

The Ethics of Style

In the debate about plain language reform in legal writing, something important has been overlooked. It is something fundamental, both in terms of how people communicate and in terms of ethics. That something is fairness.

If we do not begin from the moral premise that the writer owes the reader clarity, then we begin from the wrong premise. This is an ethical judgment on my part, and I'm stating it as plainly as possible. Fairness means playing by the rules of the game, but it also means not taking advantage of the less powerful. And in the relationship between writer and reader, the reader is powerless. He is entirely at the writer's mercy: he must read whatever the writer puts on the page. The writer can easily take advantage of this imbalance of power. When he takes advantage of his position, and presents ideas in ways that are difficult to understand, the result is text that we call "unclear." We usually leave it at that. Let's not leave it at that. Let's understand, once and for all, that there is an important ethical dimension to the behavior of writing. In fact, it is not too much to say that when the writer has a high degree of language competence, his ethics ultimately determine his style.

I'm going to discuss two transactional documents, both from the same real-world transaction (buying a car). The issue of fairness applies to transactional documents in a way it does not to most other kinds of writing. In transactional documents, fairness is at stake because the text governs and can compel behavior.

Distinguishing "fair" from "reasonable"

Before we go on, we had better clearly distinguish "fair" from "reasonable." Demanding that I sprout wings and fly is neither fair nor unfair, because it fails the test of being reasonable: such a demand defies the laws of physiology and physics, and it is not within my power to comply. We'd call this demand preposterous and leave it at that.

And because I live in the United States, where English is the everyday language, it would be equally unreasonable to demand that I understand a transactional document written in Swahili. Fairness would not apply here either. This demand wouldn't violate anything as humorless as the laws of genetics and gravity, but it does fly in the face of something else – a cultural norm.

What's important about norms in this discussion is that they do more than reflect a culture's standards. They define what is reasonable and, over time, they mandate what a culture implicitly *expects* of its people. When we go to the market, we wear clothing, even in perfect weather, because that's what our society has decided is appropriate. It's standard behavior; it's the norm. But wearing clothing has also become something society expects of us, and in this case the expectation has acquired the force of law. If we go naked to the market, we can be arrested for indecency. And we all understand this. So if we did go naked to the market and were arrested for indecency, we would not claim

that the arrest was “unfair.” We might dispute fairness of the law (arguing that freedom of expression includes airing one’s bare buttocks), but we would not dispute the fairness of the arrest. The law is on the books; the policeman is acting within the rules.

So, to sum up this groundwork, it makes no sense to examine whether behavior is “fair” until we establish that the behavior is reasonable. The policeman’s behavior in arresting Lydia for going naked to the market is fair. The behavior of demanding that she sprout wings and fly is not. Lydia is aware of the cultural expectation (in this case, a law) that she wear clothing, and she is aware that she can be arrested if she does not, and she chooses to break the rules. But she is incapable of sprouting wings and flying, even if she tries her best.

The promissory note

What does any of this have to do with legal writing? Let’s go back to that transactional document written in Swahili. Any agreement or contract written in Swahili would be incomprehensible to most of us, so we wouldn’t even bother calling it “unclear.” Instead, we’d say simply that it’s written in a foreign language, and that whether it’s clearly written in Swahili is something we can’t reasonably be expected to know. Our norm is English. We are expected to understand that language, but we are not responsible for understanding Swahili.

Or are we? For all practical purposes, many transactional documents might as well be written in a foreign language. That complaint is hardly new, but usually it’s framed as a matter of clarity, as though clarity were a result of technique alone and not an outcome of the writer’s ethics. As far as I’m concerned, it should go without saying that the writer of a transactional document has a *moral duty* to be clear. The time has come to frame the issue as a matter of fairness, because while my culture doesn’t expect me to understand Swahili, it does expect me to understand the paragraph below. According to my culture, the text below is both reasonable and fair:

Maker(s) recognize(s) and acknowledge(s) that Dealer retains a security interest in the said vehicle and that, upon default of (12.0%) percent interest per annum accruing from the date of said default, to all remedies of a seller provided by Title 8.2 Code of Virginia, and to all statutory and common law remedies available to the seller or holder, including without limitation, the right to repossess the vehicle wherever found. Maker(s) hereby waive(s) presentment, demand, protest, dishonor, offset and the benefit of the homestead exemption. In the event any action is undertaken by the Dealer to enforce it’s rights hereunder, Maker(s) agrees to pay all costs arising there from, plus reasonable attorneys fees of not less than fifteen (15%) of the amount due and owing. This note is the joint and several obligation of all makers and shall be binding upon their successors and assigns.

