REGULATING PLAIN LANGUAGE

BY MICHAEL A. BLASIE*

What one scholar coined a "quiet revolution" in consumer contracts has been a half century in the making. And the revolution extends well beyond consumer contracts. Legislatures and regulators passed over seven hundred plain language laws infusing plain language into consumer contracts, notices, disclosures, government reports, court forms, election ballots, and more. They did so with one goal in mind: make legal documents more understandable. This shared goal crosses doctrines and pierces the traditional private law-public law divide. Yet, despite sharing a goal, lawmakers differ dramatically on how to achieve it. The result is a bizarre patchwork of constitutions, statutes, and regulations with massive variations.

By examining these variations, this Article takes on the previously overlooked normative implications of plain language law design. Lawmakers must decide which documents to cover, what standard to apply, and what enforcement and penalties to allow, which necessarily involves classic policy-infused decisions like choosing between the free market or regulation, allocating burdens and costs, and line drawing. As a result, this Article contends that the traditional view that document design is a lawyer skillset reducible to convenient lists of "best practices" is wrong. Lawmakers have replaced lawyer discretion. Their involvement, and the scale and complexity of their design choices, have converted plain language into a legal doctrine driven by quintessential public policies.

More, the complexity of plain language laws extends beyond how to design the laws to the more fundamental question of who designs them. The complex patchwork of codified laws from legislatures and regulators sits alongside expansive common law plain language requirements unilaterally injected by courts. Predictably, with so many decisions made by different decisionmakers, discrepancies pervade the national landscape. Such discrepancies create separations of powers tension and inefficiencies as drafters struggle to find and comply with the many different requirements from different lawmakers. This Article argues for an expansion of plain language common law, because courts are best equipped to create such a standard. It turns out plain language laws are anything but plain.

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* Michael Blasie is an Assistant Professor of Law at Seattle University School of Law. For insightful comments and support, thank you to Yonathan Arbel, Mary Bowman, Rosa Kim, Margaret Hannon, Daniel Schwarcz, Wayne Scheiss, Rachel Stabler, Mark Wojcik, and the 2022 AALS conference attendees.

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INTRODUCTION

"What if we'd already revolutionized contract law but no one knew it?" asked Professor David Hoffman after learning of a "quiet revolution" and "shocking story" in consumer contracts.[1] The revolution and story he referred to is the passage of nearly eight hundred plain language laws.[2] The laws are ubiquitous: every state, the District of Columbia, and the federal government have them.[3] They exist in every form of codified law: constitutions, statutes, and regulations.[4] While over half govern consumer contracts, coverage ranges from insurance policies and leases,[5] to food labels and healthcare disclosures,[6] to election ballots and guardianship waivers.[7] In terms of content, these laws use a variety of approaches to theoretically increase a document's understandability.[8]

Legions of legal doctrines pivot on whether readers understand a document—just imagine all of the notice and waiver requirements. Did the defendant understand that written *Miranda* warning? Was that notice enough to help the patient give informed consent? Did the defendant know the consequences of not appearing at the immigration hearing? Then there are arenas like contract law, which assumes a signer understood the contract.[9] Yet, study after study shows no one actually understands them.[10] If plain language is the solution to incomprehensible legal documents, plain language laws could yield a host of theoretical benefits from protecting constitutional rights to improving access to justice to informing consumers. More, plain language laws may show that the traditional divides between public and private law, and between

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1. David Hoffman, *What If We'd Already Revolutionized Contract Law but No One Knew It?,* JOTWELL (Mar. 8, 2022), https://contracts.jotwell.com/what-if-wed-already-revolutionized-contract-law-but-no-one-knew-it/ [https://perma.cc/DE7Z-A9A6].

2. *See infra* Part III.

3. *See, e.g.*, MINN. STAT. § 72C.10(2)(a) (2022); D.C. CODE § 1-1162.02(a)(7) (2022); Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010).

4. *See, e.g.*, IND. CONST. art. IV, § 20; MINN. STAT. § 72C.10(2)(a) (2022); 17 C.F.R. § 230.421(d)(1) (2022).

5. *See, e.g.*, ARK. CODE ANN. § 23-61-115(b)(5); N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.5(c)(1) (2021).

6. *See, e.g.*, MICH. ADMIN. CODE r. 285.569.10(3) (2023); N.M. CODE R. § 8.300.2.11(b)(2)(b) (LexisNexis 2023).

7. *See, e.g.*, ALASKA STAT. ANN. § 15.80.005 (2021); VT. STAT. ANN. tit. 15A, § 2-406(a) (2022).

8. *See infra* Section II.B.

9. *See* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2257, 2260 (2019).

10. *See, e.g.*, Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 387 (2020).

different doctrines, are more permeable than previously thought. After all, if plain language laws make an environmental report more understandable then they probably improve a privacy agreement too. So, do they work?

The journey towards an answer requires examining these laws' design. Because most of these codified plain language laws cover different kinds of documents and apply different standards, the effects of one law may differ from another. Plus, no scholarship has yet to detail what is perhaps the most critical design choice: how to enforce the law. Can tenants bring a class action against a landlord for using an incomprehensible lease? If so, what are the damages? Must a state void election results because the ballot was not at an eighth-grade reading level? This Article investigates the key design decisions lawmakers face when creating codified plain language laws. Along the way, it makes four contributions to scholarship.

First, this Article provides a classification scheme for codified plain language law design choices. Legislatures and regulators must select the coverage, standard, and enforcement schemes for a plain language law. Each decision has enormous complexity. Nationwide there are fifteen coverage categories and four standards. The enforcement schemes for each of the nearly eight hundred plain language laws consist of several pivotal decisions like whether the law is enforceable, if so by who and how, and what penalties are available. The gamut of enforcement schemes is nearly all the ones conceivable from being explicitly or functionally unenforceable, to allowing, capping, or prohibiting monetary damages; to voiding or preserving enforcement, to authorizing or barring class actions.[11] Plus, there are good faith exceptions and other defenses.[12]

Second, this Article classifies the scope of common law plain language requirements. Courts have unliterally created common law plain language requirements that supplement, expand, and perhaps conflict with the codified laws passed by legislatures and regulators. Overlooked by scholars and perhaps by legislatures and regulators, courts have been hyperactive in applying their own plain language requirements.[13] Courts have imported such requirements into constitutional doctrines like procedural Due Process[14] and voluntary and knowing constitutional waivers.[15] More, courts now examine plain

11. *See infra* Section II.C.

12. *See infra* Section II.C.3.

13. *See infra* Part III.

14. *See, e.g.*, *Walters v. Reno*, No. C94-1204C, 1996 WL 897662, at *15 (W.D. Wash. Mar. 13, 1996).

15. *See, e.g.*, *Dennis v. G4S Secure Sols. (USA), Inc.*, No. 1:20-CV-46, 2021 WL 6275630, at *3, *5 (E.D. Tenn. Jan. 28, 2021).

language to answer contract law questions: like whether a contract is ambiguous,[16] whether the product has unambiguous intent[17] or mutual assent,[18] or is unconscionable.[19] Courts even consider the use or absence of plain language as evidence of discrimination.[20]

Third, this Article argues the design of legal documents is a policy-infused decision for lawmakers. While traditional scholarship and practitioner views classified document drafting as a skill or strategy—that view is no longer accurate. Plain language drafting is now doctrinal. More, decisions about whether to incorporate plain language into law, what documents to cover, what standard to apply, and what enforcement scheme to deploy are intensely policy-infused decisions.[21] Each decision affects burdens and costs and can achieve very different public policy goals.[22]

Fourth, this Article contends courts should expand their role in crafting common law plain language standards. The involvement of all three branches of government in creating plain language laws creates a separation of powers tension and inefficiencies over who controls these policy-infused decisions.[23] Part of that tension stems from branches effectively regulating government documents produced by the other branches.[24] Another part of the tension comes from branches creating plain language legal requirements that potentially conflict with the policy-infused decisions made by another branch's laws.[25] Lawmakers should resolve some of these tensions by tasking legislatures and regulators with creating minimum plain language standards, while allowing courts to expand upon and refine those standards in common law fashion.

This Article proceeds as follows. Part I details the Plain Language Movement, explaining what plain language is, how it gained steam in the United States, and its purported advantages and potential disadvantages. Part II reveals the varying designs of codified plain language laws passed by legislatures and regulators, including variations in coverage, standards, and enforcement schemes. Part III identifies the common law

16. *See, e.g.*, *Badger Mut. Ins. Co. v. Schmitz*, 647 N.W.2d 223, 236–38 (Wis. 2002).

17. *See, e.g.*, *Gross v. Sweet*, 400 N.E.2d 306, 309 (N.Y. 1979).

18. *See, e.g.*, *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1180 (N.J. 2016).

19. *See, e.g.*, *Stormont-Vail Hosp. v. Spurling*, No. 110,979, 2014 WL 4082469, (Kan. Ct. App. 2014).

20. *See, e.g.*, *United States v. City of New York*, 637 F. Supp. 2d 77, 122–23, 131–32 (E.D.N.Y. 2009).

21. *See infra* Section IV.A.

22. *See infra* Part IV.

23. *See infra* Section IV.B.

24. *See infra* Section IV.B.

25. *See infra* Section IV.B.

plain language requirements courts have created. Part IV argues the creation of codified and uncodified plain language laws are intensely policy-infused decisions and explains why and how courts should take on a bigger role in designing plain language standards.

I. THE PLAIN LANGUAGE MOVEMENT

The lengthy, centuries-old complaints about difficulties understanding legal documents[26] led to consensus on one modern solution: plain language. This Part details how over the last century, plain language emerged as a form of advice on drafting legal documents.

A. What Is Plain Language?

Plain language—sometimes called "plain English"[27]—refers to drafting a document in ways that maximize the understandability of a document's contents.[28] Plain language is a reader-focused concept. According to the Plain Language Association International, a "communication is in plain language if its wording, structure, and design

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26. Kenneth B. Firtel, *Plain English: A Reappraisal of the Intended Audience of Disclosure Under the Securities Act of 1933*, 72 S. CAL. L. REV. 851, 852 (1999) (acknowledging history of complaints).

27. *What Is Plain Language?*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/about/definitions/ [https://perma.cc/GA58-VLNV] (last visited Mar. 20, 2023) ("Plain language (also called plain writing or plain English) . . . ."); Wayne Schiess, *Using Intensifiers Is Literally a Crime*, 96 MICH. B.J. 48, 48 (2017) ("'Plain Language' is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee."); Michael D. Murray, *Diagrammatics and the Proactive Visualization of Legal Information*, 43 U. ARK. LITTLE ROCK L. REV. 1, 2 n.5 (2021) ("The Proactive Law movement shares common and parallel goals with the Plain Language (or Plain English) movement[s] . . . .").

28. Firtel, *supra* note 26, at 878–82; Uri Benoliel & Xu (Vivian) Zheng, *Are Disclosures Readable? An Empirical Test*, 70 ALA. L. REV. 237, 241–45 (2018) (discussing how the plain language movement tries to make legal texts readable and easily understood by normal consumers); Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 J. LEGAL WRITING INST. 183, 185 (2010) ("The basic idea behind it is to make the document as reader-friendly as possible to get the message across."); Andrew T. Serafin, *Kicking the Legalese Habit: The SEC's "Plain English Disclosure" Proposal*, 29 LOY. U. CHI. L.J. 681, 683 (1998) (stating that plain language is the "idea that writing must be clear and readable in order for people to fully understand what is written"); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. COOLEY L. REV. 1, 11–14 (1992) (plain language involves crafting a document "to convey your ideas with the greatest possible clarity"); Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. SOC. JUST. 1065, 1068 (2013) ("The goal of using plain language is to make documents intelligible to the greatest possible number of intended readers.").

are so clear that the intended audience can easily find what they need, understand what they find, and use that information."[29]

How a drafter designs a document to use plain language varies depending on both the document and the reader.[30] Plain language drafting principles include knowing the document's intended reader (which can affect decisions like vocabulary choice), deciding what content to include or exclude, determining how to organize information to aid understanding, and using clear writing techniques, which can range from creating bullet points and charts to avoiding double negatives.[31] There is no definitive list of plain language writing techniques. Plain language may receive a uniformity boost if the pending international multi-language plain language standard passes.[32]

B. The History of Plain Language as a Form of Advice

Legal documents are hard to understand. Nearly everyone from the Founding Fathers to scholars to clients to the general public agree.[33] The

29. PLAIN LANGUAGE ASS'N INT'L, https://plainlanguagenetwork.org/ (last visited Apr. 9, 2023). This Article chooses an objective standard that stops short of whether the intended results of plain language occur. That decision separates the efficacy of plain language from its standard and catches a broader range of lawmaking approaches to codifying plain language into law. *See* Annetta Cheek, *Defining Plain Language*, 64 CLARITY 5, 5–9 (2010) (discussing three ways of defining plain language through standards and advocating for a subjective standard).

30. *What Is Plain Language?*, *supra* note 27 (noting a variety of definitions); Flammer, *supra* note 28, at 185 ("Like many legal terms, 'Plain English' is vague and difficult to define.").

31. Kimble, *supra* note 28, at 11–14 (listing various plain language features); Cheek, *supra* note 29, at 5–9; Flammer, *supra* note 28, at 186; *Organize the Information*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/guidelines/organize/ [https://perma.cc/D8H7-5CM7] (last visited Mar. 15, 2023); *Be Concise*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/guidelines/concise/ [https://perma.cc/F596-P47N] (last visited Mar. 15, 2023); *Keep It Conversational*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/guidelines/conversational/ [https://perma.cc/4GS2-ZG9T] (last visited Mar. 15, 2023); *Choose Your Words Carefully*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/guidelines/words/ [https://perma.cc/HKH8-UVXL] (last visited Mar. 15, 2023).

32. *See One Giant Step Towards a Plain Language Standard*, INT'L PLAIN LANGUAGE FED'N (June 2019), http://www.iplfederation.org/one-giant-step-towards-a-plain-language-standard/ [https://perma.cc/D33Y-KB3Z].

33. George D. Gopen, *The State of Legal Writing:* Res Ipsa Loquitur, 86 MICH. L. REV. 333, 346–47 (1987) (identifying complaints throughout the centuries); Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 494 & n.19 (1999) (providing examples of complaints); Carol M. Bast, *Lawyers Should Use Plain Language*, 69 FLA. B.J. 30, 30, 32 (1995) (describing the Legal Writing Institute resolution that acknowledged over four centuries of complaints); Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 104 (1995) (describing Founding Fathers' complaints); Matthew Salzwedel, *Face It—Bad Legal Writing Wastes Money*, 92 MICH. B.J. 52, 52 (2013)

conclusion applies equally to every kind of legal document lawyers or lawmakers could draft—*e.g.*, transactional documents like contracts,[34] litigation documents like briefs,[35] legislative documents like statutes and regulations,[36] and even court notices and forms.[37]

Incomprehensible legal documents cause problems for individuals, society, and the justice system. Unclear briefs risk losing a motion and skewing the law's development.[38] Unintelligible contracts can harm

(explaining that clients realize better writing saves them "time and money by increasing the ability of readers to understand and retain what they have read"); Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 420 (2012) (judges have called legal writing "appalling" and "awful"); Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984) ("'[L]egal writing' has become synonymous with poor writing"); Matthew J. Arnold, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 CAP. U. L. REV. 227, 228 (1995) (explaining that there is "a pervasive lack of elementary writing skills among law students and lawyers").

34. *See, e.g.*, Chad Baruch, *Everything You Wanted to Know About Legal Writing But Were Afraid to Ask*, 17 J. CONSUMER & COM. L. 9, 11 (2013) ("[M]any contracts leave one with the unmistakable impression that the drafter's goal was to make certain that no one would ever comprehend the contract's terms."); Ian Gallacher, *"When Numbers Get Serious": A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals*, 46 SUFFOLK U. L. REV. 451, 462 (2013) ("Corporate lawyers rely heavily on boilerplate, and most practitioners seem to have absorbed the language of their law school casebooks. They may have heard that legalese is dead, but they don't write like they believe it.") (quoting ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER 127 (3d ed. 2009)); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 253 (2013).

35. *See, e.g.*, Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L. J. 59, 80–81 (2013) (describing harms from poor brief writing); Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 LEGAL COMMC'N & RHETORIC: JALWD 109, 109 (2014) (describing judicial admonishments to lawyers for poorly written briefs); Heidi K. Brown, *Breaking Bad Briefs*, 41 J. LEGAL PRO. 259, 262 (2017) (same).

36. Eric Martinez, Francis Mollica & Edward Gibson, *So Much for Plain Language: An Analysis of the Accessibility of United States Federal Laws Over Time* 5–6 (Oct. 23, 2022) (unpublished manuscript) (available at https://ssrn.com/abstract=4036863).

37. *See, e.g.*, 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS 7–8 (5th ed. 2019) (describing judicial branch plain language revisions to federal procedural rules); UTAH CODE JUD. ADMIN. 3-117(3)(b) (West 2023) (requiring plain language in court forms); UTAH CODE ANN. § 75-5-309(2) (West 2022) (requiring plain language in guardianship proceeding notices); Dyer et al., *supra* note 28, at 1068, 1072–73 (describing plain language revisions to court documents).

38. *See, e.g.*, Moss, *supra* note 35, at 93 (using empirical data to explain effects of bad brief writing).

consumers, businesses, and the economy.[39] Lawyers suffer too. Baffling writing leads to poor communication which in turn limits access to the law and hinders the lawyer-client relationship.[40] Public opinion, respect, and trust in lawyers decreases when clients and the public struggle to understand legal documents.[41] Pragmatically, when readers struggle to understand legal documents, lawyers waste resources, risk malpractice, and may face professional discipline.[42]

The leading solution encouraged by scholars, judges, and practitioners is using plain language so the reader can understand the document.[43] The idea is not new. The Framers wanted the Constitution to use plain language so the layperson could understand and vote on it.[44]

But it took a while before plain language became a widely known phenomenon. The concept of "plain language" as a form of advice gained momentum over the last eighty years. A 1940s federal government project to improve how the government communicates price control

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39. *See* Bernard Black, *A Model Plain Language Law*, 33 STAN. L. REV. 255, 255–57 (1981) (discussing harms to consumers from incomprehensible contracts); Christopher Cox, Chairman, SEC, Keynote Address to the Center for Plain Language Symposium: Plain Language and Good Business (Oct. 12, 2007) (discussing market benefits of plain language) [hereinafter Plain Language and Good Business]; Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 80–81 (1995) (noting litigation caused by poorly written contracts); Budnitz, *supra* note 10, at 448–49 (encouraging reporters of Restatement of the Law of Consumer Contracts to draft plain language best practices because some consumers and consumer watchdog organizations read contract terms and may inform other consumers of those terms through media); Andrea M. Matwyshyn, *Resilience: Building Better Users and Fair Trade Practices in Information*, 63 FED. COMMC'NS L.J. 391, 405–07 (2011) (suggesting requiring plain English to "greatly assist consumers' sense of control over information exchanges and, consequently, foster resiliency"); Steven O. Weise, *"Plain English" Will Set the UCC Free*, 28 LOY. L.A. L. REV. 371, 385–89 (1994) (encouraging use of plain language in warranties and providing examples of plain language provisions).

40. *See, e.g.*, *Plain English Committee*, PA. BAR ASS'N, https://www.pabar.org/site/For-Lawyers/Committees-Commissions/Plain-English [https://perma.cc/UH22-YDL6] (last visited Mar. 15, 2023); ILLINOIS SUPREME COURT POLICY ON PLAIN LANGUAGE, IL. SUP. CT. (2018), https://www.illinoiscourts.gov/Resources/e44f267e-8de5-4833-9ac7-9272e70301d2/Plain_Language_Policy.pdf [https://perma.cc/7CNH-79PE] [hereinafter ILLINOIS SUPREME COURT POLICY].

41. George Hathaway, *An Overview of the Plain English Movement for Lawyers . . . Ten Years Later*, 73 MICH. BAR. J. 26, 26 (1994).

42. Cohen, *supra* note 33, at 492–93.

43. *See, e.g.*, Bast, *supra* note 33, at 31–32; Gallacher, *supra* note 34, at 460–61 ("That [p]lain English is something to be desired in legal writing . . . is something taken almost as an article of faith in legal writing circles."); Baruch, *supra* note 34, at 11 (encouraging transactional lawyers to "set aside entrenched writing habits and embrace the use of plain language").

