

THE END OF LEGALESE: THE GAME* IS OVER

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* I use the word "game" to emphasize that legal language is not taken seriously enough. I do not use the word in the Wittgensteinian sense of "language game," though the information in this article may provide some useful data for a Wittgensteinian analysis. See L. Wittgenstein, *Philosophical Investigations* (3d ed. 1968); W. Probert, *Law, Language and Communication* (1972); H. Pitkin, *Wittgenstein and Justice* (1972).

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INTRODUCTION

Criticizing lawyers' language has been an amusing parlor game for many generations now, but it has done little to get rid of legalese. Played in a back room, and on special occasions only, the game is tolerated by most, taken seriously by few. Tell a lawyer that this is no game, that the language of this contract or that statute must actually be rewritten because it is gibberish, and you are likely to get the reaction of a Shriner whose fez has been knocked off by pranksters: the eyes smolder and the body quivers like Jello.

It is not surprising that lawyers insist that criticism of their language is just a game, for their language loses every round. With cynical rhetoric bolstered by uncontradicted empirical evidence that legal language does not do what it is supposed to do, does many harmful things that it is not supposed to do, and is quite unnecessary, the critics score their points. The defenders respond with bluster, expressions of faith, and finally, silence in the face of the empirical evidence. But ultimately the debate with the critics of legalese is shunted aside and dismissed as mere pastime. Meanwhile, in the front office it is business as usual: the contracts, wills, statutes, regulations and letters gush forth from the ancient fountainhead of legalese.

Things are changing. It has become apparent to growing numbers of people that criticizing legal language is not just a game. It is now time to call the bluff of the defenders of legal language. To dismiss criticism of legalese as a mere game is to pretend that there are no real stakes. But just as it is obvious to every school child who has ever scrawled a dirty word on the chalkboard that language is power, so it ought to be obvious to all of us that lawyers' language is power exercised by a power elite and that the stakes in it are very real and very high. Let us take a careful, comprehensive look at the critiques and defenses of legalese, at the empirical evidence, and at what is really at stake.

I

CRITICISMS OF LEGALESE

The criticisms of lawyers' language, running across the centuries to our day, boil down to essentially two: its style is strange, and it cannot be understood.

These were Thomas More's complaints when he wrote that the Utopians' laws were few and simple because they thought that no one should have to obey a law which was "too long for an ordinary person to read right through,

or too difficult for him to understand."¹ Jonathan Swift took aim at the same targets when he told of the society of lawyers who spoke in "a peculiar cant and jargon of their own, that no other mortal can understand."² And Thomas Jefferson sarcastically made the same points when he drafted a bill and sent it to a friend:

I should apologize perhaps for the style of this bill. I dislike the verbose and intricate style of the modern English statutes. . . . You however can easily correct this bill to the taste of my brother lawyers, by making every other word a 'said' or 'aforesaid' and saying everything over two or three times so as that nobody but we of the craft can untwist the diction, and find out what it means"³

About the same time, Jeremy Bentham, accusing lawyers of "poisoning language in order to fleece their clients,"⁴ denounced legalese as "excrementitious matter," "literary garbage."⁵

The criticisms by Moore, Swift, Jefferson and Bentham are merely the classics of their epochs, standing at the top of a heap of protests.⁶ In our own time, the protests continue to mount.⁷ The modern classics are books by two law professors, Fred Rodell⁸ and David Mellinkoff.⁹ The late Fred Rodell

1. T. More, *Utopia* 106 (P. Turner trans. 1965) (1st ed. Louvain 1516).

2. J. Swift, *Gulliver's Travels* 154 (U. Chi. ed. 1952) (1st ed. London 1726).

3. Letter to Joseph C. Cabell (September 9, 1817), in 17 *The Writings of Thomas Jefferson* 417-18 (Lipscomb ed. 1905).

4. J. Bentham, *Works* 260 (Bowring ed. 1843).

5. *Id.* at 236.

6. See D. Mellinkoff, *The Language of the Law* 33-275 *passim* (1963).

7. Exec. Order No. 12,044, 3 C.F.R. 12,661 (1978); G. Block, *Effective Legal Writing* (1981); R. Flesch, *How to Write Plain English* (1979); R. Flesch, *The Art of Plain Talk* (1946); R. Goldfarb & J. Raymond, *Clear Understandings: A Guide to Legal Writing* (1982); J. Redish, *The Plain English Movement*, in *The English Language Today: Public Attitudes Toward the English Language* (S. Greenbaum ed.) (in press); L. Squires & M. Rombauer, *Legal Writing in a Nutshell* (1982); R. Wydick, *Plain English for Lawyers* (1979); Beardsley, *Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles!*, 16 *Cal. St. B.J.* 65 (1941); Beardsley, *Wherein and Whereby Beardsley Makes Reply to Challenge*, 16 *Cal. St. B.J.* 106 (1941); Bennion, *The Renton Report*, 125 *New L.J.* 660 (1975); Cavers, *The Simplification of Government Regulations*, 8 *Fed. B.J.* 339 (1947); Conard, *New Ways to Write Laws*, 56 *Yale L.J.* 458 (1947); Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 *Va. L. Rev.* 841 (1977); Gerhart, *Improving Our Legal Writing: Maxims from the Masters*, 40 *A.B.A. J.* 1057 (1954); Hager, *Let's Simplify Legal Language*, 32 *Rocky Mtn. L. Rev.* 74 (1959); Lavery, *The Language of the Law*, 7 *A.B.A. J.* 277 (1921), 8 *A.B.A. J.* 269 (1922); Littler, *Legal Writing in Law Practice*, 26 *Cal. St. B.J.* 28 (1956); *Plain English in the Law*, 62 *Mich. B.J.* 941 (1983) (symposium); Raymond, *Legal Writing: An Obstruction to Justice*, 30 *Ala. L. Rev.* 1 (1978); Weissman, "Supremecourtese": A Note on Legal Style, 14 *Law. Guild Rev.* 138 (1954); Weissman, *The "No-Nonsense, Straight-from-the-Shoulder" School: Another Note on Legal Style*, 20 *Law. Guild Rev.* 24 (1960); Winter, *Legalese, Baffleleg and Plain Language Laws*, 4 *Can. Community L.J.* 5 (1980); Wright, *Is Legal Jargon A Restrictive Practice?*, in *Psychology In Legal Contexts* 121 (S. Lloyd-Bostock ed. 1981); Note, *A Model Plain Language Law*, 33 *Stan. L. Rev.* 255 (1981); Bigolski & Frangie, *Legalese, Schmeegalese: California Law in Plain English*, *L.A. Daily Journal Report*, Sept. 14, 1979, at 4.

8. F. Rodell, *Woe Unto You, Lawyers!* (1939).

9. D. Mellinkoff, *supra* note 6. See also D. Mellinkoff, *Legal Writing: Sense & Nonsense*

scorned legal language as “nonsense” and “solemn hocus-pocus” that reads as if it had been “translated from the German by someone with a rather meager knowledge of English.”¹⁰ It serves only to “conceal the confusion and vagueness and emptiness of legal thinking”¹¹ A quarter century later, Mellinkoff picked up the same torch, used it to throw incandescent scholarly light on the history of lawyers’ language, and concluded that—for no good reason at all—lawyers maintain a “specialized tongue”¹² that is “wordy,” “unclear,” “pompous,” and “dull,”¹³ as well as imprecise¹⁴ and less intelligible than ordinary English.¹⁵

In sum, the complaints about legal language are directed at both its style and its unintelligibility, and these are separate objections. It is a mistake to assume, as many do, that style is faulty only when it clouds meaning, for there is a cry of anger in these protests against style itself. “Said dog did bite aforementioned leg” will offend the critics though its meaning is clear. It is useful, therefore, to focus on these criticisms independently.

A. *The Strange Style*

Like styles of cooking or clothing, styles of writing come and go; there are large shifts in style over time, and at any one time there are faddish devotees of competing cuisines, hemlines, and approaches to prose. The adage that there is no disputing questions of taste is surely the soundest policy to follow in matters like these, and is the policy generally adopted in our modern society. Thus, criticizing your colleagues’ prose is normally as much of an indiscretion as telling them that they lack sartorial finesse.

But there are limits. Even tolerant, pluralistic publics would twitter or raise their eyebrows at persons who, in the latter half of the twentieth century, seriously insist upon wearing medieval coats of armor to work. And if these modern-day medievalists were members of an exclusive club wielding considerable power over the public, their armor would understandably provoke fear or resentment.

Legalese, the medieval armor of lawyers, has precisely that effect. It is not merely different as prose styles go; it is strange in the extreme, off the edge of the range of normal prose styles even in a diverse society. It is so out of touch with ordinary language that—in the hands of a powerful, exclusive profession—it becomes at best a symbol of alienation and at worst a tool to intimidate and exploit the public.

Come now, you say, is legalese really *that* different from ordinary Eng-

(1982); Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. Rev. 423 (1983).

10. F. Rodell, *supra* note 8, at 185.

11. *Id.* at 189.

12. D. Mellinkoff, *supra* note 6, at 11.

13. *Id.* at 24-29.

14. *Id.* at 290-398.

15. *Id.* at 415-36.

lish? The linguists who have given the matter some thought have concluded that it is. For some, it is a separate language or dialect, for others a *register* of English:¹⁶ that is, a class of language which differs in formality and other features depending on the social situation (for example, the registers of politics or sports). Brenda Danet points out that legal English also meets the criteria of *diglossia*, or double-speech, a term coined to describe the concurrent existence of high and low varieties of the same language.¹⁷ Among the characteristics of diglossia seen, for example, in Swiss-German or modern Greek, are that the high variety has a more complex grammatical structure, is learned through formal education, and is considered superior by its speakers.

Exactly what is it that makes legal language so different? Mellinkoff¹⁸ made the first attempt to describe the differences systematically, and linguists have made at least six other attempts in recent years.¹⁹ Combining the linguists' findings with Mellinkoff's, and adding some examples and modifications of my own, I have assembled here a composite list. It is divided into four categories: vocabulary, syntactic features, organization, and style.

1. Characteristics of the Language

a. Vocabulary

- Long words.
- Rare Old and Middle English words.
Examples: *aforsaid, witnesseth.*
- Latin phrases.
Examples: *nolo contendere, assumpsit.*
- Common words with uncommon meanings.
Examples: *prayer, consideration.*
- Law French.
Examples: *estoppel, voir dire.*
- Terms of art.
Examples: *eminent domain, master and servant.*
- Argot.
Examples: *at issue, toll the statute.*
- Formalistic formulas.

16. Danet, *Language in the Legal Process*, 14 L. & Soc'y Rev. 447, 470-71 (1980).

17. *Id.* at 473-74.

18. D. Mellinkoff, *supra* note 6, at 11-29.

19. D. Crystal & D. Davy, *Investigating English Style*, at 193-217 (1969); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979); Danet, *supra* note 16, at 474-84; Finegan, *Form and Function in Testament Language*, in *Linguistics and the Professions* 113 (R. DiPietro ed. 1982); Shuy & Larkin, *Linguistic Considerations in the Simplification/Clarification of Insurance Policy Language*, 1 *Discourse Processes* 305 (1978); Gustafsson, *Some Syntactic Properties of English Law Language*, Dep't of English, U. Turku, Finland (Pub. No. 4, 1975) (summarized in Danet, *supra* note 16, at 474-81).

Examples: *being first duly sworn, deposes and says; know all men by these present.*

- Frequent vague expressions.

Examples: *clearly erroneous, reasonable care.*

- Doublets.

Examples: *rights and remedies, free and clear.*

- Unusual prepositional phrases.

Examples: *as to, in the event of.*

- Use of *said* and *such* as articles.

Examples: *said agreement is signed, such payment as beneficiary requests.*

b. Syntactic Features

- Extremely long, complex sentences with many embedded clauses.

- Word lists.

Example: *all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands.*²⁰

- Nominalizations, that is, nouns constructed from verbs, usually by adding an “ing,” “tion,” or “al” ending.

Example: *after consideration of the facts, instead of the court considered the facts.*

- Passives.

Example: *this agreement is signed by the buyer, or this agreement is signed* (a truncated passive), instead of the active form *buyer signs this agreement.*

- Negatives, sometimes double or triple negatives, using such words as *no, not, never, un-* (as a prefix), *unless, except, provided that, however.*

- Misplaced phrases. These are mostly prepositional phrases stuck into the middle of clauses in a way that, outside of the law, is meant only for laughs, as in “Throw Mama from the train a kiss,” or “The man chased the cat with a broom in his underwear.”²¹

Examples: *a proposal to effect with the Company an assurance,*²² and *if in these instructions any rule, direction or idea is repeated.*²³

c. Organization

The linguists, in their own jargon, refer to this category as “discourse structure,” by which they mean “how the individual sentences are organized

20. International Typographical Union, Colorado Springs, Colo., Release form for Withdrawal Benefit (1979).

21. Smith, Let Him Make Himself Perfectly Clear, L.A. Times, Sept. 19, 1983, at V, 1, col. 1.

22. Life insurance policy quoted in D. Crystal & D. Davy, *supra* note 19, at 195.

23. California jury instruction quoted in Charrow & Charrow, *supra* note 19, at 1342-43.

relative to each other and . . . the coherence among sentences”²⁴

● Illogical ordering of ideas.

Lawyers frequently inform the reader of conditions, exceptions, and distracting details such as the date, or someone’s address, or the source of authority, instead of announcing the big news and then filling in the supporting details, or using chronological, hierarchical, or some other logical order.

● Absence of pronouns.

This occurs not only between sentences, but within them, “with the result that this type of prose strikingly resembles that found in school primers. Jill said, ‘Help Ben, Bill. Stop the ducks. Help Ben stop the ducks.’”²⁵

An example from a deed of trust:

*Trustor agrees: . . . [t]o provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be released to Trustor.*²⁶

David Crystal and Derek Davy, British linguists, were especially puzzled by this peculiarity of legalese: “But it is not simply that referential pronouns are avoided only where their use could raise genuine confusion; they seem to be eschewed as a species.”²⁷

● Too many ideas in each sentence.

“[E]ach sentence is made to count for too much. In other kinds of prose, the writer often expresses an idea one way and then restates it in somewhat different form, giving the reader more time to digest it.”²⁸ Statutory language is particularly susceptible to this. For example:

*Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States*²⁹

24. Charrow & Charrow, *supra* note 19, at 1326.

25. Danet, *supra* note 16, at 482.

26. Commonwealth Land Title Co., Los Angeles, Deed of Trust (Short Form) (Aug. 1971).

27. D. Crystal & D. Davy, *supra* note 19, at 202.

28. Danet, *supra* note 16, at 482.

29. 18 U.S.C. § 207(c) (1982).

d. Style

● Appearance of extreme precision. The result is often confusion and intimidation, instead of precision.

Example: *all manner of action I ever had, now have or . . . hereafter can, shall or may have . . . from the beginning of the world to the day of the date of these presents . . .*"³⁰

● Impersonality.

The third person (he, she, it, buyer, seller, bank, etc.) is used consistently when the first (I, we) or second person (you) would be more natural.

● Declarative sentences which pronounce rights and duties.

Here, of course, form follows function, for it is a function of the law to declare rights and duties. A steady diet of the declarative form, however, can be oppressive and cause the reader to tune out.

● Conditional sentences.

These typically list numerous contingencies that must be satisfied in order to trigger some legal result. Here again, form follows function because the law must often draw many fine, conditional lines to indicate when it applies and when it does not. Ordinary English prose, however, handles contingencies in forms that are simpler than the long conditional sentence which is characteristic of legal prose.

● Pompous tone.

This is one of Mellinkoff's conclusions about legal language.³¹ Danet takes him to task for this and other findings that Danet considers "highly subjective judgments."³² This criticism is odd because, though not as easily identified as long sentences or passive verbs, tone certainly exists in written language and can be felt by the reader like a wet mackerel in the face, a velvet glove, or any number of sensations in between. If these are subjective judgments, an empirical study could at least discover the sensations perceived by most readers in the intended audiences. I would be surprised if such a study arrived at conclusions different from those drawn by Mellinkoff.

● Dull tone.

This is another of Mellinkoff's conclusions,³³ and Danet criticizes this as a "subjective judgment."³⁴ Like pomposity, dullness of tone is felt by readers, could be measured in an empirical study, and its existence in legal writing cannot plausibly be denied.

● Poetic devices.

Danet "unexpectedly discovered" in a bank loan form many prosodic, or word-music, features that are normally associated with poetry, such as alliter-

30. Release form, supra note 20.

31. D. Mellinkoff, supra note 6, at 27.

32. Danet, supra note 16, at 469.

33. D. Mellinkoff, supra note 6, at 28.

34. Danet, supra note 16, at 469.

ation, assonance, rhythm, rhyme, meter, and phonemic contrast.³⁵ This is no surprise. These poetic features are easily observed in many legal documents. They probably stem from the law's ancient oral tradition, the archaic vocabulary still in use, and the original link between law and magic. For the same reasons, the parallel between legal language and Biblical language is striking.

● Odd graphic design.

