

## HIDING IN PLAIN SIGHT: “CONSPICUOUS TYPE” STANDARDS IN MANDATED COMMUNICATION STATUTES

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When people talk to each other, they often say, “I see” when they want to say that they understand. But seeing is not really the same thing as understanding. If you have ever signed one of those contracts that has an “all caps”<sup>1</sup> paragraph, you probably *saw* the paragraph before you signed the contract, but that did not mean that you understood it, or even that you had read it.<sup>2</sup> Here is a typical disclaimer paragraph from a business contract:

Warranty. All shipments of the product sold hereby are subject to the following warranty: THE SELLER WARRANTS FOR A PERIOD OF ONE YEAR FROM THE DATE OF *DELIVERY* THAT THE PRODUCT IS FREE FROM DEFECTS IN MATERIALS AND WORKMANSHIP. THIS LIMITED WARRANTY IS YOUR EXCLUSIVE WARRANTY FROM THE SELLER AND DESCRIBES THE EXCLUSIVE REMEDY AVAILABLE TO ANY PURCHASER OF THE PRODUCT. THE PRODUCT IS NOT SOLD WITH ANY IMPLIED WARRANTIES. NOR ANY WARRANTY OF MERCHANTABILITY AND/OR OTHER WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE. IN THE SALE OF THE PRODUCT SELLER MAKES NO REPRESENTATION OR WARRANTY OF ANY KIND OTHER THAN THAT STATED HEREIN AND NO PERSON IS AUTHORIZED TO ALTER THIS WARRANTY ORALLY.<sup>3</sup>

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1. This article will use the term “all caps” to refer to text printed in all capital letters. Courts and statutes also refer to “Capitals,” “Capital letters,” and “Upper case” or “Uppercase” to mean the same thing.

2. *E.g.*, Erica A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 171 (2012) (“As a practical matter, no one reads all warnings in uppercase type . . .”).

3. This language comes from a contract at issue in *Omni USA, Inc. v. Parker-Hannifin Corp.*, 798 F. Supp. 2d 831 (S.D. Tex. 2011). The court granted defendant's motion for summary judgment as to plaintiff's

You could probably see that paragraph on a page, and you might even be able to find it in a three or four page document if you were looking for it. But *seeing* a chunk of text is not the same thing as reading it, and reading it is not the same thing as understanding it. And if you skipped that paragraph, you are not alone. Many readers would find that paragraph so dense and unattractive that they would skip it, or would have a hard time understanding the meaning even if they did read it. All-caps paragraphs are visually difficult to read,<sup>4</sup> and in many documents, the paragraphs that are in all caps are also written in a style that slows reader comprehension.

I understand why sellers put paragraphs like that into contracts. The UCC and its state counterparts enforce an implied warranty of merchantability unless the contract disclaims the warranty.<sup>5</sup> So sellers write disclaimers. Of course, they have no reason to write and present them in a way that is easy to understand, and every reason to write and present them in a way that discourages readers from looking closely at them. They are trying to increase profit and limit potential liability in every way they can. Sellers do not write disclaimers because they want buyers to know things. They write them so they can say to the buyer, "I told you so. I told you that you can't sue me for violating the warranty of merchantability. So even though that paragraph was hard to read, and hard to understand if you did read it, it's your fault that you didn't know that you didn't have that warranty."<sup>6</sup>

But this article is not about the clauses that sellers write. It's about the clauses that legislatures write, when they enact statutes that mandate the inclusion of particular language, presented in a particular way, and aimed at a particular audience. There are dozens of state statutes (and many federal ones) that contain specific words that must appear in certain kinds of documents. I call this language *mandated communication*, and I call the statutes that include these mandates *mandated communication statutes*.

When statutes mandate categories of information (rather than specific words) that lenders or sellers must include in a document, it makes sense that the lenders or sellers would write that language in a way that may not promote speedy comprehension. But that result doesn't make sense when the legislature is actually writing the language, when it has an explicit or implicit goal of getting particular information to someone, or of making sure that both sides in a transaction have

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claims for breach of express warranty and breach of implied warranty of merchantability, finding that the warranty exclusions were conspicuous, and Omni was aware of them. *Id.*

4. E.g., Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ASS'N LEGAL WRITING DIRECTORS 108, 116 (2004) (hypothesizing that readers skip paragraphs in all caps); OFFICE OF INV. EDUC. & ASSISTANCE, U.S. SEC. & EXCH. COMM'N, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS 43

(1998) [hereinafter SEC DISCLOSURE] (Sentences written in all caps "usually bring the reader to a standstill because the shapes of the words disappear, causing the reader to slow down and study each letter. Ironically, readers tend to skip sentences written in [all caps].")

5. U.C.C., § 2-314.

6. Zacks, *supra* note 2, at 169 (arguing that mandatory disclosures and other supposedly pro-consumer contracting strategies hurt those without bargaining power because they "reinforce our tendency to perceive the contracting party as being able to act freely without being influenced by his or her situation").

certain information. If this goal is so important that the legislature has concluded that it must dictate the specific words that will be said, and the way they must be presented, it is not rational to write that language in a way that's hard for writers to read and understand.

I have posted below two sample excerpts from a fictional child support order. One of them is taken almost verbatim from a mandated communication statute.<sup>7</sup> Please read them; I will have some questions for you when you are done.

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**Sample A:**

EACH PARTY TO THIS SUPPORT ORDER MUST NOTIFY THE CHILD SUPPORT ENFORCEMENT AGENCY IN WRITING OF HIS OR HER CURRENT MAILING ADDRESS, CURRENT RESIDENCE ADDRESS, CURRENT RESIDENCE TELEPHONE NUMBER, CURRENT DRIVER'S LICENSE NUMBER, AND OF ANY CHANGES IN THAT INFORMATION. EACH PARTY MUST NOTIFY THE AGENCY OF ALL CHANGES UNTIL FURTHER NOTICE FROM THE COURT OR AGENCY, WHICHEVER ISSUED THE SUPPORT ORDER. IF YOU ARE THE OBLIGOR UNDER A CHILD SUPPORT ORDER AND YOU FAIL TO MAKE THE REQUIRED NOTIFICATIONS, YOU MAY BE FINED UP TO \$50 FOR A FIRST OFFENSE, \$100 FOR A SECOND OFFENSE, AND \$500 FOR EACH SUBSEQUENT OFFENSE. IF YOU ARE AN OBLIGOR OR OBLIGEE UNDER ANY SUPPORT ORDER ISSUED BY A COURT AND YOU WILLFULLY FAIL TO GIVE THE REQUIRED NOTICES, YOU MAY BE FOUND IN CONTEMPT OF COURT AND BE SUBJECTED TO FINES UP TO \$1,000 AND IMPRISONMENT FOR NOT MORE THAN 90 DAYS.

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**Sample B:**

**This section describes how you have to provide contact information now and in the future. If you don't provide the information in the right way and at the right times, you might have to pay fines or go to jail.**

**A. What contact information am I required to provide to the child support enforcement agency?**

1. If you are a party to this support order, you must notify the child

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7. See OHIO REV. CODE ANN. § 3121.29 (West, Westlaw through 2013 session) (mandating language that must appear in child support orders).

support enforcement agency in writing of the following four items of information:

- a. your current mailing address
- b. your current residence address (if different from mailing address)
- c. your current residence telephone number
- d. your current driver's license number.

2. If any of this information changes after you have provided the information to the Agency, you must notify the Agency of those changes.

**B. How long do I have to continue to update this information?**

You must provide this information until the Court or Agency that issued the support order tells you that you may stop providing it. In general, you can expect to have to provide the information for as long as the support order is in effect.

**C. What are the penalties if I fail to provide the information?**

The penalties vary depending on whether you are an obligor (a person who has to pay the support) or an obligee (a person who receives support). They may also vary depending on whether you failed to provide the information willfully (on purpose) or negligently (by mistake or accident).

1. If you are the **obligor** under a child support order and you fail to provide the required information and updates – even if the failure was not on purpose – you may be fined up to \$50 for a first offense, \$100 for a second offense, and \$500 for each subsequent offense.

2. If you are either an **obligor or obligee** under any support order issued by a court and you **willfully** fail to give the required notices, you may be found in contempt of court and subjected to fines up to \$1,000 and imprisonment for not more than 90 days.