44. Kali Jensen, *The Plain English Movement's Shifting Goals*, 13 J. GENDER, RACE & JUST. 807, 809 (2010); Thomas W. Taylor, *Plain English for Army Lawyers*, 118 MIL. L. REV. 217, 223–24 (1987).

regulations to businesses led to Professor Rudolph Flesch's book on how to use "plain talk."[45] The book included a readability formula that scored documents based on the number of words in a sentence and the number of syllables in a word.[46] Plain language gained steam in the social sciences as a way to communicate information more effectively; that momentum continues today where fields like accounting and finance,[47] healthcare,[48] and social justice analyze plain language.[49] In 1963, David Mellinkoff identified specific writing traits common to legal writing, detailed the historical criticisms of those traits and the corresponding problems caused by them, and declared legal documents should not diverge from everyday language without a reason.[50] In an influential 1978 article, Professor Richard Wydick explored why lawyers should use "plain English."[51]

Since 2000, plain language advice has become even more ubiquitous. Now, professors teach plain language in law school.[52] Books urge practitioners to use plain language.[53] Clients share stories of plain language successes.[54] Empiricists document plain language benefits.[55]

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45. *See* Cohen, *supra* note 33, at 499 n.46.

46. Serafin, *supra* note 28, at 683–84; Cheek, *supra* note 29, at 6.

47. *See, e.g.*, Samuel B. Bonsall IV, Andrew J. Leone, Brian P. Miller & Kristina Rennekamp, *A Plain English Measure of Financial Reporting Readability*, 63 J. ACCT. & ECON. 329, 329 (2017) (proposing new measure of readability for financial disclosures).

48. *See, e.g.*, Sue Stableford & Wendy Mettger, *Plain Language: A Strategic Response to the Health Literacy Challenge*, 28 J. PUB. HEALTH POL'Y 71, 75–86 (2007) (identifying and refuting myths about plain language and proposing plain language as a tool to promote health literacy).

49. Michela Sims, *Overcoming Tools of Oppression: Plain Language and Human-Centered Design for Social Justice* 11–19 (2020) (M.A. thesis, Minnesota State University, Mankato) (discussing research into how plain language in technical communications effects social justice).

50. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 11, 230–85 (1963).

51. Richard Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727, 727 (1978).

52. Gallacher, *supra* note 34, at 462 (noting ABA Sourcebook on legal writing courses promotes using plain language).

53. *See, e.g.*, RICHARD C. WYDICK & AMY E. SLOAN, PLAIN ENGLISH FOR LAWYERS (6th ed. 2019); BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2001); WAYNE SCHIESS, PLAIN LEGAL WRITING: DO IT (2019).

54. Shawn Burton, *The Case for Plain-Language Contracts*, HARV. BUS. REV., Jan.–Feb. 2018, at 134, 136–37; Kate Vitasek, *Plain Language Contracts on the Rise*, FORBES (Mar. 19, 2018, 7:00 AM), https://www.forbes.com/sites/katevitasek/2018/03/19/plain-language-contracts-on-the-rise/?sh=595b9e1efc66 [https://perma.cc/SE35-YG9K].

55. Gallacher, *supra* note 34, at 461; Flammer, *supra* note 28, at 211 (showing that "judges prefer Plain English to Legalese").

Anecdotes now measure pragmatic benefits to using plain language.[56] Bar association committees give out awards for plain language and create plain language templates.[57]

C. The Pros and Cons of Plain Language

Plain language supporters point to many benefits, often with the benefit changing depending on the reader and the kind of legal document. For example, supporters contend plain language makes contracts easier to read and therefore increases the chances a consumer will understand its contents.[58] Increasing consumer understanding helps consumers and businesses by helping consumers make informed decisions, increasing the chance all consumers have equal information and understanding regardless of their education or prior knowledge of the product, and promoting more purchases.[59] Others assert that plain language in business documents reduces litigation, avoids controversy, decreases ambiguity, and reduces transaction and litigation costs.[60] Some even find benefits in plain language public filings. Warren Buffet and Securities and Exchange Commission (SEC) chairpersons contend plain language helps investors make informed decisions and increases their appetite to invest while improving market transparency.[61] Supporters also argue plain language may increase respect for lawyers and the law and improve lawyer-client relations.[62]

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56. JOSEPH KIMBLE, WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW 104–33 (2012) (describing benefits to businesses and customers: customers buy more while complaining and suing less, saving companies hundreds of thousands of dollars or more); Joseph Kimble, *Notes Toward Better Legal Writing*, 75 MICH. BAR J. 1072, 1074 (1996).

57. Kimble, *supra* note 28, at 3, 19 (identifying plain language legal organizations and Michigan Bar Association plain language template forms).

58. Benoliel & Becher, *supra* note 9, at 2289 (although it is impossible to measure the effect of improving contract readability without first making them more readable, experimental evidence suggests it improves understanding).

59. Susumu Miyazaki, *Should Japan Adopt a Plain Language Rule?*, 13 MINN. J. GLOB. TRADE 1, 8–11 (2004).

60. Weise, *supra* note 39, at 385–89 (encouraging plain language use in warranties and providing examples of plain language provisions).

61. OFF. INV. EDUC. & ASSISTANCE, SEC, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS 1–4 (1998), https://www.sec.gov/pdf/handbook.pdf [https://perma.cc/9G9Q-2DTT]; Christopher Cox, Chairman, SEC, Before the Subcommittee on Contracting and Technology: Plain Language—The Benefits to Small Business (Feb. 26, 2008), https://www.sec.gov/news/testimony/2008/ts022608cc.htm [https://perma.cc/6ZZN-QLJ3]; KIMBLE, *supra* note 56, at 165.

62. *See* Kimble, *supra* note 28, at 27; Christopher R. Trudeau, *The Public Speaks: An Empirical Study of Legal Communication*, 14 SCRIBES J. LEGAL WRITING 121, 124–25, 137–44 (2012) (summarizing empirical research and results of testing).

Then there is plain language in government documents. Pointing to a national literacy assessment, one scholar contended plain language may be the only way to allow average citizens to understand government documents.[63] Data suggests using plain language in government documents saves costs and improves efficiency.[64] Using plain language in statutes and regulations may improve predictability, reduce disputes, and make interpreting laws easier.[65] Courts deploy plain language to improve access to justice and public faith in the judiciary.[66]

Despite increasing support and data, voluntary implementation of plain language into legal documents has been sporadic and inconsistent.[67] Outside the context of government documents, there are no examples of private sector mass-market contracts adopting plain language or of empirical evidence tracking the effects (beneficial or detrimental) of widespread adoption of plain language.[68]

Why plain language has not become more widespread is unclear, but plain language has always had opponents and skeptics. Some drafters may find comfort in the traditional language used in legal documents or perceive the traditional language as safe or predictable.[69] Others may worry the shift to plain language will cause litigation, a drafter may

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63. Ellen E. Hoffman, *Getting to "Plain Language,"* 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 47, 48–49 (2009).

64. Joseph Kimble, *Testifying to Plain Language*, 85 MICH. BAR J. 45, 45 (2006).

65. *See* Hoffman, *supra* note 63, at 49–57.

66. *See, e.g.*, NAT'L ASS'N CT. MGMT., PLAIN LANGUAGE GUIDE: HOW TO INCORPORATE PLAIN LANGUAGE INTO COURT FORMS, WEBSITES, AND OTHER MATERIALS, 1, 13–14 (2019), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/e777731b-4188-48dc-8213-3aec4f232b22/ReferenceGuide.pdf [https://perma.cc/F5AE-69A5].

67. George H. Hathaway, *Plain English in Car Loans*, 77 MICH. BAR J. 954, 954–56 (1998) (some companies voluntarily experimented with plain language in the 1970s); Cohen, *supra* note 33, at 501 (explaining how plain language gained momentum but, "on the whole, companies were not rushing to revise their documents"); George Hathaway, *Plain English in Real Estate Papers*, 72 MICH. BAR J. 1308, 1308–10 (1993) (even after a bar committee provided free plain language versions of real estate documents, some clients refused to use them); Friman, *supra* note 33, at 105 ("[W]hile the private sector's efforts were encouraging, there was simply not enough incentive (or disincentive) to trigger widespread use of plain English contracts.").

68. For a compilation of anecdotal evidence, see KIMBLE, *supra* note 56, at 64–73, 104.

69. Daniel Schwarcz, *The Role of Courts in the Evolution of Standard Form Contracts: An Insurance Case Study*, 46 BYU L. REV. 471, 480–85, 492–93 (2021) (discussing reasons why standard form contracts resist change but questioning traditional wisdom on degree of resistance); Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1112–28 (2006) (explaining why boilerplate language persists); George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L., BUS. & FIN. 177, 194–95 (2013).

misapply plain language, or that plain language does not or cannot apply to certain kinds of legal documents, like those that are particularly complex or have language thoroughly vetted in precedent.[70] Or perhaps some worry the costs of plain language training and of revising documents will not outweigh plain language's purported benefits. Pessimistically, although perhaps pragmatically, some might contend that even if a drafter committed to all the tenets of plain language, the purported benefits would never arrive because so few people read legal documents[71] or because the literacy rate and education levels in the United States are so low that plain language would have minimal effect.[72] Whether voluntary adoption of plain language delivers benefits or costs and, if so, when, what kind, and to what degree, is beyond the scope of this Article but certainly worthy of future research.

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70. *See, e.g.*, Nick Ciaramitaro, *The Plain English Bills . . . Ten Years Later*, 73 MICH. BAR J. 34, 34–35 (1994) (describing thirteen years of business opposition to Michigan consumer protection plain language law driven by fear of litigation); Jensen, *supra* note 44, at 810 (when Citibank considered voluntarily using plain language in bank documents, its lawyers objected because they worried plain language would create legal risks); Serafin, *supra* note 28, at 707–10 (investor lawyers opposed the SEC plain language regulations in part because they claimed the contents of public filings were too complicated to communicate in plain language); David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713, 727–29 (2002) (disputing plain language's effectiveness); Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 193–94 (2017) (contending plain language versions of tax laws result in "simplexity" that does not fully explain tax law). *But see* Kimble, *supra* note 39, at 51–62 (describing criticisms and then responding to them); KIMBLE, *supra* note 56, at 42–43 (noting errors in a plain language document are often caused by difficulties understanding the original version, not by application of plain language); Wayne Schiess, *What Plain English Really Is*, 9 SCRIBES J. LEGAL WRITING 43 (2004) (responding to Crump); Matt Keating, *On the Cult of Precision Underpinning Legalese: A Reflection on the Goals of Legal Drafting*, 18 SCRIBES J. LEGAL WRITING 91, 91–92 (2019) (finding no link between plain language adoptions and increased confusion or litigation); Miyazaki, *supra* note 59, at 5–6 (explaining that while some worry plain language can be less accurate and less complete than a more traditional disclosure, advocates of plain language contend it is more precise and accurate).

71. *See* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 30–31 (2012) (showing anecdotal and empirical evidence that people do not read standard contracts).

72. John Aloysius Cogan Jr., *Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies*, 15 ROGER WILLIAMS U. L. REV. 93, 97–98 (2010) ("Almost one quarter of the U.S. adult population is functionally illiterate and an additional quarter has poor reading and comprehension skills. Nearly half of the adult population has deficiencies in reading and/or computational skills, and it is widely acknowledged that, on average, the U.S. adult reading level is eighth to ninth grade.").

II. CODIFIED PLAIN LANGUAGE LAWS

Practitioners, clients, and lawyers are not the only ones who gravitated to plain language. Lawmakers have too. More than recommending plain language, lawmakers codified plain language into laws: constitutions, statutes, regulations, and rules. This Part details when and how lawmakers passed codified plain language laws. After explaining the history of these laws, this Part explains the pivotal decisions legislatures and regulators make about coverage, standards, and enforcement when designing these laws.

A. A Brief History of Codified Plain Language Laws

Some scholars trace codified plain language laws back to a 1362 English statute.[73] United States codified plain language laws date back to the 1800s as a way to regulate government legal writing.[74] For example, since 1851, Indiana's Constitution required every legislative act to use plain language.[75] In 1857, Oregon did the same for every legislative act or joint resolution.[76] Idaho followed in 1890 with a nearly identical provision.[77]

After 1890, codified plain language laws went into hibernation. In fact, apart from a 1942 Kentucky law governing public officer bills,[78] the idea of passing plain language laws went out of fashion.

In the 1970s, codified plain language laws covering both private and public sector documents suddenly spiked. Driven by the consumer protection movement, several states and the federal government passed plain language laws covering contracts or disclosures.[79] A similar surge

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73. Jensen, *supra* note 44, at 809; Friman, *supra* note 33, at 104.

74. *See, e.g.*, IND. CONST. art. IV, § 20.

75. *Id.*

76. OR. CONST. art. IV, § 21.

77. IDAHO CONST. art. III, § 17; 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, app. A, at 2054 (I.W. Hart ed., 1912).

78. KY. REV. STAT. ANN. § 64.410(1) (2023) (effective 1942).

79. *See, e.g.*, Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 260–61 (2002); Friman, *supra* note 33, at 105; Thomas W. Taylor, *Plain English for Army Lawyers*, 118 MIL. L. REV. 217, 223–24 (1987); Rachel Stabler, *"What We've Got Here Is Failure to Communicate": The Plain Writing Act of 2010*, 40 J. LEGIS. 280, 281–84 (2013); *see, e.g.*, CONN. GEN. STAT. §§ 42-151 to -158 (2023) (effective 1979) (consumer contracts for residential leases, for buying or leasing up to $25,000 in property or services, or for up $25,000 in credit must satisfy either features test or readability test); W. VA. CODE § 61-3-39c (2022) (effective 1977) (explanation of bank refusals to cash checks); ARIZ. REV. STAT. ANN. § 20-1110.01 (2022) (effective 1977) (insurance policies); DEL. CODE ANN. tit. 18, §§ 2740–2741 (2023) (effective 1976) (auto insurance policies); NEB. REV. STAT. § 44-3405 (2021) (effective 1979) (life, sickness and accident, credit life, credit accident, and health insurance policies); MINN. STAT. §§ 72C.06–.10 (2022) (effective May 28, 1997) (all

occurred in laws covering public sector documents. For example, in 1978 Hawaii amended its constitution to require plain language in government writing meant for the public.[80] Around the same time, Oregon required plain language in income tax return instructions and legislative digests and summaries,[81] Minnesota required plain language in labor commissioner brochures about injured worker's rights,[82] and Kentucky required the legislature to use plain language in its laws.[83] On the federal side, the executive branch started to adopt plain language, although not through laws. President Nixon asked Congress to approve a Special Assistant to the President for Consumer Affairs to translate new administrative law information "from its technical form into language which is readily understandable by the layman."[84] Later, President Carter issued an executive order requiring federal regulations to be as simple and as clear as possible.[85]

Since the 1970s, lawmakers across the country have continued to regularly pass plain language laws covering private sector documents.[86]

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insurance policies); CONN. GEN. STAT. §§ 38a-295 to -300 (2023) (effective 1979) (life, health, auto, and homeowner insurance policies); 28 TEX. ADMIN. CODE §§ 3.3092–.3102 (2023) (effective Jan. 26, 1977) (life, accident, and health insurance outlines of coverage and policies); 15 U.S.C. § 2303(a) (consumer product warranties for tangible property sold for personal, family, or household purposes); 15 U.S.C. § 2306(b) (service contracts).

80. HAW. CONST. art. XVI, § 13 (amended 1978).

81. OR. REV. STAT. § 316.364(1) (effective 1977) (income tax return instructions); § 171.134 (effective 1979) (digests and summaries of laws).

82. MINN. STAT. § 176.235 (effective 1979).

83. KY. REV. STAT. § 446.015 (West 2023) (effective 1978).

84. Richard Nixon, 37th President of the United States, The White House, Special Message to the Congress on Consumer Protection (Oct. 30, 1969) (transcript available at https://www.presidency.ucsb.edu/documents/special-message-the-congress-consumer-protection-0 [https://perma.cc/G6WG-VH7Y]).

85. Exec. Order No. 12,044, 3 C.F.R. 152 (1979). President Reagan later revoked this Executive Order. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

86. *See, e.g.*, 15 U.S.C. § 1666(f) (discount for not using credit plan or credit card); MONT. CODE ANN. §§ 30-14-1101 to -1113 (2021) (effective July 1, 1987) (consumer contracts for a sale, lease, or loan valued less than $50,000, with certain exceptions); VA. CODE ANN. § 38.2-2608(B)(1) (2022) (effective 1986) (home protection insurance contract); 15 U.S.C. § 1693c(a) (electronic fund transfer disclosures); 12 U.S.C. § 4301 (banking disclosures); D.C. CODE § 28-3702(c)(3), (d)(3) (2023) (effective Apr. 9, 1997) (credit service charge notice); 19 R.I. GEN. LAWS § 19-14.2-13 (2022) (effective 1995) (small loan lender statement); ARIZ. REV. STAT. ANN. § 44-6954(D)(2) (2022) (effective July 9, 2000) (disclosures for senior living center contract); S.C. CODE ANN. § 38-71-1940(C) (2022) (effective Sept. 6, 2000) (health carrier external review notices, statements, and forms); MINN. STAT. §§ 17.942–.944 (2023) (effective Jan. 1, 2001) (agricultural contracts); N.M. STAT. ANN. § 59A-61-5(B) (West 2023) (effective May 21, 2014) (pharmacy benefits manager contract); VT. STAT. ANN. tit. 9, § 2482i(1) (2021–22) (effective July 1, 2018) (finance lease for credit card terminal); 17 C.F.R. § 229.105 (2020) (risk factors disclosure); CAL. HEALTH & SAFETY CODE § 127350 (2022) (effective July 27, 2021) (hospital community benefit report explanation

One major burst was in the 1990s when the SEC issued several plain language regulations governing public filings to strengthen market transparency and aid investors.[87] Codified plain language laws covering the public sector also expanded.[88] In addition to President Clinton's executive order[89] and memorandum,[90] and President Obama's executive order,[91] the 2010 Plain Writing Act required many federal government agencies to use plain language in certain documents.[92]

Here is the current landscape of codified plain language laws in the United States. My earlier research revealed over 750 codified plain language laws spread across each state, the District of Columbia, and the federal government.[93] The overwhelming majority are state laws, with only about five percent coming from the federal system.[94] Some states have high numbers of codified plain language laws: Texas has over sixty and Connecticut has forty-eight.[95] Others have very few: Mississippi, Nebraska, and Kansas have four or less.[96] Nearly all of these laws are statutes or regulations passed by legislatures or regulators.[97]

B. Codified Plain Language Law Coverage and Standards

When drafting plain language laws, legislatures and regulators face two paramount decisions. The first is coverage: what kinds of documents should this law apply to? The second is standard: what standard must the covered documents satisfy? This Section details the different coverages and standards in codified plain language laws.

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of costs); *see also* Benoliel & Zheng, *supra* note 28 at 241–45 (providing examples of state and federal plain language consumer protection laws and regulations).

87. Firtel, *supra* note 26, at 877–81; Jeremy R. McClane, *Regulating Substance Through Form: Lessons from the SEC's Plain English Initiative*, 55 HARV. J. ON LEGIS. 265, 274–76 (2018) (detailing history of SEC disclosure rules and plain language initiative). For a more recent discussion on SEC initiatives to promote plain language, see Plain Language and Good Business, *supra* note 39.

88. For a detailed history of plain language requirements in federal rulemaking, see Cynthia R. Farina, Mary J. Newhart & Cherly Blake, *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1358, 1367–79 (2015).

89. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

90. Memorandum on Plain Language in Government Writing, 63 Fed. Reg. 31,885 (June 1, 1998).

91. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

92. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010).

93. Michael A. Blasie, *The Rise of Plain Language Laws*, 76 U. MIA. L. REV. 447, 485 (2022).

94. *Id.*

95. *Id.* at 487.

96. *Id.*

97. *Id.* But a small number are procedural rules that may have been passed by courts through a judicial rulemaking process. *Id.*

Coverage varies dramatically. Three quarters of codified plain language laws cover documents drafted in the private sector.[98] The largest concentration of private sector coverage is consumer contracts, which accounts for about fifty-nine percent of all codified plain language laws.[99] Codified consumer contract plain language laws are vast, covering documents like mortgages and loans,[100] medical consent forms,[101] explanations of patient rights,[102] continuing care facility disclosures,[103] leases,[104] insurance policies,[105] sale of collateral notices,[106] gas, water, and electricity termination notices,[107] car rental waivers and disclosures,[108] food labels,[109] funeral and cemetery contracts and notices,[110] consumer data and privacy notices,[111] service contracts,[112] and consumer contracts.[113] Other kinds of private sector codified plain language laws cover documents like commercial contracts,[114] securities disclosures,[115] employee discrimination policies,[116] environmental cleanup information,[117] healthcare disclosures,[118] property transfers,[119] premarital agreements,[120] guardianship waivers,[121] and wildlife

98. *Id.* at 485–86.

99. *Id.* at 486.

100. *See, e.g.*, N.J. STAT. ANN. § 17:16F-38(a) (West 2023); 7 TEX. ADMIN. CODE §§ 90.101–.105 (2015).

101. *See, e.g.*, DEL. CODE ANN. tit. 16, § 2509A(6) (West 2023–24).

102. *See, e.g.*, VT. STAT. ANN. tit. 18, § 1852(12) (2022).