Punctuation, capitalization, sectioning, headings, indentation, typeface, type size, and other graphic devices are frequently used in bizarre ways that do not tie into the meaning or importance of what is being said. Typically, these visual devices will either be completely absent, as in pages of long, solid blocks of grey prose with little punctuation, or will be so abundant that their purpose seems merely to paint the page with rococo decoration. When Crystal and Davy examined an insurance policy that was in the decorative style, they were determined to discover the graphics' logical link with meaning. They made heavy weather of it, like schoolboys struggling with a passage by the poet Browning, and their effort is recommended to all in need of comic relief.³⁶ Lawyers seem not to know what people in the advertising and communication fields know: that the visual appearance of the graphics sends messages along with the text. The shortest and sweetest proof of this that I have seen is the sign along the highways in San Antonio, Texas reading "Littering is unLAWFUL."

2. *The Social Effects of the Strange Style*

It is fair to deduce from all this that legalese is surely different from ordinary English. But what is the evidence that this stylistic difference alienates the public, or permits lawyers to intimidate and exploit people?

First, there are the pervasive twitters and raised eyebrows, the satire and ridicule that have brought laughs from audiences of Shakespeare,³⁷ Dickens,³⁸

35. *Id.* at 482.

36. D. Crystal & D. Davy, *supra* note 19, at 197-201.

37. "Dick: The first thing we do, let's kill all the lawyers.

"Cade: Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man?"

W. Shakespeare, *Henry VI, Part II, Act iv, scene 2, lines 74-79 (1623).*

38: "My name's Law," said Mr. Grummer.

"What?" said Mr. Tupman.

"Law," replied Mr. Grummer, "law, civil power, and exekative; them's my titles; here's my authority. Blank Tupman, blank Pickvick — against the peace of our sufferin Lord the King — statitt in that case made and purwided — and all regular. I apprehend you Pickvick! Tupman — the aforesaid."

C. Dickens, *The Pickwick Papers* 371, ch.XXIV (Signet Classic ed. 1964) (1st ed. London 1837).

Sandburg,³⁹ Groucho Marx,⁴⁰ newspaper humorists,⁴¹ and even Mother Goose,⁴² to name but a few. Laughter is a telling social indicator. If people

39. In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.

When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?
Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away? . . .

Carl Sandburg, "The Lawyers Know Too Much," *Complete Poems* 189 (1950).

40. Groucho parodied lawyers in several of his movies. Here is his celebrated dictation of a letter to his lawyer in *Animal Crackers*:

Honorable Charles D. Hungerdunger
c/o Hungerdunger, Hungerdunger & McCormick
Gentlemen?

In re yours of the 5th inst. yours to hand and in reply, I wish to state that the judiciary expenditures of this year, i.e., has not exceeded the fiscal year — brackets — this procedure is problematic and with nullification will give us a subsidiary indictment and priority. Quotes, unquotes and quotes. Hoping this finds you, I beg to remain as of June 9th, Cordially, Respectfully, Regards.

G. Kaufman & M. Ryskind, *Animal Crackers* (1928), quoted in R. Goldfarb & J. Raymond, *supra* note 7.

41. I have heard from a few lawyers who object to a California Plain English Law
. . . .

"As an English lawyer now practicing his profession in Los Angeles," writes Paul D.D. Bishop, "please allow me to express my dismay Unfortunately, the English language, unlike classical Greek, does not have a rich and delicate vocabulary of prepositions, participles and the like, and philosophers and other precise writers often have to approach verbosity in order to avoid ambiguity."

I suppose Bishop has a point here, but it does remind me of the Vietnam rationale that in order to save a village it was necessary to destroy it.

Smith, *It's All Greek to Him*, *L.A. Times*, Dec. 3, 1979, at IV, 1, col. 1.

. . . .
Harlan McCugh, a senior partner with McCugh, McCugh & Moore McCugh's, is one of those who believes the United States will never have enough lawyers to serve the needs of the people.

"I had an instance not long ago where a lawyer for a motion picture studio sent a one-page contract to a screenwriter I was representing. I took one look at it and became furious. I called up the studio lawyer and said, 'Are you crazy or something? My client could sign this contract today. Where the hell did you study law?'"

"The studio lawyer apologized and said he had a paralegal draw up the agreement, and hadn't realized the young man had written it in plain English. He promised to send over the studio's usual 170-page contract right away. As soon as I got it, we started haggling over it for three months, and I was able to charge my client my normal outrageous fee."

Buchwald, *Too Many Lawyers?* *The Jury Is Still Out*, *L.A. Times*, June 12, 1983, at VII, 3, col. 1.

42. "The party of the first part hereinafter known as Jack, and the party of the second part hereinafter known as Jill, ascended or caused to be ascended an elevation of undetermined

were not alienated from legal language, jokes about it would get no laughs.

Second, there are the commonplace angry anecdotes from consumers of legal language: the newspaper advice columnist who complains that he felt "manipulated" by the language of a boilerplate contract;⁴³ the physician who returns a form letter to his insurance company, protesting that it was written "in a smoke of confusion and 'double talk.'"⁴⁴ Anecdotes like these are routine to any lawyer's ear. Indeed, even judges and lawyers will occasionally divulge their bitter resentment of the legalese they are forced to read; could non-lawyers feel any less distressed than they? A judge:

I read briefs prepared by very prominent law firms. I bang my head against the wall, I dash my face with cold water, I parse, I excerpt, I diagram and still the message does not come through. In addition, the structural content is most often mystifying.⁴⁵

A lawyer:

I have in my time read millions of words from the pens of judges and, despite my professional interest in them, I have rarely failed to experience a sense of defeat or even pain. Sometimes it is as though I saw people walking on stilts; sometimes I seem to be trying to see through dense fog; and always there is that feeling of being belabored with words. I have known moments when I felt actual physical shock, as though the words were bats or bricks.⁴⁶

Third, there is solid empirical research revealing that (as George Bernard Shaw demonstrated more amusingly in *Pygmalion*⁴⁷) people draw conclusions about your social status, power, and personality from the way you speak.⁴⁸ Anthropologists have observed that formal language functions as "a form of power for the powerful."⁴⁹ Empirical studies of courtroom behavior show that lawyers influence juries and witnesses by switching language registers, resorting to legal jargon, and using other language techniques.⁵⁰ When one empirical researcher announced his findings on influential linguistic tech-

height and degree of slope, hereinafter referred to as 'hill.' " D. Sandburg, *The Legal Guide To Mother Goose* 7 (1978).

43. Buscaglia, *In a Word, Why Not keep It Simple?*, L.A. Times, Oct. 7, 1984, at V, 15, col. 1.

44. See text accompanying note 84 *infra*.

45. Letter from Los Angeles Superior Court Judge Ronald E. Swaringer (sitting temporarily, Cal. Ct. App.) to author (Oct. 15, 1984) on file at offices of N.Y.U. Rev. L. & Soc. Change. Beyond head banging, some lawyers have borrowed sophisticated techniques from other disciplines in an effort to pierce legal gobbledygook. See Benson, *Up A Statute with Gun and Camera: Isolating Linguistic and Logical Structures in the Analysis of Legislative Language*, 9 *Seton Hall Legis. J.* 279 (1985).

46. Weissman, *supra* note 7, at 139.

47. G.B. Shaw, *Pygmalion* (1913).

48. Danet, *supra* note 16, at 536.

49. *Political Language and Oratory in Traditional Society* 23 (M. Bloch ed. 1975), quoted in Danet, *supra* note 16, at 543.

50. Danet, *supra* note 16, at 527, 536-37. See also Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 *Duke L.J.* 1375.

niques in the courtroom, he promptly received more than 400 inquiries from practicing attorneys and judges.⁵¹

Finally, it is not a long jump from the empirical evidence, and from every lawyer's personal experience, to social theories that see legal language as a "restricting elitist code . . . pre-eminently the discourse of power,"⁵² or even as "bureaucratized magic" which, along with professional secrecy, ceremony, special clothing, the carefully structured courtroom, rituals of legislation, and the status of the judge, are part of a legalistic shamanism.⁵³ As stated by one neo-Marxist:

Many people today, and presumably in the past, have seen through this mystical veil and perceived the secular nature of law What we have to consider is that, in essence, law is little different from political policy, administrative decision and military strategy. In itself therefore it would be seen for what it is, a form of political control, without much difficulty. Now clearly such transparency is contrary to the interests of ruling classes who always want to give their directions some universal legitimacy. It is also contrary to the interests of lawyers who need special status and esoteric services in order to continue — who would pay so much for mere political administrators?⁵⁴

One need not be a neo-Marxist to find these social theories plausible. A noted Cambridge law professor once observed matter-of-factly: "For lawyers language has a special interest because it is the greatest instrument of social control."⁵⁵ An American law professor has boasted about the fact that "[a] common vocabulary and style enable lawyers to recognize one another as lawyers and to distinguish themselves collectively from laymen The immense, baffling, and obscure vocabulary of the law is an important weapon in the hands of the established lawyers and professors for asserting superiority over the student."⁵⁶ Every lawyer's personal experience bears witness to the fact that legalese can be a weapon. Is there a lawyer among us who has not employed the magic of legal language as a psychological device to dominate some lay person? I confess I have done so many times—particularly when dealing with recalcitrant bureaucrats and corporate clerks—and I have frequently seen my comrades-in-law do the same. If there breathes a lawyer who is free from this taint, I shall immediately nominate him or her to receive the next Saint Thomas More Award from my law school.

51. O'Barr, *The Language of the Law*, in *Language in the USA* 386, 399 n.6 (C. Ferguson & S. Heath ed. 1981).

52. Goodrich, *Rhetoric As Jurisprudence: An Introduction To the Politics of Legal Language*, 4 *Oxford J.L. Studies* 88, 90-91 (1984).

53. C. Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* 270-75 (1979).

54. *Id.* at 275.

55. Williams, *Language and the Law-I*, 61 *L. Q. Rev.* 71 (1945).

56. Friedman, *Law and Its Language*, 33 *Geo. Wash. L. Rev.* 563, 567 & n.16 (1964).

B. *Comprehensibility*

While legalese surely alienates those who are not lawyers, most critics would say the greater sin is that it keeps them in the dark. If lawyers not only intimidate people, but impose burdens and benefits upon them by means of a secret tongue, then Rodell was right: the twentieth century is still in the grip of a caste of medicine-men or high priests. Says Rodell:

In tribal times, there were the medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.⁵⁷

There is plentiful evidence that lawyers' language is hocus-pocus to non-lawyers, and that non-lawyers cannot comprehend it. There exist scores of empirical studies showing that most of the linguistic features found in legalese cause comprehension difficulties. Legalese is characterized by passive verbs, impersonality, nominalizations, long sentences, idea-stuffed sentences, difficult words, double negatives, illogical order, poor headings, and poor typeface and graphic layout. Each of these features alone is known to work against clear understanding.⁵⁸

Beyond this research on individual language features, there are four main ways to show that written language is, or is not, understood. You can make an educated guess. You can put language to the practical test by seeing whether it actually works in the field. You can examine the readers to measure their level of comprehension. Or, you can measure the language by a readability formula. Evidence gathered by each of these ways demonstrates that lawyers' language, in critical degree, cannot be understood by others.

1. *The Educated Guess that Legalese Fails to Communicate*

George R. Klare, professor of psychology at Ohio University, points out that "[w]riters and teachers have long been making estimates of readability with skill probably developed largely from experience and feedback from readers," and that numerous empirical studies have shown that these judgments correlate quite closely with readers' scores on comprehension tests.⁵⁹ Several researchers claim that such judgments correlate even more directly to comprehension scores than do readability formulas.⁶⁰ Klare's studies cast some doubt on the consistency of individual human judgments, but he concludes

57. F. Rodell, *supra* note 8, at 3.

58. For summaries of the research, and a bibliography, see American Institute Research, *Guidelines for Document Designers* (1981).

59. Klare, *Assessing Readability*, 10 *Reading Research Q.* 62, 64 (1974-75).

60. *Id.*

that such judgments are nevertheless useful.⁶¹ In the final analysis, the judgments about legal language by scores of thoughtful experts—Thomas More to Richard Wydick—cannot be dismissed with an airy, “That’s just their opinion!” It is very likely that their opinion would be supported by other “less subjective” measures. As we have seen, their opinion is that those who must read legal language find it seriously incomprehensible.

In a decision that was not officially reported, a California court considered the expert judgments of ten teachers of English as a second language, who agreed that the wording of Miranda warnings and of California’s “implied consent law” were too difficult for beginning or intermediate level students of English to understand. Based on these judgments and other tests, the court excluded from evidence incriminating statements made by the defendant, whose English was limited.⁶² The court’s use of the expert judgments was sound, and there is no reason for other courts not to follow the same practice.

2. *Legalese Fails the Field Tests*

The field test is the most direct and accurate way to tell whether language is comprehended. If the waiter in a French cafe ceremoniously serves you a glass of sparkling water with a slice of lemon, that is strong evidence that your request for a *vin mousseau du Loire* was not understood.

The existence of many cases in which the meaning of legalese was litigated provides strong field evidence of the inadequacy of legal language: if the language had been clear its meaning would not have been litigated. One of the most humorous cases of this sort (though not funny for the lawyers) is *In Re Ben Weingart*.⁶³ Large sums of money were at stake in the trust of a deceased millionaire, and the question was whether a “no contest clause” forced the decedent’s long-time “lady friend”⁶⁴ to forfeit her share. The millionaire’s team of lawyers had laboriously drafted what they obviously thought was an air-tight clause—a paradigm of most of the characteristics of legalese.⁶⁵ “The

61. Klare, *Readability Indices: Do They Inform or Misinform?*, 1981 *Information Design J.* 251, 253.

62. *Limited Legal Victory for Limited Speakers of English*, 12 *TESOL Newsletter* (Teachers of English to Speakers of Other Languages), June 1978, at 1.

63. *In re Ben Weingart*, No. P663511, slip op. (L.A. Super. Ct. March 21, 1983).

64. *Id.* at 8.

65. The clause is found as sub-article 10.8 of Article Ten of the Trust by way of the June 29, 1973 amendment, and is headed “Contests.”

It provides that the provisions of the Trust are in each case conditioned that the beneficiaries of the Trust shall not “directly or indirectly aid, counsel, commence or prosecute any demands, claims, negotiations, suits, actions or proceedings in any court of law, or other arenas, *having as an object*: A. The defeat in whole or in part thereof of this trust Agreement, or any provision or part hereof . . .” (Emphasis added).

Thereafter follows Subparagraph B . . .[:]

B. the obtaining for anyone of (i) anything of value from this Trust or my estate, (ii) any of the assets of this Trust or my estate, or (iii) any assets in which I had an interest immediately prior to my death, grounded on, arising out of, or related to any claimed or actual agreement, representation or understanding not expressly set forth in a written and executed agreement that I would (or would not cause another to) deliver to

first sentence," noted Judge Ronald E. Swearinger, "contains approximately 195 syllables." A student of Rudolph Flesch, the judge observed that a sentence of that length communicates nothing at all to a reader "who is not, say, a 'Philadelphia Lawyer' or a devotee of William Faulkner." He declared that he had "wrestled with the clause for at least a year, off and on," had parsed it, paraphrased it, and grammatically diagrammed it, yet he remained "bamboozled, befuddled and bewildered after each attack on the syntactic content of the clause. Indeed, peering into the context is an experience not unlike an examination of a bowl of Campbell's alphabet soup in an effort to derive some message or communication therefrom, however primitive."⁶⁶ As a result, he held the clause had no effect, and the "lady-friend" was entitled to her share.

In *David v. Heckler*, a case of nationwide significance, a federal district court ordered the government to rewrite the letters it sends to people when it refuses to pay for the full cost of their medical bills under the Medicare program. Chief Judge Jack Weinstein found that the existing letters

defy understanding by the general populace. They are filled with confusing cross-references to "control numbers" and are composed of paragraphs that seem strung together randomly. Explanations are couched in technical jargon. The words and phrases "approved charges," "customary charges," "prevailing charges," "locality," "economic index," and "physicians' old and new profile," which are a substance of the letter, are a specialized Medicare vocabulary. To a layman unfamiliar with Medicare regulations, this language has no real meaning The language used is bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak. It does not qualify as English."⁶⁷

The *Weingart* and *David* cases are but two among legions. It may be impossible to document the precise number of cases involving disputed legalese, but the published digests of litigated words and phrases⁶⁸ provide an indirect index of the magnitude. They contain many thousands of citations to court decisions in which the law's specialized vocabulary failed to communicate clearly. To be sure, you must examine these decisions carefully to be satisfied that legalese really was in dispute and really did cause significant confusion. But once you have done that, the scales fall from the eyes and you realize that the legal profession does indeed turn out shoddy work.

In an analytical tour de force of more than a hundred pages, Mellinkoff

anyone anything of value (directly or indirectly, in trust, by will, or otherwise) as a gift, or for services or any other thing of value (including by way of example but not limitation any employment or assistance) received by me or another. The word "another" includes any one or more (or combination thereof) people, partnerships, corporations, trusts, estates or other entities.

