On the Cult of Precision Underpinning Legalese: A Reflection on the Goals of Legal Drafting

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Legal drafting is not reputed for its clarity. In its traditional form — known disparagingly as *legalese* — it is overblown, timid, homogenous, and obscure.[1] Rather than use the ordinary terminology of daily life, legal drafters traditionally prefer long lists of particularized instances, terms of art, and terms that cover the field of possible contingencies. In doing so, these traditional drafters strive not just for "a degree of precision which a person reading in good faith can understand; but . . . a degree of precision which a person reading in bad faith cannot misunderstand."[2] That is, they aim to minimize the range of plausible interpretations that can be given to the document in any given situation.

While the resulting drafting techniques produce dense prose — bordering on impenetrable to the lay reader — traditional drafters consider this a cost worth bearing. They assume, first, that clarity and precision cannot coexist and, second, that precision must take priority over clarity to curtail those bad-faith readers.[3]

The rise of the plain-language movement and the associated scholarship have shown that the first of these assumptions is overstated, if not wholly misplaced. Plain-language drafting is the

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1 Lawrence Friedman, *How I Write*, 4 Scribes J. Legal Writing 3, 5 (1993).

2 *Re Castioni* [1891] 1 GB 149 per Stephen J at 167.

3 *See, e.g.*, Recommendation 14 of the Renton Report 1975, cited in Bennion, *The Renton Report* 125 *NLJ* 660 (1975).

converse of legalese, being the "practice of writing . . . in a clear and simple style,"[4] and yet its rise has not empowered those who are inclined to read legal documents in bad faith. There has been no observable increase in litigation,[5] and courts interpret plain-language clauses with sensitivity to their purpose, not rigid legalism.[6] Furthermore, redrafting projects illustrate how plain language can significantly improve clarity without changing the legal effect.[7] At face value, these are good reasons for legal drafters to prefer plain language to legalese.

There's been less scholarly scrutiny on traditional drafters' second assumption — that where there's incompatibility between clarity and precision, the latter should always prevail. In this article, I argue that it should not. While precision is undoubtedly important, the extreme degree to which drafters have traditionally aspired to it can come at the cost not only of clarity, but also of *accuracy*. In contrast, the clarity of plain-language drafting actively promotes accuracy in legal drafting.

I will begin by clarifying the often-overlooked[8] distinction between *precision* and *accuracy*, and by suggesting that the latter should always be prioritized by legal drafters. In doing so, I will show how documents drafted to maximize precision may have very different effects in unforeseen contingencies from documents drafted to maximize accuracy. Next, I will show how plain-language drafting is better equipped than legalese to produce

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4 Asprey, *Plain Language for Lawyers* (4th ed., Federation Press 2010) at 12.

5 *See, e.g.*, Neville King, *An Experience with Plain English*, 61 Current Affairs Bulletin 21 (1985).

6 *Re Secretary, Department of Social Security and Underwood* (1991) 25 ALD 343 at 347.

7 Victorian Law Reform Commission, *Plain English and the Law* (1987), https://www.lawreform.vic.gov.au/sites/default/files/Plain%20English%20and%20the%20Law-republished_forweb.pdf.

8 *See, e.g.*, Jack Stark, *Should the Main Goal of Statutory Drafting Be Accuracy or Clarity?*, 15 Statute L Rev 207, 209 (1994) (highlighting the conflation of accuracy with precision).

documents with accurate outcomes in *foreseen* contingencies. Finally, I will argue that the purported predictability of legalese is overstated and that plain-language drafting produces better outcomes than legalese even in *un*foreseen contingencies.

To support my arguments, I've cited authorities and examples from jurisdictions across the common-law world, but this article is not intended as a survey of law. Rather, it is a reflection on the overriding objectives that motivate choices in legal drafting. My purpose is to make legal drafters question whether they prioritize precision to a degree that does a disservice to their instructors. (I use the broad term *instructor* throughout to refer to the person seeking or directing the lawyer's work, whether that person is a client, the representative of a corporate client, or a legislator.)

My authorities are mostly from Australia and the UK, where I've done my legal work. Given that the United States consists of a vast federal court system and 50 different state jurisdictions, each with its own views on interpreting contracts and laws, my focus on common-law principles, especially toward the article's end, may find firmer ground in some U.S. locales than in others. Nevertheless, I trust that my message of accuracy is universal.

When and How Precision Can Conflict with Accuracy

Precision is distinct from, and less important than, accuracy.

If you ask me the time and I respond, "It is 3 minutes and 23 seconds past 4 o'clock," you would rightfully be impressed by my precision. But if the time is actually 5 minutes *to* 4 o'clock, my accuracy would be sorely lacking and my precision counterproductive — you may mistakenly assume from my precision that I am also being accurate. I could have better responded, "It's about 4 o'clock."

Precision requires "definiteness or exactness of expression,"[9] while *accuracy* is "conform[ity] to . . . a given standard."[10] In the case of time, the given standard is objective time determined by the planet's movement and fixed by time-zone conventions. When giving the time, my first concern should be the clock's conformity to objective time, not the exactness of my expression. Indeed, whether telling the time or otherwise, nothing is gained by speaking with a degree of exactness that exceeds the degree to which we know our "given standard." Accuracy, therefore, should always be prioritized over precision.

The standard to which accurate legal drafting must conform is the parties' intentions.

Private legal documents should be interpreted according to the parties' intentions. This is both a legal principle of interpretation[11] and a corollary of the commonsense principle that legal documents should do what they were created to do. Similarly for statutes, legislative language should be interpreted to promote the relevant act's purpose,[12] ordinarily understood as the intention of the legislature.[13] Thus, the given standard to which accurate documents must conform is the *intention of their parties*.

