COMPLEXITY IN LEGAL LANGUAGE:
Necessary or Unnecessary

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Legal language has spanned a countless number of generations and, undoubtedly, will continue to do so as long as there are people to be governed. All organized societies have agreed upon codes of behavior which people must follow to prevent anarchy within their societies.[1] But, if laws are necessary to maintain a peaceful coexistence among people, it is equally necessary for people to understand exactly what those laws mean if they are possibly to follow them, or change them. Communication of the precise limits which laws set to behavior must be the fundamental purpose of legal language. This communication must be two-way; in other words, the draftsman must write what he means, and people must understand what he means. The English language, although an imperfect instrument, is sufficient for this fundamental purpose once draftsmen understand the intricacy of their most important tool.[2]

Actually, legal language is somewhat of a misnomer because there are two types: lawyers who conduct both an office practice and a trial practice must learn two "legal" languages: the language of draftsmanship and the language of advocacy.[3] It is the language of draftsmanship and its complexity which will be dealt with in this paper. Complexity in legal language will be considered to include anything inherent within that language in the prose text which makes a legal document more difficult to comprehend. Many people who write have written on the pitfalls of legal language, usually take one of two positions. but few have tried to justify its complexity. Some take such a pessimistic view of language in general, that it seems a significant achievement for people to comprehend the law at all.[4] George Rossman expressed this point twenty-five years ago:

> It is difficult to believe that although the state and the Federal Government, through the enactment of statutes, expect the citizen to comply with their commands under pain of criminal penalty or civil liability, they write many of their enactments in such vague phraseology that extensive rules of statutory construction are needed to reveal what is meant.[5]

Other people just joke about the complexity of legal language; nevertheless, few have done it as ~~poignantly~~ wittily as the Marx Brothers in a sketch from A Night at the Opera:

> Groucho: Pay particular attention to this first clause because it's most important. Says the -- uh-- the party of the first part shall be known in this indenture as the party of the first part. How do you like that? That's pretty neat, huh.
>
> Chico: I don't know, I don't even have dentures. Let's hear it again.
>
> Groucho: The party of the first part should be known in this contract as the party of the first part.
>
> Chico: That sounds a little better this time.
>
> Groucho: Well, it grows on you. Would you like to hear it again?
>
> Chico: Just the first part.
>
> Groucho: The party of the first part?
>
> Chico: No, the first part of the party of the first part.
>
> Groucho: Look! Here's the second party of the second part.
>
> Chico: Hey, why can't the first part of the second party be the second part of the first party? Then you've got something![6]

It is easy for people to criticize and joke about the problem of complexity in legal language, but few people explain why legal language is so complex and even fewer make the distinction between necessary complexity and unnecessary complexity in legal language.

~~As was mentioned earlier, complexity in legal language was defined as anything inherent in that language which makes it more difficult to comprehend.~~ Necessary complexity, ~~then, will be viewed as~~ in legal language is complexity which ~~is either very inconvenient to avoid~~ short of gross ineptness or misPresence, is unavoidable in drafting a legal document. The ~~major~~ problems in legal language--most only because they can be solved--stem from unnecessary complexity. Unnecessary complexity ~~will be viewed as that~~ is complexity ~~which~~ that can be eliminated with little inconvenience to the draftsman and with no loss ~~in~~ of accuracy, correctness, or style.

Necessary complexity in legal language stems from the specialized nature of this language: it must be precise in naming and reference (definition); it must prescribe or describe complex behaviors which requires complex language; it must use legal jargon where simpler English equivalents would be inaccurate or very inconvenient; and it must succumb to Congressional delegation of power through statutory vagueness.[7] All of the ~~above~~ these reasons affect the number of multiple modifications of noun phrases--one of the major indicators of complexity in language.[8] When a draftsmen attempts to write rules covering every conceivable eventuality, the language is likely to be cumbersome, but to make it unnecessarily so is inexcusable.[9,10]

Unnecessary complexity stems partly from the unwillingness of draftsmen to give up their antiquated style of writing, sometimes referred to as "legalese." It may also stem from the draftsman's lack of knowledge, a lack of care, ~~or both.~~ ~~These are~~ the ills of legal language ~~which~~ that should be avoided at all costs ~~except that of accuracy.~~ are: overprecision, underprecision, grammatical deviation, wordiness, and, in many instances, traditional phraseology.