Id. at 2-3.

66. Id. at 11-12.

67. *David v. Heckler*, 591 F. Supp. 1033, 1037, 1043 (E.D.N.Y. 1984).

68. *Words and Phrases* (West 1940-present).

examined several hundred of these and other decisions involving some of the most sacred terms of the law and some of its most typical syntactic features.⁶⁹ His study demonstrates the silliness of lawyers' claim that their language is precise and understandable. Mellinkoff shows the voluminous litigation generated by such routine jargon as *whereas*,⁷⁰ *and/or*,⁷¹ *herein*,⁷² and *aforesaid*,⁷³ among others. He documents, on the basis of case law, the ambiguities and uselessness of such "precise terms of art" as *heir*,⁷⁴ *last will and testament*,⁷⁵ *seisin*,⁷⁶ *give, devise, and bequeath*,⁷⁷ and others. He exposes the perversities caused by habits of using misplaced phrases and long sentences.⁷⁸ The case law, in short, is a monument to the failure of lawyers' language to perform its principal task: to serve as an instrument of clear communication in a practical world.

Aside from the case law, there is one report of extensive field testing. The Internal Revenue Service compared existing federal income tax forms with new "Plain English" forms, and found that taxpayers were able to fill out the new forms faster and with fewer errors.⁷⁹ Moreover, the taxpayers' attitude about the new forms was much more accepting.⁸⁰

The rest of the evidence showing that legalese flunks its field tests is anecdotal, but nonetheless real. The stories are legion, and everyone has his or her own favorites. My own include the one about the taxpayer who took his income tax form to five different Internal Revenue Service offices, was given five different amounts of tax due, and chose, of course, to pay the lowest figure.⁸¹ Then there is the nonagenarian, an avid reader of the daily newspaper, murder mysteries, and health magazines, who was needlessly thrown into alarm by a one-page notice trying to tell her that her rent payments would stay the same but that her landlord's rent subsidy from the government would be increased.⁸² There is the retiree who thought he was being tricked into some sort of a scam when he was asked to sign a receipt for his money and a release of claims against his pension fund.⁸³ There is the doctor who had informed his insurance agent that a rainstorm had washed out a drainage culvert at his

69. D. Mellinkoff, *supra* note 6, at 290-398.

70. *Id.* at 321-25.

71. *Id.* at 306-10.

72. *Id.* at 315.

73. *Id.* at 305-06.

74. *Id.* at 328-31.

75. *Id.* at 331-33.

76. *Id.* at 342-45.

77. *Id.* at 353-58.

78. *Id.* at 366-74.

79. Siegel & Gale, Inc., IRS Tax Forms Simplification Project Interim Progress Report 63 (Nov. 1980).

80. *Id.*

81. Recounted to me by a client.

82. The case of one of my clients. The notice was Housing Authority of Los Angeles, HAPP-40 (July 1978).

83. This is another case from one of my clients. The form was the one cited in note 20 *supra*.

home. The company responded with a two-page letter saying that it would send an inspector out but was admitting no liability. This simple message, however, was lost in a patch-work of boilerplate legal gobbledygook, a near-parody which included such gems as this:

That in consideration of the trouble and expense in doing so this company . . . its representatives, agents and adjusters and/or attorneys may investigate, prepare for or actually defend without prejudice to the company under the above policy and reserving unto said company all of its rights, defenses under said policy of insurance as fully and completely as if said company had refused to take any steps whatsoever in the investigation in the defense of this loss as above set out.

In a triumph of plain talk, for which doctors are not commonly noted, the physician replied:

I am certain that you put a lot of thought into that letter but as far as I am concerned it is not understandable. This was not written for the common man to understand; it was presented in a smoke of confusion and "double talk." I want you to rewrite the letter so that I know simply and plainly what is on your mind.⁸⁴

The newspapers regularly report these anecdotes, too. One of the most significant tax initiatives in the history of California was so rife with unintended ambiguities that key provisions could not be implemented without first asking the courts to say what the provisions meant. The statute was the product of "ham-handed drafting," according to one angry reformer who called for future ballot initiatives to pass the scrutiny of a technical-review committee of writing experts.⁸⁵ Another critic suggested that the statute's authors should have been arrested for "drunken drafting," or sued for malpractice.⁸⁶

Though that statute was drafted outside of the legislature by citizen initiative, the legislature did no better when devising legislation to implement it. The legislature's effort caused the Mayor of Los Angeles to throw egg on his own face by leading him into a \$55 million miscalculation of the amount that the City could raise by a politically risky tax proposal.⁸⁷

The one-page form that California designed to register voters by mail has been denounced by one political party official as unworkable because it is "intimidating," and "looks like you need a college education just to be able to fill it out."⁸⁸

84. The doctor requests anonymity. Correspondence on file at offices of N.Y.U. Rev. L. & Soc. Change.

85. Hamilton, California's Sloppy Ballot Measures, L.A. Times, Aug. 11, 1982, at II, 9, col. 6.

86. *Id.*

87. City Property Tax Plan Dealt a Blow, L.A. Times, May 6, 1983, at II, 1, col. 6; Confusion in Property 13 Text Clouds L.A. Tax Question, L.A. Times, May 10, 1983, at II, 1, col. 6; Sullivan, A Web of Financial Uncertainty, L.A. Times, May 20, 1983, at II, 7, col. 5.

88. New System — Is It Registering?, L.A. Times, Sept. 27, 1982, at II, 1, col. 1.

In Washington, poor people's welfare benefits have been jeopardized because the claimants could not understand how to fill out the required forms.⁸⁹

Not all of these pratfalls can be attributed to lawyers, of course, but the language and design faults in each instance were so clearly influenced by legalese that it is likely some lawyer-adviser was in the closet when the documents were being prepared.

Unfortunately, we lack a reporting service to collect and analyze anecdotes like these. If we had such a body of knowledge, we would see more clearly that these are not merely passing foibles of the legal system, but defects endemic to lawyers' language.

3. *Legalese Fails the Comprehension Tests*

The third, and classic, way to learn whether language is understood is to ask the readers what they understood. The empirical methods of educational psychology have made comprehension testing a fairly sophisticated tool. The tool is imperfect, but is universally accepted and relied upon as the principal basis for answering society's questions about what people understand.

Of course, there are limits to empiricism. Klare took a careful look at several dozen empirical comprehension studies. He concluded that reader performance was a function not only of the difficulty of the material, but also, in critical degree, a function of the interaction between the test situation itself (time, place, payment, etc.), the content of the material, and the competence and motivation of the reader.⁹⁰ Scores, for example, will improve if the reader loves the subject matter, or is paid to take the test!

So we cannot be absolutely certain from any type of comprehension test (or readability formula) that we "know" the degree to which language is intelligible. The linguists and other social scientists knit their brows and worry a great deal over this, for theirs is a quest for scientific certainty. We lawyers, however, need not knit our brows along with them if our purpose is merely to persuade a legislature, agency or court that legalese is unintelligible. One linguist, for example, writes that plain English "regulations and statutes are often based on the assumption that plain English can be reliably and validly gauged or even measured. This assumption is unwarranted"⁹¹ Yet our legal institutions make no such assumption. They are practical bodies with real life decisions to make, and they make them every day in every field, as they must, on the basis of mere "relevance," "reasonableness," "substantial evidence," "clear and convincing evidence" or similar standards that pose no pretense of scientific certainty. Indeed, legislatures and courts often act in flagrant igno-

89. Delay or Error on Complex Forms May Cost 3,000 Families Aid, Wash. Post, Dec. 18, 1981, at A3, col. 1.

90. Klare, A Second Look at the Validity of Readability Formulas, 8 J. Reading Behavior 129 (1976).

91. Finegan, Assessing Comprehensibility in the Language of Legal Discourse, in Voice Analysis on Trial (W. Lea ed.) (in press).

rance of facts!⁹² About the toughest the legal standards ever get is the judicial standard that scientific techniques must have “gained general acceptance” in the scientific community, and even that standard is on the wane.⁹³ Comprehension tests of language, carefully performed, certainly meet any of the standards.

Having taken the necessary grain of salt about comprehension tests, and having concluded that they are nevertheless useful, it remains to ask how legal language has fared when subjected to them. The answer is “not well.”

a. Multiple Choice, Oral Questioning, Cloze

Three main types of comprehension tests are the multiple choice or short answer test, oral questioning, and the “cloze” procedure.

The multiple choice or short answer test is so familiar that it needs no further description. Its chief virtue is that it is easy to score. It has vices, on which there is a large literature.⁹⁴ For one thing, it is very difficult to create valid questions for such exams; not least among the problems is that different questions themselves can cause different scores for the same passages.⁹⁵

The second type of test, oral questioning, entails asking readers oral questions about passages they have read and probing their responses with further oral questions. One version is the “paraphrase task,” in which readers are asked to “tell us in your own words” what a written passage means. The technique is arguably good at pinning down what is really “inside the reader’s head.” Oral questioning has its flaws, however. Straight questioning runs the risk of getting different results depending on how questions are put,⁹⁶ and also carries the danger of having the examiner’s bias communicated to the respondent by intonation, body language, or other subtle ways.⁹⁷ The paraphrase task avoids the problem of inappropriate questions, but not the problem of communicating examiner bias. In addition, the paraphrase task seems to ignore individuals’ differing abilities to articulate what they have understood.⁹⁸ Oral questioning in general may put too much reliance on an individual examiner’s judgment of “right” answers.⁹⁹ Finally, the method is time consuming and costly.

92. Davis, *Facts in Lawmaking*, 80 *Colum. L. Rev.* 931 (1980).

93. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States*, a *Half-Century Later*, 80 *Colum. L. Rev.* 1197, 1205-31 (1980).

94. See D. Adkins, *Test Construction* 155-244 (2d ed. 1974); B. Hoffman, *The Tyranny of Testing* (1964); J. Nunnally, *Educational Measurement and Evolution* 153-96 (1972).

95. Lorge, *Predicting Reading Difficulty of Selections for Children*, 16 *Elementary English Rev.* 229, 231 (1939), cited in Finegan, *supra* note 91.

96. Klare, *Comments on John Bornmuth’s Readability: A New Approach*, 1 *Reading Research Q.* 119, 121 (1966).

97. A. Elwork, A. Sales & J. Alfini, *Making Jury Instructions Understandable* 23 n.36, 40-42 (1982).

98. Charrow & Charrow, *supra* note 19, at 1310, recognized the danger that differences in “subjects’ writing skills would confound the results,” but unfortunately ignored possible differences in the subjects’ oral skills.

99. A. Elwork, A. Sales & J. Alfini, *supra* note 97, at 42.

The third method, the cloze procedure, has made something of a breakthrough in the science of testing. It is not only relatively inexpensive and easy to apply, but it avoids key defects inherent in the other methods because it tests only the materials and not the questions or the examiner's bias.

Developed by a psycho-linguist in 1953,¹⁰⁰ the cloze test derives its coined name from the finding of Gestalt psychology that there is a human tendency to "close" mentally a gap in a picture of an incomplete circle to make it conform to a familiar pattern of a whole circle. Likewise, there is a tendency to close gaps in language symbols to make the prose pattern conform to a familiar pattern of meaning.

In a cloze test, you take a passage of prose and delete every *n*th (usually every fifth) word, replacing it with a standard sized blank. You then have readers who have not previously seen the passage fill in the blanks by guessing what words were deleted. The higher the score of correct guesses, the more the reader understood the passage.

At first blush, this sounds fanciful, but upon reflection it will be clear that a high cloze score must mirror (a) the ability to extract inherent meaning, (b) general aptitude, (c) previous knowledge of the subject, and (d) skill at processing written language in all its semantic, syntactic, stylistic and other complexities. If you think about it, you should see that these are precisely the qualities called into play in "comprehending" written language.

A cloze score, being a raw number of correct guesses, does not itself indicate the level of difficulty of the materials, unless you correlate it to some other known scale of difficulty. Professor John R. Bormuth, of the University of Chicago, did just that in a massive study in 1969.¹⁰¹ On the basis of extensive testing, Bormuth found that the cloze scores compare to key scores on traditional multiple choice and oral reading test approximately as follows:¹⁰²

100. Taylor, "Cloze Procedure": A New Tool For Measuring Readability, 30 *Journalism Q.* 415 (1953).

101. Bormuth, *Development of Readability Analyses* (U.S. Dep't. of HEW, Project No. 7-0052, 1969).

102. The table is adapted from the materials in Bormuth, *id.* at 57-71. Bormuth warns that these criteria may be less than perfectly reliable, due to various necessary uncertainties in his procedures, but he concludes there are good grounds for believing the criteria *are* sound and reliable. I have added the letter grades A, C, and D to Bormuth's correlations to make them easier to use. Bormuth may or may not approve of this. His concern was to offer a guide to teachers who wanted to know whether class materials were suitable for students working without supervised instruction.

% of Correct Answers on Cloze Test	% of Correct Answers on Traditional Tests
35%	60% (“Frustration” level. Material too difficult for educational uses. Think of this level as roughly “D” work.)
45%	75% (Material generally considered suitable only for supervised instruction. Think of this as roughly “C”.)
55%	90% (Material generally considered suitable for unsupervised learning. Think of this as roughly “A”.)

The objection that the cloze score may measure merely the recognition of familiar, trivial, or obvious expressions, appears to be answered by these facts: (a) The examiner tests all words through systematic deletion of every fifth word in each of the five possible positions for five different groups of readers, so that word number one is deleted for the first group, word number two for the second group, etc. . . .¹⁰³ (b) Research shows that random deletion of words produces cloze scores that are equal or superior in predictive validity to deletion of only the “hard” and “meaningful” words.¹⁰⁴

Is cloze, however, an accurate measure of what we mean by “comprehension?” Wilson L. Taylor, the developer of the procedure, showed that cloze scores have highly significant and positive correlation coefficients with scores on multiple choice comprehension tests, and with scores on general aptitude tests.¹⁰⁵ In other words, if traditional tests measure true comprehension and predict ability to comprehend, then so do cloze tests. Many other researchers have confirmed these findings.¹⁰⁶ While Klare wrote in 1966 that the question is one “on which there is still disagreement,”¹⁰⁷ he appears later to have ac-

103. Bormuth, *supra* note 101, at 12-13.

104. Taylor, “Cloze” Readability Scores as Indices of Individual Differences in Comprehension and Aptitude, 41 *J. Applied Psychology* 19, 23-24 (1957).

105. *Id.*

106. Bormuth, *Readability: A New Approach*, 1 *Reading Research Q.* 79, 83 (1966).

107. Klare, *supra* note 96, at 121. One skeptical view is apparently based upon a misunderstanding: “The basis of the cloze procedure is not the comprehension of what has been read, but what has *not* been read. Therefore, while many studies report strong correlations between cloze and comprehension scores, the result may be spurious.” Campbell & Holland, *Understanding the Language of Public Documents Because Readability Formulas Don’t*, in *Linguistics and the Professions* 157, 159 (R. DiPietro ed. 1982). The first sentence of the statement quoted is simply inaccurate. See Taylor, *supra* note 104.

cepted that cloze tests do accurately measure comprehension.¹⁰⁸ Those in the field now generally agree that "the cloze test has solved the problem of reliably measuring language difficulty,"¹⁰⁹ and that it is "a convenient and reliable criterion measure of comprehension."¹¹⁰

b. The Loyola Cloze Tests

Since I could find no reports of cloze tests on legal language, save one involving a single individual,¹¹¹ I conducted two large-scale tests with 90 law students, and 100 non-lawyers who were family members and friends of the students.

Using procedures indicated by Bormuth,¹¹² I gave the examinees five prose passages of nearly equal length:

- A set of three jury instructions, one of which had been rewritten in plain English by other researchers,¹¹³ and two of which were in the standard murky form of the California Book of Approved Jury Instructions.¹¹⁴

- A consent-to-surgery form used widely in hospitals.¹¹⁵

- A portion of the federal Ethics in Government Act of 1978, restrict-

108. Klare, *supra* note 59, at 66.

109. Bormuth, *supra* note 106, at 82.

110. Finegan, *supra* note 91.

111. Limited Legal Victory for Limited Speakers of English, *supra* note 62, at 25.

112. Bormuth, *supra* note 101, at 12-13. When the text below states that differences in the Loyola cloze scores are statistically significant, the level of significance was found to be at least .05 in a two-tailed t-test. I am indebted to my Loyola colleague, Professor Kenneth Vogel, for these findings.

113. *Members of the Jury:*

I am now going to tell you the laws that apply to this case. As jurors you have two major duties:

First, you must look at the evidence, and decide from the evidence what the facts of this case are. It is your job and no one else's to decide what the facts are.

Second, you must listen to the laws that I am now telling you, and follow them, in order to reach your verdict.

In fulfilling these duties, you must not be influenced by your feelings of sympathy or prejudice.

Charrow & Charrow, *supra* note 19, at 1341, based on California Jury Instructions — Civil Book of Approved Jury Instructions (BAJI) 1.00 (5th ed. 1969).

114. A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his opinion as an expert as to any matter in which he is skilled. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

Charrow & Charrow, *supra* note 19, at 1346 (BAJI 2.40).