**The information in this section is important; if you did not understand any of the information, please ask the court to explain it.**

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Which of the two samples would you rather read? Which would you rather keep to use as a reference for the duration of the court order? I am guessing that you chose Sample B as the answer to both questions. Of course, since you were forewarned that you would have to answer questions about the text, you probably did read (or try to read) Sample A. It is readable (if you are willing to take the

time), although it is not particularly easy to understand. But based on current knowledge of common human reading behaviors, many, if not most, readers would glance at Sample A, shudder, and skip it (or scroll past it). They would then scan the headings of Sample B, reading beyond the headings of any particular section based on need or interest.

Sample A is physically harder to read because it is written in all caps, which tends to interfere with effective reading.<sup>8</sup> But Sample A would still be hard to read even if it were written in "mixed case" (i.e., not all caps). Sample A is not well-organized, and its sentences are not written in a way that speeds reader comprehension.<sup>9</sup> Conversely, Sample B used several techniques that are easy to incorporate and known to speed comprehension: mixed-case text, with better white space and alignment; personal pronouns; "chunking" of information; bold-faced headings in FAQ style; concrete subjects and verbs; and definitions of unusual terms.<sup>10</sup>

The Plain English movement, of course, advocates all of these techniques, and has had an impact on government communication at many levels.<sup>11</sup> There are both state and federal statutes and regulations that articulate methods for clear and effective communication. The Oregon Department of Human Services,<sup>12</sup> the federal Consumer Financial Protection Bureau,<sup>13</sup> the Securities and Exchange Commission,<sup>14</sup> and various other governmental entities know how to require this

8. See, e.g., Miles A. Tinker, *The Influence of Form of Type on the Perception of Words*, 16 J. APPLIED PSYCHOL. 167, 167 (1932) ("Most individuals prefer to read material printed in lower-case. The subjective reaction of annoyance in reading text in capitals or italics may be significant[,] for this material is read appreciably slower than text printed in lower-case type.").

9. JOSEPH M. WILLIAMS & GREGORY COLOMB, *STYLE: LESSONS IN CLARITY AND GRACE* (10th ed. 2009).

10. See generally, J. B. Kitching, *Patient Information Leaflets—The State of the Art*, 83 J. ROYAL SOC'Y MED., 298, 299 (1990); Jan H. Spyridakis & Michael J. Wenger, *Writing for Human Performance: Relating Reading Research to Document Design*, TECHNICAL COMM., 202, 211 (1992).

11. See generally JOSEPH KIMBLE, *WRITING FOR DOLLARS, WRITING TO PLEASE: THE CASE FOR PLAIN LANGUAGE IN BUSINESS, GOVERNMENT, AND LAW* (2012) (debunking plain English myths and describing summarizing case studies of plain language revisions); Joe Kimble, *An Excerpt from Writing for Dollars, Writing to Please*, 91 MICH. B.J., 54 (2012) (describing case study of a revision of Washington state documents).

12. OR. REV. STAT. ANN. § 411.967 (West 2013) provides: "Every form, notice, brochure or other written material of the Department of Human Services intended for use by persons inquiring about, applicants for or recipients of public assistance shall be written in plain language. A form, notice, or brochure is written in plain language if it substantially complies with all of the following tests: (1) Uses short sentences and paragraphs; (2) Uses everyday words readable at an eighth-grade level of reading ability; (3) Uses simple and active verb forms; (4) Uses type of readable size; (5) Uses uppercase and lowercase letters; (6) Heads sections and other subdivisions with captions which fairly reflect the content of the section or subdivision and which are in boldfaced type or otherwise stand out significantly from the text; (7) Uses layout and spacing which separate the paragraphs and sections of the document from each other and from the borders of the paper; (8) Is written and organized in a clear and coherent manner; (9) Is designed to facilitate ease of reading and comprehension; and (10) Is readable at the sixth-grade level of reading ability except for vocabulary referred to in subsection (2) of this section."

13. See CONSUMER FIN. PROT. BUREAU, *PLAIN WRITING ACT COMPLIANCE REPORT* (2012), available at [http://files.consumerfinance.gov/f/201204\\_report\\_plain-writing-act-compliance.pdf](http://files.consumerfinance.gov/f/201204_report_plain-writing-act-compliance.pdf) (describing compliance with the Plain Writing Act by the Consumer Financial Protection Bureau).

14. See SEC DISCLOSURE, *supra* note 4, at 2.

kind of writing in their documents. Too many states, however, haven't yet gotten the memo.

This article has a simple premise: when a government mandates written communication, it should present the mandated communication in a way that speeds comprehension. When communication is so important that the government is mandating the words and the presentation method, the writer and not the reader should not bear the burden of making sure that the information is comprehensible. In other words, the reader should not have to work to decipher the information; the writer should work to make the information easy to comprehend.

A few different factors might explain this legislative failure. First, many mandated communication statutes are statutes that regulate powerful corporate interests. If lobbyists are holding sway, legislatures may be influenced to use language that lobbyists suggest, without questioning whether that language would fulfill the legislative goal. Even if this were true, however, it would not explain the failure to use comprehensible language in the many statutes that regulate governmental communication, such as that in the child support court order illustrated in Sample A. There is no incentive, financial or otherwise, for governments to communicate in this way; no one benefits when parties don't understand court orders.

Some of the legislative failings may stem from the fact that many of these statutes were first written in the typewriter era, when bold-faced type and other effective techniques of emphasis were not available outside the print shop.<sup>15</sup> Modern statutes may simply be written in imitation of similar statutes on the books. Organization and sentence structure may be ineffective because legislatures are unlikely to be aware of modern knowledge of reader behavior; they are more likely to be focused on legislative needs than on reader needs.<sup>16</sup> Finally, legislatures may have been influenced by statutes and court decisions that put the burden of comprehension on the reader in a variety of legislative contexts. These court decisions seem to believe in the existence of "rational economic readers," and to punish those who do not fit into this mold. Too many of these writing and design decisions focus on whether readers can *see* the relevant information, paying no attention to whether they can read it or understand it.

Admittedly, there is controversy about whether mandated communication statutes are the best way to communicate consumer information,<sup>17</sup> or to protect

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15. See Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ASS'N LEGAL WRITING DIRECTORS 87, 90 (2010) (citing JAMES FELICI, *THE COMPLETE MANUAL OF TYPOGRAPHY: A GUIDE TO SETTING PERFECT TYPE* 80 (2003)).

16. Focusing on reader needs is a foundational tenet of legal writing theory. See J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: The View from Within*, 61 MERCER L. REV. 705, 713 (2010) (discussing how legal writers must consider the needs and expectations of the audience for their documents).

17. See, e.g., Zacks, *supra* note 2, at 169, 171–72 ("Behavioral research shows, for example, that contract warnings or disclosures are largely ignored by contracting parties. The number of signature blocks in a rental car contract similarly is irrelevant to the decisions made in the contracting context in which the renter finds himself.")

consumers.<sup>18</sup> Some challenge the contractual behavior that the disclosures allow, while others argue with the timing of the disclosures.<sup>19</sup> One author argues persuasively that obfuscating disclosures actually provide a benefit to consumers by giving them one last argument against unconscionable corporate behavior.<sup>20</sup>

This article does not address the issue of whether mandatory disclosures should continue to exist. It presumes, however, that in both the short and long-term, at least some mandated disclosures will continue. Further, other kinds of mandated communication will always be necessary, whether it is mandated between businesses and consumers or between governments and the governed. And, if mandated communication does exist, the legislatures that write the mandates and the courts that interpret them should be making their decisions based on valid theories of human behavior and comprehension. For that reason, this article will refer to the people who read these documents—whether they are consumers, non-custodial parents, or in some other role—as “readers.”

Part I of this article will examine the kinds of statutes that mandate communication and describe the different ways in which these statutes articulate their communication mandates. Part II will explain how many mandated communication statutes, and the court interpretations of those statutes, focus on whether readers can see rather than whether they can read and understand the relevant language, and are consistent with an understanding that the burden of comprehension is on the reader to decipher the communication rather than on the writer to present the information effectively. Finally, Part III will explain how our knowledge of both human behavior and reader behavior reveals that the “rational economic reader” does not exist, and will discuss how and why certain revision methods can help legislator-writers to speed reader comprehension.

## I. MANDATED COMMUNICATION STATUTES

Dozens of statutes mandate that certain information be conveyed in a certain way between certain parties. Federal mandated communication is in the midst of a sea change thanks to the work of the Consumer Financial Protection Bureau.<sup>21</sup> This

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18. See, e.g., *id.* at 221–22 (noting that contract clauses in plain English may cause adjudicators to blame the less-sophisticated party—who should have understood the plain English language—for making a poor choice.). Zacks argues that plain English contracts allow the more powerful party to misrepresent the “contracting context” as being more equal than it actually was. *Id.*

19. See, e.g., Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1382 (2011) (observing with approval that the Consumer Financial Protection Bureau “is authorized to ensure that consumers are provided with timely and understandable information to make responsible decisions about financial transactions.”) (internal quotations omitted).

