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And the Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate

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AND THE WINNER IS: HOW PRINCIPLES OF COGNITIVE SCIENCE RESOLVE THE PLAIN LANGUAGE DEBATE

Julie A. Baker[1]

ABSTRACT

"Legalese – you mean jargon? Legal jargon? Terrible! Terrible!"
– U. S. Supreme Court Justice Stephen G. Breyer, 2010

This statement captures the prevailing view in the teaching and practice of legal writing – that "legalese" is bad and must be eradicated; and that plain language should be employed as the alternative to legalese. Yet defenders of legalese remain – and they argue that the language of the law is intertwined with the law itself, such that "simplifying" this language detracts from its meaning and makes it less precise. How, then, is a legal writer to write?

This article posits that the two different methods are not polar opposites, but rather are "endpoints" on the spectrum of language available to the legal writer. To explain this view, the article begins by reviewing what we mean by "legalese" vs. "plain language," and how the one has fallen into disfavor while the other has become the prevailing method in legal writing pedagogy and practice. The article then undertakes a study of Cognitive Science, particularly Cognitive Fluency – the measure of how easy or difficult the mental process feels when the brain receives information. Fluency principles are critical to the understanding of the preference for plain language, which until now has been supported only by anecdotal and empirical surveys.

Applying fluency principles to legal writing, the article demonstrates that most of the time, plain language is, in fact, the right way to write, as it is "fluent" and thereby inspires feelings of ease, confidence, and trust in readers (whereas legalese is "disfluent," engendering feelings of dislike and mistrust). The article suggests, however, that there are times when the legal

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writer's analytical or persuasive goals may be served by more difficult, less fluent language – and that, going forward, an approach aimed at moderating fluency will produce the most effective legal writing. Thus, no language (except, maybe, "law French") should be prohibited entirely; but all language should be considered as the range of options available to the skilled legal writer.

. . .

Lawyers are professional writers.[2] Despite philosophical changes over time, the goal of legal writing has always remained the same: to effectively communicate legal analysis in writing to an intended audience, the legal reader. The practice of legal writing is predominantly concerned with two forms of communication: informative and persuasive.[3] Writing intended to explain particular situations or outcomes is informative or referential.[4] Alternatively, persuasive writing is intended to influence or elicit a change in the reader's position.[5] Both types of writing, then, are meant to have distinct, deliberate effects on their readers – and legal writing professors and practitioners are always seeking the best strategies to maximize these effects.[6]

Unfortunately, according to our readers, these strategies have been largely unsuccessful. It is both the perception and, too often, the reality that legal writers are bad writers – and the blame for this has been placed squarely on "legalese." In fact, since the early 1990s, the majority support in legal writing pedagogy has been for the "plain language" method of legal writing as the alternative to legalese.[7] These two competing methods have been viewed as mutually exclusive: proponents of plain language demand the eradication of legalese;[8] while proponents of legalese maintain that the lexicon *is* the law, and that simplification cannot be achieved without dilution of meaning and effect.[9]

At the same time, research in the field of Cognitive Psychology has

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[2] *See* MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS 13 (2010) ("As lawyers, we know that writing is central to our work … our jobs require a steady flow of clear, professional written communications.")

[3] Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1092 (1986).

[4] *Id.* (noting that the audience remains passive while reading objective analyses).

[5] *Id.* (describing that goal of persuasive writing is to actively engage the reader, "to get the reader to act in a certain way").

[6] *See id.*

[7] *See generally* RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 3-6 (5th ed. 2005); Joseph Kimble, *Answering the Critics of Plain Language*¸5 SCRIBES J. LEGAL WRITING 51, 56-65 (1994-95) (hereinafter "*Answering the Critics*").

[8] *See id.*

[9] *E.g.*, Robyn Penman, *Unspeakable Acts and Other Deeds: A Critique of Plain Language*, 7 INFO. DESIGN J. 121 (1993).

given us new and precise tools to understand and influence how the human mind receives and processes information.[10] Specifically, recent studies indicate that "Cognitive Fluency" – the measure of how easy or difficult the mental process feels when the brain is receiving information – is a key indicator not only of whether and how people understand information, but also of people's *judgments* regarding that information.[11] In other words, the more "fluent" a piece of written information is, the better a reader will understand it, and the better he or she will *like*, *trust and believe it.*[12] If the use of certain language heightens or improves fluency, then it offers myriad strategic benefits for legal writers. Thus, if cognitive data can account for the success – or failure – of current methods of legal writing, then our pedagogy and practice should be adapted to incorporate and exploit these applicable lessons.

This article argues that examined through the lens of cognitive fluency, the two competing methods of legal writing are not mutually exclusive, but should be viewed more like "endpoints" on the spectrum of language available to the legal writer. Knowing this, an effective legal writer is most apt to achieve credibility and persuasive force through deliberate, conscious choice of language from across this spectrum of complexity and clarity. Part I of the article briefly traces the development of legal writing pedagogy and practice as it has evolved from legalese into our modern preference for plain language. Part II lays out the principles of cognitive fluency and information processing already being used by many other professions to enhance communications with their consumers and customers. Part III then explores the ways in which legal writing professionals may have stumbled upon some of these fluency principles empirically, and how we should begin to embrace them deliberately – increasing the efficacy of our legal writing pedagogy and practice not by insisting on one method as the "winner," but by intentionally targeting fluency.

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[10] Other cognitive science principles have already been explored by legal writing professionals in the areas of metaphor and narrative. *See, e.g.*, Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIR'S 169 (2004); Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Memoranda*, 46 WILLIAMETTE L. REV. 255 (2009-2010); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U.L. REV. 767 (2006).

[11] Daniel M. Oppenheimer, *The Secret Life of Fluency*, 12 TRENDS COGNITIVE SCI. 6, 237, 237-38 (2008) (hereinafter "*Secret Life of Fluency*").

