What Plain English Really Is

Wayne Schiess

> The challenge to those who oppose modernizing legal drafting is then apparent: why should the law use the language of yesterday? Why should legal language be subject to special rules, locked in a unique linguistic code accessible only to those with the key?[1]

Introduction

This article responds to the article *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*,[2] by Professor David Crump of the University of Houston Law Center.

In this article, I first highlight some insights and suggestions that Professor Crump got right — things he wrote that I agree with. Next, I suggest several authors, articles, and books that Professor Crump should have dealt with, discussed, or at least cited in an article that criticizes plain English. Then I address six of Professor Crump's points that I disagree with. Finally, I try to give a fuller picture of plain English; I hope to correct some mistakes and debunk some myths.

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[1] PETER BUTT & RICHARD CASTLE, MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE 174 (2001).

[2] David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713 (2002).

What Professor Crump Got Right

Though I disagree with most of what Professor Crump wrote, I applaud some of his points.

1. The distinction between persuasive documents and preservation documents.

Professor Crump rightly distinguishes between persuasive documents and preservation documents.[3] I make that distinction in my teaching, though I use the terms "analytical documents" and "drafted documents." To me, memos, briefs, and letters are different from instruments, agreements, and legislation. I say that lawyers *write* memos, briefs, and letters and that they *draft* instruments, agreements, and legislation. That distinction is now embedded in law-school legal-writing programs.

Thus, we agree that writing legal documents and drafting legal documents are two different things. Writing and drafting serve different purposes and require different skills and techniques.

2. The suggestion to use plain English depending on the type of document.

Professor Crump asserts that lawyers should use plain English in some documents but not in others.[4] I endorse his general idea — that different documents, with their different audiences, require different writing approaches.[5]

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[3] *Id.* at 716–17.

[4] *Id.* at 718.

[5] WAYNE SCHIESS, WRITING FOR THE LEGAL AUDIENCE (2003).

But I would not draw so strong a distinction. I would not say that plain English is fine for some documents and not for others. Instead, I would say that how far writers take plain-English principles depends on the document and the audience. A website disclaimer intended for the public must be plainer than an internal legal memo written for a senior attorney. But you can still write the legal memo plainly.

3. The suggestion to create a separate document that explains the legal terms in plain English.

Though this idea is not Professor Crump's and he does credit it to someone else,[6] it's excellent. Plain-English advocates have already implemented it.

In her book, *Plain Language for Lawyers*, Michèle Asprey reports that in Australia, the Corporations Law Simplification Task Force created a separate "Small Business Guide" within the Australian Corporations Law.[7] The Guide, produced in 1995, is a plain-English version of the official law and has been well received by nonlawyers: "Small business people have told the Taskforce that reading the Guide has been the first time they have understood their obligations."[8]

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[6] Crump, *supra* note 2, at 720 n.38.

[7] MICHÈLE M. ASPREY, PLAIN LANGUAGE FOR LAWYERS 83 (3d ed. 2003).

[8] *Id.* at 84.

4. The commentary on using forms.

Professor Crump is right that lawyers must use forms.[9] Lawyers must take advantage of the experience embodied in forms because, as David Mellinkoff puts it, "No one who makes frequent use of the law will ever live long enough to live without forms."[10]

Professor Crump is also right that we lawyers should not use forms blindly.[11] We should not accept form language unquestioningly. If a form has proved itself valuable and reliable, use it. Yet much form language is just so much garbage, and the drafter ought to throw it out or at least clean it up. Mellinkoff says that some forms "merit retirement or decent burial."[12]

5. The suggestion to give students a form document and require them to revise it.

Professor Crump has a good idea here,[13] one that I have been using in my drafting courses for six years. In fact, most drafting teachers use form documents, along with actual statutes and rules, for drafting exercises. How could it be otherwise?

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[9] Crump, *supra* note 2, at 725.

[10] DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 102 (1982).

[11] *See* Crump, *supra* note 2, at 726.

[12] DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 279 (1963).

[13] Crump, *supra* note 2, at 727 & n.72.

6. The point that lawyers must consider the cost of lengthy and time-consuming plain-English revisions.

Plain-English advocates like Michèle Asprey affirm Professor Crump's point that lawyers should not try to completely rewrite all their forms: "No one is suggesting that we must start by rewriting all our precedents . . . ."[14] It's too expensive and risky. Instead, as Mellinkoff suggests, make small changes, gradually.[15] And make only informed changes, supported by research.

A Threshold Concern Before Critiquing Crump's Points

Before addressing Professor Crump's specific comments, I must say that I was disappointed that he cited only one legal-writing book in his entire piece: Bryan Garner's *The Winning Brief.*

It is difficult for me to take Professor Crump's article seriously when he does not cite the literature in the field. Although I recognize that he is an established scholar — of constitutional law and criminal law[16] — I suggest that he is not an expert on legal writing, legal drafting, or plain English.