When asked to interpret contracts, however, judges cannot look inside the parties' heads to observe their intentions directly.

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[9] *Oxford English Dictionary*, www.oed.com (last visited January 1, 2019) (defining *precise*).

[10] *Id.* (defining *accurate*).

[11] *See* Christopher Staughton, *How Do the Courts Interpret Commercial Contracts?*, 58 Cambridge L.J. 303, 304 (1999); *Bank of Credit and Commerce Int'l SA v. Ali*, [2001] UKHL 8, [2002] 1 A.C. 251 (Lord Bingham) (UK).

[12] 15AA, *Acts Interpretation Act (1901)*, at Commonwealth level.

[13] D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia* 35–40 (8th ed. 2014); Keith Mason, "The Intent of Legislators: How Judges Discern It and What They Do If They Find It," *in Statutory Interpretation: Principles and Pragmatism for a New Age* 33 (June 2007), *available at* https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/education-monograph-4.pdf.

Instead, judges look to the parties' *objective* intentions or the "meaning which the document would convey to a reasonable person."[14] Similarly, judges discern the legislature's intention by objectively reading the text itself.[15] Crucially, while scholars and judges often speak loosely of the drafter's intention,[16] this is strictly irrelevant. The drafter's intention matters only to the extent that it mirrors the parties' intention.

This creates a gap: legal documents are created to realize their parties' subjective intentions, but courts interpret legal documents according to the documents' objective meaning. The drafter who prioritizes accuracy aims to minimize this gap so that the objective meaning maximally conforms to the parties' intentions. This contrasts with the traditional drafter who, in prioritizing precision, aims to minimize the document's plausible interpretations. As we will see, it isn't always possible to concurrently minimize both the intention–meaning gap *and* the range of plausible interpretations. Consequently, if traditional drafters are not mindful of this intention–meaning gap, they risk being like the person who gives the time with great exactness but little accuracy.

By their nature, parties' common subjective intentions are themselves imprecise.

While objective time can in principle be measured to any degree of precision, parties' subjective intentions are inherently

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[14] *Inv'rs Comp. Scheme v. West Bromich Bldg. Soc'y* [1998] 1 W.L.R 896 at 912 (Lord Hoffman) (UK); *River Wear Comm'rs v. Adamson* [1877] 2 App. Cas. 743 at 763 (Lord Blackburn) (Eng.); *Nat'l Commercial Bank Jamaica v. Guyana Refrigerators* [1998] 4 LRC 36 at 40 (Lord Steyn); *Australian Broad Comm'n v. Australasian Performing Rights Ass'n* (1973) 129 CLR 99, 109 (Gibbs, J) (Austl.).

[15] *Amalgamated Society of Eng'rs v. Adelaide SS Co Ltd* (1920) 28 CLR 129, 161–2 (Austl.).

[16] *See, e.g.*, *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993).

imprecise.[17] That is, parties cannot consider every possible contingency and so do not form actual intentions for those contingencies. Indeed, David McLauchlan opines that the great majority of litigated contract-interpretation disputes arise from circumstances not contemplated by the parties when the contract was formed.[18]

Of course, intentions can be made *more* precise, facilitated by the legal drafter. For example, parties to a short-term rental agreement for a place to watch a parade may not consider who bears the risk of the parade's being canceled;[19] parties to a construction contract may not consider who bears the risk of third-party injunctions that delay work.[20] If the instructor has only vague intentions, a drafter's intelligent questions can help refine them. And good drafters often foresee contingencies, draw them to the instructor's attention, and then provide for them in the legal document.

Still, no drafter can anticipate all contingencies. In such cases, courts must interpret the legal document somehow, but their interpretation will not enforce the parties' actual intention because the parties had no such intention. Instead, the courts are forced into the necessary fiction of enforcing the parties' *presumed* intention, which, in the words of Justice Thomas of the New Zealand Court of Appeal, "provides the community with a universal law of contract which could otherwise founder on the impossible task of ascertaining the parties' intention when in reality they had none."[21]

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[17] Ignoring uncertainty arising at the scale of quantum physics, which is well outside the scope of this — or any other — article on legal drafting.

[18] David McLauchlan, *Contract Interpretation: What Is It About?*, 31 Sydney L.R. 5 (2009).

[19] *See, e.g.*, *Krell v. Henry* (1903) 2 K.B. 740 (Eng.).

[20] *See, e.g.*, *Codelfa Constr v. State Rail Auth of NSW* (1982) 149 CLR 337 (Austl.).

[21] *Attorney-General v. Dreux Holdings Ltd.* [1996] 7 TCLR 617 (CA).

Further, even when the parties contemplate a specific contingency in advance, they do not always form an actual *common* intention about what should happen in that contingency. This is because most legal documents arise from compromises between people with different interests. The agreement forms "not [from] the parties' having meant the same thing but [from] their having said the same thing."[22] Consequently, commercial or political imperatives can curb the pursuit of a truly common intention, replacing it with the pursuit of wording that all parties are prepared to sign or vote for.

In the contractual context, parties may not bother negotiating details because they are in a hurry to begin commercial dealings.[23] Alternatively, they may fear that by suggesting some amendments, they will signal something about themselves that could weaken their bargaining position.[24] In both cases, parties often negotiate clauses of "studied ambiguity," gambling that a dispute does not arise.[25] That is, instead of negotiating until their actual intentions are identical, parties often agree to clauses that mask disagreements.

Things are much the same in the legislative context. Fidelity to the original motivation behind the legislation — or to the results of expert and community consultations — may conflict with the political imperative of reelection.[26] Both may succumb to

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[22] *Byrnes v. Kendle* (2011) 243 CLR 253 (Austl.); *see also Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1385 (UK).

