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AUTHOR Crandall, JoAnn; Charrow, Veda R.
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ABSTRACT

Efforts to simplify language used in consumer documents come from the consumer movement and a public disillusioned with big business and government. Even before President Carter's 1978 executive order mandating simplification in government regulations, some agencies were revising regulations for clarity. However, these efforts were based on too little knowledge of language complexity. The little existing research on legal language suggests that, more than by a specialized vocabulary, it is characterized by overly complex sentences, the overuse of passives. whiz-deletion and unclear pronoun reference, archaic and misplaced prepositional phrases, and its own set of articles and demonstrative pronouns. The historical development of legal language is unique, paralleling but independent of the development of the rest of English. Legal language is both the medium of communication and the primary tool of the legal profession, and is powerful because it carries the force of law. Some of the vagueness and ambiguity of legal language is intentional, reflecting compromise and capitulation to the complexity of issues. Some of these problems persist in the rewriting of regulations. In addition, precedent, often linked to language usage, is central to common law. Attempts to simplify legal language have been through readability formulas and editing, but resistance and inherent language complexity make change difficult. (MSE)

LINGUISTIC ASPECTS OF LEGAL LANGUAGE

Jo Ann Crandall, Center for Applied Linguistics
Veda R. Charrow, American Institutes for Researc

We have heard much about President Carter's March 1978 Executive Order, which required the Federal government to use "clear and simple English" in all government regulations. Although this Order was a landmark in the growing movement to make legal and bureaucratic language clear to the general public, it was not unexpected. It was a natural outgrowth of the consumer movement and a natural reaction from a public which was disillusioned with both big business and big government. People had become increasingly aware that the laws and regulations which govern them were often incomprehensible to them and they were demanding access to this mass of legalese.

One of the first institutions to attempt to simplify their documents was a private one: Citibank of New York. They revised their loan forms in an effort to translate cumbersome, legal phraseology into "common language". Other banks have since followed suit, as have numerous insurance companies. Even state governments have gotten into the act. As many are aware, New York passed the Sullivan Law (known as the Understandable Language Law) to require consumer credit documents of under $50,000 to be clear and understandable, and similar laws have passed or are pending in at least 22 states. The Magnuson-Moss Warranty Act requires warranties accompanying consumer goods to be written in "simple and readable language."

Even before the President's Order, several agencies had attempted to revise their regulations to make them more clear. For example, the Federal Communications Commission revised their CB regulations to make it possible for the average CB owner to comply with them. The Department of Health, Education, and Welfare initiated Operation Common Sense, which was an attempt

to rewrite all its regulations: Albert Kahn, then Chairman of the Civil Aeronautics Board, began rewriting every order that left his agency; and the Federal Trade Commission hired readability experts like Rudolph Flesch. The Internal Revenue Service is about to contract with an outside organization to have all of its individual income tax forms rewritten so that people can fill these forms out without having to enlist the aid of a tax expert. The Document Design Project, funded for 3 years by the National Institute of Education, is investigating the difficulty in government documents and assisting government agencies in improving them. A number of government departments have hired "plain English" specialists and somebody has even organized a public interest group which calls itself "Plain Talk". The prevailing attitude in Washington and around the country may be best summed up in the words of the Chairman of the Interstate Commerce Commission. As he puts it, "English is a remarkably clear, flexible language. We should use it in all our communications."

BUT WHAT IS LEGAL LANGUAGE?

The problem is more complex than that, however. Many of these bills or agency directives are based on too little knowledge of what makes language difficult. Before we can effectively simplify legal documents or federal regulations, we need to know what is causing the difficulty in the first place. The common denominator in these documents is legal language, but just what is <u>that?</u>

Although many lawyers are aware that their language differs substantially from ordinary English, their views of what makes legal language unique. differ substantially from what linguistic analyses reveal. Exhaustive studies of legal language by lawyers have focused almost exclusively on vocabulary. Take, for example, <u>The Language of the Law</u>, which was written

by David Mellinkoff, a professor of law at UCLA. Mellinkoff identifies nine characteristics of legal language:

1. Frequent use of common words with uncommon meanings (using action for lawsuit, of course for as a matter of right, etc.)