20. See Zacks, *supra* note 2. He reasons that the existence of harmful clauses that are written in plain English may bias the court to conclude that the unfair contract was the fault of the foolish person who agreed to such an obviously unfair provision. *Id.* at 221–22 (observing that anti-consumer effects on adjudicators “may not be outweighed by any supposed benefit by the plain English to the contracting party, particularly if it can be shown that such contracts are not read or understood regardless of presentation.”) (internal citations omitted).

21. The Bureau is committed to “communicating clearly and usefully to the public.” *Plain Writing*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/plain-writing/> (last visited Jan. 18, 2014).

article, therefore, will concentrate on the state statutes that mandate that certain words, sentences, or paragraphs be included in a document in all caps or “conspicuous type.”<sup>22</sup> It is logical to conclude that all legislation that mandates communication in this way is enacted to promote the understanding of the reader or user of the information; otherwise, there is no reason to require particular information in the documents, or to require that the information appear conspicuously.

Many argue that mandatory disclosure statutes of this type do not achieve the intended equalization of information or of bargaining power.<sup>23</sup> Rather, these scholars argue, the disclosure statutes provide a way to avoid more stringent regulation; it might be preferable to “use the law to help the naïve” by “outlaw[ing] practices that are too likely to result in disaster.”<sup>24</sup>

The validity of the purposes behind these mandatory disclosure statutes is beyond the scope of this article. Even if the purpose is a cynical one, however, it is all the more important for the disclosures to be transparent. If consumers—or legal scholars—understand the true cost of credit cards or the true risks of other consumer contracts, they will be more likely to demand changes or to encourage competition that will change the relevant industry.<sup>25</sup>

Further, “conspicuous text” disclosure statutes regulate not only communications from a business to its customers; they also mandate communications from various branches of government to the governed. These statutes are not designed merely to allow a business to rake in higher profits from consumers while saying “I told you so.” They are often designed to promote effective communication about various rights and responsibilities. It must always be in the government’s best interest for the governed to understand particular rules,

It specifically asks consumers to contact them if they see anything on its website that is not written in plain language. *Id.*

22. Because “all caps” continues to be interpreted as meeting the standard for “conspicuous type,” this article will analyze both statutes that mandate conspicuous type and statutes that mandate all caps text.

23. See, e.g., Dee Pridgen, *Putting Some Teeth in Tila: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act of 2010*, 24 LOY. CONSUMER L. REV. 615, 623 (2012) (observing that, for example, “[t]he stress of the mortgage loan decision may also lead consumers to mistakenly make quick decisions to escape the stressful situation, rather than spend extra time and effort to understand the parameters of the transaction being presented.”).

24. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 749 (2011); see also Pridgen, *supra* note 23 at 638–39 (noting that “specific targeted measures, such as requiring that consumers have an ability to repay their loans; requiring that appraisers act independently from brokers; eliminating confusing and potentially unfair forms of mortgage broker compensation such as yield spread premiums; limiting unexpected traps such as prepayment penalties; and banning pre-dispute mandatory arbitration clauses, will likely provide much needed fairness in the home mortgage market.”).

25. See Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 821 (2010) (“A somewhat less politically unrealistic alternative would focus on creating competition to increase the likelihood that consumers would read forms. For example, if regulators required lenders to conduct consumer testing of their forms and then publicize the results, lenders might compete for higher comprehension scores. That is to say, lenders might prefer not to disclose worse comprehension scores than their competitors, and so might increase the intelligibility of their forms. A lender might not wish to disclose that, say, half its borrowers could not understand its forms when other lenders reported that 80% of their customers understood their forms.”).



regulations, and other information.<sup>26</sup>

Statutes that mandate communication tend to fall into two categories. The first category is made up of statutes that regulate business-to-consumer communication, often as part of real estate transactions or other purchases that require a large outlay of cash or a long-term payment plan. The second category is made up of statutes that mandate communication to or from courts or other government entities.

Statutes in the business-to-consumer category include those that require companies to write contracts or other documents that include mandatory disclosures. These statutes are implicitly or explicitly based on the premise that consumers will make better decisions if they have certain information about the transaction, including the existence or non-existence, of certain rights or provisions.<sup>27</sup> Another premise is that the seller or other corporate entity who is responsible for preparing the document is likely to hide or obfuscate certain information; this problem is one of the obvious reasons that a legislature might usurp the normal methods for communicating contractual terms. The federal Fair Debt Collection Practices Act,<sup>28</sup> for example, regulates written materials sent to debtors and has a goal of eliminating "abusive debt collection practices."<sup>29</sup>

One of the most well-known mandatory disclosure statutes is the federal Truth in Lending Act<sup>30</sup> ("TILA"), which is now being administered by the Consumer Financial Protection Bureau. TILA was enacted in 1968, and it is generally regarded as having the goal of "reduc[ing] information asymmetries and facilitat[ing] credit shopping."<sup>31</sup> One goal, according to the statute, is promoting the "informed use of credit":

[t]he Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card

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26. The Ohio child support enforcement statute, for example, requires that the support-paying parent keep the relevant agency apprised of his or her current address and job status. OHIO REV. CODE ANN. § 3121.29 (West 2013). To the extent that the parent does not inform the agency, the agency must track down the information or take other onerous steps. *Id.* Thus, it is to the agency's benefit if the parent understands the requirements and actually follows them.

27. See, e.g., Fla. Stat. Ann. § 744.301 (West 2012) (regarding signing of releases on behalf of minors); S.C. Code Ann. § 44-77-50 (2012) (regarding advance health-care directives).

28. 15 U.S.C. § 1601 (2012).

29. *Corson v. Accounts Receivable Mgmt., Inc.*, No. 13 Civ. 01903 (D.N.J. Aug. 9, 2013).

30. 15 U.S.C. § 1601 (2012).

31. Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199, 211 (2005).

practices.<sup>32</sup>

Likewise, section (b) of the same statute, regarding terms of personal property leases, provides that consumer leases of automobiles and other durable goods (as an alternative to installment payment contracts for those items) have been offered “without adequate cost disclosures.”<sup>33</sup> The statute therefore provided for “meaningful disclosure of the terms of leases. . . to enable the lessee to compare more readily the various lease terms available . . . , limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.”<sup>34</sup>

In general, the reasoning behind mandatory disclosure requirements is ensuring that certain information is reliably delivered to the consumer. For example, the well-known Regulation Z, which was issued by the Board of Governors of the Federal Reserve System to implement the federal Truth in Lending Act, requires that “[t]he creditor shall make the disclosures required by this subpart clearly and conspicuously.”<sup>35</sup> The regulation specifies that “[t]he purpose of this regulation is to promote the informed use of consumer credit by requiring disclosures about its terms and cost.”<sup>36</sup>

Although state statutes that impose mandatory disclosure requirements do not always state their purposes as explicitly as does TILA, many are like TILA in that they are regulating a relationship between a more-sophisticated party and a less-sophisticated party. The statutes virtually always require the more powerful party to provide the designated information to the less powerful party. A Louisiana statute that regulates time-share developers, for example, requires an all-caps paragraph that describes the purchaser’s right to cancel the contract,<sup>37</sup> as do similar statutes in several other states.<sup>38</sup>

The UCC mandates that contracts that want to exclude certain implied warranties of fitness or merchantability must include “conspicuous” disclaimers as well.<sup>39</sup> In analyzing this and similar provisions, courts frequently comment on the importance of bringing the clauses “to the attention” or “to the notice” of the consumer.<sup>40</sup> The Texas Supreme Court has observed that “the object of the

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32. 15 U.S.C. § 1601(a) (2012).

33. 15 U.S.C. § 1601(b) (2012).

34. *Id.*

35. 12 C.F.R. § 226.5(a)(1)(i) (2011).

36. 12 C.F.R. § 226.1(b) (2011).

37. LA. REV. STAT. ANN. § 9:1131.10.1 (Westlaw through 2013 session).

38. *See, e.g.*, TEX. PROP. CODE ANN. § 221.043 (West, Westlaw through 2013 session).

39. “[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that ‘There are no warranties which extend beyond the description on the face hereof.’” U.C.C. § 2-316(2) (2002).