One test that is helpful in determining whether or not a person was negligent is to ask and answer whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If such a result from certain conduct would be foreseeable by a person of ordinary prudence with like knowledge and in like situation, and if the conduct reasonably could be avoided then not to avoid it would be negligence.

Charrow & Charrow, *supra* note 19, at 1349 (BAJI 3.11).

115. Hospital Consent Form:

ing ex-government employees from working for private clients against their former agencies.¹¹⁶

● A *Los Angeles Times* article describing a newly elected California senator's first day in Washington.¹¹⁷

The hospital maintains personnel and facilities to assist your physicians and surgeons in their performance of various surgical operations and other special diagnostic and therapeutic procedures. These operations and procedures may all involve risks of unsuccessful results, complications, injury, or even death, from both known and unforeseen causes, and no warranty or guarantee is made as to result or cure. You have the right to be informed of such risks as well as the nature and purpose of the operation or procedure and the available alternative methods of treatment, and this form is not a substitute for such explanations which are provided by the above-named physicians. Except in cases of emergency, operations or procedures are not performed until the patient has had the opportunity to receive such explanations. You have the right to consent to or refuse any proposed operation or procedure anytime prior to its performance.

Your physician and surgeons have recommended the operations or procedures set forth below. Upon your authorizations and consent, such operations or procedures, together with any different or further procedures which in the opinion of the supervising physician or surgeon may be indicated due to any emergency, will be performed on you. The operations or procedures will be performed by the supervising physician or surgeon named above (or in the event of any emergency causing his or her absence, a qualified substitute supervising physician or surgeon to be selected by your attending physician) together with associates and assistants, including anesthesiologists, pathologists, and radiologists from the Medical Staff of [City Hospital] to whom the supervising physician or surgeon may assign designated responsibilities"

Excerpts, Authorization for and Consent to Surgery or Special Diagnostic or Therapeutic Procedures, Form No. 104.21, 18 Cal. Legal Forms, Transaction Guide (Matthew Bender 1984).

116. Whoever, (i) having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States), to, or (ii) having been so employed as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before —

(1) any department, agency, court, court martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3), as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 207(a)-(c) (West Supp. 1984) (excerpted and merged).

117. Republican Pete Wilson, sworn in Monday as the junior senator from California, declared that his first priority will be legislation to increase U.S. access to foreign markets — especially Japan and the Common Market countries.

The former San Diego mayor said during an informal press conference after the ceremony that he will also devote attention to immigration problems, despite serious

● A non-fiction article on ecology from a sixth-grade reading textbook used in Los Angeles City schools.¹¹⁸

The results revealed that the 100 non-lawyers could not adequately understand any passages except the plain English jury instruction and the sixth-grade reader. (On these they came close to or surpassed the 55% cloze criterion, which would be near a 90, or a grade of A, on a traditional test.) The fact that they did best on the plain English jury instruction is testimony that legal ideas can indeed be written clearly.

The respondents showed poor comprehension of the other jury instructions, the hospital consent form, and the *Los Angeles Times*. On these, they

reservations about the Administration bill that almost was passed by the last Congress.

"The present law is a hypocrisy," he said. "It just doesn't work."

Accompanied by his 80 year old father, James Wilson, a retired advertising executive, and his frequent companion, Gayle Graham of San Diego, Wilson spent most of his first day in the Senate hurrying through a round of ceremonial events.

He attended several receptions in his honor, greeted many of the approximately 250 Californians who had flown here to watch him assume his new duties, organized his staff and toured his temporary office.

"My first day was quite different from any other I'll spend here, I'm sure," Wilson said.

Although Wilson did not get the committee assignment he had coveted — the Senate Finance Committee — he said he is pleased to have been named instead to the Senate Agriculture, Armed Services, and Aging Committees. These assignments, he said, will enable him to pursue issues of particular concern to California.

On trade issues, Wilson said he has already talked with other members of the Agriculture Committee about legislation designed to open up foreign markets and has met with U.S. Trade Representative Bill Brock and members of the White House Staff.

Wilson Vows To Back Export Legislation, *L.A. Times*, Jan. 4, 1983, at I, 6, col. 1.

118. Let The Wild Ones Stay Home

Scientists worry when wild animals are moved all around the world. Even the wisest people cannot always tell what will happen when a strange animal is turned out in a new neighborhood.

Each plant and animal developed among hundreds of other living plants and animals. They lived together in the same area for thousands of years and depended on one another for their needs. Such an ecosystem of living things includes even bacteria.

Sometimes, when moved to a strange place, the plant or animal may do well. It pushes its way into the new neighborhood and adapts to the new life. The other plants and animals that have been there for thousands of years must adapt too. They make room for the stranger.

When this happens, the whole ecosystem must change. Maybe the changes are little ones that people seldom notice. Or maybe they are big ones. Sometimes a single act sets off a chain reaction. Some time ago the World Health Organization sent supplies of the insecticide DDT to Borneo to fight mosquitoes that spread malaria among the people. The mosquitoes died. But millions of roaches lived in the villages, and they simply stored the DDT in their bodies, and went scurrying off into the dark places.

One kind of animal that fed on the roaches was a small lizard. Now when the lizards ate roaches, they also ate DDT. Instead of killing them, DDT only slowed down their nervous systems. This made it easier for cats to catch the lizards. And all over North Borneo cats died from DDT.

Excerpt, Laycock, *Let The Wild Ones Stay Home*, in W. Durr, V. Windley & K. Barnhardt, *Impressions* 340 (1978).

scored slightly above the 45% criterion, which would be about 75%, or a grade of C, on a traditional test.

With the statute, the respondents dropped close to the "frustration" level.

Mean Cloze Scores: 100 Highly Educated Non-Lawyers

	<u>Cloze %</u>	<u>Rough Equivalent</u>
Jury Instructions		
— Plain English	67.2%	A+
— Standard BAJI	48.6%	C
Hospital Consent Form	46.1%	C
Federal Statute	39.2%	D
<i>Los Angeles Times</i>	48.7%	C
Sixth-grade Reader	52.6%	B+

The different levels of performance indicated by the letter grades in the "Rough Equivalent" column were found to be statistically significant. I had expected the respondents to do a little better on the sixth-grade reader and substantially better on the *Los Angeles Times* than they did. These scores apparently reflect the fact that comprehension is not only a function of basic intelligence and language skills, but of familiarity with the topic as well. The sixth-grade reader and the newspaper piece both called for familiarity with specific information—DDT, the World Health Organization, roaches in Borneo, names of politicians, names of committees in the U.S. Senate, etc. So, even someone who is bright and possesses good language skills may not comprehend such passages as well as someone who is bright and skilled, but also familiar with the specific topics.

While it is unfortunate that the citizens did not fully comprehend a political story in the daily newspaper, at least that lack of comprehension brings no legal consequences. Failure to comprehend jury instructions, a hospital consent form, or a statute, however, can bring disaster. The law causes people to lose their bank accounts, their liberty, or even their heads on the assumption that such passages of legal prose are adequately, perhaps fully, understood.

As poor as this particular group's scores are, they are among the highest a group of non-lawyers is likely to achieve, for the 100 respondents generally were a well-educated elite with a median of fifteen to sixteen years of formal education. About 28% of them had completed some post-graduate work. The median number of years of education for the nation's population as a whole is 12.5.¹¹⁹

Of the 100 respondents, only 10% had no further education beyond high school. The scores from this subgroup are not directly comparable to those of

119. Bureau of the Census, United States Department of Commerce, Statistical Abstract of the United States 141 (1981).

the whole group, because the sample is small and because these respondents' tests did not happen to represent all five versions of the cloze test. But their vastly lower scores probably indicate a significant difference in comprehension. Note that this group at least understood the plain English jury instruction. Once again, the different performance levels represented by the letter grades in the chart were found to be statistically significant.

Mean Cloze Scores: Ten Non-Lawyers With Only High School Education

	<u>Cloze %</u>	<u>Rough Equivalent</u>
Jury Instructions		
— Plain English	59.2%	A
— Standard BAJI	42.5%	C—
Hospital Consent Form	35.8%	D
Federal Statute	15.6%	F
<i>Los Angeles Times</i>	36.2%	D
Sixth-grade Reader	48.2%	C

And the law students? As expected, they understood all passages well. The difference between this group's scores and the group of 100 non-lawyers was statistically significant. According to Bormuth's scale, they would have scored above the 90% level on traditional comprehension tests based on the passages, with the exception of the hospital consent form where lack of familiarity with medical jargon apparently kept them just below that level. According to the statistical test, however, there was no significant difference between this group's performance on the hospital form, on the statute, on the *Times*, and on the reader. So, on this chart, the B+ grade is misleading.

Mean Cloze Scores: 90 Law Students

	<u>Cloze %</u>	<u>Rough Equivalent</u>
Jury Instructions		
— Plain English	73.2%	A+
— Standard BAJI	62.2%	A+
Hospital Consent Form	52.6%	B+
Federal Statute	55.7%	A
<i>Los Angeles Times</i>	55.4%	A
Sixth-grade Reader	56.6%	A

c. Tests of Consumer Contracts

A multiple-choice test of 148 consumers at a suburban New Jersey shopping center in 1977 showed that their understanding of a contract and warranty for the installment purchase of a refrigerator was abysmal. Those who were given the standard forms averaged only 45% correct answers on the test,

while those who read "simplified" documents (which were not actually very simple) averaged 55%.¹²⁰

d. Tests of Jury Instructions

Jury instructions have provided the bulk of the grist for comprehension testers' mills. The tests have ranged from unsophisticated subjective questionnaires to paraphrase tests. Though some have been marred by methodological flaws, the overall results seem meaningful because they are uniform. They all point to the same sobering conclusion reached by the Loyola cloze test of jury instructions: extremely high percentages of jurors do not understand jury instructions.

Thus, in Ohio in 1937, 843 questionnaires sent in by former jurors disclosed that 37% heard no charge which they fully understood.¹²¹ In Oklahoma in 1947, of 185 jurors responding to a questionnaire, 40% said they had not clearly understood the jury instructions.¹²² In Florida in 1976, a multiple-choice and true-false test was given to 116 jurors who had viewed a videotape of a trial; an average of 30% failed to answer correctly key questions about the jury instructions, and on individual questions, wrong responses ranged from 23 to 50%.¹²³ In 1977 in Nebraska, 154 volunteer "jurors" recruited by advertisement saw a videotape of a mock trial, were given jury instructions, and were then asked to complete questionnaires. The results showed the jurors' understanding of the facts, the key legal concepts, and their proper application to reach a verdict, was no better than the understanding of a control group which received no instructions at all.¹²⁴

One of the most elaborate studies was conducted in 1979 by Robert P. and Veda R. Charrow, lawyer and linguist, respectively.¹²⁵ They administered a paraphrase test to a group of 35 persons called to jury duty in Maryland. Fourteen standard civil jury instructions from California were used. Each juror sat in a room in the courthouse with an experimenter. The experimenter showed a drawing of an automobile accident, read a one-paragraph description of a lawsuit arising from the accident, then played a tape recording of each jury instruction twice. The juror was asked to explain the instruction in his or her own words. The juror's paraphrase was examined first to see whether it contained every element of the instruction, and then every essential part, or the gist, of the instruction. The gist measure was regarded as the more significant one, and it showed that jurors correctly paraphrased the instruc-

120. Davis, *supra* note 7, at 876.

121. Speech of Walter B. Wanamaker, The Cincinnati Conference (Feb. 20, 1937), reprinted in *Trial by Jury*, 11 U. Cin. L. Rev. 119, 191-92 n.17 (1937).

122. Hervey, *The Jurors Look at Our Judges*, 18 Okla. B.A.J. 1508 (1947).

123. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 *Judicature* 478, 480-81 (1976).

124. Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 L. & Hum. Behav. 163 (1977).

125. Charrow & Charrow, *supra* note 19.

tions only 54% of the time.¹²⁶

The authors repeated the experiment with 48 other jurors divided into two groups. Each group was given seven original instructions and seven that were rewritten in plain English. This time, the gist measure showed correct paraphrasing 45% of the time on the original instructions, and 59% of the time on the plain English instructions.¹²⁷

The Charrows's research is additional impressive evidence that legalese cannot be understood. Unfortunately, their study is marred by their claim that there were "no real data"¹²⁸ on the point before their study, that the paraphrase method is superior to other testing techniques,¹²⁹ and that achievement of 59% comprehension on their plain English instructions constituted a "dramatic[ally]"¹³⁰ "positive"¹³¹ result. In fact, (as the entire section I B of this article demonstrates) there are lots of other "real data" indicating that legalese cannot be understood; the paraphrase method has its limitations just as other testing methods do;¹³² and none of us would care to be tried by jurors who understood only 59% of their instructions.

This last point is crucial. Since the Charrows could raise the comprehension level to an average of only 59% despite their strenuous efforts to write simple, clear instructions, their data were probably leading them to a conclusion that they failed to draw: that oral jury instructions are likely never to be understood adequately. In the Loyola cloze tests, I used three jury instructions from the Charrows's study,¹³³ and found that the level of comprehension was much higher. While the Charrows reported only 52% comprehension¹³⁴ of the plain English instruction given orally, for example, the cloze tests showed that readers understood it almost fully.¹³⁵ The conclusion seems inescapable that oral instructions are simply incomprehensible, but that clear written instructions can be understood.

This, indeed, was the first conclusion to be drawn by the authors of the most recent study.¹³⁶ Amiram Elwork, Bruce D. Sales and James J. Alfini (a linguist, a lawyer-linguist, and a lawyer, respectively) reported that their experiments with oral instructions produced nothing but "blank stares" from the jurors. This, combined with the findings of educational psychologists that people comprehend and recall written material much better than oral, led the authors to recommend strongly that jurors always be given written, as well as

126. *Id.* at 1361.

127. *Id.* at 1370.

128. *Id.* at 1307.

129. *Id.* at 1309-10.

130. *Id.* at 1358.

131. *Id.* at 1308.

132. See text accompanying notes 96-99 *supra*.

133. See notes 113-14 *supra*.

134. Charrow & Charrow, *supra* note 19, at 1370.

135. See text following note 118 *supra*.

136. A. Elwork, B. Sales & J. Alfini, *Making Jury Instructions Understandable* (1982).

oral, instructions.¹³⁷

These authors tested 269 paid, volunteer jurors. The jurors were shown videotapes of instructions given at two trials, and were presented written copies to refer to during the questioning. The experimenters administered lengthy questionnaires orally to each juror, and the dialogue was recorded. The questionnaires sought information that had been given in the instructions, some of it quite concrete, some rather abstract. For example, the jurors would be asked: "Name the charge in this case." Or: "Is direct evidence always better than indirect evidence? Please explain your answer." If the juror could not fully respond, the experimenter would say, "Would you care to look it up?" or would otherwise draw out the juror's thoughts.

The original instructions, from an actual Nevada murder trial and from a set of standard Florida forms, were rewritten, simplified, and administered in the same way to successive groups of jurors. The mean percentage of right answers per juror was 51% and 65%, respectively, on the two sets of original instructions. With one or more rewritings, these figures rose to 80%.¹³⁸ The authors strongly believed that, had they had time and money for further revisions, the level of correct answers could have approached 100%.¹³⁹

The team ran several parallel experiments to probe the effect of jury deliberations on comprehension of the instructions. These experiments tested the notion that group deliberations can correct individual misunderstandings of the instructions. The team concluded, however, that group deliberation increases individual comprehension only slightly, and does not eliminate serious misunderstandings. Further, it permits assertive individuals to dominate, allows a great number of legally inappropriate matters to be discussed, and influences the verdict and the amount of damages awarded.¹⁴⁰

In sum, sophisticated and simple comprehension tests of all types—cloze, multiple-choice, questionnaire, paraphrase, oral interview—have been performed on legal prose ranging from contracts to forms, to statutes, and to jury instructions. Every test has indicated that huge percentages of the respondents do not comprehend the legal language.

4. *Legalese Fails The Readability Formulas*

Since comprehension testing is often tricky and costly, one yearns for some simple, inexpensive way to measure the comprehensibility of legal language. Fortunately, the publishers of school books got this yearning decades ago when attempting to suit their texts to children at different grade levels. As a result, a technique was developed by which a single person can measure language difficulty using no more than a pencil and paper: the readability

137. *Id.* at 18-20.

138. *Id.* at 45-46.

139. *Id.* at 54-55.

140. *Id.* at 14-17.

formula.¹⁴¹

The developers of the formulas have looked at the measurable characteristics of written language to see if any correlate with comprehension difficulty. Hundreds of language variables have been studied, hundreds of formulas developed. Nearly all the formulas employ two factors: word difficulty and sentence complexity, usually measured by word length and sentence length. With these measurements, the formulas can predict comprehension difficulty with about 70% to 90% accuracy; that is, they correlate about .70 to .90 with the scores you would get by giving readers comprehension tests on the same passages. Many of the formulas correlate to a classic set of multiple-choice tests given to thousands of school-children in 1925 and revised in 1950 and 1961. Others correlate to cloze scores from a wide range of readers on a wide range of materials.

