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Chapter 6

Characteristics and Functions of Legal Language

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Until recently, linguists have paid relatively little attention to professional jargons, possibly because we shared the common belief that the primary differences between professional jargons and ordinary usage were purely lexical. Perhaps linguists were trapped by their own definition of "jargon." Since a jargon is usually defined in terms of vocabulary only, labelling professional sublanguages as jargons closed the door to further investigation.

In the last few years, we have begun to recognize that professional sublanguages – such as medical language, scientific language and legal language – in fact have important distinctive features beyond the lexical level. The most readily apparent differences may indeed be lexical, but there may also be syntactic and discourse features that are equally important. This is especially true in the case of legal language.

What is legal language?

Many lawyers are aware that their sublanguage differs substantially from ordinary usage, but 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 the lexical level. For example, Mellinkoff, in *The Language of the Law*, describes legal language largely in terms of vocabulary, identifying the following characteristics:

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'd 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*)

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*)
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 . . .")

Dickerson, in *The Fundamentals of Legal Drafting*, recognizes that legal language has syntactic constructions that differ from ordinary usage and create ambiguity, but he, too, emphasizes the lexical distinctiveness of legalese.

Interviews with members of the legal profession confirm this view. When asked to describe legal language, attorney subjects invariably cite terms of art, latinisms, archaic words and phrases, etc., to the exclusion of other linguistic features (Crandall, 1979).

Many lawyers are aware of the difficulties that non-lawyers have in understanding legal discourse, but they tend to attribute these difficulties to a combination of esoteric vocabulary and the conceptual complexity of the law (Charrow & Charrow, 1975, 1976).

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 & Charrow, 1979; Charrow & Crandall, 1978; Danet, 1976; Erickson et al., 1978).

Specifically, in a study of the comprehensibility of standard jury instructions, Charrow and Charrow (1977, 1978, 1979) attempted to determine what caused jurors to misunderstand and incorrectly paraphrase standard civil jury instructions from California. They empirically isolated a number of grammatical and discourse features that appeared to be causing the jurors' comprehension problems. These features showed up frequently in the jury instructions, and appear to be typical of legal language in general.

The following features of the jury instructions were found to be responsible for most of the jurors' comprehension problems:

Passives that appear in (past) participial phrases (technically, subordinate clauses with "whiz" deletion). For example, ". . . to decide all questions of fact *submitted* to you . . ."; "You must not consider . . . any statement of counsel *made* during the trial . . ."; ". . . any insinuation *suggested* by a question . . . *asked* a witness . . ."; ". . . the reasons *given* for his opinion."

"Whiz" deletion, since it is inseparable from such passives, also appeared to contribute to the comprehension problems.

Other truncated passives caused problems only when they obscured the identity of the agent, for example: "If . . . any rule . . . *is repeated* or *stated* in varying ways . . .".

Misplaced phrases, injected into the middle of clauses, such as: "If, *in these instructions,* any rule, direction or idea is repeated . . ."; or, ". . . a cause which, *in natural and continuous sequence*, produces the injury . . ."

Phrases beginning with "as to": "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. *As to* . . ."

Nominalizations (nouns created from verbs) such as "*assumption* of risk"; ". . . will bar *recovery of* damages . . ."; "failure *of recollection* . . ."; ". . . after *a consideration of* . . .".

In addition, there were discourse features, such as the repetition of an entire paragraph, with slightly different wording and organization, which confused many of the jurors.

One set of features which could not easily be quantified or generalized, but which nonetheless appeared to cause many comprehension problems, was the various types of rather unusual (for ordinary or formal non-legal usage) subordinate clause embeddings, that were rife in the jury instructions – and that appear to be common in other instances of legal language as well. For example:

"Assumption of risk however, if it meets the requirements stated to you, will bar recovery of damages although it plays no part in causing the accident except merely to expose the person to danger."

or

"Whether a discrepancy pertains to a fact of importance or only a trivial detail should be considered in weighing its significance."