40. *E.g.*, *Am. States Ins. Co. v. Surbaugh*, 745 S.E.2d 179, 184 (W. Va. 2013) (“An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary

conspicuousness requirement is to protect the buyer from surprise and an unknowing waiver of his or her rights."<sup>41</sup>

Real estate liens, transfers, and foreclosures are also common subject matter for mandated communication statutes.<sup>42</sup> Other statutes that include substantive and typographic directives for mandatory disclosures cover subjects as wide-ranging as internet dating<sup>43</sup> and pre-need funeral contracts.<sup>44</sup>

Statutes that mandate communication from the government, rather than from a seller, are (not surprisingly) often related to issues that require people to interact with the court system. Many states mandate that courts or other government actors include certain "conspicuous" information in child support orders,<sup>45</sup> adoption orders,<sup>46</sup> protection orders,<sup>47</sup> or final judgments in foreclosure proceedings.<sup>48</sup> Other statutes mandate language in documents that are submitted to a government entity rather than created by a government actor. A South Carolina statute, for example, mandates that certain language be included when people execute health care directives.<sup>49</sup> The mandated communication includes language that seems designed to ensure that the signer understands both the life-or-death import of the document and how to revoke the authorization if desired.<sup>50</sup>

Both categories of mandated communication statutes use a variety of methods to control what is said, where it is said, and how it is presented. Some statutes seemingly mandate only categories of information, using language such as "substantially the following," before a paragraph of information that may be copied, or a list of elements that must be included.<sup>51</sup> Other statutes, perhaps fearing those

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clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and *must bring such provisions to the attention of the insured.*") (internal citations omitted).

41. *Cate v. Dover Corp.*, 790 S.W.2d 559, 561 (Tex. 1990).

42. *E.g.*, FLA. STAT. ANN. § 713.596 (West, Westlaw through 2013 session).

43. *E.g.*, 815 ILL. COMP. STAT. 518/10 (West, Westlaw through 2013 session); N.J. STAT. ANN. § 56:8-171 (West, Westlaw through 2013 session).

44. *E.g.*, FLA. STAT. ANN. § 497.459 (West, Westlaw through 2013 session) (cancellation of, or default on, preneed contracts); *see also* ME. REV. STAT. tit. 24-A, § 6206 (Westlaw through 2013 session) (continuing care contract).

45. *E.g.*, OHIO REV. CODE ANN. § 3121.29 (West, Westlaw through 2013 session) ("Each support order, or modification of a support order, shall contain a notice that states the following in boldface type and in all capital letters"). *But see* N.Y. DOM. REL. LAW § 240-c (McKinney, Westlaw through 2013 session) (which mandates that those applying for a support order must include conspicuous information).

46. *E.g.*, MINN. STAT. ANN. § 259.35 (West, Westlaw through 2013 session 2013); MINN. R. 33.03 (2005); N.M. STAT. ANN. § 32A-5-42.2 (West, Westlaw through 2013 session).

47. *E.g.*, 750 ILL. COMP. STAT. ANN. 60/221 (West, Westlaw through 2013 session 2013); N.C. GEN. STAT. ANN. § 50C-5 (West, Westlaw through 2013 session); WASH. REV. CODE ANN. § 7.90.130 (West, Westlaw through 2013 session).

48. *E.g.*, FLA. STAT. ANN. § 45.031 (West, Westlaw through 2013 session) (judicial sales procedure).

49. *E.g.*, S.C. CODE ANN. § 44-77-50 (Westlaw through 2013 session) (declaration of a desire for a natural death).

50. *See id.*

51. *E.g.*, 11 OKLA. STAT. ANN. tit. 11, § 43-101.2 (West, Westlaw through 2013 session) (providing that a list "shall include a paragraph in bold, conspicuous type indicating the requirement for certain building permit applicants to register with the Oklahoma Business Registration System of the Tax Commission"); TEX.

who manipulate (or have manipulated) information in the past, dictate the exact words, sentences, or paragraphs that must be used.<sup>52</sup>

When controlling where the mandated language is placed, legislators generally focus on two locations: the front of the document, and, for contracts, the page on which the parties must sign the contract. The legislatures are no doubt reasoning (probably accurately) that readers are most likely to pay attention to these two locations. A Louisiana statute, for example, requires that an all caps, "conspicuous type" paragraph listing cancellation rights must be included "[i]mmediately prior to the space reserved in the purchase contract for the signature of the purchaser."<sup>53</sup> A New York statute provides that anyone who distributes a "simulated check" must make certain that "the phrase 'THIS IS NOT A CHECK' [is] diagonally printed in clear and conspicuous type on the front of such document."<sup>54</sup> A West Virginia statute that regulates public offerings related to time shares requires that every public offering "shall" contain a lengthy paragraph "in conspicuous type . . . on the cover page"<sup>55</sup> of the public offering. Likewise, when a car is identified as a "lemon" under the relevant statute in South Carolina, the car's title must thenceforth "have the following sentence printed on its face in large, bold, uppercase type: **'RETURNED TO MANUFACTURER UNDER LEMON LAW OR OTHER PROCEEDING.'**"<sup>56</sup>

While a number of these statutes mandate *where* the relevant information is to be included, many more of them dictate *how* it is to be included. Although some statutes state merely that the relevant document "shall contain" certain language,<sup>57</sup> many mandate that the relevant information must be "conspicuous" or "in conspicuous type." The UCC defines the term "conspicuous" as follows:

(10) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is for decision by the court. Conspicuous terms include the following:

(a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the

PROP. CODE ANN. § 222.008 (West, Westlaw through 2013 session) ("If applicable, immediately before the space reserved in the contract for the signature of the purchaser, in bold-faced and conspicuous type or print that is larger than the type of print in the remaining text of the contract, substantially the following statement must appear. . .").

52. *E.g.*, Continuing Care Provider Regulation Act, ARK. CODE ANN. § 23-93-108 (West, Westlaw through 2013 session).

53. LA. REV. STAT. ANN. § 9:1131.10.1 (Westlaw through 2013 session).

54. N.Y. GEN. BUS. LAW § 396-aa (McKinney, Westlaw through 2013 session).

55. W. VA. CODE § 36-9-6(e) (West, Westlaw through 2013 session) (the paragraph is illustrated in all caps in the statute).

56. S.C. CODE ANN. § 56-19-490(A) (Westlaw through 2013 session).

57. *E.g.*, VA. CODE ANN. § 38.2-2621 (West, Westlaw through 2013 session) ("Home service contracts insured under a reimbursement insurance policy pursuant to subdivision E 1 of § 38.2-2619 shall contain a statement in substantially the following form: 'Obligations of the provider under this home service contract are insured under a home service contract reimbursement insurance policy.'").

surrounding text of the same or lesser size; and

(b) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.<sup>58</sup>

A variety of mandated communication statutes (from both categories) echo these typographic requirements. Many statutes provide only that the information must appear "in conspicuous type," perhaps relying on the UCC definition. Others start with the term "conspicuous," but add one or more modifiers to make their point more strongly. Statutes require that language be included "in bold and conspicuous type,"<sup>59</sup> in "large conspicuous type,"<sup>60</sup> or in "clear and conspicuous type."<sup>61</sup>

Some states give alternatives to document drafters, permitting language to be presented "in bold face or other conspicuous type or lettering,"<sup>62</sup> but many more *add* various mandates, including requirements that language must appear in "bold and conspicuous type of at least 10-point type"<sup>63</sup> or "in boldfaced and conspicuous type which shall be larger than the type in the remaining text of the contract."<sup>64</sup> Some statutes impose other graphic requirements, mandating that language appear "in conspicuous type, circumscribed by a line,"<sup>65</sup> or "clear and conspicuous type, surrounded by bold black lines."<sup>66</sup> A statute that has been adopted in several states, and that regulates mulch-seed-fertilizer, requires that certain words appear in "the largest and most conspicuous type on the container, equal to or larger than the product name."<sup>67</sup>

Likewise, statutes that mandate all caps (rather than "conspicuous type") do so in several different ways. Some statutes micromanage the typography; a Pennsylvania statute that regulates eviction notices provides as follows:

The following statement of the tenant's rights, the words and phrases of which appear all in capital letters to be printed in 12-point bold-faced type with the first letter printed in upper case and the letters that follow in lower case and the words and phrases which do not appear all in capital

58. OHIO REV. CODE ANN. § 1301.201(B)(10) (West, Westlaw through 2013 session).

59. ARK. CODE ANN. § 23-93-108(b)(27) (West, Westlaw through 2013 session).

60. CAL STS. & HIGH. CODE § 3114.5(b) (West, Westlaw through 2013 session).

61. DEL. CODE ANN. tit. 29 § 6516(d)(5)(c) (West, Westlaw through 2013 session); *see also* N.J. STAT. ANN. 39:4-10.8(c) (West, Westlaw through 2013 session); N.Y. VEH. & TRAF. LAW § 140-a (McKinney, Westlaw through 2013 session).

