

# PLAIN LANGUAGE PROSPECTS IN AMERICAN PUBLIC LAW: INSIDERS WEIGH IN

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While many international lawmaking jurisdictions have incorporated plain language principles for statutory drafting, the United States remains reluctant, and subsequently has no official policy on employing such principles for the drafting of federal legislation. Though Executive Orders and congressional statutes regarding plain writing have recently been enacted, these have been aimed at Executive Agency regulations and communications, not statutes. This article explores the current prospects of plain language implementation for U.S. statutory law, relying primarily on interviews from Congressional insiders, including lawmakers, staffers and legal/political journalists. Responses demonstrated that plain language standards for statutory law in the U.S. do not seem likely to be implemented anytime soon. However, interviewees also noted the significant contribution that the health care debate of 2009 was having on the legislative process, including an increased focus on statutory text by both lawmakers and citizens. Discussion of plain language principles was certainly present on Capitol Hill during the health care debate. If such standards are ever implemented, interviewee responses suggest that this debate could be recognized as a pivotal moment in regard to the general access and understandability of such text that the public faces when interacting with legislation. Additionally, this article discusses both the premise and challenges of plain language being considered a democratic right, and ultimately recommends that a legislative commission study the prospect of plain language in US statutory drafting.

## I. Introduction

*It is difficult to come across anyone, be they a politician, lawyer, academic, administrator or anyone else who deals regularly with legislation, who now disagrees with the main tenets of plain language legislative drafting – that the law should be expressed in the simplest terms available and in a way which communicates directly and effectively with as much of its intended audience as possible.<sup>2</sup>*

Plain language legislative drafting has developed rapidly over the past few decades, and is now a common international lawmaking practice.<sup>3</sup> That is not to say that the practice is uncontroversial, however.<sup>4</sup> In terms of American public law, finding those that disagree with the above quotation was not too difficult; all one has to do is question those working inside and around the U.S. Congress.<sup>5</sup> While Congress has implemented plain writing conventions and an emphasis on clear language in terms of Executive Agency materials,<sup>6</sup> the statutes that govern the American people remain exempt from such standards. This presents a problem because statutes are the primary source of law; “govern[ing] almost every facet of our lives from birth to death, and even after.”<sup>7</sup> According to interviews of American legislative insiders regarding clear law and plain language, a major opening for plain language reform arose during the health care debate, as an increasing number of individuals were interacting with the bill text as it travelled through the legislative process and lawmakers began to make calls for plain language bills on Capitol Hill. However, many interviewees, some

of whom draft legislation themselves, stated that the situation as it pertains to federal statutes does not seem likely to change anytime soon.

Controversy over the use of plain language within the legal community has existed for centuries,<sup>8</sup> but the movement only started gaining greater amounts of support and influence within the past three to four decades.<sup>9</sup> Some believe that employing plain language renders legal texts inaccurate and populist,<sup>10</sup> while others think that such language expands the usability and clarity of such texts, making them more accessible for those with and without legal training.<sup>11</sup> Despite the ongoing debate on this issue within the U.S. legal community, many foreign countries have decided that implementing plain language drafting standards for legislation is essential to running an effective government.<sup>12</sup>

This article first describes both the domestic and international plain language landscape. In doing so it demonstrates that while the U.S. has tepidly applied plain language standards to governmental communication throughout the years, though never to statutory law, many of the Nation's international contemporaries have begun to draft nearly all of their laws in plain language<sup>13</sup> and some are currently revising existing laws to bring them into compliance with plain language standards.<sup>14</sup> Next, the article presents views from U.S. legislative insiders on the prospects of plain language in U.S. statutory law. Recommendations and implementation of such plain language principles are explored in the subsequent section, and the article ends with concluding statements.

## II. The Domestic & International Plain Language Context

### A. Domestic

*I should apologize, perhaps, for the style of this bill. I dislike the verbose and intricate style of the English statutes . . . You, however, can easily correct this bill to the taste of my brother lawyers, by making every other word a 'said' or 'aforesaid,' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction, and find out what it means; and that,*

*too, not so plainly but that we may conscientiously divide one half on each side. Mend it, therefore, in a form and substance to the orthodox taste, and make it what it should be; or, if you think it radically wrong, try something else, and let us make a beginning in some way.*<sup>15</sup>

Thomas Jefferson

The plain language movement in the U.S. began to build momentum in the 1970s following the publication of David Mellinkoff's triumph, *The Language of the Law*,<sup>16</sup> which explored some of the deficiencies of legal language and challenged it to become more like common speech.<sup>17</sup> In his work, Mellinkoff provocatively stated that "[l]aymen are certain that law language is not English. Statutes make the distinction official."<sup>18</sup> The author also documented not only the history of the language of the law, but thoroughly prescribed his four recommendations for legal language: to make it "more precise, shorter, more intelligible, [and] more durable."<sup>19</sup> Jimmy Carter capitalized on repeatedly lambasting the complexity of the Internal Revenue Code in his 1976 presidential campaign, and was the first President to issue an Executive Order ("E.O.") mandating plain English for significant regulations.<sup>20</sup> New York was the first U.S. state to pass a plain language law in relation to consumer contracts, doing so in 1977,<sup>21</sup> and several other states followed suit by enacting laws mandating the usage of plain language.<sup>22</sup>

Executive Orders were the first pieces of federal law to mention plain language in governmental operations. The most recent E.O. issued by President Barack Obama on this subject, E.O. 13,563: Improving Regulation and Regulatory Review,<sup>23</sup> builds on previous plain language acknowledgement by two Executive Orders from former President Bill Clinton<sup>24</sup> and one from former President Jimmy Carter.<sup>25</sup> President Obama's E.O. stresses that the regulatory system "must ensure that regulations are accessible, consistent, written in plain language, and easy to understand."<sup>26</sup> President Clinton's 1993 E.O. incorporated similar language, expressing that "[e]ach agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from

such uncertainty.”<sup>27</sup> Additionally, a 1996 Executive Order by President Clinton in relation to civil justice repeatedly mentions “clear language.”<sup>28</sup> While this E.O. mentions clear language in relation to both legislation and regulation, the U.S. Congress has never considered or agreed upon any authoritative standards regarding clear or plain language in terms of statutory law.<sup>29</sup> However, Congress has recently implemented plain language standards for federal agencies.

Executive agencies have implemented the Plain Writing Act of 2010 (“the Act”), which was signed into law on October 13, 2010<sup>30</sup> and complements the previously-mentioned Executive Orders. Section 2 of the Act notes that its purpose “is to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.”<sup>31</sup> The Act lays out the responsibilities of federal agencies in terms of utilizing plain language on their websites and in official reports.<sup>32</sup> However, Section 6 of the Act prohibits judicial review enforceability of such publications for their compliance with the Act.<sup>33</sup> In addition, Section 6(b) provides that “[n]o provision of this Act shall be construed to create any right or benefit, substantive or procedural, enforceable by any administrative or judicial action.”<sup>34</sup> These provisions constitute an important disclaimer: though the Act was designed to “promot[e] clear Government communication that the public can understand and use,”<sup>35</sup> it explicitly provides the American public with no right to such language.

Federal employees, official statutory drafters, and others have also taken further steps. A federal Plain Language governmental website has been set up that provides more information on the use of plain language<sup>36</sup> and links to federal guidelines,<sup>37</sup> agency requirements,<sup>38</sup> and useful examples and tips,<sup>39</sup> among other things. There are even monthly PLAIN (Plain Language Action and Information Network) meetings, a group comprised of federal employees from various agencies working to make government communications clearer.<sup>40</sup> This represents concerted effort by employees to further implement plain language reform within the federal government.

In regard to statutory drafting, the official drafting manuals of both the House and Senate Legislative Counsel do mention readability and

understandability, two primary characteristics of plain language. The House manual notes in Section 102(f)(3) that a “Draft Should Be Readable and Understandable – In almost all cases, the message has a better chance of accomplishing your client’s goal if it is readable and understandable. It should be written in English for real people.”<sup>41</sup> The Senate manual contains similar language, noting in Section 107 that “[a] draft must be understandable to the reader. The rules in this manual should be applied in a manner that makes the draft clearer and easier to understand.”<sup>42</sup> Yet these manuals are not binding when drafting legislation and the House blatantly ignores the House Drafting Manual in particular situations.<sup>43</sup> Additionally, many of the insiders interviewed for this article do not believe that U.S. legislation is becoming clearer or that Congress should draft its legislation in “plain English.” Besides these fleeting passages, neither the Senate nor House Legislative Counsels make mention of clear language goals in any other form. For example, the House Legislative Counsel has two documents available on their website, a *Quick Guide to Legislative Drafting*<sup>44</sup> and an *Introduction to Legislative Drafting*,<sup>45</sup> but neither mentions clarity, clear language, nor plain language. Conversely, many other official parliamentary or legislative counsels from other countries have written their own dossiers or instruction manuals on the topic.<sup>46</sup>

American courts have also imposed clear-statement rules on the legislature in particular situations, but these mostly relate to accuracy standards, rather than implementing plain language principles. The clear-statement rule doctrine stipulates that “a legal instrument, esp. a statute, will not have some specified effect unless that result is unquestionably produced by the text.”<sup>47</sup> For example, the case *Gregory v. Ashcroft*<sup>48</sup> imposed these rules in relation to federalism, noting that, “Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States.”<sup>49</sup> This “presumption against waiver of sovereign immunity canon” is present in other U.S. Supreme Court cases,<sup>50</sup> a recent illustration of which is apparent in *Hamdan v. Rumsfeld*.<sup>51</sup> In *Hamdan*, the U.S. Supreme Court “held that the traditional forms of adjudication should be presumed unless Congress has legislated exceptional procedures in clear language.”<sup>52</sup> The “void-for-vagueness” or “fair notice” doctrine is another example of the Court imposing clear

drafting principles on the writers of legislation. This doctrine comes into effect when courts determine that criminal statutes lack sufficient definitiveness or specificity.<sup>53</sup> The U.S. Supreme Court has decided that such unclear language violates the Due Process Clause because “[m]en of common intelligence cannot be required to guess at the meaning of [an] enactment.”<sup>54</sup> As such, courts can and do prescribe drafting standards to the legislature, and this has been especially true in terms of clear, accurate language.