[23] Eric Bennett Rasmusen, *Explaining Incomplete Contracts as the Result of Contract-Reading Costs*, 1 Advances in Economic Analysis and Policy iii (2001), *available at* http://www.rasmusen.org/published/Rasmusen_01.negot.pdf.

[24] *Id.* at 2.

[25] Johan Steyn, *The Intractable Problem of The Interpretation of Legal Texts*, 25 Sydney L.R. 5 (2003).

[26] Hillary Penfold, "Legislative Drafting and Statutory Interpretation," *in Statutory Interpretation: Principles and Pragmatism for a New Age* 91 (June 2007), *available at* https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/education-monograph-4.pdf.

amendments needed to force the bill through both legislative houses.[27] In these cases, legislative bodies often pass vaguely drafted bills without an actual common intention about how they should apply in many anticipated contingencies, leaving the courts to fill in the details.[28]

Of course, the distinction between what parties do and do not anticipate is a matter of degree. No one can predict every fine detail of a future event, but we say that parties have anticipated a contingency whenever they have anticipated its pertinent details (itself, of course, a matter of degree). Nevertheless, there is an intuitive distinction between contingencies for which parties have formed an actual intention and those for which they have not. For the sake of this discussion, I will say that parties' intentions are more precise when there are more contingencies for which the parties intuitively have an actual intention. As we will see, there is no need to exactly define the boundaries of actual intention because plain language is superior to legalese regardless of how precisely the parties have formed their intention.

Accuracy and precision can diverge.

When parties have a highly precise intention about how their legal document should operate, it should always be matched by equally precise drafting. Doing so, of course, is necessary to maximize accuracy. To this extent, precise drafting can complement the overriding priority to accurately capture the parties' subjective intention in the legal document's objective meaning.

But there is a point at which the pursuit of precision diverges from the pursuit of accuracy. Both pragmatism and lack of

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[27] *Id.* at 92.

[28] James Spigelman, "The Principles of Legality and Clear Statement," *in Statutory Interpretation: Principles and Pragmatism for a New Age* 15 (June 2007), *available at* https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/education-monograph-4.pdf.

foresight often prevent parties from forming an actual common intention for every possible contingency. When unanticipated contingencies arise, documents drafted with higher degrees of precision are applied according to interpretive considerations that are independent of their parties' actual intentions.

In the next section, I argue that when parties have an actual common intention, plain-language drafting is better equipped than legalese to capture that actual intention. In the last section, I argue that even in entirely unforeseen contingencies, plain-language drafting is more likely to produce outcomes that are consonant with parties' diffuse intentions.

How Plain Language More Accurately Captures Parties' Actual Intentions

While a document's precision *shapes* the document's content and effect, a document's clarity makes the content and effect *understandable*. Therefore, whenever legal documents become more precise than their instructors' intentions, they necessarily become less accurate records of those intentions. In contrast, there is no natural limit to how clear a document can be to accurately reflect its parties' intentions. In principle, only the drafter's skill limits the extent to which clarity can coexist with accuracy.

Defenders of legalese may argue that, in practice, parties carefully negotiate legal documents in great detail. Consequently, so the argument may go, legalese promotes accuracy because the degree of precision in the parties' actual intention exceeds that which can reliably be captured in plain language.

In this section I take the opposite view, arguing that the opacity of legalese actively undermines accuracy, while the clarity of plain language actively promotes it.

Legalese can induce misunderstandings.

The most obvious way that legalese adversely affects the accuracy of a legal document is by inducing parties to misunderstand the document's effect. In general,

> [i]f the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different.[29]

While there will always be some risk of executing a legal document under a misunderstanding of terms, the opacity of legalese exacerbates this risk. In *Arnold v. Britton*,[30] the Supreme Court of the United Kingdom considered the effect of a clause in a 99-year lease for the payment of maintenance fees:

> [The Lessee will] pay to the Lessor without any deduction in addition to the said rent as a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance and renewal of the facilities of the Estate and the provision of services hereinafter set out the yearly sum of Ninety Pounds and value added tax (if any) for the first Year of the term hereby granted increasing thereafter by Ten Pounds per Hundred for every subsequent year or part thereof.[31]

The literal effect of this provision is that annual maintenance fees would increase by a compounded rate of 10% each year from £90 in its first year to a dizzying £1,127,504 in its last. Though the clause's terms are precise, one may confidently suppose that the

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[29] *Australian Broad Comm'n v. Australasian Performing Right Ass'n* (1973) 129 CLR 99, 109 (Gibbs J) (Austl.).

[30] [2015] UKSC 36.

[31] *Id.* at 7 (noting that the phrase *or part thereof* appears to be the basis on which this increase was understood to be compounded).

poor lessee did not appreciate its implications, hidden as they were behind dense legalese. Nevertheless, the Supreme Court of the United Kingdom upheld the literal calculation of maintenance fees, remarking that the parties' subjective intentions were irrelevant.[32]

The lessee did not seek to rectify the contract,[33] presumably because the parties had not expressly negotiated the rate at which maintenance fees would increase. But this does not mean that the rate of increase was entirely outside the parties' contemplation. Indeed, given that time passing was the only precondition for maintenance fees to increase, it cannot sensibly be characterized as an unanticipated contingency. Rather, the lessee (if not the lessor) surely anticipated that maintenance fees would continue to broadly reflect maintenance costs. Therefore, either the effect of this clause was contrary to the parties' actual common intention or its wording obfuscated the fact that the parties had no actual common intention at all.