This is a paragraph – verbatim – from a promissory note used by a car dealership in Virginia. Anyone who buys an automobile from this dealership is expected to understand the text, and we infer this simply because the document is placed on the table for us to read and sign. Without thinking about it any more than we stop to think whether we should wear clothing to the market, we know that the text has been vetted by attorneys, that it has been approved by the State of Virginia, and that the dealership has sanctioned

it. So, ostensibly, we should be capable at least of understanding this text, never mind at what cost of effort. But the key word there is *ostensibly*. We'll return to this point in a minute.

Before we examine this paragraph from various ethical points of view, let's assess it as *text* – that is, as an artifact, created by people for a particular purpose. In this case, the primary purpose of the artifact is to communicate something.

A casual look at the surface reveals incompetence with the nuts and bolts of usage (the instances are too numerous to list). The reader can overcome this kind of incompetence; it doesn't require much extra work to wrest intention from "it's rights." Next we turn up instances where the writer's choice of style (unrelated to law) adds unnecessary difficulty. "Maker(s)," for example, for example, is the complex choice when we remember that someone is going to sign the document, and that that reader thinks of himself as "I." (If two individuals sign the document, we have two signatures and "I" applies to both.) So a glance at the surface suggests that skillful hands have not massaged the text.

Digging a bit deeper, we encounter faults far worse, faults that begin to bear on the issue of fairness. The first sentence is blissful in its disregard for making sense: a phrase, and possibly more than one, has been omitted after "upon default." No matter how adept we are as readers, we cannot read what is not on the page. Expecting anyone to do so is unreasonable, and yet the text is there, and the document requires our signature.

But let us keep digging, because the truly interesting stuff is deeper down. Deeper down we find the most remarkable fault of this paragraph: its absolute blitheness in the use of jargon. The use of "*the* said" instantly reveals that the writer either does not understand how to properly complicate things with "said" or is neglecting to pay attention to his words. This seems like a minor matter until we remember how sloppy writing erodes the reader's trust, and how the erosion of trust provokes readers to stray into proofreading. And it is a minor matter when compared to the preposterous use of legal terms of art. The idea of "waiving dishonor," for example, is as clear to me as it would be to a brindled cow. I don't know what "presentment" means. I could look it up, but then I still wouldn't know what this writer meant by it. I understand what a "homestead exemption" is in terms of property taxes, but I can't see what it has to do with buying a car. To sum this up: though I'm highly skilled as a reader of English, I don't understand what I'm reading.

And so I have a question: For all practical purposes, what is the difference between the paragraph from the promissory note and a paragraph in Swahili? None. Arguing that the paragraph might be valid because it is "written in English" would be the worst sort of casuistry. The language used in the paragraph is only *ostensible* English. That is, one can claim that it is written in English – after all, the words do lurk in an unabridged dictionary – but to claim that it is written in anything approaching understandable English would be nonsense of the highest ray serene. What we have here is the linguistic equivalent of a snake inside a turtle shell.

The point is that my culture finds such writing to be reasonable and expects me to be able to understand it. Is the cultural expectation fair?

To begin to answer this question, we must remember that in the case of public discourse (that is, when reader and writer are unknown to each other), the reader doesn't care about the evolution of the text. He doesn't know and doesn't care whether the text was snatched from a century-old form book or composed from scratch. He doesn't care how many times it was reviewed and revised, or who gave final approval for its use, or why it has been squeezed onto two pages when mere legibility requires four. All he cares about is the text and format immediately before him *because that's what he gets* – that's what he has to read. For this reason, it is fitting to understand “the writer” as whoever is ultimately responsible for what the reader gets. In the example here, the writer is the individual at the car dealership (most likely an attorney) who decided that the text was good enough.