Yet he obviously felt comfortable writing on those subjects, and it's worth asking why. For example, I have never written an article on criminal law, and I would not feel competent to publish a law-

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[14] ASPREY, *supra* note 7, at 308.

[15] *See* MELLINKOFF, *supra* note 10, at 102; *see also* Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 THOMAS M. COOLEY L. REV. 1, 26–27 (1992) ("Forms and statutes can be rewritten into plain English gradually, one at a time, project by project. The important thing is to get started.").

[16] University of Houston Law Center, *Law Center Faculty*, at http://www.law.uh.edu/faculty/ (last visited Jan. 29, 2004).

review piece critical of self-defense in murder cases, especially because I do not know the leading sources on that topic. So I might legitimately ask why Professor Crump felt competent to write about legal writing, legal drafting, and plain English. He has never done so before, he does not (to my knowledge) teach courses in those subjects, and he did not cite any of the important sources in those fields.

The main reason he felt competent probably has little to do with Professor Crump and more to do with how legal academia treats legal writing. Most law-school faculties do not consider legal writing and legal drafting independent "fields." Legal-writing and legal-drafting teachers often do not receive support for scholarly production. Legal writing and legal drafting are considered merely "skills." So if you're an experienced lawyer, as Professor Crump is, and if you're an established legal scholar, as Professor Crump is, then you are assumed to be qualified to expound on legal writing, legal drafting, and plain English.

I strongly disagree. It's a myth that expertise in law qualifies you as a legal drafter. If that were true, the UCC, the Federal Rules of Civil Procedure, and the Internal Revenue Code would be well drafted.

More specifically here, the myth implies that expertise in law qualifies you to comment on legal writing. In reality, legal writing, legal drafting, and plain English are independent areas of expertise, in which one succeeds not only through practice, but after study and research. What's more, these three are legitimate fields, worthy of independent study and instruction — as this piece will show. They contain a growing body of scholarship, and they are vital to the practice of law. Their recognition as worthwhile, scholarly, and independent subjects is still being realized.

But even more to the point of this article, one who writes about plain English should consider the recognized literature in that field. For example, here are four of the most widely known plain-English sources for lawyers. Three of the most important experts wrote these books, and anyone well versed in plain English would be familiar with them:

- DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963).
- RUDOLF FLESCH, HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS (1979).
- DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE (1982).
- RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (4th ed. 1998).

Professor Crump cited none of these.

And one who criticizes plain English should also address Professor Joseph Kimble's work. It explains, in concrete terms, the benefits of plain-English writing, and Professor Kimble has written many articles debunking the myths about plain English:

- *Strike Three for Legalese*[17]
- *Plain English: A Charter for Clear Writing*[18]

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[17] 69 MICH. B.J. 418 (1990).

[18] 9 THOMAS M. COOLEY L. REV. 1 (1992).

- *Answering the Critics of Plain Language*[19]
- *Writing for Dollars, Writing to Please*[20]
- *The Great Myth That Plain Language Is Not Precise*[21]
- *How to Mangle Court Rules and Jury Instructions*[22]

Finally, anyone who plans to characterize plain English and its advocates, especially in negative terms, should at least skim the following books:

- IRWIN ALTERMAN, PLAIN AND ACCURATE STYLE IN COURT PAPERS (1987).
- ROBERT J. MARTINEAU, DRAFTING LEGISLATION AND RULES IN PLAIN ENGLISH (1991).
- THOMAS R. HAGGARD, THE LAWYER'S BOOK OF RULES FOR EFFECTIVE LEGAL WRITING (1997).
- BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES (2001).
- PETER BUTT & RICHARD CASTLE, MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE (2001).

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[19] 5 SCRIBES J. LEGAL WRITING 51 (1994–1995).

[20] 6 SCRIBES J. LEGAL WRITING 1 (1996–1997).

[21] 7 SCRIBES J. LEGAL WRITING 109 (1998–2000).

[22] 8 SCRIBES J. LEGAL WRITING 39 (2001–2002).

- HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING (2002).

- MICHÈLE ASPREY, PLAIN LANGUAGE FOR LAWYERS (3d ed. 2003).

Professor Crump cited none of these, either. As a result, he got many things wrong.

What Professor Crump Got Wrong

1. *The assertion that a preservation document is "filed away until it is needed. It will not be routinely read by someone who needs to understand it . . . ."*[23]

Perhaps the reason some documents are filed away and not read is that the users have given up on them. Many preservation documents are so dense, so archaically drafted, and so full of needless legalisms that users have given up trying to understand them. Just because many legal documents are hard to understand is not proof that they *must* be written that way — only that they are.

In reality, nonlawyers need to understand many legal documents: legislation, divorce decrees, contracts, consumer documents. Perhaps if lawyers wrote so that users could understand, the documents would be read and used more often. But as Professor Kimble suggests, readers don't even try to understand most legal documents "because they can tell in one look that they don't stand a chance."[24]

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[23] Crump, *supra* note 2, at 716.

