THE UNIVERSITY OF MANITOBA

LEGALLY SPEAKING: THE POTENTIAL FOR A "PLAIN ENGLISH" MOVEMENT IN THE WINNIPEG JUVENILE COURT

by

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ABSTRACT

This thesis examines the potential for a "Plain English" movement in the Winnipeg juvenile court in the Province of Manitoba, Canada. The writer perceives that there is a failure of communication between the juvenile and the court which has resulted from the use of legal language or legalese. The degree of understanding of the language used in juvenile court proceedings, from the juvenile's perspective, needs to be assessed.

The juvenile's understanding of the legal process is evaluated through the administration of an interview schedule. In addition to interviewing juveniles, probation officers, defense counsel and juvenile court judges are also interviewed to determine their role in the explanation process of the legal language to which the juvenile is exposed and subjected. Thus this study has four parts.

Five hypotheses are set forth. Specifically, a juvenile's understanding of legal language is dependent on his/her contact with (1) probation services, (2) defense counsel, and (3) the judge's explanation of the language, process and procedure of the court. In addition, (4) time spent in custody is believed to affect understanding. Finally, (5) a juvenile's sense of justice (fairness) is thought to be affected by his/her understanding of legal language.

In general, the data support the hypotheses. It is concluded that there is indeed the potential for a "Plain English" movement in the Winnipeg juvenile court. Certain recommendations are made which are believed to contribute to the juvenile's understanding of legal language.

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Finally, I wish to thank those juveniles who agreed to be interviewed. They taught me to understand a great deal about what they think and feel. I hope this thesis will help their understanding.

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For Judge Ronald J.W. Morlock
whose wise counsel and commitment
to my life and my lifeswork will inspire me always

CHAPTER 1

AN INTRODUCTION AND OVERVIEW

Introduction

It is the purpose of this thesis to examine the potential for a "Plain English" movement within the Winnipeg juvenile court in the Province of Manitoba, Canada. The impetus for such an investigation comes not only from academic commentaries on the use and misuse of language in the spheres of social, political, economic and legal life but also from a growing concern over these issues among the general public as well.

Use and misuse of language is not a new topic of social inquiry which has come to the fore in the 1970's and 1980's. As early as the 1930's harsh criticisms of language use in the public forum were expressed. H.L. Mencken, author of The American Language (first published in 1936) voiced concern over such matters as "euphemisms and jargon in politics, bureaucracy and the professions" (op. cit. in Danet, 1980: 450). Similarly, as other authors acknowledge, George Orwell (1957: 153) commented that political language "consists largely of euphemism, question-begging and sheer cloudy vagueness".

The dawn of World War II and proliferation of propaganda reopened the debate on language. Hayakawa published the book Language in Action which he admits was "a response to the dangers of propaganda especially as exemplified in Adolf Hitler's success in persuading millions to share his maniacal and destructive views"

(ibid, 1964 Preface).

During the 1950's and 1960's the use and misuse of language was not a topic of widespread public debate. It was in the 1970's however, that the subject seemed to gain its greatest strength and popularity. Its saliency was largely a response to the controversy over Watergate. For the American public, this affair became a matter of determining the meaning of certain government acts as conveyed through the use of specific words and sentences. During the period of the Watergate hearings held before the Senate Investigation Committee, a number of top government officials were seen to manipulate language in such a way as to provide excuses and justifications to exculpate them from that scandal. Such behavior not only created widespread public frustration and confusion but stimulated a large number of articles in newspapers and magazines condemning the apparent misuse of language by government officials as well as academic debate and criticism of language use in the public forum in learned journals and books.

In response to the overwhelming concern raised by the American public over the use and misuse of language at the bureaucratic level, former President Jimmy Carter issued an executive order "requiring 'clear and simple English' as a means of improving government regulations". This was a significant first step in the long process of language-use reform - a process which when combined with the creation of the Document Design Centre in Washington, D.C. has come to be termed the "Plain English Movement".