Two syntactic and semantic features which appear frequently in other varieties of legal language did not show up in empirically measurable quantities in the jury instructions, but are worth mentioning: word lists and multiple negatives. For example, "A witness who has special *knowledge, skill, experience, training* or *education* in a particular *science, profession* or *occupation* . . .". And, for multiple negatives, ". . . and innocent *mis*recollection is *not un*common."

There appear to be other features,[1] of legal language, such as aspects of pronoun anaphora, but the Charrow & Charrow study did not deal with

[1] Noun strings, which are very common in bureaucratic legal writing (e.g., waste water treatment facility implementation plan) did not appear in the jury instructions.

them. Further empirical research will be necessary to discover all the syntactic and pragmatic features of the legal sublanguage.

As we stated earlier, the features that Charrow and Charrow isolated are not confined to jury instructions. They appear repeatedly in briefs, appellate court decisions, statutes, regulations and form books. Indeed, these features are probably perpetuated by lawyers' wholesale use of "boilerplate" (formbook language) culled from legal formbooks.

For example, consider the following multiple embeddings from a randomly selected legal brief (a particularly egregious example): "The requirement that affidavits in opposition to summary judgment motions must recite that the material facts relied upon are true is no mere formality."

Whiz-deletion takes place regularly in all types of legal documents. The following example, from a fraud form, is especially difficult to understand because of unclear anaphora: "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 _____ that he was rescinding the contract."

Finally, consider the potential effects on comprehension of the following combination of nominalizations, truncated passives, whiz-deletion, technical vocabulary and embeddings in this notice from a consumer loan form:

> ". . . and to consent to immediate execution upon any such judgment and that any execution that may be issued on any such judgment be immediately levied upon and satisfied out of any personal property of the undersigned . . . and to waive all right of the undersigned . . . to have personal property last taken and levied upon to satisfy any such execution."

Interestingly, a U.S. District Court was actually called upon to decide whether or not the average person could understand this notice. The court, without revealing its rationale, held that although the clause was written in somewhat legalistic terms, the language was understandable (See, *Garza v. Chicago Health Clubs*, 347 F.Supp. 955 [N.D. Ill. 1972]).

It is clear that legal language differs both qualitatively and quantitatively from ordinary usage. Although a descriptive linguistic analysis provides some evidence of these differences, there is additional evidence that legal language is quite distinct from Standard English: its process of development, which has spanned centuries, has differed, in several important ways, from the developmental processes of ordinary English.

A number of factors account for the evolution of legal language into a unique variety of English – even more so than other professional languages. These factors are historical, sociological, political and jurisprudential, and each has left its own imprint on legal language. In the following sections, we will discuss each of them.

This feature may in fact be a hybrid of legal and technical sublanguages, and hence not a "pure" legal form.

Historical

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. While English common law was evolving, the English language was going through a number of historical changes, but the changes that were taking place in ordinary English were not necessarily taking place in legal language. Legal language underwent its own *processes* of change and growth. 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 linguistic forms. 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.

The legal term "negligence" developed its meaning through litigation. The meaning has been refined through a history of appellate court decisions, so that it now has a very specialized meaning in the law. Whereas in ordinary usage, "negligence" is synonymous with "carelessness," the legal meaning, honed through over a century of litigation, is now the following:

> "Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under a given set of circumstances."

Ordinary English replaces older vocabulary items with newer forms, and the older forms either change their meanings or become archaic. 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:

cease and desist
null and void
remise, release and forever discharge

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
give, devise and bequeath[2]

This tendency parallelled the fashion, in ordinary usage, of using strings of synonyms for ornament (Mellinkoff, p. 121), but the habit persisted in legal language long after the fashion had died out in ordinary usage.

As a result of this, and of the use of Latin as a medium of 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
nolo contendere	tort	heretofore
habeas corpus	oyez	writ

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

malice aforethought
revoking all wills and codicils by me made
absent (used as a preposition)
fee simple } which retain the French word order
fee tail }

These forms, "frozen" in legal language, come from grammatical constructions no longer in use. Perhaps the most recognizable example of these is the retention of "such," "said" and "which" as demonstrative adjectives or determiners.

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 *mandatory* meaning. Black's Law Dictionary explains that the meaning of "may" is altered so that "justice may not be the slave of grammar."