~~Professor~~ Randolph Quirk and his co-authors in A Grammar of Contemporary English ~~revealed their work on~~ describe noun phrase modification as an indicator of complexity in language. They studied four categories of writing: informal, basically

letters we write to one another; fiction, self explanatory; serious, ~~basically~~ non-fiction ~~not dealing with professional~~ written in non-technical languages; and scientific, ~~basically~~ articles found in scientific journals. They studied each category by dividing noun phrase modification into four types: simple unit, a name or pronoun—specific reference; simple phrase, articles, demonstratives, quantitative modifiers plus noun; complex single, all nouns with a single modifier—either an adjective or a prepositional phrase; and complex multiple, all other noun phrases. The type of writing with the highest ~~ratio~~ percentage of complex modification to ~~simple modification~~ is generally considered to be the most complex.[11] ~~One could probably guess which type of writing was the most complex; it was~~ Scientific are the most complex, ~~scientific~~ with 54 percent of its noun phrases having complex modification. Sentence weight distinction Scientific writing was followed by serious (34 percent complex).[12]

~~What has all of this got to do with legal drafting? Plenty! I did~~ a study of various legal documents, using the same criteria as Quirk and his colleagues, ~~and~~ found that legal writing is at least a complex as scientific writing ~~if not more so~~. Legal writing, in his study, was virtually equivalent to scientific writing in complexity at the complex-simple distinction level with 53 percent of its noun phrases having complex modification. However, of the 47 percent of those noun phrases having simple modification, only 9 percent were simple unit, that is names or pronouns, compared to 21 percent in scientific writing.[13] This data reflects two major complexity-causing factors in legal language: ~~First, they point to~~ the tendency of draftsmen to rename everything ~~which is convenient for them~~ they can (Mr. Jones, hereinafter "the seller."), ~~And second, this data points~~ and to the necessary generality in case law and statutory law. Any law which is directed at an individual is most often declared unconstitutional; the laws are for everybody to follow and, hence, must be written in a general fashion to keep from excluding someone. These two factors,

although often necessary, cause complexity in legal language.

Rudolph Flesch, often regarded as a ~~Columbia University professor who is~~ a pioneer in ~~the~~ research of clarity in writing, has devised a test for the "readability" of writing.[14] This test is used to examine the clarity of laws and bureaucratic regulations mandated by statute to be readable. The formula it uses ~~accounts for~~ examines the document's average number of words per sentence and average number of syllables per word. The higher these averages are, the poorer is the document's readability score.[15] ~~I question~~ the validity of this test as it is applied to legal documents is questionable for two reasons. First, legal jargon is often more obscure and less polysyllabic than its possible English equivalents. ~~A~~for example, "res gestae" is much shorter than writing "all of the things done in the course of a transaction ~~is admissable as evidence~~." Besides, the draftsman's main concern is ~~that he says what he means according to the standards of communication prevalent in his audience~~ to write clearly for his audience. ~~The audience in a legal case is~~ usually the lawyers and their clients--with the lawyers available to interpret any necessary jargon.[16] Here, the use of English equivalents is both unsuitable and inconvenient. Second, the Flesch test implies that the length of a sentence alone makes it less readable--not true. Sentence length may allow for more confusion, but it does not cause it; writers alone cause confusion.

Flesch's remarks from his book The Art of Plain Talk emphasize this implication:

> ...there is one profession that thinks it cannot live without long sentences: the lawyers. They maintain that all possible qualifications of an idea have to be put into a single sentence or legal documents would be no good.[17]

Where else would one put the qualifications of an idea? The qualifications have to be there. To split up the qualifications and put them in separate

sentences would cause one to restate the main idea ~~an innumerable amount of times creating unbelievable confusion~~ repeatedly and to create unacceptable redundancy. One must remember that the sentence is the smallest unit in which one can deal with presupposition and assertion, and that short sentences can be lifted out of context with a corresponding change in meaning.[18] But, if a long sentence is handled well, length need not affect clarity. Here is a good example of a long, clearly written sentence:

> The Court of Appeals, or any division thereof, or any District Court, or judge thereof, or any board, agency or commission, when exercising adjudicative power or entertaining an individual proceeding under this article, if the determination of any pending matters depends upon as unsettled question or questions of law and important and urgent reasons exist for immediate determination, may certify such question or questions, with any facts necessary to proper determination of the law, together with the reasons for immediate determination, to the Supreme Court, which, if it finds the reasons to be sufficient, shall take jurisdiction for the purpose of deciding the questions of law and shall transmit its decision to the tribunal from which the certification came, which thereupon shall proceed in accordance with the decision.[19]

~~This sentence might have been written better, but it probably would not greatly affect the sentence's length or clarity.~~ Big problems sometimes require big sentences.