As Klare says,

It may seem surprising that counts of the two simple variables of word length and sentence length are sufficient to make relatively good predictions of readability. No argument that they *cause* ease or difficulty is intended; they are merely good *indices* of difficulty. Consequently, altering word or sentence length, of themselves, can provide no assurance of improving readability. How to achieve more readable writing is another and much more complex endeavor. But as long as predictions are all that is needed, the evidence that simple word and sentence counts can provide satisfactory predictions for most purposes is now quite conclusive.¹⁴²

Unquestionably, the most widely used readability formula is that of Rudolph Flesch.¹⁴³ A Viennese lawyer, Flesch came to the United States in 1938, earned a Ph.D. at Columbia, and eventually became the "great popularizer" of easy reading and writing. Several of his books¹⁴⁴ were successes in the mass-market. Flesch has advised numerous business and government agencies, and his Reading Ease Scale has been adopted in model acts¹⁴⁵ and by statute or regulation in at least seventeen states as a standard for readable insurance policies.¹⁴⁶ Here is Flesch's formula:

$$\text{Reading Ease} = 206.835 \\ \text{minus } .846 \times \text{average number of syllables per 100 words}$$

141. For the sources of the following discussion, see generally G. Klare, *The Measurement of Readability* (1963); Klare, *supra* note 59; Klare, *supra* note 90.

142. Klare, *supra* note 59, at 97-98.

143. Flesch, *A New Readability Yardstick*, 32 *J. Applied Psychology* 221 (1948).

144. R. Flesch, *The Art of Plain Talk*, *supra* note 7; R. Flesch, *The Art of Readable Writing* (1962); R. Flesch, *Why Johnny Can't Read* (1966); R. Flesch, *How To Write Plain English*, *supra* note 7.

145. *Life and Health Insurance Policy Language Simplification Model Act*, 2 *Proc. Nat'l A. Ins. Commissioners* 298-302 (1978); *Property/Casualty Insurance Policy Simplification Model Act*, 2 *Proc. Nat'l A. Ins. Commissioners* 910-11 (1980).

146. R. Pressman, *Legislative and Regulatory Progress on the Readability of Insurance Policies* 8-9, 11-12 (1979).

minus $1.015 \times$ average number of words per sentence

The higher the resulting score, the easier the passage is to understand. Flesch gives this scale:¹⁴⁷

90-100	= Very Easy	5th grade level
80-90	= Easy	6th grade
70-80	= Fairly Easy	7th grade
60-70	= Plain English	8th grade
50-60	= Fairly Difficult	10th - 12th grade
30-40	= Difficult	College
0-30	= Very Difficult	College graduate

Although the formula can be programmed for computer calculation with large amounts of material, Flesch has made it simple for individuals to gauge single passages. He publishes a thermometer-like chart¹⁴⁸ with the average number of syllables down one side and the average sentence length down the other; you simply lay a pencil across to connect your syllable and sentence-length counts, then read the level of difficulty from the point the pencil crosses the 0-100 scale in the middle of the thermometer.

Although the Flesch scale only correlates around .64 to .70 with the McCall-Crabbs comprehension scores on which it is based,¹⁴⁹ this correlation was for years about as high as any readability formula achieved, and was accepted as adequate and useful by textbook publishers and others. A few other formulas were also widely adopted, notably the Dale-Chall and the Gunning Fog Index, but these achieved no higher validity than the Flesch scale.¹⁵⁰ In the 1960s, Bormuth, whose research on cloze tests was discussed earlier,¹⁵¹ developed twenty-four new readability formulas based on cloze tests administered to several thousand school children. Some of these formulas have correlation coefficients as high as .81, .84, and .90 with the cloze criterion on which they are based.¹⁵² However, the formulas are much more complicated to handle than Flesch or Dale-Chall and, apparently for that reason, have not attracted a wide following.

Edward Fry's influential "Graph for Estimating Readability" relies on word-count and syllable count like Flesch's formula, but is perhaps even easier to apply and immediately gives an approximate school grade level of difficulty. Since Professor Fry has given blanket permission to copy his graph, I reproduce it here:¹⁵³

147. R. Flesch, *How To Write Plain English*, supra note 7, at 26.

148. *Id.* at 25.

149. Klare, *Assessing Readability*, supra note 59, at 69.

150. *Id.* at 70-73.

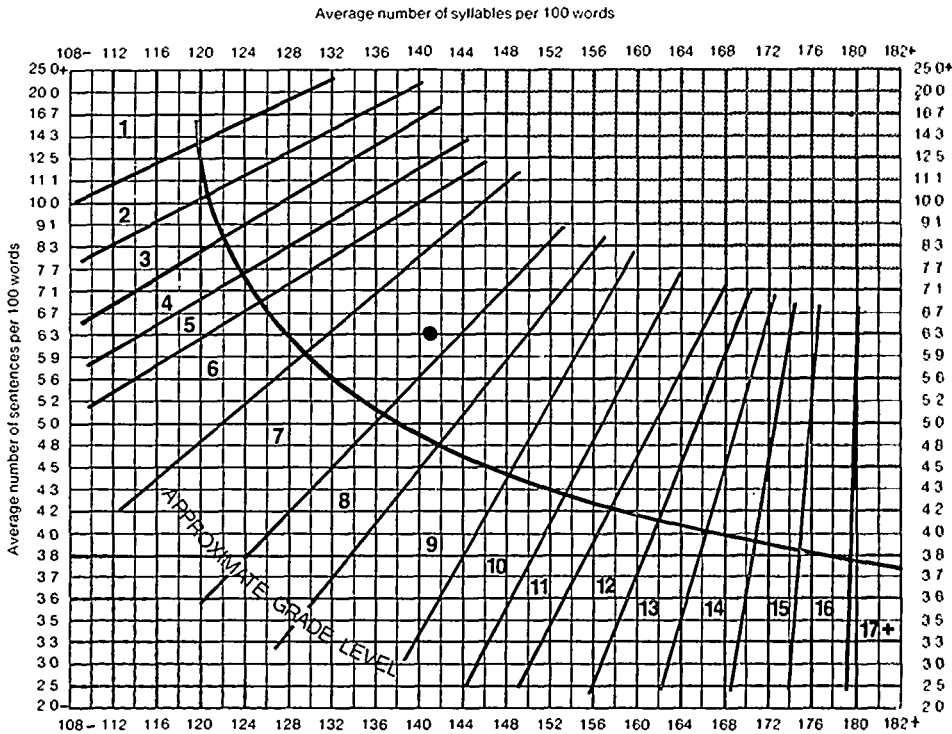
151. Bormuth, supra note 101.

152. Bormuth, supra note 106.

153. Fry, *Fry's Readability Graph: Clarifications, Validity and Extension to Level 17*, 21 *J. Reading* 242 (1977) (compiled at Rutgers University Reading Center, New Brunswick, New Jersey).

GRAPH FOR ESTIMATING READABILITY — EXTENDED

by Edward Fry, Rutgers University Reading Center, New Brunswick, N.J. 08904



Expanded Directions for Working Readability Graph

1. Randomly select three (3) sample passages and count out exactly 100 words each, beginning with the beginning of a sentence. Do not count proper nouns, initializations, and numerals.
2. Count the number of sentences in the hundred words, estimating length of the fraction of the last sentence to the nearest one-tenth.
3. Count the total number of syllables in the 100-word passage. If you don't have a hand counter available, an easy way is to simply put a mark above every syllable over one in each word, then when you get to the end of the passage, count the number of marks and add 100. Small calculators can also be used as counters by pushing numeral 1, then push the + sign for each word or syllable when counting.
4. Enter graph with *average* sentence length and *average* number of syllables; plot dot where the two lines intersect. Area where dot is plotted will give you the approximate grade level.
5. If a great deal of variability is found in syllable count or sentence count, putting more samples into the average is desirable.
6. A word is defined as a group of symbols with a space on either side; thus, *Joe*, *IRA*, *1945*, and *&* are each one word.
7. A syllable is defined as a phonetic syllable. Generally, there are as many syllables as vowel sounds. For example, *stopped* is one syllable and *wanted* is two syllables. When counting syllables for numerals and initializations, count one syllable for each symbol. For example, *1945* is four syllables, *IRA* is three syllables, and *&* is one syllable.

Note: This "extended graph" does not outmode or render the earlier (1968) version inoperative or inaccurate; it is an extension. (REPRODUCTION PERMITTED—NO COPYRIGHT)

a. The Formulas: Objections and Answers

Some linguists dislike readability formulas.¹⁵⁴ Their criticisms are useful as minor precautions. But a few critics seem bent on discrediting readability formulas altogether. Do they fear that the formulas are so easy to use that there will be less work around for trained linguists to perform? We should be careful not to throw off a caste of lawyer-priests only to substitute a caste of linguist-priests. The best thing about readability formulas is that they empower the layperson.

Klare, who possesses the most balanced view of readability formulas and of the fallibility of his own profession, recently reviewed several attacks on the formulas. After conceding that the formulas may have been "oversold" and sometimes used in the wrong ways, he admonishes that:

abandoning formulas would mean to give up tools which can correlate in the .80s or low .90s with the comprehension criterion on which they were based On the basis of such data, and compared to other kinds of psycho-educational prediction such as school grades, sales, or success on the job, readability formulas stand up very well indeed¹⁵⁵

Since readability formulas are mandated by law in many states¹⁵⁶ and are bound to become increasingly scrutinized, it is worthwhile to examine the critics' objections.

Objection: Formulas cannot distinguish sense from nonsense.

It is true that, with any formula based on word difficulty and sentence length, a sentence will receive the same score whether its words are read forward, backward, or scrambled. Critics have made much of this, but the objection is trivial. The formula assumes that the passage will be written in normal English rather than in scrambled English. Formulas are not magic tricks, but tools to measure normal language typically occurring in real settings.

Objection: Formulas fail to take account of "discourse" features.

The flow of ideas, the links between sentences, and other discourse features help or hinder comprehension greatly, yet the formulas omit these by measuring attributes of individual sentences only. A string of easy but unrelated sentences might be gibberish, while a string of difficult sentences might be clear because of keen use of various discourse features.

154. See, e.g., Charrow & Charrow, *supra* note 19, at 1310 n.10, 1319-20, 1340-41; V. Charrow, *Let the Rewriter Beware* (1979); Finegan, *supra* note 91; J. Redish, *Readability* (1979); Campbell & Holland, *supra* note 107; Redish, Felker & Rose, *Evaluating the Effects of Document Design Principles*, 1981 *Information Design J.* 236.

155. Klare, *supra* note 61, at 252; Campbell & Holland, *supra* note 154, raise questions about the validity of the underlying comprehension tests used to validate the formulas, but the evidence they cite seems thin.

156. R. Pressman, *supra* note 146.

The answer to this objection, for extreme cases, is the same one given above: the formulas assume normal English with normal discourse structures; nonsensical discourse structures simply do not typically occur in real settings where the formulas will be applied. But what about slightly odd discourse structures, the kind that frequently are the culprits in bad legal writing? Do formulas fail to measure that kind of defect? The answer has to be that they do not fail to measure it. True, the formulas may only *count* word and sentence difficulty, but these are *indices* of discourse features and all the other variables that make up total comprehension. We know this because the formulas correlate highly with cloze and other comprehension tests that clearly do take into account the discourse features. It is wrong, therefore, for critics to claim that the formulas measure only "the difficulty of an average sentence in a passage," and to warn that "legislators and regulatory agencies concerned with understandability" should not use the formulas as techniques to measure entire passages.¹⁵⁷

Objection: formulas mislead by measuring sentence length, because sentence length per se does not cause difficulty.

The Charrows present this objection in its extreme form: "Although readability formulas are easy to use and certainly do indicate the presence of lengthy sentences, they cannot be considered measures of comprehensibility. Linguistic research has shown that sentences of the same length may vary greatly in actual comprehensibility."¹⁵⁸ This objection misses the mark not once, but twice.

First—and this is sometimes overlooked even by the authors of readability formulas—*extremely* long sentences do cause comprehension difficulty, probably because of memory overload.¹⁵⁹ And what someone once observed about the philosopher Kant can surely be said of lawyers: some of their sentences can be measured only by carpenters. The *arc de triomphe* of lawyers' sentences may be § 341(e)(1) of the Internal Revenue Code,¹⁶⁰ a single sentence of some 550 words. Sentences in the 100-200 word range are common. Some linguists are apparently innocent of the existence of these monstrosities. One empirical study of sentence length merely tested sentences of 15.4, 23.2 and 38.6 average word length.¹⁶¹ When linguists start plugging sentences of 100 or 200 plus words into their empirical studies, they will no doubt prove the obvious: lawyer-size sentences are too long to be understood.

157. Finegan, *supra* note 91, at 8 of manuscript.

158. Charrow & Charrow, *supra* note 19, at 1319.

159. Coleman, Improving Comprehensibility by Shortening Sentences, 46 J. Applied Psychology 131 (1962); Wearing, The Recall of Sentences of Varying Length, 25 Australia J. Psychology 155 (1973); see also Davis, *supra* note 7, at 847-50; G. Klare, A Manual for Readable Writing III-2-4, V-8 (1980).

160. 26 U.S.C. § 341(e)(1) (1982).

161. Coleman, *supra* note 159. Coleman did find a significant relationship between comprehension and sentence length, but he had expected the relationship to be stronger than it was. *Id.* at 132. Perhaps he should have tested 26 U.S.C. § 341(e)(1).

In the second place, with sentences of normal length, it is conceded by all that sentence complexity (along with word difficulty) rather than length itself causes comprehension difficulty. There are many theories of what "sentence complexity" actually is and how to measure it: the Yngve word depth,¹⁶² the number and types of subordinate clauses,¹⁶³ the extent of passive forms, and other factors. These are competing views of how the mind comprehends written material.¹⁶⁴ But over an entire passage, it turns out that sentence length correlates extremely well with measurements of these "real causes" of complexity. When combined with a measurement of word difficulty, sentence length also correlates well with scores by readers on actual comprehension tests.¹⁶⁵ Bormuth has shown, for example, that sentence length correlates .86 with Yngve mean word depth.¹⁶⁶ As Bormuth says, so long as readability correlations are understood only as indices of difficulty, they "need not cause intellectual indigestion for anyone."¹⁶⁷

Remarkably, the Charrows fail to mention these correlations. Moreover, they assert: "The results of our study clearly illustrate that sentence length has virtually no effect on subjects' performance."¹⁶⁸ The statement is questionable. The Charrows drew their conclusion from the finding that sentence length had a low correlation with "variability" in comprehension scores. This means, apparently, that a passage 50% shorter than another did not have a 50% better comprehension score. That is not surprising, for no one would claim that sentence length alone varies in a linear fashion with comprehension. But further, I calculated that the Charrows themselves always shortened sentences (by an average of 36%) when they rewrote the jury instructions in their study, and comprehension as measured by the "gist" scores improved on each of these rewritten instructions.¹⁶⁹ The shorter sentences may well have played a role in the improved comprehension.

Objection: Formulas mislead by penalizing all long words and rewarding all short ones; long words are often familiar and short ones often arcane.

Certainly there are easy long words (encyclopedia) and difficult short ones (gnu), but extensive empirical research has now established beyond cavil that there is a strong positive correlation between short word length and word familiarity. Readability formulas successfully employ this generalization across typical prose passages of some length. The formulas are not designed

162. Yngve, *A Model and Hypothesis for Language Structure*, 404 *Proc. Am. Phil. A.* 444 (1960); *Computer Programs for Translation*, 206 *Sci. Am.* 68 (1962).

163. *Am. Inst. Research, Guidelines for Document Designers* 48 (1981). See also Arena, *The Language of Corporate Attorneys*, in *Linguistics and the Professions* 143 (R. DiPietro ed. 1982).

164. See G. Klare, *supra* note 159, at V-6 to 9; *Guidelines for Document Designers*, *supra* note 163, at 48.

165. Finegan, *supra* note 91, at 6.

166. Bormuth, *supra* note 106, at 113.

167. *Id.* at 129.

168. Charrow & Charrow, *supra* note 19, at 1320.

169. *Id.* at 1370.

to work on single words or short passages, especially those filled with atypical words. Thus, there is some danger that short legal documents (say, fewer than 100-200 words) containing a lot of relatively short, technical words will score artificially high on the Flesch or other scales.

Objection: Formulas are not adequate guides of how to write clearly.

True. Readability formulas are not intended to tell you how to write, only how to measure the clarity of what is already written.¹⁷⁰ Rudolph Flesch may regret that he once stated: "If you want to learn how to write Plain English, you must learn how to use a readability formula."¹⁷¹ Standing alone, his statement is misleading, for if you do nothing more than "write to the formula"—chop the sentences into 20 words each, and replace the silver-dollar words with nickel and dime words—you may not end up with effective, readable prose even though the readability score will be high. In your mechanical manipulations you may have omitted other keys to good writing, especially intuitive "discourse features" like logic, structure, and rhythm, that hold language together and get ideas across. These features are naturally present in normal prose and, as noted earlier, are inherently reflected in readability indices when applied to normal, not mechanically assembled, prose.