Sociological

Legal language does not only have a communicative function. In both its written and oral forms, it is the primary *tool* of the legal professional.

[2] There are valid reasons for this particular string of synonyms. Because of certain court decisions, one can "bequeath" anything except real property (real estate); one can only "devise" real property. (However, the phrase *could* be shortened to "give," since that covers all possibilities.)

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." True, all professions have a body of thought and theory that is embodied in language, but for lawyers there is only *one* way of accessing this knowledge – through legal language.

In addition, one of the most important functions of legal language is a performative one (Austin, 1962). 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. The 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 truth, so help you God" cannot but be impressed by the power of the law.

This by itself would not be so harmful, as a society does need laws, and legal incantation may persuade us to follow them. As Mellinkoff explains, "The early history of the language of the law was made rememberable by repetition, rhythm, rhyme, alliteration and an awestruck respect for the magic potency of certain words. Planned for that effect or willy-nilly, these features fastened upon the language of the law in a time of illiteracy when the very survival of law depended on mnemonic devices, and where the memory of man did not run – there was no law." (Mellinkoff, p. 438).

But as Mellinkoff also states, "the necessity for repetition and the tricks of verse to insure the law's survival passed long ago." In an age of the written word, such repetitions only reinforce Professor Fred Rodell's view of much of legal language as "high class mumbo jumbo."

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 rituals in order to be impressed by the power of the deity, it is not necessary for the lay person to understand the law in order to be impressed by the power of the law. As with religion, the law has trained intermediaries – lawyers – who will interpret, even intercede for us.[3]

[3] Many ritualistic legal utterances are strikingly similar to religious phrases, e.g. "I pray the court . . ."

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 that many lawyers are reluctant to make even the most minor of changes to their sublanguage. 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, hereinbefore).

Political

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* divergent 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 provide only a vague framework, which must then be filled in by administrative agencies through the drafting of regulations.

Unfortunately, many of the 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 intensive lobbying on the part of various special interest groups. The result is often the drafting of a compromise regulation, which may be intentionally vague or ambiguous. Moreover, the government agencies themselves may have a vested interest in perpetuating 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, is regulations which may be as vague as their statutes.

Moreover, when a government agency wishes to extend its authority – perhaps beyond the limits provided by statute – it derives a certain degree of security if it can do so by using language plucked from the statute. For example, the Homeowners' Loan Act empowers the Federal Home Loan Bank Board to grant charters to new savings and loan associations. Under the terms of the statute,

> "no charter shall be granted . . . unless in the judgment of the board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions." (Homeowners' Loan Act, § 5(e)).

However, the Act does not explicitly empower the Bank Board to grant permission for existing savings and loans to establish branch offices. Nonetheless, the Bank Board took it upon itself, by regulation, to permit savings and loans to "branch out." Under the branching regulation, an applicant for a branch office must show:

> (1) a necessity for the proposed branch in the community to be served by it at the time it is opened; (2) the branch has a reasonable probability of success; (3) the branch can be established without undue injury to properly-conducted existing local thrift and home-financing institutions; . . . (12 C.F.R. § 545.14(c))

As the reader will note, the regulatory criteria for a branch office closely parallel – in both form and substance – some of the statutory criteria for a charter. The reader will also note that many of the vague and elastic terms of the statute ("reasonable probability," "necessity," "undue injury") are perpetuated without further definition in the regulation. The Bank Board felt that it was safer to use existing statutory phraseology in enlarging its jurisdiction than to make up and define new criteria in new terms. It may have felt that introducing additional powers for itself by means of new language would weaken the legal propriety of the regulation.

But even regulations that are not vague 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: The detail lessens the industry's power to make decisions; the legal language serves formal notice that the agency now possesses the authority to make the decisions. Here are two examples from a proposed regulation of the U.S. Environmental Protection Agency:

1. (a) Any person who produces and disposes of no more than 100 kilograms (approximately 220 pounds) of hazardous waste in any one month period, or any retailer disposing of hazardous waste (other than waste oil), is not a generator provided that the hazardous waste:

   (1) Is disposed of in an on-site or off-site solid waste disposal facility in a State with an approved State plan under Subtitle D of the Solid Waste Disposal Act, as amended, which facility has been permitted or otherwise certified by the State as meeting the criteria adopted pursuant to Section 4004 of the Act; or (2) Is shipped to and treated, stored, or disposed of in a facility permitted by the Administrator pursuant to the requirements of Subpart E of this Part or permitted by an authorized State program pursuant to Subpart F of this Part . . .