103. *See, e.g.*, N.M. STAT. ANN. § 24-17-4(B)(1) (West 2022).

104. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.5(c)(1) (2023).

105. *See, e.g.*, WIS. STAT. § 631.22(2) (2023).

106. *See, e.g.*, ALA. CODE § 7-9A-101, U.C.C. cmt. 4(j)(vii) (2022); ALA. CODE § 7-9A-614(3) (2022).

107. *See, e.g.*, NEV. ADMIN. CODE § 704.393(5) (2023); NEV. ADMIN. CODE § 704.360(7) (2023).

108. *See, e.g.*, HAW. REV. STAT. §§ 437D-3 to 17.5 (2022).

109. *See, e.g.*, MICH. ADMIN. CODE r. 285.569.10(3) (2023).

110. *See, e.g.*, TEX. FIN. CODE ANN. § 154.151(d) (West 2021); TEX. HEALTH & SAFETY CODE ANN. § 711.064(c) (West 2021); TEX. HEALTH & SAFETY CODE ANN. § 712.066(c) (West 2021); 7 TEX. ADMIN. CODE § 25.4(a) (2023).

111. *See, e.g.*, CAL. CODE REGS. tit. 11, § 7012(a)(2) (2023).

112. *See, e.g.*, N.J. STAT. ANN. §§ 56:12-1, -2, -10 (West 2023).

113. *See, e.g.*, MINN. STAT. §§ 325G.29–.37 (2022).

114. *See, e.g.*, 505 ILL. COMP. STAT. 17/20 (2022).

115. *See, e.g.*, 17 C.F.R. § 240.13a-20 (2023).

116. *See, e.g.*, WASH. REV. CODE § 49.95.020(c) (2022).

117. *See, e.g.*, 35 PA. STAT. & CONS. STAT. ANN. § 6026.901 (West 2022).

118. *See, e.g.*, N.M. CODE R. § 8.300.2.11(B)(2)(b) (LexisNexis 2023).

119. *See, e.g.*, OHIO REV. CODE ANN. § 5311.26 (West 2022).

120. *See, e.g.*, N.D. CENT. CODE § 14-03.2-08(1)(c) (2023).

121. *See, e.g.*, VT. STAT. ANN. tit. 15A, § 2-406(a) (2022).

records.[122] Some laws even govern litigation filings like complaints,[123] answers,[124] notices of proceedings,[125] explanations of rights,[126] and settlement agreements.[127]

The other quarter of codified plain language laws cover documents drafted by the government.[128] Some of these laws are so broad that they cover all branches of government, like an Illinois law that applies to all laws and government public-facing documents.[129] The range of executive branch plain language law coverage is gigantic: student progress reports[130] and school safety plans,[131] election ballots and pamphlets,[132] river commission documents,[133] security breach notices,[134] tax forms and instructions,[135] ethics guides,[136] agency websites,[137] and hospital reports to name a few.[138] The judiciary is not immune. Some laws apply to administrative hearing notices,[139] child support notices,[140] pro se forms,[141] court instruction forms,[142] explanations of rights,[143] court orders,[144] and class action notices.[145] Still other laws target legislatures and regulators by requiring plain language in regulations,[146] statutes,[147] and even state constitutional amendments.[148] Yet, others govern documents created by

122. *See, e.g.*, W. VA. CODE R. § 58-47-3.11 (2022).
123. *See, e.g.*, HAW. CODE R. § 3-170-7 (LexisNexis 2023).
124. *See, e.g.*, 104 KY. ADMIN. REGS. 1:020(4)(2)(b) (2021).
125. *See, e.g.*, W. VA. CODE § 48-22-602(b) (2022).
126. *See, e.g.*, CONN. GEN. STAT. § 10a-55m(b)(3), (e) (2023).
127. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-1706(e) (McKinney 2022).
128. Blasie, *supra* note 93, at 486.
129. *See, e.g.*, 20 ILL. COMP. STAT. 4090/30 (2022).
130. *See, e.g.*, N.Y. EDUC. LAW § 305(36) (McKinney 2022).
131. *See, e.g.*, 16 R.I. GEN. LAWS § 16-21-24(a) (2022).
132. *See, e.g.*, ALASKA STAT. § 15.80.005(a) (2022).
133. *See, e.g.*, OR. ADMIN R. 350-016-0001 (2022).
134. *See, e.g.*, WASH. REV. CODE § 42.56.590(6)(a) (2022).
135. *See, e.g.*, LA. STAT. ANN. § 47:15(2) (2023).
136. *See, e.g.*, D.C. CODE § 1-1162.02(a)(7) (2023).
137. *See, e.g.*, TEX. GOV'T CODE ANN. § 531.119 (West 2021).
138. *See, e.g.*, DEL. CODE ANN. tit. 16, § 1005A(c) (West 2023–24).
139. *See, e.g.*, HAW. REV. STAT. § 353-13.8(b)(3), (b)(5) (2022).
140. *See, e.g.*, ALASKA STAT. § 25.27.120(c) (2022).
141. *See, e.g.*, MICH. COMP. LAWS § 600.2950b(1) (2023).
142. *See, e.g.*, MICH. COMP. LAWS § 600.8401a(1) (2023).
143. *See, e.g.*, GA. CODE ANN. § 17-17-6(a) (2022).
144. *See, e.g.*, VA. CODE ANN. § 24.2-684 (West 2016).
145. *See, e.g.*, WYO. R. CIV. P. 23(c)(2)(B).
146. *See, e.g.*, OKLA. STAT. tit. 75, § 251(B)(2) (2019).
147. *See, e.g.*, COLO. REV. STAT. § 2-2-801 (2022).
148. *See, e.g.*, COLO. REV. STAT. § 1-40-105(1) (2016).

municipalities like board of education information[149] and zoning change notices.[150]

The coverage of individual laws varies significantly too. Some codified plain language laws are extremely targeted, like a Colorado law on car rental collision damage waivers,[151] a Texas law about prepaid funeral service contracts,[152] and an Ohio law on agency information to child day care providers.[153] But others are staggeringly broad, like a California law covering agency forms, contracts, and communications,[154] and a Montana law covering consumer contracts worth up to $50,000.[155]

Generally, codified plain language laws apply one of four kinds of standards. The *first* kind of standards are "Descriptive Standards." Descriptive Standards describe results without describing the process to achieve the result. Sometimes the "result" is the kind of language in the document. For example, some Descriptive Standards require a document to use "plain language"[156] or "plain English"[157] without defining either term. Other times the result describes the document's effect on the reader. For example, some Descriptive Standards require the document to be "understandable by a person of average intelligence and education."[158] Descriptive Standards are the most common by far. About 700 codified plain language laws use them, which accounts for about eighty percent of all codified plain language laws.[159]

The *second* kind of standards are "Readability Standards." These standards subject a document to one or more readability tests that measure objective features. Often these standards require a document to meet a certain score on a test. For example, the Flesch Reading Ease Test scores a document on a zero-to-one-hundred scale based on the number of syllables in words and the number of words in a sentence.[160]

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149. *See, e.g.*, CONN. GEN. STAT. § 10-222r (2019).

150. *See, e.g.*, ME. STAT. tit. 30-A, § 4352(9)(B) (2010).

151. COLO. REV. STAT. § 6-1-203(1)(a) (1990).

152. 7 TEX. ADMIN. CODE § 25.4 (2016).

153. OHIO REV. CODE ANN. § 5104.14 (West 2014).

154. CAL. GOV'T CODE § 6219 (West 2005).

155. MONT. CODE ANN. §§ 30-14-1101 to -1113 (West 1985).

156. 3001 DEL. ADMIN. CODE § 5.0(5.2) (detailing Delaware's language requirements regarding utility bills).

157. N.Y. COMP. CODES R. & REGS. tit. 19, § 201.11(a)(8)(B) (detailing New York's language requirements regarding mausoleum construction notices).

158. *See, e.g.*, MINN. STAT. § 80D.04 (detailing Minnesota's language requirements regarding continuing care facility disclosure statements).

159. Blasie, *supra* note 93, at 488.

160. *Id.* at 482. Other tests use a close variation. For example, the Dale-Chall Readability Test measures sentence length and the difficulty of words used based on a 1993 list of 3000 words fourth graders recognized. Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26

Another common test is the Flesch-Kincaid Grade Level formula, which calculates a grade level reading score (*e.g.*, eighth-grade level).[161] Some Readability Standards import external formulas from the social sciences like the Flesch Reading Ease Test, while others detail their own hyper-precise formula, often going as far as explaining how to count contractions or digits.[162] Only about eight percent of codified plain language laws use Readability Standards.[163] Scores range from as low as forty to as high as seventy on a one to one-hundred scale.[164]

The *third* kind of standards are "Features Standards." They require documents to use, or prohibit documents from using, specific writing features that affect structure, design, or language. Consider New Jersey's consumer contracts law, which prohibits using confusing cross-references, "[s]entences that are of greater length than necessary," "double negatives and exceptions to exceptions," confusing or illogically ordered sentences and sections, and "Old English," "middle English," Latin, French or "words with obsolete meanings or words that differ in their legal meaning from their common ordinary meaning."[165] Oregon's equivalent law requires using "words that convey meanings clearly and directly," "present tense and active voice," "simple sentences," and "frequent section headings, in a narrative format."[166] Features Standards are the most rare. Only about five percent of codified plain language laws use them.[167]

The *fourth* kind of standards are "Hybrid Standards." Hybrid Standards combine a Readability Standard with a Features Standard or offer a choice between the two. For example, an Arizona insurance law requires documents to have a minimum readability test score of 40[168] (a Readability Standard) and to organize sections logically, place exclusions near the general rule, cut non-essential provisions, place defined terms up front, use "everyday, conversational language," and use "short, simple sentences and words in common usage" (a Features Standard).[169]

QUINNIPIAC L. REV. 147, 162–64 (2007) (detailing the evolution of the Dale-Chall formula).

161. Veronica J. Finkelstein & Nicole E. Crossey, *Making Every Word Count: Using Strategic Editing to Increase the Readability of Your Appellate Brief*, 67 DEP'T JUST. J. FED. L. & PRAC. 85, 90 (2019).

162. *See, e.g.*, ARIZ. ADMIN. CODE § R20-6-213(C)(2) (2007).

163. Blasie, *supra* note 93, at 488.

164. *Id.* at 488–90.

165. N.J. STAT. ANN. § 56:12-10(a) (West 1981).

166. OR. REV. STAT. § 180.545(1) (2021).

167. Blasie, *supra* note 93, at 488.

168. ARIZ. ADMIN. CODE § R20-6-210(C)(2) (2007).

169. ARIZ. ADMIN. CODE § R20-6-210(D)(1)–(3) (2007).

About six percent of codified plain language laws use Hybrid Standards.[170]

Like any codified standard, courts exert considerable discretion in applying the standard. Some courts apply them strictly. In one New York court case, landlords claimed they have the "overwhelmingly difficult and possibly impossible task of converting each and every clause of the lengthy expired lease to plain English," while tenants claimed they have "the equally difficult task of determining whether the terms and conditions in the plain English lease are the same as the expired lease."[171] The court called both arguments specious because the benefits to all involved "far outweigh these inconveniences."[172] Another New York court awarded fifty dollars in damages when a lease violated a law's "division of subject matter and captions" requirements.[173] A Connecticut court deemed a contract noncompliant for using the incorrect kind of pronouns.[174] The Ninth Circuit held the National Environmental Policy Act's plain language provision required agency environmental impact statements to be "organized and written in language understandable to the general public and at the same time contain sufficient technical and scientific data to alert specialists to particular problems within their expertise."[175]

Other courts apply plain language laws more loosely. Consider Wisconsin, where a law requires the state government to create a plain language pamphlet describing eminent domain.[176] When a landowner tried to prevent the state from exercising eminent domain authority because the pamphlet inadequately explained the law, a Wisconsin court rejected the argument, reasoning "[n]o reasonable person would initiate a lawsuit against a state agency and rely on a pamphlet's summary of a complex area of the law as its sole source of information."[177]

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170. Blasie, *supra* note 93, at 488.

171. *Francis Apts. v. McKittrick*, 429 N.Y.S.2d 516, 518–19 (Civ. Ct. 1979).

172. *Id.* at 519.

173. *Rock v. Klepper*, No. SC-270-2008, slip op. at *7 (N.Y. City Ct. Mar. 25, 2009).

174. *Keill v. Howland*, No. CV NH 6172, 1995 WL 591467, at *13 (Conn. Super. Ct. Sept. 1, 1995).

175. *Or. Env't Council v. Kunzman*, 817 F.2d 484, 494 (9th Cir. 1987) ("The discussion of certain risks is at times dry and dense, but accessible to the interested layperson.").

176. WIS. STAT. § 32.26(6) (2019–20).

177. *Scott Dev. Co. v. State Dep't of Transp.*, No. 99-2329, 617 N.W.2d 677, at *4 (Wis. Ct. App. June 20, 2000); *see also Benson v. Dep't of Emp. & Econ. Dev.*, No. A08-1144, 2009 WL 1374886, at *3 (Minn. Ct. App. May 19, 2009) (rejecting challenge that unemployment handbook violated plain language law by not adequately explaining how to seek benefit because handbook was not intended to be exhaustive explanation and ability to understand handbook does not affect right to benefit).

C. Enforcement of Codified Plain Language Laws

Just as the standards and coverage of codified plain language laws vary, so too do the enforcement mechanisms. In designing enforcement mechanisms, lawmakers make three fundamental decisions: (1) how to enforce the law; (2) what penalties are available; and (3) what defenses or exceptions to permit.

1. HOW TO ENFORCE CODIFIED PLAIN LANGUAGE LAWS

Nationwide, lawmakers employ five approaches to enforcing codified plain language laws.

The *first* approach is silence. Many codified plain language laws say nothing about enforcement. Some of these laws have language suggesting compliance is mandatory, like a Kentucky law that says car rental insurance agreements "shall not be transacted" unless certain disclosures meet readability requirements.[178] But without explicit penalties or caselaw interpreting such laws, whether anyone could enforce them is unclear. To be sure, sometimes courts have interpreted silence as creating a viable cause of action. For example, the Indiana Constitution requires every legislative act and joint resolution to "be plainly worded, avoiding, as far as practicable, the use of technical terms."[179] For over a century, Indiana courts have fielded claims that statutes were unconstitutional for not being plainly worded.[180] Likewise, a Pennsylvania law requires the state Attorney General to prepare a plain language explanation of proposed state constitutional amendments before election day.[181] Although the Pennsylvania Supreme Court has on at least two occasions

178. KY. REV. STAT. ANN. § 304.9-509 (West 2010) (applying readability standard to disclosures in car rental agreements); *see also* KY. REV. STAT. ANN. § 304.9-497 (West 2014) (same for self-service storage insurance).

179. IND. CONST. art. IV, § 20.

180. *See, e.g.*, *Welsh v. Sells*, 192 N.E.2d 753, 762–63 (Ind. 1963) (although the statute is "clumsily worded and is certainly confusing . . . [and] is not crystal-clear," the statute did not violate the constitution because it was susceptible to both an intelligible and reasonable construction), *opinion adhered to on denial of reh'g*, 193 N.E.2d 359 (Ind. 1963); *State ex rel. Spencer v. Baker*, 7 N.E.2d 984, 988 (Ind. 1937) ("A statute should not be held void for uncertainty, if any reasonable and practical construction can be given it. Mere difficulty in ascertaining its meaning does not render it void. It is the duty of the courts to endeavor by every rule of construction, if possible, to give full force and effect to every enactment of the General Assembly not obnoxious to constitutional prohibitions.").

181. 25 PA. CONS. STAT. § 2621.1 (1986).

rejected challenges to a statement's adequacy,[182] in doing so the Court showed that the requirement is enforceable.

The *second* approach is no enforcement. Many broad public sector codified plain language laws are explicitly unenforceable, including the federal Plain Writing Act of 2010.[183] However, more targeted laws governing government writing often are enforceable.[184] Some plain language laws simply state that they do not create new causes of action or penalties, nor do they create, expand, or limit other causes of action.[185] Whether this latter variation is enforceable seems to depend on whether other sources of law could enforce the plain language provision.

The *third* approach is regulatory enforcement. This approach empowers agencies to ensure regulated industries comply. In doing so, lawmakers sometimes shift the enforcement burden. The insurance industry provides a good illustration. Insurance forms are almost entirely regulated by states.[186] State regulators usually supply template insurance forms or review insurance forms for compliance with state law, although some commentators have questioned how effective regulators are at doing so.[187] Some insurance plain language laws require insurers to certify that each policy complies with the plain language law.[188] Others

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182. *See Grimaud v. Commonwealth*, 865 A.2d 835, 843–44 (Pa. 2005); *Bergdoll v. Commonwealth*, 858 A.2d 185, 196 (Pa. Commw. Ct. 2004), *aff'd*, 874 A.2d 1148–49 (Pa. 2005).

183. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861 (2010) (no judicial review or enforceable rights); *see also* COLO. REV. STAT. § 2-2-801 (1993) (enactment of bill by the Colorado General Assembly "create[s] a presumption that such bill conforms" to law requiring plain language in statutes); KY. REV. STAT. ANN. § 446.015 (West 1978) (enactment of bill by the Kentucky General Assembly creates "a conclusive presumption that such bill conforms" to law requiring plain language in statutes); ALASKA STAT. § 44.62.300(b)(3)(A) (failure of agency to use plain language in notices is not grounds to void regulation); *id.* § 15.80.005(d) (election results remain valid even if election ballot fails the plain language requirement).

184. *See, e.g.*, *Grimaud*, 865 A.2d at 843–44 (considering plain language challenge to election ballot design); *Welsh*, 192 N.E.2d at 762–63 (considering constitutional challenge to statute's compliance with plain language standard); *TracFone Wireless, Inc. v. State*, 351 P.3d 599, 605 (Idaho 2015) (considering and rejecting claim that statute violated plain language provision of Idaho Constitution); *In re Idleman's Commitment*, 27 P.2d 305, 311 (Or. 1933) (considering and rejecting claim that statute violated plain language provision of Oregon Constitution); *Marcoccia v. Suffolk Cnty. Bd. of Elections*, 766 N.Y.S.2d 567, 568 (App. Div. 2003) (election ballot question phrasing violated plain language election law).

185. *See, e.g.*, ARK. CODE ANN. § 23-61-115(c) (2019) (guaranteeing a "readable [insurance] policy" but not creating a new cause of action); LA. STAT. ANN. § 22:41 (2018) (creating "the right to a readable [insurance] policy," but not creating a cause of action or new damages).

186. 15 U.S.C. § 1012.

187. Robert L. Tucker, *Disappearing Ink: The Emerging Duty to Remove Invalid Policy Provisions*, 42 AKRON L. REV. 519, 576–80 (2009).

188. *See, e.g.*, ARIZ. ADMIN. CODE § R20-6-213(C)(4) (2023); COLO. REV. STAT. ANN. § 10-4-633.5(1)(b) (West 2023); COLO. REV. STAT. ANN. § 10-16-

place the entire burden of review on agencies, like those requiring insurance commissioners to check for compliance before approving a policy.[189] Yet, other states combine both approaches. Consider Minnesota, which requires the insurer to submit certifications and the insurance commissioner to conduct an independent assessment.[190] Notably, regulatory enforcement sometimes is a tradeoff that offers protection to the regulated parties. For example, SEC regulations require certain public filings to use plain language.[191] But even when violations harm individuals, the individuals have no private right of action.[192] "That the SEC has the power to enforce its rules and regulations creates a strong presumption that Congress did not intend for private individuals to have that power."[193] Thus, without an explicit private right of action, regulatory enforcement may preclude individuals from suing.

A *fourth* approach is enforcement under a pre-existing cause of action.[194] For instance, failure to use plain language in Alaskan and

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107.3(1)(b) (West 2023); HAW. REV. STAT. ANN. § 431:10-107(a) (West 2022); ME. REV. STAT. ANN. tit. 24-A, § 2441(4); *see also* HAW. REV. STAT. ANN. § 431:10-105 (West 2022).

189. *See, e.g.*, CONN. GEN. STAT. ANN. § 38a-299(a)(1) (West 2022) (describing how the insurance commissioner must approve policies as meeting readability requirements); IOWA ADMIN. CODE r. 191-28.14(509) (2023); N.J. STAT. ANN. § 17B:25-18(h) (West 2023) (explaining that the insurance commissioner may disapprove policy that is unjust, unfair, misleading, contrary to law, or contrary to public policy); N.C. GEN. STAT. ANN. § 58-38-30(b) (West 2022) (stating the commissioner must deny noncompliant policies); N.J. STAT. ANN. § 17:46C-6(3)(b)(ii)–(iii) (West 2023) (explaining that the insurance commissioner must reject legal services insurance policies that fail "to attain a reasonable degree of readability, simplicity and conciseness" or are "misleading, deceptive or obscure because of its physical aspects such as format, typography, style, color, material or organization"); 230-20-60 R.I. Code R. § 1.14 (LexisNexis 2023) (explaining the insurance commissioner cannot approve certain consumer credit insurance forms "unless the policy or certificate is written in non-technical, readily understandable language, using words of common everyday usage" and those forms meet a minimum readability score on the Flesch scale).