Prominent legal scholars have also advocated plain language. U.S. drafting expert and influential commentator Reed Dickerson has stated that many draftsmen apparently do not realize that, in addition to providing rights, duties, and privileges; legal instruments are also communications.<sup>55</sup> He notes that “the audience” is one of the four main elements of communications, and stresses that “such laws [should also be] intelligible and feasible to the general public.”<sup>56</sup> William Eskridge, Phillip Frickey and Elizabeth Garrett note that a bill should be drafted “*so that the language and organization are no more complicated than necessary.*”<sup>57</sup> The authors continue by stating that “[t]he main purpose of statutes is to communicate directions to citizens, telling us what legal rights and duties we have in our polity. . . . [I]t is certainly the job of the statutory drafter to communicate what directives there are with clarity and precision to the citizenry.”<sup>58</sup>

From the information provided above there would seem to be a burgeoning tide of momentum for plain language in US statutory law. That is not the case. While there is some movement in that direction, statutes remain unrestrained by any type of official plain language standard. The interviews discussed in this article elaborate on why this is the case, and provide enlightening views on where plain language statutory use currently stands with Congress.

### *B. International*

The opening paragraph of this article noted the many jurisdictions that actively engage in plain language statutory drafting, as opposed to the U.S.’ passive style for Executive Agency communication and regulation.<sup>59</sup> While America has struggled to discuss the issue in much depth, many other governments and parliamentary/legislative counsels have issued reports on plain language in legislation or are required

to draft in such language.<sup>60</sup> Examining where U.S. contemporaries stand in terms of employing plain language (and especially plain English) in legislation can aid this endeavor, and provide a context for the interviews detailed below.

Many jurisdictions recognize the benefits of employing plain language. The United Kingdom Office of the Parliamentary Counsel issued drafting advice in 2011 that covers the issue of “clarity” in depth, and which includes the use of plain language.<sup>61</sup> The U.K. has also been undergoing a Tax Law Rewrite Project since 1996, which aims to use language that is plainer and simpler for their tax code.<sup>62</sup> The Scottish Parliamentary Counsel advocates for the use of plain language and in 2006 issued a dossier detailing such use in Scottish statutes and throughout the international community.<sup>63</sup> Since 1992, the European Union has advocated for “clearer, simpler acts complying with good principles of legislative drafting.”<sup>64</sup> Sweden has been advocating plain language practices in legislation since 1976, and has linguists examine all bills before sending them to press.<sup>65</sup> The Australian Parliamentary Counsel (“APC”), however, probably provides the most comprehensive information on plain language drafting. In total, thirteen documents are available on the APC website in regard to the subject,<sup>66</sup> including articles on plain language drafting written by APC members,<sup>67</sup> a Plain English Manual,<sup>68</sup> and instructional “Drafting Directions” provided by the First Parliamentary Counsel,<sup>69</sup> among other documents. The APC defends their rationale for drafting in plain English by noting,

We also have a very important duty to do what we can to make laws easy to understand. If laws are hard to understand, they lead to administrative and legal costs, contempt of the law and criticism of our Office. Users of our laws are becoming increasingly impatient with their complexity. Further, if we put unnecessary difficulties in the way of our readers, we do them a gross discourtesy. Finally, it [i]s hard to take pride in our work if many people can’t understand it.<sup>70</sup>

Some countries mentioned above have had commissions or Law Review Units throughout

the years that thoroughly examined plain language. Ireland has had both. The Irish Law Reform Commission issued their “Statutory Drafting and Interpretation: Plain Language and the Law” report in December of 2000.<sup>71</sup> The report advocated the use of “familiar and contemporary language,”<sup>72</sup> but stressed a commitment to legal certainty.<sup>73</sup> Ireland’s Statute Law Revision Unit goals are to “consolidate, streamline and simplify Irish statutes and to make legislation more accessible to the public.”<sup>74</sup> The fruits of their Revision Unit produced the Statute Law (Restatement) Act, which allows Ireland’s Attorney General to “restate legislation in a more readable format.”<sup>75</sup>

Influential think tanks and drafters in the U.K. also advocate plain language, though they do so cautiously. A recent Hansard Society report on “Making Better Law” supports the increased use of plain language bills, noting that the “actual text of the law also needs to be as accessible as possible to the widest possible audience.”<sup>76</sup> Even though the U.K. Parliamentary Counsel endorses a standard of clarity, the report notes that many U.K. statutes remain “less than accessible,” and that this can have a compromising effect on the clarity of bills and laws.<sup>77</sup> Experienced UK drafter Ian McLeod states, “all good drafting is as plain as it can reasonably be. Once this is accepted, it follows that the principles of plain language provide a sub-text to all effective guidance on good drafting.”<sup>78</sup> As can be seen from the above, many jurisdictions advocate the use of plain language in statutes. Parliamentary Counsel Offices of the respected jurisdictions officially advance those directives, but at times law commissions, law revision units, think tanks, and others, such as influential drafters (both officially and unofficially) endorse them as well.

### III. Insider Interviews

In order to determine if the plain language movement has any traction in Congress, legislative insiders were questioned about whether they thought American statutory law was moving in this direction.<sup>79</sup> The interviews were performed in the fall of 2009, in the middle of the health care debate that led to passage of the Patient Protection and Affordable Care Act of 2010.<sup>80</sup> In total, twelve legislative insiders were

interviewed, consisting of: one member of Congress, five House staffers, one Senate staffer, and five legal and/or political journalists. Responses fell within three categories: (1) current prospects for plain language in congressional statutes, (2) public access to legislation, and (3) additional points relating to plain language.

#### A. Current Prospects

A Senate staffer provided the clearest evidence that plain language has indeed been an issue on Capitol Hill, and especially with the health care bill. He noted, “[w]ell, the Finance committee had a version of the health care bill that was in plain English, before they sent it to Legislative Counsel to change it. Also, [Senator] Bunning and [Senator] Conrad had a debate over which version of the bill to debate, the plain English one or the Legislative Counsel one.”<sup>81</sup> This represents the most convincing evidence that plain language bills are not only written in particular situations, but that legislators would at times prefer to discuss the plain language version over the more technical version. However, one journalist accurately summed up the state of official Congressional legislation in terms of technical versus plain language drafting, declaring, “clear language or not . . . one bill is going to become law, and it’s not the clear language bill.”<sup>82</sup>

A couple of respondents stated that members of Congress or of Congressional staff had mentioned or at least thought about clear or plain language at certain points. As a staffer noted, “[t]here are definitely some bills that have been introduced over the last few sessions about clear legislative language, and laymen’s terms, and plain-speak . . . people say things like that.”<sup>83</sup> In addition, a legal journalist stated that, “I think there’s been a movement to do that with laws that are on the books. You know, to kind of clarify . . . put plain language for laws that are on the books.”<sup>84</sup>

The lawmaker interviewed stated that she had not “heard that argued” about Congressional legislation, but noted that she was a freshman legislator.<sup>85</sup> Other interviewees, however, were disparaging in terms of the prospects for plain language. One House staffer noted:

[T]here’s so much legalese in legislative text that . . . I don’t think that aspect of it has changed or will change in the near future, maybe

over time. But, I still think the actual text will remain very legal and very . . . Beltway . . . as we say, inside the Beltway . . . and then it will be up to those interest groups or whoever to, you know, break it down and present the sides for folks to look at. But, I don't think the actual text will change, or the style of the text will change.<sup>86</sup>

Supporting this notion, another staffer declared, "unfortunately that's not the way it is here,"<sup>87</sup> and noted in a follow up question about whether or not such language has been changing at all in legislation by answering, "[n]o . . . you need it to be technical here."<sup>88</sup> Another House staffer reported the surprising belief that the current lack of plain language use in Congress was due to public mistreatment of bills and laws, noting,

I think it would be great to have more simple legislative language if people . . . really wanted to engage with it in a good faith manner . . . but . . . right now in the absence of the expertise to evaluate what the legislative language says, people just use opacity to reinforce their preconceived notions of what Congress is trying to do. So, that's unfortunate. So, to the extent that that situation can be alleviated, I don't know that it's a matter of, you know, changing the entire legal code to read more in plain English . . . that's possible, but then again, I mean, that could have all kinds of unintended consequences.<sup>89</sup>

Most journalists believed the prospects for plain statutory language were dire. One exclaimed,

[n]o, to the contrary. Statutes are really a mess. There's a little bit of a movement in the law generally, but in federal statutes I haven't seen efforts to make it readable. In fact, . . . in order to attract votes, and to get people on board, there's purposeful ambiguity inserted in the statutes so

that people can plausibly say they voted for X or Y and the Courts will decide later on what it really means.<sup>90</sup>

Another journalist stated, "No, no, not at all, no. I mean legislation in Congress is actually written by the clerk's office, a guy sits there in legalese, I mean, it's impenetrable, you know. They usually include some type of executive summary or something like that, I think. But no, no movement that I've seen in the U.S. toward that sort of thing."<sup>91</sup> Another answered,

I don't see that happening anytime soon. I just think we've crossed that point in both the way the Republic is organized, and . . . but look there are, I think, there are a lot more entities now who are reading bills and translating them and saying . . . not just the media, but all the partisan organizations, and blogs that are translating them . . . so, there really isn't any neutral arbiter of what is in a bill anymore. Um . . . and that's neither good nor bad, I think it's just a consequence of what's happening with technology especially.<sup>92</sup>

He went on to explain his answer by declaring, "[w]ell I think that . . . in part because the guardians of the . . . well, the mandarins of the power structure in some sense, want to preserve their element of savviness and specialness."<sup>93</sup>

The Senate staffer's revelation that lawmakers were having discussions over whether or not to debate the plain language or the technical version of a bill is certainly positive news for plain language advocates. This is evidence that such language for statutory law may indeed have some momentum in Congress. Other interviewees, however, viewed immediate prospects for statute law to be either non-existent or somewhat minimally discussed in Congress. Journalists seemed much more somber on such prospects than staffers, who mentioned that plain language had been discussed on some occasions.<sup>94</sup> Additionally, one staffer expressed the desire to utilize plain legislative language, but did not think the American public was ready to engage with it in good faith.