The reason meaning must be, at the very least, resistant to change is expressed eloquently by Sir Ernest Gowers:

> The reason why certainty of meaning must be the paramount aim is clear enough.... If anyone is to be held irrevocably to meaning what he says, he must be very careful to say what he means.[20]

English words, however, are notorious for having multiple meanings. Ogden and Richards, in The Meaning of Meaning, demonstrate that "meaning,"

used often as an absolute term, is very susceptible to ambiguity because of its many interpretations. They list sixteen different definitions of "meaning," many of interest to lawyers: the words following designated words in a dictionary, what the writer intends to be understood by his audience, that to which the writer actually refers, that to which the writer ought to be referring, that to which the recipient of the word refers, and that to which the recipient believes the writer to be referring.[21] Of course, ambiguity does not apply exclusively to writers, but speakers are involved in a different context of hand gestures, ~~voice~~ intonation and other ways of communicating which will not be discussed here.

A draftsman must be very careful to be precise in both naming and referencing. If the reference is unique, ambiguity is not a problem; if the reference is not unique, but the context solves the ambiguity, there is no problem. But, if the reference is not unique and the context does not solve the ambiguity, the passage suffers from semantic ambiguity. Ambiguity, unlike vagueness, usually produces an either/or question--"The passage either means this or that." In the statement, "His rights depend on his place of residence," it is unclear whether his rights depend on place of abode or on legal home--if, indeed, they are not one and the same.[22] There are other kinds of ambiguities besides the semantic ones stemming from multiple dictionary meanings. Syntactic ambiguities are uncertainties of modification or of what the modification is to ~~refer~~ apply to. In the statement, "Landlord shall require tenant promptly to pay his rent," does "promptly" modify "require" or "pay"? One cannot tell from the construction of this sentence.[23] Another type of ambiguity arises when there is an internal inconsistency within a document or statute or when there is an external inconsistency between two statutes.[24] The court must find in favor of one of the two

interpretations; this is easy when one statute is state law and the other federal, but it is not always a clear-cut choice ~~in other instances~~.

Reed Dickerson addresses the problems of ambiguity in legal language:

> The ambiguous word carries the threat, in specific use, of competitive thrusts of meaning that are almost never desirable or justifiable. Because of its potential for deception and confusion, the draftsman should not use an ambiguous word in a context that does not clearly resolve the meaning....[25] It is also highly desirable, though not so critical, that he see that the effectiveness of the statute is not impaired by unnecessary uncertainties of reference that, although resolvable, risk misreading at the hands of unperceptive courts or, at best, require time and effort to resolve.[26]

Ambiguity is the unfortunate result of unperceptive draftsmen who should know better.

In an Arkansas case, a will stated that all of the residue of the estate should be divided equally between the nephews and the nieces upon the testator's wife's side of the family and his niece. The nephews and the nieces on the wife's side of the family were twenty-two in number; the husband only had one niece. The question was, should the estate be divided into twenty-three equal parts, or should the wife's nieces and nephews receive one half and the husband's niece the other half? The only key the court could find to construe this will was the use of the word "between" which implies division into two parts. The court believed that if division into more than two parts had been intended the word "among" would have been used--a potent lesson for choosing the exact word to convey the desired meaning.[27] The ambiguity results from colloquial use of "between" to mean "among" It is easy to see that ambiguity can be the source of innumerable law suits.

