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A Curious Criticism of Plain Language

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Essay

A Curious Criticism of Plain Language

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Just when you thought you had answered every possible criticism of plain language, along comes one that you never could have imagined—in a place you never would have expected. The previous issue of *Legal Communication & Rhetoric: JALWD* included an article called *Language Ideology and the Plain-Language Movement*, by Soha Turfler. The author, a lawyer who is now a doctoral student in Rhetoric and Writing, identifies what she describes as three "ideologies" from the movement and undertakes to "discuss how each ideology perpetuates discriminatory norms and practices."[1] Supposedly, advocates go wrong by promoting a prescriptive style, by trying to standardize language, and by thinking that plain language is morally superior to traditional legal style.

These three criticisms do not, however, hold up under any fair examination of what advocates actually say and do. I'll address each one after some initial comments.

I. Some Preliminary Points

Consider a few general observations about Turfler's article.

A. No Examples

The article does not contain a single example. It includes an appendix of assorted quotations—"considered [by the author] to be especially revealing"[2]—but not one example from the countless number that advocates have put forward for decades. Thus the article has an abstract,

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1 Soha Turfler, *Language Ideology and the Plain-Language Movement*, 12 LEGAL COMM. & RHETORIC: JALWD 195, 198 (2015).

2 *Id.* at 200.

disembodied feel. Let's remember that the debate (legalese vs. plain language) is over differences like these:

Before:

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 avoidable, then not to avoid it would be negligence.

After:

To decide whether the defendant was negligent, there is a test you can use. Consider how a reasonably careful person would have acted in the same situation. To find the defendant negligent, you would have to answer "yes" to the following two questions:

(1) Would a reasonably careful person have realized in advance that someone might be injured by the defendant's conduct?
(2) Could a reasonably careful person have avoided behaving as the defendant did?

If your answer to both of these questions is "yes," then the defendant was negligent. You can use the same test in deciding whether the plaintiff was negligent.

Before:

When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

After:

If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

B. No Mention of the Evidence

The article ignores the evidence that plain language works. The author cites my book *Writing for Dollars, Writing to Please* many times,

but she never mentions the 50 case studies summarized in Part Five. They involved many different kinds of documents and settings. As those studies demonstrate, readers strongly prefer plain language to legalese and officialese, understand it better and faster, are more likely to read it in the first place, and are more likely to comply with it. Without countering that empirical evidence, the author baldly asserts, "Plain style is . . . [not] more consistently effective . . . than other styles."[3] Yes, it is.

C. A Narrow Definition

The author circumscribes plain language in describing it: "such features as active voice, short sentences, and familiar words";[4] "[avoiding] specific language features—such as obscure Latin terms or long, periodic sentences";[5] "[f]or example, one common prescription is to use familiar or to avoid obsolete words."[6] Even as she acknowledges that "advocates . . . often rely on various lists of rules and preferences,"[7] she tends to reduce plain language to simple words and short, active sentences. It's much more than that, as she must know.

I listed more than 40 guidelines in *Writing for Dollars, Writing to Please* (pp. 5–10). They span everything from design, organization, sentences, and words to general principles like testing consumer documents on typical readers. And I prefaced the list with a qualification: "Of course, bare guidelines are not enough: they need to be explained and illustrated, and applied with an eye for possible exceptions and occasional tensions between them." In short, the guidelines are flexible and varied. The author loses sight of all that in suggesting that advocates are bent on "a singular style as the standard for all written discourse."[8]

D. Almost No Useful Advice

Throughout her article, Turfler plumbs sociolinguistic theory and its jargon: *the methodology of linguistic differentiation*, *communicative action*, *macrosocial constraints*, *iconicity*, *recursiveness*, *erasure*, *heterogeneity*, *linguistic revalorization*. Now, plain-language advocates have always welcomed insights from linguistic and cognitive disciplines. We're eager to

3 *Id.* at 198.

4 *Id.* at 196.

5 *Id.* at 201.

6 *Id.* at 203.