Flesch's statement, however, does not stand alone in his book; he goes on to recommend other guides for clear writing. In context, he seems only to be stressing that short sentences and familiar words, the factors measured by the readability formula, are terribly important to clear writing. Indeed, this is emphasized by virtually every manual on good writing, and even by the critics of readability formulas.¹⁷²

It is prudent, of course, to guard against high—but invalid—readability scores achieved by artificial "writing to the formula." Educators are concerned that some school textbook writers, mandated by their publishers to achieve certain readability scores, are simply doing just that.¹⁷³ But there is no evidence that anyone has been exploiting this method in complying with legally required readability scores in insurance policies or other legal documents. Indeed, any such effort could just as easily be put to adhering to genuine guides to good writing found in any style manual. The potential danger does suggest, however, that formulas should not be used as the sole touchstone for assuring that comprehension standards are met.

Objection: The Flesch scale is not a precision measuring instrument.

This is a sound criticism, but it should not obscure the fact that the

170. G. Klare, *supra* note 159, at ii, makes the essential point: "*Prediction* can be relatively simple when done statistically with readability formulas *Production* is much more complex."

171. R. Flesch, *How To Write Plain English*, *supra* note 7, at 20.

172. See, e.g., J. Redish, *supra* note 154; *Guidelines for Document Designers*, *supra* note 163.

173. A Debate Over "Dumbing Down," *Time*, Dec. 3, 1984, at 68.

Flesch scale is nevertheless useful. Flesch, like other formulas, correlates imperfectly though substantially with the comprehension tests on which it is based,¹⁷⁴ so any Flesch score is only an approximation of comprehensibility to start with. It also must be conceded that there is little difference between close scores on the scale. Moreover, Flesch has subjectively assigned ascending adjectives of reading ease to every 10 points on the scale. In addition, the scale does not move proportionally; a passage scoring 30 is not necessarily twice as hard as one scoring 60.

Thus, Flesch numbers should be used to make macro, not micro, judgments about readability. It is safe to draw judgments about scores at the bottom, middle, or top of the scale, but silly to quibble over scores within several points of each other in the mid-range. A score off the scale, like the minus 219 achieved by the statute¹⁷⁵ used in the Loyola cloze tests, tells you all you need to know.

Used this way, as a screening device for sick language, the readability formula works. The objections to it are like objections to an oral thermometer: as any child knows, it can be deceived by tricks; fine lines on its scale are not as significant as large ones; and it cannot tell you how to get well. Used properly, though, it tells you whether you are ill.

It takes you only a few moments to apply the Flesch formula to test the readability of any passage of legal prose. Caution: unless you select a reasonably long, representative sample, and count words and syllables very carefully, the scores may be wildly invalid. Following are some Flesch scores I calculated from a wide range of legal materials, all demonstrating once again that legalese is seriously incomprehensible.

*b. Readability Scores of Sample Legal Documents*¹⁷⁶

Vocational Education Act ¹⁷⁷	— 83
Postal Reorganization Act ¹⁷⁸	26
National Labor Relations Act ¹⁷⁹	14
Social Security Act ¹⁸⁰	— 130
Ethics in Government Act of 1978 ¹⁸¹	— 219
Hospital Consent Form ¹⁸²	12
Release form for Withdrawal of Union Pension Benefit ¹⁸³	— 197

174. Klare, *supra* note 59, at 69.

175. 18 U.S.C. § 207 (1982).

176. I picked the first three of these at random from a library shelf of the United States Code.

177. 20 U.S.C. § 11 (1982).

178. 39 U.S.C. § 101(a) (1982).

179. 29 U.S.C. § 161(1) (1982).

180. 42 U.S.C. § 1382(c)(2) (1982).

181. 18 U.S.C. § 207 (1982), as excerpted *supra* note 116.

182. Hospital Consent Form, *supra* note 115.

183. Release form for Withdrawal Benefit, *supra* note 20.

Model Homeowners' Association Agreement to Discontinue Violation of Restrictive Covenant ¹⁸⁴	10
Trust Clause from <i>In re Ben Weingart</i> ¹⁸⁵	-55
Standard Form Builder's Contract ¹⁸⁶	0

In a study impressive for its thoroughness, Professor David B. Magleby of the department of political science at Brigham Young University applied three readability formulas to voters' pamphlets used in four states in the last decade.¹⁸⁷ He found that the pamphlets were written at levels much too difficult for most voters to comprehend. While the mean number of years of education for citizens in California, Oregon, and Massachusetts was 13, and 12 in Rhode Island, all the pamphlets required more advanced reading ability:

Readability of Voters' Pamphlets in California, Massachusetts, Oregon, and Rhode Island, 1970-1979¹⁸⁸

Sections of the pamphlet	Words in sample	Average no. of words per sentence	Readability		
			Fry	Dale-Chall	Flesch
<u>Official Description</u>					
California	8,121	21.4	17.9	17.3	24.5
Massachusetts	4,414	30.4	15.0	14.5	32.9
Oregon	3,779	21.2	17.9	16.3	25.4
Rhode Island	1,588	41.8	15.0	14.5	32.9
<u>Analysis/Explanations</u>					
California	9,528	23.3	15.4	14.5	36.6
Oregon	5,830	23.7	15.1	14.6	37.3
<u>Arguments Pro/Con</u>					
California	14,327	18.8	13.9	12.8	44.2
<u>Actual Proposition</u>					
California	2,725	45.4	15.3	16.1	19.2

By contrast, popular mass-market magazines are typically written at much easier levels:

184. A. Canzoneri, B. Gerstel & A. Grogan, Homeowners Associations 283 (1980).

185. *In re Ben Weingart*, supra note 63.

186. Excerpt, Builder's Contract, Wolcotts Form 567 (adopted by joint committee American Institute of Architects, Association of Creditmen of Building Material Dealers, Builders Exchange of Los Angeles, L.A. Building Materialmen's Protective Association and Master Builders' Association of Los Angeles).

187. Magleby, Voter Pamphlets: Understanding Why Voters Don't Read Them, Paper Prepared for Delivery at 1981 Annual Meeting of American Political Science Association, New York City, Sept. 3-6, 1981; attached as Exhibit B, Declaration of David B. Magleby in Support of Ex Parte Application for Alternative and Preemptory Writs of Mandate, Common Cause v. Eu, Civ. No. 322060 (Sacramento Cal. Super. Ct., July 27, 1984).

188. Declaration of Magleby, supra note 187, at 91.

Readability of Text from Recent Issues of *Time*, *Newsweek*, *People*, and *Readers Digest*¹⁸⁹

Magazine	Words in sample	Average no. of words per sentence	Readability		
			Grade level		
			Fry	Dale-Chall	Flesch
<i>Time</i>	8,405	20.4	12.4	11.3	49.6
<i>Newsweek</i>	8,216	21.5	12.3	11.8	49.6
<i>People</i>	9,130	17.8	9.4	8.7	64.7
<i>Readers Digest</i>	11,466	15.5	10.1	9.7	61.8

Magleby also found, in an analysis of data from Massachusetts in 1976, that the length and difficulty of ballot propositions would cause certain groups of citizens to skip voting altogether. Low-income voters, "middle of the road" voters, and Democrats would tend to give up voting—even on propositions they favored—in the face of difficult language.¹⁹⁰

In California, the Political Reform Act of 1974¹⁹¹ requires that the analysis accompanying ballot propositions "be written in clear and concise terms which will be easily understood by the average voter . . ."¹⁹² Professor Daniel H. Lowenstein of UCLA Law School (who helped write the Act and was the first chair of the commission it set up) and Common Cause recently brought suit to enforce the requirement.¹⁹³ Represented by the Center for Law in the Public Interest, they based their complaint largely upon Magleby's readability data which found that "[f]rom 1974 to 1980 . . . a large majority of the state's population—as high as 83% in June 1980—had not completed sufficient formal schooling to comprehend the ballot measure descriptions prepared by the Legislative Analyst according to the readability analysis."¹⁹⁴ The Secretary of State and Legislative Analyst defended, in part, by asserting that readability formulas are inadmissible in court because they are "invalid, makeshift devices."¹⁹⁵ A decision is pending.

Readability formulas have, in fact, been admitted in numerous courts across the country.¹⁹⁶ It was, for example, the formula and testimony of Professor Edward Fry that recently led a federal court to find that Medicare let-

189. *Id.* at 87.

190. *Id.* at 84.

191. Initiative Measure approved by the electors, June 4, 1974, Cal. Gov't Code § 81000-91000 (West 1976).

192. Cal. Gov't Code § 88003 (West 1976); Cal. Elec. Code 3572 (West 1976).

193. *Common Cause v. Eu*, Civ. No. 322060 (Sacramento Cal. Super. Ct., July 27, 1984).

194. Declaration of David B. Magleby, *supra* note 187, at 50-51.

195. Return to Alternative Writ By Way of Answer to Complaint, *Common Cause v. Eu*, *supra* note 187, at 24. The pleading relies heavily on statements found in Charrow & Charrow, *supra* note 19, and V. Charrow, *supra* note 154.

196. See, e.g., *Anderson v. Banks*, 540 F. Supp. 761 (S.D.Ga. 1982); *Hooks v. Wainwright*, 536 F. Supp. 1330 (M.D.Fla. 1982); *Seltzer v. Foley*, 502 F. Supp. 600 (S.D.N.Y. 1980); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952 (D.D.C. 1980).

ters violated the due process requirement of reasonable notice.¹⁹⁷

II

DEFENSES OF LEGALESE, AND REBUTTALS TO THEM

Many pages ago we began observing a parlor game—the criticism of legalese. The critics have now moved all their pieces onto the board. Some demonstrate that legalese alienates and intimidates the public, and the rest prove that legalese cannot be understood by those who the law presumes understand it.

The defenders of the language now make their moves, but are in my view quickly checked by the critics' countermoves.

A. *It Works/It Does Not Work*

Plain English is a solution in search of a problem, say the defenders. If legal language were not effective, then statutes, contracts, wills, and other legal instruments would be gumming up the gears of society instead of making them mesh smoothly. The fact that legal documents facilitate millions of transactions involving innumerable dollars, people and things everyday, is proof that the language works. The documents are drawn up in safe, legal prose, designed to keep people out of court, and, most often, they do just that.

Rebuttal:

“Well, don’t you believe a word of it,” says Fred Rodell.

In the first place, those legal papers . . . are phrased the way they are, not in order to keep the people whose affairs they deal with *out* of court, but in order to give somebody a better chance of winning if the affair gets *into* court . . . Most business transactions, however, run off smoothly of their own accord . . . And, very briefly, it is this fact, not the fact that lawyers are always hovering around advising and charging fees, that is responsible for the small percentage of business affairs that find their way into a courtroom.¹⁹⁸

Moreover, I would add, the claim that “legal language works” blithely ignores the massive contrary evidence presented above. Does legalese work? When it is denounced by thoughtful commentators as “excrementitious,”¹⁹⁹ and “hocus-pocus”?²⁰⁰ When it is the butt of Marx Brothers antics?²⁰¹ When it is characterized as a power elite’s instrument of social intimidation?²⁰² When it causes thousands upon thousands of litigated cases?²⁰³ When it leads

197. *Heckler*, 591 F. Supp. at 1033.

198. F. Rodell, *supra* note 8, at 175-77.

199. J. Bentham, *supra* note 4.

200. F. Rodell, *supra* note 8.

201. See note 40 *supra*.

202. See text accompanying notes 48-56 *supra*.

203. See text accompanying notes 63-78 *supra*.

a mayor and all his advisors into a \$55 million political fiasco?²⁰⁴ When all testing techniques employed have consistently proven that people of average education cannot understand jury instructions,²⁰⁵ statutes,²⁰⁶ the installment contract for their refrigerator,²⁰⁷ the ballots on election day,²⁰⁸ or the permission they are giving the surgeon to carve them up?²⁰⁹

The defenders of legalese have never responded to this evidence. They remain head-in-the-sand silent, except to pop up when prodded and exclaim "It works!"

B. *It Is Precise/It Is Imprecise*

The claim that legalese is precise presents a more formidable defense. This claim could easily be discredited if it were only the stuffed-shirts²¹⁰ of the profession who advanced it. But no less a person than the patron saint of sensible writing, Sir Ernest Gowers, endorsed the claim in his influential book, *The Complete Plain Words*.²¹¹ It was as if the Sunday preacher had unveiled himself as Judas Iscariot.

The peculiarities of legal language, wrote Gowers,

are caused by the necessity of being unambiguous. That is by no means the same as being readily intelligible; on the contrary, the nearer you get to the one, the further you are likely to get from the other It is accordingly the duty of a draftsman of these authoritative texts to try to imagine every possible combination of circumstances to which his words might apply and every conceivable misinterpretation that might be put on them, and to take precautions accordingly. He must avoid all graces, not be afraid of repetitions, or even of identifying them by *aforesaid*s; he must limit by definition words with a penumbra dangerously large, and amplify with a string of near-synonyms words with a penumbra dangerously small; he must eschew all pronouns when their antecedents might possibly be open to dispute, and generally avoid every potential grammatical ambiguity.²¹²

Rebuttal

I think Gowers must be called on the intellectual legerdemain of saying the nearer you get to intelligibility, the further you get from precision. By

204. See text accompanying note 87 *supra*.

205. See text accompanying notes 114, 120-39 *supra*.

206. See text accompanying note 118 and text accompanying notes 177-81 *supra*.

207. See text accompanying note 120 *supra*.

208. See text accompanying notes 178-95 *supra*.

209. See text following note 118 and accompanying note 182 *supra*.

210. See Prather, *In Defense of the People's Use of Three Syllable Words*, 39 Ala. L. Rev. 394 (1978).

211. E. Gowers, *The Complete Plain Words* (Pelican ed. 1962).

212. *Id.* at 19-20.

dimissing the relevance of intelligibility, he changes the concept of what precision must mean for legal work. It should mean "precise communication;" if a legal document fails to communicate, its precision is beside the point. But for Gowers, precision has a value of its own.

This brings to mind the tale of the Swiss clockmaker who installed his most perfect clock in the tower on the town square.

"But Johann," complained the mayor, "the clock has no hands or numbers and the citizens cannot tell the time!"

"I give you the finest precision-instrument in Europe," grumbled Johann, "and you are ungrateful. Besides, if the citizens want to know the time, they can pay me to climb the tower, inspect the workings, and announce it."

That is what Gowers (a lawyer) was defending: unintelligible, and therefore useless, precision. And if the people want to know what those precision-instruments — by which they live their daily lives, carry on business, and leave their money after death — actually mean, then they can jolly-well pay Gowers's fellow lawyers to inspect the complicated workings and tell them.

In any event, the debate over Gowers's unintelligible precision is a moot one, for in fact there is relatively little precision, intelligible or unintelligible, in legal language. As Mellinkoff points out, "[l]istening to these discussions about precision . . . law students and lawyers come to the effortless conclusion that with so much interest in precision, there must be a lot of it around."²¹³ Anyone who believes the law is precise has not read Mellinkoff's 100 pages or so. In those pages he exposes the ambiguity, confusion, and litigation generated by the hallowed *aforsaid*s ("has been causing trouble for more than three hundred years")²¹⁴ *hereinafters* (cannot tell when it starts or stops),²¹⁵ lists of synonyms (just a sloppy way to add emphasis and sound important),²¹⁶ long sentences ("betrays even competent draftsmen"),²¹⁷ and other alleged precision tools of the trade.

The illustration of "legal phraseology that makes its meaning certain"²¹⁸ used by Gowers in his book is itself full of ambiguities, vagueness, loopholes and absurd meanings.²¹⁹

213. D. Mellinkoff, *supra* note 6, at 293.

214. *Id.* at 305.

215. *Id.* at 316.

216. *Id.* at 363-64.

217. *Id.* at 373.

218. E. Gowers, *supra* note 211, at 20.

219. *Id.* at 22. Gowers quotes a wartime order regulating charges for the laundering of "wiping rags":

(i) basic charge means in relation to the services to which this Order applies,

(a) the charge made for such services in the ordinary course of the business in the course of which those services were being performed during the week beginning 31st August, 1942, in accordance with the method of charge then in being in relation to that business for performing such services; or

(b) the charge made for such services in the ordinary course of a substantially similar business during the said week, in accordance with the method of charge then in being in relation to that business for performing such services;

In short, where is all this vaunted precision? And, if you find any, is it intelligible? Those are the hard questions which the defenders of legalese have not answered.

C. *It Is Settled/It Is Unsettled*

“‘Legalese,’” the argument goes,

evolved because the meaning of a word or phrase frequently had gone to court This process has meant that legal language gradually has become precise and relatively certain; when a word, term or phrase is used in a contract, and that contract has been the subject of judicial interpretation, the precise meaning of the words therein has become more certain or determinable. Thus, one can depend upon what the particular words mean (or certainly what they do not mean) because a court has ruled, and probably would rule in the future, that they mean just that.²²⁰

With this argument, the tongues cluck and the heads shake in regret: yes, we would love to simplify our language but—such a shame—the courts and so many years of history have tied our hands!