190. MINN. STAT. ANN. § 72C.10(2)(a) (West 2023).

191. SEC Div. of Corp. Finance: Updated Staff Legal Bulletin No. 7, WL 34984247 (June 7, 1999) [hereinafter SEC Staff Legal Bulletin No. 7]; 17 C.F.R. § 230.421(d)(1) (2023); 17 C.F.R. § 230.481(b) (2023); 17 C.F.R. § 229.105 (2023); 17 C.F.R. § 270.30e-3(d) (202317 C.F.R. § 240.13a-20 (2023); 17 C.F.R. § 240.15d-20 (2023); 17 C.F.R. § 229.503 (2023); 17 C.F.R. § 229.501 (2023); 17 C.F.R. § 229.502 (2023).

192. *Campbell ex rel. Equity Units Holders v. Am. Int'l Grp., Inc.*, 86 F. Supp. 3d 464, 471–72 (E.D. Va. 2015), *aff'd sub nom. Campbell v. Am. Int'l Grp., Inc.*, 616 Fed. Appx. 74 (4th Cir. 2015).

193. *Id.* at 472.

194. A close variation creates functional barriers to enforcing a noncompliant contract. One of the few codified New York rules of evidence prevents fine print consumer contracts or leases that use fine print or illegible print from being admitted into evidence at any trial, hearing, or proceeding by the party who prepared the contract. N.Y. C.P.L.R. § 4544 (McKinney 2022).

Coloradan installment plan contracts is grounds for unfair competition and deceptive trade practices claims.[195] Car rental companies who dare issue a Colorado collision damage waiver not written "in simple and readable plain language" have committed a deceptive trade practice.[196] The Colorado Attorney General, district attorneys, and injured consumers can sue.[197]

The *fifth* approach is explicitly creating a cause of action. This approach allows allegedly harmed parties to bring a claim under the plain language law. Several laws explicitly authorize injured parties to seek relief like an injunction[198] or monetary damages.[199]

2. PENALTIES FOR VIOLATIONS

When permitted, the penalties for violating plain language laws vary dramatically. In fact, the kinds of penalties encompass nearly the full range of civil law penalties.

A sampling of plain language laws enforceable by regulators showcases such variety. The FEMA administrator can fine flood insurers up to $50,000 for noncompliant policies.[200] State insurance departments can deny or withdraw approval of noncompliant policies.[201] Meanwhile, the SEC can issue comments and deny requests to accelerate noncompliant filings.[202] The New Jersey Office of Administrative Law will reject any noncompliant notice of rule changes.[203] The Colorado Attorney General can seek up to $20,000 for each violation of a consumer protection plain language law.[204] And the Vermont Commissioner of

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195. ALASKA STAT. ANN. § 45.50.471(b)(13) (West 2022) (creating unfair competition or deceptive practices claim when seller permits payment on an installment plan without including a description of the goods or services "in readable, clear, and unambiguous language"); COLO. REV. STAT. ANN. § 6-1-105(1)(m) (West 2023) (creating unfair competition or deceptive practices claim when seller permits payment on an installment plan without including a description of the goods or services "in readable, clear, and unambiguous language").

196. COLO. REV. STAT. ANN. § 6-1-203(1)(b) (West 2022); *see also* 16 C.F.R. § 436.6(b) (2023) (stating that it is an unfair or deceptive act or practice for a franchisor to not use plain language disclosures and is enforced by the federal trade commission).

197. COLO. REV. STAT. ANN. § 6-1-103, -112 to -113 (West 2022).

198. *See, e.g.*, MINN. STAT. ANN. § 604.175(a) (West 2023).

199. *See, e.g.*, MONT. CODE ANN. § 30-14-1111 (West 2021).

200. 42 U.S.C. § 4013(b)(A)(iii).

201. *See, e.g.*, S.C. CODE ANN. § 38-61-40 (empowering insurance director to withdraw approval or certification of policy).

202. SEC Staff Legal Bulletin No. 7, *supra* note 191; 17 C.F.R. § 230.461(b)(1) (2023).

203. N.J. STAT. ANN. § 52:14B-4.1a(b) (West 2023) (stating that the Office of Administrative Law cannot accept notice of a rule change "which lacks a standard of clarity").

204. COLO. REV. STAT. ANN. § 6-1-112(a) (West 2022).

Disabilities, Aging, and Independent Living can fine a nursing home up to $1,000 for not issuing a certain kind of notice in plain language.[205] Thus, regulatory penalties range from monetary fines to denying market access to halting or slowing government processing.

Laws enforceable by private parties have similar variety. Some authorize equitable remedies. For example, a Minnesota law allows patients to enjoin a nonprofit hospital from collecting bills when the hospital failed to provide a plain language summary of the financial assistance policy.[206] And New York courts have required landlords to rewrite noncompliant renewal leases.[207] Some laws even authorize courts to reform noncompliant contracts.[208]

Other laws void noncompliant documents.[209] For instance, a North Dakota premarital agreement is unenforceable without "an explanation in plain language of the marital rights or obligations being modified or waived by the agreement."[210] Oregon voids noncompliant lawyer contingency fee agreements.[211] Substantial compliance is insufficient.[212] Citizens are not bashful about suing the government to void quintessential government actions like elections or even the passage of a law.[213] By

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205. VT. STAT. ANN. tit. 33, § 7303 (2023) (describing notice); VT. STAT. ANN. tit. 33, § 7304 (2022) (authorizing penalty).

206. MINN. STAT. ANN. § 604.175(a) (West 2023).

207. *Newport Apartments Co. v. Collins*, 431 N.Y.S.2d 231, 232 (App. Term 1980) (finding landlord must rewrite renewal lease to satisfy plain language law); *Francis Apts. v. McKittrick*, 429 N.Y.S.2d 516, 519 (Civ. Ct. 1979) (finding landlord must rewrite renewal lease to satisfy plain language law).

208. MINN. STAT. ANN. § 325G.33 (West 2023). A New Jersey plain language law permits courts to reform a consumer contract if a notice provision of the contract violates the consumer protection plain language law and the violation has caused or is likely to cause financial detriment to the consumer. N.J. STAT. ANN. § 56:12-4.1 (West 2023) (authorizing court to reformat consumer contract when violation substantially confused and caused financial detriment to the consumer); *Alloway v. Gen. Marine Indus., L.P.*, 695 A.2d 264, 274 (N.J. 1997).

209. *See, e.g.*, W. VA. CODE R. 77-6-3 (2022) (stating that a waiver is not knowing and voluntary if not in plain language); 18-1 VT. CODE R. § 14: 4.702(B)(1) (2023) (explaining that a letter changing long distance telecommunication provider is invalid if not in plain language); DEL. CODE ANN. tit. 6, § 2807(a), (g) (West 2023) (giving purchaser option to void camping ground contract that does not use plain language); GA. CODE ANN. § 10-4-107.1(b)(2) (2023) (stating that a contract to purchase tobacco is invalid and not binding unless written in plain language).

210. N.D. CENT. CODE ANN. § 14-03.2-08(1) (West 2021).

211. OR. REV. STAT. ANN. § 20.340 (West 2022).

212. *Bechler v. Macaluso*, No. CV 08-3059-CL, 2010 WL 2034635, at *9 (D. Or. May 14, 2010).

213. *See, e.g.*, *Mavromatis v. Town of W. Seneca*, 869 N.Y.S.2d 709, 710 (App. Div. 2008) (finding election proposition language misleading); *Marcoccia v. Suffolk Cnty. Bd. of Elections*, 766 N.Y.S.2d 567, 568 (App. Div. 2003) (affirming annulment of election proposition language because it was misleading); *Ass'n for a Better Long Island v. Cnty. of Suffolk*, 663 N.Y.S.2d 226, 227 (App. Div. 1997) (finding proposed election ballot language misleading); *Bint v. Creative Forest Prods.*, 697 P.2d

contrast, some laws are careful to preserve enforcement of noncompliant documents. One of Wisconsin's plain language laws states a violation does not void or render voidable any part of an insurance policy and the law is not a defense to an action under the policy.[214]

Consumer contract plain language laws exemplify how lawmakers mix and match a smorgasbord of penalties, including monetary damages, class actions, and attorneys costs and fees.[215] Any violation of New York's plain language consumer contract law permits affected consumers to recover "any actual damages" plus fifty dollars.[216] The law caps class action penalties at ten thousand dollars.[217] Violations do not void the contracts or prevent enforcement.[218] For repeat offenders, the New York Attorney General can move to prevent the company from doing business.[219] Pennsylvania's plain language consumer contract law takes a similar approach, allowing parties to recover actual loss, statutory damages of the larger of $100 or the total value of the contract, court costs, reasonable attorney fees, and any other relief ordered by the court.[220] Like New York, Pennsylvania does not allow breaches to void

818, 830 (Idaho 1985) (Bistline, J., dissenting) (finding statute unconstitutional because it "is not plainly worded"); *Gruskoff v. Cnty. of Suffolk*, 18 N.Y.S.3d 344, 345 (App. Div. 2015) (rejecting plain language challenge to proposed election proposition); *Leib v. Walsh*, 992 N.Y.S.2d 637, 640 (Sup. Ct. 2014) (considering election language challenge); *In re Initiative Petition No. 363, State Question No. 672*, 927 P.2d 558, 567–68 (Okla. 1996) (considering challenge to election ballot language); *In re Initiative Petition No. 360, State Question No. 662*, 879 P.2d 810, 819 (Okla. 1994) (rejecting challenge to election ballot language because language was not misleading); *TracFone Wireless, Inc. v. State*, 351 P.3d 599, 605 (Idaho 2015) (presence of technical term did not render law unconstitutional); *State v. Newman*, 696 P.2d 856, 865 n.17 (Idaho 1985) (describing constitutional provisions as a "void-for-vagueness" doctrine); *Simmons v. Ewing*, 529 P.2d 776, 778 (Idaho 1974) (upholding statute against constitutional challenge); *Nelson v. Marshall*, 497 P.2d 47, 51–52 (Idaho 1972) (same); *Ada Cnty. v. Wright*, 92 P.2d 134, 137–38 (Idaho 1939) (same); *Burns v. Lukens*, 269 P. 596, 596–97 (Idaho 1928) (upholding statute against constitutional challenge); *Settlers' Irrigation Dist. v. Settlers' Canal Co.*, 94 P. 829, 831 (Idaho 1908) (finding act constitutional under plain language challenge even though phrasing included a word that was "meaningless and surplusage").

214. WIS. STAT. ANN. § 631.22(6) (West 2022).

215. *See, e.g.*, MONT. CODE ANN. § 30-14-1111 (2021) (setting remedy at $50 plus actual damages and costs); MONT. CODE ANN. § 30-14-1112 (2021) (capping class action damages at $10,000 plus actual damages and a violation does not void a contract); MINN. STAT. § 325G.33 (2022); MINN. STAT. ANN. § 8.31(3) (2022) (permitting reformation, injunctions, monetary penalty up to $25,000, attorneys fees and costs); MINN. STAT. § 325G.34 (2022) (permitting class actions).

216. N.Y. GEN. OBLIG. LAW § 5-702(a) (McKinney 2020).

217. *Id.*

218. *Id.* § 5-702(b).

219. *Id.* § 5-702(c); N.Y. EXEC. LAW § 63(12) (McKinney 2022).

220. 73 PA. STAT. & CONS. STAT. § 2207 (West 1993).

the contract, but Pennsylvania prohibits class actions.[221] Connecticut sets damages of its plain language consumer contract law at $100 and potential attorney fees.[222] Its courts have certified class actions based on plain language law violations, like one case involving claims that a standard-form lease breached the statute by using the words "lessor" and "lessee" in two sentences.[223] New Jersey's plain language consumer contract law permits punitive damages on top of attorney's fees and costs.[224]

3. DEFENSES AND EXCEPTIONS

At least three unique exceptions or defenses are sometimes built into plain language laws. Usually, they arise in very broad laws.

First, some plain language laws contain a "practicable" exception. These laws require drafters to abide by the plain language law only to the extent doing so is practicable. For example, Hawaii's constitution says "[i]nsofar as practicable" government writing for the public must use plain language.[225] Indiana's Constitution takes a similar approach: legislative acts must use plain language and avoid "as far as practicable . . . technical terms."[226] Colorado's General Assembly must "to the extent possible" use plain language when drafting laws.[227] Such caveats seem to provide substantial discretion to drafters. Research revealed no sources commenting on when using plain language would be impracticable.

Second, some plain language laws allow parties to obtain government preapproval: a certification from a government agency that a document complies with the plain language law. This exception arises in plain language insurance and consumer contract laws. Most commonly, government approval comes from the head of the state insurance agency or department of justice.[228] For example, under the New Jersey plain language consumer contract law, the attorney general

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221. *Id.* § 2208(c)–(d). A consumer contract preapproved by the Attorney General complies with the act and constitutes good faith effort to comply with the act. 37 PA. CODE § 307.10(a) (1999).

222. CONN. GEN. STAT. ANN. § 42-154 (West 1979).

223. *Lessard v. Rent-A-Ctr. E., Inc.*, 250 F.R.D. 103, 105–06 (D. Conn. 2008).

224. N.J. STAT. ANN. § 56:12-3 to -4 (West 1981).

225. HAW. CONST. art. XVI, § 13.

226. IND. CONST. art. IV, § 20.

227. COLO. REV. STAT. ANN. § 2-2-801 (West 1993).

228. *See, e.g.*, N.J. ADMIN. CODE § 11:2-18.5(a) (2018) (insurer can request insurance commissioner opinions on whether policy and documents satisfy plain language standard); OR. REV. STAT. ANN. § 180.540 (West 2009) (permitting department of justice review of certain consumer contracts); *id.* § 180.520(1)(h) (same); 73 PA. STAT. ANN. § 2209 (West 1993) (attorney general can preapprove consumer contracts).

and commissioner of insurance can certify a contract complies with the law.[229] Preapproval eases the mind of drafters but shifts power from courts and legislators to agencies. Under the New Jersey law, the attorney general's and commissioner's determinations are not appealable.[230] And if a drafter obtains preapproval, that preapproval can serve as a defense: when certified the contract "is deemed to comply with this act."[231] While the act provides guidelines the attorney general and commissioner could use to review contracts for compliance, the guidelines appear to be suggestions and non-exclusive, which means both agencies have significant influence over the law.[232]

Third, some plain language laws contain a good faith defense. Usually, this defense is in plain language consumer contract laws. For example, alleged violators of Minnesota's or Pennsylvania's plain language consumer contract laws have a defense if they "made a good faith and reasonable effort" to comply with the law.[233] What actions do or do not amount to good faith and reasonable effort is unclear. Although under the Pennsylvania law, preapproval by the attorney general satisfies the good faith exception.[234]

D. The Unmeasured Effects of Plain Language Laws

Generally, the effects of plain language laws fall into two categories. The first is compliance: have the laws affected the documents they cover? The second is societal effects: when covered documents do comply with the laws, what is the effect on readers, drafters, and society as a whole? This Section details the data currently available on these effects and the significant challenges to measuring these effects.

1. MEASURING COMPLIANCE WITH PLAIN LANGUAGE LAWS

This Article offers a summary of some of the empirical scholarly work on compliance but does not offer definitive estimates. Data tracking whether documents comply with plain language laws is scarce. Several complications likely contribute to the scarcity. For one, until recently no

229. N.J. STAT. ANN. § 56:12-8 (West 1982).

230. *Id.*

231. *Id.*; *see also* 37 PA. CODE § 307.10(a) (1999) (attorney general preapproval is compliance with act).

232. *See* N.J. STAT. ANN. § 56:12-10 (West 1982).

233. MINN. STAT. § 325G.34(1) (2022); 73 PA. STAT. & CONS. STAT. § 2208(a)(3) (West 1993).

234. 37 PA. CODE § 307.10(a) (1999). One of Pennsylvania's laws also prevents liability when all contracting parties complete their responsibilities or the consumer wrote the part of the contract that violates the law. *See* 73 PA. STAT. & CONS. STAT. § 2208 (West 1993).

one knew how many plain language laws existed.[235] Moreover, any researcher would face difficulties obtaining a representative sample set of covered documents. For instance, how could one analyze all the contracts covered by a consumer protection law or obtain all law firm contingency agreements in a state? Even tracking plain language law lawsuits is difficult as such cases are most likely in state courts and state court trial decisions and pleadings are not readily searchable on Westlaw or LexisNexis. How to measure compliance also presents novel methodological challenges, like how to decide if a contract is understandable to a person of average intelligence and education.[236] Still, a few scholars have ventured into this unmapped territory.

In one of the earliest assessments of plain language laws, in 1979, Michael Wisdom analyzed compliance with the 1975 Magnuson-Moss Warranty Act's requirements that certain warranties use "simple and readily understood language."[237] Looking at a sample set of about thirty seven warranties he concluded most corresponded to a college-level reading score or higher; one-third of warranties were more readable than their pre-act predecessors while two-thirds were less readable.[238] Wisdom concluded manufacturers may have complied with parts of the Magnuson-Moss Warranty Act but not the plain language portion.[239]

Fast forward to 2013, when Rachel Stabler analyzed federal government compliance with the Plain Writing Act of 2010 and concluded the Act has not stimulated government use of plain language due to its lack of oversight and enforcement.[240] Of thirty-five agencies, few issued the required annual reports and compliance decreased over time, eventually to less than fifty percent compliance; of those who did file, most reports "are generally paltry and provide little useful

235. *See* Blasie, *supra* note 93, at 473–75.

236. *See* McClane, *supra* note 87, at 268 ("Moreover, it has been difficult in the past to measure style in a way that permits investigation into whether the regulations are followed."); *accord* Firtel, *supra* note 26, at 887–93 ("What constitutes plain English is a subjective standard that will be hard to determine and virtually impossible to enforce.").

237. Michael J. Wisdom, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117, 1119–20 (1979).

238. *Id.* at 1127–29.

239. *Id.* at 1144. In 1995, Michael Friman pointed to treatise commentary no longer available that suggested in response to New York's consumer protection plain language law a "[l]arge numbers of firms have revised their printed forms to comply with the statute and have experienced no adverse impact. There has been no flood of litigation as initially feared." Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 108 (1995). Some government agencies provide resources to private entities to assist their compliance with plain language laws. *See, e.g.*, *Plain Language Initiative*, TEX. OFF. CONSUMER CREDIT COMM'R, https://occc.texas.gov/industry/plain-language-initiative (last visited Mar. 2, 2023).

240. Rachel Stabler, *"What We've Got Here Is Failure to Communicate": The Plain Writing Act of 2010*, 40 J. LEGIS. 280, 280 (2013).

information."[241] One agency duplicated the prior year's report and just changed the date.[242] Conversely, most agencies complied with the requirement to appoint an official to oversee the Act and provide a point of contact.[243] Looking at documents the agencies drafted, Stabler reported mixed improvement: agencies that do not comply with "the more technical requirements of the Act, are also faring poorly when it comes to communicating in plain language.[244] Still, Stabler noted many agencies have moved away from certain bad writing habits, like using legal jargon.[245]

The Center for Plain Language has graded each federal agency's compliance with the Plain Writing Act of 2010 since 2012.[246] The report card reflects massive variance. The Department of the Interior went from a B one year, to an F the next, to an A the following year, and in the last four years has received a C-, two Fs, and one A+.[247] The Departments of Commerce, Housing and Urban Development, Transportation, and the Treasury all received an F annually from 2018 to 2021.[248] By contrast, the Departments of Defense, Energy, Health and Human Services,

241. *Id.* at 296–303.

242. *Id.* at 302–03.

243. *Id.* at 304.

244. *Id.* at 306–15. But some agencies embraced the Act's plain language goal. The Department of Health and Human Services reduced a resource library from over one-hundred pages to only thirty-three, concluded the top three documents on substance abuse and mental health that had the largest public impact used plain language, provided information on how to submit grant applications using plain language, pages describing intensive writing training programs and evaluations of work product. U.S. DEP'T OF HEALTH & HUM. SERVS., PLAIN WRITING ACT COMPLIANCE REPORT, 2–4 (2020), https://www.hhs.gov/sites/default/files/hhs-2020-plain-writing-act-compliance-rpt.pdf [https://perma.cc/W9SK-QWRY]. To comply with the 2010 Plain Writing Act, the FDA made employees aware of the new requirement, provided training by using recorded modules developed by another government agency, and recognized employees who excel at using plain language. *Plain Writing: It's the Law!*, FOOD & DRUG ADMIN., https://www.fda.gov/about-fda/plain-writing-its-law [https://perma.cc/TE7U-NDB5] (last visited Mar. 2, 2023). The Department of Labor has a Senior Official for Plain Language, gives itself a grade each year on organizational compliance and writing quality, and requires new employees to take a plain language training. *Plain Language*, DEP'T OF LABOR, https://www.dol.gov/general/plainwriting [https://perma.cc/KMF5-VVB3] (last visited Mar. 2, 2023).