7 *Id.*

8 *Id.* at 197.

learn, of course. But after studiously reading this exploration, I'm not sure what to *do* with it.

The author encourages everyone "to examine the three ideologies discussed below and to consider how to improve legal discourse."[9] Toward the end, she says that advocates could "focus their efforts on revising the ways that . . . legal discourse is structured, and find means to reject unfair and discriminatory hierarchies in which certain ways of using language are more valued than others."[10] It would be helpful to know how she would improve legal discourse. What (more) can be done to make it fair to lawyers, clients, judges, and other people who have to deal with legal documents?

But no one should think that all styles are equally good, clear, effective, and (yes) valued by readers generally. Just about everyone who has ever taught or given advice about legal writing believes otherwise, and the evidence supports them in counseling against legalese.

E. Various Inaccuracies

The article includes some misstatements, overstatements, and murky connections that create a false impression about plain-language work and advocates. Three bulleted examples follow.

> • [T]he Plain Language movement associates specific language features—such as obscure Latin terms or long, periodic sentences—with legalese and then uses these associations to make social evaluations about the group that uses such features. . . . Traditional legal writers are characterized as "wordy, stuffy, artificial, and often ungrammatical" individuals . . . .[11]

Notice how the internal quotation (from Bryan Garner) ends before the word *individuals*, which the author added. Garner was not criticizing lawyers as individuals, as people. Nor was he making a "social evaluation" about lawyers or the legal profession. He was criticizing their tendencies as legal writers—that is, the way they perform one aspect of their job. If studies show that doctors tend to interrupt patients or not listen carefully, are the researchers making "social evaluations" or moral judgments about doctors? Or are they trying to solve a problem? And by the way, how can individuals be "ungrammatical"? It's about the writing, not the person.

9 *Id.* at 198.

10 *Id.* at 215.

11 *Id.* at 201.

> • [A]dvocates often distinguish plain style by its reliance on active voice; yet these same advocates recognize that they sometimes use passive constructions, nevertheless explaining that passive voice is used only when necessary and appropriate. On the other hand, passive voice is considered overused, unnecessary, and inappropriate when used in legalese. In this way, the Plain Language movement can legitimatize the use of certain stylistic features in its own styles and discourses, while stigmatizing legalese when it relies on the very same features.[12]

Did you follow the logic of that? Nobody considers the passive unnecessary or inappropriate *when* used in legalese. Rather, its overuse may be symptomatic *of* legalese—one possible symptom among many others. The style doesn't characterize the features; the features characterize the style. You might as well accuse advocates of saying that *pursuant to* and *further affiant sayeth naught* are quite appropriate when used in a plain style. The author needs to explain why a guideline like "prefer the active voice"—together with a list of exceptions or good uses of the passive—is somehow bad advice. The same goes for all the other plain-language guidelines.

> • [T]he concept of audience often offers little help in defining "familiar" words when it comes to legal texts. But the Plain Language movement mostly erases this heterogeneity, relying instead on homogenous concepts to define its features.[13]

Usually, the same plain language works for most people. For most readers (if not all), isn't *I have received* more likely to be easily understood than *the undersigned hereby acknowledges receipt of*? Any guideline has to be stated more or less generally. Yet even then, one of the most important guidelines is to test consumer documents with a small group of typical users whenever possible.[14] We want to know whether they indeed understand the words in the document.

To support her point about "erasure" of "heterogeneity," the author cites an article recommending a seventh-grade reading level for texts. But surely she knows that readability formulas are controversial and that most advocates either don't recommend them at all or recommend them only as one way of assessing clarity (or, more accurately, lack of clarity).

12 *Id*. at 202.

13 *Id*. at 204.

14 *Federal Plain Language Guidelines* 100–12 (2011), http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/FederalPLGuidelines.pdf.

I could continue in this vein, but let's turn to the three language myths and the related ideologies that plain language supposedly perpetuates.

