BLACK LETTERS
Epistolary Rhetoric and Plain English Laws

*Nicholas Horn**

Two letters of the law are distinguished: on the one hand, a black letter law whose force is based in its authority rather than its content; on the other hand, a dream of a 'living law' constituted by an epistolary circulation between the giver of the laws and those to whom they are subject. This dream is first manifest in St Paul's argument in 2 Corinthians that 'the written code [the letter] kills, but the Spirit gives life'. Peter Goodrich's critique of English jurisprudence as exemplified by the postal rule is viewed as a secular extension of St Paul's argument. Rousseau's attempt to secularise the theory of governance by the replacement of the authority of God and the King with 'the People' as represented in parliament is seen (following Goodrich) to be an inspired, but failed, attempt to break the closed hermeneutic of a black letter law. Finally, this distinction is applied to a critique of the plain English movement for legislative drafting reform. The dream of a transparent law that communicates without mediation, like a private letter, to each individual subject, is set against the deadening black letter tendency inherent in a narrow, style-based approach to plain English. In conclusion, it is suggested that, to achieve a truly living law that circulates freely between law-makers and subjects, more is needed than a new drafting style.

I would like to write you so simply, so simply, so simply. Without having anything ever catch the eye, excepting yours alone, and what is more while erasing all the traits, even the most inapparent ones, the ones that mark the tone, or the belonging to a genre (the letter for example, or the post card), so that above all the language remains self-evidently secret, as if it were being invented at every step, and as if it were burning immediately, as soon as any third party would set eyes on it ...[1]

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* Nicholas Horn drafts legislation for the ACT in the ACT Parliamentary Counsel's Office and teaches a course on legislation at the ANU. The views expressed in this article are his own and not those of his office. This article is a revised version of paper presented at the 8th Annual Conference of the Law and Literature Association of Australia, Brisbane, 18–21 July 1997. Thanks are due to Jeffrey Barnes, James Graham, Desmond Manderson and the *Griffith LR* editor and readers for their assistance and encouragement, to Marion Pascoe for access to drafting materials from the NSW Parliamentary Counsel's Office, and to Judith Taylor for theological advice.

[1] J Derrida (1987a) 'Envois' in *The Post Card: From Socrates to Freud and Beyond*, trans Alan Bass, University of Chicago Press, p 11.

Introduction

This article takes as its starting point a passage from St Paul's second letter to the Corinthians. It is argued that Paul's distinction between the dead letter of the Mosaic law and the living letter of the law of the spirit is compromised by the issue of authority, of the origin of law. This argument is applied to a critique of closed, black letter, secular jurisprudence and Jean-Jacques Rousseau's secularising theory of governance. Rousseau only succeeds in reinstating the black letters of the *ancien régime* by simulating a point of origin in the end point of law ('the People'), by dressing up the rule by decree of pre-Enlightenment law in the democratic costume of the apparently intimate epistolary mode of the parliamentary statute.

St Paul's and Rousseau's dreams of establishing a jurisprudence that bridges the gap between the sender and receiver of the letter of the law find an echo in the contemporary advocacy of plain English statutory drafting. Here, too, there are two letters of the law: black letter gobbledegook on the one hand, and transparent plain English on the other. It is suggested that the hermeneutics of black letter law continue to haunt plain English drafting in the tendency of plain English law, under an unreformed legal system and polity, to degenerate into a closed style. Yet again, the radical dream by which law is constituted in a dynamic interplay between the senders and receivers of its letters is shut down by the dead hand of authority and power.

Sacred Letters

Some of Christianity's foundational law is found in Paul's letters to the early churches. For example, in the second letter to the Corinthians, Paul writes:

> we are not, like so many, peddlers of God's word; but as men of sincerity, as commissioned by God, in the sight of God we speak in Christ. Are we beginning to commend ourselves again? Or do we need, as some do, letters of recommendation to you, or from you? You yourselves are our letter of recommendation, written on your [or *our*] hearts, to be known and read by all men; and you show that you are a letter from Christ delivered by us, written not with ink but with the spirit of the living God, not on tablets of stone but on tablets of human hearts. Such is the confidence that we have through Christ toward God. Not that we are sufficient of ourselves to claim anything as coming from us; our sufficiency is from God, who has qualified us to be ministers of a new covenant, not in a written code but in the Spirit; for the written code kills, but the Spirit gives life.[2]

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[2] 2 Cor 2:17–3:6. All biblical quotations are taken from the Revised Standard Version unless otherwise stated. It is illuminating, however, to note that in the final verse (6) here, the New International Version has (in part) 'a new covenant — not of the letter but of the Spirit; for the letter kills, but the Spirit gives life'. Between these two translations, the connections between 'letter' and 'code' (or law) played on throughout this article become apparent.

An important part of Paul's mission as an apostle of the early church was to bear witness to the law of the New Covenant. In the second letter to the Corinthians (and the letter to the Galatians), Paul is concerned to counter the influence of a 'Judaising' faction of the early Church. These Palestinian Jewish Christians emphasised the links between Judaism and Christianity, holding that it was necessary for gentiles to adhere to the Mosaic law in order to be accepted into the Christian church.[3] This explains the emphatic nature of the contrast between the law of the Old Covenant (the ten commandments written on stone tablets) and the new Christian law of the spirit, 'written on tablets of human hearts', as in Paul's image of the Corinthian church as his 'letter of recommendation'. There appears to be a clear binary opposition: 'the written code [letter] kills, but the Spirit gives life'.