[12] *See id.* at 237.

I. LEGAL WRITING: A HISTORY

For more than twenty years, the concept of simple, clear writing has permeated the legal profession.[13] In both academia and professional practice, lawyers are urged to write in concise and simple language – plain language – in order to best persuade the reader.[14] While this concept has gone by many names and inspired much debate, its evolution has been entirely theoretical and anecdotal; scholarly research has not offered any direct, scientific support for its use. Correspondingly, "legalese" still lingers; and proponents of plain language must still justify and defend their methods and choices. An examination of the evolution of the plain language method demonstrates the logical and the empirical reasons for its success, along with a basis for recognizing its continuing vulnerabilities.

A. The Current-Traditional Paradigm

At the outset, legal writing was taught via the current-traditional paradigm.[15] This paradigm focused on the finished written product, rather than on the process of organizing and drafting the document.[16] Lawyers learned to write in courses involved teachers assigning papers, students writing papers, and then, teachers assigning grades.[17] The only efforts to improve writing quality were those at the final revision and editing stages.[18] Proponents believed that the initial composition process was a "mysterious creative activity" that could not be learned.[19] As a result, teachers relied on "frequent writing followed by careful criticism" to improve students' writing.[20]

Ultimately, this paradigm overlooked both the existence of the writing process and the audience's role in it. Law students were instructed on how to write either objective or persuasive documents merely by distinguishing among formal styles or constructions.[21] Instruction on the

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[13] *See* Bryan A. Garner, *In Praise of Simplicity But in Derogation of Simplism*, 4 SCRIBES J. LEGAL WRITING 123, 123 (1993) (hereinafter "*In Praise of Simplicity*").

[14] *See id.* (emphasizing the importance of expressing difficult ideas simply and directly).

[15] Phelps, *supra* note 3, at 1093 (describing problems with the "current-traditional paradigm").

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76, 77-78 (1982).

[20] Richard E. Young, *Paradigms and Problems: Needed Research in Rhetorical Invention*, RESEARCH ON COMPOSING 29, 31 (1978).

[21] Phelps, *supra* note 3, at 1093.

modes of discourse was omitted entirely.[22] The current-traditional paradigm "neglect[ed] the role of the reader and the writer, seeing writing as form rather than as conversation."[23] The form typically preferred by current-traditional writers was traditional legalese, now widely criticized as making the law inaccessible and preventing effective communication between writers and readers.[24]

B. The Use of Legalese

Historically, the legal community has written using different vocabulary, syntax, organization and style than other professional writers.[25] For instance, legal vocabulary contains long, rare, and archaic English words.[26] It also uses Latin phrases, "law French," and the notorious "terms of art."[27] As for syntax, long and complex sentences have been the norm, with no shortage of lists, misplaced clauses, and phrases.[28] Paragraphs in legal documents are often organized by tradition, without respect to importance, and offering no help to the reader in navigating the relationships between complex legal concepts and principles.[29]

Defenders of legalese most often cite precision as its justification. Essentially, the argument proceeds that the common law system employed in the United States allows for the establishment of settled legal principles and meanings based on *stare decisis*.[30] Because earlier decisions are binding law, lawyers can anticipate what words mean by what they have always meant.[31] Similarly, terms of art convey generally agreed-upon legal principles.[32] Yet in an effort to account for as many scenarios and possible outcomes as may result (or be litigated), some proponents of legalese find it necessary to expand, qualify, explain, and re-explain.[33] Ironically, this line

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[22] *Id.*

[23] *Id.*

[24] *E.g.*, Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301, 305 (1987). The term "legalese" was coined to describe the language that seemingly only lawyers understood. *See* Stanley M. Johanson, *Counterpoint: In Defense of Plain Language*, 3 SCRIBES J. LEGAL WRITING 37, 38 (1992).

[25] Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 535 (1985).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *See id.*

[30] *See* Kimble, *Answering the Critics*, *supra* note 7, at 51-52.

[31] *See* Benson, *supra* note 25, at 561-62.

[32] *Id.*

[33] *See id.* at 523-27 (listing the negative characteristics of legalese).

of reasoning seems to contradict – or at least ignore – the roles of intelligibility and precision as tools for communication.[34]

Despite this long tradition (or maybe because of it), consumers of legalese complained for decades that the language employed by lawyers was too difficult to understand.[35] Legalese has also been assaulted on the grounds that it is overly wordy, lengthy, and vague.[36] Complaints from lawyers and non-lawyers alike refer to the "dense nature" and "unintelligibility" of legalese.[37] In fact, critics of legalese go as far as accusing lawyers of "poisoning language in order to fleece their clients."[38] As Thomas Jefferson once said, "[t]he most valuable of all talents is that of never using two words when one will do."[39] It was from these criticisms that the "new rhetoric" movement was born.

C. The New Rhetoric Movement

In the 1980's, judges and practitioners began to complain about the lack of writing ability that recent graduates brought to their practices.[40] The message being sent back to law schools was that poor legal writing was ineffective for analytical and persuasive discourse, no more effective than "silence in a spoken conversation."[41] Critics of the current-traditional paradigm identified three key flaws: (1) that it assumed writers knew what they were going to write at the outset, ignoring the critical process of organization; (2) that it failed to acknowledge the writing process as linear and systematic, beginning with prewriting and progressing to writing to rewriting; and (3) that it isolated "editing" as the only part of the process that a legal writing teacher could teach, incorrectly assuming that the

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[34] *See* Kimble, *Answering the Critics*, *supra* note 7, at 55 (describing plain language as "an ally of precision" because it seeks to eliminate confusion).

[35] *See* Benson, *supra* note 25, at 535.

[36] *Id.* at 522.

[37] *Id.*

[38] Id. at 521 (quoting English jurist and philosopher Jeremy Bentham). *See also* George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 347 (1987) (quoting same).