2. (1) Generators must send hazardous waste to a treatment, storage, or disposal facility permitted by the Administrator pursuant to the requirements of Subpart E and shall comply with the requirements of this Subpart as follows:
   (i) If the generator sends the hazardous waste to an off-site treatment, storage or disposal facility which the generator does not own or the generator owns but which is

> not located in the State where generation occurred, the generator shall comply with all requirements of this Subpart except §§ 250.23(d), (e), (f), (g), and (h) and 250.28 . . . .

Note the long sentences and complex sentence structure; the statement of exceptions within the rule; the overuse of the passive voice; the noun string "offsite solid waste disposal facility"; the use of "which" as a determiner; the legal preposition "pursuant to"; the legal terms "shall," "amended," "certified," "authorized"; and the peculiar but typically legal discourse structures for delineating a person who is *not* a member of a class, and for referring the reader elsewhere.

All of these linguistic characteristics help mark this as a regulation with the force of law, and this use of legal/regulatory language, in turn, reinforces the power and authority of the agency which created the regulation.

Jurisprudential

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 above 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 illustrative. 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 "devise" or "give" it.

Another example of a term with a 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, nor can it be solely verbal.

There are numerous 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 interaction 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 statute" 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 Latinate maxims, to take care of more specific situations. One such well-known maxim is the maxim of Ejusdem Generis, which says that in a list of two or more items, followed by a more general term that includes the prior items, the more general term is limited by the prior items (thus, "dogs, cats and other animals" would probably exclude amoebas). Some other maxims are *Expressio unius est exclusio alterius* – "a statement of one is an exclusion of another"; and "*In pari materia*" – which says, essentially, that when a statute is ambiguous, the legislative intent may sometimes be gathered from other statutes dealing with the same subject matter.

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, notwithstanding ordinary usage, 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."

The Legal Sublanguage and the Non-lawyer

One of the reasons that the legal sublanguage has recently generated interest among linguists and other social scientists is that it has become clear that although many non-lawyers are affected by legal language, they cannot effectively comprehend or deal with it. Thus, the study of legal language is not merely an academic exercise; such studies help to define what is immutable and what is capable of being changed or eliminated from legal language, without drastically affecting the legal system and legal processes. In addition, linguistic studies of legal language can give the non-lawyer a better understanding of lawyers' (often reasonable) fears of tampering with terms and grammatical constructions that have been established by legal-historical processes and confirmed through use. In short, social scientific studies of legal language can provide empirical evidence of the lay person's need to deal with legal language, of his or her inability to do so, and of the consequent necessity for changing and simplifying those aspects of legal language that the lay person comes in contact with.

Prospects for Change

Given the historical, sociological, political and jurisprudential background of legal language, what are the prospects for making it more accessible or clear to the lay person?

Overall, the prospects do not appear to be very good. To begin with, most lawyers believe that the problem is not with the complexity of legal language, but with the conceptual complexity of the law itself. As Friedman (1978) puts it, "maybe real property law, deeds and mortgages are so complex that no layman can even be made to understand" them, and lay people will simply have to depend on lawyers to interpret these documents for them. But when Charrow and Charrow (1975) asked 35 experienced trial attorneys to rate the conceptual complexity of 52 California standard civil jury instructions, the lawyers' ratings bore little relationship to the jurors' actual comprehension of these instructions. Moreover, when the jury instructions were rewritten in simpler language, the greatest improvements in comprehension occurred for those instructions that the lawyers had rated the most conceptually complex. In short, it was the language, not the ideas, which was most difficult.