The written code — a sentence of death; laws of threat, prohibition, censure; a law whose author is absent; 'black letter law'. The law of the heart — written 'not with ink but with the Spirit of the living God'; a law whose author (God) is present in the material fabric of the law, in the person of Christ. The addressor is Christ — both God and human, both absent and present, dead and resurrected. Similarly, the addressee is both human and God: 'we all, with unveiled face, beholding [or *reflecting*] the glory of the Lord, are being changed into his likeness from one degree of glory to another; for this comes from the Lord who is the Spirit'.[4]

God and man are brought together by the 'writing' of the law 'on tablets of human hearts'. The glory of the Lord is experienced without any need for the mediation of the letter, 'with unveiled face', so that there is a perfect reciprocity between God and humans — expressed neatly in the translators' equivocation between the 'beholding' and the 'reflecting' of the glory of the

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Paul echoes here Christ's words in John 6:63: 'It is the spirit that gives life, the flesh is of no avail; the words that I have spoken to you are of spirit and of life' (a teaching, of course, that echoes John's identification of the Word with God in John 1:1). This is a variation on the teaching earlier in the same sermon that Christ is the 'bread of life', the eating of which brings His followers to God the Father and eternal life (John 6:48–58). For Christ, it is the word that is important, not flesh, because Christ represents the *embodiment* of the Father's holy word (using the imagery of the same fleshly instrument, the mouth, that eats both material and spiritual bread). Once these words have gone out into the world, however, they are infected with materiality (commodified by 'peddlers', as Paul indicates). Paul's authority is *threatened* by the word; Christ's*constituted* by the word. Thus Paul's apparent clear break between the word and the 'living spirit' reverses Christ's original dichotomy between the word and *death* (the flesh). Later in the article, it will be seen that the word of plain English law also moves from one letter of the law to the other in the contrast between a living, process-based approach and the tendency for degeneration into a deadening style. I am grateful to a *Griffith LR* reader for pointing out this shift within the Christian rhetoric of the word.

[3] See J Murphy-O'Connor (1968) 'The Second Letter to the Corinthians' in RE Brown et al. (eds) *The New Jerome Biblical Commentary*, Study Hardback edn, 1995, Geoffrey Chapman, p 817 (par 5); and JA Fitzmyer (1968) 'The Letter to the Galatians' in Brown et al., p 781 (pars 7–8).

[4] 2 Cor 3:18.

Lord. The reference to 'veiling' reinforces the contrast between the laws of the old and the new covenants, for it is in direct counterpoint to Paul's mention of 'the dispensation of death, carved in letters on stone, [that] came with such splendour that the Israelites could not look at Moses' face because of the brightness, fading as this was'.[5] The figure of veiling/unveiling to express a dream of unmediated presence re-emerges in modern form in the visual imagery with which the rhetoric of plain English law is suffused, as will be seen below.

Inevitably implicated in any discussion of the nature of law is the question of origin, of the originating authority under which the law is made. Law is by definition an authorising system, so its authority to authorise (the origin of its authority) must be stable if it is to continue to be effective. It is thus anything but irrelevant that Paul's discussion of sacred law in 2 Corinthians is framed by a treatment of the issue of his own earthly legitimacy as a preacher, a vehicle for the dissemination of the law, and a law-giver himself (for later generations of Christians reading the letter). The Judaisers who had been intriguing against Paul in Corinth and among the Galatian church had cast doubt on Paul's teaching by questioning his status as a mere 'convert', and not one of the original twelve apostles.[6] This emphasis on genealogy is a significant aspect of the Jewish legal precepts that Paul is seeking to overturn through his second letter to the Corinthians and to the Galatians. By countering the attack on his authority, Paul aims to reinforce his central thesis (the primacy of the new law brought by Christ over the Mosaic law).

The manner of Paul's response is instructive, too. He first exhorts the Corinthian Christians to forgive certain members (the Judaisers) who had been attacking his teaching.[7] In doing so, Paul implicitly invokes the precept of the law of the new covenant that replaces the old in doing so: 'the entire law is fulfilled in one word, "You shall love your neighbour as yourself."'[8] Paul then deals directly with the question of authority: what gives Paul the right to lay down the law to them? This is subtly reversed in the assertion that the Corinthians' own Christianity is his 'letter of recommendation' — it was Paul

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5 2 Cor 3:7. Paul alludes to Moses' encounters with God at the time of the giving of the old covenant (Ex 34:29–35). It is noteworthy, as pointed out by Murphy-O'Connor, that Paul directly contradicts the Old Testament account in this passage (Murphy-O'Connor (1968) p 821 par 19). In Exodus, Moses' face is *not* veiled when he speaks to the people of Israel. Thus Paul 'veils' the Mosaic tradition itself in order to emphasise the doctrinal break constituted by his own teaching that there is no need for such a veil in an encounter with Christ. Paul's disparagement of the Mosaic tradition is rhetorically reinforced, too, by his reference to the 'fading' brightness on Moses' face.

6 On Galatians, see Fitzmyer (1968) p 781 (par 7). On 2 Corinthians, see Murphy-O'Connor (1968) p 817 (par 5).

7 2 Cor 2: 5–11.

8 Gal 5:14. A law of the old covenant (Lev 19: 18); the new covenant is always already marked with the trace of the old, just as the letter of the law is inscribed in the law of the spirit (see below).

who had established the Church there in the first place. If the lawful authority of his teaching is questioned, so is the origin and legitimacy of the Corinthian Church itself.