[39] PlainLanguage.gov, *Historical Quotes on Plain Language and Writing Simply*, http://www.plainlanguage.gov/resources/quotes/historical.cfm (last visited 8/15/11).

[40] Phelps, *supra* note 3, at 1094. *See also* Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 J. LEGAL WRITING INST. 183, 184 (2010) ("In recent decades, academics and some judges have urged the legal community to write in Plain English"); Kristen K. Robbins Tiscione, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. LEGAL WRITING INST. 257 (2002).

[41] *Id.* (or maybe even less so, as legalese often adds to the confusion).

writing process itself simply could not be learned.[42]

"New Rhetoric" attempted to solve these deficiencies by considering not only the finished form, but the process as well.[43] This new rhetoric acknowledged that legal writing was a conversation between the writer and the reader.[44] Most notably, the new rhetoric paradigm focused on brevity and clarity throughout the writing process to improve reader comprehension.[45] The new rhetoric method applied the five basic theses of classical rhetoric to legal writing pedagogy: (1) that writing is recursive rather than linear; (2) that writing is rhetorically based; (3) that the written product is evaluated based on how well it fulfills the writer's intent; (4) that writing is a creative activity that can be analyzed, described, and taught; and (5) that the teaching of writing is well-served by linguistic research and research into the composing process.[46]

Although the fundamentals of new rhetoric were not rooted in scientific evidence, they logically suggested that making certain changes to the writing process overall could have a profound impact on the finished product.[47] Application of these principles addressed the complaints of judges and practitioners, and provided a new aim for legal writing pedagogy.[48] Over time, proponents of new rhetoric saw the value of teaching writers to use simple and clear language.[49] In order to best carry out the goals of new rhetoric, theorists devised the plain language method of writing.

D. The Plain Language Approach

The ideas supporting new rhetoric evolved to become the platform for plain language. Advocates for the new plain language approach theorized that the effective conversation sought by the proponents of new rhetoric could not be achieved until the language it was conducted in was

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[42] *See* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 40 (1994).

[43] Phelps, *supra* note 3, at 1090.

[44] *Id.* at 1095 (explaining that writing should be viewed from the perspectives of both the writer and the reader, as a form of "verbal communication by other means").

[45] *Id.*

[46] *Id.* at 1094 (discussing proponents' desire to learn what happens during the "internal act of writing" and to intervene during that act).

[47] *Id.* at 1090.

[48] Phelps, *supra* note 3, at 1094-95.

[49] *Id.* at 1091 ("When students enter law school, they begin an initiation into a new 'discourse community'; they find their legal personalities by mastering a new 'tribal speech.' They need to know how this tribal speech resembles and differs from the speech and writing they already know, and we need a pedagogy that emphasizes law's communal and conversational nature.")

intelligible to the reader.[50] If the objectives of legal writing were to be clear, simple, and persuasive, then writing in plain language was the best way to further those objectives.[51]

Plain language is more than just writing in simple terms and striving for brevity.[52] While both of these are considerations, "[p]lain [language] is language that is not artificially complicated, but is clear and effective for its intended audience… ."[53] The movement does not strive for overly simplistic writing, but eliminates or replaces superfluous or "antiquated and inflated" words and phrases.[54] Writers employing plain language plan, design, and organize their documents in an overall effort to achieve clear communication with the reader. Plain language writers also use straightforward sentences and simple words, so that the writing does not interfere with the goals of communication and comprehension.[55]

Despite the criticisms of legalese and prior approaches to legal writing, the transition to plain language has not occurred without great opposition and argument (no doubt what one would expect among lawyers). Defenders of legalese have argued that "plain language is a solution in a search of a problem."[56] In other words, its defenders protest that legalese has been the method of conducting business for centuries throughout which statutes, wills, contracts and countless legal documents have been drafted in the traditional style; had it not worked, it would have been changed a long time ago.[57] In rebuttal, proponents of plain language argue that while this has been practice, it has not been a *good* practice; and that the confusion it has created among lawyer and laypersons alike requires correction.[58]

Supporters of plain language maintain that legal writings have no value to readers who cannot understand them; and that precision should not

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[50] *Id.* at 1102.

[51] In defining these objectives, it is important to remember that legal writings are not intended solely for members of the legal community, like lawyers and judges. Legalese also prevents laypersons from comprehending documents vital to their physical and financial well-being (wills, waivers of liability, statutes, etc). *See* Benson, *supra* note 25, at 558-59.

[52] Wayne Schiess, *What Plain English Really Is*, 9 SCRIBES J. LEGAL WRITING 43, 63 (2004).

[53] *Id.* at 65 (quoting PETER BUTT & RICHARD CASTLE, MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE, 174, 185-86 (2nd ed. 2001) (emphasis added)). *See also* WYDICK, supra note 7, at 5-6.

[54] *Id.* at 63.

[55] Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 2 (1997) (hereinafter "*Writing for Dollars*").

[56] Benson, *supra* note 25, at 558.

[57] *Id.*

[58] *Id.* at 558-59.

be confused with clarity.[59] Rather, the process of reducing certain terms to common language actually "uncovers the ambiguity and errors that traditional style, with all its excesses, tends to hide."[60] As a result, plain language more effectively directs the reader's attention to the ideas and analyses being conveyed, rather than forcing the reader to have to "ferret it out" for him or herself.[61] Moreover, defenders of plain language stress that this style does not call for the complete expulsion of terms of art from the legal lexicon; it merely proposes that legal documents be constructed as comprehensibly as possible.[62] Even staunch plain language advocates acknowledge that, regardless of audience, not every term of art need necessarily be replaced.[63] Whereas proponents of legalese place equal weight on *all* legal lexicon and terms of art, plain language proponents seek to filter out those terms that cloud reader comprehension.[64] Properly executed, plain language improves the reading experience for all legal readers.[65] For this reason, the plain language approach to writing has consistently grown in popularity.