## *B. Public Access to Legislation*

Public access to and understandability of legislation is one of the main goals of the plain language movement. While such standards have been achieved to a certain extent for Executive Agency communications and regulations,<sup>95</sup> a statutory standard remains elusive. However perceptions could be changing, as interviewees reveal below.

Health care reform was in full swing at the time of the interviews and received a significant amount of attention from respondents. Should Congress ever embrace the use of plain language in U.S. statutes and legislative drafting, this period could be seen as a major turning point both in the clarity of statutes and in public attention paid to statutes. The far-reaching effect that the health care debate had on the respective legislation and the legislative process more generally cannot be denied. As one House staffer stated with respect to the proposed healthcare bill,

As far as I know, nobody was talking about that even like a year ago. I mean, I've been here for almost two years and I remember last year we didn't really get any calls about people talking about the opacity of legislation. I mean, fact is that laws are complicated. You know, that's why you have to go through significant training to be a lawyer, and you know actually writing laws requires significant expertise . . . I think things certainly have changed. People feel that they ought to be able to understand what the laws are, and not just the summary of [them]. Because, you know, you can read this stuff, and unless you have three or four existing federal codes to reference, you would have absolutely no idea what that was meant to do, unless you have a summary that you can read, which is generally what the member certainly, and also often the staff . . . operates on. But, nobody had ever complained to me, or I never heard any complaints

from our constituents that legislation was too opaque, until health care reform came out. And I think it's a factor . . . and I mean, I hate to be too . . . I guess, dismissive of it, but there's a strong streak of amateurism, I guess . . . and that's good . . . people should, you know, take an ownership of the laws that are being passed in Congress on their behalf.<sup>96</sup>

Another staffer noted that the length of legislation and the complexity of the language were being discussed in meetings around this time, as he revealed,

In the meeting I just came out of, that issue was raised with the health care debate that we are currently engaged in here in the U.S. Um . . . one of the bills on the House side is plus 1,500 pages . . . H.R. 3200. And, one of the comments was, 'well, why can't we do this in ten pages and write it in a way that the average individual with a high school education could understand' . . . when [the legislators are] drafting the legislation, . . . the purpose of the legislation is to not to underwrite the legislation in a way that confuses people. But, because of the precision and the technical attributes that are required . . . it inevitably becomes complicated. And when you talk about health care . . . there are just so many moving parts that it's really hard to do everything that needs to be done in ten pages. So, it turns into 1500 pages. And it does take some time and some skill to sit down and read it. But, that's why members of Congress have staffs, to sit there and comb through that material. And, one of the things we've been pushing for now, here in Congress, is making sure that all the bills . . . are made available online so that the average American can sit at home

or go to the library or whatever and wherever they have internet access, and go through the process of reading that bill. If they have questions, then they are more than welcome to pick up the telephone or write a letter to their member of Congress. And I would be hard pressed to find a member of Congress who would refuse to provide some type of response to questions constituents have regarding pieces of legislation.<sup>97</sup>

Additionally, a journalist also noted the impact the health care debate was having on the public's attention to the text of the bill, the consequences of which spilled over to legislators when they visited their constituencies, stating,

Well I think that there's a couple issues there. One is that there's general apathy, typically toward the legislative process in the United States . . . health care is a huge anomaly . . . actually. I wrote a story about people reading the health care bill, literally. So . . . in August all these Democrats are having town hall meetings, and people are like getting up and screaming at them and they had read the bill. And I had talked to some Republicans from the area that I cover, and they were saying that, their staff was saying that, they had . . . their Congressman, had to read the bill. They usually don't read every . . . 850 page bill, they maybe don't read every 850 page bill, but they had constituents, who are Republicans, who are already going to vote against the bill, their constituents know they're going to vote against the bill, they're having town-hall meetings, and people were coming in with like the bill in hand being like 'I'd like to refer you to page 459 where they talk about Medicare reimbursement levels being like six to twenty percent', and the Congressman has like never

encountered this before, where his constituents have read every page of the bill, and they're testing them, in a way to make sure he's read it too.<sup>98</sup>

Those are just three prominent examples of how the health care debate was influencing legislation, lawmakers, and constituents in the fall of 2009.

Complexity of the law was another topic mentioned by respondents. One staffer noted,

You know, it's complicated for a reason. These are complex measures, complex reforms. Like financial regulatory reform, you can't get the financial regulatory reform for dummies, you know. You need to know how the market works and how the regulatory agencies work and that requires really complicated language. I don't necessarily agree with, you know, I suppose dumbing things down is unfair, but I don't think our purposes would be served by simplifying it so much that it could be called 'clear language.'<sup>99</sup>

This response is a strong indictment of clear language; it could explain both the Capitol Hill mindset on plain language and the reason that the movement has not gained much traction in Congress.

Another journalist touched on points similar to those mentioned above, accentuating the complexity of legislation and the roles that representatives and their staffs play in governance. He noted,

I think again, the way that our Republic functions, is such that we elect people to read bills for us. That doesn't mean that citizens shouldn't have every opportunity to look at something themselves. But . . . when it comes to a complex piece of legislation like health care reform, no amount of plain language is going to make it simple to understand . . . and, in fact, you need quite a bit of technical language when you're talking about actuarial tables and



adjustments to the tax code. So, unless you simplify the underlying dynamics, which you're not going to do, it doesn't make sense to . . . you just can't simplify the language . . . . If there really was, to every single bill, every controversial bill, a neutral way of explaining it that both sides could agree on . . . . In other words, it has legitimacy, then . . . it would be feasible at least to require or encourage . . . a plain-language summary. And on certain bills it is much easier . . . than others.<sup>100</sup>

This answer touches on the quote provided by one House staffer with respect to citizens engaging in a good faith manner.<sup>101</sup> At times, the ideology of particular citizens seems to trump accurate legislative information. Therefore, questions remain as to what type of an effect, if any, plain language would have in mitigating the distrust that citizens have for lawmakers and the information that they and their staffs are providing. Explaining his earlier statement, the aforementioned House staffer noted the following:

I mean, a lot of people simply don't believe what we say . . . and that's a shame . . . and that's something that we're working very hard on, and Congressman \_\_\_\_\_ is working very hard on, but . . . you know, there are a lot of people who will call the office and say, 'well, . . . I looked at the legislation', they may say that, or 'I read that this section does this', and we'll say no, that really doesn't do that. The thing about the bank accounts is about insurance companies, and if they don't pay then the government can seize . . . or something like that. Um . . . a perfectly reasonable, and in fact, the correct explanation, they would say . . . oh well; they just simply don't believe it. And so, that's a shame . . . but . . . I think the internet has a lot to do with it. I mean, the bills themselves are available, you know, most people don't [know]. I mean,

they're surprised . . . like a lot of people say, 'why don't you post the bills on the internet,' and we say, 'look, every bill that's introduced is posted on the internet, and you can go find it'.<sup>102</sup>

In terms of access to legislation, interviewees focused on different elements of the issue. A few noted the significance that the health care debate was having in both the halls of Congress and in the minds of the populace. In this instance, lawmakers and staffers discussed plain language and, even in the face of the technical language used in the official health care bill, constituents were reading the legislation and questioning their elected officials on the topic. Technical complexity was also discussed, and included in this discussion was the role of representative politics: should legislators and their staffs be the ones conveying legal and technical information about laws to their constituents or should the general public take more ownership of the laws that are being passed? Congress rarely discussed these questions after the passage of the Patient Protection and Affordable Care Act<sup>103</sup> and they persist even after the U.S. Supreme Court decision in *Sebelius*.<sup>104</sup> However, it seems apparent that the grandiosity of the health care debate got citizens more involved in the legislative process—particularly in reading the text of bills.