There are actually two 'letters of recommendation' in this passage to match the two letters of the law. In Paul's language, there is again inscribed the contrast between the dead (written) letter of recommendation and the (living) letter that is the spirit of the Corinthian Church itself. This letter is also written 'on your hearts', and moves in a circular fashion from the Church to Paul (a letter 'from you', able to be employed in Paul's preaching elsewhere) and back again (a letter 'to you') as he claims a renewal of his authority among the Corinthians.[9]

Paul then turns to his first theological argument. The 'new covenant' brought by Paul is not a message brought down from the mountain on stone tablets, but a law of the spirit, the text of which is written on earth, on human hearts. The people are in the service of a covenant written within themselves; the law circulates from sender to the receiver and back again — each substituting for the other.[10]

Such a binary opposition between 'dead' and 'living' law runs through discussions of the nature of modern secular law in the common law tradition, and spills over into the contemporary rhetoric of the advocates of plain English, as shall be seen below. In the present instance, it is particularly notable that Paul introduces himself by contrasting those who 'are peddlers of God's word' and those (like Paul) who speak 'as men of sincerity, as commissioned by God'. The peddlers treat God's law like a commodity ('cheap merchandise', as the *Good News Bible* has it); the suggestion is that it is only when the messenger speaks 'with sincerity' that the law has force. The law does not live unless it is conveyed *sincerely*; an assertion that something *more* is required than the strict letter of the law to convey its full meaning.

For modern secular law, this extra quality may variously take the form of parliamentary intentions 'before' the law, the purpose of parliament as to the implementation of the law, or the context of the application of the law.[11] In jurisprudential terms, this means an appeal to a natural law foundation for positive law; in the vocabulary of the English legal tradition, it refers to equity as a supplement to the common law.

Four letters, or laws, have been discerned already — the laws of the Old and the New Covenants, and the two analogous 'letters of recommendation'. Two more are inescapable. The first is Paul's letter *itself*, and the second is that letter considered to be part of the New Testament canon, the new law to which

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9 This circularity is also evident in two alternative translations: 'written on *your* hearts' (Revised Standard Version, emphasis added); and 'written on [King James Version 'in'] *our* hearts" (King James Version, Good News Version; New International Version, emphasis added).

10 This anticipates Rousseau's justification for secular legal authority, discussed below.

11 See N Horn, 'T(r)op(ic)ology: Law, Interpretation, Power' (1996) 5 *Griffith LR*, pp 125–32 for an overview of the intentionalist approach to statutory interpretation.

Christians are subject. Paul's letter is itself (partly) constitutive of the New Covenant that is the subject of the epistle — the law of love, of the spirit, is contained within the black letters of the New Testament (within Paul's letter).

Paul condemns the written law, but the written (dead letter) law is always and already reinscribed into the contrasting (living) law to which he bears witness, and which is constituted by his own letters. His own conveyance of God's truth is in the form of a letter (forming part of a larger written canon), and his own language for the transmission of the truth ('written ... on tablets of human hearts') is framed in terms of its contrary.

The apparently clear rhetorical opposition between 'good' and 'bad' letters of the law is compromised in this manner, recalling Jacques Derrida's analysis of writing, speech and memory in Plato's *Phaedrus*.[12] Derrida observes that, despite Socrates' condemnation of writing as an inferior source of knowledge (akin to imitation — knowledge precisely as an *object*, just as Paul condemns those who peddle God's word as a commodity), writing is placed before knowledge in the metaphor of true knowledge being 'inscribed in the soul' (in the doctrine of *anamnesis*, the means by which divine truth known to the soul before birth is 'remembered' by the soul of the living person).[13]

Derrida notes elsewhere in that essay that 'what Plato *dreams* of is a memory with no sign'.[14] This is reminiscent of Paul's metaphor of a letter of recommendation 'written on tablets of human hearts', a letter of recommendation without paper or ink, without the need for any intermediate 'veil' — or, indeed, the mediation of a Moses. In a legal context, this is a dream of a self-originating authorisation, a fixed point of origin to stabilise the law once and for all time. We shall now proceed to explore versions of this dream proposed in the modern day by Jean-Jacques Rousseau in his theory of the social contract, and by advocates of plain English laws. As with Plato and Paul, it will be seen that these dreams are by their nature unrealisable, even if the legitimisation of the law, and possibly justice, demands that they continue to be pursued.

In the Ordinary Course of Post ...

Peter Goodrich is savage in his polemic against traditional black letter English jurisprudence, finding the dominant aspect of law in that tradition to be tied to 'the sacral quality of legal writing'.[15] This quality is constituted in the 'directly performative' nature of positive law that:

> announces a discourse which is in all ordinary senses hermetically sealed, the property of the institution to which it is tied and within

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[12] J Derrida (1981) 'Plato's Pharmacy' in *Dissemination*, trans B Johnson, Athlone Press, pp 62–171.

[13] ibid. pp 148–49.

[14] ibid. p 109.

[15] P Goodrich (1990) *Languages of Law: From Logics of Memory to Nomadic Masks*, Weidenfeld and Nicholson, p 137.

> which it circulates according to strict offices of ingrossing, tabling, noting, posting and custody of the various instruments and fines ...[16]

The obsessive emphasis on the authentication of the *origin* of the law confines the signifying possibilities of the text within a second order of laws — 'issues of documentation and status that travel under the lexico-grammatical axioms and exegetical rules of notation'.[17] Laws are given force not according to the merits of any arguments in their text (not because the addressee is persuaded to obey them), but because they *are* laws: because of where they come from — the power of the addressor — not because of what they signify in themselves.

Echoing St Paul's comments about the peddlers of God's word, Goodrich remarks that 'the note [the written law] contracts; it reduces; it limits, it binds. It might also be said that in claiming to represent real properties it becomes a form of property, a unit in a system of exchange ...'[18] The law becomes a commodity itself (with the stamp of approval of its origin embossed on it), a parcel that remains sealed and wrapped and is valuable as such; such a message is not so much 'written on ... the hearts' of its addressees (as St Paul has it) as shackled around their wrists.