E. Plain Language in Current Legal Writing Pedagogy and Practice

An examination of current legal writing pedagogy and practice suggests that the plain language movement has all but won the day. The

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[59] *Id.* *See also* Johanson, *supra* note 24, at 39. Anecdotal evidence accounts for abundant instances of perplexed citizens frustrated with the legalese used in contracts, release forms, tax initiatives, insurance policies, and so on. *See Recent News*, PLAINLANGUAGE.GOV, http://www.plainlanguage.gov/news/index.cfm?topic=home (last visited 8/15/11). In his article, Benson relates the following striking example:

> A physician told his insurance agent that a rainstorm had caused damage to his home. The company replied with a two-page letter of boilerplate legal language. Somewhere in this "gobbledygook" the company was merely trying to tell him that they would be sending an inspector out to see the problem. In response, the physician asserted that the company's letter was not understandable for the common man, as it was "presented in a smoke of confusion and 'double talk.'" He requested that the company write him a new letter written more simply and plainly.

Benson, *supra* note 25, at 535.

[60] Kimble, *Writing for Dollars*, *supra* note 55, at 2. Moreover, while plain language may look easy, it is actually difficult to achieve. *See* Kimble, *Answering the Critics*, supra note 7, at 53 (contending that only the "best minds" and "best writers" can take a complicated topic and express it in easy-to-understand terms).

[61] Benson & Kessler, *supra* note 24, at 305.

[62] Johanson, *supra* note 24, at 38-39.

[63] *Id.* (*e.g.*, "proximate cause" and "*res judicata*").

[64] *Id.*

[65] *Id.*

defenses of legalese outlined above have proved insufficient to survive the onslaught of criticism from the general public and rebuttal arguments made by the proponents of plain language. Indeed, the Justices of the United States Supreme Court have made clear their views on the undesirability of legalese, including responding to interview questions about legalese with the following:[66]

> Justice Breyer: "Legalese – you mean jargon? Legal jargon? Terrible! Terrible! I would try to avoid it as much as possible. No point. Adds nothing."[67]
>
> Justice Thomas: "[W]e have to be careful not to overuse [legalese]. … We might think we're saying something important when we're really not. It can be pretentious."[68]
>
> Justice Ginsberg: "I can't bear [legalese]. I don't even like legal Latin. If you can say it in plain English, you should."[69]

In terms of affirmative supports, however, the proponents of plain language have based their reasoning almost exclusively on anecdotal and behavioral research.[70] These anecdotal and empirical supports clearly indicate a positive effect stemming from the use of plain language.[71] They fail, however, to answer the question of *why* audiences prefer plain language than to legalese. Without this "why," we can never truly silence the critics of plain language, nor can we evaluate this latest paradigm to determine whether it really is the most effective method for teaching current

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[66] Bryan A. Garner, *Interviews with the United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING (entire issue) (2010).

[67] *Id.* at 156.

[68] *Id.* at 97-98.

[69] *Id.* at 141. And Justice Scalia had this to say in the book that he coauthored with Bryan Garner: "Jargon adds nothing but a phony air of expertise. … [W]hat is *the instant case*? Does it have anything to do with instant coffee? Write normal English." ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 113-14 (2008).

[70] *See id. See also* Garner, *In Praise of Simplicity*, *supra* note 13, at 123; Flammer, *supra* note 40, at 187-90.

[71] For example, in one study the Internal Revenue Service compared the ability of taxpayers to complete federal income tax forms in both traditional and plain English forms. *See* Benson, *supra* note 25, at 534. Taxpayers completed the new forms more accurately and in a shorter time than the traditional forms. *Id.* According to some researchers, the support for the method is inherent in its findings: "write for your readers." *See* Kimble, *Writing for Dollars*, *supra* note 55, at 6.

and future legal writers. The application of cognitive science principles to legal writing pedagogy helps to answer these questions and provides insight into strategies for the future. Ultimately, it is simply this: understanding the minds of readers will enable legal writers to make the choices that will best achieve their analytical and persuasive objectives.

II. THE COGNITIVE PROCESS, FLUENCY, AND JUDGMENT FORMATION

Cognition is the act of knowing.[72] Cognitive psychology is the study of the mental processes which dictate how people think and process information.[73] This subdiscipline of psychology promotes the use of the scientific method to study higher brain functioning.[74] Major areas of research include perception, language, memory, problem-solving, decision-making, judgment and intelligence.[75] As this field has evolved, "information processing" has become the leading paradigm for those who analyze how the adult brain functions.[76] Within this model, cognitive psychologists have defined the area of study as the way individuals collect, interpret, and recall environmental stimuli.[77] Many varying characteristics can significantly influence how easily the reader understands text, both in a direct ("judgment formation") and indirect ("processing choice") manner.[78] Understanding information processing is key for legal writers, because the more knowledge we have about how the brain works, the better we can understand how individuals read and comprehend written analyses.[79]

A. Cognitive Fluency

As we receive information and attempt to make judgments, our mental processes are greatly impacted by "fluency."[80] Fluency evaluates

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[72] *Merriam-Webster Student Dictionary*, WORDCENTRAL.COM, http://www.wordcentral.com/cgi-bin/student?book=Student&va=cognition (last visited 8/15/11).

[73] *See* ROY LACHMAN, ET AL., COGNITIVE PSYCHOLOGY AND INFORMATION PROCESSING: AN INTRODUCTION (Psychology Press 1st ed. 1979).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 6.

[77] *See* LACHMAN, *supra* note73, at 6.

[78] *See* Oppenheimer, *Secret Life of Fluency*, *supra* note 11, at 237 (explaining that fluency can influence judgment directly by attributional processes or indirectly by changing how information is represented).