62. TENN. CODE ANN. § 47-25-804(b)(2) (West, Westlaw through 2013 session).

63. MD. CODE ANN. COM. LAW § 14-2503(e)(2)(i) (West, Westlaw through 2013 session).

64. W. VA. CODE ANN. § 36-9-5(f) (West, Westlaw through 2013 session).

65. ARIZ. REV. STAT. ANN. § 28-4420 (Westlaw through 2013 session) (vehicle dealer requirements).

66. IND. CODE § 28-1-29-8.6 (repealed 2013) (cancellation of agreement).

67. KY. REV. STAT. ANN. § 250.041(8)(f) (West, Westlaw through 2013 session) (fertilizer labeling requirements).

letters to be printed in ten-point type, with any letter in upper case to remain so and the rest in lower case.<sup>68</sup>

Other statutes are a little less fussy. One statute requires that the relevant information appear “prominently printed in no less than 10-point uppercase type,”<sup>69</sup> while another mandates “upper case boldface type of a minimum size of ten points,”<sup>70</sup> and another requires “12-point or larger underlined uppercase type.”<sup>71</sup> Some statutes, perhaps recognizing that some of those creating these documents may still be using typewriters, impose one requirement on “printed” information and another on “typewritten,” mandating that the information must be “*printed* in 14-point boldface type or 14-point uppercase *typewritten* letters.”<sup>72</sup>

The information in most mandated communication statutes is meant to help the reader to make informed decisions. Sometimes those decisions are imminent, as with a contract or waiver that is about to be signed. At other times, the information relates to decisions about future events, as with a court order or health-care directive. The differing descriptions of how the relevant language is to be presented all focus on making the information more emphatic: it must be “conspicuous,” “bold,” “bold and conspicuous,” “large,” “larger,” or “largest.” This craving for more and more emphasis makes clear that the mandated communication in these statutes is important. Unfortunately, in too many cases, the emphatic devices that legislatures use serve only to allow readers to see that the information exists; they do nothing to insure that the reader can read, let alone understand, the relevant language.

## II. HOW THE LANGUAGE OF MANDATED COMMUNICATION STATUTES AND COURT INTERPRETATIONS PUTS THE BURDEN OF COMPREHENSION ON THE READER

In one of Aesop’s Fables, the Sun and the Wind have a debate over which of them is more powerful.<sup>73</sup> They decide to settle the debate by seeing who can force a man to take his cloak off.<sup>74</sup> The wind blows and blows, but the man resolutely hangs onto his cloak, even wrapping it around himself more tightly.<sup>75</sup> Then it is the sun’s turn. The sun begins to shine, making the day warmer and warmer.<sup>76</sup> Eventually, the man decides on his own to remove his cloak.<sup>77</sup> The moral of the

68. 66 PA. CONS. STAT. ANN. § 1526(a)(4) (West, Westlaw through 2013 session).

69. CAL. INS. CODE § 786(c) (West, Westlaw through 2013 session).

70. N.Y. GEN. BUS. LAW § 653(1) (McKinney, Westlaw through 2013 session).

71. MINN. STAT. ANN. § 559.21(3) (West, Westlaw through 2013 session).

72. TEX. PROP. CODE ANN. § 5.074(c) (West, Westlaw through 2013 session) (emphasis added).

73. See *Aesop’s Fables*, BARTLEBY.COM, <http://www.bartleby.com/17/1/60.html> (last visited Nov. 14, 2013) (recounting the fable of the Wind and the Sun).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

story is that "kindness effects more than severity."<sup>78</sup>

Too many mandated communication statutes act like the wind in the old fable: they blow and bluster with all caps and conspicuous type mandates, trying to force readers to read the required information. But the small fonts and all-caps presentation style are too severe to promote reader engagement. Further, even if the readers would take the trouble to read the language, it is too often written in a stiff, noun-heavy style, using vocabulary and sentence structures that even sophisticated readers would struggle to decipher, sounding like so much wind to the unsophisticated readers who will often encounter them.

When writing mandated communication statutes, legislators should treat readers with kindness rather than severity. Plain English mandates, which are famously reader-centered,<sup>79</sup> have had some notable successes, but they have yet to be widely adopted by state legislators. Although it is impossible to determine precisely why legislators don't treat readers with more kindness, they may be influenced by court interpretations of reader encounters with the written word. Courts that analyze reader responsibilities in various contexts intentionally or unintentionally impose a burden of comprehension on readers, even when the apparent purpose of the legislation is providing information to the reader. Legislators reflect this attitude when they draft statutes whose "conspicuousness" mandates ensure a focus on whether the reader can see or find the relevant language, rather than on whether the information is comprehensible.

#### A. Successes and Failures in Mandated Communication

The Modern Plain English movement is said to have begun in 1975, when CitiBank of New York simplified its promissory note statement, reducing it from 3,000 words to 600.<sup>80</sup> As one author characterizes it, the movement "'advocates for communication in language that an average person can understand.'"<sup>81</sup> The movement has had many successes. Many states now mandate that insurance policies be written in plain English.<sup>82</sup> A continuing success is the SEC's mandate

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78. *Id.*

79. See Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 65 (1995) ("In a 1980 study of an administrative rule by the Document Design Center, inexperienced readers of the original rule got an average of 8.54 questions right out of 20; on the plain-language version, they got an average of 17.26 questions right, for an improvement of 102%. Even experienced readers of the rule improved by 29%. In addition, the average response time improved from 2.97 minutes to 1.62 minutes.").

80. Kali Jensen, *The Plain English Movement's Shifting Goals*, 13 J. GENDER RACE & JUST. 807, 810 (2010).

81. *Id.* at 807 (citing George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 346 (1987)).

82. E.g., N.C. GEN. STAT. ANN. § 58-38-30 (West, Westlaw through 2013 session) ("Any policy filed with the Commissioner must be accompanied by a certified Flesch scale readability analysis and test score and by the insurer's certification that the policy is, in the insurer's judgment, readable based on the factors specified in G.S. 58-38-20 and G.S. 58-38-25."); Gopen, *supra* note 81, at 337. But see Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINN-PIAC L. REV. 147 (2007) (analyzing accuracy and validity of computer-based readability test and concluding that readability software must be used with care).

that prospectuses be written in Plain English, which is still in force.<sup>83</sup> A recent shining example is the Consumer Financial Protection Bureau, whose focus includes improving the readability of mandatory disclosures.<sup>84</sup> The Bureau has started an aggressive campaign to rewrite and redesign lending documents. Its “Know Before You Owe” program has used design experts, crowdsourcing, and other innovative methods both to redesign the lending documents and to get information to the public at a meaningful time and in a meaningful way.<sup>85</sup>

Admittedly, some mandated communication statutes use language that is easy to read and understand. A New Hampshire contract that regulates public adjusters, for example, imposes a readable mandate on certain contracts:

A statement printed in not less than bold, 12-point type, which shall state, in substance: “You have the right, at your option, to rescind this contract at any time within 3 business days after the end of the day you sign it. Should you wish to discuss this matter with the New Hampshire insurance department, it can be reached, toll-free, by dialing 1-800-852-3416.”<sup>86</sup>

Unfortunately, however, too many other statutes present language in ways that are challenging to both the eye and the brain. As shown above, child support orders—which are issued to readers at all levels of sophistication<sup>87</sup>—may be presented in all caps, may contain too many unfamiliar terms (like “obligor” and “obligee”), and may contain too many sentences that readers must struggle to understand. Here is just the first sentence of three paragraphs that must be included in certain motions for child support in New York:

A COURT ORDER OF SUPPORT RESULTING FROM A PROCEEDING COMMENCED BY THIS APPLICATION (MOTION) SHALL BE ADJUSTED BY THE APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR

83. 17 C.F.R. § 230.421 (2011) (mandating writing style for prospectuses, including provision that provides, at sub-section (d)(1), “[t]o enhance the readability of the prospectus, you must use plain English principles in the organization, language, and design of the front and back cover pages, the summary, and the risk factors section.”).

84. The Bureau is responsible for implementing and enforcing a variety of laws that mandate disclosures to consumers, including the Truth in Lending Act (“TILA”), the Fair Credit Reporting Act (“FCRA”), the Home Mortgage Disclosure Act (“HMDA”), the Fair Debt Collection Practices Act (“FDCPA”), and the Truth in Savings Act (“TISA”). See Leonard J. Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1148–49 (2012) (listing laws that the Bureau is charged with implementing and enforcing).