Goodrich illustrates these observations about the packaging of the law by an analysis of the postal rule — an apt illustration, too, for this essay on the letters of the law. As he describes the rule:

> an epistolary acceptance of a contractual offer becomes binding once placed in the course of post. An epistolary acceptance thus need not be communicated or brought to the attention of the offering party. It is possible that the letter fails to arrive at its destination, or that it arrives late, and yet a binding contract nonetheless subsists. It is possible, in this as in numerous other instances of contemporary contract law, to be bound by texts one has not read ... the system of circulation of messages, the means of communication or objectified text, is often of greater significance than its apparent subjective content ... the letter, the contractual act, may have an existence independent both of its sender and of its destination.[19]

By giving force to the contract in the absence of any *actual* 'acceptance', the law elevates form (putting the letter in the mail) over content (actual communication of the substance of the contract). The dead letter of a formalised system of circulation is thus opposed to the living letter of actual communication. A similar function is performed by the law of 'deemed acceptance' through the application of a signature: the terms of the contract are

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16 ibid.

17 ibid. p 144.

18 ibid.

19 ibid. pp 149–50. A standard provision in all interpretation laws in Australia similarly guarantees service of documents under statute 'in the ordinary course of post' (see, for example, *Acts Interpretation Act* 1901 (Cth), s 28A).

presumed to have been read and understood irrespective of their actual communication to the party signing the contract.[20]

Furthermore, in the 'numerous other instances' mentioned by Goodrich in which consumers enter into most of the most significant contracts of their lives — employment, mortgages, insurance — due to the power imbalance between the individual and the institution, the only meaningful freedom to contract is the choice of whether to enter the contract or not. There is no choice about the terms of that contract, which must be agreed as a 'sacral text', in Goodrich's phrase. The powerful institution is as unapproachable as Jehovah on mist-enshrouded Mt Sinai, and the contract written on a tablet of stone.

With statute law, of course, there is not even the choice of whether to sign or not, and we may be deprived not only of our money but of our liberty by the state without any actual knowledge of the law under which the deprivation takes place. Moreover, the unavailability of any defence is traditionally couched in terms of a *presumption* of knowledge reinforcing Goodrich's observations (cited above) about the elevation of system over content.[21] The rights and duties prescribed by a statute are presumptively offered to, and accepted by, the subject by the operation of a postal rule applying at the level of society at large. This is the pact known as the 'social contract', to which we shall now turn our attention.

Secular Law-making and the Social Contract

Jean-Jacques Rousseau proposed the doctrine of the social contract as an answer to an urgent new question of origins facing European political theory in the eighteenth century: how to maintain the authority of the state in the absence of both God and King? He argued that this dangerous double void could be filled by simulating a point of origin — of authority — for legislation:

> Thus in the task of legislation one finds two seemingly incompatible things: an enterprise beyond human power and, for its execution, a non-existent authority.[22]

The problem, in other words, was the need to justify legislation by reference to human authority. Rousseau's solution was to posit a human collective

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[20] The rule in *L'Estrange v Graucob* [1934] 2 KB 394 at 403 (Scroton LJ) that 'a party signing a document is bound by its content in the absence of fraud or misrepresentation' (JG Starke et al. (1988) *Cheshire and Fifoot's Law of Contract* 5th Aust edn, Butterworths, p 147). Additional dicta is cited by Starke et al., showing that under Australian law 'a radical misapprehension of the content of the document may entitle its signatory to disown it even if no fraud or misrepresentation is shown' (ibid.). The *prima facie* presumption remains, however.

[21] On the presumption of knowledge, see D O'Connor and PA Fairhall (1996), *Criminal Defences,* 3rd edn, Butterworths, pp 51–52.

[22] J-J Rousseau *Contrat Social*, trans and qtd Goodrich (1990), p 167.

'sovereign' will in place of divine authority. As Goodrich notes, this is effectively a Deleuzian 'simulacrum' — not an image, but a kind of substitute by which the divine enjoys a deferred presence.[23] A divinely absent law-maker's authority is deferred into the hands of the people by virtue of a fictional collective agreement (the social contract), sent in the ordinary course of post, presumed to have been received by each individual legal subject.

As Goodrich explains, Rousseau's system endorses a closed rhetoric of internality that elevates positive law above natural law:

> the sender and receiver of the message *are one and the same*; the contract separates the parties to the exchange simply so as to unite them indissolubly, textually, legally. That is to say, in metaphysical terms, the contract internalises both origin and end ... semiotic and juridical subjects alike are destined eventually to refer only to themselves, their messages simply and ceremonially reflecting its origins, its sender.[24]

The law thus has force simply by virtue of *being* law (the 'ceremonial reflection' of the origin).

The passage from 2 Corinthians discussed above demonstrates the same conflation of addressor and addressee. This concerned a letter of recommendation both *to* and *from* the Christians in Corinth — a hermetically sealed circle of authority (the church established by Paul is sufficient authority for Paul to preach to the church). Paul draws on the distinction between the letter 'written on tablets of human hearts' and the positive law written on 'stone tablets'. Rousseau uses strikingly similar theological rhetoric to make the same distinction at a secular level. The point of origin of law moves from God to nature (the 'hearts' of men) and then to the social contract when Rousseau speaks of the 'sanctity' of the contract, justified by virtue of a '*lien social*' (social bond) inscribed indelibly 'in all hearts'.[25] Thus, although Rousseau asserts the contrary (the source of the social bond is said to be in the legal subject's human nature), as Goodrich succinctly puts it, 'the individual ... never had a chance; the individual was always already the product of law'.[26]

Goodrich argues that there is a movement here back from the natural law of rhetoric, or the 'heart' (associated with *ius* or justice), to the 'positive social bond legislated in written form' (*lex* — the law). This movement is effected through the level of generality of the social contract; as Rousseau says:

> The object of laws is always general, I mean that the law considers subjects as bodies and actions as abstractions, and never a particular man as an individual nor a particular action.[27]

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[23] Goodrich (1990), p 167. See also G Deleuze (1994) *Difference and Repetition*, trans P Patton, Athlone Press, pp 17, 67–69.

