Why Prolixity Does Not Produce Clarity: Francis Lieber on Plain Language

Nelson P. Miller

Francis Lieber was a German who fought in the Napoleonic wars and the war of Greek liberation before coming to America in 1827, where he wrote the seminal American work on interpretation of legal texts.[1] He ended his career as a law professor at Columbia. American lawyers and the legal academy so thoroughly accepted Lieber's principles of interpretation that within a half century they hardly knew of Lieber anymore — hardly knew that their peculiarly American principles of interpreting legal texts had an author. Only Lieber's principles survived in the American legal lexicon.[2]

Here is what Lieber wrote, in essence, about plain language.

Lieber traced the prolixity in our legal texts — the tendency to multiply words in an effort to make the meaning clear — to the desire of the English to respect civil liberties.[3] No person, the English properly believed, should be governed by other than the written law. So English lawyers (including those in the British Parliament in particular) wrote and wrote, and spoke and spoke, with what seemed to some like endless circumlocution.

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[1] Francis Lieber, *Legal and Political Hermeneutics*, in *Classics in Legal History* (Roy M. Mersky & J. Myron Jacobstein eds., William S. Hein & Co. 1970).

[2] *See* Paul D. Carrington, *Stewards of Democracy: Law as a Public Profession* 71–72 (Westview Press 1999).

[3] Lieber, *supra* n. 1, at 30.

To substantiate this prolixity and the confusion it produced, Lieber quoted Sir Robert Peel's declaration in Parliament: "Not being myself a lawyer, and possessing, of course, no technical knowledge, I do confess, sir, that there is no task which I contemplate with so much distaste, as the reading through of an act of parliament."[4] Peel complained that "all these various repetitions, recapitulations, and references" in the law become "so tedious and so perplexing, that I, for one, almost invariably find myself completely puzzled before I get to the end of a single clause."[5] Lieber and Peel saw that "the attempt at being absolutely distinct leads to greater uncertainty instead of certainty . . . ."[6]

Prolixity does not produce clarity. An attempt at "perfect perspicuity" is in effect a "matter of impossibility."[7] Rather, it only produces confusion. In Lieber's words:

> Men have at length found out that little or nothing is gained by attempting to speak with absolute clearness, and endless specifications, but that human speech is the clearer the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words.[8]

For illustration, Lieber gave the example of a housekeeper handing some money to a domestic while saying to "fetch some soupmeat."[9] Common sense and good faith would require the domestic to accept several premises not explicitly stated within the instruction. These unstated limitations would include, at a

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[4] *Id.* at 31.

[5] *Id.*

[6] *Id.* at 32.

[7] *Id.*

[8] *Id.* at 30.

[9] *Id.* at 28.

minimum, that the domestic should go immediately — or at least as soon as finished with the task at hand — rather than at some distant time in the future; that the domestic should pay for the meat with the money given; that the domestic should buy the type of meat normally used in the kitchen to make soup and not any other urged by the seller; that the meat should be the best that can be obtained at a fair price; that the purchase should be from the usual butcher or shop; that the balance of the money should be returned rather than kept or given away; and that the meat should be returned to the kitchen for the family's consumption rather than consumed by the domestic.[10]

Now, the housekeeper could have stated all these subordinate specifications. But each specification would suggest other specifications, such as the extent to which negotiations should be conducted over the price, how the meat should be packaged, and how it should be transported home. "Where," asked Lieber, "would be the end?"[11] Indeed, the elaboration not only would have interfered with other household work but also would have probably suggested to the domestic some mischief still permitted by an incomplete specification within the elaborate instructions.

To further illustrate his point, Lieber reminded his readers of the many nursery tales in which the protagonist's pedantic anxiety to speak and to understand with absolute clarity led only to greater and greater misunderstanding and entanglement, until the protagonist died of hunger, unable to ask for food. These nursery tales challenged the premise that "explanation and specification, piled upon explanation, would produce greater and greater clearness" because "in fact they produced greater and greater obscurity."[12]

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[10] *Id.* at 29.

[11] *Id.* at 30.

[12] *Id.* at 28.

But why is this principle so? Why do more words not make for clearer understanding?

Lieber explained as follows. Because we have no direct communion of minds (no extrasensory perception, as it were), the very essence of human language is to convey meaning from one person to another by using intermediate symbols or signs.[13] And yet the events, actions, activities, or other phenomena that our language is meant to describe are not in themselves perfectly delimited or discrete. They instead carry a host of adjuncts, adhesions, and circumstances. The uncertain nature of things makes their description necessarily uncertain.[14] Efforts to reduce such natural uncertainties by prolix legal language are unwise because the uncertainties are inherent in what we try to communicate.