85. See *Know Before You Owe*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/knowbeforeyouowe> (last visited Nov. 14, 2013).

86. N.H. REV. STAT. ANN. § 402-D:13(I)(k) (Westlaw through 2013 session).

87. See, e.g., Karen Stonecypher, *Creating a Patient Education Tool*, 40 J. CONTINUING EDUC. NURSING 462, 462–63 (2009) (“Approximately 40% of adults in the United States are poor readers, with only 25% reading at a 10th grade level.”).



MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED, UPON THE REQUEST OF ANY PARTY TO THE ORDER OR PURSUANT TO PARAGRAPH (2) BELOW.<sup>88</sup>

There are mandated communication provisions whose sentences are written in Plain English style, with more active voice verbs and uses of "you" and "we" as subjects. But because these provisions are often presented in mandated all-caps style, and contain no headings or other context cues, they still place needless burdens on the reader. A Louisiana statute regulating language that appears in time-share purchase contracts includes many well-written sentences:

YOU MAY CANCEL THIS PURCHASE CONTRACT WITHOUT ANY PENALTY OR OBLIGATION WITHIN SEVEN DAYS FROM THE DATE YOU SIGN THIS PURCHASE CONTRACT, AND UNTIL SEVEN DAYS AFTER YOU RECEIVE THE PUBLIC OFFERING STATEMENT, WHICHEVER IS LATER. IF YOU DECIDE TO CANCEL THIS PURCHASE CONTRACT, YOU MUST NOTIFY THE DEVELOPER IN WRITING OF YOUR INTENT TO CANCEL. YOUR NOTICE OF CANCELLATION SHALL BE EFFECTIVE UPON THE DATE SENT AND SHALL BE SENT TO... (NAME OF DEVELOPER)... AT... (ADDRESS OF DEVELOPER) False ANY ATTEMPT TO OBTAIN A WAIVER OF YOUR CANCELLATION RIGHT IS UNLAWFUL.<sup>89</sup>

Readers need more than just better sentence structure, however. As will be discussed below, myriad features of the written word can encourage or discourage reader engagement with the text.

The legislative process has some natural impediments to the widespread use of Plain English. The complexity of the legislative process means that legislators have many different audiences when they draft or sponsor legislative language. They may be trying to gather votes of constituents by legislating on a popular or controversial issue, or they may be trying to garner legislative votes for a bill by including a clause that addresses a pet issue of fellow legislators. Further, once a legislator has been promised even one vote by a colleague, it may be difficult to change language without having to begin the process of vote-gathering all over again. Finally, some language may be left vague on purpose, with the knowledge that the legislators cannot anticipate every application of the statute, or with the assurance that the courts are in a better position to interpret the language on a case-by-case basis.

However true these concerns may be when it comes to most statutes, they should be irrelevant when drafting mandated communication. Mandated

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88. N.Y. DOM. REL. LAW § 240-c(5)(a) (McKinney, Westlaw through 2013 session) ("All applications or motions by the support collection unit or by persons seeking support enforcement services . . . shall on their face in conspicuous type state [the following three all-caps paragraphs].").

89. LA. REV. STAT. ANN. § 9:1131.10.1 (Westlaw through 2013 session).

communication should have just one audience: the reader of the document that will include the mandated communication. Legislatures should expend all reasonable effort to ensure that the relevant information is communicated effectively to that audience.

### *B. Court Interpretations of Reader Behaviors*

When courts analyze statutes and other legal pronouncements, they usually don't think in terms of "readers" and "writers." Perhaps they should. After all, in the twenty-first century, governments don't use town criers anymore; the main way that a government communicates with the governed is through the written word. The law imposes some high expectations on readers, but both legislators and judges seem not to be aware of the impact that ineffective writing and presentation can have on whether readers will understand text—or whether they will even read it.

Analysis of reading behaviors is implicit in myriad court decisions. Three categories of cases, however, are particularly illustrative of some of the expectations that are imposed on readers: (1) cases in which defendants raise "ignorance of the law" as a defense; (2) cases in which courts apply the "least sophisticated debtor" standard; and, finally, (3) cases in which courts interpret "conspicuous type" statutes and other mandated communication statutes.

Opinions in the first two categories of cases may refer to the high burden put on readers, and these cases are also more likely to at least acknowledge the act of reading. Cases in the third category, however, are more limited in focus due to legislative language that mandates only "conspicuousness." This standard shifts the focus to the act of "seeing" rather than the act of reading. Implicit in these opinions—as it is in the statutes they analyze—is the presumption that the reader is responsible for reading and deciphering any language that is legible. While this presumption may be logical in "ignorance of the law" cases, it makes no sense in statutes that are supposedly written with the goal of promoting a reader's understanding of legal rights or responsibilities.

#### 1. Ignorance of the Law Cases & Least Sophisticated Debtor Cases

One of the most well-settled tenets in the American legal system is that "ignorance of the law is no excuse."<sup>90</sup> Although there are rare exceptions,<sup>91</sup> this standard applies in civil<sup>92</sup> as well as criminal cases.<sup>93</sup> Courts consider that mere

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90. See, e.g., *United States v. Hutzell*, 217 F.3d 966, 968 (8th Cir. 2000) ("[The defendant] acknowledges, as he must, that his position is in direct conflict with the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" (citing *Barlow v. United States*, 32 U.S. 404, 411 (1833))).

91. See *Lambert v. California*, 355 U.S. 225 (1957) (allowing an "ignorance of the law" defense for a defendant who did not register as a felon when visiting a city that had a law requiring him to do so.) The court noted that it allowed the defense because the defendant's behavior was "passive" and there were no circumstances that would alert the wrongdoer that his behavior was illegal. *Id.*

92. See, e.g., *Sparks v. White*, 26 Tenn. (7 Hum.) 86, 90 (1846) ("That a mere naked ignorance of the law will not be sufficient to authorize a court of chancery to set aside a contract is well settled.").

"publication" of a criminal statute is sufficient to provide notice to those to whom the statute applies.<sup>94</sup> In analyzing statutes of limitations in the habeas context and others, courts have refused to toll time limitations for reasons of deafness, illiteracy, or lack of legal sophistication.<sup>95</sup> These decisions are based on an expectation that even those who cannot read will take the steps needed to gain knowledge about all laws that may regulate their behavior. Courts justify the "ignorance of the law" holding by indicating that it is a legal fiction,<sup>96</sup> but a necessary one: "If a person accused of a crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result."<sup>97</sup>

In 1998, the United States Supreme Court affirmed a conviction despite the defendant's claim that he had been unaware of a federal licensing requirement when he sold firearms.<sup>98</sup> The court observed that when a statute requires "knowing" behavior, "the background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove that 'an evil-meaning mind' directed the 'evil-doing hand.'"<sup>99</sup>

In the civil context, a Georgia appellate court refused to allow plaintiffs in a class action to recover late fees they had paid that may have been imposed illegally.<sup>100</sup> The court, writing at the turn of this century, observed that "when payment is made through mere ignorance of the law, it is not recoverable,"<sup>101</sup> quoting with approval an 1881 decision in which the court observed that "[w]hen

93. See, e.g., *Bryan v. United States*, 524 U.S. 184, 194–196 (1998).

94. See, e.g., *Roberts v. Maine*, 48 F.3d 1287, 1300 (1st Cir. 1995) (Cyr, J., concurring) ("As a general rule, of course, publication of a criminal statute affords adequate notice to the public at large.")

95. See, e.g., *Butler v. Dir.*, TDCJ-CID, 6:13CV368, 2013 WL 4035645 (E.D. Tex. Aug. 7, 2013) ("It should be noted that the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, and unfamiliarity with the legal process are insufficient reasons to equitably toll the statute of limitations.") (citing *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir. 2000); *Baker v. Cal. Dep't of Corr.*, No. 09–17371, 2012 U.S. App. LEXIS 11507 at \*2–3 (9th Cir. June 7, 2012) ("Low literacy levels, lack of legal knowledge, and need for some assistance to prepare a habeas petition are not extraordinary circumstances to warrant equitable tolling of an untimely habeas petition.") (cited sources omitted); *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) ("[A] *pro se* petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling.").

96. E.g., *In re Di Maggio*, 65 N.Y.S.2d 613, 615 (N.Y. Dom. Rel. Ct. 1946) ("The maxim, 'Ignorance of the law is no excuse,' assumes that people do know all the law. And that is a fiction. Adults do not know all the law. Lawyers do not know all the law and judges are in no better position.").