[24] Goodrich (1990), pp 170–71.

[25] Rousseau, trans and qtd Goodrich (1990), p 169.

[26] Goodrich (1990), p 169.

[27] Rousseau, trans and qtd Goodrich (1990), p 169.

This level of generality is necessitated by the temporal character of the contract: the positive written law seeks to govern the future and outlive the lives in being of both legislator and existing legal subjects. The legislator's moral vision for (in Rousseau's words) the 'state [that] the population ... ought naturally to attain' entails, as de Man has pointed out, a reversal of cause and effect — the future state of society becomes the point of origin for the present law.[28] This inherent uncertainty — the ever-present possibility of the law's not arriving at its destination — requires the pre-emptive presumption that the law *has* arrived (in the ordinary course of post, so to speak); its rationale and interpretation must not be questioned. This letter of the law is thus the expression of the unequal power relations between state and citizen, between addressor and addressee, that stand in the way of the realisation of a dream of the law being written on the heart.

Plain English Legal Letters

Advocates of plain English laws also, of course, draw on a distinction between two different letters of the law: those that communicate clearly, and those that employ 'obscure and convoluted language'.[29]

The basic precepts of 'plain language' (interchangeably known as 'plain English') are conveniently encapsulated in the following remarks by the Law Reform Commission of Victoria (LRCV):

> The central platform of the plain language movement is the right of the audience — the right to understand any document that confers a benefit or imposes an obligation ... it is not the reader's responsibility to have to labour to discover the meaning ... Documents are not equitable if they cannot be understood by all parties who have to read them.[30]

Plain English legal letters are thus written to be 'understood', not just to be obeyed. They are letters addressed to the heart, to be unpacked and read by those affected directly by them, and not black letters that are for the eyes of the legal priesthood alone. It is true that the LRCV elsewhere seeks to distinguish between its aim to promote plain legal language and the substantive reform of the law in emphasising that 'A plain language project is not fundamentally concerned with the fairness or reasonableness of laws and policies'.[31] However, it still may be said that the LRCV and other plain English advocates share a common dream with Goodrich and other critical legal scholars to the extent

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28 Rousseau ibid. p 172; P de Man (1979) 'Promises (Social Contract)' in *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust*, Yale University Press, p 273. See Horn (1996), pp 132–35 for further discussion of de Man's observation as applied to the intentionalist approach to statutory interpretation.

29 Law Reform Commission of Victoria (LRCV) (1986), *Legislation, Legal Rights and Plain English*, Discussion Paper No 1, Victorian Government Printer, p i.

30 LRCV (1986), pp 8–9.

31 ibid. p 7.

that they argue that there is the need for plain English reform in areas of legal language 'where the form of expression disadvantages and even disenfranchises' those to whom the legal document is addressed.[32]

The LRCV quotations already cited are from a pioneering discussion paper setting out the principles that formed the basis for a more comprehensive report on the issue.[33] The LRCV's vigorous advocacy of plain legal language set the scene for the movement's growing influence.[34] In Australia, perhaps the most significant developments in plain English legal writing have been in legislative drafting, and so it is appropriate to examine the precepts of the movement in that context.[35]

Two Letters of Plain English Law

Two trends may be discerned in prescriptions for plain English law: a rule-based approach that treats plain English as a clearer *style*, and an approach based around an empirical analysis of readability that treats plain English law as a *process of communication*. The first will be outlined by reference to the LRCV discussion paper already mentioned; the second will be seen through a brief account of the views of Robyn Penman.

The LRCV's method of persuasion revolves around the common technique (in the literature of plain English) of presenting 'before-and-after' texts, with the claim that the second version removes 'gobbledegook' or 'mumbo-jumbo' from the first.[36] Central to the claims of plain English is that

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32 ibid.

33 ibid. and LRCV (1987) *Plain English and the Law*, Victorian Government Printer. This article uses the discussion paper as the basis for much of its argument because it highlights the particular issues that are of concern here. However, similar arguments and prescriptions for plain English are to be found in the subsequent report, and, indeed, in the writing of most modern advocates of plain English legal language.

34 For concise accounts of the rapid development of the modern movement for plain English legal writing since the 1970s in Australia and elsewhere, see M Duckworth, 'Clarity and the Rule of Law: The Role of Plain Judicial Language' (1994) 2 *The Judicial Review* 69, pp 70–74, and P Butt, 'Plain Language in Property Law: Uses and Abuses' (1999) 73 *ALJ* 807, pp 812–15.

35 First the Victorian Office of Parliamentary Counsel (in 1985), then the NSW Office of Parliamentary Counsel formally adopted plain English policies (Duckworth (1994), p 70; NSW Parliamentary Counsel's Office (NSW PCO) (1991), *Language Policies* [draft], p 2). In the early 1990s, both Commonwealth drafting offices followed suit, as recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs in (1993), *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth*, Australian Government Publishing Service. The Queensland Office of Parliamentary Counsel has also blazed a trail for plain English and, since 1999, the ACT Parliamentary Counsel's Office has rapidly been catching up with plain English drafting techniques (see N Horn (2000) 'Implementing Drafting Change', presented at the Australasian Drafting Conference, Wellington New Zealand, February).