[24] Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 65 (1994–1995).

In asserting that many legal documents need not be understandable to nonlawyers, Professor Crump is operating on an old model: the businesspeople do the deal; the lawyers paper the deal; and the two versions of the deal bear little resemblance to each other. That model is changing.

Plain-English advocates and drafting experts today remind lawyers again and again that we must try to draft documents — as much as possible — so that nonlawyer clients can understand them. As legal-writing expert Michèle Asprey has written, "We cannot continue to pretend that legal writing is meant to be read and used only by lawyers."[25]

And drafting expert Howard Darmstadter, an experienced attorney and author of *Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting*, has presented a new model for preparing legal documents: "A legal document should teach a reader how a transaction works."[26]

Imagine that: a legal document that can be understood by the people it affects. That is the kind of legal document that Professor Stanley Johanson of Texas suggested in his teaching materials on wills and estates, which Professor Crump criticized (albeit mildly).[27] Johanson and a growing number of legal-drafting experts believe that clients ought to be able to understand the words that give away all their property.

And a businessperson ought to be able to understand — for the most part — the written document that obligates the company to lend $5 million. The buyer for a manufacturer ought to be able to

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[25] ASPREY, *supra* note 7, at 8.

[26] HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING 25 (2002).

[27] Crump, *supra* note 2, at 718 n.26.

understand the sales contract she signed. A sales rep ought to be able to understand the language in the software license he just negotiated.

This goal — that the people affected by legal documents actually be able to comprehend them — is at the heart of the plain-English movement. But Professor Crump's "preservation documents" are not intended to be used and understood by the people they affect, only by lawyers.

I believe that the era when clients will accept and pay for legal documents that they cannot understand — and are not expected to understand — is fading away. And I offer a brief aside to those who may still believe that writing dense legal jargon is the way to keep clients coming back so you can explain what you've written: you're living in the past.

Today, more and more clients insist on knowing what you're doing on their behalf, and they are willing to find a lawyer who can explain things clearly. More and more clients have gotten the notion that if you're a professional, you should be able to explain complex matters in plain terms. As Bryan Garner points out in *Securities Disclosure in Plain English*:

> Clients — especially sophisticated clients — are demanding more from their lawyers. They know now that they ought to be able to read and understand their wills, their leases, and their other contracts. And corporate clients believe, quite rightly, that they ought to be able to understand their prospectuses, their proxy statements, and the like.[28]

Finally, more and more lawyers are realizing that traditional, convoluted legal drafting does not retain clients; it pushes them away. According to Peter Butt and Richard Castle, authors of

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[28] BRYAN A. GARNER, SECURITIES DISCLOSURE IN PLAIN ENGLISH 4 (1999).

Modern Legal Drafting: "'Few things have done more to drive people from our doors than our inability both in documents and in letters and speech to express ourselves in clear simple English.'"[29]

Preservation documents, as Professor Crump defines them, are decreasing. Instead, we should think of them as "user documents," and we should draft them so that they can be used.

2. *The assertion that breaking one sentence into two contributes to ambiguity.*

Professor Crump quotes this sentence:

> If my husband does not survive me by thirty (30) days, I give, devise and bequeath unto such of my children as survive me all of my interest in household furniture, furnishings and fixtures, automobiles, club memberships and all other articles of household or personal use or adornment which I may own at the time of my death; provided, however, that my executor in its sole and absolute discretion may divide, partition, and distribute such property among my children or may sell any such articles and include the proceeds in the residue of my estate or include such articles directly in such residue.[30]

He then asserts that breaking this 104-word sentence into two sentences could create ambiguity. He goes on to say:

> So long as the "provided, however," clause is included in the same sentence as the basic distribution, it is hard to argue that the "prop-

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[29] BUTT & CASTLE, *supra* note 1, at 91 (quoting Arthur Hoole, 81 *Law Soc'y's Gazette* 2817 (1984)).

[30] Crump, *supra* note 2, at 719.

> erty" referred to is any other than the personalty referred to, but if the clause were a separate sentence, this clarity might vanish.[31]

But would it, really? How, exactly, would the clarity vanish? Crump does not explain. He does not elaborate. He does not cite any authority.

So let's try it. If we replace the semicolon with a period and convert the second half of the original sentence into a separate, grammatical sentence, here is what we get (with no other changes):

> If my husband does not survive me by thirty (30) days, I give, devise and bequeath unto such of my children as survive me all of my interest in household furniture, furnishings and fixtures, automobiles, club memberships and all other articles of household or personal use or adornment which I may own at the time of my death. However, my executor in its sole and absolute discretion may divide, partition, and distribute such property among my children or may sell any such articles and include the proceeds in the residue of my estate or include such articles directly in such residue.