Another concept related to ambiguity and vagueness is generality. A term is general when it is not limited to a unique referent.[28] Like vagueness, generality is often desirable ~~in many instances~~. The problem, here, ~~lies with~~ is that language "either ~~being~~ too general or not general enough. ~~Classes~~ Categories

denoted in a statute or case law should be neither broader nor narrower than the interpretation needed to carry out the policy-maker's objectives. Draftsmen should be careful not to say "criminal" when they mean "felonious," and vice versa.[29] The reason generality is so often confused with vagueness is that most general terms are also vague. Reed Dickerson explicates the difference between the two concepts:

> The word "many," for example, is both vague and general. So also the word "automobile." The generality of the latter is exemplified by its capacity for simultaneously covering both Fords and Chevrolets without a tinge of uncertainty. Its vagueness is exemplified by the uncertainty whether it covers three-wheeled Messerschmitts, which bear a strong resemblance also to motorcycles.[30]

Vagueness and generality are often ~~very~~ beneficial tools of the draftsman as long as they are not misunderstood or misused. While ambiguity, like vagueness and generality, leaves a question in the mind of the reader, the question is usually substantive rather than quantitative and should be avoided altogether.

People who complain the most about legal language rarely complain about ambiguity, however. They complain about the jargon. Although some jargon is necessary in any profession, the legal profession has more needless jargon and traditional phraseology than most. Maury Maverick coined the term "gobbledygook" for the pedantries and verbosities of legal language which almost always obscure meaning.[31] Polonius, the Lord Chamberlain in Hamlet, said it best (if not contradictingly):

> My liege and madam,--to expostulate
> What majesty should be, what duty is,
> Why day is day, night night, and time is time,
> Were nothing but to waste night, day, and time.
> Therefore, since brevity is the soul of wit,
> And tediousness the limbs and outward flourishes,
> I will be brief...[32]

that piece of circumbendibus
One might even, before guess that Polonius had taken a few law courses at the Univer-
sity of Wittenberg after this piece of circumlocution.

Legal language is full of verbose expressions, pedantic references, and circumlocutory roundabout phrasing. Much of this problem stems from the traditional phraseology inevitably passed down through the law schools themselves.[33] The many "hereinafters," "theretos," "same and said" articles, and "whereases," not to mention the usual trinities of verbs--"give, bequeath, and convey," nouns--"right, title, and claim," and other all-encompassing statements do very little to change the legal effectiveness of the document except to drown it in avoidable redundancy. Traditional phraseology of this type is directed at a lay audience, not to convey information, but emotion, to scare them into a grudging respect for the law.[34] The documents most affected by traditional phraseology are those of solemnity--wills, contracts, complaints and summonses. This emotion-evoking phraseology may have had a practical value at one time, but ~~I seriously doubt it has an emotional impact anymore~~. ~~This phraseology~~ it does more to distract the ~~party~~ layman from the message to be conveyed than it does to evoke respect. Perhaps, people would have a less grudging respect for the law if they understood it better.

Traditional phraseology used in a will has been known to be troublesome as well as cumbersome. A lady left her estate to "my heirs at law living at the time of my decease." This sounds straightforward enough. The trouble was that she wanted her money to be shared equally among her twenty-five cousins. The deceased, however, had an obscure aunt living at the time, and she received all of the money.[35] One can see why traditional phraseology and its redundancy is used in contracts and wills— it arises out of a sense of insecurity.[36] But, tradition did not help those twenty-five

cousins in the least. Many lawyers take the attitude of Byrne Bowman who believes that redundancy is a necessary evil:

> While some persons may consider this lousy writing, I say if you have to do it you have to do it and it is not lousy because you have to do it if it will put your coat and shoes on for you and help you pay for them when you are tired and sleepy and hungry and thirsty and broke and do not want to lose a client because of some misinterpretation of the intent of the contract by some court that can't read let alone understand what the parties were agreeing upon especially when they were jousting with each other and each hoping that an ambiguity will be one to their benefit which anybody knows you can never depend upon being for your benefit unless you own the judge which I don't think you are going to do this year anyway.[37]

All one can say to that is if redundancy is really necessary, at least do it clearly.