97. *People v. Snyder*, 652 P.2d 42, 44 (Cal. 1982) ("It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit any one to gainsay . . . . The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement. If a person accused of a crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result.") (citation omitted).

98. *Bryan*, *supra* note 93, at 193.

99. *Id.* at 193–95 (the court refused to remand to address the interpretation of "willfully," indicating that the defendant's statements to his straw purchasers showed that he was aware that this conduct was unlawful, and that the law did not require him to be aware of the specific statute he was violating) (internal citations omitted).

100. *Telescripps Cable Co. v. Welsh*, 542 S.E.2d 640, 642 (Ga. Ct. App. 2000).

101. *Id.* at 285.

money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or *with the means of such knowledge*, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay, when in truth he was not.”<sup>102</sup> In other words, the court put the burden of knowledge or investigation on the plaintiffs who had received a bill for a late payment fee and paid it. Since they did not research the laws regulating whether the company had the legal authority to enforce that debt before they made the payment, they had no right to recover.

Although courts analyzing “ignorance of the law” claims explicitly presume that the “reader” has knowledge of the law, courts applying the “least sophisticated debtor” standard will often actively consider the words used in debt notices and analyze whether the reader understands them. Courts use the “least sophisticated debtor” standard when analyzing the Fair Debt Collection Practices Act. These cases show both the range of techniques that writers will use to mislead readers, and courts’ sometimes-uninformed knowledge of common reader behaviors.

The Act is “a remedial statute aimed at curbing what Congress considered to be an industry-wide pattern of and propensity towards abusing debtors.”<sup>103</sup> When analyzing debt notices, courts use a “least sophisticated debtor” standard, and find actionable notices that could “mislead” or “deceive” those debtors.<sup>104</sup> Even with this generous-sounding language, courts aim to avoid “bizarre or idiosyncratic interpretations of collection notices” by presuming, perhaps optimistically, that consumers have “a basic level of understanding and willingness to read with care.”<sup>105</sup>

The purpose of the Act, and of the standard used to interpret it, is to protect consumers from lenders. As the third circuit observed in 2006, “[a]nalyzing lender-debtor communications from this perspective is consistent with ‘basic consumer-protection principles.’”<sup>106</sup> That court reversed a district court decision and held that a debt-collection letter was misleading when it said that the collection agency “could” initiate legal proceedings, disagreeing with the district court’s distinction between “the conditional term ‘could’ as opposed to the affirmative term ‘will.’”<sup>107</sup> The court noted that due to the use of the term “could,” “the least sophisticated debtor might get the impression that litigation or referral to a CSC lawyer would be imminent if he or she did not respond within five days.”<sup>108</sup>

It may be inappropriate to presume that a reader will “read with care” when the notice provided is difficult or confusing, and courts, unfortunately, do not always recognize predictable reader weaknesses. In 2012, for example, a New Jersey

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102. *Id.* at 285 (quoting *White v. Rowland*, 67 Ga. 546, 557 (1881) (emphasis added)).

103. *Heathman v. Portfolio Recovery Associates, LLC*, No. 12-CV-515-IEG RBB, 2013 WL 3746111, at \*1, \*2 (S.D. Cal. July 15, 2013) (quoting *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006)).

104. *See, e.g., Brown v. Card Serv. Ctr.*, 464 F.3d 450, 454 (3d Cir. 2006).

105. *Id.* at 454.

106. *Id.* at 453 (quoting *United States v. Nat’l Fin. Servs.*, 98 F.3d 131, 136 (4th Cir.1996)).

107. *Brown* 464 F.3d at 454.

108. *Id.* at 455.

District Court was called on to interpret a debt collection notice that included information required by the Act.<sup>109</sup> After the document provided initial identifying information, it included the following paragraph:

YOU OWE \$2854.04. FOR FURTHER INFORMATION, WRITE THE UNDERSIGNED OR CALL 1-866-415-2398. UNLESS YOU NOTIFY THIS OFFICE WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF THIS DEBT OR ANY PORTION THEREOF, THIS OFFICE WILL ASSUME THIS DEBT IS VALID. IF YOU NOTIFY THIS OFFICE IN WRITING WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THAT YOU DISPUTE THE VALIDITY OF This [sic] DEBT OR ANY PORTION THEREOF, THIS OFFICE WILL OBTAIN A VERIFICATION OF THE DEBT OR OBTAIN A COPY OF A JUDGMENT AND MAIL YOU A COPY OF SUCH JUDGMENT OR VERIFICATION. IF YOU REQUEST THIS OFFICE IN WRITING WITHIN 30 DAYS AFTER RECEIVING THIS NOTICE THIS OFFICE WILL PROVIDE YOU WITH THE NAME AND ADDRESS OF THE ORIGINAL CREDITOR, IF DIFFERENT FROM THE CURRENT CREDITOR.<sup>110</sup>

Thus, after listing the amount owed, the message said, "for further information, write the undersigned or call 1-866-415-2398. Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid."<sup>111</sup> If you are the debtor reading that notice, you may think you've been told to call *or* write for more information, and that calling or writing will serve as valid options for "notifying" the office if you dispute the validity of the debt. And if you then turned your attention to the signature line of the letter, you would find the name of the account representative, with the phone number just below the signature line.

You might think you would be justified in concluding that calling the office is a valid way to provide notice that you dispute the validity of the debt, but you would be wrong. The sentence following "unless you notify this office," states: "if you notify this office in writing within 30 days after receiving this notice that you dispute the validity of this debt or any portion of thereof, this office will obtain a verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification."<sup>112</sup>

The plaintiff argued that the letter was "confusing" because "the least sophisticated consumer could believe he could dispute the debt by either writing or calling when, by law, he could only dispute the debt in writing."<sup>113</sup> The court

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109. See *Ardino v. Fin. Recovery Servs., Inc.*, 2:11-CV-06520 WJM, 2012 WL 2036817 (D.N.J. June 6, 2012).

110. *Id.* at \*1.

111. *Id.*

112. *Id.*

113. *Id.* at 2.

disagreed, observing that the letter included the information mandated by the Act, and observed that “[n]umerous courts have held that the inclusion of a telephone number and an instruction to call does not contradict or overshadow” an otherwise valid document.<sup>114</sup>

This conclusion is surprising, given that the letter never says explicitly that *only* a written request can serve as valid notice. As will be noted below, those who study reader behavior note that writing is more demanding when it requires readers to draw inferences.<sup>115</sup> This letter gives information about telephoning and writing; the reader must read between the lines - i.e., draw inferences - to determine that getting “more information” (which can be obtained by writing or making a phone call) is not the same as challenging the debt (which can happen only by writing).

The court did not believe that the required inference was significant, observing, “[r]eview of the entirety of the Communication reveals that a proper dispute must be made in writing. Plaintiff’s interpretation requires the reader to ignore his own common sense and is the kind of idiosyncratic interpretation that the Court need not heed, even under the low bar of the least sophisticated debtor standard.”<sup>116</sup> The court’s basis for this conclusion is unclear, as neither the words “must” or “proper” are in the quoted language. The court’s definition of reading “with care” burdens readers - especially “least sophisticated” readers - by expecting them to draw inferences that may or may not be intuitive. It is apparent that some courts have high expectations of reader competence and performance.

## 2. Mandated Communication Statutes that Require “Conspicuous” Type

Court analysis of mandated communication statutes varies according to the specificity of the mandate, but that analysis is necessarily limited in cases in which the legislation has already validated the adequacy of the words by mandating the specific text. If the statute mandates the words and then micromanages the presentation of those words, courts will make generally straightforward factual findings as to whether the words were printed in the appropriate type size.<sup>117</sup> If the statute mandates only that the mandated communication be “conspicuous,” courts typically engage in more detailed analysis to determine whether the language was situated in a way that allowed the reader to “notice” it, and whether it was

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114. *Id.* at 3.

115. See Rebekah George Benjamin, *Reconstructing Readability: Recent Developments and Recommendations in the Analysis of Text Difficulty*, 24 EDUC. PSYCHOL. REV. 63, 70 (2012) (recommending “highly cohesive” texts for weak readers, observing that in highly cohesive text, “inferences are explicit and the reader does not have to fill many gaps using his or her own knowledge about the topic. . . . [h]owever, in a text where less propositional overlap exists, the reader will be required to fill gaps of information with his or her own knowledge”).

116. *Ardino v. Fin. Recovery Servs., Inc.*, 2:11-CV-06520 WJM, 2012 WL 2036817, at 4.