Next, to tease out the issue of fairness, let's take the four branches of normative ethics¹ and apply them to the situation *from the reader's point of view*.

- Pragmatics, which is concerned only with consequences and not with motives, would argue that the text fails because it results in confusion and wasted time. Pragmatics would add that if a writer lacks competence with language, he should not be in a position to write a transactional document.
- Utilitarianism would argue that the text fails because the writer makes things easy for himself at the expense of hundreds, if not thousands, of readers.
- Deontological (duty-based) ethics, which are concerned with intention, would argue that the text fails because the writer wouldn't want to be in the position of the reader. Kant would remark (probably with great impatience) that the writer fails in fulfilling the prime imperative of any writer, *being clear*.
- Virtue ethics would find the writer lacking in a number of traits that constitute what's good in the behavior of writing; the two most conspicuously absent are competence and respect.

What does respect for the reader have to do with good writing? Ask U.S. Magistrate Judge Jacob P. Hart, who in March 2004 reduced an attorney's fees because of this very issue. Explaining his decision in *Devore v City of Philadelphia*, Judge Hart remarked that the attorneys' “complete lack of care in his written product shows disrespect for the court. His errors, not just typographical, caused the court . . . to spend an inordinate amount of time deciphering the arguments.” The judge went on to indict the attorney's prose as “vague, ambiguous, unintelligible, verbose, and repetitive.”²

¹ These are the four major branches of ethics today. The central tenet of *pragmatism* (also called *consequentialism*) is that only outcomes matter. Motives don't. The core notion of *utilitarianism* is that the good of the many outweighs the good of the individual. *Deontological ethics* are concerned primarily with fulfilling one's duty to others. In the famous formulation of Immanuel Kant, “Always act in such a way that you could desire your act to be universal.” For this branch of ethics, intention counts. *Virtue ethics* are concerned with the most intimate traits of an individual. This school examines the relative “good” of, for example, courage and cowardice, or diligence and laziness.

² This ruling, in *Devore v City of Philadelphia*, was reported by several periodicals. The quotations here are from the article in the *New York Times* on March 4, 2004: <http://www.law.uh.edu/lrw/lrwcourses.html>

Here we have a reader, in this case a federal judge, who believes he's entitled to the writer's respect – and who actually says so. This reader also believes he's entitled to be treated fairly, as evidenced by the remark “an inordinate amount of time,” for nothing can be deemed inordinate unless there is an expectation of what's ordinary. And from this remark we may distill the following: from Judge Hart's perspective, the attorney's sloppiness imposed an unfair burden.

Instances of such burdens – often verging on unreasonable expectations – can be had by the bushel. We encounter them every day. We catch only a glimpse of the disclaimer paragraph of small print flashed for two seconds at the end of a television commercial. Apparently our culture expects us to comprehend what it says, just as we're expected to grasp, at the end of a commercial on the radio, a similar disclaimer uttered in speech so rapid that no listener can separate the words. In certain contracts, not only is the vocabulary unfamiliar to the reader and the sentences so convoluted as to defy description, but the text is presented in a pitch so tiny that we need a microscope in order to be baffled by what it says.

The “conditions of sale” agreement

Please imagine two solid pages of the following presentation of ideas from a “conditions of sale” agreement. When you imagine it, picture quarter-inch margins, and picture a type size quite a bit smaller than the one you see here.³

Manufacturer has reserved the right to change the design of any new motor vehicle, chassis, accessories or parts thereof at any time without notice and without obligation to make the same or any similar change upon any motor vehicle, chassis, accessories or parts thereof previously purchased or ordered by or shipped to Dealer or being manufactured or sold in accordance with Dealer's orders. Accordingly, in event of any such change by Manufacturer, Dealer shall have no obligation to Purchaser to make the same or any similar change in any motor vehicle, chassis, accessories, or parts thereof covered by this invoice either before or subsequent to delivery thereof to Purchaser.