Had the clause read "the Lessee must pay the Lessor an annual maintenance fee as follows," followed by a schedule of fees per year, this problem could have been avoided. The lessee could then have recognized the clause's effect, and the parties could have negotiated an amendment or walked away without reaching an agreement. Instead, an opaque clause forced a contractual obligation on a party who did not voluntarily take it on in any real sense. By drafting with precision, the drafter may have ensured a determinate outcome; but by doing so without clarity, the protected agreement was a gross distortion of the lessee's perceived bargain.

Legalese's techniques for precision can reduce accuracy.

Parties rarely misunderstand clauses having such mechanical application as increases in periodic payments at a fixed rate per

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[32] *Id.* at 12.

[33] *Id.*

annum. But when clauses have a less quantifiable application, the misunderstanding induced by legalese can have a more insidious effect. Indeed, many legalese techniques intended to create precision often undermine accuracy by creating misleading nuance.

For example, drafters of legalese frequently try to incorporate precision into their legal documents by making liberal use of terms of art and judicially defined terms. They claim that such legalistic terminology is backed by centuries of judicial consideration and resulting precision.[34] Consequently, so the argument goes, one needs only to consider centuries of judicial authority to understand exactly how to apply a legalistic clause.

The weight of this judicial-clarification argument is greatly undermined by practical realities. First, drafters purporting to rely on judicially defined terms are rarely able to cite relevant caselaw;[35] second, in any case, the number of judicially clarified terms is strikingly small,[36] and those few terms that are judicially clarified are self-selecting in that they are sufficiently opaque to warrant litigation in the first place.

But the judicial-clarification argument also has a conceptual flaw. Even if a term has been judicially defined — and the drafter is a scholar of the relevant authorities — the drafter doesn't know whether the term's nuances match the instructor's subjective intention. This is because, by their very nature, terms of art and judicially defined terms have an unclear meaning to laypeople.

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[34] Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 Mich. B.J. 1136 *passim* (Oct. 1985).

[35] *See* Michael Hwang, *Plain English in Commercial Contracts*, 32 Malaya L. Rev. 296, 304 (1990).

[36] *Id.*; *see also British Elec. & Assoc. Indus. Ltd. v. Patley Pressings Ltd.* [1953] 1 All E.R. 94 (Eng.) (finding that a clause was void for uncertainty because *force majeure* has no established meaning in English law).

Consider the term *consequential loss*, which has traditionally been used in England[37] to refer to the loss recoverable in damages under the second limb of *Hadley v. Baxendale*[38] — that is, to refer to loss that has not arisen "according to the usual course of things" but that nevertheless "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Drafters may expressly exclude liability for consequential loss when instructed that the scope of each party's liability should be narrow.

But by doing so, drafters exclude a vast body of case law that builds on and refines the second-limb test. Often the liability being excluded is the kind that common sense demands. In *Hadley v. Baxendale*, the defendant failed to deliver a crankshaft required to operate the plaintiff's mill. If the defendant had been aware that the plaintiff's mill was inoperable until the crankshaft arrived, the second limb would have granted damages for lost production resulting from the defendant's delay.[39] Later cases have given the second-limb test greater nuance, attempting to shape a doctrine that assigns liability in proportion to the proven breach. Parties to legal documents will almost never have refined their subjective intention to nearly the same degree.

Given this, a legal drafter cannot know whether the extra layers of nuance in the term *consequential loss* will produce an objective meaning agreeable or disagreeable to the instructor. By excluding such liability, drafters take a figurative sledgehammer to 150 years of caselaw based on the instructor's loosely conceived

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[37] *See, e.g.*, *Saint Line Ltd. v. Richardsons, Westgarth & Co. Ltd.* [1940] 2 K.B. 99 (Eng.); *Croudace Construction Ltd. v. Cawoods Concrete Prods. Ltd.* (1978) 8 B.L.R. 20; *Deepak Fertilisers & Petrochemicals Corp. v. ICI Chems. & Polymers Ltd.* [1999] 1 Lloyd's Rep. 387 (Eng.). *But see Transocean Drilling U.K. Ltd. v. Providence Res. PLC* [2014] EWHC 4260 [15] (Lord Justice Moore-Bick) (UK).

[38] [1854] 9 Ex. 341 (Eng.).

[39] *Id.*

desire to reduce exposure to liability. By taking a few minutes to discuss an instructor's concerns about liability under ordinary principles of damages, a drafter could prepare a more refined plain-language clause to reflect those concerns. Alternatively, the drafter could reassure the instructor that ordinary principles of damages do not have the feared effect.

The same is true whenever drafters adopt terms of art to add layers of precision. Neither the parties nor the drafter knows whether this additional precision will produce a meaning that matches the parties' intentions. While this additional precision may produce a definite result when a dispute arises, the result will be arbitrary justice for the parties, who never understood the document's precise meaning.

Plain language promotes a convergence between objective meaning and the parties' intentions.

In contrast to legalese, plain language is, by its very nature, clear to both the parties who are executing it and those who are bound by its terms. Thus, plain-language drafting promotes a convergence between the parties' intentions and the document's meaning and effect. This convergence occurs at four levels.

First, at the level of taking instructions, drafters who draft for clarity allow the instructors to engage directly with the document, rather than rely on the drafter's advice about its effect. This provides an extra safeguard to ensure that communication between instructor and drafter has not broken down. Messages are easily corrupted in translation. When drafting in legalese (translating instructors' intentions into esoteric terms), drafters must explain what they have drafted (translating those esoteric terms into legal advice) and therefore risk corrupting the communication channel between instructor and any judge who ultimately interprets the document. By drafting in plain language, rather than merely *advising* their instructor in it, drafters increase the chance

that the judge will understand the document in the same way as the instructor.