[79] *Id.*

[80] *See* Christian Unkelbach, *The Learned Interpretation of Cognitive Fluency*, 17 PSYCHOLOGICAL SCIENCE VOL. 4, 339, 339 (2006).

how easy or difficult the mental process feels.[81] It relates to the level of confidence a person has regarding his or her understanding of an object or piece of information.[82] Simply put, a reader more quickly and easily processes fluent communications.[83] Psychology – and cognitive theory in particular – recognize two unique systems for information processing.[84] The first system is the "associative system," which operates by comparing a novel stimulus with known information about the world.[85] This system of analysis is based primarily on probabilities and assessing new stimuli by referencing previously perceived objects.[86] This system is often characterized by quick, automatic reasoning decisions based on inferences.[87] The second system is referred to as a "rule-based," product, or analytic system.[88] It allows for a conscious consideration of the stimulus in decision-making situations.[89] By actively considering multiple options, explanations and deviations, this system attempts to describe the world through logical analysis.[90] Decisions made via this system can produce thorough reasoning, rather than mere predictions as offered by the associative system, which relies on known experiences.[91]

Fluency plays a role in determining which mental operation is used for information processing.[92] In familiar situations, individuals are likely to employ System 1 processing.[93] Because an analogy can be formed from past experience, the more detailed analysis of System 2 is not needed.[94] Importantly, the root of the analysis (and system choice) is the formulation of a confidence judgment, based on fluency, about how known or familiar a new stimulus seems.[95] Where the stimulus is novel or "disfluent," the problem solver will likely opt to use a System 2 analysis and thoroughly

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[81] *See* Oppenheimer, *Secret Life of Fluency*, *supra* note 11, at 237.

[82] *Id.*

[83] *See* Daniel M. Oppenheimer & Michael C. Frank, *A Rose in Any Other Font Would Not Smell as Sweet: Effects of Perceptual Fluency on Categorization*, COGNITION 106, at 1178 (2007).

[84] *See* S.A. Sloman, *The Empirical Case for Two Systems of Reasoning*, PSYCHOLOGY BULLETIN 119, at 3 (1996).

[85] *Id.* at 4.

[86] *Id*. at 4.

[87] *See* Oppenheimer, *Secret Life of Fluency*, *supra* note 11, at 239.

[88] *See* Sloman, *supra* note 84, at 3.

[89] JONATHAN ST. B. T. EVANS, ET AL., ESSAYS IN COGNITIVE PSYCHOLOGY: RATIONALITY AND REASONING 145-46 (PSYCHOLOGY PRESS 1996).

[90] *See* Sloman, *supra* note 4, at 6.

[91] *Id.*

[92] *See* Oppenheimer, *Secret Life of Fluency*, *supra* note 11, at 239.

[93] *Id.*

[94] *Id.*

[95] *Id.*

consider the product of multiple possible solutions to make a decision.[96] This, too, is important for the legal writer to understand -- because the possibility exists to consciously elicit varying levels of fluency in order to trigger a particular type of reasoning.[97]

Researchers have discovered that characteristics like font, color, and spacing can affect how understandable a written stimulus is.[98] For example, in one study, researchers asked participants to rate how likely a specified animal/object had a certain feature (e.g., "How likely is it that a cat meows?").[99] In the "control" condition, participants were given a chart that listed the stimuli in normal 12-point Arial font. In the "lowered fluency" condition, the same chart was printed in a smaller italic font that was faded. Although the words on the lowered fluency chart were degraded, they were entirely legible. The results showed that the group with the lower fluency chart made poorer judgments about how often a feature belonged to an animal/object; that is, participants reading the more difficult-to-read chart judged features to be less likely for any given animal/object than the participants reading the fluent chart. The researchers hypothesized that those participants may have experienced difficulty reading the materials, which in turn may have lowered their ability to process the stimuli.[100]

In addition to the appearance of the text, word choices and sentence structure also affect how easy it is for a reader to understand a piece of writing. For this reason, readers may believe that writers are less intelligent if their texts are riddled with complex vocabulary and convoluted grammar – probably the exact opposite of the writers' intent.[101] This hypothesis was confirmed by asking students to judge how intelligent they believed a person to be based on a writing sample.[102] Seventy-one Stanford University undergraduate students were asked to read six different personal statements of aspiring English graduate students. These textual complications lowered fluency, and in the end, simple texts were given higher ratings. Despite the common perception that a large vocabulary makes writing sound more intelligent, the students believed that the texts containing long words and complicated sentences were written by someone of lower intelligence.[103]

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[96] *See* Sloman, *supra* note 4, at 3.

[97] *Id. See also* Oppenheimer, *Secret Life of Fluency*, *supra* note 11, at 239.

[98] *Id.*

[99] *See* Oppenheimer & Frank, *supra* note 83, at 1185-86.

[100] *See id.* (suggesting that those readers may have become frustrated or generally less able to understand the words and in return had more difficulty with processing).

[101] *See* Daniel M. Oppenheimer, *Consequences of Erudite Vernacular Utilized Irrespective of Necessity: Problems with Using Long Words Needlessly*, 20 APPLIED COGNITIVE PSYCHOL. 139 (2006) (hereinafter "*Erudite Vernacular*").

[102] *Id.* at 140-41.