36 For example (one of many), LRCV (1986), pp 7–8.

'A plain English document is legally accurate and precise. It does not change or distort the impact of *the original*. It ensures that the expression of the law is clear and free from obscurity and convoluted language.' (emphasis added)[37]

The claim is that there are two documents, each with an identical meaning, but one of which communicates that meaning more clearly than the other. One is an 'original', the other a substitute, a deferred version. The 'clear' expression of the law mentioned by the LRCV reflects a central metaphor of the plain English movement — for example, 'Clarity' has been adopted as the name of the English-based organisation promoting plain legal language as well as the group's journal. This visual imagery indicates that the law is always presumed to be somewhere other than in the legal document itself; the legal document is a window on to the law that may be either 'clear' or 'obscure'.

In the quotation above, the LRCV reference to 'the original' is particularly interesting; there is actually no prior reference in this context to an 'obscure' document whose impact is not 'distorted' by a plain English version. This is a stylistic slip, certainly, but one that is symptomatic: it indicates that the plain English text is always compared against a law residing elsewhere that is prior to, and of a different order from, the legal document, even if the text of the document is not actually a translation. This indication is reinforced by the assertion that 'a plain English document is legally accurate and precise' — how is either the 'obscure' or the 'clear' document to be tested except against some law situated outside of the discursive system of translation implied by this approach to plain English?

Such a model of translation from one version of legal English to another is pervasive, even where no actual translation or rewriting of an old law takes place. The LRCV states emphatically that: 'Plain English is a full version of the language, using the patterns of normal, adult English. It is not a type of basic English, or baby-talk.'[38] Even if plain English is 'normal', it is only asserted to be such by the loaded contrast with other (less full) 'versions' of the language ('basic English'; 'baby-talk') and, implicitly, traditional legal English. It is, in short, a *style*.

What makes this style 'free from obscurity' and 'mumbo-jumbo'? You follow a series of rules (of laws).[39] Some of the section headings of the LRCV

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[37] ibid. p i.

[38] ibid. p 3.

[39] Some more recent approaches to plain English drafting are more sophisticated than that proposed by the LRCV, responding to elements of Penman's critique (or similar criticisms) outlined below. For example, the Commonwealth Office of Parliamentary Counsel's (OPC's) *Plain English Manual* (2000), www.opc.gov.au [About OPC–OPC documents], pars 13–14, advises drafters that no rule for 'drafting simply' is 'absolute', and that simple drafting is more a matter of cultivating 'techniques' rather than following rules. However, there is still a strong element of 'style' (with the presumption that readability will follow simple style) in the detailed guide that follows, with its four basic elements of 'planning', 'developing good writing habits', 'avoiding bad writing habits by rejecting

paper are indicative: 'the long sentence', 'active and passive voice', 'negation', 'archaic' words'. What makes these rules a guarantee of plainer communication? Empirical research is cited in support, but it is of a very general nature — often based around reading by a lay-reader of legislation with average literacy and educational qualification.[40] The LRCV paper, and much other literature in the same vein, *presumes* that if these rules are followed, legislation will be easier to understand for such a *notional* user.[41] Knowledge of the law is still presumed, rather than assured; the letter is taken to have arrived in the 'ordinary course of post'.

Thus within an admirable project to make legal writing more accessible and to abolish the convolutions and specialised style involved in traditional drafting, a certain sort of black letter law known as 'plain English style' is reinstituted. This style, justified by rules and presumptions, acts as a substitute for actual communication 'in the hearts' of different users. It always carries with it the possibility of degeneration into a new legal jargon, particularly in harness with the institutions of legal interpretation (mentioned further below) that, by their generic operation, blacken letters that might once have been clear.

Robyn Penman, a communications theorist, is critical of the assumption that 'plain English *per se* ... [leads] to better comprehension'.[42] She found in one set of tests of a black letter traditional version of an insurance investment policy against three different sets of plain English versions that 'Plain English was not enough to make this insurance document comprehensible to the actual people for whom it was designed'.[43] Penman argues that, for comprehension to take place, a 'broader communication perspective' is necessary.[44] The meaning of the text is established not by the addressor (whether writing in a black letter or a plain English style), but in the context in which it is actually received by each addressee. More effective communication is possible through what she

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traditional forms of legal expression that are unnecessarily obscure or long-winded' and 'using various aids [e.g. graphic aids] to understanding the text'.

40 See D Berry 'Audience Analysis in the Legislative Drafting Process' (2000) *Loophole* 61 for an overview of the concept of readability testing. Berry discusses two 'armchair' approaches involving the drafter's presumptions about the law's audience and compares them with actual 'empirical' readability testing. However, he does not address the evident limitations of any empirical testing: no matter how carefully targeted the tests, the drafter still must make presumptions about readability based on induction from the selective test results to more general levels of readability.

41 In legislative drafting offices that have adopted plain English policies, internal drafting rules are formulated as a means to ensure that drafts conform to a consistent plain English style. See, for example, NSW PCO (1991); OPC (2000) (see note 39 above).

42 R Penman (1993) 'Legislation, Language and Writing for Action' in NSW Parliamentary Counsel's Office (ed) *A Conference on Legislative Drafting* [Conference proceedings], pp 33–72, at p 37.

43 ibid. p 38.

44 ibid. p 39.

calls 'writing for action': understanding how the document will be used in all its various contexts and addressing each different particular context. Moreover, it is not enough for the user to have a *general* understanding of the document; the reader must be able to understand how to *use* the document from their particular social position and contingent circumstances.

Penman's approach to the issue of communication and legal text reaches its limit, however, when she comes to consider the traditional black letter requirement of certainty. She regards the 'struggle between certainty and understanding' as simply a 'tension between different ways of understanding'.[45] This is an admirable insight into the (uncertain) way in which the term 'certainty' is itself understood differently, depending on the speaker's position in relation to the communication (a text can have an equally certain, but different, meaning for the addressor and the addressee).