Second, by using plain language, drafters better understand the document's effect. Legalese is harder for laypeople *and* lawyers to understand,[40] and redrafting one's work into plain language can reveal ambiguities or muddled thinking that was previously obscured by the density of words.[41] When drafters themselves do not understand the legal effect of their documents, it is exceedingly unlikely that the legal effect will match the instructors' intentions.

Third, when a document is negotiated, clear drafting ensures that the document reflects the common intention of both parties, not just the intention of the party who prepared it. A drafter who prioritizes accuracy will not only draft to the instructions but draft in a way that ensures that the document is clear to anyone agreeing to it. This is arguably an ethical requirement[42] and, in some American states, a legal requirement.[43] But it is also pragmatic: legalese can delay negotiations when one party suspects that the other's proposed clauses contain carefully hidden tricks.[44]

Finally, once a legal document is executed, plain language promotes an ongoing operation that is consonant with how a court could ultimately enforce the document. This is especially important with legislation because the vast majority of those subject to the document are not parties to its execution. Even in the case

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[40] *See* Victorian Law Reform Commission, *Plain English and the Law* 69–70 (1987), *available at* https://www.lawreform.vic.gov.au/sites/default/files/Plain%20English%20and%20the%20Law-republished_forweb.pdf.

[41] Joseph Kimble, *Answering the Critics of Plain Language*, 5 Scribes J. Legal Writing 51, 55 (1994–1995).

[42] Peter Rodney, *Plain English and the Law*, 4 Legal Ethics 18 (2001).

[43] *See* William J. Scheibal, *The Effectiveness of Plain English Laws: A Legal Perspective*, 23 Int'l J. Bus. Comm. 57 (1986).

[44] Eric Bennett Rasmusen, *Explaining Incomplete Contracts as the Result of Contract-Reading Costs*, 1 Advances in Economic Analysis and Policy iii (2001), *available at* http://www.rasmusen.org/published/Rasmusen_01.negot.pdf.

of contracts, whenever the parties are corporations, the people controlling those parties may later change. In these cases, those subject to the document are likely to rely on the terms of the document itself to determine the nature of their obligations. If the document is drafted in impenetrable legalese, those subjects' actions may begin to diverge from that required by its objective meaning. This will either make a white elephant of the legal document or, worse, create enormous disruption if the document is ever judicially enforced based on its objective meaning.

The danger of having a legal document whose objective meaning — as ultimately determined by a court — diverges from its ongoing practical effect is illustrated by the aftermath of *Forrest & Forrest Pty Ltd v. Wilson*.[45] In that case, the High Court of Australia found that the Western Australian Mining Warden lacked jurisdiction to grant a mining license to applicants who had failed to file a mineralization report *concurrently* with their application. Before this, the mining industry and the office of the mining warden had acted for many years on the understanding that jurisdiction could be enlivened by filing a mineralization report at a later time. Following the High Court's decision, many high-value applications — some of which had been progressing through the system for years — were rendered invalid and had to be recommenced.[46]

[45] [2017] HCA 30 (Austl.).

[46] James Hunt, Jonathan Fulcher & Michael Hunt, *Problems Arising from the Forrest Case and WA's Partial "Legislative Fix,"* HG Lawyers (Nov. 30, 2017), https://www.hopgoodganim.com.au/page/knowledge-centre/blog/problems-arising-from-the-forrest-case-and-was-partial-legislative-fix.

The Limits of Accuracy: Why Plain Language Is Superior to Legalese Even When the Parties Have No Actual Intention

So far, I have argued two points: first, that the inherent imprecision of parties' intentions creates an upper limit on how precise a legal document can be without compromising accuracy; and second, that the clarity of plain language is more reliable than legalese for accurately reflecting parties' actual intentions.

But I have not yet addressed the more difficult question of how legal drafters should confront the inherent imprecision of parties' subjective intentions. Contract law should enforce only obligations that parties have voluntarily taken on,[47] and yet if an unanticipated contingency arises, they will be bound by an imputed intention.[48] In the case of legislation, imprecision arguably requires the courts to perform a retrospective legislative function.[49] So the simple truth that legal documents often govern entirely uncontemplated contingencies shakes the philosophical foundations of both contract and statutory law. Whenever legal documents are applied to such uncontemplated contingencies, the outcomes necessarily turn on artificially imposed precision, whether conjured by the drafter or the judge.

Proponents of legalese may argue that drafters are better placed to conjure up this extra precision because precise drafting produces predictable, and therefore efficient, outcomes. Put another way, when unanticipated contingencies arise, a determinate (even if somewhat arbitrary) resolution is preferable to costly litigation. Indeed, this could be seen to conform to the parties' more diffuse intentions: the parties may not have formed a definite

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[47] *See* Martin A. Hogg, "Competing Theories of Contract," *in Commercial Contract Law: Transatlantic Perspectives* 14 (Cambridge University Press 2013).

[48] *See Gibbons Holdings Ltd. v. Wholesale Distributors Ltd.* [2008] 1 NZLR 277 at [96] per Thomas J.

[49] Antonin Scalia et al., *A Matter of Interpretation: Federal Courts and the Law* 3 (Princeton University Press 1997).

intention about what their obligations ought to be in a particular situation, but by entering into a written contract, they intend their agreement to be given "the force of law" in whatever situation arises.[50]

Nevertheless, I argue that parties' diffuse subjective intentions are best served by drafting in plain language, even when uncontemplated contingencies arise, for these reasons:

- clauses in precise legalese can conflict with the document's broader purpose and reduce predictability;
- plain-language documents can promote cooperative behavior and mutually beneficial outcomes, which avoids the need for strict legal predictability; and
- by leaving room for common-law principles to operate, imprecise plain language promotes principled outcomes having a sense of reasonableness.