Have I created ambiguity? No. The two sentences are as clear as the original, except that now we have a 58-word sentence and a 43-word sentence. Those are still too long (and wordy), but they are much better than the original and easier to understand.

That's because our minds can process only so much information at once — as we must to remember what we're reading — and the longer it is, the harder it is to read and remember.[32] So we get lost. That's why breaking long sentences into shorter ones can be an effective way of improving understanding.

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[31] *Id.*

[32] *See* RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 37 (4th ed. 1998).

For example, securities-disclosure documents ought to have an average sentence length of somewhere between 20 and 30 words, with variety: some longer sentences and some shorter.[33] And legal-writing expert Steven Stark, in *Writing to Win*, says that legal complexity and sentence length ought to be inversely related: "The more complicated your information is, the shorter your sentences should be."[34]

If the revision into two sentences contains ambiguity on the subject of what property the testator is referring to, that ambiguity arises not because of two sentences, but because of the phrase *such property*. *Such* is a vague and sloppy word, and plain-English advocates have spoken out against it.[35] It should not be used — as it is in the original — as a demonstrative adjective to refer to a specific list already created (household furniture, furnishings and fixtures, automobiles, club memberships, and all other articles of household or personal use or adornment). Instead, it should be used only to refer to a category of items, to show that the current reference is to an item of the same kind.[36] (To improve the original, use "that property," name the property again, or define the property and use the defined term.)

Still on the subject of ambiguity, Professor Crump suggests that ambiguity may be necessary to embody a compromise,[37] though he

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[33] GARNER, *supra* note 28, at 50.

[34] STEVEN D. STARK, WRITING TO WIN 33 (1999).

[35] BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 35 (2001).

[36] BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 849 (2d ed. 1995).

[37] Crump, *supra* note 2, at 735–37.

probably means *vagueness*, not *ambiguity*.[38] In reality, plain-English advocates acknowledge this point. Mellinkoff, for example, suggested that "calculated ambiguity" has a place in professional drafting.[39] But lawyers overrate its value and exaggerate how often it is needed.

Professor Crump also asserts that a long sentence containing a proviso is often necessary or preferable to shorter sentences.[40] This idea seems related to the ancient myth that any legal idea and all its qualifications must be in the same sentence. That's not true, as legal-drafting expert Howard Darmstadter explains:

> When a general statement is subject to an exception or two, why do drafters feel that the exceptions must be packed into the same sentence as the general statement?
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> For many drafters, the unit of truth is the sentence. . . . On this line of reasoning, each sentence must be true taken by itself — that is, its truth or falsity cannot be allowed to depend on some other sentence or sentences. . . .
>
> Such a position is, of course, ridiculous.[41]

Besides, provisos — like *provided that*; *provided, however, that*; and *provided further that* — are soundly and rightly criticized in nearly every book on legal drafting:

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[38] *See* Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEGAL WRITING 54–57 (2001–2002).

[39] MELLINKOFF, *supra* note 10, at 117–18.

[40] *See* Crump, *supra* note 2, at 736.

[41] DARMSTADTER, *supra* note 26, at 41.

- Michèle Asprey in *Plain Language for Lawyers*:

  "Most lawyers know that they shouldn't use provisos."[42]

- Bryan Garner in *A Dictionary of Modern Legal Usage*:

  "[T]he words *provided that* are a reliable signal that the draft is not going well."[43]

- Thomas Haggard in *Legal Drafting in a Nutshell*:

  "Apart from being a grammatical abomination, *Provided that* is ambiguous . . . ."[44]

So if provisos are an abomination, if not all qualifications need to be in the same sentence, and if two sentences are no more ambiguous than one, why should clients put up with a "104-word monstrosity," as Professor Johanson called it? They shouldn't, and neither should we.

3. The idea that precision is one benefit of traditional language.[45]

This myth has been around for a very long time. It probably arose from the need of lawyers to justify the archaic and dense language that set them apart from nonlawyers. They began telling

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[42] ASPREY, *supra* note 7, at 132.

[43] GARNER, *supra* note 36, at 710.

[44] THOMAS R. HAGGARD, LEGAL DRAFTING IN A NUTSHELL 279 (2d ed. 2003).

[45] Crump, *supra* note 2, at 732–33.

nonlawyers that legalese is necessary because it is more precise, because it is unambiguous, and because its meaning is clear — to lawyers.

Baloney. Legal words are no more clear and precise than plain-English words. At least that's what experts Peter Butt and Richard Castle think:

> Modern, plain English is as capable of precision as traditional legal English. It can cope with all the concepts and complexities of the law and legal processes. The few technical terms that the lawyer might feel compelled to retain for convenience or necessity can be incorporated without destroying the document's integrity.[46]

Professor Kimble agrees that traditional legal language has nothing over plain English: "The choice is not between precision and plain language. Plain language can be at least as precise — or as appropriately vague — as traditional legal writing."[47]

Plus, traditional, non-plain English often requires more words. And using more words often makes things more ambiguous:

> Elaboration in drafting does not result in reduced ambiguity. Each elaboration introduced to meet one problem of interpretation imports with it new problems of interpretation.[48]

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[46] BUTT & CASTLE, *supra* note 1, at 95.