### *C. Additional Points Mentioned*

Outside of the immediate prospects for plain language statutory implementation and public access to legislation, interviewees mentioned a number of additional points. One staffer questioned the role of both the legislature and the judiciary in terms of drafting and interpreting legislation, and accentuated the tension between the branches when deciding the true meaning of particular statutory provisions. He exclaimed,

Isn't the job of the legislature to pass laws that are so specific that it doesn't leave very much room for justices or judges to interpret . . . you know, they shouldn't have to interpret a whole lot, I guess. They should be able to make a judgment about whether something is inside

or outside the law, but I don't think that as . . . generally unelected officials, the judicial branch would have too much authority to decide what a law does or doesn't mean. You know, because words are funny things, they're very slippery. You know, getting back to the acronyms, they can mean a lot of different things. So, I think that that could be an unintended consequence, that it could be a . . . in an effort to make things more clear we could be making them more ambiguous by using plain English instead of legislative language.<sup>105</sup>

The concern expressed at the end of the staffer's statement has been discussed in terms of implementing plain language.<sup>106</sup>

Moving past the legislative text, one journalist examined the summaries of bills and public laws provided by the Congressional Research Service and other outlets, which are supposed to be in plain language. These important summaries provide the most authoritative sources for the public in terms of conveying the purposes behind particular laws. He stated,

Now, whether they are doing a good enough job of simplifying it . . . maybe sometimes they are, maybe sometimes they're not. But, they try to say what it is about. California has a very good legislative analyst that writes bill summaries, and it's on the cover of the bill. Like, if you have the printed copy of the bill, there's the legislative analyst's summary, and then it will have most check-offs, of some things you would really want to know: fiscal impact, you know, yes, no, imposes mandate on local government, yes, no. You know, certain things you would probably want to know at a glance to get a sense of what type of bill this is and what type of impact it's going to have. So, I don't know

if I would say it's a movement, . . .  
I think it probably ebbs and flows .  
. . .<sup>107</sup>

Perhaps the final statement by the journalist is the most significant in terms of where current plain language prospects stand for U.S. public law: besides in a couple high profile instances, the American people are not currently demanding it; so therefore it is not a priority. Of course there have been "ebbs and flows" of attention, as was demonstrated in the health care debate and noted by various interviewee responses above. Yet, overall, the so-called "apathy" towards the legislative process mentioned above<sup>108</sup> is a very real concern, and the plain language movement for statutory law has therefore not been given much attention either inside or outside of Washington.

#### IV. Is Plain Language a Democratic Right?

*"That legislation should be accessible, intelligible and clear to all audiences is both a democratic right and also an essential prerequisite in the process of making better law."*<sup>109</sup>

The quotation above is from a report by a highly respected U.K. think tank, the Hansard Society, that examined how to make better laws. Though the report focused on Westminster, the quote's main premise is applicable to all contemporary democracies: it calls clear and intelligible language a democratic right. This is a bit stronger language than is usually used on the subject.<sup>110</sup> In fact, Congress explicitly noted in the Plain Writing Act of 2010 that, "[n]o provision of this Act shall be construed to create any right or benefit, substantive or procedural, enforceable by any administrative or judicial action."<sup>111</sup> Yet, could the authors of the report have a legitimate argument for employing such strong language in their pronouncement above? If so, a few important matters still need to be firmed up.

The statement is susceptible to the "utopia" counter-argument: generally, that legislative text will never be understandable by the whole citizenry. The terms "accessible" and "intelligible" in the passage, while imprecise, would probably not cause too much controversy;<sup>112</sup> while the "clear to all audiences" phrase is a vague statement that could indeed incite counter-utopian critics. The target audience classification

for the phrase certainly needs more definition. What exactly is meant by the words “all audiences” (i.e., high school educated citizens, individuals over a particular age, all audiences that the bill is aimed at, all citizens, etc.)? This answer is difficult to surmise when not properly specified. In order for governments, drafting offices, and others to use this standard, the report should provide a definition of “all audiences.”<sup>113</sup> If the authors merely meant “all citizens,” then a question remains as to whether that standard is realistic or perhaps too ambitious. Specifically defining an audience or audiences for the implementation of plain language standards is one of the missing pieces in many arguments made by plain language advocates.<sup>114</sup> Should advocates desire intelligible and clear legislative language for all citizens, then the intricacies of the practice must be taken into more extensive consideration.

Second, how would the term (and standard) of “clear” be measured in regard to legal language? As influential legal drafter and commentator Reed Dickerson explained, “[t]he importance of clarity to statutes needs little urging. Clarity is important not only to the substance of the legislative message but also to its adequacy as a means of transmission. A statute is a communication and thus subject to the principles applicable to communications.”<sup>115</sup> The current Senate Legislative Drafting Manual mentions clear language and understandability,<sup>116</sup> while the House manual states that language should be “readable” and “understandable.”<sup>117</sup> Ostensibly, legislative drafters have been attempting to draft statutes with more clarity for quite some time, sometimes with dubious results.<sup>118</sup> The clear language standard differs between individuals and drafting offices, and would be inherently difficult to standardize. Therefore, a plain language critic could easily assert that such a drafting standard is impossible. In order to legitimize the idea of clear drafting, further explanation and definition is needed by drafters and advocates in terms of how clarity in the law will be measured, if indeed plain language standards are to be implemented in US statutory law.<sup>119</sup>

Third, what type of a democratic right should “accessible, intelligible and clear” legislation, or any other plain language variations, actually have? Should it remain a non-enforceable standard applied by drafting offices to their own work, or should the

citizens of democratic countries have some type of binding, enumerated right to “accessible, intelligible and clear” legislation? Obviously, the latter is a much bolder type of right, but it could also lead to a litany of litigation until either the courts, the legislature, or both, agree upon the definitions of such terms. Many countries that have implemented plain language standards have followed the former classification,<sup>120</sup> and their drafting offices, not constitutions, statutory law, or common law, are usually the places that plain language is officially endorsed.<sup>121</sup> Nevertheless, these distinctions are important for determining the future of plain language legislation in democratic societies and must be thoroughly considered by those drafting, interpreting, and accessing legislation, if the U.S. wants to implement plain language standards in the future.

## V. Recommendations

### *A. Possible Commission on Legislative Drafting*

The fact that many international jurisdictions and even some U.S. Presidents are attempting to draft laws and official communications in plain language makes the lack of attention to the issue on the U.S. statutory side that much more curious. From the interview responses discussed in this article, it appears that some support exists in Congress for drafting laws in plain English, even though some interviewees stated that this is currently nowhere close to happening while others suggested that laws are becoming even more technical and complex.<sup>122</sup> Thus, a practical idea for investigation into drafting plain language statutes would be to ask a commission to study the practice, similar to what Ireland<sup>123</sup> and Victoria<sup>124</sup> have done. This way, experts would be able to vet the idea more thoroughly and some consensus may emerge. In fact, it might be time for some form of an established commission to critique Congressional legislation as a whole. While the interview answers were mostly in relation to plain legislative language, the responses brought up a host of other issues. They covered public trust in lawmakers and staff, the role of lawmakers and staff in communicating with the public, and whether bills and acts should have official summaries and other relevant information displayed on the face of the printed version. The communication of laws between

a government and its citizens is vitally important, and as statutes get longer, more frequent, and are increasingly politicized,<sup>125</sup> setting up a commission to study the drafting and communication of laws could only be a positive step for the future of U.S. statutory law.

One essential for any commission on plain language would be to solicit and examine empirical data on the use of plain language and how this impacts the clarity and understanding of statutes. There seems to be very little empirical data on plain language available, though there are a few sources that state it was helpful in certain experiments.<sup>126</sup> The discussion thus far has been largely a normative debate, and the lack of empirical discussion seems odd with so many advocates and critics of the practice. Additionally, Redish points out in comparison to other fields, that, “before products and documents are released, representatives of the audiences for the products or documents try them out. Agencies and companies that produce successful products and documents use the test results to improve their work before it is released.”<sup>127</sup> This is an astute point concerning legislation, which usually does not go through such scrutiny before being officially introduced by lawmakers. Some jurisdictions (e.g. the Westminster Parliament) release draft bills before introducing them to the legislature in order to gain initial public and special interest group feedback.<sup>128</sup> Not providing any official vehicles for the study or improvement of legislation in the U.S., such as a legislative drafting or plain language commission, is only adding to the frustration over the statute book by many who wish to interact with it, as was evidenced in the health care debate. Bentham acutely sums up this status quo mindset by asking, “[A] great deal of bad legislation, the work of a variety of hands, all of them very indifferently qualified, may be endured, and the mischief flowing from it may continue to flow without much notice. Why?”<sup>129</sup>

### *B. Implementing Features of Plain Language*

A common perception among plain language critics is that employing such standards merely means “dumbing down” such language or making it less accurate.<sup>130</sup> However, plain language advocates, including many official drafting offices noted above, disagree with this assessment. As Krongold notes,

Although the drafter cannot often influence the complexity of the policy that gives rise to statute law, the drafter is responsible for making sure that everyone who is supposed to be able to read a statute will be able to read it. And he or she does this, not by reducing it to kindergarten level, but by directing it to the level of the identified readers.<sup>131</sup>

Of course, any so-called “movement” will have hard-liners that tend to advocate their reforms in the strictest manner, even in the face of practical problems. Yet most drafting offices that have implemented plain language standards are not among the aforementioned group; they are practical legal experts who believe that striving to make laws clearer and more understandable will benefit their jurisdiction’s governance. Examining plain language principles demonstrates that advocates of the practice take the intricacies of legislation into considerable thought. Drafters who advocate plain language offer a host of common suggestions:<sup>132</sup>

#### VOCABULARY, GRAMMAR, AND STYLE

- Use English: Latin words and phrases should be shunned<sup>133</sup>
- Archaic words should be avoided (e.g. “hereby”, “thereto”, etc.)
- Use of excessively formalized words should be discouraged for simpler words (e.g. “fax” in place of “facsimile”, or “e-mail” rather than “electronic communication”)
- Synonyms are repetitive and should be avoided (e.g., “null and void”, “full and complete”, etc.)
- Initials and acronyms can be helpful
- Common symbols can make text easier to read (e.g., “%”, “\$”)
- The active voice is preferable to the passive
- The present tense should be used
- Drafting in the third person is preferable
- Use singular rather than the plural
- Express cardinal numbers above two as figures (e.g., 3, 4, 5...)