The upper echelons of government bureaucracy have not been

the only institutions to be affected by President Carter's executive order. The spirit of the Plain English Movement has influenced such economic institutions as banks and insurance companies. According to one author "state and federal government agencies have held and are holding conferences on language reform, hiring consultants and producing revised versions of legal and bureaucratic documents" (Danet, 1980: 451). There has been the proliferation of "simplified" insurance policies and bank loans to provide two substantive examples of the impact in this sector. In the broader perspective, Brenda Danet (1980: 487) cites authority which suggests that as of 1980 "22 American states had laws specifying standards for the readibility of insurance policies and other types of consumer contracts, 8 had bills pending and 10 had regulations or directives relating to this issue".

Another area which has indirectly, to date, felt the effects of this trend towards a more 'clear and simple English' has been the law and its constitutive elements. It is not surprising since most individuals who work within the legal profession as well as those external to it regard the law "as a profession of words" (Mellinkoff, 1963: vii). As California attorney David Mellinkoff (ibid, 1963: 24, 27) points out, "the language of the law has a tendency to be wordy, unclear, pompous and dull. It is full of long sentences, awkward constructions and fuzzy words. The result is often nothing less than a failure of communication".

In addressing the issue of "language and the law" Professor Brenda Danet, a key proponent of the emerging social science field

of the same name, suggests that traditionally law and language have been studied in isolation from one another. With the growing interest in "law and language" as a separate area of investigation one sees "social scientists, lawyers and linguists attempting to hurdle interdisciplinary barriers in order to study how language relates to the function of law in society" (Danet, 1980: 447, emphasis added).

The need to examine law and language together as a single area of research is summed up in the following words expressed by William Probert at the conference, "Developments in Law and Social Science Research" held in the early 1970's. He commented that,

> there needs to be greater concern in the law of all places, with language behavior, not just language, but language behavior... I am concerned not with written language but with 'law talk'. (op. cit. in Danet, 1980: 448)

Basically two concerns to date have emerged from the Plain English Movement. In particular, the primary focus has been an emphasis on the language of written documents and materials ranging from insurance policies and contracts to abortion consent forms. The Movement's more peripheral and indirect concern has been language in the communication process - "talk", an area which according to Probert is of utmost importance and demands the full attention of researchers who concentrate their efforts in the emerging area of "law and language". The task which presents itself to interested researchers is one that extends well beyond the original goals and ambitions of the Plain English Movement. Probert's concern draws attention to the need for investigators to

not only address themselves to the stable and structured language represented by the written word, but the ever-changing and spontaneous language observed in talk in different social milieu.

This thesis takes as its point of departure the Plain English Movement's concern with talk and not with the written language of statutes. Specifically the focus of this thesis is upon talk, including language used to explain the legal process, criminal code provisions, case law and dispositions, as it occurs in the pre-trial hearings held in the juvenile court. This represents an attempt to combine law and language as components of the "talk process" as it occurs within the courtroom setting, an area which until recently social scientists have had only a peripheral involvment. There is no doubt that the lack of investigation into law and language does not stem from a lack of interest but rather from the relative newness of the subject matter. As Danet (1980: 463) points out "legal language as a social problem has only become a major issue in the last five years". Furthermore Atkinson and Drew (1979: 5) who are concerned with the organization of "court-room conversation" provide keen insight into this issue:

> ...in so far as this multi-disciplinary convergence is a recent phenomenon the products of which are only just becoming available, it is hardly surprising that the organisation of verbal exchanges in courts has yet to be subjected to much in the way of detailed scrutiny.

The Basis of The Study

This study attempts to elaborate how the goals and philosophy of the Plain English Movement might be extended and expanded to

the hearings and trials in the juvenile court setting. This thesis is based on the premise that "Canada's juvenile courts are essentially criminal courts calibrated to the age of its clients and carrying with them the ingredients of a 'fair' hearing through recognized and practiced procedures of due process, but, at the same time bearing the burden and disadvantages attached to criminal-court type procedure" (Stewart, 1978: 158). The juvenile court in seeking to provide a standard structured legal proceeding which combines and ensures the critical elements of "fairness", "justice" and "impartiality" is faced with a fundamental dilemma. The juvenile court and its key actors, judges, prosecutors, lawyers, probation officers and child care workers are bound to act not only within the legal parameters of the governing legislation, the Juvenile Delinquents Act (JDA), (R.S.C. 1970, Chap. J-3, 1929) but also to act in the spirit of the law as well. To elaborate how legal personnel act in the spirit of the juvenile legislation, two sections of the JDA, Section 3(2) and Section 38, may be cited. First, Section 38, of the Act which deals with how the legislation may be construed:

> Section 38. This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, one needing aid, encouragement, help and assistance. R.S., c. 160, s. 38.