[47] Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109, 116 (1998–2000).

[48] Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9, 11 (1982).

4. The assertion that "not unreasonably withheld" is clearer or more precise than "proper" or "reasonable."

Professor Crump makes three assertions in this part of his article.

First, he says that a plain-English advocate might insert the word "proper" into a commercial lease in the following provision: "[T]he tenant may assign this lease only in *proper* circumstances."[49] He discusses the word *proper* and points out several problems with it.[50] I agree that *proper* is a poor word to use here. But I have never seen a plain-English book or article recommending that drafters use *proper* in this way. In fact, Professor Crump introduces this suggestion with the phrase "let us say,"[51] presumably because he can't cite a plain-English source that recommends *proper*. In other words, Professor Crump would have a point if plain-English advocates recommended *proper* in a commercial lease. But they don't. To hold up this usage as representative of plain English is uninformed.

Second, he says that *reasonable* would be better than *proper*. It is more accurate, though he isn't satisfied with it because it lacks precision: "Circumstances reasonable to one adjudicator may not be to the next . . . ."[52] This makes sense. *Reasonable* is highly vague. But that is precisely why it is often used in law, as Professor Crump surely knows. It lets us get on with things instead of trying to define every possible circumstance. In commenting on it, Mellinkoff said,

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[49] Crump, *supra* note 2, at 732.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 733.

"[T]here is general agreement that it cannot be hog-tied and branded."[53] So to call *reasonable* more accurate than *proper* is to make the finest of distinctions between two highly vague words.

Third, Professor Crump asserts that the traditional phrase in commercial leases is better than either *proper* or *reasonable*. That phrase conditions assignment "upon the consent of the lessor, which shall *not be unreasonably withheld*."[54] This is a better wording, he says, because "[a] vast array of judicial decisions construes the meaning of this phraseology."[55] He does not cite a vast array; he cites one case.[56]

Besides not citing an array of judicial decisions construing *not reasonably withheld*, Crump apparently did not research judicial construction of one of the alternatives he rejected: *reasonable*. In the current edition of *Words and Phrases*, *reasonable* gets 28 pages of case squibs,[57] compared to 1 page of case squibs for *unreasonably withheld*.[58] By weight of judicial construction, which is what Professor Crump seems to rely on, *reasonable* has a "vaster array" behind it. That's hardly strong proof, but it is better than relying on a "vast array" of decisions and citing just one.

I conclude that *not be reasonably withheld* is hardly more precise than *be granted in reasonable circumstances*. I also conclude that Professor Crump's position gives too much credence to a

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[53] MELLINKOFF, *supra* note 12, at 302.

[54] Crump, *supra* note 2, at 733 (emphasis added).

[55] *Id.*

[56] *Id.* at 733 n.101.

[57] 36 WORDS AND PHRASES 269–97 (2002).

[58] 43A WORDS AND PHRASES 130 (Supp. 2003) (*unreasonably withheld* does not appear in the main volume).

venerated but questionable proposition: once drafted language has been construed by a court, it ought to be set in stone.

Isn't it likely that the next judge, confronted with the same vague language in a different factual context, will hold that it means something else? It's not too hard to figure out. Look through *Words and Phrases.* A few minutes in there should dispel the myth that judges are consistent in assigning meaning to legal language. Howard Darmstadter has cynically said this:

> Lawyers may insist that a provision has "stood the test of time." This only means, however, that the provision has been around so long that no one in the room is old enough to know how it got there originally.[59]

Language that causes litigation ought to be questioned, if not purged. Mellinkoff agrees in his book *The Language of the Law*, in which he convincingly debunks the idea that litigation-tested language makes good formbook material.[60] Once a term or phrase has been the cause of a court case, should we really keep using it again and again? A vast array of judicial decisions does not mean that the word or phrase is precise; it more likely means that the word or phrase is so vague that it gets litigated a lot.

5. The assertion of the models of plain English.

Professor Crump sets up three models of plain English in the following terms:

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[59] DARMSTADTER, *supra* note 26, at 108.

[60] MELLINKOFF, *supra* note 12, at 279–82.

- Plain English refers to brevity of expression.[61]

- Plain English means that the expression should be as intelligible to an untutored but intelligent layperson as it is to a technician.[62]

- Plain English means that legal writing should be interesting, dramatic, or even fun to read.[63]

Who said these things about plain English, and where did they say them? Professor Crump cites no legal-writing authority, no legal-drafting book, and no plain-English expert. I address these "models" here.

a. Plain English refers to brevity of expression.