Lieber gave as an example two witnesses' seemingly inconsistent descriptions of a murder scene. One witness testified that there was a bench with blood on it. The other testified that there was no bench but only a table. Both witnesses were credible. In fact, there was an unusually tall and wide bench, or an unusually low and narrow table. As designed, the single object that both witnesses described was not clearly within either of the two categories for which commonly understood words were available.[15]

Other reasons why uncertainties must necessarily exist in our legal documents include that the words themselves (even if not the underlying things they are meant to describe) may carry more than a single meaning, at least when used in different contexts at different times by different writers having different knowledge, or when read by different readers. The meaning to be given a legal text can

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[13] *Id.* at 27.

[14] *Id.* at 26–27.

[15] *Id.* at 33.

depend as much on the knowledge, understanding, and intent of the writer as on the language chosen. The longer a text survives — such as a will, letter of intent, contract, or constitution — the more intervening events might render the text's meaning uncertain unless one considered who the writer was.

Again, Lieber gave an example. A man made a will bequeathing substantial property to a nephew bearing the same name. Unknown to the will's maker, the nephew predeceased him, so the property should have passed by the will's other provisions. But further unknown to the will's maker and before his death, another relative was born and given the nephew's very same name — a child who did survive the maker. In such a case, the maker's property would not have passed to the new relative by the same name unless that was in fact what the maker intended. In such unanticipated circumstances, the will would have had to be construed consistently with the maker's intention, even though its literal language would have clearly indicated (to one who did not know the circumstances) a different disposition.[16]

The lawyer drafting the will might possibly have added to the will a circumlocutory caution that by using proper names the maker intended to mean actual relatives who actually had those proper names. But see how that circumlocution would have created rather than avoided the problem? The unborn and therefore unknown child did in fact later become a relative with that same name. The circumlocution could easily have been misinterpreted to suggest that the maker had intended to create an incentive to have his name given to relatives yet to be born. Adding words and clauses in an attempt to clarify the obvious may instead create an inference that the drafter intended something extraordinary.

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[16] *Id.* at 62–63.

Of course, there are certain ambiguities that we should make reasonable efforts to reduce, though not by circumlocutions. As lawyers, we should know and use our language well — the proper grammar and punctuation to convey our clients' meanings and the proper choice of words to reflect their common meanings (what Lieber called their signification). As lawyers, we not only should be well trained in language but also should especially avoid careless usage in a moment of sloth, hurry, distraction, or disability.[17] Proper grammar and usage, though, do not require prolixity.

We should also know our clients' businesses so that we do not misuse their technical terms of art and thereby communicate unintended meanings.[18] Some writings (especially those relating to peculiar industries) necessarily use technical words or even common words that carry a technical meaning. The lawyer's solution in writing those legal instruments is not to become verbose. Rather, it is to properly use the technical terms, which would then be properly interpreted by their technical (rather than their common) meanings.

Consider this example. Near the end of his unparalleled law career and with his wife in ill health, Justice Thomas Cooley was appointed chairman of the nation's first important federal administrative agency, the Interstate Commerce Commission. His apolitical fairness, commitment to public service, and understanding of the proper use of law and legal language made him the perfect candidate. Congress had created the Commission to regulate the piratical railroads but had failed to give the Commission corresponding powers. And so Justice Cooley undertook to learn everything he could about the business of the railroads whose magnates his powerless Commission would have to convince. And he largely

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[17] *Id.* at 34–35.

[18] *Id.* at 35–36.

succeeded because of the accessibility, comprehensibility, and consistency of the (effectively advisory) regulations that his Commission adopted, together with the fairness of the new administrative procedures for putting them into place and a good bit of Justice Cooley's personal preaching to those railroad magnates.[19] Whereas prolix and abstruse regulations would have unquestionably failed — especially without the power to back them up — technically correct, straightforward, and practical regulations succeeded.

None of this argument is meant to suggest that sentences do not convey specific meaning or that loose or extravagant interpretation of vague documents should be the norm. One of Lieber's first principles was that a text has only a single true meaning.[20] But it's not by prolix description that single meanings are conveyed. For "interpretation of some sort or other is always requisite, whenever human language is used," because except in mathematics "no absolute language, by which is meant that mode of expression, which absolutely says all and every thing to be said, and absolutely excludes every thing else, is possible . . . ."[21]

The renowned University of Michigan law professor Yale Kamisar once vigorously admonished a law student in class for having relied for authority on the legal encyclopedia *Corpus Juris Secundum*. The humble practitioners who authored that treatise, Professor Kamisar suggested (if I recall the event correctly), are not great legal minds worthy of authority and respect.

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[19] *See* Carrington, *supra* n. 2, at 112–15 (summarizing Justice Cooley's career and service on the Interstate Commerce Commission).

[20] *See* Lieber, *supra* n. 1, at 25.

[21] *Id.* at 39.

Professor Kamisar's point is well taken: we ought not look to encyclopedias for profundity of learning. But in an equally or more important respect, a fair rejoinder might have been that such prosaic texts as a practitioner's law summary are precisely what we should look to for plain meaning. As Lieber suggests, it may well be that the meaning we intend to convey for our clients is most at risk just when our greatest minds — or (worse) those of us who would imitate them — start to chase down the ephemeral goal of perfect clarity.