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A Dainty Dish to Set before the King: Plain Language and Legislation

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A Dainty Dish to Set before the King: Plain Language and Legislation¹

For my contribution to the conference, I thought I'd reflect a little on some *limits* of plain language which it seems to me are not always properly recognised. These arise out of two factors:

- *The performative character of legislation*
- *Distortions in the communication model for legislation*

Blackbird Pie

To put my remarks into perspective, though, I'd like to begin with the language of literature, and discuss the passage that begins Raymond Carver's story "Blackbird Pie":

I was in my room one night when I heard something in the corridor. I looked up from my work and saw an envelope slide under the door. It was a thick envelope, but not so thick it couldn't be pushed under the door. My name was written on the envelope, and what was inside purported to be a letter from my wife. I say "purported" because even though the grievances could only have come from someone who'd spent twenty-three years observing me on an intimate, day-to-day basis, the charges were outrageous and completely out of keeping with my wife's character. Most important,

¹ Adapted from a paper originally presented at the 9th Annual Conference of the Law and Literature Association, Beechworth, 5-7 February 1999. My former colleague in the Australian Capital Territory, James Graham, provided some initial inspiration. The views expressed are, however, my own, not those of the ACT Parliamentary Counsel's Office or the Ontario Office of Legislative Counsel (the drafting offices in which I have worked while this paper has been gestating). Feel free to quote from the paper, with due acknowledgement.

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however, the handwriting was not my wife's handwriting. But if it wasn't her handwriting, then whose was it?

--Raymond Carver, "Blackbird Pie" (492)

Unwelcome messages come into our lives in strange ways. In Carver's story, the narrator just doesn't want to know that his wife is leaving him, but her list of grievances comes with an inexorable finality. Similarly, a parking ticket, or a law requiring me to pay a parking fine, is not any more well received because I can understand it clearly. It slips past our defences like an envelope under a door. The law imposes itself despite our will, and irrespective of how efficiently it communicates.

The words travel from the public into the private sphere, from the shared space of the passage outside the door into the private space of the narrator's study. Legislation must make the same journey from the public halls of parliament into the intimacy of my den at home. Public laws are not private letters, no matter how similarly their language may be rendered.

The narrator experiences the language of the letter as merely FEIGNING intimacy. When drafting legislation, I do my best to address the future users of the statute as directly as possible with text pitched at what I take to be their level of understanding. I do so by *feigning intimacy* with my reader. I pretend that my public Bill is actually written with her specifically in mind. I "write my reader's name on the envelope" in the terms of Carver's story. Carver's narrator senses that he is being duped; this apparently private, personal communication is experienced as a disturbingly foreign, pronouncement: "the charges were outrageous and out of keeping with my wife's character". It is my contention that plain language legislation

aspires to a mythical model of transparent, private conveyance of the law from the State to the citizen. An instrumental myth, certainly, that has supported worthwhile reforms in legislative language. But still a myth.

The medium is the message. "Most important, it was not my wife's *handwriting*". The narrator is not concerned with what is *communicated* in the letter. The charges may be outrageous; but they may as well be completely justified. It is the *performance* of the letter that changes everything: the act of writing; the sliding of the letter under the door; the fact of the letter's having been written at all. Similarly, law is a performative utterance. To a drafter's dismay, a government is often only interested in the *act* of legislating itself, not in the precise messages so carefully crafted into the Bill. The significance of the distinction between a statement of policy and an Act of parliament is not lost on politicians, yet it is one that is sought to be elided in the advocacy of plain language for legislation.

1. Legislation as performance

One of the things that distinguishes legislation from other public documents is its self-performing character. If the law prohibits you from doing something, it doesn't need to persuade you that it's wrong, it just enacts the command "don't do it". A statute is a ***performative utterance***: it has effect simply by being stated.

But plain language reforms tend to disguise this feature of the law. This is made particularly clear in the seminal plain language advocacy of the use of "must" to replace the use of "shall" in its directory sense.

In Australia, an exchange of views in the pages of the *Australian Law Journal* in 1989-90 was the harbinger of change. Professor Robert Eagleson and Ms Michele Asprey, in the long run, have now helped to convince almost every legislative counsel's office in the country to switch from "shall" to "must" in its command context, and to find other alternatives to "shall" in declaratory contexts (eg "The XYZ body is established by this section").

An eminent barrister, Mr J M Bennett, opposed this reform in responses to the *Journal* at the time. I don't support his particular objections, which I regard as muddled and reactionary. But none of the participants in this exchange succeeded in articulating a significant distinction between "must" and "shall". "Shall" ENACTS a legislative command; "must", in its ordinary usage (advocated by Eagleson and Asprey) EXPRESSES a command with authority ELSEWHERE than in the command itself.

Shakespeare's King Richard II says "6 years we banish him, and **he shall go**". The words of the King: the words of a statute, a performative utterance. We can imagine, however, King Richard's men, acting on that command, saying in effect "Get a move on then, you piece of scum: **you must go**, the King has ordered it".

This reform is emblematic of the whole plain language legislative program. Plain language sidelines the "legal" character of law and emphasises improvements in communication - in "expression" of the law. In the process, a word is chosen - "must" - which *expresses* obligation in preference to another word - "shall" - which *enacts* the obligation. The communicative and legal functions of legislation are thereby purportedly elided.