No model of plain English seeks brevity alone: Michèle Asprey says that "[b]revity is *one* of the aims of plain language, but not the only one."[64] No plain-English advocate has ever asserted that brevity is important enough to override substance, accuracy, or clarity. Indeed, Butt and Castle explain that the opposite is true:

> While it shuns the antiquated and inflated word and phrase, which can readily be either omitted altogether or replaced with a more useful substitute, it does not seek to rid documents of terms which express important distinctions. Nonetheless, plain language documents offer

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[61] Crump, *supra* note 2, at 728.

[62] *Id.* at 730.

[63] *See id.* at 728.

[64] ASPREY, *supra* note 7, at 306.

> non-expert readers some assistance in coping with these technical terms.[65]

In suggesting that plain English is only about brevity — short words and short sentences — Professor Crump has raised a common critique of the plain-English movement. Professor James Boyd White likewise oversimplified the plain-English movement in his 1985 book *Heracles' Bow*, and he unintentionally revealed that he was uninformed on the subject when he said that the plain-English movement would never go far:

> [The] characteristics of legal discourse mean that the success of any movement to translate legal speech into Plain English will be severely limited. For if one replaces a Legal Word with an Ordinary English Word, the sense of increased normalcy will be momentary at best: the legal culture will go immediately to work, and the Ordinary Word will begin to lose its shape, its resiliency, and its familiarity, and become, despite all the efforts of the writer, a Legal Word after all.[66]

What Professors Crump in 2002 and White in 1985 both failed to understand is that the plain-English movement is about a lot more than words and the length of words; it is about a lot more than sentences and the length of sentences; it is about a lot more than brevity. In reality, plain-English advocates are cautiously willing to create longer documents if it means that the documents will be clearer, more accurate, and easier to understand. Professor Johanson

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[65] BUTT & CASTLE, *supra* note 1, at 85–86 (quoting LAW REFORM COMM'N OF VICTORIA, LEGISLATION, LEGAL RIGHTS AND PLAIN ENGLISH 3 (1986)).

[66] JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 72 (1985).

has said that using more words sometimes makes the draft clearer to the client — by reducing ambiguity.[67]

What's more, plain-English advocates are so universally acquainted with this uninformed criticism that many of them try to preempt it by addressing it in their writing. Plain-English advocates constantly explain that plain English is not just about shorter words, as Butt and Castle did in *Modern Legal Drafting*:

> Plain English is language that is not artificially complicated, but is clear and effective for its intended audience. . . . [P]lain language is concerned with matters of sentence and paragraph structure, with organization and design, where so many of the hindrances to clear expression originate.[68]

Professor Kimble has offered similar explanations in his writing. For example, in *Writing for Dollars, Writing to Please*, he said: "[P]lain language is not just about vocabulary. It involves all the techniques for clear communication — planning the document, designing it, organizing it, writing clear sentences, using plain words, and testing the document whenever possible on typical readers."[69]

Thus, anyone who takes the time to read the writing of plain-English advocates learns that plain English is about more than brevity, more than short words.

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[67] Stanley M. Johanson, *Counterpoint: In Defense of Plain Language*, 3 SCRIBES J. LEGAL WRITING 37, 38 (1992).

[68] BUTT & CASTLE, *supra* note 1, at 85–86 (quoting LAW REFORM COMM'N OF VICTORIA, LEGISLATION, LEGAL RIGHTS AND PLAIN ENGLISH 3 (1986)).

[69] Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 2 (1996–1997); *see also* Kimble, *supra* note 24, at 66–67.

b. *Plain English means that legal documents should be just as intelligible to an untutored but intelligent layperson as they are to a technician.*

That's about right. Plain English does mean that legal documents should be intelligible to nonlawyers, with exceptions for legitimate terms of art and justifiable technical terms, as Professor Kimble has written in *Writing for Dollars, Writing to Please*:

> [P]lain language is not subverted by the need to use technical terms or terms of art. Real terms of art are a tiny part of any legal document. What's more, lawyers have an exaggerated notion of the extent to which legal terms are precise or are settled and unchangeable. I invite anyone to find a case saying that *give* won't do in a will — that it has to be *give, devise, and bequeath*.[70]

Kimble's article is full of real-world examples of how legal documents have been translated into plain English and how those documents have greatly improved understanding for businesspeople, clients, and others who must deal with the law. The article is the proof that ought to silence all the naysayers who still insist — more than five years after it was written — that you can't put complicated legal ideas into plain English. You can. Plain-English experts do it all the time.

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[70] Kimble, *Writing for Dollars*, *supra* note 69, at 2.

c. Plain English should be interesting, dramatic, or even fun to read.