Consequently, even in contingencies for which parties have no actual intention, plain language is better equipped than legalese to give effect to the parties' diffuse intentions for their documents. To the extent that accuracy is possible in uncontemplated contingencies, plain language is more accurate than legalese in these cases too.

Precise clauses that exceed parties' subjective intentions can conflict with the spirit of the parties' wider intention and reduce predictability.

By their very nature, *when read in isolation*, highly precise clauses have a definite application to most contingencies. But clauses in legal documents are not read in isolation. Rather, legal documents should be construed according to the meaning of the

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[50] Masood Ahmed, *The Interpretation of Commercial Contracts: Time for Reform*, 21 Nott. L.J. 26, 28 (2012).

text read as a whole.[51] Thus, a clause having definite application when read in isolation may produce unpredictability when read within the wider text. In general, this will occur whenever the clause's definite application in isolation conflicts with the purpose evidenced by the wider text. When drafters use legalese to manufacture precision beyond their instructors' intentions, they produce motley documents with often-unpredictable applications. For example, in *Bank of Credit and Commerce International SA v. Ali*, the House of Lords considered the application of a redundancy agreement with a limitation clause excluding "any claims . . . under statute, common law or in equity of whatsoever nature that exist or may exist."[52] One may confidently suppose that the parties contemplated excluding liability for claims that typically arise out of employment relationships, such as unpaid wages, workers' compensation, or workplace discrimination. The clause's terms are expressed broadly, however, presumably to circumvent crafty litigators' trying to recharacterize one of these claims under a novel legal or equitable doctrine. These broad terms have seemingly definite application because they refer to all claims indiscriminately. But such indiscriminateness will rarely reflect the purpose behind the clause. On signing, the redundant worker may have reasonably understood that the employer–employee relationship was severed, but the express terms go beyond that.

In *Ali*, the employer was later shown to have practiced such widespread fraud that the reputational damage and regulatory sanctions drove it into insolvency. The redundant workers who had agreed to the limitation clause were neither complicit in nor

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[51] Richard Calnan, *Principles of Contractual Interpretation* 29–40 (Oxford University Press 2013) (commenting on the contractual context); D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia* 146–49 (8th ed. 2014) (commenting on statutory interpretation).

[52] [2001] UKHL 8, [2002] 1 A.C. 251.

aware of this fraud. Yet they were left effectively unemployable by the stigma. In an earlier case arising from the Bank of Credit and Commerce International liquidation, the House of Lords found that the common law recognized liability for stigma damages in circumstances such as these.[53] But the liquidator in the later case argued that such damages were excluded by the limitation clause in the plaintiff's redundancy agreement.

Read in isolation, the phrase "any claims . . . under statute, common law or in equity of whatsoever nature" has definite application to stigma damages and so appeared to prevent the redundant worker from claiming those damages. Yet the parties had almost certainly not contemplated this type of claim. Indeed, stigma damages were not a recognized type of damages when the contract was executed. Even if they had been, the redundant workers would not have risked their future livelihood on the blind assumption that the bank was not committing fraud, and the bank could not credibly object to such a carve-out.[54] So although the clause had an apparently definite application to the circumstances, this application did not reflect the spirit of the parties' bargain.

Despite this apparently definite application, the majority in the House of Lords found that the limitation clause did *not* exclude liability for stigma damages. This conclusion was based on two considerations. First, a line of authority recognizes that "a court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have

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[53] *See Malik and Mahmud v. Bank of Credit & Commerce Int'l SA* [1997] UKHL 23.

[54] *See Bank of Credit and Commerce Int'l SA v. Ali* [2001] UKHL 8 at 19 (noting that it appears that those negotiating the redundancy agreement for BCCI had no knowledge of the fraud).

been aware."[55] Second, the contract read as a whole did not indicate an intention to exclude liability for stigma damages.[56]

At first instance, and in the intermediate Court of Appeal, the liquidator had successfully argued for the opposite conclusion — the definite words of the limitation clause prevent its being read down. That argument was also accepted by the dissenting Lord Hoffman[57] in the House of Lords and was described as "compelling" by Lord Bingham in the majority.[58] Thus, the precise words of the clause militated against the decision that was ultimately reached.

If the clause had been drafted with *less* precision and more sensitivity to the parties' purpose, the result ultimately reached in the House of Lords would probably have succeeded at first instance or not been litigated at all. The definite application of the clause's strict meaning, when read in isolation, muddied the waters of an otherwise straightforward case, and so diminished predictability.

Legalese can disguise imprecisions and encourage rent-seeking behavior, while plain language makes imprecisions transparent and promotes cooperative behavior.

In addition to generating unpredictability through motley documents, legalese often hides imprecision within its prolix. In particular, the long sentences and myriad qualifications that are typical of legalese frequently produce ambiguities.[59] When the subjects of legal documents are unhappy with the operation of those documents — and call on lawyers to assist — these

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55 *Id.* at 10, 30.

56 *Id.* at 28, 84–86.

57 *Id.* at 38.

58 *Id.* at 18.

59 *See* Peter Butt, *Modern Legal Drafting* 196–98 (3d ed., Cambridge University Press 2013).

ambiguities can give rise to disputes between drastically divergent interpretations.

For example, in *Robina Syndicate v. RPA Properties*,[60] a land vendor had represented that at settlement there would be no "unsatisfied judgment, order or writ of execution which affects the land."[61] On the contract date, the land had the benefit of an easement over a neighboring property. By the time of settlement, however, a court order for the partial extinguishment of this easement was registered on the title. The buyer purported to terminate the contract on the basis that the land was affected by an order, albeit one that had been satisfied by registration.