Note first what this argument fails to defend in legal language. It defends some of the vocabulary of legalese, but not the syntactic features (long sentences, word lists, nominalizations, passives, negatives, misplaced phrases),²²¹ or the organization (illogical ordering of ideas, lack of pronouns, sentences stuffed with too many ideas),²²² or the stylistic features (pretense of extreme precision, impersonality, declarative sentences, conditional sentences, pompous and dull tone, poetic and magical flavor, bizarre graphic design).²²³ The argument, in short, concedes most of the debate.

What alone remains of this defense of legal language is support for some legal vocabulary, a small island of true terms of art that are precise, useful, and generally necessary for lawyers to use. A term of art is “a short expres-

Provided that in any case in which a person who performs such services proves that such services were being performed in the course of his own business during the said week, “basic charge” shall only have the meaning specified in sub-paragraph (a) of this paragraph.

“Rags” means any worn-out, disused, discarded or waste fabric or material made wholly or mainly from wool, cotton, silk, rayon or flax or from any mixture thereof.

“Wiping rags” means rags each one of which is not less than 144 square inches in size and has been trimmed and washed and is suitable for use as a wiping rag.

Observe these problems: Does the order include a discarded sheepskin rug as a rag? Cotton bandages? A discarded, but never-worn silk dress? Would a floor or window washing business using rags qualify as a business “substantially similar” to that of laundering of rags? Note also the loophole: a cloth that is only 143 square inches, or one with ragged, untrimmed edges, is not within the definition of “wiping rag.” Note, too, the absurdity: there is no need to launder a “wiping rag” for, by definition, a wiping rag is one that has already been washed.

220. Prather, *supra* note 210, at 395.

221. See *supra* part I A. 1. “Syntactic Features.”

222. See *supra* part I A. 1. “Organization.”

223. See *supra* part I A. 1. “Style.”

sion that (a) conveys a fairly well-agreed meaning, and (b) saves the many words that would otherwise be needed to convey that meaning."²²⁴ *Plaintiff, defendant, hearsay, injunction, felony* are all true legal terms of art along with, I would estimate, no more than 100 others. The rest, including such worshipped terms as *heir*,²²⁵ *last will and testament*,²²⁶ *seisin*,²²⁷ and *proximate cause*,²²⁸ fail to fit the test.

Many of these terms can be found in case law, of course. However, as Mellinkoff points out:

[L]ike soldiers who have been "in the army" but not "in combat," most of the words in the cases have been "in litigation" but not "litigated." And even when the words themselves are litigated, they have seldom come to rest for more than a moment. With each change of circumstance, they are prodded, stretched, squeezed, and reshaped.

Yet the lawyer's traditional respect for the preserved word encourages him to believe that words uttered in court — as in some ancient temple — are sacrosanct It is on the strength of this belief that what is sanctioned by precedent is precise . . . that indifferent scraps of language enjoy an undeserved reputation for precision.²²⁹

The hope for a precise language through terms of art, Mellinkoff adds, has "overexcited the profession."²³⁰

Once it is conceded, as it must be, that most of the alleged precise terms of art in the law are really just trade jargon, the defenders must fall back on the argument that the jargon is comfortable and useful. Abandon it, they say, and lawyers will have to do more original writing; moreover, they will run the risk of not being understood by other lawyers and judges.

That position is maintainable only if the sole audience for legal writing is lawyers. But there is no class of legal documents whose audience consists entirely of lawyers—with the possible exception of the papers involved in litigation. Statutes, regulations, contracts, wills, notices, judicial opinions and other documents: all are read by ordinary mortals who do not understand the jargon and who act on it at their peril. Is it too much to ask the legal profession to engage in a bit of original, jargon-free writing, to reach these readers?

Lawyers may wind up communicating better even among themselves if forced into original writing. Original writing requires effort and skill; legalese is usually just a fast way of writing without having to think much. Time and again, experience has shown that when customary jargon is subjected to original thought the jargon is revealed as a trap. I asked my specialist colleagues,

224. R. Wydick, *supra* note 7, at 19.

225. See D. Mellinkoff, *supra* note 6, at 328-31.

226. *Id.* at 331-33.

227. *Id.* at 342-45.

228. *Id.* at 379-83.

229. *Id.* at 375.

230. *Id.* at 392.

for instance, why a certain statute exempted from tax the "community, quasi-community, or quasi-marital property" of spouses.²³¹ They replied, "because that's the way the property of spouses is traditionally categorized." But after several minutes of discussion, they realized that "separate property" of spouses had been omitted and that no plausible reason could be imagined for omitting separate property from this particular tax exemption. Our best guess was that the legislative drafter, trapped in the litany of the traditional phrasing, goofed; the Legislature probably intended to exempt simply "all property."

Will lawyers or judges misunderstand writing cleansed of traditional jargon? Since English is their mother tongue, they will not actually misunderstand a plain English document. But might they argue that the intention is not clear because the customary phrasing is absent? Might some lawyers, for their own purposes, insist that "To repay my loan, I promise to pay . . ." is fatally different from "For value received, the undersigned here promises to pay . . . ?"²³² Or might they argue that the language "is so plain and simple as to be devoid of legal meaning . . . ?"²³³ Indeed they might, just as lawyers have always argued about the meaning of the tried and true phrases. Some of the quibbling about the substitution of plain English words for legalese at least can be quieted before it begins by inserting a gentle notice to the reader. Much as a law revision commission routinely tells a legislature "We have simplified the code you asked us to look at, and changed only the words, not the law," so any drafter of legal documents can put in a clause like this one: "This document is written in plain English, in an effort to make it understandable to persons who are not lawyers. Legal terms of art are used when necessary, but unnecessary legal jargon is omitted. The absence of jargon reflects an attempt to make the law clear, not to change it."

D. The Law Is Too Complex/Any Complex Law Can Be Simplified

"Blackstone doesn't translate well into Hemingway [R]eadability of complicated contracts by lay persons is a quixotic goal 'It just may be that society has grown so complex that we really do need lawyers to interpret its transactions' "²³⁴ Sir Ernest Gowers adds: "If anyone thinks that he can draft more simply and no less certainly, I advise him to try his hand and then ask an expert whether he can find any loopholes. I have seen

231. Cal. Rev. & Tax Code § 11927 (West Supp. 1984). My legislation students gave this statute our 1982 Gobbledygook Award. For our plain English version, see K. Hegland, Introduction to The Study and Practice of Law 159 (1983).

232. Siegel & Gale, Simple is Smart (undated pamphlet comparing former and rewritten loan note forms of First National City Bank, N.Y.).

233. Morton, Challenge Made to Beardsley's Plea for Plain and Simple Legal Syntax, 16 Cal. St. B.J. 103, 105 (1941).

234. Simply Put, Plain English Drive Stalls, Nat'l L. J., June 9, 1980, at 1, col. 8, quoting Wilbur H. Friedman of N.Y. Bar. See also Grad, Legislative Drafting as Legal Problem Solving, in Drafting Documents in Plain Language 481 (Practicing L. Inst. 1979).

even eminent members of the Bar humbled by that test."²³⁵ In a nutshell, this argument maintains that it is the complexity of the law, not the complexity of the language, that is the enemy of comprehension.

Rebuttal

Even in those palmy days of the past when society was (we presume) simpler, lawyers wrote in "a peculiar cant and jargon of their own, that no other mortal [could] understand."²³⁶ So it is hardly the case that the increased complexity of modern life has brought legalese upon us. Rather, like the cockroach that survives all upheavals in its physical environment, legalese has persisted intact, oblivious to changes in society.

Moreover, statements like "Blackstone doesn't translate well into Hemingway" ignore all the translations being done. Plenty of lawyers and linguists have taken up Gowers's gauntlet. Here is a partial list:

- *In general:* In *Plain English For Lawyers*,²³⁷ a law professor shows how to do it. At the end of his book, the author observes that what John Kenneth Galbraith said about economics applies equally to the law: "[T]here are no important propositions that cannot be stated in plain language."²³⁸ In *How To Write Plain English (A Book For Lawyers And Consumers)*, a lawyer-educator also shows how to do it, rejecting the lawyers' claim that some ideas are too complex. "Rule Number One," says Flesch, is "stick to Plain English through thick and thin. When you come up against a roadblock . . . try a little harder."²³⁹ In *Clear Understandings*, a lawyer and an English professor team up to prove that "lawyers do not need a separate language."²⁴⁰

- *Contracts:* Carl Felsenfeld and Alan Siegel (respectively, a lawyer and a language consultant) in *Writing Contracts In Plain English*²⁴¹ transform three paradigm documents—a bank's promissory note, a form for the sale of a cooperative apartment, and an insurance policy—into plain English. The objective, they point out, is "to make complex legal documents intelligible to the average consumer while retaining the binding force of the original text."²⁴² They meet that objective, and argue that "plainer legal language is better legal language . . . contracts that are understandable to those who sign them are, in the technical sense, better contracts."²⁴³

- *Consumer loan forms:* The broadest range of plain English forms, and the most deeply analyzed, are those published by Felsenfeld and Siegel in

235. E. Gowers, *supra* note 211, at 22.

236. J. Swift, *supra* note 2.

237. R. Wydick, *supra* note 224.

238. *Id.* at 65.

239. R. Flesch, *How to Write Plain English*, *supra* note 7, at 3-4.

240. R. Goldfarb & J. Raymond, *supra* note 7, at xii. See also *Plain English in the Law*, *supra* note 7; *Drafting Documents in Plain Language*, *supra* note 234.

241. C. Felsenfeld & A. Siegel, *Writing Contracts in Plain English* (1981).

242. *Id.* at 27.

243. *Id.* at v. See also P. Till & A. Gargiulo, *Contracts: The Move To Plain Language* (1979).

Simplified Consumer Credit Forms.²⁴⁴ Credit applications, loan notes, installment contracts for anything from cars to boats, credit card agreements, and even rejection letters are all here in simple language, together with detailed legal analysis of their content and their relation to state and federal disclosure laws. A note appears on the copyright page, apparently written by grudging counsel to the publisher, warning that "because the suggested language style herein [*sic*] represents a significant, untested departure from traditional legal draftsmanship, users of this book are cautioned against employing any form without consulting local counsel."²⁴⁵ Felsenfeld and Siegel, however, retort in their preface:

"[T]he courts will be more, not less, likely to enforce an agreement when it is written in a way that a consumer-customer can understand. We now have over five years' experience since the first breakthrough consumer agreements in simple English were put into use. The authors are aware of no failure of enforceability resulting from the use of plain language."²⁴⁶

● *Leases*: Felsenfeld and Siegel do it again for apartment leases, house leases, an Avis rent-a-car form, and television and other personal property rental forms.²⁴⁷

● *Real estate forms*: Still mining the Felsenfeld and Siegel vein, you will find that the impossible has been accomplished: both loan notes and mortgage documents have been simplified.²⁴⁸ The form developed by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation is the most impressive. Counsel to the FHLMC confessed:

"As the project progressed, we found several things. First, while the task of translating mortgage documents into simple, everyday language was a difficult one, it was not the impossibility that we had initially believed it would be."²⁴⁹

● *Wills*: The former president of the New York County Lawyers Association, an estate planning specialist, has urged plain English wills and has drafted a suggested model.²⁵⁰ At the prodding of a creative sole practitioner, the California Legislature has authorized a simple, check-the-box, statutory will form of which thousands of copies have been sold at nominal cost.²⁵¹ Wisconsin has followed suit.²⁵²

● *Insurance policies*: The laws of at least 21 states now require at least

244. C. Felsenfeld & A. Siegel, *Simplified Consumer Credit Forms* (1978, 1981 Cum. Supp.).

245. *Id.* at ii.

246. *Id.*, 1981 Cum. Supp. at vi.

247. C. Felsenfeld & A. Siegel, *supra* note 244.

248. *Id.* at Cum. Supp. 1-74.

249. *Id.* at 8-16, quoting Browne, *ABC's of Language Simplification*, *Am. Banker*, Aug. 14, 1978, at 37.

250. Cusack, *The Plain English Will Revisited*, *Trusts & Estates*, July 1980, at 42-43.

251. Kellogg, *Adapting Your Practice to the New Statutory Wills*, 3 *Cal. Law.* 14 (1983). See *Cal. Prob. Code* § 56-56.14 (West Supp. 1984).

252. *Wis. Stat. Ann.* § 853.50-.62 (1984-85).

some insurance policies to be written in plain English,²⁵³ and the National Association of Insurance Commissioners has adopted a Model Life and Health Insurance Policy Simplification Act,²⁵⁴ as well as Model Property/Casualty Insurance Policy Simplification Acts.²⁵⁵

● *Statutes:* In demonstration projects, my students and I have simplified extremely complex federal²⁵⁶ and state²⁵⁷ statutes, as well as several hundred pages of municipal ordinances from the City of Los Angeles²⁵⁸ and the City of Downey²⁵⁹ in California. The simplified statutes not only meet the tests of legal accuracy and clarity, but are an average of 35% shorter than the originals.

● *Administrative regulations and materials:* The Office of Federal Register's *Legal Drafting Style Manual*²⁶⁰ and its *Document Drafting Handbook*²⁶¹ demonstrate how to write readable regulations, as does *Guidelines For Document Designers*²⁶² funded by the National Institute of Education. Goaded by President Carter's executive order on plain English,²⁶³ most federal agencies began revising at least some of their regulations. Among others, rules on citizens' band and recreational boat radios²⁶⁴ and wonder of wonders, federal individual income tax forms²⁶⁵ have been rendered readable. Even the crusty old National Labor Relations Board has gotten into the act with a style manual²⁶⁶ whose goal is unabashedly "to eliminate legalese."²⁶⁷

● *Legal notices:* The landlord-tenant court in Detroit adopted "Street Talk" for summonses and for notices of eviction and default judgment, and the number of tenants actually showing up in court and contesting their evictions increased markedly.²⁶⁸ The traditional notices (which one 85-year-old woman mistook for Jehovah's Witness literature)²⁶⁹ had clauses like this:

253. R. Pressman, *supra* note 146, at 6.

254. 2 Proc. Nat'l Ass'n Ins. Commissioners 298-302 (1978).

255. 2 Proc. Nat'l Ass'n Ins. Commissioners 910-11 (1980).

256. 42 U.S.C. § 1382(c)(2) (1982). See translation in Benson, Gibberish, Gobbledygook and Such: "Legalese" at Its Best, L.A. Daily Journal, Jan. 17, 1984, at 3, col. 1.

257. K. Hegland, *supra* note 231, at 159 (Cal. Rev. & Tax Code § 11927 (West Supp. 1984)).

258. Loyola Law School Revision of Los Angeles Municipal Code, submitted to Los Angeles City Council (Feb. 6, 1981) (Council File 81-1544).

259. Loyola Law School Revision of Downey Code, submitted to City Manager, City Attorney & City Prosecutor, Downey, Cal. (Feb. 22, 1982).

260. United States Office of Federal Register Legal Drafting Style Manual (Interim Mar. 1978).

261. United States Office of Federal Register Document Drafting Handbook (1980).

262. See note 163 *supra*.

263. Exec. Order No. 12044, 3 C.F.R. 12,661 (1978).

264. 47 C.F.R. 95.201-428 (1983).

265. IRS Form 1040EZ (1983).

266. NLRB, Style Manual (1983).

267. NLRB's New Style Manual Seeks to Limit Legalese, Press Release No. R-1692 (Sept. 14, 1983).

268. Rose & Scott, "Street Talk" Summonses in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants, 52 J. Urban L. 967, 997 (1975).

269. *Id.* at 987.

“PLEASE TAKE NOTICE, That you are hereby required to quit, surrender and deliver up possession to me of the premises hereinafter described” The new court forms say: “Your landlord or landlady wants to evict you.”²⁷⁰

● *Pleadings:* Courts in California²⁷¹ and elsewhere are experimenting with rules to simplify pleadings. Meanwhile, a few members of the private bar already write pleadings and other legal documents in clear, ordinary language.²⁷² Some firms have hired professional English instructors and editors to revise their lawyers’ work. The head of one of these firms is convinced that the clarity of its pleadings “gives us a significant edge”²⁷³

E. The Process Is Too Complex to Produce Simple Language/The Process Is Rarely Too Complex for Competence

The adage has it that there are two things you should never watch being made: sausages and laws. Certainly the processes for making both are messy and difficult for some to stomach. A United States senator made the point in a more refined way when he protested the Gobbledygook Award he had won for sponsoring an unintelligible statute:

What may appear to some to be a lack of clarity or excess verbosity in a statute is usually not a result of careless drafting or a desire to conceal the effect of the statute, but of the necessity to deal with issues of great complexity in very short periods of time, and in language which a large number of people can agree upon as being an accurate reflection of the policy which the Congress intends . . . to implement. Many different people, generally with differing viewpoints and interpretations of congressional intent, are involved in the legislative process of the drafting of a bill. Pleasing everyone from a stylistic point of view is not always possible in this process.²⁷⁴

What the senator said about the legislative chamber goes also for the courtroom, labor negotiations, divorce disputes and many other pressure cooker situations in which lawyers find themselves, pen in hand, looking for language that will produce a result that everyone can live with. Little do they care if the result is stuffed with sloppy ingredients; everyone is just thankful to get the sausage.