2. Frequent use of Old and Middle English words once in use but now rare (aforesaid, whereas, said and such as adjectives, etc.)

3. Frequent use of Latin words and phrases (in propria persona, amicus curiae, mens rea, etc.)

4. Use of French words not in the general vocabulary (lien, easement, tort, etc.)

5. Use of terms of art--or what we would call jargon--(month-to month tenancy, negotiable instrument, eminent domain, etc.)

6. Use of argot--ingroup communication or professional language--(pierce the corporate veil, damages, due care, etc.)

7. Frequent use of formal words (Oyez, oyez, oyez, which is used in convening the Supreme Court; I do solemnly swear and the truth, the whole truth and nothing but the truth, so help you God)

8. Deliberate use of words and expressions with flexible meanings (extraordinary compensation, reasonable man, undue influence, etc.)

9. Attempts at extreme precision (consider the following formbook general release:

> "Know ye that I, _____ of _____, for and in consideration of ____ dollars, to me in hand paid by _____, do by these presents for myself. my heirs, executors, and administrators, remise, release and forever discharge _____ of _____, his heirs, executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever. . . . .")

Reed Dickerson, a professor of law widely known for his interest in legal writing and the author of The Fundamentals of Legal Drafting (1965) agrees with Mellinkoff that much legal language is ambiguous, wordy, and either overly precise or overly vague. In the words of Yale Professor Fred Rodell, legal language is "high class mumbo jumbo." As Rodell puts it, there are only two things wrong with most legal writing: one is style; the other is content (cited in Goldfarb, Barrister, Summer 1978).

Although some lawyers have urged simplification (for example, Wilbur Friedman, Chairman of the New York County Lawyers Committee and partner in a New York law firm, most members of the legal profession do not consider legal language a problem. Most lawyers assume that they are understood--that legal language is basically clear. In fact, the legal system largely proceeds on that assumption. As Roger Traynor (1970) noted, with regard to jury instructions, "in the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow /jury/ instructions."

Where lawyers do see a problem, most assume it is the result of conceptual difficulty--that is, the legal ideas are the difficulty, not the wording of them. As Friedman puts it, "maybe real property law, deeds, and mortgages are so complex that no layman can ever be made to understand them and lay people will simply have to depend on their lawyers to explain or simplify these documents for them (MacNeil/Lehrer Report, 1978). Interestingly, in a survey of 40 experienced trial attorneys, Charrow and Charrow (1976) found that lawyers' ratings of the conceptual difficulty of 52 standard jury instructions bore little relationship to jurors' actual comprehension of these instructions, and that when those which the lawyers viewed as most conceptually difficult were rewritten in simpler language, the jurors had far less difficulty in understanding them. In short, it was the language,

not the ideas, which were difficult. In fact, the rewritten versions of these supposedly difficult instructions showed the greatest improvement in comprehensibility and became the easiest to understand.

LINGUISTIC ANALYSES

To date, there have been few linguistic analyses of legal language, but the results from those studies that have been undertaken indicate that there is more to legal language than a specialized vocabulary. (Charrow and Charrow, 1979; Charrow and Crandall, 1978; Danet, 1976; Erickson et al., 1978). The following are some of the features which linguists have identified in their analyses of legal language:

1. Overly complex sentences (multiple embedded sentences) are egregious features of legal language. Take, for example, the following, which was part of a legal brief:

> "The requirement that affidavits in opposition to summary judgment motions must recite that the material facts relied upon are true is no mere formality."

Worse yet is this example from an orally presented California jury instruction, ironically called Res Ipsa Loquitur--"the thing speaks for itself":

> ". . . However, you shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless you believe, after weighing all the evidence in the case, and drawing such inferences therefrom as you believe warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant."

As might be expected, those sentences which have the most embeddings are those which are also the most difficult for jurors to understand, even

when the sentences are relatively short. For example, this sentence, which contains only 16 words, is very difficult to understand:

> "You must never speculate to be true any insinuation suggested by a question asked a witness."