[103] *Id.* at 142 (suggesting the results occurred because the complex texts were less

As a result, the researchers concluded that writers should avoid needless complexity in order to increase reader understanding.[104]

The impact of fluency sometimes turns not on the information itself, but on how the information is perceived.[105] For example, fluency plays a large role when a reader comes across an unfamiliar word or symbol. This role was examined in a study rating the perceptions of stock names and symbols which measured for both fluency and judgments.[106] Research demonstrated that companies with a greater fluency of stock name (*e.g.*, Barnings, Foleman, Hillard) performed better than other stocks having less fluent names (*e.g.*, Ulymnius, Queown, Jojemnen, Xagibdan).[107] Similarly, stocks with pronounceable three letter symbols (*e.g.*, KAR) sold better than those with unpronounceable symbols (*e.g.*, RDO).[108] The researchers discussed these findings and concluded, fittingly, that "…sometimes a surprisingly simple theory is a successful predictor of human behavior."[109]

Most importantly for the legal writer, fluency acts as a cue for judgment formation.[110] Research has shown that where people are unfamiliar with the truth of a statement, fluency is one factor that the mind considers.[111] For instance, if a person was presented with the written sentence, "There are 8,024 words in the English language that begin with the letter B," the fluency conveyed by the font, color and clarity of the text might help offer the individual's mind some measure of confidence or skepticism.[112] This phenomenon demonstrates how fluency can shape a reader's judgment.[113] Similarly, one researcher found that readers presented with two phrases identical in meaning – "Woes unite enemies" vs. "Woes unite foes" – more readily accepted and believed the second,

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fluent).

[104] *Id.* at 152.

[105] *See* Unkelbach, *supra* note 80, at 339.

[106] Adam L. Alter & Daniel M. Oppenheimer, *Predicting Short-term Stock Fluctuations by Using Processing Fluency*, 103 PROC. NAT'L ACAD. SCIENCES 24, 9369, 9371 (2006).

[107] *Id. See Data Set 1*, PNAS.org, http://www.pnas.org/content/suppl/2006/05/24/0601071103.DC1/01071DataSet1.pdf (last visited 8/15/11).

[108] *See* Alter & Oppenheim, *supra* note 106, at 9371.

[109] *See id.*

[110] *See* Unkelbach, *supra* note 80, at 339.

[111] *Id. See, e.g.*, Hyunjin Song & Norbert Schwarz, *If It's Easy to Read, It's Easy to Do, Pretty, Good, and True*, THE PSYCHOLOGIST, VOL. 23, NO. 2, 108-11 (Feb. 2010); Anuj K. Shah & Daniel M. Oppenheimer, *Easy Does It: The Role of Fluency in Cue Weighting*, JUDGMENT AND DECISION MAKING, VOL. 2, NO. 6, 371-79 (Dec. 2007); Rolf Reber & Norbert Schwarz, *Effects of Perceptual Fluency on Judgments of Truth*, 8 CONSCIOUSNESS AND COGNITION 338-42 (1999).

[112] *Id.*

[113] *See* Oppenheimer, *Secret Life of Fluency*, *supra* note 11, at 239.

rhyming version, an example of the "Rhyme as Reason" effect.[114] Studies such as these have proven that greater fluency results in more positive judgments, and lower fluency results in more negative judgments.[115] Further, readers may not consciously realize what words are foreign, what fonts are difficult to read, and what print has been blurred.[116] These feelings of ease or difficulty are "nearly effortless" for the brain to realize, and allow readers to make almost immediate judgments – including judgments about what is persuasive and what is not.[117]

B. Implementing the Tenets of Fluency

Font, color, spacing, vocabulary, grammar, and myriad other characteristics of writing greatly shape how readers comprehend material. Studies undoubtedly indicate that the higher the fluency, the better experience for the reader. The profound effect that fluency has on comprehension, likeability, and profitability has not gone unnoticed, but has been used to influence language choices in the stock market, advertising, customer relations, and even politics. These industries have recognized, and made use of, the powerful findings made by cognitive psychology researchers. Many businesses and professionals have implemented the basic tenets of fluency, and as a direct result have successfully increased sales, attained new clients, saved money, and garnered trust.

"Easy to say makes easy to buy."[118] In keeping with the research, some companies have realized that their stocks may sell better if they have simpler names.[119] Research showed that out of 89 companies that were tracked for their first year on the market, companies with easy to pronounce names were traded at a higher price than companies whose names were harder to pronounce.[120] This research looked further, and analyzed the three-letter symbols for the company.[121] While some symbols could be

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[114] Matthew McGlone & Jessica Tofighbakshs, *Birds of a Feather Flock Conjointly(?): Rhyme as Reason in Aphorisms*, J. PSYCHOLOGICAL SCI., VOL. 11, NO. 5, at 424 (Sept. 2000).

[115] *See* Unkelbach, *supra* note 80, at 339. Similarly, in the 2008 Song & Schwartz study, researchers discovered that people misread the difficulty of a new exercise program and a new recipe based on the difficulty of the font in which the instructions for each were published. *See* Song & Schwartz, *supra* note 111, at 108-10.

[116] *See* Oppenheimer, *Secret Life of Fluency*, *supra* note 11, at 239.

[117] *See id.*

[118] Art Markman, *A Stock by Any Other Name Might Not Sell as Well*, PSYCHOLOGY TODAY, October 2, 2009.

[119] Alter & Oppenheim, *supra* note 106, at 9371.

[120] *Id.*

[121] *Id.*

pronounced phonetically (WIF), others could not (BGJ).[122] Similar to the earlier finding, stocks with pronounceable symbols sold at a higher price than stocks with symbols that could not be pronounced.[123]

Advertising campaigns have long applied the tenets of fluency in order to effectively reach out to consumers. When looking at the top 100 slogans of all time, the vast majority are concise and simple.[124] At number one, Volkswagen had great success with its "think small" campaign.[125] Other noteworthy and fluent slogans include: "A Diamond is Forever"; "Have it your way"; "Melts in your mouth, not in your hands"; "Breakfast of Champions"; and "Just Do It."[126] They all use common words and straightforward sentence structure, and they cause the reader no confusion. When asked what makes a good advertising slogan, a writer in the field responded, "It should be simple and memorable. It should be relevant to the target and unique to the brand. It uses consumer language."[127]

In response to the growing public knowledge that simple language is more fluent than complex language, some companies have altered their written materials to increase consumer awareness and satisfaction. Federal Express simplified its operations manuals, and saved $400,000 in the first year.[128] Similarly, General Electric rewrote one of its software manuals to eliminate unduly complex language, and saved up to $375,000 in the first year due to decreased customer service calls to the help desk.[129] The Veterans Benefits Association noted a high number of calls to its help desk, worked on creating a more fluent form, and the number of customer calls dropped from 1,100 to 200 in one location in the following year.[130] Just as their consumers are benefiting from increased fluency, the companies are seeing the benefits, too.