I think we need to reflect on how desirable this is. There *is* a difference between a brochure and an Act of parliament. The people affected by the Act need to know whether they are reading the words of the law, or someone's interpretation of the law, or a combination of both. There is a need to retain clear markers of status in both format and language, to enable law to be recognised as such.

And the use of the same "plain" style of language has potential for distortion, as I want to explore now.

2. Communication distortions

First distortion - Plain language becomes legal language, no matter how plain. "Must" takes on the full burden of both expressive and declaratory senses. Plain language, in a legislative document, becomes *plain language style*. Moreover, the same word, no matter how "plain" its origin, takes on a *different* sense when used in a statute, because its sense is determined by its context.

This is deceptive; the legislative context demands that language, however "plain", be read in a certain way, with the application of the statutory and common law rules of interpretation, having regard to any number of statutes or cases that may bear on the use of the language, and so on. These are inescapably unique protocols of reading that do not apply in a non-legislative context.

Take an example: the use of the second-person singular "you" to address the reader in a legal document. This technique has mostly been applied, to my knowledge in insurance contracts, but even there (with an audience restricted by the direct contractual

relationship) such usage must be hedged around with qualifications and sometimes multiple definitions ("In this Part, "you" means such-and-such" etc.). The deceptively direct and simple form of address is distorted into something complex by its very presence in a legal document.

Desmond Manderson comments on such a "denaturalising" effect of law when he says that:

"Sometimes, like a secret handshake, a password or a trapdoor, codes conceal the very fact that they conceal." (3).

The narrator in "Blackbird Pie" feels duped by the letter that purports to be from his wife - the words seem familiar, no one else could have written them or slipped them under his door, *but the handwriting is not*. This is clearly *more than a letter* - by its manner of transmission it functions predominantly as a signal of the end of a relationship, and the narrator's failure to recognise the handwriting is a powerful symbol of the *performative* meaning of the letter. Similarly, the legal context in which the language of a statute appears - a context in which language takes on a performative role - has a transforming effect on the meaning of the language.

Second distortion - multiple readings; single text

The fruitful striving of the plain language project to seek new ways of drafting legislation so it may communicate effectively to individuals comes up against a limit due to the peculiar and complex transmission system of legislation.

Plain language style for both legal and other official documents aspires to the intimacy of private correspondence. Thus the proposal to consider the use of the intimate address of "you" in

this context. Plain language documents seek to "write the name of their readers on the outside of their envelopes", like that in which the letter is delivered to Carver's narrator. (It is interesting to note at this point that Carver gives no name to his narrator throughout the story.)

The problem for legislation in particular is that the **actual** communication model for law is **one: many**, not **one: one**. This results in a double bind I feel every day as I attempt to draft legislation "for the readers", caught between a rock and a hard place:

- ***the statute I am drafting is legion:*** it must apply in multiple reading contexts, many of which I need to predict in advance (hard enough in itself, even harder to draft for)
- ***statutes are unitary,*** so I only have a single text to work with - and I must in that text ***control*** the inherent potential for proliferating multiple interpretations (a potential made more evident everyday as legislation is accessed using internet search tools - as it is read in ever more new and exotic ways - a point made entertainingly by David Hayes at the recent CIAJ conference in Ottawa).

The demands made by these two limiting factors are evidently inconsistent. Any attempt at intimacy - at directly speaking to any particular reader or class of readers, must, to a certain extent, be feigned. I cannot limit my conversation to that reader or those readers alone.

The logical conclusion of the first limit is a different text of the law for each significant different audience. But we currently have no protocols of reading to allow such multiple texts to operate concurrently. We must continue to draft our legislative stories in a singular, linear fashion, until reforms other than of a linguistic nature are made to the legal system.

3. The limits of plain language

I emphasise that my remarks about plain language law, critical though they may seem, are not intended to discredit the plain language project. I fully support its goal of making the law more accessible to those affected by it. I have every respect for my colleagues at this conference striving to find new ways to express complex legal concepts in simpler legal documents. I have little time for the sort of reactionary criticism offered by Mr Bennett. However, after plain language legislation's admirable record of achievement in a short period of time, I think it worth taking a little time to reflect on and acknowledge some limits of the project.

The tendency in the advocacy of plain language for the law to be placed somewhere "outside" the statute runs up against the limit imposed by legislation's self-authorising, self-originating nature.

This inclination of plain language advocates to conflate legal documents with non-legal texts may not take proper account of the demands of statutory form. The use of plain language has the tendency of masking the character of the legislative text, that is, its very status as law can be disguised.

More significantly, the plain language model of one:one communication of legislation does not reflect the actual communication model that governs the transmission of law via statute. The twin demands of multiple, future, never entirely predictable applications of a statute and the certainties of a single authoritative text with a containable penumbra of interpretation are difficult to reconcile at the best of times. It helps no one that plain language legislative proposals are premised on overly simple notions of reception, or (on the other hand) utopian dreams of proliferating text and interpretation that ignore the conservative demands of the rule of law for stable legislative meaning.

A final reality check. For many, the law is not a welcome visitor. No matter how plainly or obscurely drafted, no matter how well or badly disguised as plain language, the letter of the law launched from the far reaches of State power slides under the door to haunt each of us in our locked rooms.

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