## STRUCTURE/DESIGN

- The primary substance of the act should be put at the beginning
- Including tables of contents can aid both the drafter and the reader
- Accurate titles can aid in understanding
- Brevity is preferred; but it is acknowledged that longer sentences can at times provide increased clarity if too many ideas are not presented at once
- Incorporating lists are often a good way of conveying information
- Running headers and running footers can help readers locate material

## READABILITY

- Increase the amount of white space on the page
- Definitions should be used sparingly
- Examples may be used to help understand the meaning of provisions
- Cross-referencing can easily become confusing; restraint should be used when incorporating such references
- Especially in lengthy pieces of legislation, signposts (e.g., “see section 1”), marginal notes and flow charts can be helpful
- Formulas, diagrams and footnotes can improve readability, if constructed carefully and properly

The three focus areas above offer a way forward. Generally, the style section focuses on drafting nuances, such as eliminating Latin phrasing, synonyms, and excessively formalized words, while drafting in the present tense, active voice and third person is preferable. The structure section takes into account the understandability aspects of legislation, hoping that such aspects as controlling the length of sentences and increasing accuracy in titles can positively influence the text. The final section provides some easily implemented recommendations for improving readability, such as using signposts, diagrams and examples, and using restraint when making cross-references.

The practices related to plain language mentioned above do not “dumb down” the text or make it more vague or ambiguous; they merely

simplify and clarify the language being used and offer suggestions on how to improve readability and understanding. Implementing many of these practices could be easily done by most drafting offices, and the recommendations themselves should not be overly controversial. As Krongold states, “[w]hen the principles are applied, the law should be just as legally precise as it was before but clearer and more inviting to the reader.”<sup>134</sup>

## VI. Conclusion

Domestic and international momentum for plain language statutory drafting is increasing throughout drafting offices, public forums and among the citizenry.<sup>135</sup> This heightened appeal for clearer laws appears in a global context that is more accepting of the public’s interest in accessing and understanding legislation.<sup>136</sup> What many plain language critics fail to grasp is that most advocates of the practice are not demanding a complete and thorough restatement of laws; they merely want contemporary laws drafted with more clarity and with an aim to improve understanding by those interacting with legislation.<sup>137</sup> Some seem to fear that adoption of plain language standards would threaten the legal profession; such fears are entirely unfounded.<sup>138</sup> There will never be a utopia in which the public – regardless of education or experience – understands the meaning of every law. Nevertheless, increasing the clarity and understanding of governmental communications (in this case, statutes) is indeed an honorable and worthwhile endeavor. It would be of much benefit to the American people should Congress and their corresponding Legislative Counsels implement official plain language drafting standards in accordance with their international contemporaries.

A few insider responses above do provide hope for the prospect of plain statutory language, and the health care debate certainly had a large impact on Capitol Hill and throughout the country for those interacting with legislation. Unfortunately, this brief moment of attention on the opacity and complexity of statutory text seems to have faded, or is at least waiting in the wings for the ascendance of the next landmark piece of legislation. According to many of the interviews presented in this article, plain language implementation for U.S. statutory law seems a far

way off. The central missing piece of the puzzle at this point is the public, who “must insist on legislative texts that they can understand.”<sup>139</sup> Until the citizenry demands that laws be written with an increased focus on plain language principles, change is unlikely in U.S. statutory law.

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## (Endnotes)

<sup>1</sup> Postdoctoral Research Fellow, Institutum Iurisprudentiae, Academia Sinica; PhD in Law, University of Stirling (2012).

<sup>2</sup> Office of the Scottish Parliamentary Counsel, *Plain Language and Legislation*, Scottish Government, 17 (2006), available at <http://www.scotland.gov.uk/Resource/Doc/93488/0022476.pdf/>.

<sup>3</sup> *Id.* Chapter 3. The Scottish Parliamentary Counsel report notes that, in addition to their own standards, the following jurisdictions advocate plain language drafting or have official plain language standards in place: United Kingdom, Ireland, Jersey, New Zealand, Australia, Canada, Sweden and the European Union. However, the author also found that other jurisdictions also advocate such standards, such as Finland (*See, e.g.*, Ministry of Justice, *Bill Drafting Instructions* (2006), available at [http://oikeusministerio.fi/fi/index/julkaisut/julkaisuarkisto/20063billdraftinginstructions/Files/OMJU\\_2006\\_3\\_Bill\\_Drafting\\_Instructions.pdf](http://oikeusministerio.fi/fi/index/julkaisut/julkaisuarkisto/20063billdraftinginstructions/Files/OMJU_2006_3_Bill_Drafting_Instructions.pdf)); and Hong Kong (*See, e.g.*, Department of Justice, Law Drafting Division, available at <http://www.doj.gov.hk/publications/doj2010/en/drafting.html#5>).

<sup>4</sup> For example, Bennion wrote in 2007 the prospect of plain language law “was always a misconceived and hopeless project, and it has failed.” Francis Bennion, *Confusion Over Plain Language Law*, 16 *Commonwealth Law* 61 (2007), available at <http://www.francisbennion.com/pdfs/fb/2007/2007-018-plain-language-confusion.pdf>. He is not the only one who believes this to be the case. For further discussion on the merits of plain language, *see generally* Jeffrey Barnes, *The Continuing Debate About ‘Plain Language’ Legislation: A Law Reform Conundrum*, 27(2) *Stat. L. Rev.* 83 (2006); Brian Hunt, *Plain Language in Legislative Drafting: Is it Really the Answer?*, 23(1) *Stat. L. Rev.* 24 (2002); Brian Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?*, 24(2) *Stat. L. Rev.* 112 (2003); Anthony Watson-Brown, *In Search of Plain English—The Holy Grail or Mythical Excalibur of Legislative Drafting*, 33(1) *Stat. L. Rev.* 7 (2012); Martin Cutts, *Plain English in the Law*, 17(1) *Stat. L. Rev.* 50 (1996).

<sup>5</sup> *See infra* Section III: Insider Interviews.

<sup>6</sup> *See* Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861.

<sup>7</sup> Susan Krongold, *Writing Laws: Making Them Easier to Understand*, 24 *Ottawa L. Rev.* 495, 499 (1992).

<sup>8</sup> *See* Ian McLeod, *Principles of Legislative and Regulatory Drafting* 64 (2009) (pointing to statements from St. Paul, who noted, “except ye utter by the tongue words easy to be understood, how shall it be known what is spoken? for yet shall speak into the

air” (quoting A. Pope, *An Essay on Criticism* (1711))). McLeod also quotes C.K. Allen, who stated that, “From the laconic and often obscure terseness of our earliest statutes, especially when in Latin, we swung in the sixteenth, seventeenth and eighteenth centuries to a verbosity which succeeded only in concealing the real matter of the law under a welter of superfluous synonyms” *Id.* (quoting C.K. Allen, *Law in the Making*, 482 (7th ed. 1964)). Ruth Fox and Matt Korris, note, “not everyone favours the use of plain language,” stating that legislation is complex, and that sometimes only technical language can be as precise as the drafters need. Ruth Fox & Matt Korris, *Making Better Law: Reform of the legislative process from policy to Act 107* (2010). However, others disagree, such as former UK Parliamentary Counsel drafter Daniel Greenberg, who remarks that “plain English is an old idea; many of the people who claim to want it don’t like it when they get it; and it has severe implications on its usefulness many of which are not properly recognised.” Daniel Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems that Shape Acts of Parliament 217* (2011). He further notes that “[w]hatever the Government and the Bar Council may think, citizens like to see their judges in clothes that represent something of the majesty and distance of the law itself: in a similar way, apparently, they like to see legislation dressed up a bit, so as to emphasise that it is something out of the run of ordinary documents.” *Id.* at 219.

<sup>9</sup> Robert J. Martineau & Michael B. Salerno, *Legal, Legislative, and Rule Drafting in Plain English* 10 (2005); Bennion, *supra* note 4, at 61; G.C. Thornton, *Legislative Drafting* 45 (3d ed. 1987).

<sup>10</sup> *See e.g.*, Bennion, *supra* note 4 (remarking that, among other things, drafting statutes in plain language encourages individuals to interpret laws for themselves rather than seeking legal advice from experts, and it introduces ambiguity by exchanging precise terms for imprecise ones and introducing variation without intending to change meaning); Greenberg, *supra* note 8, at 219 (noting that some people regard the plain language drafting style as too “ordinary” and lacking in a “legal feel”).

<sup>11</sup> One of the most notable historical supporters of clear language in legislation is Jeremy Bentham. When listing properties or qualities that bodies of laws must contain, he noted that “[c]learness in respect of its language” should be included. Jeremy Bentham, *Letter II: Properties desirable in a Body of Laws, for all Purposes*, in *The Collected Works of Jeremy Bentham, ‘Legislator of the World’: Writings on Codification, Law, and Education* 117, 117 (Philip Schofield & Jonathan Harris eds., 1998); Krongold, *supra* note 7, is a Canadian drafter and a large supporter of plain language in legislation.

<sup>12</sup> *See supra* note 3 for a list of countries that have officially implemented plain language drafting in some manner.