Politicians have always strived to relate to their constituents and thereby garner votes. Speeches are a particularly vital means of communication in politics, as they are often calculated to convey

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[122] *Id.*

[123] *Id.*

[124] *The Advertising Century: Top 100 Advertising Campaigns*, ADAGE.COM, http://adage.com/century/campaigns.html (last visited 8/15/11).

[125] *Id.*

[126] *Id.* How many of these were you able to identify immediately upon reading them? They are the well-known slogans for: DeBeers; Burger King; M&Ms; Wheaties; and Nike.

[127] Willy E. Arcilla, *What makes a good advertising slogan*, INQUIRER.NET (Nov. 21, 2008, 4:01) http://business.inquirer.net/money/features/view/20081121-173486/What-makes-a-good-advertising-slogan (last visited 8/15/11).

[128] *Making written information easier to understand*, THEPLAINLANGUAGEGROUP.COM, http://www.theplainlanguagegroup.com/Good-For-Business.html (last visited 8/15/11).

[129] *Id.*

[130] *Id.*

particularized messages to the public. Using the "wrong" word or phrase can do serious damage to an initiative or a career. Former Mayor of New York City Rudolph Giuliani made many public speeches during his tenure, some of which have been studied by researchers interested in his language use.[131] Researchers have found that Mayor Giuliani deliberately changed the complexity of his language based on how he wanted to be perceived: during times of crisis, his words became simpler in an effort to garner trust from the people.[132] The federal government, too, has recognized that citizens will respond better to materials that are written with them in mind as the intended audience. In light of this, in October of 2010 the federal government enacted the Plain Writing Act of 2010 (H.R. 946), which requires the federal government to "write all new publications, forms, and publicly distributed documents in a 'clear, concise, well-organized' manner that follows the best practices of plain language writing."[133]

Clearly, cognitive fluency principles have had major effects on language choices in many professional sectors. By grounding their writing and communication strategies in science, these professionals have been able to use these fluency principles to their advantage. It is time for the legal writing field to catch up. Proponents of plain language as the primary legal writing paradigm will almost certainly be more successful in their quest if they similarly use and apply this science as hard evidence for their position.

III. AND THE WINNER IS: THE (SURPRISING) REVISED CASE FOR LEGALESE

While other professions have recognized the impacts of fluency, many lawyers continue to resist the change from legalese to plain language; and even those who have come to accept and practice plain language did so empirically, without employing any science to reach this decision.[134] Yet when looking at the research involving fluency and reader comprehension, it is clear that a reader's mental process is substantially affected by how easy it feels to read the material. We should expect that the same process used to think about stock names, slogans, customer manuals, and speeches, will be used to think about legal analyses and legal arguments. If people in

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[131] James W. Pennebaker & Thomas C. Lay, *Language Use and Personality During Crises: Analysis of Mayor Rudolph Guiliani's Press Conferences*, 36 J. OF RES. IN PERSONALITY 271 (2002).

[132] *See id.*

[133] *See Plain Writing Act of 2010*, CENTERFORPLAINLANGUAGE.ORG, http://centerforplainlanguage.org/plain-writing-laws/plain-writing-actof2010 (last visited 8/15/11).

[134] *See HR 946: Plain Writing Act of* 2010, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h111-946 (last visited 8/15/11).

the business world gain a sense of confidence, trust, and liking from writings that are straightforward, then why not in the legal world as well? Our objectives are the same: to persuade and convey a message to our intended audience in the most effective way possible.

Now that scientific research clearly demonstrates the direct link between fluency and efficacy in written communication, legal writers should make the most of this information. Instead of falling victim to proponents of legalese who contend that plain language "dumbs down" legal analysis, we should build upon the clear evidence proving otherwise.[135] At the same time, complex legal language should not be rejected out-of-hand. Instead, just as good advertising slogans make deliberate use of language to deliver their messages, good legal writing should make deliberate use of language to ensure that readers receive – and believe – their writers' intended messages.

A. *Targeting Fluency in Legal Analysis and Argument*

We know that legal readers form judgments, both conscious and unconscious, about what they read. Key to a reader's acceptance of a writer's analysis is the *ethos*, or credibility, of the author: a reader will not accept or be persuaded by a legal writer's analysis until he or she is convinced that that writer is knowledgeable and capable of making the legal and factual assessments that are required.[136] Similarly, a legal analysis will fail unless it meets the test of *logos*, or logic – each issue must be analyzed in a clear, logical, step-by-step way, such that the reader sees how the writer reached his or her conclusions and, ideally, agrees with them.[137]

Both of these requirements, *ethos* and *logos*, are best served by the use of plain, fluent language. Readers cannot be expected to trust and believe what they cannot understand.[138] Thus, many of the principles of plain language that have evolved anecdotally can now be shown to have scientific support: using short, simple sentences and clear, repetitive words to communicate legal rules and standards;[139] employing headings, subheadings, and thesis sentences to serve as signposts to lead readers through the analyses;[140] and practicing all the principles of typography that

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[135] As one study confirmed earlier, plain language can actually have the opposite effect: it can cause a reader to believe an author is *more* intelligent than the author who uses convoluted legalese and archaic language. *See* Oppenheimer, *supra* note 101, at 139.

[136] *See* MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 10-11 (2d ed. 2008).

[137] *See id.*

[138] *See* Johanson, *supra* note 24, at 38-39.

[139] *See* Wydick, *supra* note 7, at 35-36.