245. Stabler, *supra* note 240, at 315–16.

246. *Report Card Grades Across 10 Years: Compliance Grades, 2012–2021*, CTR. FOR PLAIN LANGUAGE (2023), https://centerforplainlanguage.org/2021-federal-plain-language-report-card/report-card-grades-across-10-years [https://perma.cc/3NPX-U9DU].

247. *Id.*

248. *Id.*

National Archives, and Social Security Administration received an A+ annually during the same time period.[249]

Turning to securities filings, take a look at Jeremy McClane's 2018 analysis of 2,255 initial public offering prospectuses filed with the SEC.[250] McClane analyzed each one for compliance with the SEC regulations' Features Standard.[251] More than that, his conclusions are telling: compliance varied within each prospectus with the most technical portions having the lowest score.[252] Compliance also varied over time. Compliance was "relatively stable" with a "gentle upward" trend in some sections before the 1998 plain language regulations took effect.[253] After the regulations took effect, plain language compliance had a "steep upward trend, peaking in mid-2000."[254] But after mid-2000, compliance had a "downward drift" and some sections fell below their pre-regulation averages.[255] For example:

> It is not clear why the plain English scores taper off over time, although it is possible that for both plain English and boilerplate, compliance with the regulation slipped once the SEC or the bar stopped focusing on it. Given the subjective nature of the regulation, it could also be the case that the SEC was unwilling or unable to enforce the policy and allowed compliance to slacken over time.[256]

Although there is insufficient data about compliance with plain language laws, the data available suggests compliance is mixed and may vary over time, by law, and by drafter. More research is needed.

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249. *Id.* Keep in mind the grades are based on a small snapshot of what agencies write. For example, the 2021 grades were based on each agency's FOIA page and COVID-19 page. *What We Graded in 2021*, CTR. FOR PLAIN LANGUAGE (2023), https://centerforplainlanguage.org/2021-federal-plain-language-report-card/what-we-graded/. These amount to a very small subset of what an agency writes that is considered by the Plain Writing Act. At the same time, voluntarily examining and grading this material is a true labor of love for the volunteers at the Center for Plain Language.

250. McClane, *supra* note 87, at 283.

251. *Id.* at 280–81.

252. *Id.* at 287.

253. *Id.* at 291.

254. *Id.*

255. *Id.* at 293.

256. *Id.* at 294.

2. MEASURING THE SOCIETAL EFFECTS OF PLAIN LANGUAGE LAWS

The societal effects of plain language laws are not fully understood.[257] Here again, several challenges impede understanding but there is some data.

At least four challenges limit assessments. *First*, there is no consensus on what effects to look for. Noted above, plain language supporters point to a range of benefits like helping consumers make informed decisions, improving market transparency, helping business efficiency, improving access to justice, and decreasing litigation.[258] Likewise, plain language skeptics and opponents have a list of concerns like causing confusion or increasing litigation.[259] *Second*, scholars have yet to agree on reliable methods to measure effects like trust in lawyers, consumer behavior, access to justice, or market transparency. *Third*, accessing and gathering data to measure these laws' effects is difficult. Researchers might need generous cooperation from businesses and citizens, and investments from governments willing to collect the right data. Researchers might also need data before and after plain language laws took effect or to compare jurisdictions with different plain language laws or one with a law to one without a law. *Fourth*, variations in coverage, standards, enforcement, and penalties add complex variables to any comparison.

Nonetheless, there are some data points on potential effects. One kind of data point is reflections from judges and scholars. In 1998, James Fischer was not optimistic as he opined that despite revised plain language insurance policies "it is difficult to discern any notable improvement in policy readability over the past 25 years."[260] He concluded insurance policies for even basic consumer products like car and home insurance remain complex contracts.[261] But in a 2004 opinion, Judge Richard S. Brown of the Wisconsin Court of Appeals was more optimistic. He said:

> Compared to years past, the policies are now written in simple words, short sentences and the active voice rather than in long

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257. *See* Betsy A. Bowen, Thomas M. Duffy & Erwin R. Steinberg, *Analyzing the Various Approaches of Plain Language Laws*, 20 VISIBLE LANGUAGE 155, 155 (1986) (noting there has been no comprehensive evaluation of the effectiveness of plain language laws and more research is needed to determine what characteristics of style and design effect use and comprehension, what are characteristics of strategies of companies that produce the most understandable contracts, and the best model of plain language laws).

258. *See supra* Section I.C.

259. *See supra* Section I.C.

260. James M. Fischer, *The Doctrine of Reasonable Expectations Is Indispensable, If We Only Knew What For?*, 5 CONN. INS. L.J. 151, 170 (1998).

261. *Id.*

> pages of text without headings, complex sentences, passive construction, unnecessary legalese and multisyllabic words. . . . But more needs to be done.[262]

As improvement, Judge Brown pointed to examples of undefined jargon, confusing organization, and poorly explained complexities.[263] Then he suggested plain language will help decrease lawsuits over contract ambiguity even if they do not disappear and insureds will make informed decisions about insurance.[264] Judge Brown recommended the Wisconsin Bar Association, plaintiffs' bar, and defense bar create a committee to award writers of well-written policies and "spur a Plain English movement in the writing of policies."[265]

Empirical research is needed. Here again, Jeremy McClane's work comes in handy. McClane concluded using plain language in federal securities filings did not affect deal speed or significantly save issuers legal fees but did impact "the outcome of the deal, and thus matters to investors, either because it affects the intelligibility of disclosure, or because better drafting forces more information to be disclosed in the first place."[266] McClane concluded "it is unclear whether stylistic regulation is effective as an empirical matter."[267]

Regardless of the empirical challenges of measuring effects, there is little evidence that plain language laws have had widespread effects. Consider consumer protection, the largest concentration of plain language laws where nearly five hundred plain language laws provide coverage.[268] Despite such a large number of laws, studies universally agree consumer contracts have abysmal readability.[269] Nonetheless, a compelling and growing body of literature and anecdotes shows that voluntary adoption of plain language delivers many benefits including increased readability.[270] The seemingly conflicting results raise questions about the need for plain language laws, and whether a combination of coverage, standard, and enforcement decisions have weakened their efficacy. Big questions remain about the effects of plain language laws and how to measure them; whether the effects vary depending on the

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262. *Com. Union Midwest Ins. Co. v. Vorbeck*, 674 N.W.2d 665, 677 (Wis. Ct. App. 2003) (Brown, J., concurring).

263. *Id.* at 677–79.

264. *Id.* at 679.

265. *Id.*

266. McClane, *supra* note 87, at 269–70.

267. *Id.* at 268.

268. Blasie, *supra* note 93, at 486.

269. Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. 55, 60–82 (2023) (summarizing studies of "contractual non-transparency practices" to demonstrate that these practices severely hinder consumer readability).

270. *See* KIMBLE, *supra* note 56, at 103–05.

reader, document, or context; and whether different designs of laws could have different effects. All are worthy of scholarly inquiry.

III. COMMON LAW PLAIN LANGUAGE

With nearly eight hundred codified plain language laws, one might assume that courts are powerless to impose plain language requirements. After all, with legislatures and regulators so involved, there is likely little elbow room for courts.

At times, courts suggested this assumption is correct. In a memorable 1984 opinion, the Supreme Court of Mississippi chastised a district attorney's form indictment for breaking and entering, which included incomplete sentences and legalese.[271] The trial court had

> repeatedly begged for six years or five years for the district attorney not to use this form. It is very poor English. It is impossible English. . . . I again ask the district attorney not to use this form. It's archaic. Even Shakespeare could not understand the grammatical construction of this indictment.[272]

Nonetheless, the Court upheld the form because the relevant criminal procedure rule only required the indictment to be "plain, concise and definite" and the Court knew "of no constitutional or natural law that might supplement" the rule with a requirement of basic grammatical compliance; "[e]stablishment of a literate bar is a worthy aspiration."[273]

But it turns out this case is an anomaly. When examining citing references to all 700-plus plain language laws, I discovered courts are intensely involved in crafting plain language standards. At times, they are interpreting codified plain language laws with considerable discretion. Other times, they are unilaterally creating and imposing their own plain language requirements in areas not covered by codified plain language laws. Sometimes they import standards from plain language laws; other times they create their own standard. This Part describes this body of court-made law and labels it "common law plain language," because courts develop it on a case-by-case basis.

A. Notice and Waiver Requirements

In a variety of settings, codified laws require individuals or entities to receive a written notice. These notices might explain the recipient's rights, trigger a recipient's legal obligation, or satisfy a legal

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271. *Henderson v. State*, 445 So. 2d 1364, 1366–69 (Miss. 1984).
272. *Id.* at 1366.
273. *Id.* at 1368.

requirement. Two common ways of challenging such a notice are: (1) contending the notice was inadequate; and (2) when the notice constitutes a waiver of rights, contending the waiver was not made knowingly and voluntarily by the recipient. In both instances, courts have imported or expanded on plain language requirements.

1. ADEQUACY REQUIREMENT

To determine the adequacy of a legally required notice, courts often examine both the notice's substance and form. More and more, that examination includes determining whether the notice uses plain language.

The presence or absence of plain language can affect how courts weigh an act or omission following receipt of a written notice. For example, an Illinois case pivoted on whether a death certificate made the next of kin sufficiently aware of the cause of death which would start the clock on the claim's statute of limitations.[274] The court considered the certificate's lack of plain language in finding it did not trigger the clock.[275] A federal trial court concluded a plaintiff "intentionally and in bad faith misrepresented his financial status" on an *in forma pauperis* application.[276] The court also said that "[w]hile he claims he misunderstood the IFP form, the Court questions this explanation in light of the plain language of the form itself."[277]

Some courts even consider plain language when assessing the adequacy of a verbal notice. Iowa criminal law waivers provide a good illustration. Under Iowa law, many criminal defendants have argued they did not waive the right to challenge their guilty pleas because the trial court did not adequately advise them of the need to file a motion to preserve such an argument.[278] But Iowa courts repeatedly reject this argument when the trial judge used plain language during a hearing.[279]

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274. *Fure v. Sherman Hosp.*, 380 N.E.2d 1376, 1386 (Ill. App. Ct. 1978).

275. *Id.* ("Because the widow did not within 2 years translate 'Mallory Weiss Syndrome' into a discrepancy between the treatment and the actual illness is hardly a reason to deny her a right to try her case.").

276. *Johnson v. Working Am.*, No. 1:12CV1505, 2013 WL 3822232, at *5 (N.D. Ohio July 23, 2013).

277. *Id.*

278. *See, e.g.*, *State v. Thornburg*, No. 16-2019, at *2 (Iowa Ct. App. Sept. 13, 2017).

279. *See, e.g.*, *id.* at *3 ("While the court did not use the specific words 'appeal' or 'waive,' the court's plain-language explanation informed Thornburg that he had only a limited time to point out any mistakes."); *State v. Abrahamson*, No. 06-0383, at *2 (Iowa Ct. App. May 23, 2007) ("Given the court's statements to Abrahamson, outlining in 'plain English' the consequences of the rule coupled with the clear indication of Abrahamson's understanding of the functioning of the rule, we find there was substantial compliance with rule 2.8(2)(d)."); *State v. Straw*, 709 N.W.2d 128, 132 (Iowa 2006), *superseded in part on other grounds by* Iowa Code §§ 814.6(1)(a), 814.7 ("Instead of

Shifting to the Due Process context, lack of plain language supports a finding of inadequate notice. In *Walters v. Reno*,[280] a federal court found a class action Due Process violation from immigration notices and orders of alleged immigration law violations that described the administrative hearing process and recipient's rights.[281] Due Process required the notices to be "reasonably calculated, under all the circumstances," to make recipients aware of the pending case and an opportunity to object.[282] In addition to the class members' language barriers and lack of education, the court noted the notices used "highly technical, legalistic language."[283] The court found the "confusing nature of this language, whether in English or Spanish, is manifestly evident from the record," pointing to testimony that "[m]ost, if not all, of the aliens who testified stated that they did not understand the forms, and did not realize that they faced permanent exclusion."[284]

Evidence also showed many federal agents did not understand the forms.[285] Ironically, an order written in plain language that accompanied the notices "profoundly exacerbated" the confusion because of how it interacted with the incomprehensible notices.[286] Another class action reached a similar conclusion, finding Medicare claim notices violated Due Process.[287] "First, they are incomprehensible to most of the people who receive them."[288] The evidence "clearly established that the review notices could not be understood by the great majority of the beneficiaries who received them" and were "written at a level well beyond most in this segment of the population, with no discernable added benefit from complexity in information provided."[289] Not pulling its punches, the court declared the "language used is bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak. It does not qualify as English."[290] Lastly, the court reasoned the government burden to write in a clear manner was not substantial.[291]

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quoting rule 2.8(2)(d) verbatim, the court performed its duty commendably by using plain English to explain the motion in arrest of judgment.").

280. *Walters v. Reno*, No. C94-1204C, 1996 WL 897662 (W.D. Wash. Mar. 13, 1996).

281. *Id.* at *15.

282. *Id.* at *10 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978)).

283. *Id.* at *10–11.

284. *Id.* at *11.

285. *Id.* at *4.

286. *Id.* at *11.

287. *David v. Heckler*, 591 F. Supp. 1033, 1035 (E.D.N.Y. 1984).

288. *Id.* at 1042.

289. *Id.* at 1042–43.

290. *Id.* at 1043.

291. *Id.* In 1983, the First Circuit found a food stamp reduction notice violated of Due Process in parts because of its deficient form. *Foggs v. Block*, 722 F.2d 933, 938

Thus, regardless of the statutory, common law, or constitutional notice adequacy requirement courts are applying, many courts have added plain language as a factor when considering such requirements.

2. VOLUNTARY AND KNOWING REQUIREMENT

Sometimes how recipients respond to a notice can waive rights. When that occurs, some legal doctrines will only enforce that waiver if the facts show the recipients voluntarily and knowingly waived their rights. As part of that analysis, courts often examine the presence or absence of plain language.

As an example of a statutory waiver of rights, consider the Age Discrimination in Employment Act. The Act is a codified plain language law in the form of a federal regulation that applies a Descriptive Standard: a waiver under the Act is only valid if made voluntarily and knowingly, which requires using language "geared to the level of understanding of the" signatory.[292] *Romero v. Allstate Insurance Co.*[293] shows how courts have considerable discretion when interpreting a Descriptive Standard. *Romero* held a waiver with a critical, solitary, 203-word-long sentence filled with legal jargon satisfied the Descriptive Standard.[294] Even though the sentence "is hardly the model of clarity and certainly is less preferable to the use of several shorter sentences," the court found it met the standard because the sentence was "not buried at the bottom of a contract, but rather [was] highlighted for the employee,"

(1st Cir. 1983) (cleaned up) ("[T]he form of the notice was constitutionally inadequate owing to its unfamiliar language, poor composition, small print, exclusive use of capital letters, and excessive line length. . . . [T]he December notice was difficult to read, relatively difficult to comprehend, ambiguous (in that it indicated only that benefits would be reduced or terminated), and that it lacked the specific information necessary to allow recipients to determine if a calculation had been made."). The Supreme Court reversed without diving into the format of the notice. *Atkins v. Parker*, 472 U.S. 115, 131 (1985) ("Surely Congress can presume that such a notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood. The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny."). *See generally Stevenson v. Reed*, 391 F. Supp. 1375, 1377–79, 1383 (N.D. Miss. 1975) (acknowledging inmate access to law library was ineffective because of low educational attainment of inmates and high reading level of library material but denying Due Process claim because inmates had adequate access to writ writers), *aff'd*, 530 F.2d 1207 (5th Cir. 1976).

292. 29 C.F.R. § 1625.22(b)(3)–(4) (2023). West Virginia has a similar law: no waiver of a right or claim under the West Virginia Human Rights Act is knowing and voluntary unless the waiver uses plain language "in a manner calculated to be understood by the average person with a similar educational and work background as the individual in question." W. VA. CODE R. 77-6-3 (2002).

293. *Romero v. Allstate Ins. Co.*, 1 F. Supp. 3d 319 (E.D. Pa.), *mem. clarifying denial of reconsideration* (2014).

294. *Id.* at 388–89.

the "provision says what it means," and another document helped clarify its meaning.[295] "Thus, the mere fact that the Release was long and contained legalese does not, in and of itself, render it incomprehensible."[296] Plus, the court considered the signatory's business background, education, and experience with the insurer and insurance contracts.[297] Thus, to apply this Descriptive Standard the *Romero* Court decided to examine language features like sentence length, location, and highlighting, plus factors about the signatory like education and familiarity with the content.

Even when not required by statute, courts sometimes look at plain language to determine if a waiver was made voluntarily and knowingly. For example, when assessing whether a contractual waiver of ERISA claims was made knowingly and voluntarily, a federal court noted the contract's use of plain language.[298]

Turning to the intersection of contractual waivers and constitutions, courts will only enforce a contractual waiver of the Seventh Amendment right to a jury trial when the waiver was made knowingly and voluntarily.[299] To determine if a waiver meets this standard, courts consider many factors including the "clarity of the waiver."[300] A Tennessee federal court found such a contractual waiver to be clear because it used plain language and a high school graduate could understand it.[301]

To be sure, not all courts require plain language for constitutional rights waivers. For example, in assessing whether a defendant "understandingly waived his right to conflict-free representation," Colorado courts examine whether the defendant voluntarily, knowingly, and intelligently relinquished the right.[302] In a 1990 case, a criminal defendant argued his waiver was invalid because he did not receive

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295. *Id.*

296. *Id.* at 398; *see also Ridinger v. Dow Jones & Co., Inc.*, 717 F. Supp. 2d 369, 374 (S.D.N.Y. 2010) ("While the Agreement is nevertheless scarcely a model of 'plain English' draftsmanship, it adequately conveys the limitations that Ridinger accepted in exchange for enhanced severance pay. There also is no indication that any of the undertakings set forth in the Agreement were couched in terms too complicated for Ridinger to understand."), *aff'd*, 651 F.3d 309 (2d Cir. 2011).

297. *Romero*, 1 F. Supp. 3d at 390.

298. *Yablon v. Stroock & Stroock & Lavan Ret. Plan & Tr.*, No. 01 CIV.452, 2002 WL 1300256, at *6 (S.D.N.Y. June 11, 2002), *aff'd*, 93 F. App'x 329 (2d Cir. 2004), *opinion amended and superseded*, 98 F. App'x 55 (2d Cir. 2004).

299. *Dennis v. G4S Secure Sols. (USA), Inc.*, No. 1:20-CV-46, 2021 WL 6275630, at *3 (E.D. Tenn. Jan. 28, 2021).

300. *Id.*

301. *Id.* at *4–5.

302. *People v. Czemerynski*, 786 P.2d 1100, 1105–06 (Colo. 1990).

information in plain language.[303] The Colorado Supreme Court disagreed, concluding:

> [T]he court and counsel used appropriate language to advise him . . . . Our preference for plain English does not mean that a trial court is required to avoid all use of legal terms when advising a defendant. . . . While the record might have been more fully developed on the waiver issue, it is adequate for us to conclude that the defendant understandingly waived his right to conflict-free representation.[304]

Therefore, voluntary and knowing waiver requirements are an area courts have expanded on statutory plain language requirements or imported their own plain language requirements.

B. Contract Law

Courts have imported plain language requirements into contract law doctrines. In particular, the use or absence of plain language in a contract affects how courts interpret a contract and whether courts enforce a contract.

1. AMBIGUITY AND MEANING

Courts usually resolve contractual ambiguities against the drafter.[305] This principle often applies in the insurance context under the doctrines of *contra proforentum* or the reasonable expectations doctrine.[306] More and more, plain language affects whether courts find a contract ambiguous.

Courts consider the use or nonuse of plain language to determine if an insurance policy is ambiguous. For example, invoking the doctrine of

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303. *Id.* at 1106.

304. *Id.*; *see also Kinney v. Nogan*, No. CV 17-5608 (MCA), 2020 WL 1466361, at *7 (D.N.J. Mar. 26, 2020) ("Petitioner has not . . . provided any precedent that requires trial courts give a 'plain English' explanation of a [jury] charge.").

305. 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 (4th ed. 2022).