II. The Myth of Decay and the Problems with Prescription

What are plain-language advocates guilty of, according to Turfler? Believing that the language is in a state of deterioration. Trying to purify or control language use. Offering an incontestable cure. Not recognizing that language changes and that lawyers have over time molded the law into a discourse called legalese. Being an elite group with a moral duty to pronounce on language behavior. Being a prescriptive movement.[15]

A state of decay and deterioration? No, we believe that most legal writing has been pretty awful for centuries, and scholars agree.[16]

Trying to purify and control language use? No, trying to improve it, for the sake of readers. The author uses the language of authoritarianism to discredit a reform movement. Inevitably, some of our guidelines sound like dictates—"omit unnecessary words"—but they are in the nature of advice, suggestions, recommendations.

As for not recognizing that language changes, we are not so benighted. In fact, *Garner's Modern English Usage*[17] includes a "language-change index" that tries to measure, in five stages, the changing usage of different words and phrases. The author cites no advocate—not one—who holds the view that language is fixed.

Not recognizing that the law has been molded into a discourse called legalese? Indeed it has, and that's the trouble. We acknowledge that the law, like any other profession, has certain terms of art, although (in my view, at least) they are more rare and more replaceable than lawyers like to think.[18] Beyond that, the author needs to provide some examples of how this highly developed discourse serves both the public and the profession. Try to find readers and commentators who approve of the state of legal writing and drafting. For every one she finds, I'll give you many more who castigate it, including judges and lawyers themselves.[19]

15 Turfler, *supra* note 1, at 205–08.

16 *See, e.g.,* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 24 (1963) (concluding, from an exhaustive historical study, that legal language has a strong tendency to be "wordy, unclear, pompous, and dull").

17 BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE (4th ed. 2016).

18 Joseph Kimble, *You Think the Law Requires Legalese?*, MICH. B.J., Nov. 2013, at 48, 49–50; *see also* KIMBLE, WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW 35–37 (2012) (discussing why plain language is not subverted by the need to use technical terms).

19 *See, e.g.,* Bryan A. Garner, *Learning to Loathe Legalese*, MICH. B.J., Nov. 2006, at 52; Garner, *Judges on Effective Writing: The Importance of Plain Language*, MICH. B.J., Feb. 2005, at 44.

Finally, the charge of prescriptivism. The author sprinkles her criticism with vocabulary like this: "notions of legitimacy or correctness," "imposition of a singular style," "claim the right to control the communicative practices of an entire community," "a select few self-appointed authorities."[20]

The readers of this journal are mainly legal-writing teachers. Has any one of you ever put a passage on the board or screen, asked your students to rewrite it, settled on a different version, and asked, "Which is better, clearer, more effective, more persuasive?" Has any one of you ever offered what you regarded as a model, an exemplar, of a certain piece of writing? I wouldn't call that being rigid, elitist, prescriptive, controlling. I'd call it teaching your students how to better communicate with their readers.

III. The Myth of Homogeneity and the Problems with Standardization

Before I get to the next volleys, an observation: in this section of her article, the author (again) does not cite one plain-language advocate who makes the kind of assertions that she accuses advocates of making. Not one, in 20 footnotes.

So what are these next accusations? Advocates believe in "standard-language ideology," "seek[] to erase linguistic variety by establishing norms and standards in which some usages are accepted as legitimate and others are stigmatized," and assert that "anyone who uses language improperly should be excluded or corrected."[21]

Exactly the opposite is true. The central goal of the plain-language movement is to include, not exclude. It seeks to make legal and official writing clear and accessible to the greatest possible number of intended readers. Anyone who reads the literature, follows the discussion groups, and attends the conferences knows about the concern that advocates have to reach low-literacy and other readers with various challenges. The Plain Language Commission, for example, recently published the second edition of a free book called *Communicating with Older People*.[22] As just one more example, a plenary speaker at the latest (2015) conference of the Plain Language Association International gave a talk called "e-Accessibility: Leaving No One Behind Online," about designing

20 Turfler, *supra* note 1, at 205, 206, 207, 208.

21 *Id.* at 208.