2. Passives - The overuse of passives (for example, Mary was hit by John rather than John hit Mary) is characteristic of legal language, especially with passives which delete the agent or doer (in the above example, Mary was hit, without the "by John"). Charrow and Charrow found 35 passives in only 44 sentences in jury instructions, and of these 35, 27 lacked the agent. The overuse of passives in legal language often results in inappropriate focus. This example is from American Jurisprudence Forms and comes from a fraud form:

> "The aforesaid representations were false and were then and there known by defendant to be false"

Here the focus should be on the defendant, and the fact that he knew these were false, not upon the representations known by the defendant. Another difficult passive meant to be heard and understood by jurors is this one:

> "No emphasis thereon is intended by me and none must be inferred by you."

3 and 4. Whiz-Deletion and Unclear Pronoun Reference - The next example exhibits many characteristics of legal language besides passive voice and complex structure. These are whiz-deletion (the deletion of which is or that is) and unclear pronoun reference. The example is drawn from a fraud form:

> "That on or about _____, plaintiff discovered that the representations made by defendant were false and he thereupon elected to rescind the contract hereinabove referred to, notifying defendant in writing on _____

If you know how the legal system operates, you know that the he can only refer to the plaintiff: if you are not a lawyer, the reference is not very clear.

A combination of these features makes this next example from a jury instruction very ambiguous:

> "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."

How much clearer this would have been if the instruction had said: "and the reasons he gave for his opinion."

Here is another bad example with an agentless passive and a missing relative pronoun:

> "However if assumption of the risk meets the requirements stated to you, it will bar recovery of damages. . . "

5. Nominalizations - In common with bureaucratic language, legalese is replete with nominalizations. Examples from one brief include: "made application" (instead of "applied") and "demonstrates an entitlement to" (instead of the simpler, "entitles"). California Standard Civil Jury Instructions provides this example:

> "Failure of recollection is a common experience and innocent misrecollection is not uncommon."

Note the Piblical parallelism here.

6. Multiple Negation - The last example also exhibits another problematic structure which is typical of legal language: the use of more than one negative (innocent misrecollection is not uncommon") It's not surprising that not many jurors were not unable to paraphrase this: only 12% did in Charrow and Charrow's study.

Another example is the following:

> ". . . that it is the kind of accident which ordinarily does not occur in the absence of someone's negligence."

Compare the more ordinary phrasing: It is the kind of accident which occurs when someone is negligent.

7. Archaic and Misplaced Prepositional Phrases - These are also a problem. Here is an example of a misplaced prepositional phrase:

> "If in these instructions any rule, direction, or idea is repeated (or stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you."

The more normal way of saying this would be to place "in these instructions" after the verb to read: If any rule, direction, or idea is repeated in these instructions . . . .

As to is one of the more prevalent archaic prepositions still used in legal language. Take the following example:

> "You will regard that fact as being conclusively proved as to the party or parties. As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

About or concerning would have been much clearer here.

8. Some Other Features - Legal language has its own set of articles and demonstrative pronouns. In addition to a, an, and the, legal language also uses said, such, and aforesaid where the rest of us would use this or that, or these or those. For example, lawyers are fond of saying: "such case" or "said person" when they could have said "this case" or "that person".

It would also appear to the untrained observer that lawyers fear stating things only once: consider "give, devise, and bequeath" or "null and void".

9. A Final Example - For a final example, consider the old version of Citibank's loan form, which contains nearly all of the features we have identified, not to mention the legal jargon:

> "In the event of default in the payment of this or any other obligation or the performance or observance of any term or covenant contained herein or in and note or any other contract or agreement evidencing or relating to any obligation or any collateral on the borrower's part to be performed or observed; or the undersigned borrower shall die; or any of the undersigned become insolvent or make an assignment for the benefit of creditors; or a petition shall be filed by or against any of the undersigned under any provision of the Bankruptcy Act; or any money, securities or property of the undersigned now or hereafter on deposit with or in the possession or under the control of the Bank shall be attached or become subject to distraint proceedings or any order or process of any court; or the Bank shall deem itself to be insecure, then and in any such event, the Bank shall have a right (at its option), without demand or notice of any kind, to declare all or any part of the Obligations to be immediately due and payable, whereupon such obligations shall become and be immediately due and payable, and the Bank shall have the right to exercise all the rights and remedies available to a secured party upon default under the Uniform Commerical Code (the "Code") in effect in New York at the time and such other rights and remedies as may otherwise be provided by law."