<sup>13</sup> *See supra* note 3. Or, at least, they have set plain-language standards by which their laws are supposed to adhere to.

<sup>14</sup> *See e.g., infra* note 56 in regard to the UK Tax Law Rewrite Project.

<sup>15</sup> David Mellinkoff, *The Language of the Law* 253 (1963) (quoting Thomas Jefferson, *Letter to Joseph C. Cabell, Sept. 9, 1817*, in 17 *The Writings of Thomas Jefferson*, 417-18 (Lipscomb ed. 1905)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at vii. The author notes,

With communication the object, the principle of simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference. If there are reasons – old, refurbished, substituted, or brand-new – it is essential that lawyers know those reasons. And this not merely to satisfy an intellectual craving. An ancient and still vital maxim tells us that when the reason ceases, the rule also ceases. When and when not to use particular language is the lawyer’s daily decision. If some reason requires special language, the choice is made. If there is no reason for departure from the language of common understanding, the special usage is suspect. If, in addition, a special usage works evil, it should be abandoned, and quickly.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 285-454. Mellinkoff ended his book by declaring, “Cleansed of words without reason, much of the language of the law need not be peculiar at all. And better for it.” *Id.* at 454.

<sup>20</sup> Martineau & Salerno, *supra* note 9, at 3; Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (March 23, 1978). This E.O. was later repealed by President Reagan in Executive Order 12291, 46 C.F.R. 13193 (February 17, 1981).

<sup>21</sup> Rosemary Moukad, *New York’s Plain English Law*, 8(2) Fordham Urb. L.J. 451, 451 (1980).

<sup>22</sup> Connecticut (Conn. Gen. Stat. Ann. § 42-151 (West 2013) (requiring certain consumer contracts to be written in plain language)), Hawaii (Haw. Rev. Stat. § 487A-1 (West 2013) (mandating that certain written agreements to which a consumer is a party, as well as certain residential leases, to “be written in a clear and coherent manner using words with common and everyday meanings”)) and Maine (Me. Rev. Stat. Ann. tit. 10, § 1124 (2013) (calling for certain consumer loan and lease agreements to be written in plain language and “meaningful[ly]” divided into various sections)) followed soon thereafter with laws similar to that of New York. Harold A. Lloyd, *Plain Language Statutes: Plain Good Sense or Plain Nonsense?*, 78 Law Libr. J. 683 (1986). For a recent example, see e.g., Ore. Rev. Stat. 183.750 (West 2013), which states in Section 1 that “Every state agency shall prepare its public writings in language that is as clear and simple as possible.”

<sup>23</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>24</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996).

<sup>25</sup> Exec. Order No. 12,044, *supra* note 20 .

<sup>26</sup> Exec. Order No. 13,563, *supra* note 23, § 1(a).

<sup>27</sup> *Supra* note 24, § 1(b)(12).

<sup>28</sup> *Supra* note 24, § 3(b)(1)(B), § 3(b)(1)(C), § 3(b)(2)(A), § 3(b)(2)(B), § 3(b)(2)(D).

<sup>29</sup> However, there have been statutes that required plain language in various circumstances, mostly private law. Lloyd, *supra* note 22, at 686, states:

The Employment Retirement Income Security Act of 1974, for example, requires giving members of covered employee plans a description of such plans ‘written in a manner calculated to be understood by the average plan participant.’ The Magnuson-Moss Warranty -Federal Trade Commission Improvement Act of 1975 requires that warranties for consumer products be written in ‘simple and readily understood language.’ The Electronic Fund Transfer Act of 1978 requires that the terms for the use of

electronic funds transfer accounts be disclosed to consumers in ‘readily understandable language.’

<sup>30</sup> Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861.

<sup>31</sup> *Id.* § 2.

<sup>32</sup> See e.g., *id.* § 4(a)(1)(E) (requiring each agency to create a plain writing section on its website); § 4(b) (instructing agencies to use plain writing in all relevant documents that they issue or revise).

<sup>33</sup> *Id.* § 6.

<sup>34</sup> *Id.* § 6(b).

<sup>35</sup> *Id.* § 2.

<sup>36</sup> Plain Language Action and Information Network, *Plain Language: Improving Communication from the Federal Government to the Public*, PlainLanguage.gov [www.plainlanguage.gov/](http://www.plainlanguage.gov/) (last visited Oct. 4, 2013).

<sup>37</sup> Plain Language Action and Information Network, *Federal Plain Language Guidelines*, PlainLanguage.gov (2011), available at <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/FederalPLGuidelines.pdf/>.

<sup>38</sup> Plain Language Action and Information Network, *Plain Writing Act of 2010: Federal Agency Requirements*, PlainLanguage.gov, <http://www.plainlanguage.gov/plLaw/law/index.cfm/> (last visited October 4, 2013). The official guidance from the Office of Management and Budget is available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-15.pdf/>.

<sup>39</sup> Plain Language Action and Information Network, *Tips and Tools*, PlainLanguage.gov, <http://www.plainlanguage.gov/howto/index.cfm/> (last visited October 4, 2013).

<sup>40</sup> Plain Language Action and Information Network, *About Us*, PlainLanguage.gov, <http://www.plainlanguage.gov/site/about.cfm/> (last visited October 8, 2013).

<sup>41</sup> House Office of the Legislative Counsel, 104th Cong., *Manual On Drafting Style 5* (1995). The phrase “real people” could use a bit more clarification. Certainly lawyers, judges and other legal professionals are “real people.” Perhaps what the Legislative Counsel meant to write was “the average citizen.” Nevertheless, it remains unknown what “real people” means in this context.

<sup>42</sup> Senate Office of the Legislative Counsel, *Legislative Drafting Manual 7* (1997).

<sup>43</sup> Brian Christopher Jones, *Drafting Proper Short Bill Titles: Do States Have the Answer?* 23(2) Stan. L. & Pol’y Rev. 455, 463 (2012) (noting that the House at times completely disregards the Manual’s instructions in drafting titles and subtitles, such as in the Adam Walsh Child Protection and Safety Act of 2006, which contains multiple short titles within titles and subtitles despite the Manual’s explicit recommendations against this practice).

<sup>44</sup> House Office of the Legislative Counsel, *Quick Guide to Legislative Drafting*, House.gov (2013), available at [http://www.house.gov/legcoun/HOLC/Resources/quick\\_guide.pdf/](http://www.house.gov/legcoun/HOLC/Resources/quick_guide.pdf/).

<sup>45</sup> House Office of the Legislative Counsel, *Introduction to Legislative Drafting*, House.gov (2013), available at [http://www.house.gov/legcoun/HOLC/Drafting\\_Legislation/intro\\_to\\_drafting.pdf/](http://www.house.gov/legcoun/HOLC/Drafting_Legislation/intro_to_drafting.pdf/).

<sup>46</sup> For example, Office of the Parliamentary Counsel, Drafting Guidance (2011), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61010/Office\\_of\\_the\\_Parliamentary\\_Counsel\\_revised\\_guidance\\_16\\_12\\_11.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61010/Office_of_the_Parliamentary_Counsel_revised_guidance_16_12_11.pdf), contains a “Clarity” section, which constitutes the first eleven pages of the document. The Australian Parliamentary Counsel has multiple sections and numerous documents related to plain language and clearer law, see Office of Parliamentary Counsel, *Plain Language*, Australian Government, <http://www.opc.gov.au/plain/index.html> (last visited October 8, 2013) and Office of Parliamentary Counsel, *Clearer Commonwealth Law*, Australian Government, <http://www.opc.gov.au/clearer/index.html> (last visited October 8, 2013); and the Scottish Parliamentary Counsel has produced their own dossier on plain language and legislation, which is heavily cited in this manuscript, only seven years after their Parliament came into existence in 1999, see Office of the Scottish Parliamentary Counsel, *Plain Language and Legislation* (2006), <http://www.scotland.gov.uk/Publications/2006/02/17093804/0>.

<sup>47</sup> Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 426 (2012).

<sup>48</sup> 548 U.S. 452 (1991)

<sup>49</sup> 501 U.S. at 461 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>50</sup> See e.g., *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (“A waiver of the sovereign immunity of the United States ‘cannot be implied but must be unequivocally expressed.’” (quoting *United States v. King*, 395 U.S. 1, 4 (1969))); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992) (holding that a statute lacking unequivocal expression did not waive sovereign immunity). Scalia and Garner note that clear-statement rules are also present in the constitutional doubt canon and the presumption against retroactivity canon (Scalia, *supra* note 47, at 426, 437).

<sup>51</sup> 548 U.S. 557 (2006).

<sup>52</sup> Lawrence M. Solan, *The Language of Statutes: Laws and Their Interpretation* 193 (2010).

<sup>53</sup> See e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (declaring that a statute criminalizing breach of the peace was too broad and imprecise to meet the requirements of due process).

<sup>54</sup> *Winters v. New York*, 333 U.S. 507, 515 (1948). See also *Musser v. Utah*, 333 U.S. 95, 97 (1948) (asserting that legislation that fails to provide sufficient guidance to those seeking to follow its commands, to inform defendants of the nature of their alleged offence, or to give courts some direction in how to try the accused, violates the Due Process Clause); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972):

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

<sup>55</sup> Reed Dickerson, *The Fundamentals of Legal Drafting* 18 (1965).

<sup>56</sup> *Id.* at 20.

<sup>57</sup> William N. Eskridge, Jr., Philip Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 440 (4th ed. 2007). They further note that “[o]ne of the cardinal rules for drafters is that the language chosen should be helpful for the reader. Statutes are meant to influence conduct, and the basic purpose of almost all statutes is, obviously, better served if the statute is clear, precise and logically developed.” *Id.* (emphasis in original).