Secondly, Section 3(2) states:

> Section 3(2). Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision. R.S., c. 160, s. 3.

A careful reading of the two cited passages reveals both implicit and explicit assumptions. For example, Section 3(2) refers to a "condition of delinquency". The use of the word "condition" in the context of the phrase "condition of delinquency" seems to be used in almost a colloquial sense implying either illness or ailment. This medical connotation seems to suggest the need to "treat" the juvenile in a less severe manner than an adult offender who has possibly committed the same criminal act. The Section furthermore makes use of the words "help", "guidance" and "proper supervision". To achieve these ends, that is to provide guidance, help and supervision one would anticipate a certain informality in the juvenile court proceedings evidenced by a lack of legal technicality and an open rapport between the delinquent and his/her family and the court. An informal hearing would seem to be most conducive to appreciate the nature of the juvenile delinquent condition and provide informed opinion as to how this condition might best be alleviated. Informality in juvenile court proceedings proves not to be the case however. Rather one finds the highly formalized legal proceeding that is characteristic of adult criminal hearings. As Emerson (1969: 174) suggests, the juvenile court "maintains a formal and solemn atmosphere in its proceedings".

In preserving the due process procedure, the juvenile court

not only maintains a highly formalized method of dealing with juveniles, i.e. of determining their guilt or innocence, but promotes and encourages an environment whereby lawyers become the key actors. Despite Judge R. Stubbs' astute remark that "...the juvenile court is a special kind of court and needs a special kind of lawyer" (op. cit. in Bala and Clarke, 1981: 206) with the presence of lawyers one discovers a situation which might be described as "legal acrobatics". Legal language becomes the dominant mode of communication. While such discourse can be argued by its defenders to be more precise than "ordinary" language by "promoting the efficiency and reinforcing the cohesiveness of the legal profession" (Danet, 1980: 467) and perhaps furthering due process for the juvenile and protecting his/her interests as key court actor's behavior is regulated by this speech; more skeptical individuals argue that the use of legal language can lead to nothing but disaster (Mellinkoff, 1963: 295) in terms of effectively communicating to the accused the ideas and meanings inherent in legal proceedings. As Matza writes,

> The little that he hears and understands in court is enough to maintain and refuel the delinquent's sense of injustice. Because of the structure of the court, its mysteries and its rhetoric, the accused cannot see the actual consistency implicit in the emergent amalgam that guides disposition. (Matza, 1964: 133)

To recapitulate two polar positions, one supports and one criticizes the nature of legal language and its effectiveness in the courtroom. The more central issue to be addressed is one that considers whether or not legal language is in fact understood by

the accused juvenile or whether for the most part legal language remains incomprehensible to the juvenile. To dramatize this issue a passage from Atkinson and Drew (1979: 11) shows how some adult individuals feel about such specialized legal language and their understanding of their hearings:

> Generally speaking defendents are described as being variously bullied, thwarted, misunderstood, coerced, oppressed, manipulated, etc., all of which can be readily contrasted adversely with alternative claims about the propriety of legal procedures and the idea of justice.

If most adults voice this sentiment then consider the plight of the accused juvenile.

The employment of legal language, then, is said by some to accomplish high levels of specificity and precision in legal proceedings. Legal language from the legal proponents' perspective is said to contribute to the general and overall efficiency of the legal process. For example, many lawyers would argue adamantly that "to change the language of the law is to make it less precise because lawyers and judges know what the words mean; these words have stood the test of time. To change the language is to create new legal issues, to sacrifice the comforts of precedent" (Danet, 1980: 541; cf. Mellinkoff, 1963: 290). From the accused's perspective legal language contributes to a general lack of understanding as to what has been said and what has actually transpired (Atkinson and Drew, 1979: 11; Ericson and Baranek, 1982: 93). These problems are seen to be particularly serious for the juvenile offender who despite his/her alleged criminal behavior remains a juvenile who lacks familiarity and a thorough understanding with