No wonder Citibank's customers were delighted with the revised version, which read:

> "I'll be in default:
> (1) If I don't pay an installment on time; or
> (2) If any other creditor tries by legal process to take any money of mine in your possession."

THE CAUSES OF LEGAL LANGUAGE

Having identified some of the features of legal language, we will turn now to the reasons why legal language evolved. There are four major factors which account for the differences between legal language and ordinary English. These factors are historical, sociological, political, and jurisprudential, and each has left its own imprint upon legal language. We will discuss each of these in turn.

1. HISTORICAL CAUSES

Legal language has had its own historical development, which parallels, but is often independent of, the historical development of the rest of the English language. Ordinarily, languages change over time through use--words develop new meanings and old meanings are lost; archaic terms drop out of the language; grammatical structures shift to reflect changes in the status of competing dialects. But legal language develops many of its forms and meanings through a legal--and not an ordinary linguistic--process. A good example of this is the legal meaning of "fresh" as in "fresh fish." The lay person's understanding of "fresh fish"--based on the most common current meaning of the word "fresh," as it has developed--is likely to be "fish that was recently caught." But the legal definition, as set by regulations, is "fish that has never been frozen," no matter when it was caught. It is the courts, legislatures, and government agencies, which decide the legal meanings of terms, not ordinary usage and historical change.

Ordinary English replaces older vocabulary items with newer forms, and the older forms either change their meanings or drop out of the language. Legal language, on the other hand, does not usually replace an older form; rather, it simply adds the new terms to previously-used terms, creating strings of largely synonymous words; for example:

Especially as French was giving way to English in the courts, an English word was often added to the French predecessor, yielding:

act and deed
acknowledge and confess
new and novel

This use of strings of synonymous words was in fashion for a while in ordinary English, especially in poetry, but the habit persisted in legal language long after the fashion had died out.

As a result of this, and of the use of Latin in written legal language well into the Renaissance, legal language has also retained a number of Latin, French, and other archaic forms:

Latin	French	Archaic English
prima facie	in lieu of	witnesseth
res judicata	lien	whereas
mens rea	easement	aforesaid
habeas corpus	tort	heretofore

not to mention the now famous "nolo contendere."

The differences are not just at the single word level. Whole phrases and clauses exist which have no counterpart in ordinary English:

malice aforethought
revoking all codicils by me made
absent (in the sense of "without")
fee simple
fee tail

These forms are unfortunately "frozen" in legal language and come from grammatical constructions no longer in use.

The effect of the independent development of legal language is nicely summed up in the discussion of the word "may" in Black's Law Dictionary. Unlike ordinary usage, in legal language "may" can carry obligatory meaning. It can mean "must." Black's Law Dictionary explains that the meaning of "may"

is altered so that "justice may not be the slave of grammar."

2. SOCIOLOGICAL CAUSES

Another reason why legal language is the way it is sociological. Legal language is both the medium of communication and the primary tool of the legal profession. Unlike physicians who have instruments and procedures, engineers who have blueprints, computers and processes, and scientists who have laboratories, lawyers have only legal language. In fact, lawyers call their legal documents "instruments." It's true that all professions have a body of thought and theory that is embodied in language, but for lawyers, there is only one way of getting at this knowledge--through legal language. You know an engineer has failed when the building falls down, or a dentist has hit a nerve, but you only know that a lawyer has made a mistake when someone else interprets his language.

In addition, legal language carries the force of the law: the statement is the act. A person who has been pronounced guilty is guilty(whether he is or not, in reality). When a divorce is granted, two people who were previously married, are un-married, by a set of written (and spoken) words. And, most egregious of all, when a person has been missing for seven years in many jurisdictions a court can declare him or her dead, whether or not that is the case.

It is perhaps this power of legal language, and the fact that the law can only be communicated through it, that has led to the ritualistic quality of much legal discourse. This ritualistic quality, in turn, gives greater credence to the power of the courts. Anyone confronted by a uniformed bailiff crying "Oyez, oyez, oyez" demanding that "All please rise," and requiring witnesses to state "the whole truth, so help you God" cannot b

be impressed by the power of the law.