<sup>58</sup> *Id.* at 444.

<sup>59</sup> See *supra* note 3 for a list of examples.

<sup>60</sup> See *supra* note 3 for examples; see also *infra* text accompanying notes 57-65 for further examples.

<sup>61</sup> Office of the Parliamentary Counsel, *supra* note 46 at 1-2.

<sup>62</sup> Office of Scottish Parliamentary Counsel, *supra* note 3, Chapter III. See also *Tax Law Rewrite: The Way Forward*, HM Revenue & Customs, <http://www.hmrc.gov.uk/rewrite/wayforward/menu.htm> (last visited October 5, 2013). The project has led to numerous draft bills and three pieces of enacted legislation: the Capital Allowances Act 2001 (c.2), the Income Tax (Earnings and Pensions) Act 2003, (c.1) and the Income Tax (Trading and Other Income) Act 2005(c.5).

<sup>63</sup> *Id. supra* note 3.

<sup>64</sup> Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the community institutions, 5 (2003).

<sup>65</sup> Ruth & Korris, *supra* note 8, at 107-08.

<sup>66</sup> Office of Parliamentary Counsel, *Plain English Documents*, Australian Government, <http://www.opc.gov.au/plain/docs.html>. There is also a ‘Links’ section on this website, which provides links to major international organizations within and outside the UK that focus on plain language. *Id.*

<sup>67</sup> These include articles by then-First Parliamentary Counsel members Hilary Penfold, QC, *The Genesis of Laws*, Commonwealth Office of Parliamentary Counsel (1994), available at <http://www.opc.gov.au/plain/docs/genesis.pdf> and Ian Turnbull, QC, *Plain Language and Drafting in General Principles*, First Parliamentary Counsel (1993), available at [http://www.opc.gov.au/plain/docs/plain\\_draftin\\_principles.pdf](http://www.opc.gov.au/plain/docs/plain_draftin_principles.pdf).

<sup>68</sup> Australian Office of Parliamentary Counsel, *Plain English Manual* (1993), available at <http://www.opc.gov.au/about/docs/pem.pdf>.

<sup>69</sup> See Office of Parliamentary Counsel, *supra* note 66, for links to Drafting Directions. Among them are: “Building the new tax law”; “Organising the law”; “Designing the law”; and “Extracts from OPC Annual Reports.” *Id.*

<sup>70</sup> Australian Office of Parliamentary Counsel, *supra* note 66, at 4.

<sup>71</sup> Ireland Law Reform Commission, *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (2000).

<sup>72</sup> *Id.* at 86.

<sup>73</sup> *Id.* at 87.

<sup>74</sup> Office of the Scottish Parliamentary Counsel, *supra* note 62 at 20-21.



<sup>75</sup> *Id.* at 21. By contrast, the US also has an Office of the Law Revision Counsel, whose main job it is to revise the US Code from non-positive law into positive law. While they do not have an explicit policy on plain language, they do at times mention aspects related to such language. On their website they note that positive law codification, conforms to the policy, intent, and purpose of Congress in the original enactments, but the organizational structure of the law is improved, obsolete provisions are eliminated, *ambiguous provisions are clarified*, inconsistent provisions are resolved, and technical errors are corrected. (emphasis added) U.S. Office of the Law Revision Counsel, <http://uscodebeta.house.gov/codification/legislation.shtml> (last visited Nov. 10, 2013). Also, in their Positive Law Codification Brochure, they state that one of the benefits of Positive law is improved wording and form. They note that, Improved wording and form that some provisions—particularly provisions enacted many years ago—use archaic “legalese” that obscures the meaning of the text. Positive law codification provides an opportunity to update wording to achieve a more consistent and readable style. Even when no words are changed, improvements in form may make the text more understandable. For example, an overlong and complex provision may be broken down into labeled parts to aid the reader in following the text and focusing on relevant material. In all cases, great care is taken to ensure that the restatement of existing law conforms to the policy, intent, and purpose of Congress in the original enactments. U.S. Office of the Law Revision Counsel, Positive Law Codification Brochure, [http://uscodebeta.house.gov/codification/positive\\_law\\_codification.pdf](http://uscodebeta.house.gov/codification/positive_law_codification.pdf) (last visited Nov. 10, 2013).

<sup>76</sup> Ruth & Korris, *supra* note 8 at 105.

<sup>77</sup> *Id.* at 106.

<sup>78</sup> McLeod, *supra* note 8 at 64. However, it has been noted above that other prominent UK drafters, such as Bennion and Greenberg, both former members of Westminster’s Office of the Parliamentary Counsel, are critics of plain language use in statutory law.

<sup>79</sup> My exact question was: “There’s been a push in the UK for what they call ‘clear language in legislation’, where, they’re working to make it easier for ordinary citizens to understand legislation. Have you seen a change similar to that in the [United] States at all?”

<sup>80</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119

<sup>81</sup> Interview with Senate Staffer 1, in Wash. D.C. (Oct. 27, 2009).

<sup>82</sup> Interview with Media Member 8, in Wash. D.C. (Oct. 29, 2009).

<sup>83</sup> Interview with House Staffer 5, in Wash., D.C. (Oct. 22, 2009).

<sup>84</sup> Interview with Media Member 4, in Wash., D.C. (Oct. 21, 2009). It is likely that the journalist was talking about the Law Revision Unit’s work on positive law for the US Code, but I’m not convinced of this. The interviewee went on to state: And you’ll see that the Congress, and a lot of state legislatures sometimes pass laws directing various industries to be clear in their language...like the credit card bill recently. Which is called the CARD Act or something like that, or the CREDIT Act,

or something with a similar acronym. Ah...in order to force these banks to say exactly what the charges are instead of kind of bearing them in fine print, right. So, whether they do that themselves . . . usually the legislature has someone like a . . . non-partisan legislative analyst, or someone like that, whose job is to write a non-political summary of what the bill does. It’s not part of the law itself, but it is easily found and usually attached to the legislation.

Thus, it is likely that the respondent was referring to the fact that agency regulation has to be performed in plain English, and not that Congress was undergoing any re-writes of laws already on the books.

<sup>85</sup> Interview with Member of Congress 1, in Wash., D.C. (Oct. 29, 2009).

<sup>86</sup> Interview with House Staffer 4, in Wash., D.C. (Oct. 26, 2009).

<sup>87</sup> Interview with House Staffer 1, in Wash., D.C. (Oct. 27, 2009).

<sup>88</sup> *Id.*

<sup>89</sup> Interview with House Staffer 6, in Wash., D.C. (Oct. 21, 2009).

<sup>90</sup> Interview with Media Member 1, in Wash., D.C. (Oct. 23, 2009).

<sup>91</sup> Interview with Media Member 6, in Wash., D.C. (Oct. 29, 2009)

<sup>92</sup> Interview with Media Member 7, in Wash., D.C. (Oct. 28, 2009)

<sup>93</sup> *Id.*

<sup>94</sup> Staffer discussion was also in relation to the health care legislation.

<sup>95</sup> Plain Writing Act of 2010, *supra* note 6; Exec. Order 13563, *supra* note 23.

<sup>96</sup> Interview with House Staffer 6, *supra* note 89.

<sup>97</sup> Interview with House Staffer 2, in Wash., D.C. (Oct. 21, 2009).

<sup>98</sup> Interview with Media Member 8, *supra* note 82.

<sup>99</sup> Interview with House Staffer 5, *supra* note 83. This interviewee went on to state: “But, that makes me sound like I’m for unclear language, which is not what I’m trying to convey. But, yeah, I don’t really agree with those kinds of like, movements toward, you know, clear language legislation.”

<sup>100</sup> Interview with Media Member 7, *supra* note 92.

<sup>101</sup> Interview with House Staffer 6, *supra* note 89.

<sup>102</sup> Interview with House Staffer 6, *supra* note 89. Congressman’s name was eliminated for confidentiality purposes.

<sup>103</sup> Patient Protection and Affordable Care Act, *supra* note 80.

<sup>104</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).

<sup>105</sup> Interview with House Staffer 6, *supra* note 89.

<sup>106</sup> Reed Dickerson, who advocated for more intelligible and clear laws for the public, states that, [t]he draftsman’s highest responsibility is to see that the final text, when read in its proper context, contains no unresolved ambiguity . . . . It is also desirable that he [the draftsman] avoid the needless use of terms and configurations of syntax that, whatever their immediate impact, are known to carry the general risk of real or apparent ambiguity. Also, *see supra* note 4.

<sup>107</sup> Interview with Media Member 4, *supra* note 84.

<sup>108</sup> Interview with Media Member 8, *supra* note 82.

<sup>109</sup> Ruth Fox & Matt Korris, *Making Better Law: Reform of the Legislative Process from Policy to Act*, 99 (2010); Other authors have used similar language in describing their standards. For example, Krongold states that “the drafting community, governments and statute users all have a part to play in creating legislation that is *accessible, understandable and inviting* to its audience.” (emphasis added). Thus, Krongold’s standard is similar to Fox and Korris’s, but substitutes “understandable” for “intelligible”, and “inviting” for “clear” Krongold, *supra* note 7 at 495; In another example, Bekink and Botha states that “plain language refers to legal communication that is clear, understandable, accessible, and also user-friendly” Bernarn Bekink & Christo Botha, *Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing)*, 28(1) Stat. L. Rev. 34, 37 2007.