legal terminology as a result of limited schooling. As the representative of D.A.R.E. in the CBC television documentary (January 3, 1982) "Sharp and Terrible Eyes" commented, "there can be no justice without understanding". If this is accepted as true then the need to assess the degree of understanding of the language of juvenile court proceedings from the juvenile's perspective becomes a critical consideration and a primary research problem. What the juvenile understands about his/her hearing is the central issue in this thesis. To elaborate, some key questions to be considered are, Does the juvenile understand the charges? Does s/he understand what it means to make a plea? Does s/he even understand the difference between guilty and not guilty? Does s/he understand the reason for an adjournment, the nature of the disposition or for the termination of the proceedings - a stay of proceedings, the withdrawal of a charge, adjournment sine die, final dispositions? If the juvenile's understanding of the formal legal process proves to be less than adequate (i.e. the juvenile doesn't understand why he is in court, what he is charged with, what the seriousness of the offence is, what the possible dispositions might be) then two related issues must be investigated. Specifically, "How best can the goals of the due process procedure be secured while at the same time ensuring that the juvenile is able to 'understand' the nature of the proceedings within the court setting?". The outcome of the hearing(s) will ultimately affect the juvenile in one way or another. Likewise, if one of the key functions of the law is to educate (Nader, 1973) and the juvenile

does not understand the language used in the proceedings, then can his/her court experience be a learning one? Will it deter the juvenile or instruct him/her?

An investigation of the juvenile's understanding of the language used in juvenile court proceedings is particularly important as the Juvenile Delinquents Act (JDA) is about to be replaced by new legislation known as the Young Offenders Act (YOA). The YOA unlike the JDA, places its emphasis on the juvenile's legal rights including the right to the due process of law. It also stresses the juvenile's right to participate in decisions and his/her responsibilities. The critical question is whether or not this orientation is realistic if it is found that the juvenile does not recognize his/her rights as being protected?

One is unable to find many examples of efforts on the part of lawyers (Ericson and Baranek, 1982: 83), or members of the judiciary to make legal proceedings more understandable to the accused juvenile. More often than not the individual is left in a state of confusion and bewilderment as to what has occurred in court. Attempts to make more sense of legal proceedings seem only to be those made in court by individual judges, lawyers or other key legal actors rather than by any widespread or institutional reform in this direction outside the courtroom. This is particularly significant in the context of the current changes which are presently occurring within the Winnipeg juvenile court. Specifically one sees a strong movement towards a more formalized legal procedure. One obvious effect of this has been the increase of

defense counsel in the courtroom. They have seized the role of case manager from probation officers. Whereas probation officers have traditionally provided the juvenile with an explanation, either partial or complete, of the legal proceedings, one is faced with the question of whether or not defense lawyers will now provide this explanation? If they do not, will the use of legal rhetoric without explanation become a means by which these key legal actors are able to assert their dominance over probation officers, vocal parents, social workers and juveniles? As two authors comment,

> The courtroom, too, has its exotic jargon. Its subject is the defendant, who cannot understand what it says of him. All too often the defendant is left to make of it what he can. No effort is made to bring him in, even on the court's terms. It is taken for granted that he cannot and moreover does not want to understand. He is universally seen as the recipient of whatever is judged to be appropriate for him. (Bankowski and Mungham, 1976: 89)

One can suggest, based on the preceding passage, that the more the obfuscation of language, the greater the manipulative power of law as a control structure. To elaborate, the juvenile, probation officer, parent or social worker who is unable to understand the language used in court is forced to rely on key legal actors to determine the nature of the proceedings and the outcome of the case. Denied of an explanation as to what has occurred in court that day they become <u>completely</u> dependent on the members of the legal profession to resolve the case. Their input is negligible. The court's pedagogical function is negated.

The study of the potential for a "Plain English" movement in

the Winnipeg juvenile court system is thus really the study of the current use of language in courtrooms and how this use might be changed and/or modified to ensure a more thorough understanding of the process for the juvenile involved. It is also an investigation of what is done outside of the courtroom by key legal actors to explain the process and the procedure of the court to the juvenile. This inquiry does not advocate deprofessionalization or deformalization of process. As Danet (1980: 489) has commented "reform of legal English is not a rejection of legality but an attempt to make it more accessible to the lay person. The linguistic reformers are not claiming that we should do away with legal forms but only that we should make them better". Furthermore, Bala and Clarke (1981: 187) warn of the dangers of simplifying legal language too much. They cite the case of Smith v. Queen from which the following verbal exchange is excerpted.