22 Sara Carr, Communicating with Older People: Writing in Plain English (2d ed. 2016), *available at* http://www.clearest.co.uk/pages/publications/books.

websites for people with disabilities. He approached the podium wearing goggles that dimmed vision, and passed the goggles around so that people could see for themselves. If you think that plain language is exclusionary, look through the program for that conference.[23]

What's more, as already noted, a basic tenet of plain language is that mass documents, public documents, should be tested with typical readers to make sure that they will be intelligible and useful to the intended audience.[24] And we try to keep abreast of research to determine whether the guidelines (not rules; not fixed, immutable norms) are supported by evidence.[25]

It rings hollow, then, to say that "the [plain-language] ideology encourages a view of 'language as a relatively fixed, invariant and unchanging entity.'"[26] And it borders on offensiveness to suggest that advocates wish to "force[] nonconforming individuals into either identity-stripping assimilation . . . or further marginalization."[27] Likewise to say that "the Plain Language movement comes dangerously close to promoting a system which favors, legitimatizes, and promotes individuals from privileged groups and which disfavors, stigmatizes, and marginalizes others."[28] The author mistakes the tone and purpose and actual effect of plain language. I've yet to hear about any group that feels stigmatized by best efforts at clarity, and the author cites no examples or evidence. It's all theory, and elusive at that.

This paragraph is typical:

> Plain language, of course, relies on the rules of Standard American English. Thus, the imposition of plain-language standards will not increase access to justice for groups already marginalized by this dialect. This is true regardless of whether plain style actually has the potential to make the law more understandable to individuals who lack legal training. Nonstandard-language speakers may not have access to the resources that would allow them to understand these standard texts, no matter how plainly they are written.[29]

23 *Available at* http://plain2015.ie/wp-content/uploads/2015/10/PLAIN2015_Programme_Final.pdf.

24 *See, e.g.,* International Plain Language Federation, *What Is Plain Language?*, PLAIN LANGUAGE ASSOCIATION INTERNATIONAL, http://plainlanguagenetwork.org/plain-language/what-is-plain-language (last visited May 6, 2016) ("A communication is in plain language if the language, structure, and design are so clear that the intended audience can easily find what they need, understand what they find, and use that information.").

25 *See* Karen A. Schriver, *Developing Plain-Language Guidelines Internationally*, YOUTUBE (June 24, 2015), www.youtube.com/watch?v=1oB1bYlu5us.

26 Turfler, *supra* note 1, at 209 (citation omitted).

27 *Id.* at 210.

28 *Id.* at 211.

29 *Id.* at 210.

Well, yes, most plain-language documents in the United States are in standard English. Where else would you start? But many are in Spanish. Many are in other languages to meet the needs of those speakers. (For example, information about voting in Los Angeles County is available in ten different languages.[30]) Around the world, advocates are working to meet the language needs of audiences in their countries.[31] And despite all that, we're criticized for marginalizing those we don't manage to reach?

It is legal style that marginalizes people, even those who are proficient in standard English. It is legal style that "prescribes" old models from one generation to the next. It is legal style that has been standardized—in an archaic, dense, verbose language that most people simply cannot understand.

IV. The Myth of Superiority and the Problems of Morality

From an article in the journal *Clarity* reviewing several ways to define plain language, the author pulls a paragraph suggesting that the need for honesty should be incorporated into the standards (guidelines) set for plain-language practitioners and documents.[32] Why? Because a lie can be expressed in plain language.

But an honesty component does not appear in any of the definitions or guidelines discussed at length in the *Clarity* article. It has never played a significant part in the modern push for plain language. Maybe it should, but it hasn't. The author is treating a possibility as if it were a pillar.

Next accusation:

> [L]egalese is often portrayed as morally deficient puffery designed to manipulate and deceive, or as the intentional obfuscation of language for the purposes of maintaining current the hierarchy wherein lawyers possess unchallenged authority over legal discourse.[33]

As an example of someone who has so "portrayed" legal language, the author cites me, or rather my book *Writing for Dollars, Writing to Please*, adding in a parenthetical that I was "reviewing [the] argument that lawyers

30 *See* Los Angeles County Registrar-Recorder/County Clerk, *Voter Bill of Rights*, https://www.lavote.net/documents/materials_voter_bill_of_rights.pdf (last visited May 6, 2016).