<sup>110</sup> However, Krongold noted that “[g]overnments are slowly realizing that the public not only is interested, but also has a *right* to participate in the development of statutes” (emphasis added). *Supra* note 7 at 548. Additionally, Barnes, *supra* note 4, notes that plain language has been called many things, “from an access to law or human rights issue, to good professional writing practice.”

<sup>111</sup> *Supra* note 6, Sec. 6(b).

<sup>112</sup> After all the House manual uses the terms “readable” and “understandable”, and the Senate manual also uses the term “understandable”. See *supra* notes 38 & 39.

<sup>113</sup> For example, in relation to drafting audiences, Dickerson notes,

With statutes and regulations, the audiences may be more varied. A statute addressed primarily to government officials may need to be written differently from one addressed to a segment of the public, and a statute addressed to a highly specialized segment of the public, such as the tobacco industry, may need to be written differently from one addressed to the public at large. Unfortunately, the concept of a particular legal audience and the broader concept of the ‘users of language’ are complicated by the irregularity with which usages, assumptions, and values tend to be shared even within the same speech community. The concepts of legal audience and users of the language are further complicated because some legal instruments are not normally read or intended to be read by the persons to whom they directly apply. (i.e. federal income tax laws)

Dickerson, *supra* note 55, at 19-20.

<sup>114</sup> Krongold, *supra* note 7 at 552-53, also succumbs to this, as she says, “One of the primary goals of drafting any document, including a statute, should be that its *ultimate readers* will be able to understand it” (emphasis added). However, she never defines “ultimate readers”, and this leaves her argument open to critique. Later, however, Krongold does say that the “plain language approach to statutes aims for a wider audience, not everybody. Complex statutes cannot reach everybody. They are not are not aimed at everybody anyway.” And she further elaborates on this point at 553, noting that “drafter[s] should write for the audience that is least familiar with the law”.

<sup>115</sup> Reed Dickerson, *The Diseases of Legislative Language*, 1 Harv. J. on Legis. 5 (1964).

<sup>116</sup> Senate Legislative Drafting Manual, *supra* note 42 at 7.

<sup>117</sup> House Legislative Drafting Manual, *supra* note 41 at 5.

<sup>118</sup> Scalia and Garner, *supra* note 47, *passim*, take much issue with the quality of legislative drafting in general. They state that “[n]ot only is legal drafting sometimes imperfect...” (at 39); “drafters have been notoriously sloppy with their *shalls*...the problem is that drafters have used the word improperly” (emphasis in original)(at112); “Although drafters, like all other writers and speakers, sometimes perpetuate linguistic blunders . . .” (at 140); “Despite the well-known semantic hazards or omitting the serial comma, some legal drafters do it anyway...” (at 166); “A more careful drafter might have written, in the second sentence...” (at 171); “Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.” (emphasis in original) (at 176-177); “any lawyer or legislative drafter who writes two or more specifics followed by a general residual terms without the intention that the residual term be limited may be guilty of malpractice” (at 212); and they have a technical term in relation to what they deem as “poor drafting”, known as “legislative free-riding”, which means – “A legislature’s passive reliance on the judiciary to ameliorate poor legal drafting by ‘interpreting’ statutory provisions by means other than the fair-reading method, as by creating equitable exceptions to plainly worded mandates or by filling *casus omissi* with judicially fabricated gap-fillers” (at 432).

<sup>119</sup> One main essential to any argument that is missing from both the plain language advocacy and the critic camps is empirical evidence backing their claims. This should be further explored in order to evaluate how exactly clear language or plain language could aid those who encounter legislation.

<sup>120</sup> *Supra* note 3, the following jurisdictions have done so: Australia, New Zealand, United Kingdom, Scotland, Ireland, Canada, Sweden, Finland, Hong Kong, South Africa and the European Union.

<sup>121</sup> Although, some have demonstrated that clear language has been advocated by courts. Bennion, *supra* note 4, notes that Lord Diplock stated,

Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty, demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.

(*Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 279). Bennion also cites an 1891 decision by Steven J, who notes, do draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which, therefore, it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.

*In re Castioni* [1891] 1QB 149 at 167.

<sup>122</sup> Interview with House Staffer 4, *supra* note 86; Interview with House Staffer 1, *supra* note 87; Interview with Media Member 1, *supra* note 90; Interview with Media Member 6, *supra*

note 91; Interview with House Staffer 5, *supra* note 83; Interview with Media Member 7, *supra* note 92.

<sup>123</sup> Ireland Law Reform Commission, *Report On Statutory Drafting And Interpretation: Plain Language And The Law* (2000), available at [http://www.lawreform.ie/\\_fileupload/Reports/rPlainLanguage.htm](http://www.lawreform.ie/_fileupload/Reports/rPlainLanguage.htm).

<sup>124</sup> Law Reform Commission of Victoria, *Plain English and the Law* Report No 9 (1987).

<sup>125</sup> Brian Christopher Jones, *The Congressional Short Title (R) Evolution: Changing the Face of America's Public Laws*, 101 Ky. L.J. Online 42 (2013); Brian Christopher Jones, *Drafting Proper Short Titles*, *supra* note 43; Brian Christopher Jones, *Fiduciary Principles and Statutory Form in Relation to the Necessary and Proper Clause: Potential Constitutional Implications for Congressional Short Titles*, 6(2) Univ. St. Thomas J.L. Pub. Pol'y 347 (2012); Brian Christopher Jones, *One Redeeming Quality About the 112th Congress: Refocusing on Descriptive Rather Than Evocative Short Titles*, 112 Mich. L. Rev. First Impressions 1 (2013); Brian Christopher Jones, Brian Christopher Jones, *Processes, Standards, and Politics: Drafting Short Titles in the Westminster Parliament, Scottish Parliament, and U.S. Congress*, 25(1) Fla. J. Int'l L. 57 (2013); Brian Christopher Jones, *Manipulating Public Law Favorability: Is It Really This Easy*, 2(2) Brit. J. Am. L. Studies 509 (2013).

<sup>126</sup> Krongold, *supra* note 7, notes at 503 that "A test conducted during the Victoria Law Reform Commission's plain English review established that it took lawyers twice as long to solve problems if they had to work with legislation in its traditional form. When lawyers were presented with legislation in plain language, they cut their reading and problem solving time in half." Taken from: Eagleson, *Taking the Gobbledegook Out of Language* 115. Although, it is tough to know if this was a controlled, academic experiment that took place, or merely a test administered by a review panel. Also, Krongold quotes Janice Redish of the US Dept. of Education, who stated that much savings was made after the transition of its regulations into plain language. However, this was not empirically tested, either.

<sup>127</sup> Janice C. Redish, *Testing to see if people understand a statute*, located in Krongold, *supra* note 7, at 544. However, throughout this section Redish does not cite one empirical piece of data that was tested on an individual's understandability of a statute (although, there was one study that tested regulations).

<sup>128</sup> Sir Malcolm Jack, *Erskine May's Parliamentary Practice* (24th Ed.): *The Law, Privileges, Proceedings and Usage of Parliament* 531 (2011); William McKay & Charles Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* 56 (2010).

<sup>129</sup> Jeremy Bentham, *Supplement, No. II*, *supra* note 11, at 87.

<sup>130</sup> See Interview with House Staffer 5, *supra* note 83.

<sup>131</sup> Krongold, *supra* note 7 at 505.

<sup>132</sup> All the recommendations and examples below are taken from three sources: the Scottish dossier on *Plain Language and Legislation*, *supra* note 2 at 29-43; Krongold, *supra* note 7; and Martineau & Salerno, *supra* note 8. However, not all recommendations below are mentioned or advocated by the three sources listed.

<sup>133</sup> Although, Krongold states that some legal terms have become terms of art, meaning they could not be conveyed succinctly in any other way, and they are: *plaintiff, defendant, estoppel, ex parte, res judicata, hearsay, injunction, fee simple, mandamus, easement, tenancy in common, habeas corpus, consideration, domicile, executor, testator, and remainderman* (terms taken from Elmer Driedger, *A Manual of Instructions for Legislative and Legal Drafting* 1(1982), cited in Krongold). However, Krongold states that these terms should still be challenged, and that at times it may be best to have a plain language description first and then the term of art in parenthesis.

<sup>134</sup> Krongold, *supra* note 7, at 509. She repeats this throughout her article, noting at 528 that "[p]lain language does not mean lowering standards for precision".

<sup>135</sup> See *infra* Part 2 (in regard to the domestic and international plain language context).

<sup>136</sup> Although Bennion even raises the point that criticizing plain language nowadays is akin to "undermining motherhood and apple pie" (Bennion, *supra* note 4, at 61). While overstated, he is probably correct in acknowledging that condemning plain language implementation is not a popular position in many jurisdictions.

<sup>137</sup> Even Krongold, who is highly cited throughout this article and a former professional drafter accentuates that "[s]tatutes require more effort to read than most prose. To understand a statute, a reader must be willing to spend time with it, reading it slowly, not just once, but several times. The reading should not be directed at sorting out a jigsaw puzzle but rather at becoming familiar with the whole story." *Supra* note 7, at 509.

<sup>138</sup> And even if this unlikely event does happen, the legal profession will still not be threatened. As Scalia and Garner point out, "You may be tempted to say, 'If the language were plain and unambiguous, we wouldn't be arguing about it, would we?' Banish the thought: Lawyers argue about plain and unambiguous language all the time. That is their job: to inject doubt when it is in their clients' interest." (Scalia & Garner, *supra* note 47, at 54).

<sup>139</sup> Krongold, *supra* note 7, at 554.