But this insight itself indicates where communications theory ceases to be applicable to legal drafting. Statutes must be drafted for a multitude of legal subjects affected by the law, and for others who may come under the law's jurisdiction in the future. This is an obvious limit for the epistolary plain English law model: an Act of Parliament is not a private letter written from the head of state to a legal subject, it is a public decree that must be capable of general application. Penman's choice of example in her article is a plain English brochure explaining Victorian tenancy law. She presents two different versions — one for tenants and one for landlords — as an illustration of the 'process' approach to communications. But she does not discuss the evident impracticability of enacting such alternative accounts as the law *itself*; the supervening requirement of legal certainty, even for 'plain English' laws, would prevent it.

Moreover, Penman's translation of 'certainty' into 'comparative understanding' is altogether too balanced: it takes no account of inequalities of power, and the way in which 'certainty' is appropriated by the influential interests that support that system against the interests of those without influence. Her analysis is insufficient to account for the fact that certain 'ways of understanding' are privileged over others; the understanding of those with economic and institutional power (banks, finance companies, insurance companies, courts) will tend to take precedence over conflicting understandings entertained by relatively powerless legal addressees.

By contrast with their sometimes exaggerated claims about improvements in access to the law and readability, as observed above, plain English advocates are very careful to maintain an emphasis on certainty. This is essential to legitimise the claims of the reformers in the legal and political communities within which they hope to gain influence.[46] The plain English

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[45] ibid. p 41.

[46] See, for example, VLRC (1996), p i, quoted above. The OPC directive that the plain English drafter must 'strike a balance between precision and simplicity', and the NSW PCO warning that 'precision and accuracy should not be sacrificed in an attempt to be succinct and readable' are commonplaces in this literature (OPC (2000), par. 48; NSW PCO (1991), p 2).

drafter's address to the law's immediate institutional audience must be at least equally as finely tuned as its attempts to address the wider circle of community users of the law, particularly given the difficulty of simultaneously addressing such a heterogeneous group in a single legal text (as discussed above).

As Pierre Legendre says, glossing a maxim from Justinian (*non solis litteris adhearere*, 'not to adhere to the letter alone'), we here 'enter the other world of interpretation, that is to say the world in which writing is bound to power, where there is that which is written plus something else, something more, something *extra*'.[47] No matter how well targeted the language of the law, there is always 'something else' — an interpretative system, lying outside of the text, binding the law to power.[48] While 'something else' for the black letter law may be its natural law supplement (the letter purportedly addressed to the heart of each legal subject), as observed above, as a result of the power imbalances underlying the legal system in which all law circulates, this further interpretative supplement to both letters of the law is inescapable.

Where is the Law?

In their concern for the readers to whom the law is addressed, advocates of plain English law of all sorts tend to avoid generic distinctions between types of document; Penman's use of an explanatory brochure, described above, to illustrate an analysis of legal communication is symptomatic. The strategy is to generalise about communication, to emphasise the function of legal documents to *communicate*, and to downplay the particular features of those documents that endow them with legal status. This is also seen in the failure to distinguish, in discussions of plain English legislation, between features of the legislation that are binding as law, and supplementary features that do not have legal status (footnotes, headings in some cases, tables of contents, document design).[49] The plain English dream is, as Derrida has it, to 'eras[e] all the traits, even the most inapparent ones, the ones that mark the tone, or the belonging to a genre'.[50] The legal text is to be wiped clean so as to present a 'clear window' on to the law; the effect, however, is to treat the law as 'somewhere else', and not in the document at all — it is 'expressed' by the document but it resides *outside* it.

In short, there is a concerted attempt to evade the performative character of the law that is the object of Goodrich's critique; almost to hide the fact that the law *is* a law. The statute loses its sacral character (the law is *somewhere else*, not in the words of the Act); empowered by greater comprehension of the law, the addressee is to be more at liberty to resist its demands if it is found to be objectionable. Despite clear reservations about the limits of the mission of plain English, as stated by the LRCV and most other advocates, the impulse in

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47 P Legendre (1989) *Le Désir Politique de Dieu*, trans and qtd Goodrich (1990), p 115 (n 2).

48 See the discussion of Kafka and Foucault in Horn (1996) (esp pp 138–43).

49 For example, see Corporations Law Simplification Task Force (1995), *Organising the Law*, Drafting Issues (No. 1), Commonwealth Attorney-General's Department.

50 See epigraph.

giving the communication of the law emphasis over traditional concerns for certainty (particularly in the case of Penman) is to take the law out of the closed hermeneutic circle of the legal institutions into the broader social and political arena where its policy shortcomings are perhaps 'clearer', but exposed in a harsher light.

The account Goodrich gives of the debates over a 'plain English' biblical tradition is instructive here. The debate was between a tradition of scriptural exegesis and reformers such as Tyndale who distrusted the power of the Church to control access to biblical truth through this means. As Goodrich explains, the Catholic church:

> distrusted the immediate sign, and so where language was the object of analysis the meaning of the text was to be viewed as external to the text itself. The text, scripture, was formally incomplete; it required interpretation, exegesis and, in a full sense, tradition to complete it.[51]

Plain English has as its goal giving access to the 'immediate sign' of the law to the legal subjects affected by it, and is concerned to avoid the need for 'interpretation, exegesis and ... tradition' in understanding the law. As the LRCV paper has it (and Penman would agree here):

> Acts, regulations and other official documents are *functional* documents. Their purpose is either to give someone information or to have someone do something. Their primary purpose is not to have judges interpret them. Our object is to have the public understand so that matters do not end up in court![52]

An uneasiness with interpretation is evident in the awkwardness of the assertion that laws are asserted as having as a 'purpose' that judges should not interpret them. This anxiety is also evident in the oft-repeated assertion that the legal 'meaning' of black letter law need not be affected by plain English 'translation' (if that translation is effected with care). But by treating laws as documents giving access to some form of extra-textual law (perhaps parliamentary intentions), plain English paradoxically gives *more* room for legal intervention. Moreover, by moving to a new style (or drafting technique, as OPC has it), plain English law offers additional scope for judicial intervention (as parties test the new legal language in the courts) and the development of uncodified common law interpretative glosses of that language.[53]

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[51] Goodrich (1990), p 63. Desmond Manderson has pointed out in conversation that there appears to be a consistent historical association between the movement for plain English law and protestantism going back at least to the time of the Commonwealth in the seventeenth century, continuing through the reforms advocated by Bentham and Austin in the nineteenth century, along precisely the lines outlined by Goodrich here.