One reason lawyers use traditional phraseology and redundancy as a crutch could be because of the standardized nature of legal language. Standardized language leads to a reliability and predictability of interpretation by a court. Courts ~~taking such an approach~~ pay particular attention to words and phrases and changes in words and phrases. To depart from a conventional way of saying something, therefore, is to invite disaster.[38] On the other hand, the lawyer who does not know those "magic" words and phrases causes redundancy and complexity. The lawyer sees no cost in a few extra words, but the cost for leaving out the one or two essential words could be great. So, the lawyer heaps words on top of words, hoping that one of them will be "Rumpelstiltskin."[39]

Because of this standardization, ~~I seriously doubt that~~ lawyers will never be out of a job if they chose to write in a clear style. The easiest way to write clearly is to start by using good grammar. Rules of grammar are rules of convenience--not for the writer, but for the reader. It is ironic

that the legal documents that the public most needed to ~~be~~ understood ~~by the public~~ are the ones in which grammar is usually the poorest; contracts are notorious for abandoning grammatical rules, as ~~well as~~ and for turning base verbs into nouns: "Rent to be payed by the first of the month; Failure to do so will result in penalty of five dollars:" As one can see from ~~the preceding~~ this example, lawyers also have a serious tendency to leave out both definite and indefinite articles ~~in front of most nouns~~ (The rent, a penalty). Two simple grammatical rules should always be followed. 1) Every sentence needs both a subject and a verb: "The rent is to be payed by the first of the month;" adding the verb "is" to this statement not only makes it a sentence, but makes it more readable. 2) Most Nouns not preceded by adjectives or possessives should ~~always~~ be preceded by either a definite or indefinite article. Although it is not a matter of grammar ~~grammatical per se~~, punctuation is probably the most important device for making things easier to read.[40] Punctuation is especially useful in renaming a person or other entity. Instead of saying "Mr. Neumann, hereinafter the 'seller'," it is much easier to say "Mr. Neumann (the 'seller')," and it is also easier to read. ~~If there is one thing that should be perfectly clear from reading this paper, it should be~~ Complex that ideas are difficult enough to express in ~~complex~~ legal language when written with proper grammar and mechanics. To deviate from those rules generally affects clarity adversely.[41]

In his essay "Politics and the English Language," George Orwell attempts to reduce unnecessary complexity in language while increasing the effectiveness of the message. He does this through the implementation of a few simple rules:

1) Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.

2) Never use a long word where a short one will do.

3) If it is possible to cut a word out, do so.

4) Never use the passive when you can use the active.

5) Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.

6) Break any of these rules sooner than say anything outright barbarous.[42]

I believe the largest part of unnecessary complexity in legal language can be eliminated by simply avoiding a few often-used ~~legalistic~~ words and verbose expressions:

Legalese to avoid	Use instead
prior to	before, earlier
subsequent to	after, later
commence	begin, start
vendee	buyer
vendor	seller
covenants, warrants	promises, agrees to
indenture	contract, mortgage, will, agreement, promissory note
estopped	prevented from
lessee	tenant
lessor	landlord
please find	is, are
shall have the right	may
herein, herewith, hereunder	in this agreement, etc.
hereinafter	("seller")
hereinabove	earlier in this agreement
hereinbelow	later in the agreement
thereto, therein, thereof, thereby, therewith	to that agreement, in that agreement, of that agreement, etc.
shall be	is
shall	will, must, agrees to
said, same, such, subject	the, this, those, that, these, them, it
wherein	where, in which
in the event	if
upon	on
please be advised	This is to inform you, this is to let you know
witnesseth	background facts
whereas	[eliminate without replacing][43]

Verbose or vague expressions and constructions	Use instead
Whether or not	Whether
"There is" constructions	[eliminate without replacing]
"What ...is that..."constructions	[eliminate without replacing]
"The...of" constructions	[eliminate without replacing]
The foreseeable future	[eliminate both explicitly and implicitly]
All are not	Not all...are
To the extent that	[rewrite using "if"]
On the part of	[eliminate without replacing]
In situations where	When
Was a factor that	[eliminate if possible]
The usual practice has been to	Usually,...; or (the practice) usually
On the rationale that or	Because
Under the theory that	
Cf...character (or nature)	[eliminate without replacing]
...is the one (or individual) who	[eliminate without replacing]
On numerous occasions	Often
In some instances	Sometimes
In many cases	Often
In the majority of instances	Usually
It is not the case that	Did not
In those instances where or	When
In situations where	
Chose to	[eliminate if possible]
Due to	Because
Proved to be	Was
In the absence of	[rewrite using "unless"]
For the purpose of	To
With respect to	About or concerning[44,45]