> Judge: There's an information here sonny, that on or about the 7th of June, a long time ago, unlawfully and indecently assault Helen Balaba (sic). What about that, is that correct or not? What did you do?
>
> Gerald: We took her pants down and let her go. (op. cit. in Bala and Clakre, 1981: 186)

This case was brought before the Supreme Court of Canada which "held that this was inadequate. The charge should have been explained to him in language he could comprehend, with an explanation of the gravity of the offence" (Bala and Clarke, 1981: 187).

The "due process" model and the "plea bargain" model, characteristic of the juvenile justice system, are recognized as accomplishing and fulfilling the aims and goals of criminal process

while at the same time attempting to safeguard the rights of the accused juvenile. As Hackler (1978: 208) points out however, "relatively little research has been done to see whether the person processed by the criminal justice system really understands what is happening". In substantiating this claim that there is a genuine need for such an assessment he cites an example of a young Indian who had been institutionalized in the Northwest Territories. He comments that "after being released the juvenile told his friends that everyone treated him very nicely and he was well fed and housed. However he complained that no one had paid him yet!". This thesis, in short, takes such a blatant example of the failure of communication through legal language to be indicative of the need to examine in detail the juvenile's understanding of the juvenile court proceeding and subsequently to provide ways and to advocate means to alleviate such serious forms of misunderstanding.

An additional concern is raised in this thesis with respect to the issue of fairness of current court proceedings. Will the reform of legal language contribute to an increase in the "fairness" of the procedure of determining guilt or innocence? In addressing this topic some might query as to whether or not the accused will benefit at all by virtue of a new comprehensibility of the language in juvenile hearings. To respond to this it might best be said that certain individuals will benefit but that the disadvantaged will only be marginally affected. A juvenile's rights may be protected however fairness will not necessarily mean that the juvenile also understands that he has been handled in an

objectively fair manner.

Some writers, Procacci (1979) in particular, would most likely strongly advocate against the reform of legal language employed in juvenile court hearings arguing that in other areas of law, in contracts specifically, the obscurity of meaning created by legal English has actually benefitted litigants more often than it has hindered their success before the courts. Procacci would seem to suggest that if the obscurity and vagueness of legal language enables individuals to be more successful with their cases because the court will rule in favor of the accused where reasonable doubt is created, then legal language as it currently exists should be perpetuated and not subjected to scrutiny, analysis or reform. Such a position will be disputed theoretically in the course of this thesis and an attempt will be made to establish why the perpetuation of legal language for the purposes Procacci suggests should not be the primary motivating factor in evaluating the need for the reform of legal English.

This thesis falls within the boundaries of one substantive area within the discipline known as the sociology of law. Some of the major research trends and theoretical developments of the area will be briefly highlighted in order to situate this study and its objectives.

The Broader Framework: The Theory and Research Trends of The Sociology of Law

The study of law as an area of social inquiry is not new. Specifically as Timascheff (1937: 224) points out "since olden

times, law has been the object of a science called 'jurisprudence' ... which has developed into a network of numerous special sciences called 'civil law', 'criminal law', 'constitutional law' and so forth". Jurisprudence recognizes law as a force which imposes its rules and norms upon the will of the individual persons. These rules and norms become the central focus of studies in jurisprudence.

The view of law which jurisprudence assumes is an important one and yet a seemingly narrow one. While much of the classical work generated out of this orientation features some of the most famous names and writings, the research does not in any way attempt to bridge the gap between law and society. As the world becomes increasingly complex the law has expanded into all areas of human activity. As Edwin Schur (1968: 4) points out,

> ...when one realizes that <u>any</u> aspect of social relations can be brought within the legal system (that is, made subject to legal ruling) simply by an individual initiating a suit in court to establish the rights and duties involved in the situation in question, one sees quite clearly that the boundaries of law are, in at least one sense, coterminous with those of the full range of social interaction.

The recognition of the link between law and social relations represents the most significant premise in combining the areas of law and sociology into a single sub-discipline. Insofar as sociology can best be described as "the intellectual discipline concerned with developing systematic, realiable knowledge about social relationships" (Hoult, 1969: 308) it is hardly surprising that law has become an area of investigation. The sociology of law can be