Religion uses similar rituals and formulaic expressions most effectively. And, as in some religions, where it is not necessary (or perhaps even desirable) to understand the meaning of the words in order to be impressed by the power of the deity, it is not necessary for the lay person to understand legal language in order to be impressed by the power of the law. As with religion, the law has trained intermediaries--lawyers--who will interpret, and even intercede for us.

Nonetheless, a result of all this is that we are governed by regulations which we often do not understand.

This view of language as carrying the power of the law appears to be one reason why many lawyers are reluctant to make even the most minor of changes in their language. For example, many lawyers would hesitate to substitute the term "cause" for the legal term "proximate cause," not merely because "cause" has not had its meaning decided by courts, but because tampering with a legal term might affect the legal force of that term. True, there may indeed be legal reasons (either because of precedent or statute) for retaining many terms, but there are few valid reasons for clinging to latinisms (e.g. prima facie = on the face of it; supra = above); strings of synonyms (e.g. null and void; any and all; rest, residue and remainder; false and untrue); or archaic phrases (e.g. witnesseth, thereinabove, hereirbefore).

3. POLITICAL CAUSES

Some of the vagueness and ambiguity in legal language is intentional. Laws are enacted usually as a result of discussion and compromise. The lawmaking process is not necessarily a process of reconciling different views;

more often it is a process of carefully choosing language which all--even those with mutually contradictory positions--can agree upon. The problem is further exacerbated by the fact that many of the problems addressed in legislation are so complex that the bill can only provide a vague framework, which must then be filled in by government agencies when they draft regulations.

Unfortunately, many of these political considerations that are responsible for the legislatures' creating vague statutes are still present when the regulations writers begin writing regulations. Furthermore, each regulation is subject to public comment and often intense lobbying on the part of various special interest groups. The result is often compromise regulations, which may be intentionally vague or ambiguous. Moreover, the government agencies themselves may have a vested interest in retaining the vagueness. In order to maintain control over industries, institutions and individual programs, federal agencies often prefer to decide questions on a case-by-case basis. The result, not surprisingly, are regulations which may be as vague as their statutes.

But even detailed regulations possess all the grammatical and semantic earmarks of legal language (often further complicated by the presence of vocabulary from other technical jargons) and these regulations, by their use of legal language and legal discourse style, and by their surfeit of detail, serve political purposes also. The detail lessens the industry's power to make decisions and the legal language serves formal notice that the agency now has authority to make the decisions.

4. JURISPRUDENTIAL CAUSES

Besides the historical, sociological, and political factors behind legal language, there is a jurisprudential one. Common law is built on precedent. In the law, terms, phrases, even whole chunks of discourse, mean

what courts have decided they mean. While the common meaning of a word or phrase remains "valuable as a potential basis for overruling" a court's decision (Dickerson, p. 39), Chief Justice Hughes' statement that a "federal statute finally means what the Court says it means" (C. Hughes, The Supreme Court of the U.S. 230 (1928)) is probably more accurate, as the legal system actually operates.

For example, most people would recognize the dictionary definition of the term "heir": "1. Law. A person who inherits or is entitled by law or by the terms of a will to inherit the estate of another. 2. A person who succeeds or is in line to succeed a hereditary rank, title or office. 3. One who receives or is expected to receive a heritage, as of ideas, from a predecessor." (American Heritage Dictionary of the English Language, p. 611). However, the strict legal definition of "heir" differs in important ways from the common dictionary definition. An "heir" is a person entitled by statute to the land of someone who dies intestate -- without a will. This means that a person who receives property under a will is not an heir according to the law. Further, a person who receives personal property, even under the laws of intestate succession (if the deceased had no will) is not an heir. Such a person is a "distributee" or "next-of-kin." In fact, the word "inherit", as used in the dictionary definition, was technically misused. Only a "distributee" or "next-of-kin" can inherit; an heir cannot. This is because the term "inherit" in a will can legally refer only to personal property, not land. The analog for "real property" (land) is "to take by descent."