[52] LRCV (1996), p 9.

[53] Butt (1999), p 817 briefly mentions some generally favourable — but also some superficially critical — judicial reaction to plain English. However, his evaluation

The performative character of the law is hidden by plain English laws; at the same time greater access is purportedly offered to a 'law' outside the legal text. Rousseau's analysis, described above, of the relationship between God and the sovereign, and the sovereign and parliament (and parliament and the people) holds good for the law as well: it is that of the Deleuzian simulacrum.[54] The law thwarts the dreams of plain English and remains inaccessible (it is elsewhere, guarded by the priesthood of lawyers and judges, the maze of rules of statutory interpretation and the other effects of power with which it is inescapably associated). At the same time, it is ever-present through the everyday effects of its simulacrum, the statute, however well disguised in 'plain language'. In short, in Derrida's phrase, 'the inaccessible incites from its place of hiding'.[55]

Conclusion: Dream, Dream, Dream ...

Derrida writes in his postcard: 'I would like to write you so simply, so simply, so simply. Without having anything ever catch the eye, excepting yours alone ...' These are words from the heart, love letters, but also the epistolary dream of successive legal visionaries. St Paul dreams of a new letter of law, a new covenant communicated directly from God to the soul of His subjects without the mediation of the mosaic canon. Jean-Jacques Rousseau dreams of a *lien social*, a contractual letter between the state and its citizens, and a mystical bond whereby the citizens and the state can become one and the same, without recourse to God or King. Plain English campaigners dream of a law that speaks directly to its audience, without the mediation of lawyers and judges; a law that completely escapes the bounds of the legal process.

In each case, the black letter of law, of legal genre, of a closed hermeneutics, throws the law off course. The letter to the heart is always liable to be diverted to the dead letter office, and the letter of the law may always fail

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is only in terms of general attitude, and not in relation to particular interpretative situations; little work has been done analysing the impact that plain English has had on statutory interpretation. However, see DG Hill, 'A Judicial Perspective on Tax Law Reform' (1998) 72 *Australian Law Journal* 685, in which Justice Hill indicates just how complex the interpretation of plain English still may be in an analysis of statutory provisions purporting to provide interpretative guidance for plain English 'rewrites' of existing law. For a systematic review of problems with the interpretation of plain English statutes, see J Barnes (1999), 'Plain English Drafting and the Judiciary: Interpretation and Assumptions', presented at the 9th Annual International Conference of the Law and Literature Association of Australia, February.

[54] See N Horn (1999) 'The Haunting of Plain English', presented at the 9th Annual International Conference of the Law and Literature Association of Australia, February, for a more detailed account of this relationship.

[55] J Derrida (1992) 'Before the Law', trans A Ronell and C Roulston, in D Attridge (ed) *Acts of Literature*, Routledge and Kegan Paul, p 192.

to arrive at its destination.[56] In St Paul's case, the old testament canon is replaced by a new testament (of which his letters form a fundamental part), whose letters have been blackened with the years of Christian exegesis. For Rousseau, the living letter of the *contrat social* between the citizen and state is always and already a dead-letter *lien*, tying each individual subject down with promises and assurances presumptively made on the subject's behalf. If God and King are banished, they are also *revenant* in the simulacrum of the 'people's state'.

And, despite the best efforts of the crusaders for plain English, the living letter of a legal text that communicates directly to its intended audience cannot evade the black letters of its performative, generic status as law, with the requirements of certainty and (as with Rousseau) a fundamental incapacity to speak individually to each subject in the infinitely varied circumstances in which the law is encountered every day.

It is not suggested that the effort that has been expended on the plain English law project is wasted, just that it makes unanalysed claims for itself that cannot be justified, and that it places itself within a history of religious and legal reform in so doing. Certainly, the stripping away of the black marks of legal jargon and the move to emphasise the communicative function of legal texts is to be strongly supported. But a call to a more radical reconfiguration of the institutional role and functioning of statute law, and of democratic government itself, is implicit in what Goodrich terms:

> a linguistics of textual recovery that does not simply reproduce the text but also makes it perform beyond its simple letters or literal form: [by virtue of which] to know the law is not to know the words of the law, but the force and property of the words.[57]

The two letters of the law described in this article represent two paths for plain English law-making. Along one path there is the dead letter of a new formalism as plain English style solidifies itself into a new jargon in which the letter of the law is presumed to be communicated 'in the ordinary course of post'. Along the other, a focus on a 'linguistics of textual recovery' has the capacity of enabling law to be formulated in such a way as to encourage greater awareness of, and participation in, the larger political and social universe circumscribed by, and circumscribing, the circulation of the letters of the law.

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[56] See J Derrida (1987b) 'Le Facteur de la Vérité', in *The Post Card: From Socrates to Freud and Beyond*, trans Alan Bass, University of Chicago Press, pp 411–96, alluded to by Goodrich above in his discussion of the postal rule.

[57] Goodrich (1990), p 115.