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 an economic one. 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. What students read in law school 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 language complex. Where legislatures, government agencies,

and private industries have attempted to simplify legal documents, most have embraced readability formulas, in the misapprehension that the number of syllables per word and the number of words per sentence are accurate indicators of the comprehensibility of a document (see, for example, 31 Penn. Code Ch. 64). One of the reasons for the use of the Flesch readability formula, the Fry Readability Index, the Gunning "Fog Index," the Dale-Chall formula, and others, is that they are cheap and easy to use. Most have been computerized, and provide safe, quantifiable (although misleading) measures of alleged complexity or simplicity.

However, not only is "readability" not equivalent to comprehensibility (Klare, 1963), indeed, those who devised the readability formulas cannot provide any non-circular definition of what "readability" is. This has resulted in absurd situations, such as simplifying tax forms to an 8th-grade level, as measured by a readability formula, and then finding, as one would expect, that 8th graders cannot fill one out, or even understand it.

In fact, there can be a *negative* correlation between readability indices and the results of well-designed comprehension tests (Charrow and Charrow, 1979). Obviously, readability formulas do not offer much prospect for changing legal language (Charrow, 1978).

The outlook for changing legal language so that ordinary persons can understand it may be bleak, but it is not hopeless. In the United States, numerous government agencies – both Federal and State – as well as banks, and insurance companies, under pressure from the growing consumer movement, have begun analyzing and simplifying their language and redesigning their forms. There is even a three-year federally funded project to do research into the comprehensibility of government documents and provide technical assistance to government agencies in rewriting and redesigning their documents (Redish, 1979). The problems with legal language are increasingly recognized, as reflected in the fact that three states have passed "plain English" laws, and 17 others are currently considering them.

If the legal sublanguage is really to become accessible to non-lawyers, however, 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.

Legal language will always be a sublanguage of English, but given its importance in regulating society, society has a right – indeed an obligation – to demand more comprehensible legal language.

References

[1] American Heritage Dictionary of the English Language, New York, N.Y.: American Heritage Publishing Co., 1973.

[2] Austin, J. How to Do Things with Words. New York and London: Oxford University Press (1962).

[3] Black's Law Dictionary, St. Paul, Minn.: West Publishing Co., 1957 (p. 1131).

[4] Charrow, R. & Charrow, V. "An Investigation of Jury Instruction Comprehension," paper presented at the 4th Annual NWAVE Colloquium, Georgetown University, Washington, D.C., October, 1975.

[5] Charrow, V. & Charrow, R., "Investigating Comprehension in Real-World Tasks," paper presented at the Linguistic Society of America Annual Meeting, Philadelphia, December, 1976.

[6] Charrow, R. & Charrow, V. "The Comprehensibility of Standard Jury Instructions," paper presented at the National Center for State Courts, Conference on Social Science Research in the Courts, Denver, January, 1977.

[7] Charrow, V & Charrow, R., "The Comprehension of Jury Instructions: A Sociolinguistic Perspective," paper presented at the Ninth World Congress of Sociology, Uppsala, Sweden, August, 1978.

[8] Charrow, R. & Charrow, V. "Comprehension of Standard Jury Instructions: A Psycholinguistic Approach," Columbia Law Review, Vol. 79, 1979 (in press).

[9] Charrow, V. & Crandall, J. "Legal Language: What Is It and What Can We Do About It?" paper presented at the American Dialect Society Conference/Georgetown NWAVE Conference, Washington, D.C., October, 1978.

[10] Crandall, J. "Lawyers Look at Their Own Language," unpublished manuscript, 1979.

[11] Danet, B. "Language and the Construction of Reality in the Courtroom," Working Paper, Boston University, 1976.

[12] Dickerson, R. The Fundamentals of Legal Drafting, Boston: Little, Brown and Co., 1965.

[13] Erickson, B., Lind, E. A., Johnson, B. C. & O'Barr, W. M. "Speech Style and Impression Format in a Court Setting: The Effects of 'Powerful' & 'Powerless' Speech," Journal of Experimental Social Psychology, 14, 266–279 (1978).

[14] Friedman, W. In an Interview on the MacNeil/Lehrer Report, February 17, 1978. Friedman is a lawyer with the New York County Lawyers Association and a senior partner in a New York City law firm.