The dispute arose entirely from ambiguity in the vendor's representation. The vendor contended that the word *unsatisfied* qualified all the subsequent terms (*judgment*, *order*, and *writ of execution*), so a *satisfied* order affecting the land was no ground to terminate. The buyer argued the reverse — that the word *unsatisfied* qualified only the word *judgment*, such that any order or writ of execution whatsoever provided a basis to terminate. It was common ground that the easement was antiquated and gave no actual benefit to the land, and the buyer conceded that it would have no right to terminate if not for the representation.[62] Thus, the buyer was not claiming that the land was in any way inferior to that which it had agreed to purchase. Rather, one can infer, the buyer had simply changed its mind and sought to rely on the terms of the representation to escape the agreement.

Both the judge at first instance and the Queensland Court of Appeal found that the buyer's purported termination was invalid. In doing so, both courts also found no distinction between

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[60] [2011] QCA 151 (Austl.).

[61] *Id.* at 14.

[62] *Id.* at 13.

judgments and orders,[63] and so it would be nonsense for the term *unsatisfied* to qualify one but not the other.

The drafter of this unfortunate clause seems to have used the three expressions to ensure completeness, when just one would have achieved the same result.

In using three distinct terms, however, the drafter created ambiguity and opened the door to dispute.[64] When executing the contract, both parties may understandably have supposed the content of the vendor's representation to be beyond doubt. If it had been *clear that the clause was unclear*, perhaps a few minutes of precontractual clarification and negotiation would have saved litigation costs.

In contrast, imprecision in plain-language documents more often manifests in *vagueness* than in ambiguity. Perhaps the most beloved plain-language word among legal drafters is *reasonable* and its derivatives[65] — *reasonable efforts*, *as soon as reasonably possible*, and *acting reasonably in all the circumstances*. These are given a vague meaning by U.S. courts just as they are understood vaguely in ordinary usage.[66] This conscious, strategic imprecision allows legal drafters to accurately capture vagaries in their instructors' subjective intentions. Parties who agree to a clause requiring *reasonable efforts* broadly know what it requires but also understand that people will frequently disagree on the details.

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[63] *Id.* at 26.

[64] *Id.* at 24 (noting that a writ of execution is simply a type of order, according to JA Wilson, so this term also adds nothing).

[65] *See* Michael Hwang, *Plain English in Commercial Contracts*, 32 Malaya L. Rev. 296, 307 (1990).

[66] *See* Kenneth A. Adams, *Understanding "Best Efforts" and Its Variants (Including Drafting Recommendations)*, Prac. Law., Aug. 2004, at 11, *available at* https://www.adamsdrafting.com/downloads/Best-Efforts-Practical-Lawyer.pdf (noting Adams's survey of *reasonable efforts*, *reasonable best efforts*, and the like, in which he finds that technical distinctions intended by lawyers are not reflected in judicial interpretations).

While such vagaries prevent parties from knowing the exact bounds of their obligations, they give the obligor sufficient understanding to take a commercial approach. That is, the obligor can, in the interests of avoiding costly disputes, behave in a manner beyond reproach and so give a wide berth to its *reasonable efforts* obligations. Such behavior will be commercially prudent whenever simple steps are available to the obligor to prevent the counterparty from suffering a significant loss. This approach contrasts sharply with the approach engendered by ambiguous clauses — as seen in *Robina Syndicate* — by which parties can stand to make large gains by pushing the limits of interpretation.

When documents are drafted in plain language, parties are more aware of imprecisions and may choose to narrow those imprecisions by negotiation. Alternatively, people subject to such documents can know the broad contours of their obligations and make decisions accordingly. In this way, plain-language drafting allows more efficient negotiation of legal documents and promotes cooperative implementation, even if a court's interpretation would be unpredictable.[67]

Legalese distorts the operation of the common law and obstructs principled judicial decision-making.

We have seen in the previous two sections that plain-language drafting tends to produce more coherent documents and more cooperative implementation, thus diminishing some causes of litigation. But sometimes circumstances conspire to produce the perfect storm for dispute that no drafting technique can prevent. Legalese's proponents may claim that this scenario proves legalese's merit: that is, even if precise legalese can cause otherwise avoidable disputes at times, perhaps it is still more likely to

[67] *See* J.E. Adams, *Address to the Commerce and Industry Group of the Law Society of England and Wales*, 72 Law Soc'y Gazette, 1982, at 1582 (highlighting the distinction between "drafting for performance" and "drafting for risk").

produce simple, predictable resolutions when perfect storms for dispute cross the horizon.

The problem with this argument is that precise drafting is neither the only way nor the best way to promote predictability. When the words alone do not produce a determinate outcome, judges (and the lawyers who try to predict their decisions) rely on the common law. In unanticipated contingencies, courts can draw on vast swaths of previously decided cases that had similar facts.[68] Often a contingency that was not anticipated by the parties will have arisen before in similar circumstances, and its legally relevant features will already be authoritatively analyzed. Although the common law cannot produce a determinate outcome in every case, the relative predictability of this method underpins the stability of our legal system.[69] In contrast, to predict a judicial decision based on a legal document alone, one's available material is limited to the pages of that document and primarily to a sprinkling of words in a single clause or section. The drafting decisions behind these words are just as likely to undermine predictability, by providing a ground on which past authorities can be distinguished, as they are to promote it.

Furthermore, parties usually want more from their legal documents than bare predictability in unanticipated contingencies. By signing legal documents, parties indicate an intention that courts (or, when there is an arbitration clause, arbitrators) will resolve any dispute according to principles accepted by reasoning

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[68] *See generally* Gerald J. Postema, "Philosophy of the Common Law," *in The Oxford Handbook of Jurisprudence and Philosophy of Law* 590, 603–09 (Oxford University Press 2002).