306. *See, e.g.*, Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1078 (2010) (describing doctrines); *Comm'rs of State Ins. Fund v. Ins. Co. of N. Am.*, 570 N.Y.S.2d 51, 52 (App. Div. 1991) (ambiguities are resolved against the insurer), *aff'd as modified*, 607 N.E.2d 795 (N.Y. 1992); *accord Aetna Ins. Co. v. Stevens*, 229 So. 2d 601, 602 (Fla. Dist. Ct. App. 1969) ("Florida courts have held in many cases, some of which are cited in the cases cited in our memorandum opinion, that ambiguity is resolved against the insurer. If this insurance company had no intention of defending an electrical contractor accused of negligent *installation* (not *manufacture*) after completion of his work it should have said so in plain English.").

reasonable expectations and referencing a plain language regulation, a Delaware court found ambiguity in an insurance policy because "the terms as used differ from the term as ordinarily understood and is so convoluted as to cause confusion to the reader."[307] Conversely, the New York Court of Appeals refused to find ambiguity when a clause used plain language because to "divine ambiguity here would violate that principle and would defeat the use of plain English language in this insurance policy and clause."[308] When an Ohio litigant tried to argue an insurer's compliance with a plain language law rendered a contract ambiguous, the court described the argument as "highly ironic" and "more than a little specious" as the statute decreases ambiguity.[309] While plain language is a strong factor in determining ambiguity,[310] its presence or absence is not always dispositive.[311]

Even if a clause is unambiguous, sometimes the document's overall lack of plain language can cause ambiguity. In *Badger Mutual Insurance Co. v. Schmitz*,[312] the Wisconsin Supreme Court found the poor drafting of an insurance policy rendered an otherwise "unambiguous clause unenforceable."[313] The policy was "a maze that is organizationally complex and plainly contradictory," that "sends several false signals to the insured" and "is not user-friendly," which created enough "confusion, ambiguity, and illusory coverage in the context of the entire

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307. *Cintron v. Universal Underwriters Grp.*, 601 A.2d 1051, 1056 (Del. Super. Ct. 1990), *aff'd*, 586 A.2d 1203 (Del. 1990).

308. *Comm'rs of State Ins. Fund v. Ins. Co. of N. Am.*, 607 N.E.2d 795, 797 (N.Y. 1992); *see also Steinhauer v. Liberty Mut. Ins. Co.*, No. 3:18-CV-1416-JR, 2019 WL 3559474, at *7 (D. Or. May 21, 2019) (finding insurance policy was not ambiguous because "the contract clearly spells out that requirement in plain English"); *Hill v. Wackenhut Servs. Int'l*, 865 F. Supp.2d 84, 97 (D.D.C. 2012) (finding meeting of minds on arbitration clause in part because clause used plain English); Mark Cooney, *Style Is Substance: Collected Cases Showing Why It Matters*, 14 SCRIBES J. LEGAL WRITING 1, 3, 15 (2011–12) ("For example, legalese can doom exculpatory releases designed to avoid personal-injury suits. On the flip side, courts have cited the absence of legalese as a reason to enforce a release. . . . [A] court may be reluctant to enforce a potentially harsh contractual provision, such as an indemnity clause in a consumer document, if that provision is "buried at the end of a run-on sentence.").

309. *See Tscherne v. Nationwide Mut. Ins. Co.*, No. 81620, 2003 WL 22724630, at *1 (Ohio Ct. App. Nov. 20, 2003).

310. *See, e.g.*, *Harris v. St. Vincent Healthcare*, 305 P.3d 852, 857 (Mont. 2013) (rejecting claim of ambiguity when contract clauses used plain language). But just because a contract describes itself as using plain language does not mean a court will not find the contract ambiguous. *See H.E.D. Inc. v. Konica Minolta Bus. Sols. U.S.A. Inc.*, No. 2:14 CV 311, 2017 WL 4340205, at *3 (N.D. Ind. Sept. 29, 2017) (finding contract ambiguous even though contract asserted it used plain language).

311. *See Plastic Surgery Ctr., P.A. v. Cigna Health & Life Ins. Co.*, No. 3:17-cv-2055-FLW-DEA, 2021 WL 1686772, at *6 (D.N.J. Apr. 29, 2021) (insurance plan was not ambiguous even though provision was "far" from plain language).

312. *Badger Mut. Ins. Co. v. Schmitz*, 647 N.W.2d 223 (Wis. 2002).

313. *Id.* at 236–38.

policy" to "render an otherwise unambiguous, although poorly labeled" clause unenforceable.[314]

Plain language's role has become so important that courts actively encourage insurers to use it. For example, when interpreting an insurance contract in a way adverse to the insurance company, an Indiana court explained, "if the insurance company intended a different interpretation, it should have stated so in plain English so that their policyholders understand what is necessary to protect their interests and collect their benefits under the policy."[315] The court reached this conclusion even though the insurance company may have had a different intent: "[w]hile we recognize that this may have been Auto–Owner's intent, it should have stated so in plain English in its policy documents so that its policyholders know how to protect their interests and collect their benefits."[316] Likewise, a New York federal court awarded attorney fees for an ERISA violation in part to incentivize insurance companies to "draft plain policy language in plain English and expressly delineate policy exclusions."[317]

2. CLARITY AND UNAMBIGUOUS INTENT REQUIREMENTS

When certain areas of contract law require heightened clarity, some courts have begun examining the use or absence of plain language.

A good example is the 1979 case of *Gross v. Sweet*,[318] where the New York Court of Appeals imported a statutory plain language standard into the common law. The court held a plaintiff could sue a parachute jumping company for negligence despite a contractual release clause exempting the company from all liability.[319] New York common law permitted releases of negligent conduct only if the provision uses

314. *Id.* at 238. The next year, the Wisconsin Supreme Court backpedaled. *Folkman v. Quamme*, 665 N.W.2d 857, 869 (Wis. 2003) ("Aspirational goals and admonitions on how to avoid ambiguity are admittedly different from minimum legal standards. *Schmitz* and its predecessors do not demand perfection in policy draftsmanship. . . . To prevent contextual ambiguity, a policy should avoid inconsistent provisions, provisions that build up false expectations, and provisions that produce reasonable alternative meanings.").

315. *Auto-Owners Ins. Co. v. Benko*, 964 N.E.2d 886, 887 (Ind. Ct. App. 2012).

316. *Id.* at 891.

317. *McLean v. Cont'l Cas. Co.*, No. 95 CIV. 10415 HB, 1997 WL 566117, at *3 (S.D.N.Y. Sept. 11, 1997); *see also Auto-Owners Ins. Co.*, 964 N.E.2d at 887 ("[I]f the insurance company intended a different interpretation, it should have stated so in plain English so that their policyholders understand what is necessary to protect their interests and collect their benefits under the policy.").

318. *Gross v. Sweet*, 400 N.E.2d 306 (N.Y. 1979).

319. *Id.* at 307.

"unmistakable language."[320] To be "unmistakable language," the terms must be both "unambiguous" and "understandable."[321] The provisions "should not compel resort to a magnifying glass and lexicon. Of course, this does not imply that only simple or monosyllabic language can be used in such clauses. Rather, what the law demands is that such provisions be clear and coherent (*cf.* General Obligations Law, § 5-702)."[322] Note the citation to Section 5-702 (New York's plain language consumer contract law), which did not apply to the parachute contract. The law only covered contracts for residential and personal property leases.[323] And the plain language law could not void covered contracts or defend against enforcement.[324] Nonetheless, the court used the codified law's standard to explain the "unmistakable language" common law standard.

Elsewhere, courts reference plain language as evidence of whether provisions meet a clarity standard. Consider California, where an insurance policy risk carveout must be "plain and clear."[325] One court held such a clause satisfies the "plain and clear" requirement because it used plain language and did not contain insurance jargon.[326] Likewise, Hawaii law looks for whether there was unambiguous intent to agree to arbitration.[327] In finding unambiguous intent, one court reasoned, "[i]t is written in plain English with no fine print or cross-references to other documents. . . . the plain language of the arbitration agreement demonstrates the parties' mutual assent to arbitrate."[328]

Courts even consider plain language to determine whether there was mutual assent to a contract's terms. A great illustration comes from New Jersey. New Jersey requires all contracts to have mutual assent and requires contracts that waive rights to use clear and unmistakable language.[329] A 2014 New Jersey Supreme Court decision held arbitration clauses will be enforced when they use plain language that is understandable to the reasonable consumer or else they are unenforceable for lack of mutual assent.[330] In defining what makes such a waiver understandable, the court imported the standard from the New Jersey

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320. *Id.* at 309.

321. *Id.*

322. *Id.*

323. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 2022).

324. *Id.* § 5-702(b).

325. *Fussell v. AMCO Ins. Co.*, No. 2:11-cv-02766-GEB-EFB, 2013 WL 127675, at *10 (E.D. Cal. Jan. 9, 2013).

326. *Id.*

327. *Gabriel v. Island Pac. Acad., Inc.*, 400 P.3d 526, 535 (Haw. 2017).

328. *Id.* at 536.

329. *Atalese v. U.S. Legal Servs. Grp.*, 99 A.3d 306, 313 (N.J. 2014).

330. *Id.* at 314.

plain language consumer contract law.[331] Under that law, courts have discretion to void noncompliant contracts but voiding is not automatic.[332] Yet, by incorporating the plain language standard into the mutual assent requirement, the court seemed to change the stakes of noncompliance. Indeed, in a 2016 case the court refused to enforce an arbitration clause that violated the plain language law's standard, noting the clause was in nine-point font and had a "more than 750-word arbitration clause set forth in thirty-five unbroken lines."[333] In 2019, the court again struck down an arbitration clause for failure to follow the plain language law based on "small typeface, confusing sentence order, and misleading caption."[334]

Thus, courts have used their common law control of contract law to extend the reach of plain language statutes or to import plain language into contract law.

3. ENFORCING UNENFORCEABLE PLAIN LANGUAGE LAWS

Even unenforceable plain language laws influence courts. When consumers are unable to sue for a violation of a plain language consumer contract law, some courts have found ways to enforce such laws.

In *Gross v. Lloyds of London Insurance Co.*,[335] the Wisconsin Court of Appeals interpreted an insurance policy governed by Minnesota law.[336] The insured contended the policy violated the Minnesota plain language statute because it used legal terminology, lacked a cover sheet, and lacked bold warnings.[337] While correct, the court held the statute contained no penalty for violation apart from disapproval by the Minnesota Commissioner of Insurance.[338] Because the Commissioner had approved the noncompliant policy and there was no other basis for relief, the court could not void the contract.[339] On appeal, the Wisconsin Supreme Court reversed. Without addressing the plain language statute, the court invalidated the provision for being added during a policy renewal process through a deficient notice.[340] Because the new language was an exception

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331. *Id.*

332. N.J. STAT. ANN. §§ 56:12-11, -17 (West 2023).

333. *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181 (N.J. 2016).

334. *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 199 A.3d 766, 781 (N.J. 2019).

335. *Gross v. Lloyds of London Ins. Co.*, 347 N.W.2d 899, 904 (Wis. Ct. App. 1984).

336. *Id.* at 903.

337. *Id.*

338. *Id.* at 904.

339. *Id.*

340. *Gross v. Lloyds of London Ins. Co.*, 358 N.W.2d 266, 271–72 (Wis. 1984).

to longstanding coverage, it needed to "be highlighted in the policy and binder by means of conspicuous print, such as bold, italicized, or colored type, which gives clear notice to the insured . . . ."[341] Essentially, the Wisconsin Supreme Court created a common law plain language standard for policy change notices that applies even to insurance policies that pass the Commissioner's review.

In 2008, the Montana Supreme Court faced a similar issue when a party tried to invalidate an insurance policy provision for noncompliance with a plain language law based on the failure to include the provision in the table of contents and notice section.[342] Both parties agreed the policy violated the plain language law.[343] Just like in *Gross*, the insurance commissioner had "sole authority to enforce" or "to seek remedies."[344] Nonetheless, although the statute barred a private right of action, it "does not prevent this Court from determining that the notice provision in the policy before us violates the laws of this State, and from refusing to enforce it."[345] The court held the provision was void and unenforceable as a matter of public policy because it violated the plain language law.[346]

These examples showcase how courts can use their power to supplement and arguably override limitations in plain language statutes and regulations.

4. UNCONSCIONABILITY

Courts have also added plain language as a factor in unconscionability analyses. When considering procedural unconscionability, many courts consider plain language features, like "hidden or unduly complex contract terms,"[347] "the use of complex

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341. *Id.* at 271 (plurality opinion). Two concurrences flagged the need for deference to the Minnesota Commissioner. *Id.* at 272 (Abrahamson, J., concurring); *id.* at 273 (Ceci, J., concurring).

342. *Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc.*, 174 P.3d 948, 959 (Mont. 2008).

343. *Id.*

344. *Id.* at 960 (quoting MONT. CODE ANN. § 33-15-338(2) (2007)).

345. *Id.*

346. *Id.*; *see also Hayes v. AMCO Ins. Co.*, No. CV 11–137–M, 2012 WL 5354553, at *7 (D. Mont. Oct. 29, 2012) (dismissing attempt to raise independent claim under plain language law); *High Country Paving, Inc. v. United Fire & Cas. Co.*, No. CV 18-163-M, 2020 WL 42722, at *3 (D. Mont. Jan. 3, 2020) (declaring insurance policy exclusion unenforceable for violating the plain language statute); *Van Vallis v. Transcon. Ins. Co.*, No. CV 07–26–M, 2008 WL 11348493, at *8–9 (D. Mont.) (denying insurer's motion for summary judgment on the issue of the enforceability of certain provisions because the insurer had failed to provide evidence of compliance with the statute), *report and recommendation adopted*, 2008 WL 11349695 (D. Mont. Aug. 28, 2008).

347. *Laibow v. Menashe*, Civ. No. 19-4549, 2019 WL 6243368, at *8–9 (D.N.J. Nov. 21, 2019); *see also Hampden Coal, LLC v. Varney*, 810 S.E.2d 286, 297–

legalistic language,"[348] or "the hiding of clauses in fine print or inconspicuous places . . . [and] phrasing clauses in language incomprehensible to an average person without legal training, or phrasing clauses in such a way so as to divert from the problems they raise or the rights relinquished under them."[349] Other courts explicitly consider whether a contract uses plain language in conducting a procedural unconscionability analysis.[350] Some courts even consider plain language as part of a substantive unconscionability analysis.[351]

So even if no plain language statute or regulation applies, or perhaps applies but does not void a contract for noncompliance, courts have added their own backstop by at least considering plain language in an unconscionability analysis.

C. Other Doctrines

Plain language has also affected how parties support their claims and what kinds of evidence courts consider.

More and more parties use the absence of plain language to support claims, with mixed success. In 2009, a New York federal court held the New York City Fire Department's written examinations constituted employment discrimination and "unfairly excluded hundreds of qualified people of color," in part because the exams were not written at an appropriate reading level.[352] Based on the results of a readability formula, the court found the exams had an inappropriately high reading level that exceeded a twelfth-grade level.[353] Meanwhile, in a 2001 case, a criminal

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98 (W. Va. 2018) (considering "inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties" that include "whether each party had a reasonable opportunity to understand the terms of the contract"); *Sierra v. Isdell*, No. 09-cv-124-Orl-19KRS, 2009 WL 2179127, at *4–5 (M.D. Fla. July 21, 2009) ("Procedural unconscionability . . . turns on the bargaining power of the parties and their ability to understand the relevant terms, . . . [including] whether each party had a reasonable opportunity to understand the terms.").

348. *Bell v. Koch Foods of Miss., LLC*, 358 F. App'x 498, 503 (5th Cir. 2009).

349. *Stormont-Vail Hosp. v. Spurling*, No. 110,979, 2014 WL 4082469, at *5 (Kan. Ct. App. Aug. 15, 2014).

350. *See, e.g.*, *id.*; *Pietroske, Inc. v. Globalcom, Inc.*, 685 N.W.2d 884, 888 (Wis. Ct. App. 2004); *In re Park W. Galleries, Inc., Mktg. & Sales Pracs. Litig.*, MDL No. 09–2076, 2010 WL 2640262, at *3 (W.D. Wash. June 25, 2010); *Sierra*, WL 2179127, at *4–5; *Sanchez v. Brown Auto., Inc.*, B306713, 2021 WL 1608575, at *7 (Cal. Ct. App. Apr. 26, 2021).

351. *See, e.g.*, *Copello v. Boehringer Ingelheim Pharms. Inc.*, 812 F. Supp. 2d 886, 896–97 (N.D. Ill. 2011); *H.H. Franchising Sys., Inc. v. Pawson*, No. 17-CV-368, 2018 WL 1456131, at *6 (S.D. Ohio Mar. 23, 2018); *Hampden Coal*, 810 S.E.2d at 295.

352. *United States v. City of New York*, 637 F. Supp. 2d 77, 79, 122–23 (E.D.N.Y. 2009).

353. *Id.* at 122–23.

defendant argued his defense attorney was ineffective by not enforcing the plea agreement.[354] Although ultimately rejecting the claim, the Eighth Circuit had to "decipher the poorly written plea agreement," and pointed to the SEC handbook on plain language before concluding the agreement was "a monument to legalese. The paragraph's three sentences drown in clauses. The key middle sentence runs over fifty words. The middle sentence also makes unfortunate use of the 'and/or' phrase."[355]

Plain language also affects evidentiary decisions. For example, courts will not consider external representations when a contract uses plain language.[356] According to one court, "[g]iven the plain language on the face of the signature page," a signatory was negligent for relying on an alleged oral representation.[357] Similarly, the presence or absence of plain language affects whether courts permit expert testimony on contract language.[358]

The use or absence of plain language in documents also affects litigation strategies and costs. Parties now use plain language experts to opine on the understandability of legal documents, like class action notices, election ballots, operator manuals, consumer disclosures, advertisements, and contracts.[359]

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354. *United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001).

355. *Id.* at 818–20, 819 n.3.

356. *Demarco v. LaPay*, No. 09–CV–190, 2009 WL 3855704, at *9 (D. Utah Nov. 17, 2009) (concluding complaint did not allege an investment contract amounting to a federal security).

357. *Generale Bank v. Wassel*, 779 F. Supp. 310, 315 (S.D.N.Y. 1991).

358. *See Or. Env't Council v. Kunzman*, 636 F. Supp. 632, 634–36 (D. Or. 1986) (considering conflicting expert testimony about how to measure readability and concluding environmental impact statement was written in language public could understand), *aff'd*, 817 F.2d 484 (9th Cir. 1987). *Compare Suzlon Wind Energy Corp. v. Shippers Stevedoring Co.*, 662 F. Supp. 2d 623, 668–69 (S.D. Tex. 2009) (excluding expert testimony on contract because contract uses plain language so expert's testimony would not assist the jury), *with N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, C.A. No. 88C-JA-155, 1995 WL 628447, at *1–2 (Del. Super. Ct. Apr. 22, 1995) (observing that the court and jury would benefit from insurance contract expert because "the contracts are complex commercial insurance policies which are not written in a layperson's 'plain English' and which have evolved from a highly specialized commercial environment"), *and Playtex FP, Inc. v. Columbia Cas. Co.*, 622 A.2d 1074, 1076–77 (Del. Super. Ct. 1992) ("Because of the specialized nature of the language used in the insurance contracts at issue and the fact that these are not 'plain English' policies, the court considered expert testimony [to determine the contract's meaning].").

359. *See, e.g.*, Affidavit of William Lutz at 2–18, *Am. Council of Life Insurers v. Vt. Dep't of Banking*, No. 50-1-02 Wncv (Super. Ct. Vt. Feb. 12, 2004), 2004 WL 578737 at *7 (evaluating financial and insurance company privacy notices for compliance under federal law); Affidavit of Todd B. Hilsee on Settlement Notices & Notice Plan at 27–30, *Larson v. AT&T Mobility LLC*, Civ. Act. No. 07-5325 (D.N.J. Mar. 21, 2011), 2011 WL 1085255 (class action notices); Readability Issues & State of Alaska & City of Bethel Ballot Propositions Since January 2000, *Nick v. Bethel*, Case No. 07-cv-0098 (D. Alaska filed May 13, 2008); A Pallet Jack Injury Case: Human Factors Analysis at 4, *Beard v. Mighty Lift, Inc.*, 224 F. Supp. 3d 1131 (W.D. Wash. 2016) (Case No. C15–

As party reliance on and use of plain language grow, so too will court's reliance on and use of plain language. Common law plain language is likely on the rise.

IV. THE ROLE OF CODIFIED AND COMMON LAW PLAIN LANGUAGE LAWS

The preceding section shows writing legal documents is more than an issue of skill or strategy. Yes, skill and strategy are involved, but what the hundreds of laws and cases on plain language show is that the design of legal documents is now doctrinal and regulated. This Part details two conclusions from the above findings. *First*, plain language law design implicates public policies, and those policies are different from the policies driving the covered documents' substance. *Second*, the inconsistencies in plain language laws and uncertainty about their effectiveness creates an untenable national patchwork and courts are well-suited to find the most effective plain language law standard.