I've never seen this point in a book or article on plain English. Only the critics of plain English suggest it as a model for writing, and then only as a straw figure to knock down.[71]

Yes, plain English can be enjoyable to read. But no legal-writing expert says that a loan agreement should be written like a Hemingway novel. Plain-English advocates temper the aspiration to write plainly with the realities of legal complexity. For example, experts Ronald Goldfarb and James Raymond say in their book, *Clear Understandings*, that lawyers should try to write clearly and plainly, but:

> We are not so naive as to suppose that lawyers should write like journalists or novelists, or that their prose should always be entertaining as well as instructive. On the other hand, we are persuaded that lawyers who have distinguished themselves as great writers have in common with other good writers certain techniques, certain resources, certain sensibilities to the nuances of language that enrich the law, not encumber it, making its expression both pleasurable and precise.[72]

To say that plain-English advocates insist that legal writing be entertaining or fun is to misunderstand the aims of the plain-English movement. Again, this misplaced criticism is common enough that legal-writing experts have commented on it. Butt and Castle say that "[t]he modern English of a legal document will never read like a

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[71] *See, e.g.*, Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 599 (1986).

[72] RONALD L. GOLDFARB & JAMES C. RAYMOND, CLEAR UNDERSTANDINGS: A GUIDE TO LEGAL WRITING xv (1982).

good novel, but it can be attractive and effective in a clean, clear, functional style."[73] And Mark Mathewson said, responding to one of the critics: "Lawyers should write like novelists? If that were truly what plain-language advocates thought, [we] could rightly dismiss them, but that's not what they think, at least none that I've read."[74]

6. *The assertions about "tripartite expressions" and about solemnizing.*

a. *Tripartite expressions.*

Despite what Professor Crump suggests,[75] plain-English advocates do not blindly denounce "tripartite expressions," which we call "triplets."[76] Rather, we advise lawyers to question them, look them up, and decide whether they are necessary. Richard Wydick's advice is typical:

> When one [a doublet, triplet, or synonym string] looms up on your page, stop to see if one of the several words, or perhaps a fresh word, will carry your intended meaning. . . . This is not as simple as it sounds. . . . To check it in the law library will take time, and time is the lawyer's most precious commodity. But remember — once you slay one of these old monsters, it will stay dead for the rest of your legal career.[77]

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[73] BUTT & CASTLE, *supra* note 1, at 95.

[74] Mark Mathewson, *A Critic of Plain English Misses the Mark*, 8 SCRIBES J. LEGAL WRITING 147, 148 (2001–2002).

[75] Crump, *supra* note 2, at 739.

[76] KENNETH A. ADAMS, LEGAL USAGE IN DRAFTING CORPORATE AGREEMENTS 100 (2001); BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 195 (2d ed. 2002).

[77] WYDICK, *supra* note 32, at 21.

In reality, the advice from legal-drafting and plain-English experts is to avoid *redundant* triplets.[78]

The example from the Sherman Act that Crump cites[79] — "contract, combination . . . , or conspiracy" in restraint of trade — is a legitimate use of a triplet because the statute uses three different terms to express three different ideas. So it's a poor example for Crump to use because plain-English advocates suggest eliminating only redundant triplets.

Still, most doublets, triplets, and synonym strings do not express different ideas. They are redundant and ought to be shortened. "Rest, residue, and remainder" is an example[80] — one among many.

b. The solemnizing function of legal language.

The solemnizing function of legal words is overrated. In his book *Legal Language*, Peter Tiersma spoke of solemnizing, which he called legal language's "ritual function."[81] He said of the ritual function that "[e]ven though formal legal language may serve some purpose, we should ponder whether that goal might not be carried out just as well by some other means, one that does less injury to the goal of clear communication."[82]

Another writer responded to a suggestion that the "ritualistic solemnity" of formal legal language is not such a bad idea. He said that "[i]f the best we can say about a legalistic form is that it's 'not

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[78] HAGGARD, *supra* note 44, at 318; ADAMS, *supra* note 76, at 101.

[79] Crump, *supra* note 2, at 739.

[80] HAGGARD, *supra* note 44, at 323.

[81] PETER M. TIERSMA, LEGAL LANGUAGE 102 (1999).

[82] *Id.* at 102–03.

such a bad idea,' perhaps we should revisit the need for obsolete formalisms."[83]

Indeed, Professor Crump is a "throwback," as he refers to himself, if he believes that a phrase like this is solemn: "[D]o present that, on or about the date in question, the defendant did then and there unlawfully commit the crime."[84] Such phrases do not engender solemnity; they prompt confusion, laughter, or — worse — derision.

After all, it is the legal effect of words, not their emotional impact, that is important in drafting. Jury arguments and persuasive briefs are, of course, a different matter. But if a drafted document says what it legally needs to say, even in simple terms, I cannot imagine a court's refusing to enforce it and telling the drafter something like this:

> I recognize, counselor, that the document the opposing party signed was clearly and unambiguously drafted. In fact, I acknowledge that it was so clear an eighth-grader could understand it. Unfortunately, it does not sound "legal." If it does not sound "legal," that is, if it does not contain a liberal sprinkling of jargon, legalisms, and archaic vocabulary, we cannot expect a nonlawyer to take it seriously. I am therefore forced to hold that the opposing party is not bound by the terms of the document.