31 *See, e.g., Plain Language Around the World*, PLAIN LANGUAGE ASSOCIATION INTERNATIONAL, http://plainlanguagenetwork.org/plain-language/plain-language-around-the-world (last visited May 6, 2016) (listing organizations and resources in many different countries and languages).

32 Turfler, *supra* note 1, at 212.

33 *Id.*

have a 'vested interest in obscurity.'"[34] But wait—I was addressing a hypothetical defense of legalese that some lawyers *might* make, not portraying legalese as "morally deficient." I was not describing legalese but criticizing those who would defend it out of naked self-interest.

I went on to say that "I think very few [lawyers], when pressed, would argue for deliberate obscurity. There's no vast conspiracy to perpetuate legalese."[35] So, far from portraying legalese as an exercise in "the intentional obfuscation of language," I said just the opposite: "[Legalese] keeps its hold on many lawyers, sadly, for the reasons discussed in the previous section (inertia, habit, overreliance on old models, a misunderstanding of plain language, lack of training and self-awareness, and the specter of too little time)."[36] None of these has to do with intentional obfuscation.

Next, the author says that the plain-language movement's "moral concerns about language use are not new."[37] She then quotes two sociolinguists for the proposition that "language guardians often portray certain styles and usages as signs of 'stupidity, ignorance, perversity, moral degeneracy, etc.'"[38] Thus is the charge of "moral concerns"—which is tenuous to begin with—equated with labeling some writers as "stupid" and "ignorant." Once again, the author does not cite an advocate who uses terms or a tone like that. And if we have suggested that clinging to legalese is perverse, it's not in any sense of being dishonest or immoral, but of being stubborn or closed-minded.

Then the author refers to "the fuzzy distinctions between legalese and plain style."[39] She ignores an extensive body of literature—several decades' worth—that identifies the characteristics of legalese, provides guidelines for plain style, and illustrates the difference.[40]

And so on, and so on:

> • [T]hese complaints and concerns are an assessment of the relative moral merit or truthfulness of the users of these various styles.[41]

We're going in circles. As pointed out earlier, the concern is with the quality and effectiveness of the writing, not the character of the person.

34 *Id.* at n.96.

35 KIMBLE, WRITING FOR DOLLARS, *supra* note 18, at 28.

36 *Id.* at 28–29.

37 Turfler, *supra* note 1, at 212.

38 *Id.*

39 *Id.* at 213.

40 *See, e.g.,* Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, MICH. B.J., Aug. 2009, at 52; Sept. 2009, at 46; Oct. 2009, at 54; Nov. 2009, at 50; Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 SCRIBES J. LEGAL WRITING 25 (2008–2009).

Someone who wastes a reader's time may be thoughtless or unproficient or overtaxed, but he or she is not immoral, not a bad person.

> • [T]he belief that legal discourse is in need of correction may be a belief that the legal profession and laws are in need of moral realignment, or at least superficial revision.[42]

These are two very different things: substantive change and stylistic revision. The author knows which one advocates are focused on.

> • By diverting attention towards stylistic revision, the Plain Language movement arguably inhibits substantive reforms that could actually address [the moral and social failings of our legal system].[43]

Do we, then, just forget about the enormous inefficiencies of poor communication in the legal profession? Forget about whether people can understand all the information, important to their lives, that comes from business and government as well? Shrug off the huge waste of time and money, the confusion and ill-will and distrust, the recurring cry for clarity in public discourse? The author's argument, it seems, is that we have more important things to attend to.

You readers can judge for yourselves whether clear, plain writing is worth the candle. I'll leave it at that.

41 Turfler, *supra* note 1, at 213.

42 *Id.*

43 *Id.* at 214.