There are numerous other examples where a definition decided either by the courts or by statute differs substantially from the common meaning of the term. Our previous example of "bequeath" is particularly illus-

trative. When the layman composes his own will, using "I bequeath everything to my wife," in the belief that this will include his house and land, his wife may be in for a rude awakening. If the courts adhere to their strict definition of "bequeath," the wife will only receive her late husband's personal property, since one cannot "bequeath" real property. One can only "devise" or "give" it.

Another example of a term with strict legal definition built on precedent is "assault." The dictionary definition accurately reflects common usage: "A violent attack, either physical or verbal." However, the legal definition, as set forth in the Restatement of the Law of Torts 2d § 21, is as follows:

> An actor is subject to liability to another for assault if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) the other is thereby put in such imminent apprehension.

In other words, legal "assault" is an intention in one person which produces a fear in another. It does not require physical contact, and it cannot be solely verbal.

Here are some other examples of terms whose meanings have been established through the legal process, with little regard to the everyday meaning of the term:

adultery	purchase
income	domicile

The relation between jurisprudence and legal language is nicely illustrated in the often contradictory rules that courts use to interpret the meaning of statutory language. Among them is the Plain Meaning Rule, which states that a statute means what it says on its face. However, this

rule can often be counteracted by the "purpose of the statue" rule, which states that a statute should be interpreted to fulfill its underlying purpose. In addition to these two broad rules, the courts have created a host of maxims, to take care of more specific situations.

While the purpose of these rules is to provide so-called "objective criteria" for resolving statutory ambiguity, courts often use these rules to support a particular interpretation after they have reached a decision.

Consequently, different courts have, according to their various judicial philosophies, applied the various rules and maxims to the same term, and come up with a variety of contradictory meanings. For example, courts have managed to totally confuse and twist the meanings of "shall," "may," "must" and "will," so that "may" has been interpreted to have mandatory meaning ("must"). "Must" or "shall" have been interpreted as "may," and "shall" has been interpreted as "may." "must" or "will."

ATTEMPTS TO SIMPLIFY LEGAL LANGUAGE

Clearly there is a need to simplify legal language, but how to do that is a problem.

Attempts to simplify legal language have been broadly of two types: readability formulas, such as the Flesch Test, the Gunning "Fog Index," or the Fry Scale, and rhetorical approaches which utilize editing techniques and focus on stylistic conerns in an attempt to meet audience needs.

All of the nearly 50 readability formulas assume a surface level model of text comprehension. They all have a sentence variable and a word variable and assume that by counting the number of "long" words and "long" sentences, they can predict difficulty (relying most heavily on the word

factor), (Klare, 1974-5, Kintsch and Vipond, 1977). But readability formulas only measure symptoms of incomprehensibility, not the causes of it. They pay no attention to specific complexities of word order, sentence construction, sequencing signals, or other discourse elements which could cause a sentence of only 16 words, as cited previously, to be difficult to comprehend. For example, John went to the store and Store John to the went would have the same readability score, since the formula makes no attempt to deal with word order. A more serious objection to readability formulas concerns their failure to consider discourse cohesion in their insistence upon short sentences. Take, for example, the following sentence: When Alice hit me on the shoulder, I cried, because I had recently broken my arm. If you cut this up into shorter sentences, and by readability formulas, simpler sentences you get: Alice hit me on the shoulder. I cried. I had recently broken my arm. The result: certainly not more comprehensibility, since there is no text cohesion.

This is an extreme example, but it is meant to show what readability formulas can't account for. Worse yet, readability formulas are used inappropriately as criteria for rewriting documents, something even the proponents of these formulas caution against.

Psycholinguistic complexity depends on a great deal more than the number of words per clause or the number of clauses per sentence. It is not that readability formulas don't tell us anything; they just don't tell us enough, and often when they are predictive, they are so for the wrong reasons.