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146) (pallet jack operator's manual); Human Factors Incident Report at 7, *Sherwood v. Jeld-Wen, Inc.*, No. 04-CV-03020 (E.D. Wash. filed Feb. 24, 2005) (safety instructions); Expert Report of Gail Stygall at 4–9, *Hampton v. Allstate Corp.*, No. 13-cv-00541 (W.D. Wash. filed Nov. 15, 2013) (insurance policy); Report Prepared for William D. Chapman at 5–6, *Merck Eprova AG v. Gnosis S.P.A*, 901 F. Supp. 2d 436 (S.D.N.Y. 2012) (No. 07 Civ. 5898) (consumer label); GC Services: Analysis of Debt Collection Documents, *Sims v. GC Servs. L.P.*, No. 03-4077 (C.D. Ill. Mar. 16, 2005), 2005 WL 3988380; Declaration of Jens Grossklags at 9–11, *Baxter v. Intelius, Inc.*, Case No. 09-cv-01031 (C.D. Cal. Sept. 16, 2010), 2010 WL 3791487 (consumer offer); Analysis of Loan Solicitation Document at 4–5, *Murray v. Indymac Bank, F.S.B.*, No. 04 C 7669 (N.D. Ill. June 13, 2005), 2005 WL 1866043; Declaration of Wendy Levin Newby, *In re Cmty. Bank of N. Va.*, 467 Fed. Supp. 2d 466 (W.D. Pa. 2006) (No. CV-03-0425) (class action notice); Declaration of Sheryl Ann Greenwood Gowen at 4–6, *Common Cause/Georgia v. Billups*, 504 Fed. Supp. 2d 1133 (N.D. Ga. 2007) (Civil Action File No. 05–CV–201–HLM) (absentee ballot); Report of David G. Curry at 3–5, *Hernandez v. Schering Corp.*, No. 04L 9028 (Ill. Cir. Ct. Nov. 2, 2009) (drug warning and instructions); Declaration of Alan Vasquez re Dissemination of Notice to Class Members at 23–24, *Larson v. AT&T Mobility LLC*, Civil Action No. 07–5325 (D.N.J. Mar. 21, 2011) (class action notice); Report of William Lutz, *In re Paxil Litigation*, 218 F.R.D. 242 (C.D. Cal. 2003) (No. CV 01–07937 MRP) (television drug advertisement); Declaration of Jeanne C. Finegan at 10, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 931 Fed. Supp. 2d 458 (E.D.N.Y. 2013) (No. 06–MD–1775) (class action notice); Affidavit of Linda J. Gummow at ¶¶ 11–17, *Williams v. Progressive Halcyon Ins. Co.*, No. 05-CV-00324 (D. Wyo. 2006), 2006 WL 2232274 (prenuptial agreement); *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, Civil Action No. MDL 1632, 2006 WL 8451358, at *8 (E.D. La. Sept. 7, 2006) (class action notice drafted by expert who federal judicial center endorsed as using plain language class notices).

A. The Policy Decisions of Converting Plain Language into Law

Once a lawmaker—legislature, regulator, or court—decides to convert plain language from advice into law, the lawmaker makes at least four major policy-infused decisions.

1. ADVICE OR LAW

First, lawmakers decide to require plain language through the law, rather than other means like advice, bar reform, or market pressures.[360] Thus, the decision to convert plain language into law suggests lawmakers are concluding these other avenues of change are falling short or that a law will have more positive effects than these alternatives.

Here are a few potential reasons lawmakers might prefer implementing plain language through the law. Lawmakers may think there is symbolic value to elevating plain language into law, even if that law is unenforceable. For example, even though the Plain Writing Act of 2010 is unenforceable, it influenced certain federal agencies.[361] Alternatively, lawmakers may believe requiring plain language through an enforceable law will incentivize widespread change in industries that have resisted change.[362] Yet another reason may be that lawmakers

360. Thomas W. Taylor, *Plain English for Army Lawyers*, 118 MIL. L. REV. 217, 235–40 (1987) (describing need for top-down pressure to convince military lawyers to use plain language); Carl Felsenfeld, *The Plain English Movement in the United States*, 6 CAN. BUS. L.J. 408, 414–15 (1982) (supporting expansion of plain language laws because businesses have not deployed plain language quickly enough).

361. *See Report Card Grades Across 10 Years*, CTR. FOR PLAIN LANGUAGE (2023), https://centerforplainlanguage.org/2021-federal-plain-language-report-card/report-card-grades-across-10-years (last visited Mar. 19, 2023). *But see* Rachel Stabler, *"What We've Got Here Is Failure to Communicate": The Plain Writing Act of 2010*, 40 J. LEGIS. 280, 287 (2013) ("Federal agencies that deal with the public should obviously be communicating the benefits and services they provide in clear, understandable language. It should not require legislation to accomplish that goal, and it is not clear how the legislation would actually achieve that.") (quoting 156 CONG. REC. H111,7315 (daily ed. Sept. 29, 2010) (statement of Rep. Jason Chaffetz)).

362. Corey Ciocchetti, *Just Click Submit: The Collection, Dissemination, and Tagging of Personally Identifying Information*, 10 VAND. J. ENT. & TECH. L. 553, 588–91, 598, 632 (2008) (proposing plain language law to require e-commerce privacy policies to use plain language); Benoliel & Zheng, *supra* note 28 at 257 (proposing enhancing plain language laws with a clear mechanism to determine readability, like setting an average sentence length of under twenty-five words, and adding sanctions for violations); Felsenfeld, *supra* note 360, at 414–15 (supporting expansion of plain language laws because businesses have not deployed plain language quickly enough); *see also* David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1416–21 (2018) (discussing incentives and disincentives for contract innovation while acknowledging limited innovation in certain kinds of contracts); Jensen, *supra* note 44, at 812–13 (President Clinton's memorandum emphasized time and cost savings and required government agencies to use plain language in government documents, but resulted in little change).

believe a plain language law will ensure a long-term commitment to and investment in plain language. Such a commitment helps plain language outlast changes in government administrations or private sector executive turnover.[363] In the regulatory space, plain language may be a way to improve disclosures without expanding them, a compromise to appease disclosure supporters and opponents.[364]

Keep in mind that converting plain language into law changes who controls plain language. Once converted, the parameters of plain language no longer lie with lawyers and bar leaders who understand the legal profession and attorney-client relationship. Nor do they lie with businesses and individuals who know their industry and might have expertise in document design. Nor do they lie with academics who research behavioral psychology, linguistics, and other disciplines involving how people comprehend documents. Each of these groups may have influence or a voice, but once plain language becomes part of a law, the future of plain language in that area now lies exclusively with legislatures, regulators, and courts.[365]

2. COVERAGE

Second, lawmakers decide which documents the law covers. Lawmakers choose which documents must use plain language and which retain the option of using plain language. Policies often drive that choice.

One policy driving this choice is the lawmaker's goals. Noted above, plain language has many different purported benefits ranging from access to justice to protecting consumers.[366] Coverage decisions reveal which benefits the law targets. Sometimes legislatures include the law's goal in the statute's text. Consider the legislative findings in Pennsylvania's consumer protection plain language law: "[M]any consumer contracts are written, arranged and designed in a way that makes them hard for consumers to understand. Competition would be aided if these contracts were easier to understand;" plain language "will protect consumers from making contracts that they do not understand. It will help consumers to

363. *See, e.g.*, Exec. Order No. 12,291, 3 C.F.R. 13193 (1981) (revoking prior presidential plain language executive order).

364. McClane, *supra* note 87, at 268.

365. Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 108–09 (1995) ("[W]hile plain English statutes are a definite step in the right direction, achieving plain English will require more than just legislation. It will require a good faith effort on the part of contract drafters to provide coherent language and to comply with the ordinary rules of English grammar that have always produced clear writing.").

366. *See supra* Section I.C.

know better their rights and duties under those contracts."[367] Other times court opinions detail a statute's goals. For example, a Pennsylvania court described an insurance plain language law as protecting "consumers by completely informing them of their choices and the costs associated with each" without imposing a "costly burden on insurers."[368] The New Jersey Supreme Court made a similar point: "[u]nderlying that requirement is the legislative judgment that the average insured can better understand his or her policy" when it uses plain language.[369] When examining an election plain language law, the Pennsylvania Supreme Court explained the law "ensures that voters will receive all the information that they need to make an informed choice."[370]

Coverage decisions involve more than just choosing the kind of document to cover. Lawmakers are also choosing which specific documents and sometimes which parts of documents to cover. For instance, a Kentucky law covers all administrative hearing notices,[371] while a Maine law covers only environmental administrative hearing notices,[372] and an Idaho law only covers a certain part of a racing commission administrative hearing notice.[373]

Equally telling are coverage limitations. For instance, many consumer-contract plain language laws exclude commercial contracts or contracts worth large amounts.[374] Such exclusions suggest lawmakers intended the benefits to target only everyday individual consumers or perhaps standard form contracts. Alternatively, such limitations might suggest lawmakers believe a plain language law is unnecessary when contracts are negotiated by parties represented by lawyers or perhaps that the purported benefits of plain language do not flow to the same degree in these excluded contracts. To be sure, this reasoning may be flawed. Businesses sign standard form contracts like leases and loans just like individuals do, and there is little evidence contracts negotiated and customized by lawyers are any more understandable than template

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367. 73 PA. CONS. STAT. § 2202 (2023); *see also Grimm v. First Nat'l Bank*, 578 F. Supp. 2d 785, 793 n.15 (W.D. Pa. 2008) (acknowledging the Pennsylvania consumer protection law's purpose); *In re Derienzo*, 254 B.R. 334, 345 (Bankr. M.D. Pa. 2000) (same).

368. *Donnelly v. Bauer*, 683 A.2d 1242, 1251 (Pa. Super. Ct. 1996) (Del Sole, J., dissenting), *aff'd*, 720 A.2d 447 (Pa. 1998).

369. *Longobardi v. Chubb Ins. Co.*, 582 A.2d 1257, 1261 (N.J. 1990).

370. *Sprague v. Cortes*, 145 A.3d 1136, 1144 (Pa. 2016).

371. KY. REV. STAT. ANN. § 13B.050(3) (West 2023).

372. 06-096-003 ME. CODE R. § 12(A)(3)(a) (LexisNexis 2023).

373. IDAHO ADMIN. CODE r. 11.04.04.071(4) (2022) (description of conduct at issue in notice of disciplinary hearing of racing commission).

374. *See, e.g.*, ME. REV. STAT. ANN. tit. 10, §§ 1121–1124 (West 2023) (defining consumer and limiting coverage to consumer leases of goods and loans for less than $100,000).

contracts. Indeed, some plain language laws apply to commercial contracts.[375]

Just because a law does not apply to a document does not mean the law does not affect that document. When a law forces drafters to learn plain language, there is some evidence of a bleed-over effect into other kinds of documents the drafter creates. For example, even when SEC plain language regulations covered only parts of public filings, compliant documents tended to use plain language throughout.[376] In other words, once a drafter acquires the skill of writing in plain language, that skill is always "on."

Coverage decisions also reveal a lawmaker's judgment on who bears compliance costs. Depending on a law's scope, costs could include writing training or revising legions of templates. Depending on who the law covers, those costs might be borne by the individuals and entities affected, or the lawyers or drafters they hire. Some laws even contemplate these costs. A federal environmental plain language law encourages agencies to "employ writers of clear prose or editors to write, review, or edit statements,"[377] while an Ohio housing plain language law authorizes an agency to hire a readability expert.[378]

3. STANDARD

Third, lawmakers must define plain language by selecting which standard to apply. Recall there are four general kinds of plain language standards: Descriptive Standards, Readability Standards, Features Standards, and Hybrid Standards. In addition to deciding which standard produces the intended result on the reader, choosing a standard also involves carefully weighing costs and benefits.

In many ways the choice of plain language standards resembles the choice lawmakers make in the regulatory context. Imagine an environmental regulation designed to improve air quality. One version of the regulation might require factories to reduce pollutant emissions or implement air quality controls. Like Descriptive Standards, this approach grants affected parties considerable discretion in how to achieve the end result. Parties can customize their methods based on their particular context. This approach may create market competition to find the most cost-effective means of compliance. The approach also allows parties to change their method over time as new methods become available or research reveals which methods are the most effective. However, this standard is also the least predictable. Parties would likely struggle to

375. *See, e.g.*, MINN. STAT. ANN. §§ 17.942–.944 (West 2023).
376. McClane, *supra* note 87, at 292.
377. 40 C.F.R. § 1502.8 (2018).
378. OHIO REV. CODE ANN. § 5104.14 (West 2022).

know if they comply or to predict how a court or regulator will interpret the law.[379] If penalized, parties would cry foul because they were not on notice of how to comply and would argue the law is too subjective.[380] Plus, regulators charged with enforcement might water down the standard to render it ineffective. More, the approach may yield inconsistent application between different courts and regulators. Finally, the ambiguity of Descriptive Standards may cause affected parties to do the bare minimum to comply, functionally stripping the law of any meaningful effect.[381]

A different approach might limit the amount of methane a factory releases each year. Like a Readability Standard, this approach has the benefit of objective application. These objective tests mean affected parties can accurately predict whether they comply, and courts and regulators can more consistently apply the law. Affected parties can also predict whether document edits comply. However, this approach has limitations. To the extent the problem of comprehension is more than the length of words and number of words in sentences (or the problem with air quality is more than just methane), the law only addresses part of the problem. Indeed, many have criticized Readability Standards for not addressing the many causes of reader confusion.[382] In short, Readability Standards make compliance predictable and application consistent but may not have a significant effect on the problem the law hopes to solve.

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379. Rachelle R. Greer, *Introducing Plain Language Principles to Business Communication Students*, 75 BUS. COMMC'N Q. 136, 138 (2012) (criticizing plain language mandates "for lacking a clear definition [and] being too difficult . . . to adopt"); Black, *supra* note 39, at 278 (criticizing a New York plain language law as a vague standard that left too much uncertainty).

380. *See* McClane, *supra* note 87, at 268 (describing how stylistic regulations, such as SEC plain language regulations, are "tricky to enforce, in part because style is relatively subjective").

381. Black, *supra* note 39, at 278–79 ("The New York law leaves businesses uncertain about how much must be done to achieve compliance. As a result, businesses are likely to take the easier route of doing too little . . . . The vaguer the underlying standard, the greater the chance that a good faith defense will succeed. This weakens the incentive for private enforcement, leading to spotty compliance."); *see also* Serafin, *supra* note 28, at 698 (suggesting many plain language laws fail because of a lack of clear standards); Jensen, *supra* note 44, at 812 (explaining that President Carter's Executive Order had little effect because functionally, it contained no plain language standard and limited coverage, and pragmatically, bureaucrats did not know what the average citizen could understand).

382. *See, e.g.*, Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 420–22 (2014) [hereinafter Schwarcz, *Transparently Opaque*] (criticizing readability formulas and noting importance organization can play in understanding); Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1326–27 (2011) [hereinafter Schwarcz, *Reevaluating Policies*] (noting same and that combining information from different provisions and "verbose and confusing grammatical structures and word choices" harm comprehension).

Yet another approach is to require factories to place a particular air filter in their smokestack. Like a Features Standard, this approach dictates a specific solution to a problem. Benefits include the predictability of compliance and consistency in application, but often at great cost because it is the most elaborate and detailed solution. The great downside of this approach is that the affected parties lack flexibility and any incentive for innovation. The solution chosen by lawmakers might not work, might not be the most effective, or might not be the most efficient or the cheapest. Even as better solutions become available, affected parties remain unable to implement them until lawmakers amend the law. Such laws only incentivize compliance, not creativity or an investment in effective communication.[383] In the worst-case scenario, the solution chosen by lawmakers worsens the problem and affected parties have no choice but to comply.[384] Plus, this approach usually consists of bright lines: avoid passive voice, limit sentence length to twenty words, etc. But such Features Standards strip parties of judgment and risk being both underinclusive and overinclusive.[385]

The final approach combines two of the others such as by requiring an air filter and requiring a decrease in a certain amount of methane. Like the Hybrid Standard, this approach inherits the advantages and disadvantages of the others.

Whether one standard is more effective than the others, or whether effectiveness varies depending on the law's goals, the documents at issue, or the readership, are areas for future inquiry. Regardless, the choice of standard by lawmakers remains a policy-infused decision with significant ramifications on those affected. And the choice can vary not just between laws but sometimes between documents or parts of documents. For example, although a Texas statute covers many different kinds of loans,

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383. *See generally* Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862 (measuring the impact of "all-caps" contract language on consumer comprehension and suggesting that reliance on such requirements stifles more potentially effective innovation).

384. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-92, PRIVATE PENSIONS: CLARIFY OF REQUIRED REPORTS AND DISCLOSURES COULD BE IMPROVED 2, 36 (2013) ("Thus, it seems likely that the information in these disclosures would not be readily understandable to many average plan participants and that readability might present a challenge for participants, even when plan sponsors adopt the model notice developed by the agency.").

385. *See, e.g.*, Mary Beth Beazley, *Hiding in Plain Sight: "Conspicuous Type" Standards in Mandated Communication Statutes*, 40 J. LEGIS. 1, 16–17 (2014) ("Readers need more than just better sentence structure . . . myriad features of the written word can encourage or discourage reader engagement with the text."); Friman, *supra* note 365 at 104 ("[N]ot all short sentences are coherent, and the passive voice is perfectly acceptable when used properly.").

it requires an eighth-grade reading level for one kind of loan, ninth-grade for another, and tenth-grade for a third.[386]

4. ENFORCEMENT, PENALTIES, AND DEFENSES

Fourth, lawmakers decide if the new plain language law is enforceable and, if so, by who and with what penalties and defenses. Each decision shapes a law's effect.

Laws that charge regulators with enforcement strike a delicate balance. On one hand, such a design charges particular people with being aware of the law and enforcing it year-round. Plus, the agency has funding and the internal skillset to enforce the law. On the other hand, this design runs the risk the agency will not devote enough staff to enforcement or that the staff will not have adequate training on plain language.[387] Sometimes noncompliant documents pass regulators.[388] Plus, as administrations or employees change, regulators may vary in their interpretation or rigor when enforcing the law.[389]

Even when private parties can enforce a plain language law, penalties affect whether they exercise that right. Laws that do not offer a defense to contract enforcement, or which have limited monetary recovery, may not provide a strong enough incentive to bring a claim given litigation costs. It may be that such a plain language law violation gets tacked on to other claims, but such limitations make it less likely a prospective plaintiff would sue exclusively for violating a plain language law. Rarely raised claims might contribute to their own downfall. Since few lawyers are periodically combing caselaw and statutory codes, they may be unaware of plain language laws because they do not come across them, which in turn means fewer covered parties and fewer harmed parties being aware of these laws. If the costs of compliance exceed the costs of penalties, then affected parties likely will not comply.[390]

Likewise, the burdens of proving a plain language law violation may also discourage claims or decrease the likelihood of success. A claimant might need to hire experts because some standards are unclear. Violations of Features and Readability Standards may be more straightforward than violations of the ambiguous Descriptive Standards. Also, claimants may have significant evidentiary burdens like proving causation and actual

386. 7 TEX. ADMIN. CODE § 90.104(c)(4) (2023).

387. Black, *supra* note 39, at 286–87.

388. *See, e.g.*, *Gross v. Lloyds of London Ins. Co.*, 347 N.W.2d 899, 904 (Wis. Ct. App. 1984); *Mont. Petrol. Tank Release Comp. Bd. v. Crumleys, Inc.*, 174 P.3d 948, 959 (Mont. 2008).

389. McClane, *supra* note 87, at 294 (describing how compliance with the SEC plain language regulations decreased over time and hypothesized potential causes included inability to enforce or slackened enforcement).

390. *Id.*

damages.[391] One court balked at a defendant's claim that the failure to define certain terms led him to incorrectly borrow money when the terms identified had no relation to the contract's core provisions.[392] A New York appellate court enforced a noncompliant insurance policy that violated the typeface requirements because the insured was not prejudiced and the noncompliant provision did not materially influence the insured's rights and liabilities.[393] How many contractual breaches are the result of confusing language is an unanswered question. But odds are slim a tenant did not pay rent because the lease was not in plain language.

Lastly, defenses also affect enforcement. Agency preapproval may stifle innovation because if businesses can get pre-approval then they have no incentive to go beyond the minimum for pre-approval.[394] A good faith defense could be an exception that swallows the rule.[395]

B. The Case for Expanding Common Law Plain Language

Assuming there should be some degree of plain language laws,[396] if the creation of plain language laws necessarily involves multiple significant policy decisions, the next question is who should make these policy decisions. With plain language appearing in constitutions, statutes, regulations, and common law, all three branches of government have been making those decisions. This Section details the potential tensions and inefficiencies when all three branches start creating laws on the same topic without coordination. Then, this Section proposes an expansion of uncodified common law plain language standards.