Someone approved this. An individual who would cry, “Unfair burden!” if you asked him to read it went ahead and approved it for others to struggle with. Forget meaning; format alone is unfair. It is tantamount to someone whispering, from a mile away, at the bottom of a well, while suffering from acute laryngitis, something we know we need to hear. We strain and strain to hear what he's saying – and maybe we catch a phrase here and there, but we can't possibly get the context. So we need to move closer – and closer, and closer still, to make communication convenient for the speaker. We have to go out of our way, walk that mile, because the whisperer, in plain language now, either fails to recognize his responsibility to us or is simply too lazy to give a damn.

And there is another motive. Here we have format so daunting as to border on the deceptive. If the writer is even remotely conscious, then he understands perfectly well that such an outrageously tiny pitch – again, picture two solid pages of it – serves to discourage reading. Does he have reason here to wish to discourage reading? You bet he does. The “Conditions of Sale” agreement, like the promissory note and the other

³ My computer is unable to replicate the microscopic 6-point of the original. This agreement was used by the same car dealership.

“closing” documents, is geared primarily to protecting the dealership. Thus, all the dealership wants is the customer’s signature – it is unconcerned with whether the customer understands what he’s signing. Toss fairness out the window, and we can argue that it’s to the dealership’s advantage if the customer doesn’t fully understand all the restrictions.

And so what the writer owes the reader – clear language and a clear visual presentation of that language – is stood on its head. I don’t believe this is accidental. Raw facility with language is evident in the conditions-of-sale example, and one cannot achieve that degree of facility without also achieving a grasp of what decent communication requires. In other words, difficult text was presented in microscopic type on purpose. Let’s be candid: this is the behavior of a bully.

Suppose I have something to ship to you, and I have a choice of two boxcars (one in perfect condition and the other dilapidated), and I pay the same fee regardless of which boxcar I choose. In this case, I would choose the boxcar in perfect condition *if I cared* about the cargo’s reaching you in decent shape. If I didn’t care whether the cargo reached you in decent shape, I might choose the dilapidated boxcar. I would certainly choose the dilapidated boxcar if I wanted the cargo to be damaged by the time it reached you – a motive we might call bad faith.⁴

And this is where style becomes a matter for ethical scrutiny. Style is form. Style is how we choose to express an idea.⁵ It’s the boxcar we put the cargo in. It’s self-evident that anyone who has *inter alia* in his vocabulary also has *among other things* in it. When he writes *inter alia*, he has chosen the ruined boxcar for the cargo of his thought. When he writes long, herky-jerky sentences that smother the main idea with qualifications and conditions, he is choosing the ruined boxcar. And he is choosing it when he uses a tiny typeface and writes page-long paragraphs. The important point is that he is choosing it – and since he knows better, the choice bespeaks callousness.

Self-interest is not necessarily the enemy of fairness, and certainly not of fairness to a reader. In transactional matters, an attorney’s job is to represent and protect his client’s interests, and he can do that by behaving like a professional – by knowing what the law allows and by structuring agreements, on his client’s behalf, to make best use of what the law allows. But that is content, and the fairness of content, of the law itself, is not the concern of this short paper. I am concerned with the fairness of how that content is expressed: with the ethics of style.

The reader has a job: to understand what’s put before him. The writer, on the other hand, has a duty: to facilitate that understanding – to be clear. *When a writer is*

⁴ I’m using “bad faith” in both its moral sense (lack of concern for the welfare of another) and its legal sense (fraud, or the willing attempt to deceive). If you pay me for something and I ship it in such a way that I can reasonably expect it’ll be damaged on arrival, I am defrauding you.

⁵ I’m using “style” to cover every aspect of text. It includes not merely the choice of words and the length of sentences, but all formatting decisions and page-design elements, from the size of the type to the width of the margins.

competent with language, ethics are the final arbiter of his style. With transactional documents, fairness is at stake because such documents govern and can compel behavior.

Ultimately, fairness is a matter of opinion. It can't be quantified or measured; it has no telltale odor and doesn't announce its presence with a chime. In terms of the relationship between writer and reader, there's no clear demarcation of fair from foul like the line of white chalk on a baseball field. Like pornography, unfairness is difficult to define, but people know it when they see it. Those who don't should not be writing.

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