[140] *See* MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 192-98,

have most recently taken the legal writing field by storm.[141] Applying the teachings of cognitive science, we now also know that "sounding like a lawyer" is likely to work against us as legal writers, making our readers (colleagues, opposing counsel, and clients) *less* impressed by our reasoning and our predictions, not more. Because it is never the goal of objective analysis to encourage disbelief or rejection by readers, disfluent forms of communication (*i.e.*, legalese) should never be employed in objective legal writing.

Persuasive writings – *e.g.*, trial and settlement memoranda, or appellate briefs – similarly require *ethos* and *logos*. As studies in fluency have demonstrated, words and communications with higher fluency increase trust and confidence; which means that persuasiveness can be increased when a reader experiences positive feelings about his or her comprehension of the arguments or assertions being offered. But persuasive writings also implicate *pathos*, the sense of sympathy or justice that the reader feels for the writer's position or argument.[142] Fluent language serves *pathos* directly, too – by making the reader more readily like and trust what is written *simply because* it is easier and more comfortable to comprehend. Thus, persuasive writers should strive for fluency when making their affirmative arguments and offering proofs and supports for them.

On the other hand, the science suggests that using *less* fluent language when addressing counter-facts and opposing arguments will actually *increase* the writer's persuasion – by making the reader less friendly to those less fluent portions of the opponent's analysis.[143] One of the most difficult tasks, particularly for new legal writers, is to effectively distinguish or counteract an opponent's arguments – the "bad facts" or "bad law" that every advocate must confront.[144] Here again, some of the traditional techniques reflect the science: for example, strategic placement of counterarguments (in between affirmative arguments, never at the beginning or end of an argument); and reduced focus on counterarguments (including use of passive voice and minimizing of "air time").[145] But now, we can add to these techniques the ability to make counter-facts and

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204-08 (3rd ed. 2010).

[141] *See, e.g.*, BUTTERICK, *supra* note 2, at 24 ("Good typography can help your reader devote less attention to the mechanics of reading and more attention to your message. Conversely, bad typography can distract your reader and undermine your message.").

[142] *See* Smith, *supra* note 136, at 10-11.

[143] *See, e.g.*, Hyunjin Song and Norbert Schwarz, *If It's Hard to Read, It's Hard to Do: Processing Fluency Affects Effort, Prediction and Motivation*, PSYCH. SCI. 986, VOL. 19, NO. 10, 986-88 (2008).

[144] *See* Beazley, *supra* note 140, at 95.

[145] *See id.* at 95-98.

arguments seem less appealing by deliberately discussing them in unclear, inaccessible language – maybe even in Latin! – thereby implementing the science of cognition to give legal writers another tool in their persuasive arsenals.[146]

B. Where Do We Go From Here? Moderating Fluency

Perhaps the most interesting potential application of these cognitive fluency principles going forward is in their use to moderate readers' understanding and engagement by moderating fluency. Recent cognitive studies have shown that while more fluent words are easier and more familiar, they are also less stimulating, and cause our brains to engage much less when processing them.[147] Less fluent communications, on the other hand, require the brain to engage in more complex processing – which also

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[146] Consider, for example, a persuasive memo arguing that a defendant should be found not guilty of "operating" while intoxicated because she realized she was "tipsy" and decided to stay in her parked car and "sleep it off." The affirmative argument is based on the policy underlying the drunk driving statute – to protect the safety of the public by keeping intoxicated drivers from moving their cars while drunk. Defense counsel anticipates that the prosecution will argue that the courts in the jurisdiction have not recognized a "shelter" defense for drunk drivers, and that courts in precedent cases have found that even a driver sleeping in a parked car with the engine idling may be enough for "operating," due to the risk that the driver might wake up and decide to start moving the car. After making the affirmative arguments, defense counsel could follow fluency teaching to address the prosecution's arguments as follows:

> Although it is true that our courts have not yet adopted a "shelter" defense, policy considerations favor encouraging drunk drivers such as Ms. D to choose not to drive. *The prosecution's objections on the grounds of policy are inapposite. It may be true that concerns exist regarding the risk of intoxicated individuals' waking up, finding their keys in the ignition, and deciding to further engage the machinery of their vehicles. Certainly, intoxicated individuals have a propensity to exhibit lowered inhibitions and poor judgment.* But the public safety concern is better served by creating a "shelter" for drivers who make the right choice – not to drive.

Two cautions: one, writers should be careful to separate their own, well-written affirmative arguments from the less fluent discussion of the opposing arguments (italicized in the example above); and two, writers should remember that in the end, it is the law that wins the argument, not the writing. But the writing can certainly help move the decision-maker either toward the desired result or further away from it.

[147] *E.g.*, Connor Diemand-Yauman, Daniel M. Oppenheimer, & Erikka B. Vaughan, *Fortune Favors the* ***BOLD*** *(*and the Italicized*): Effects of Disfluency on Educational Outcomes*, COGNITION 1-5 (2010), doi:10.1016/j.cognition.2010.09.012 (last visited August 16, 2011); Adam L. Alter, Daniel M. Oppenheimer, Nicholas Eply, & Rebecca N. Eyre, *Overcoming Intuition: Metacognitive Difficulty Activates Analytic Reasoning*, JOURNAL OF EXPERIMENTAL PSYCHOLOGY, VOL. 136, NO. 4, 569-76 (2007); Oppenheimer & Frank, *supra* note 83, at 1178-79.

means processing that is more careful and, often, more interesting.[148] Less fluent communications have been found to heighten risk perception among readers, too.[149] Thus, skillful legal writers should actually be able to *choose* the level at which they cause their readers to engage by choosing the level of fluency that they employ – always taking care to make their writing neither too simplistic, nor so complicated that the reader gets frustrated and simply gives up. These findings have implications for all aspects of legal writing practice and pedagogy, and require us to accept the proposition that legalese, while not usually preferred, still has a place at one end of the spectrum of language available to legal writers to accomplish their goals.

[148] *See id.*
[149] *See id.*