom it is attributed, or it could have been an anonymous clerk, recently graduated from a prestigious law school—undoubtedly understood it when she or he wrote it. But it is a private language, not at all fit for consumption by the bar at large, let alone the jailhouse lawyers to whom it applies. A very important principle was at stake. This case altered (some would say "eroded") the concept of *habeas corpus* as it had been understood for centuries in Anglo-American law. It is the sort of decision that every criminal lawyer in America needs to understand, not just lawyers who argued this particular case. Even these, however, would probably have a hard time deciphering this passage if it were presented to them cold, eight years after the decision was published.

A third motive for obscurity in legal writing often overlaps with the other two. It is the desire to get it "right." Between this desire and its satisfaction, however, something often goes awry. We can infer this motive in virtually every example cited up to this point. The people who drafted the proposed amendment to the Alabama constitution no doubt realized that, were the amendment approved, it would be subjected to microscopic scrutiny by local governments wanting to raise taxes as well as by local taxpayers hoping to find loopholes. Similarly, the people who drafted the statute about aircraft in Canada had probably spent hours discussing scenarios in which the statute could be misinterpreted and misapplied.

Saddest of all, however, is the trial judge who refused to explain a jury instruction because it had already been approved by the Supreme Court in a previous case. The judge knew that any interpretation—even if he were to tell the jury what *he* thought the instruction meant—would run the risk of yet another review and reversal. In a sense, then, this judge was not writing the language of the law. The language of the law was writing him. He was merely a conduit for words that someone else had written, language that passed through him without being fully understood—or at least not sufficiently understood that he felt comfortable explaining it to non-lawyers in his own words. He was possessed, as lawyers often are, by the desire to get it "right." And he did get it right, if the Supreme Court is to be believed, even if it was incomprehensible. And on March 16, 2000, at a correctional facility in the Commonwealth of Virginia, Lonnie Weeks was executed, despite pleas for commutation by the children of the victim, and despite

evidence that the jurors would not have recommended the death penalty if they had known they had another option.

Techniques for Remedying Obscurity in Legal Writing

The normal remedies for obscurity and turgidity in legal writing are too widely known to need repetition on this occasion. Avoid legalisms. Apply readability tests.
Write short sentences. Use ordinary words. Prefer active voice. All good advice for achieving workmanlike prose.

But the art of legal writing consists, at least in part, in knowing when to ignore the rules. Every rule should be understood to have an "except when" clause appended to it. The following are a few of the common and commonsensical rules, to which are appended some necessary codicils along with examples to illustrate that it is sometimes better to break the rule.

1. **Use active voice** (except when passive voice works better)

> Ms. O'Riley was last seen at her bother's wedding reception.

2. **Write short sentences** (except when a well written long sentence works better)

> With his popularity, if Eisenhower had said that black children were being discriminated against long after the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, that the Supreme Court of the land had now declared it unconstitutional to continue such cruel practices, and that it should be the duty of every good citizen to help rectify more than eighty years of wrongdoing by honoring that decision—if he had said something to this effect, I think we would have been relieved of many of the racial problems which have continued to plague us. Earl Warren, *Autobiography*

3. Organize point first (except when you want your readers to consider your evidence before they see your conclusion, or when the point is obvious from context)

> Inside a relatively modern exterior in a modest, busy part of town, was a cramped, dark, dank interior. Large, four-sided cages each held sixteen men, with disheveled beds and an open toilet. Inmates are kept inside these cages twenty-four hours a day throughout their often prolonged stays in the Atlanta Jail. There is no privacy and no activity at all, artificial air and light, and nothing at all to do day and night. A dismal atmosphere, a constant din, and a wretched stench pervade the place. Ronald L. Goldfarb, *Jail: The Ultimate Ghetto*

4. **Avoid metaphors** (except when a metaphor is the best way to make a point)

> The machinery of government would not work if it were not allowed a little play in its joints. *Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931)*

5. **Avoid rhetorical flourishes** (except when they make your writing effective and memorable).

> The criminal is to go free because the constable has blundered. Benjamin Cardozo, *People v. Defoe*

How Good Can It Get?

Eloquence in legal writing did not die with Cicero. Numerous examples of legal prose are quite properly considered "literary" (i.e., if we define literature as writing worth reading for pleasure). "Law and Literature" is, in fact, a separate heading in the Library of Congress; and the books in that section include not only literary treatments of the law, but actual legal language that is notable for its literary quality. A single passage from Brandeis's opinion in *Olmstead v. United States* (227 U.S. 438, 471, 485) is enough to show how good legal writing can be:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

It would be a mistake, however, to imagine that legal writing is good only if it has the formal eloquence of Brandeis, or of other talented jurists in what might be called a Ciceronian tradition. The "goodness" of legal writing is not absolute. It depends on context. The Brandeis passage was perfect for its context; but it would be inappropriate in a contract, or a statute, for example, or even a jury instruction.

For most legal writing, excellent models are found almost daily in big-city newspapers and weekly magazines, like the *New Yorker*, when they turn their attention to the business of the courts. Good journalists write about the law in language that is clear to ordinary readers without compromising precision. They know how to tell a story, which is a skill every lawyer needs to master. An opening narrative that grabs the reader's attention—and, if possible, subtly seizes the moral high ground—is an invaluable aid to persuasion. Here, for example, is a first paragraph that manages to bleed all interest from a tragic situation:

> Plaintiff hereby moves this Court, pursuant to Rule 16 of the Alabama Rules of Civil Procedure, for leave to re-add the expert testimony of Dr. William Frankel and add the video testimony of Dr. Richard Miller and Dr. Elizabeth Welch.

Beginnings of this sort are standard fare in American jurisprudence. Judges who read them must react the way a character in Annie Proulx's *The Shipping News* reacted to the first efforts of a novice newspaper reporter: "It's like reading cement." And yet the facts of the case provided ample material for grabbing any reader's attention:

> Jimmy Johnston is dying of cancer. He does not smoke. His disease is the result of secondary smoke he breathed from his wife, who has been addicted to cigarettes for more than forty years.

A beginning of this sort establishes a context in which the technical evidentiary squabble has human significance. And a judge who is aware of what is at stake is likely to take a different approach to what otherwise might seem an academic debate.

Summation

Good legal writing is an art, not a science. It requires, among other things, accurate guesses about what readers already know, what they need to be told, what words they understand, what words they do not understand, and what sequence will make most sense to them. It is not the sort of skill that can be reduced to a recipe, or certified by a style checker on a computer. It requires conceptualizing an audience as ordinary friends and neighbors. For this reason, the best legal writing often seems breathtakingly ordinary. It can be as plain as the front page of any good newspaper. In some instances—jury instructions, for example—it can seem even plainer than journalism. It can read like dialogue, like one neighbor talking to another. But it can also reach extraordinary heights, as Brandeis does in the passage from *Olmstead* quoted above.

The cause of incomprehensibility in legal documents is much deeper than their stylistic surfaces. It lies in structural failures, the inability to arrange material in a sequence that makes sense to readers as they read it. It lies in a failure of voice—the refusal of lawyers to address their readers, including other lawyers, as they would address their friends and neighbors.

While other professionals may have a right to technical jargon intelligible only among themselves, the law has a way of touching all our lives. When jurors are asked to apply legal principles to facts, when defendants are expected to understand the charges brought against them, when ordinary people are told to abide by statutes, ordinances, contracts, settlements, and other legal documents, common sense dictates that these documents be written in language they can understand.