Rebuttal

Here at last is a defense of legal language that makes a little sense—not much, but a little. The pressures of the legislative chamber and other lawyers’ haunts are undeniable and relentless. Nice, precise, clear language will inevi-

270. *Id.* at 1017, 1021.

271. Cal. Rules of Court 982-982.1 (West Supp. 1985).

272. I. Alterman, *Plain and Accurate Style in Lawsuit Papers* (1983).

273. Fadem, *Legalese as Legal Does: Lawyers Clean Up Their Act*, *Prosecutor’s Brief* 14, 15 (Jan-Feb 1979).

274. Letter from U.S. Senator Robert J. Dole to Robert W. Benson (June 7, 1983) (on file at offices of N.Y.U. Rev. L. & Soc. Change).

tably receive mortal wounds from these explosive pressures. At times, deliberate lack of clarity may even be desirable, so as to paper over underlying disagreements.²⁷⁵ But the casualty rate need not be nearly so high as it is, for several reasons.

In the first place, most legal writing does not take place under these pressures. The letter to a client, the will, the loan agreement form for the bank, administrative regulations, and the thousands of routine legal documents that pass through the lawyer's in-basket and out again, are written with fair time for contemplation, precision, and attention to prose. Second, even statutes, labor contracts, divorce agreements, and similar documents susceptible to intense pressures are initially conceived in silent minds and quiet rooms and have a gestation period of many months. It is only the moment of birth of these documents that tends to be quick and violent. If the prose is clear and simple from conception through gestation, chances are that a good deal of clarity and simplicity will survive the birth. Finally, a good writer—or a good lawyer—should not panic or flail about under pressure, grabbing onto silly and imprecise vocabulary, word lists, 100-word sentences, illogical organization, and absurd medieval style of legalese, for comfort. A good lawyer—one who deserves to earn a paycheck for practicing this craft—will admit occasional compromises with reality, but will maintain levelheaded writing and thinking under pressure.

III THE GAME IS OVER

The critique of lawyers' language is no longer a parlor game, but an analysis of social policy and a demand for reform. Now, reform is on its way, borne by inexorable forces that promise to bring an end to legalese as the predominant language of the law within our lifetime. These forces arise as the intellectual foundations of legalese crumble, self-interest is exposed as the sole rationale for the language, and the objective self-interest of the profession begins to demand that lawyers use plain English.

A. Erosion of the Intellectual Foundations of Legalese

Numerous fundamental doctrines depend upon the assumption that legal language is comprehensible. Under the assault of empirical evidence, these doctrines have been revealed as myths. The doctrines that due process guarantees a right to trial by correctly instructed jurors,²⁷⁶ and notice that reasonably conveys required information,²⁷⁷ are, in practice, myths.²⁷⁸ The doctrine that a contract is a "meeting of the minds" is a myth when the contract is written

275. See Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 Va. L. Rev. 23 (1956); Christie, *Vagueness and Legal Language*, 48 Minn. L. Rev. 885 (1964).

276. See *People v. Ramos*, 37 Cal. 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984).

277. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

278. See Part I B *supra*.

in legalese.²⁷⁹ The tort doctrine that a plaintiff has given "informed consent"²⁸⁰ to a risk imposed by the defendant is a myth when the consent document is but legal boilerplate.²⁸¹ Democracy presumes an informed electorate. When citizens cannot understand the ballots,²⁸² or the statutes,²⁸³ an informed electorate is a myth. As the empirical evidence keeps accumulating, so do the myths. No end is in sight.

The revelation that key legal doctrines are myths inevitably raises searching questions about the legal language that is causing the illegitimacy. Those who produce the legalese are increasingly pressured to justify it. When they look for justifications, they find the traditional rationales have crumbled in the face of the growing body of empirical evidence that the language is ineffective,²⁸⁴ imprecise,²⁸⁵ unsettled,²⁸⁶ and, in any event, unnecessary.²⁸⁷ The hard-line defenders of legalese have never responded to this evidence. Nor have they offered any new rationale. Their language, consequently, has been left without an intellectual foundation.

B. Exposure of Self-Interest as the Sole Rationale of the Language

If legalese cannot be otherwise justified, what explains its continuing dominance of lawyers' language? No empirical research has been done to answer that question; there are only hypotheses. The hypotheses overlap and there is truth in each of them.

A threshold hypothesis is that most lawyers, though familiar with the game of criticizing legalese and its polemics, simply have not yet learned of the hard evidence that has undermined the traditional rationales. It was only in 1963 that Mellinkoff established the base of that evidence,²⁸⁸ and the bulk of the empirical data has been collected only recently. As the hard evidence continues to accumulate and the profession becomes familiar with it, many lawyers can be expected to shed their old linguistic habits spontaneously.

The other hypotheses assume that lawyers would prefer to maintain their language despite the evidence against it. In one form or another, these hypotheses all expose legalese as resting on a bare foundation of perceived professional self-interest. These theories posit INERTIA, INCOMPETENCE, STATUS, POWER, COST, and RISK as the reasons legalese persists.

INERTIA prevents lawyers from changing their language because they find it less work to copy an old boilerplate form from the file or a form book than

279. *Id.*

280. See Comment, *Informed Consent: From Disclosure to Patient Participation in Medical Decisionmaking*, 76 *Nw. U.L. Rev.* 172 (1981).

281. See Part I B. 3 *supra*.

282. See Part I B. 4 *supra*.

283. *Id.*

284. See Part II A *supra*.

285. See Part II B *supra*.

286. See Part II C *supra*.

287. See Parts II D & E *supra*.

288. See D. Mellinkoff, *supra* note 6.

to create a new one in ordinary English. Moreover, dictating a letter in legalese can be a fast way of "sounding professional" without having to think much about form or sometimes even about content. The old way of writing is familiar and comfortable, so why change?

INCOMPETENCE in writing English is widespread among the legal profession. Relatively little writing is taught in colleges, and still less is taught in law schools, so there is no reason to be surprised at the fact that many lawyers are poor writers. The surprising thing is that the public seems to believe that all lawyers must be good with words since words are their stock in trade. Even more surprising is that many lawyers have fooled themselves into believing the same thing. But the easily-mimicked formulas of legalese — stringing together long lists of words connected by "pursuant tos," "hereinafters," and similar incantations — merely allow them to "sound professional." To ask these lawyers to give up legalese for plain English is to ask them to admit to themselves and others that they cannot distinguish, for example, between a complete sentence and a sentence fragment, or to confess that the notion of active and passive verbs eludes them. It is to ask them to search for the concrete word, to re-think the logical structure of a form, to muse about the psychology of readers — to be concerned about the techniques of clear communication. These are painful prospects for incompetent writers.

STATUS in society is frequently derived directly from the ability to speak an elitist language, even, as in Shaw's *Pygmalion*,²⁸⁹ when the speaker possesses few other skills. Twenty-four hundred years ago, Plato observed practitioners of rhetoric in the law courts and public assemblies enjoying this advantage derived from their language skill alone: "But is not this a great comfort, Socrates, to be able without learning any other art but this one, to prove in no way inferior to the specialists?"²⁹⁰ Today, the purveyors of legal rhetoric not only are not inferior to other specialists in society, but in fact usually control them. "Perhaps this is the secret of the lawyer's self-imposed 'omnicompetence' . . . he is in possession of the code which enables him to tell us in general what we can and cannot do."²⁹¹ To ask lawyers to give up that code and speak plainly is to ask them to surrender that portion of their social status that comes from feeling (falsely) omnicompetent and "in no way inferior" to other specialists.

POWER flows from language as surely as it does from might or money,²⁹² and the power of legal language is extraordinarily strong because it is backed by the legitimacy and sanctions of the state. In combination with the black robes, the rituals of process, and the law's other accoutrements of magic, legal language helps conceal the politics of power under the guise of a state-founded secular religion called Law.

289. G.B. Shaw, *supra* note 47.

290. Plato, *Gorgias*, in *Collected Dialogues* 459 (Princeton Univ. Press 1978), quoted in Goodrich, *supra* note 52, at 100.

291. C. Sumner, *supra* note 53, at 271.

292. See notes 47-56 and accompanying text *supra*.

Legal language is, after all, "a code which simultaneously serves the functions both of communication and of non-communication" ²⁹³ The "frequently obscured persuasive, argumentative and coercive levels inherent in the writing of legal texts," ²⁹⁴ serve to legitimate the powerful by intimidating the powerless. At bottom, legal discourse is a "language of normative propositions whose extreme ideological power resides in the very fact" that their reference to reality is "at best partial and obscure." ²⁹⁵

My guess is that many lawyers only dimly perceive the social power that their language possesses. However, they perceive it sufficiently to want to hold onto it, and they correctly see the attack on legalese as an attempt to loosen their grip. Thus, they resist.

COST, imaginary or real, can impede the change from legalese to plain English. The cost may be real if the proposal is to rewrite large numbers of forms or statutes all at once. If, on the other hand, the old language is phased out gradually as new forms and statutes are created, there need be no extra cost associated with clear writing. Nevertheless, because costs are perceived, the adoption of ordinary English is impeded.

RISK of change from the familiar legalese to the unknown plain English makes many lawyers wary. Even when they intellectually accept the evidence that their traditional language is ineffective, imprecise, unsettled, and unnecessary, caution tells them to shy away from the new. All instincts tell them to maintain the same old practices until the old practices actually cause trouble.

Inertia, incompetence, status, power, cost, and risk are a formidable set of motivations to keep legalese. Their tenacity should not be underestimated. One observation must be made, however. These motivations lack any intellectually or socially acceptable rationale; they amount to assertions of naked self-interest. The self-interest of the legal profession, thus exposed, is vulnerable to social and political forces that can make the costs and risks of legalese unacceptably high. Rather than accepting those costs and risks, lawyers will overcome their inertia and incompetence, and will forfeit a portion of their status and power in the process. Pollyannish prediction? It has already happened to large segments of the profession.

C. Objective Self-Interest Demands the Use of Plain English

The contemporary political and social movements pushing for plain English in laws ²⁹⁶ and deformalization of legal processes in general ²⁹⁷ are only in their adolescence. Yet, they have wrought remarkable changes. The costs and

293. Goodrich, *supra* note 52, at 90. Unfortunately, Mr. Goodrich's prose also seems to serve both functions.

294. *Id.* at 99.

295. *Id.* at 122.

296. See J. Redish, *supra* note 7.

297. See *The Politics of Informal Justice*, vols. 1 & 2, (R. Abel ed. 1982). See also HALT newspaper (Help Abolish Legal Tyranny — An Organization of Americans for Legal Reform) 201 Massachusetts Ave., N.E., Washington, D.C. 20002.

risks associated with using legalese have increased so greatly in some cases that large numbers of lawyers no longer dare use it. This is an objective shift. Whatever self-interest is perceived, the objective interest of many thousands of lawyers today is to adopt plain English.

Thus, if you practice law in Connecticut, Hawaii, Minnesota, New Jersey, or New York, and you deal with consumer contracts (variously defined, but typically including leases and all contracts for personal, family or household purposes) you must write those documents in plain English.²⁹⁸ Moreover, you must be prepared to sue for, or defend, a client who had a right to a plain English contract but got one in legalese.

If you practice law in Maine and deal with consumer loans, you had better know plain English.²⁹⁹

If you deal with insurance policies for insurers or consumers, you need to know not only about plain English but about readability formulas if you practice in any of these twenty states: Arizona, Arkansas, Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin.³⁰⁰

If you are a lawyer for the federal government, or the state governments of Arkansas, California, Kentucky, New York, or Oregon, you will very likely have to write many documents in plain English.³⁰¹ If you sue those governments over those same documents, you may be liable for malpractice if you fail to raise the plain English issue.

If your practice brings you into contact with the federal Truth in Lending Act,³⁰² Magnuson-Moss Warranty Act,³⁰³ Employee Retirement Income Security Act of 1974,³⁰⁴ Electronic Funds Transfer Act,³⁰⁵ Civil Rights Act of 1964,³⁰⁶ or state statutes patterned after these federal laws, you had best be alert to the plain English requirements expressed or latent in them.

298. Conn. Gen. Stat. Ann. § 42-151-158 (West Supp. 1984); Hawaii Rev. Stat. § 487A-1 (Supp. 1983); Minn. Stat. Ann. § 325 G. 29-37 (West 1981); N.J. Stat. Ann. § 56: 12-1 to -18 (West Supp. 1983-84); N.Y. Gen. Oblig. Law § 5-702 (McKinney Supp. 1983-84).

299. Me. Rev. Stat. Ann. tit. 5, § 8002 (1982).

300. See R. Pressman, *supra* note 146.

301. Ark. Stat. Ann. § 1-106 (Supp. 1983) (plain English in legislation); Cal. Gov't Code §§ 6215, 11349-11349.9 (West Supp. 1983-84) (plain English in government documents), Cal. Gov't Code § 88003 (West 1976) and Cal. Elec. Code § 3572 (West 1976) (plain English in ballot pamphlets); Ky. Rev. Stat. § 446.015 (1984) (plain English in government documents); N.Y. Exec. Order No. 100 (Apr. 8, 1980) (plain English in government documents); Or. Rev. Stat. § 250.039 (1983) (readability of ballot titles), Or. Rev. Stat. § 171.134 (1983) (readability of legislative digest and summaries), Or. Rev. Stat. § 456.787 (1983) (readability of building codes), Or. Rev. Stat. § 316.364 (1983) (readability of tax instructions), Or. Rev. Stat. § 183.025 (plain English in government documents).

302. 15 U.S.C. §§ 1631-1639 (1982) (credit transaction disclosure requirements).

303. 15 U.S.C. § 2302(a) (1982) (warranty disclosure requirements).

304. 29 U.S.C. § 1022(a)(1) (1982).

305. 15 U.S.C. § 1693c (1982) (terms and conditions disclosure requirements).

306. 42 U.S.C. § 2000e to e-17 (1964). See, e.g., *Guardians Ass'n. v. Civil Service Comm'n*, 484 F. Supp. 785 (S.D.N.Y. 1980) (readability levels of job promotion tests).

And you should be looking over your shoulder for malpractice claims³⁰⁷ if you fail to deal adequately with the plain English issues in cases involving the Uniform Commercial Credit Code,³⁰⁸ adhesion contracts,³⁰⁹ unconscionable contracts,³¹⁰ adequate due process notice,³¹¹ informed consent,³¹² or jury instructions.³¹³

Finally, if you are litigating in the federal courts, be sure to know how to write "a short and plain statement of the claim"³¹⁴ instead of the "gobbledygook" that could cause your pleadings to be thrown out of court.³¹⁵

CONCLUSION

This flood of plain language statutes, decisions, and possibilities, has brought about a sea-change in the law. No lawyer can now safely navigate without knowing the problems of legalese and the principles of plain English. Most of the new laws threaten hefty damages if you violate them; all of them implicitly threaten malpractice liability if you fail to assert for your client the claims they authorize. The costs and risks of legalese are now simply too great for most lawyers to ignore.

It seems exceedingly unlikely that these costs and risks will ever be reversed, though the flood of plain language laws is sure to ebb and flow over the years. At the moment, the horizon looks promising: there is widespread evidence that the private bar is switching rather than fighting, that inertia and incompetence are being overcome³¹⁶, and that the law schools have begun to train a generation of lawyers who will know that criticizing legal language is more than just a game.³¹⁷

307. See Comment, *Attorney Malpractice in California: The Liability of a Lawyer Who Drafts an Imprecise Contract or Will*, 24 *UCLA L. Rev.* 422 (1976).

308. *U.C.C.C.* § 5.108(4)(e) (1974).

309. See Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *Harv. L. Rev.* 1173 (1983).

310. See Fort, *Understanding Unconscionability: Defining the Principle*, 9 *Loy. U. Chi. L.J.* 765 (1978).

311. See, e.g., *Rau v. Cavanaugh*, 500 F. Supp. 204, 207-08 (D.S.D. 1980) (inadequate notice of foreclosure procedure in mortgage); *Heckler*, 591 F. Supp. at 1033 (inadequate notice of action on Medicare claims); *Muir v. HHS*, No. 79-320, slip op. (D. Or. 1984) (federal agency settles litigation by agreeing to simplify supplemental Social Security notices).

312. See Comment, *supra* note 280.

313. See A. Elwork, B. Sales & J. Alfini, *supra* note 136.

314. *Fed. R. Civ. P.* 8(a)(1).

315. *Gordon v. Green*, 602 F.2d 743, 744 (5th Cir. 1979).

316. See, e.g., *Drafting Documents in Plain Language*, *supra* note 234; *Plain English in the Law*, *supra* note 7.

317. See, e.g., *American Institute Research, Institute on Teaching Legal Writing* (1982); R. Wydick, *Plain English for Lawyers*, *supra* note 7 (widely adopted law school text).