Although I have combined both legal language and statutory language under the somewhat imprecise heading "legal language," ~~I hope~~ my comments ~~will not be misconstrued because they~~ apply to both in most instances. These comments and constructive criticisms ~~must be~~ are pertinent to legal language, ~~for~~ because states ~~would not be~~ are passing legislation requiring "plain English" in various types of legal documents--"from consumer contracts to insurance policies to government regulation."[46] To stop this trend in the legislatures, more and more of the top law schools are teaching "nonlegal" legal drafting.[47] This trend is wholesome. If more lawyers and legislators were willing to write documents for ease of comprehension as well as

accuracy, they would not have to worry about writing under the burden of specific "plain english" laws, and people would not be nearly as apprehensive of and ~~unknowledgable~~ ignorant about the legal system.

ENDNOTES

[1]S.I. Hayakawa, "Semantics, Law, and 'Priestly-Minded Men,'" Case Western Reserve Law Review, 1958(Mar), p. 179.

[2]Arthur S. Miller, "Statutory Language and the Purposive Use of Ambiguity," Virginia Law Review, 42, 1958, p. 23.

[3]George Rossman, "Better English for Lawyers as Draftsmen and Advocates," American Bar Association Journal, 48, 1962, p. 1048.

[4]Reed Dickerson, "The Diseases of Legislative Language," Harvard Journal on Legislation, 1, 1964, p. 5.

[5]Rossman, pp. 1049-1050.

[6]Charles J. Averbrook, "Legalese vs. Clear, Readable Writing: Make the Change Now!!" The Florida Bar Journal, 55, 1981, p. 624.

[7]A. S. Miller, "Statutory Language...," p. 30.

[8]R. Quirk, et al, A Grammar of Contemporary English, (New York: Seminar Press, 1972), p. 433.

[9]David Nachmias, and David H. Rosenbloom, Bureaucratic Government USA, (New York: St Martins Press, 1980), p. 23.

[10]A. S. Miller, "Some Remarks on Legal Writing," Georgia Bar Journal, 18, 1956, p. 268.

[11]Quirk, p. 433.

[12]Quirk, p. 433.

[13]Quirk, p. 433.

[14]Averbrook, p. 625.

[15]Averbrook, p. 625.

[16]Dickerson, p. 14.

[17]A. S. Miller, "Some Remarks...," p. 263.

[18]Byrne Bowman, "Are Lawyers Lousy Writers?," Georgia State Bar Journal, 6, 1970, p. 286.

[19]Bowman, p. 286.

[20]Bowman, p. 286.

[21]Bowman, p. 287.

[22]A. S. Miller, "Some Remarks...," p. 259.

[23]Dickerson, p. 7.

[24]Dickerson, p. 8.

[25]Dickerson, p. 8.

[26]Dickerson, p. 7.

[27]Dickerson, p. 9.

[28]Rossman, p. 1049.

[29]Dickerson, p. 10.

[30]A. S. Miller, "Statutory Language...," p. 30.

[31]Bowman, p. 289.

[32]William Shakespeare, Hamlet, (New York: Signet Books, 1963), p. 73.

[33]Lawrence M. Friedman, "Law and Its Language," George Washington Law Review, 33, 1964, p. 571.

[34]Friedman, pp. 571-572.

[35]A. S. Miller, "Some Remarks...," pp. 265-266.

[36]Bowman, p. 282.

[37]Bowman, pp. 288-289.

[38]Friedman, p. 578.

[39]Friedman, p. 578.

[40]Bowman, p. 288.

[41]A. S. Miller, "Some Remarks...," p. 268.

[42]George Orwell, "Politics and the English Language," Language Awareness, 3rd ed., Ls. P. Eschholz, A. Rosa, and V. Clark, (New York: St Martins Press, 1982), p. 51.

[43]Averbrook, p. 630.

[44]George J. Miller, "On Legal Style," New York University School of Law Journal, 12, 1957, pp. 300-301.

[45]Flora Johnson, "Less is More," Student Lawyer, 1981(May), pp. 14-15.

[46]Averbrook, p. 624.

[47]Averbrook, p. 624.

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