Too many lawyers are still willing to believe the myth that something must sound legal to be legal. Hardly a year goes by that a student in my Basic Drafting class doesn't say something like this: "But Mr. Schiess, it's so simple. It doesn't sound legal."

Sadly, this is the writing heritage of legal education and law practice, in which usage of Elizabethan times (that's the 1500s) can

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[83] John F. Rohe, *Conservation Easements and Plain English*, 74 MICH. B.J. 402, 403 (May1995).

[84] Crump, *supra* note 2, at 734.

still be found and is often still used without question. This is the profession whose writing style is so resistant to change that lawyers continue to use the word "shall" in a variety of inappropriate ways although few, if any, have ever bothered to research it.[85] This is the profession in which no lawyer would speak to a jury in complex and jargon-filled legalese, but if asked to write an affidavit for someone on that jury, the same lawyer wouldn't hesitate to use the phrase "Further affiant sayeth naught."

Part of the problem is that lawyers are woefully uninformed about what good legal writing and good legal drafting really are or ought to be. Far too many lawyers are ignorant of what plain English is all about.

What Plain English Really Is

Here are some lists of plain-English principles from the advocates. Notice that word length and sentence length are important, but that they are not the only things mentioned.

First, here are ten plain-English principles that I teach my students:

1. Use easily readable typefaces and type sizes.

2. Keep sentences and paragraphs short.

3. Use headings to create obvious, large-scale organization.

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[85] *See, e.g.*, Joseph Kimble, *The Many Misuses of* Shall, 3 SCRIBES J. LEGAL WRITING 61 (1992); Michèle M. Asprey, Shall *Must Go*, 3 SCRIBES J. LEGAL WRITING 79 (1992).

4. Use moderate enumeration and tabulation for small-scale organization.

5. Use concrete nouns as subjects; use concrete verbs.

6. Prefer active voice to passive.

7. Avoid unnecessary Latin, formal words, and jargon.

8. Cut unnecessary words.

9. Punctuate correctly.

10. Test documents on the intended audience before finishing them.

Here are ten plain-English guidelines from Bryan Garner in his *Dictionary of Modern Legal Usage*:

1. Achieve a reasonable average sentence length.

2. Prefer short words to long ones, simple to fancy.

3. Avoid double and triple negatives.

4. Prefer the active voice.

5. Keep related words together.

6. Break up the text with headings.

7. Use parallel structures for enumeration.

8. Avoid excessive cross-references.

9. Avoid overdefining.

10. Use recitals and purpose clauses.[86]

And here are some from Professor Kimble's article *Writing for Dollars, Writing to Please*:

- Pay attention to document design — the typeface, length of line, white space, and so on.

- Use short sections, or subdivide longer ones.

- Use lots of headings.

- Group related ideas together, and order the parts in a logical sequence.

- At the beginning of most documents, have an executive summary.

- Don't hesitate to use examples, tables, and charts.

- Eliminate unnecessary words and details.

- Break up long sentences.

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[86] GARNER, *supra* note 36, at 663–64.

- Don't put too much information before or between the main subject, verb, and object.
- Prefer the active voice.
- Put the central action in verbs, not in abstract nouns.
- Use a list — at the end of the sentence — for multiple conditions, consequences, or rules.
- Give *shall* the boot; use *must* instead.
- Use familiar words — the ones that are simple and direct and human.[87]

Finally, I'd like to present ten commandments for legal writing from Goldfarb and Raymond's book, *Clear Understandings.* Their advice is entirely appropriate for plain English, and we should pay special attention to number 9:

1. Write like a human being.
2. Think of your audience.
3. Do not use jargon (unless you have to).
4. Forget the windup; just make the pitch.

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[87] Kimble, *supra* note 69, at 6–7; *see also* Joseph Kimble, *The Elements of Plain Language*, 81 MICH B.J. 44 (Oct. 2002) (listing 41 elements).

5. Avoid purple.

6. Write concise, clear, simple words, sentences, and paragraphs.

7. Punctuate precisely.

8. Use other people's written work incidentally and deftly.

9. Check writing authorities.

10. Edit one more time.[88]

Conclusion

Professor Crump used the word *might* a lot to describe what plain-English advocates do. He used it in sentences like this: "A plain-English advocate might say _____." This use of *might* reveals the most crucial weakness in his article: he can't tell us what a plain-English advocate *would* say because he doesn't know. He didn't look it up.

But anyone can learn what plain-English advocates really would say, have said, and do say: ask them, or read what they write.

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[88] GOLDFARB & RAYMOND, *supra* note 72, at 130–58.