[69] Hon. Michael McHugh, *The Judicial Method*, Address at the Australian Bar Association Conference (July 5, 1998) (transcript available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_london1.htm).

members of society.[70] When the words in the document are more precise than the parties' actual intentions, however, the parties expose themselves to fundamentally unprincipled resolutions, dictated by the unconsidered implications of words chosen for wholly different purposes. Drafting with precision beyond intentions is like shooting a gun in a dark room: one may hit a determinate target, but it could very well be the instructor's foot.

In contrast, the common law tends to produce outcomes having a sense of reasonableness. That's not to say that unsuccessful litigants ordinarily believe that they ought to have been unsuccessful. But when judges hand down decisions, they are obliged to justify those decisions by giving reasons that are understandable to the unsuccessful party.[71] Understandable reasons require that judicial decisions be based on "the common custom of the realm . . . binding in this kingdom by virtue of being received and approved here."[72] Expressed in modern terminology, the common law reflects "the fundamental legal commitments of the whole community as shaped by history and experience."[73]

While these sentiments may sound abstract and grandiose, they reflect two simple, practical realities: first, judges tend to modify the common law when it becomes "out of step with the view [that] society now takes";[74] second, our communal life takes place against the background of the established law, which shapes community expectations.[75] For example, one cannot do business

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[70] Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 Law & Contemp. Probs. 133, 148 (2012).

[71] *See Soulemezis v. Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279 (Austl.) (noting comments by JA McHugh).

[72] Postema, "Philosophy of the Common Law," *in The Oxford Handbook of Jurisprudence and Philosophy of Law* at 590–91 (quoting Matthew Hale).

[73] T.R.S. Allan, "Text, Context, and Constitution: The Common Law as Public Reason," *in Common Law Theory* 198 (Cambridge University Press 2007).

[74] *R v. L* (1991) 103 ALR 577 at 583.

[75] Postema, "Philosophy of the Common Law," *in The Oxford Handbook of Jurisprudence and Philosophy of Law* at 592 (Oxford University Press 2002).

in common-law countries without coming across elementary notions of company law, contract law, and trusts; and once one has come across these elementary notions, they shape the rules of the game by which one expects to be governed. Thus, contracting parties who have not contemplated contract-termination circumstances or default implications can brush over these issues entirely and rest content that they will be governed by the same broad principles that apply to most other commercial arrangements. Similarly, legislators who don't wish to disrupt the existing balance of rights between citizens and their government do not need a deep understanding of that balance of rights — instead, they can support bills expressed in broad terms and rely on the rebuttable presumption adopted by courts that legislation does not abrogate or alter the common law.[76]

Conclusion

The practice of law is unlike many other technical disciplines in an important respect: the frequent need to communicate with a lay audience. Professionals in the sciences, for example, spend most of their time communicating with colleagues and so can confidently speak in dense jargon without risking miscommunication. In contrast, the legal profession produces a wide array of writings directly affecting laypersons, whether statutes, wills,

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[76] *Fed. Comm'r of Taxation & Ors v. Citibank Ltd* (1989) 20 FCR 403, 433 (Austl.); *see also Roch v. Mollica*, 113 N.E.3d 820, 824–25 (Mass. 2019) (courts should not interpret a statute to change or repeal the common law without clear, explicit language to the contrary); *State v. Farnworth*, 430 P.3d 1127, 1130 (Wash. 2018) (courts "will not find [that] the legislature intended that the common law be changed unless such an intent 'appears with clarity'"); *Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 689 (Minn. 2018) (when interpreting a statute, courts presume that the legislature did not intend to repeal or modify the common law unless express language or a "necessary implication" dictates otherwise).

contracts, or hospital consent forms. Even sophisticated commercial readers are (unless formally schooled in the law) lay readers. They may be more comfortable with legal principles or jargon than consumers, but their knowledge isn't that of an attorney. Healthy legal systems must constantly be shaped by and justified to wider society, so it is essential that legal documents are clear to, and accurately reflect the intentions of, laypeople.

Plain-language drafting promotes this objective by allowing instructors to engage directly with a document to ensure that its meaning matches their intentions. Plain language also promotes transparency in negotiations and allows people who are later subject to the document to better understand the intentions behind it.

Of course, when a legal document reflects its parties' intentions with maximal accuracy, it will be imprecise to the extent that the parties' intentions were imprecise. Courts called on to interpret such documents in unanticipated contingencies must impose a balance of rights and obligations to which the parties did not consciously assent. This is undoubtedly problematic, but the problem is not the imprecision of the document. The problem is the imprecision of the parties' intentions. No drafting technique can overcome this problem, but plain-language drafting can mitigate its effects. That is, in the absence of any actual intention covering some contingency, plain language allows courts to produce a just outcome, consonant with the spirit of the parties' intention and informed by the common law. In contrast, opaque but precise legalese — too often recycled from previous forms without much thought — may produce arbitrary outcomes, set in stone by ill-considered prose.

George Orwell disparagingly described obscurantist political language in the following way:

> The inflated style itself is a kind of euphemism. A mass of Latin words falls upon the facts like soft snow, blurring the outline and covering up all the details.[77]

By changing the word *facts* to *intention*, this passage applies strikingly well to legalese. The density and impenetrability of a document drafted in legalese may comfort the parties that no crafty litigator could circumvent its provisions. But without a parallel assurance that those provisions accurately represent their intentions, that comfort is misplaced. If a dispute arises and the soft snow of verbiage is wiped away, one party may be confronted by a grotesque imitation of its intention and may wish that the document had sufficient imprecision to promote a more cooperative approach or a principled judicial determination.

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[77] George Orwell, *Politics and the English Language* (1946), http://www.resort.com/~prime8/Orwell/patee.html.