A second approach, used in most legal drafting courses and business

and government writing seminars, is basically a rhetorical or editing approach. This type of approach is more helpful and may demonstrate the state of the art in clear writing. This approach emphasizes the reader's point of view, stressing the need for clarity, conciseness, and directness. Proponents of this approach suggest reducing nominalizations, passive voice, avoiding unnecessary repetition (or redundancy), which, interestingly, leads to deletion of <u>that</u> and to whiz-deletion, defining or reducing all jargon or unfamiliar terminology, increasing the use of transitional markers, and using a logical order with effective captions, numbering, and white space. Although many of these principles lead to effective re-writing, they are not based on linguistic theory or empirical evidence regarding comprehension, and rarely are revised or edited versions tested for their comprehensibility. What is needed are more studies of legal language in context and more empirically derived guidelines for rewriting more clearly.

However, given the historical, sociological, political and jurisprudential background of legal language, what are the prospects for simplifying legal language and making it clear to the lay person?

Overall, the prospects do not appear to be very good. To begin with, as we indicated earlier, most lawyers believe that the problem is not with the complexity of legal language, but with the conceptual complexity of the law itself.

Even demonstrating that legal language can be simplified may not convince lawyers to change their language, for a number of reasons.

The most compelling reason for legal "frozen forms" is economic. It is simpler, safer and cheaper for an attorney to go to a book of accepted

(if archaic) forms and to have the appropriate form copied, rather than to try to draft a new, simpler form from scratch. "Boilerplate" saves time and money. Moreover, lawyers believe that this procedure is safer for the client. If an attorney were to deviate from an accepted form, he or she would have to establish, through costly and time-consuming research, that the new form was legally equivalent to the original one.

Even then, there is a fear that deviating from time-honored phraseology will stimulate litigation -- another costly and time-consuming procedure. As one government attorney put it,

> "In drafting legal instruments most lawyers tend to be conservative and tend to use those words and phrases that have been interpreted by the courts. Many of the redundancies, like 'cease and desist' or 'give, devise and bequeath' arise because prior instruments that omitted one or more were found to be defective in some way. Without doubt, the new simple language movement will engender a great deal of litigation, and will probably, and gradually become encrusted with modifiers and qualifiers because of judicial decisions finding loopholes in the new simplified text." (Crandall, 1979)

Besides, it takes years of training and experience for lawyers to acquire and properly use their sublanguage. They are not about to give up any part of it easily. The principal goal of law school is to train students to "think like lawyers." Students believe, not without some justification, that "talking like a lawyer" demonstrates that they are "thinking like a lawyer." As Ronald Goldfarb, a Washington, D.C. attorney, humorously explains it:

> "Something strange happens when human beings enter law school. At some point during their three years, students pick up the notion that in order to be a lawyer, one must learn to speak and write like a lawyer. No one actually tells law students this is a requirement to pass the bar, but inevitably the message reaches them.

> Nothing is done in law school to cure the problem, in fact it is compounded. That students read in law schools are law review articles, legal treatises and judicial opinions. In the most part this is a collection of turgid, overblown, pompous, technically incompetent prose.
>
> By the end of three years, students barely can get through a letter or a conversation without dropping a few 'notwithstandings,' heretofores' and 'arguendos.' Everything they have seen and heard for three years leads them to assume this lingo is expected of them."

Aside from lawyers' resistance, there are reasons why legal language will be difficult to change. These stem from a general misunderstanding of what makes lanugage complex. Where legislatures, government agencies, and private industries have attempted to simplify legal documents, most have embraced readability formulas.

However, as said before, "readability" is not equivalent to comprehensibility (Klare, 1963).

In fact, there can be negative correlation between readability indices and the results of well-designed comprehension tests (Charrow and Charrow, 1979).

The outlook for changing legal language so that ordinary persons can understand it may be bleak, but is not hopeless, as the many Plain English laws and attempts to simplify government regulations attest.

However, if the legal sublanguage is really to become accessible to non-lawyers, both lawyers and lay persons must acknowledge certain things: First, legal language is appropriate for lawyers to use in communicating with other members of the legal community, unless members of the general public need to be included as well. Second, lay persons have a responsibility to familiarize themselves with the law and with more common legal terms; they should not be afraid to demand clarification when

necessary. However, lawyers are the gate-keepers: even the most responsible lay person will not be able to gain access to legal language without the cooperation of the legal community.

Given the importance of legal language, society has a right -- indeed an obligation -- to demand more comprehensible legal language.