1. THE SEPARATION OF POWERS TENSION AND INEFFICIENCIES WHEN ALL THREE BRANCHES CREATE PLAIN LANGUAGE LAWS

Two kinds of tensions arise when different branches of government create plain language laws with overlapping coverage. The first tension is a conflict over who controls how to write government documents. The

391. Black, *supra* note 39, at 288–94.

392. *Providian Nat'l Bank v. McGowan*, 687 N.Y.S.2d 858, 862 (Civ. Ct. 1999), *aff'd as modified*, 720 N.Y.S.2d 709 (N.Y. App. Div. 2000).

393. *McDaniels v. Am. Bankers Ins. Co.*, 643 N.Y.S.2d 846, 846–47 (App. Div. 1996).

394. Black, *supra* note 39, at 286–87.

395. *Id.* at 278–79.

396. The landscape of whether plain language laws are needed may be changing. New technology that translates dense contract language may change lawmaker opinions on the need for plain language laws. *See* Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. 83, 95–114 (2022) (discussing how consumers can use "smart readers" to understand contracts). Or perhaps this technology informs the design of such laws.

other separation of powers tension is which branch of government controls plain language in the private sector. This Subsection explains how these tensions arise.

a. Who Controls Plain Language in Government Documents

When one branch of government creates a plain language law covering documents produced by a different branch, the creating branch is making policy-infused decisions about how another branch should do its job. Such an act may be a separation of powers overreach or perhaps checks and balances at work.

Through statutes, legislatures have exercised control over all three branches. Sometimes legislatures regulate themselves. While one might see little need in legislatures passing a law governing themselves, such a statute continues to bind legislatures even when membership changes. Thus, the law could produce a longer lasting effect than voluntary changes.[397] Statutes governing the executive branch cover documents like administrative agency forms and letters,[398] election ballot designs,[399] governor reports,[400] and even the school textbook approval process.[401] Other statutes govern the judicial branch. For instance, an Illinois statute recommends the judiciary use plain language in public-facing documents.[402] Others cover documents ranging from pleadings and settlement agreements,[403] to court notices and forms,[404] to court orders.[405] Plain language statutes have even influenced how courts exercise their judicial authority. When the New Jersey Supreme Court used its constitutional powers to oversee the practice of law to require certain real estate contract disclosures, it drafted the required language to comply

397. But the effect will be limited or nonexistent if the law is unenforceable. *See, e.g.*, KY. REV. STAT. ANN. § 446.015 (West 2023) (passage of law is conclusive presumption of compliance with plain language standard).

398. Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861.

399. CONN. GEN. STAT. ANN. § 9-139a(c) (West 2023).

400. NEV. REV. STAT. ANN. § 353.333(2)(b) (West 2022).

401. KY. REV. STAT. ANN. § 156.407(5)(d) (West 2023).

402. 20 ILL. COMP. STAT. ANN. 4090/30(2) (West 2022).

403. *See, e.g.*, ALASKA ADMIN. CODE tit. 3, § 48.130(a)(2) (2023) (statement of facts and circumstances in formal complaint or protest to regulatory commission); WASH. JUV. CT. R 3.3(e); N.Y. GEN. OBLIG. LAW § 5-1706(e) (McKinney 2022) (transfer of structured settlement payment rights); N.Y. GEN. OBLIG. LAW § 5-336(1)(b) (McKinney 2022) (confidentiality terms and conditions of employment discrimination claim settlement).

404. UTAH CODE ANN. § 75-5-309(2) (West 2022) (guardianship proceeding notices); MICH. COMP. LAWS ANN. § 600.2950b(1) (West 2023) (pro se forms for personal protection orders); *id.* § 600.8401a(1) (West 2023) (instruction forms for small claims court); *id.* § 600.8409(2) (West 2023) (instructions enforcing small claims court judgment).

405. VA. CODE ANN. § 24.2-684 (West 2022).

with the New Jersey consumer protection plain language law.[406] Voluntary court plain language initiatives like revising procedural rules,[407] court forms,[408] class action notices,[409] jury instructions,[410] and other court documents[411] may be an effort to fend off more legislative regulation. Enforceability aside, these statutes reflect legislatures regulating areas traditionally controlled by the other branches.

Like legislatures, courts have used plain language to influence how other branches operate. So far, court intervention has been minimal and concentrated on the executive branch by importing plain language into constitutional requirements like procedural Due Process[412] or the voluntary and knowing waiver requirement.[413] Courts have also worked plain language into the judicial branch by considering plain language when evaluating a statutory or common law claim or by interpreting codified plain language laws.[414] So far courts have not added plain language requirements into their review of the legislative or lawmaking process.[415] Thus far, the executive branch (through regulations) has not added plain language to legislative or judicial documents.

Doctrinally, there is a need to clarify the source and scope of authority for one branch to regulate another branch's written documents. Pragmatically, because government documents are mass produced and have wide-ranging effects, branches need to accurately predict a document's legal compliance. When, why, and how one branch can decide to intervene in another branch's document drafting is an arena ripe for future research. After all, imposing an enforceable plain

406. *Calvert v. K. Hovnanian at Galloway, VI, Inc.*, 607 A.2d 156, 162–63 (N.J. 1992).

407. *See, e.g.*, WRIGHT, MILLER, COOPER & STRUVE, *supra* note 37, at 7–10; ARIZ. R. CIV. P. cmt. (noting that the 2017 amendments sought to use "plain English" where possible).

408. *See, e.g.*, Dyer et al., *supra* note 28, at 1068; Hathaway, *supra* note 41, at 28; FED. JUD. CTR., JUDGES' CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE 5–6 (2010), https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf [https://perma.cc/6AQ6-KSG8].

409. *See, e.g.*, FED. JUD. CTR., *supra* note 408.

410. *See, e.g.*, Arthur J. Hanes, Jr., Bert S. Nettles & Leila H. Watson, *The "Plain English" Project of the Alabama Pattern Jury Instructions Committee—Civil*, 68 ALA. LAW. 368, 371–72 (2007).

411. *See, e.g.*, ILLINOIS SUPREME COURT POLICY, *supra* note 40.

412. *Walters v. Reno*, No. C94-1204C, 1996 WL 897662, at *10–14 (W.D. Wash. Mar. 13, 1996).

413. *Dennis v. G4S Secure Sols. (USA), Inc.*, No. 20-CV-46, 2021 WL 6275630, at *5 (E.D. Tenn. Jan. 28, 2021).

414. *See, e.g.*, *United States v. City of New York*, 637 F. Supp. 2d 77, 122–23 (E.D.N.Y. 2009).

415. The closest courts have come may be the Due Process Clause's void for vagueness doctrine. *See Reynolds v. Quiros*, 25 F.4th 72, 96 (2d Cir. 2022).

language standard on a branch could impose enormous costs and might impose a standard the branch disagrees with. For now, this Article contributes the conclusion that branches are intervening and that the intervention creates potential tension.

b. Who Controls Plain Language in Private Sector Documents

Apart from a few regulations, hundreds of plain language statutes govern the private sector, courtesy of legislatures.[416] Yet, courts too have flexed their authority to create plain language legal requirements. Sometimes they interpret codified laws, like by determining what factors are relevant to a Descriptive Standard.[417] Elsewhere courts infuse plain language in traditional common law doctrines, like determining if a contract is ambiguous,[418] enforcing common law requirements for clarity,[419] or deciding if a contract is unconscionable.[420] Other times courts are more aggressive, like when they find ways to enforce unenforceable codified laws.[421]

When courts have exercised their authority, in many ways they are making significant plain language policy decisions. And those decisions potentially conflict with the decisions made by legislatures and regulators. For instance, when adding a plain language requirement to an area of law that had none, courts are potentially deciding to regulate a kind of document legislatures chose to exclude from plain language statutes. When finding ways to enforce unenforceable codified laws, courts are effectively changing the enforcement scheme chosen by the legislature or regulator. Thus, courts are often making policy decisions about whether to require plain language in the law, and the appropriate coverage, standard, and enforcement schemes. In doing so, they may be extending, modifying, or conflicting with policy decisions made by legislatures or regulators.

Currently, plain language laws may suffer from the "too many cooks in the kitchen" syndrome. Imagine a drafter creating a standard form lease for use in multiple jurisdictions. Such a drafter must find the relevant codified laws, caselaw interpreting those codified laws, and the contract common law for *each* jurisdiction. The drafter may need to

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416. Blasie, *supra* note 93, at apps. A–J (on file with author).

417. *Romero v. Allstate Ins. Co.*, 1 F. Supp. 3d 319, 375, 387–90 (E.D. Pa. 2014).

418. *Cintron v. Universal Underwriters Grp.*, 601 A.2d 1051, 1052–56 (Del. Sup. Ct.), *aff'd*, 586 A.2d 1203 (Del. 1990).

419. *Gross v. Sweet*, 400 N.E.2d 306, 308–09 (N.Y. 1979).

420. *See, e.g.*, *Stormont-Vail Hosp. v. Spurling*, No. 110,979, 2014 WL 4082469, at *3–6 (Kan. Ct. App. Aug. 15, 2014).

421. *Mont. Petrol. Tank Release Comp. Bd. v. Crumleys, Inc.*, 174 P.3d 948, 959–60 (Mont. 2008).

consult multiple lawyers to find these sources, determine whether they apply, and determine what they mean. Sources may differ or even conflict between and within jurisdictions. And each year regulators, legislatures, and courts in each jurisdiction might create new laws. The costs and inefficiencies of such an evolving patchwork create high demand for uniformity.

2. EXPANDING COMMON LAW PLAIN LANGUAGE

With so many policy decisions embedded in plain language, which branch of government is best positioned to make them? Given the breadth of these laws, the answer may differ depending on the kind of document or kind of reader, or even on the kind of policy decision. Thus, on the policy issues of whether to require plain language by law, what documents to cover, and how to enforce legal requirements, this Article leaves that question open. But on the issue of setting plain language standards, this Article contends there is a role for both codified plain language laws made by legislatures and regulators, and for uncodified plain language laws made by courts. More, this Article argues for expanding the role of plain language common law created by courts to determine the most effective plain language standards.

Designing an effective plain language law standard is extraordinarily difficult. Many plain language laws have incredibly broad goals, like ensuring consumers are well-informed or making the court system as accessible as possible to all citizens. Achieving such goals impacts documents written for a massive cross-section of the country. The challenge cannot be understated: some legal documents are incredibly complex yet must be understandable to readers whose education and literacy rates vary dramatically. At the same time, science's understanding of how readers process legal documents is evolving, while the number of drafting options available continues to expand, especially with electronic documents that can make use of colors, shapes, sounds, brightness, and even movement. Deciding the "best" method or incentivizing others to find the best method is a monumental task still in progress. Nonetheless, because each branch of government creates laws differently, each can play a unique role in crafting the most effective plain language standard.

Legislatures and regulators should focus on setting plain language minimum requirements through codified laws. Because "many different writing styles can communicate effectively, an exact formula for success in plain English is difficult to define."[422] But "identifying poorly written documents may be an easier task."[423] Therefore, codified laws can be

422. Serafin, *supra* note 28, at 681.

423. *Id.*

powerful ways of identifying common drafting techniques that do not work or whose benefits have universal acceptance. Such codified laws incentivize long-term change in parts of the public and private sector that have resisted adopting plain language.[424] These laws can also encourage change across a much broader spectrum of parties because the laws can apply to parties and documents rarely subject to litigation or to parties who traditionally have strategic advantages in litigation. Essentially, codified plain language laws can serve as effective floors for industries and governments: at a minimum, here is what you must stop doing and must start doing.

However, legislatures and regulators are not well-positioned to do more than set minimum standards because codified laws tend to be static and generalized. Indeed, codified laws do not have an impressive record of improving reader understanding of legal documents. As one example, consider efforts to make information "conspicuous" using empirically discredited methods like all-caps.[425] While all-caps may have at one time seemed liked a good idea, evidence shows it does not work yet the laws remain, effectively requiring documents to use a method that may make a document less understandable.[426] More, legislatures and regulators may face pressure to pass laws with "bright line" standards to make those laws' application predictable. But those bright lines cannot keep up with a changing society, a changing understanding of linguistics, and variations in readers and content. One of the chief critiques of codified plain language laws is that they are too mechanical and inflexible.[427] On the other hand, many of the currently problematic documents might satisfy a codified standard that is too general. More, codified laws run the risk of setting too low of a bar and not incentivizing or even permitting experimentation with more effective methods. We have seen this occur. Despite the massive concentration of plain language laws on the insurance industry—more than any other industry—insurance policies are hardly models of clarity. One main contributor is that these laws often use Readability Standards.[428] As Daniel Schwarcz rightfully points out, "[n]ot only are the required scores well above the reading level of most Americans, but these scores do not reflect the length of the underlying document, its organization or formatting, or the extent to which words

424. *See* Cohen, *supra* note 33, at 504–05 (discussing why lawyers in all sectors have resisted changing how they write).

425. *See* Arbel & Toler, *supra* note 383, 866–72; Beazley, *supra* note 385, at 16–17.

426. *See* Arbel & Toler, *supra* note 383, at 869–71, 875–83; Beazley, *supra* note 385, at 15–17, 32–34.

427. Felsenfeld, *supra* note 360, at 415 (noting opposition to plain language laws includes being too mechanical and unyielding, prevents experimentation, and we do not yet know the best form of language).

428. *See* Blasie, *supra* note 93, at 503–07.

are put together in logical and clear sentences."[429] Thus when incomprehensible documents comply with a codified plain language law's standards, courts are often left with little choice but to reject claims that a compliant document is unclear.[430] Indeed, when a statute applies, a court's primary inquiry is what the legislature intended, not what is the most effective way to achieve a result.[431]

To be clear, state and federal governments can still play a significant role in influencing plain language practices without passing plain language laws. For example, employees from multiple federal agencies regularly share best practices on working plain language into government documents and make this information publicly available for others.[432] And the Consumer Financial Protection Board uses qualitative and quantitative testing to design more understandable mortgage disclosures.[433] Another example is the National Center for State Courts, which offers a plain language glossary and forms training to court personnel to design court forms and notices.[434] To the extent governments draft, provide templates for, or influence the documents or forms in particular private industries or in the public sector, this kind of collaboration and experimentation should continue. However, providing tips, examples, and research is still a long way from articulating an effective plain language legal standard.

Here is where courts step in. For several reasons, courts should continue to, and even expand their role in, developing uncodified plain language law standards. First, courts can more effectively consider

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429. Schwarcz, *Transparently Opaque*, *supra* note 382, at 420–22; *see also* Schwarcz, *Reevaluating Policies*, *supra* note 382, at 1326–27 ("Thus, to understand whether a policy provides coverage for property damage, the policyholder must understand the relationship among six different portions of the contract. Insurance policies are also indecipherable because they rely on verbose and confusing grammatical structures and word choices. . . . The typical requirement is that insurance contracts score 40 on the Flesch-Kincaid scale, which equates to the reading level of an early college student. Yet most Americans read below their grade level—high school graduates typically read at the eighth-grade level and college graduates typically read at the tenth-grade level. In any event, anyone who has attempted to comprehend even a small part of an insurance policy will recognize that crudeness of quantitative readability scores.").

430. *See, e.g.*, *Tscherne v. Nationwide Mut. Ins. Co.*, No. 81620, 2003 WL 22724630, at *1 (Ohio Ct. App. Nov. 20, 2003).

431. *See Smith v. Parker*, No. 10-1158-JDB-egb, 2013 WL 5409783, at *27 (W.D. Tenn. Sept. 25, 2013) ("Our duty in construing statutes is to ascertain and give effect to the intention and purpose of the legislature.").

432. *See About*, PLAINLANGUAGE.GOV, https://www.plainlanguage.gov/about/ [https://perma.cc/T5M5-CL4T] (last visited Mar. 5, 2023).

433. Talia B. Gillis, *Putting Disclosure to the Test: Toward Better Evidence-Based Policy*, 28 LOY. CONSUMER L. REV. 31, 66–67 (2015).

434. *Plain Language*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/plain-language [https://perma.cc/74BZ-JRT6] (last visited Mar. 19, 2023).

emerging social science evidence as a battle of experts plays out between the litigating parties.[435] For example, a court could hear expert testimony on the different kinds of readability tests to learn which, if any, to apply.[436] And courts could hear from the drafters about why they designed language a particular way, or how other readers have reacted in the past. Likewise, plaintiffs could submit evidence about what confused them or how other people in similar situations would not understand the language. Although any branch of government can consider expert evidence, the adversarial process incentivizes parties to bring forth new social science evidence specific to the case's context. While a legislature might consider research on what makes contracts more or less understandable, courts could hear evidence about what makes the kind of contract at issue in that case more or less understandable to that contract's signatories. In other words, while the Pennsylvania General Assembly might consider data on how the average person interprets contracts, a Pennsylvania court could consider evidence about what makes a lease more or less understandable to low-income residents with an average eleventh-grade education who happen to live in a particular apartment complex.

Second, a common law standard can evolve as science's understanding of how humans comprehend documents changes. There is no consensus on an exhaustive list of reader or document traits that affect understanding. Perhaps the most effective form of plain language for the same document may vary as the reader changes.[437] Or perhaps what is effective when a particular reader reads one kind of document is less effective when the same reader accesses a different kind of document. And of course, what may be true today may not be true ten years from now as education changes, as cognitive abilities change, or as technology evolves. Indeed, the kinds of traits we can measure or the kinds of features a document can contain are changing. Perhaps people do not comprehend court notices viewed on cell phone screens the same way as court notices viewed on paper. A common law doctrine can evolve to match new information and societal changes.[438] In short, because

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435. For example, James Gibson proposed courts evaluate evidence of unconscionability "in light of the emerging empirical findings on consumers' cognitive limitations when dealing with boilerplate." James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 218–24 (2013).

436. *See* Jonathan M. Barnes, *Tailored Jury Instructions: Writing Instructions That Match a Specific Jury's Reading Level*, 87 MISS. L.J. 193, 198–202 (2018) (describing how there are over hundred readability tests and how their results can vary dramatically from one another).

437. *See id.* at 211–21.

438. *See* Babette E. Boliek, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, 81 MD. L. REV. 46, 49 ("Moreover, the benefit of a common law doctrine is that it can both support a statute enacted to define and control particular

currently no one knows what the most effective form of plain language is for a particular context or all the factors about a reader or context that affect understanding, a common law doctrine helps combine the most recent knowledge from multiple disciplines to determine the best form of plain language legal documents.

Third, the common law's flexibility allows drafters to test and apply new plain language techniques. A common law doctrine encourages parties to gather data, subject their documents to qualitative and quantitative analysis, and to consult experts in the drafting phase. Such a process encourages drafters to experiment with new and potentially radically different (and radically more effective) forms of legal documents. For instance, drafters could consider working in visual aids like charts, maps, or images.[439] Drafters could even become teams of drafters consisting of more than just lawyers; nonlawyers who have a better sense of how to communicate with the average person, like marketers or user experience experts, could add their insights.[440] More, if future market forces or bar reform efforts become strong enough to incentivize plain language, common law standards will not impede innovation.[441] Thus, a common law standard brings lawyers, businesses, and scientists back into the evolution of plain language. Court endorsement of new effective techniques encourages others to follow. When Schwarcz found caselaw had a significant impact on prompting material changes to homeowners' insurance policies, he concluded "courts play a pivotal role in forcing insurers to spell out their contractual relationship with policyholders more precisely."[442] The same could be true more broadly for all legal documents and the use of plain language.

CONCLUSION

Plain language law design has massive variance between and within jurisdictions, and between and within different branches of government. Each law contains several policy-infused design choices which convert

terms (such as those that touch on informational privacy) and can also be applied to new situations and terms that develop over time.").

439. *See* Thomas D. Barton, Gerlinde Berger-Walliser & Helena Haapio, *Visualization: Seeing Contracts for What They Are, and What They Could Become*, 19 J.L. BUS. & ETHICS 47, 48 (2013); Olga V. Mack, *Tech Toolbox: Visual Intelligence Is Imperative for Lawyers*, ACC DOCKET (May 3, 2022) https://docket.acc.com/tech-toolbox-visual-intelligence-imperative-lawyers.

440. *See* David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1433 (2018) (describing Etsy's revisions to a legal document using lawyers and "product, engineering and design teams").

441. *See* Friman, *supra* note 365, at 108 (suggesting "market forces can bring about most necessary changes in contract language without the aid of these [plain language] statutes").

442. Schwarcz, *supra* note 69, at 478.

legal document design from being within a lawyer's discretion to being subject to lawmakers' requirements. More data and research will help measure the effects of plain language, necessity of plain language laws, and design of plain language laws. To achieve more informed plain language policy decisions, courts should play a more aggressive role in designing plain language standards and weaving them into legal doctrines. A future article will explain how. For now, all lawmakers should be aware of the many design options available, the policy implications of choosing amongst those options, and the role other lawmakers play in implementing plain language.

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