117. See, e.g., *Charbonnet v. Shami*, 04-12-00711-CV, 2013 WL 2645720 (Tex. Ct. App. June 12, 2013) (“The release signed by Cathy contained not only a larger heading, but also text of a legible size in a bold font”).

sufficiently legible.<sup>118</sup> In very few of these situations do courts address comprehensibility; they rarely get beyond "noticeability" and "legibility."

Statutes that mandate conspicuous type often call for court interpretation by definition. As noted above, the U.C.C. definition of "conspicuous," which has been adopted in numerous states, provides that "[w]hether a term is 'conspicuous' or not is for decision by the court."<sup>119</sup> Many states have created their own definitions of "conspicuous type." As you will not be surprised to learn, the definitions vary. Some states mandate all-caps as part of the definition of "conspicuous"; Louisiana's statute provides in part that "[c]onspicuous type' means type in boldfaced capital letters no smaller than the largest type, exclusive of headings, on the page on which it appears and, in all cases, at least ten-point type."<sup>120</sup> Several jurisdictions specify a minimum point size (generally ten points),<sup>121</sup> require bold-faced type,<sup>122</sup> or both.<sup>123</sup> The Louisiana statute referenced above (and a similar Florida statute) define conspicuous as a size that is "no smaller than" the surrounding type,<sup>124</sup> but other statutes mandate that the conspicuous type must be "at least two points larger" than other type,<sup>125</sup> with a Georgia statute stating that the conspicuous type must be "larger," without specifying how much larger the type must be.<sup>126</sup>

Because conspicuousness often depends on context, several statutes impose requirements on what surrounds the mandatory language. Of course, the statutes that have mandated larger type have guaranteed that the language surrounding the conspicuous type will be smaller. Interestingly, at least one statute mandates that in certain kinds of statutes, conspicuous type may be used *only* for the mandated language.<sup>127</sup> Presumably, this limit is meant to prevent document drafters from printing an entire document in "conspicuous type." For, of course, when everything is conspicuous, nothing is conspicuous.

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118. See, e.g., *Guthrie v. Hidden Valley Golf & Ski, Inc.*, ED98704, 2013 WL 2181247 (Mo. Ct. App. May 21, 2013) ("The title of the Contract, which stated that Guthrie was acknowledging the risk of snow tubing and agreeing not to sue Defendants, was printed in all capital letters at the top of the page in large, readable type. . . . [t]hus, the Contract's exculpatory language was conspicuous and obvious to Guthrie and sufficient to uphold Guthrie's agreement not to sue Defendants.").

119. TENN. CODE ANN. § 47-1-201 (West, Westlaw through 2013 session).

120. LA. REV. STAT. ANN. § 9:1131.2 (Westlaw through 2013 session); see also FLA. STAT. ANN. § 718.103 (West, Westlaw through 2013 session) (containing nearly identical language: "[c]onspicuous type' means bold type in capital letters no smaller than the largest type, exclusive of headings, on the page on which it appears and, in all cases, at least ten-point type.").

121. E.g., P.R. LAWS ANN. tit. XXXI § 1251b (Westlaw through 2013 session).

122. E.g., IND. CODE ANN. § 23-1-20-4 (West, Westlaw through 2013 session).

123. E.g., GA. CODE ANN. § 44-3-162 (West, Westlaw through 2013 session).

124. See FLA. STAT. ANN. § 718.103 (West, Westlaw through 2013 session); LA. REV. STAT. ANN. § 9:1131.2 (Westlaw through 2013 session).

125. E.g., CAL BUS. & PROF. CODE § 11212 (West, Westlaw through 2013 session) ("Type in upper and lower case letters two point sizes larger than the nearest nonconspicuous type").

126. See GA. CODE ANN. § 44-3-162 (West, Westlaw through 2013 session) (defining a "[c]onspicuous statement" as "a statement in boldface and conspicuous type of at least ten points, such statements always being larger than all other statements, except for other conspicuous statements" in the document).

127. E.g., LA. REV. STAT. ANN. § 9:1131.2 (Westlaw through 2013 session) (providing that "[c]onspicuous type may be utilized in purchase contracts or public offering statements only where required by law.").

Some statutes mandate (or allow) other methods to make the conspicuous type stand out. An Indiana statute largely tracks the U.C.C. definition, and defines conspicuous type as including “[t]yping in capitals or underlined” and “[p]lacement of text in a separate or otherwise noticeable location.”<sup>128</sup> Similarly, some statutes provide that “conspicuous type” must be “separated on all sides from other type and print.”<sup>129</sup>

Conspicuous type statutes are spread throughout the statute books, covering topics as diverse as mortgages, recycling, and ballot design.<sup>130</sup> Much of the litigation emerges from U.C.C.-type statutes; nevertheless, court analysis of conspicuous type is emblematic of an attitude that puts the “burden of comprehension” on the reader rather than the writer.

When analyzing whether language meets the conspicuousness requirement, courts first ask whether the complaining party would have been able to find and physically read the relevant language. If the language was “buried in fine print,”<sup>131</sup> or in dense language within a long contract, courts will be more likely to question the validity of the disclosure. They may also be willing to find lack of conspicuousness if a paragraph’s title was misleading as to its true content.<sup>132</sup>

Likewise, courts may be more stringent in their analysis of conspicuousness if the relevant language acts to waive a significant right or warranty, particularly if waivers of that type are discouraged in the relevant jurisdiction. In 2012, for example, a Maryland court refused to uphold a waiver of a jury trial, noting that “the law does not presume the waiver of constitutional rights” and that waiver language was not “conspicuous” because it was “listed on page fifteen of a thirty-two page asset purchase agreement; page five of an eighteen page senior promissory note; and page four of a twenty-one page subordinate promissory note.”<sup>133</sup>

On the other hand, courts are less likely to be sympathetic to plaintiffs who admit that they noticed the language but did not read it,<sup>134</sup> often using language that

128. IND. CODE ANN. § 23-1-20-4 (West, Westlaw through 2013 session).

129. *E.g.*, CONN. GEN. STAT. ANN. § 42-103dd (West, Westlaw through 2013 session).

130. *See, e.g.*, S.D. CODIFIED LAWS § 21-48A-1 (Westlaw through 2013 session) (mortgages); UTAH CODE ANN. 1953 § 61-2d-105 (West, Westlaw through 2013 session) (recycling bins); W. VA. CODE § 3-5-10 (West, Westlaw through 2013 session) (ballots).

131. *Cole v. U.S. Capital*, 389 F.3d 719, 731 (7th Cir. 2004) (refusing to find conspicuousness, noting “[t]he type in this disclaimer fairly can be described as disproportionately small compared to the surrounding text; indeed, its size approaches that which cannot be read with the naked eye. The text is the smallest text on a page that is filled with larger type, as well as type that is bolded and italicized. The notice does nothing to draw the reader’s attention to this material; to the contrary, the flyer appears to be designed to ensure minimal attention by the reader.”).

132. *See, e.g.*, *Cont’l Ins. Co. v. Barratt Am.*, 1995 U.S. Dist. LEXIS 19016, \*12 (S.D. Cal. Sept. 29, 1995) (noting that “[a]n exclusion is not conspicuous if it is placed under a heading whose ordinary meaning does not encompass the condition purportedly excluded,” and finding insurance company’s heading was not conspicuous because it did not accurately label an exclusion).

133. *Ohio Learning Ctrs., LLC v. Sylvan Learning, Inc.*, 2012 U.S. Dist. LEXIS 102784, 23-24 (D. Md. July 24, 2012).

134. *See, e.g.*, *Van Voris v. Team Chop Shop, LLC*, 2013 LEXIS 7011, 6-7 (Tex. App. Dallas June 7, 2013) (refusing to consider plaintiff’s allegations that the relevant language was in seven-point font and not-



echoes language used by courts addressing an "ignorance of the law" defense. Courts have held that those who are insured have a "duty to read" the policy and that "[a] reasonable person will read the coverage provisions of an insurance policy to ascertain the scope of what is covered."<sup>135</sup> The court observed that "the insured is 'bound by clear and conspicuous provisions in the policy even if evidence suggests that the insured did not read or understand them.'"<sup>136</sup>

In 2011, a California court granted a defendant manufacturer's summary judgment motion on a failure to warn issue because the plaintiff admitted that he had never read the one-inch by two-inch warning on his wakeboarding boots.<sup>137</sup> The court rejected plaintiff's argument that the warning had been "significantly larger" in the memorandum to the court than it had been in reality, noting that the plaintiff did not allege lack of conspicuousness.<sup>138</sup>

Although courts do not always specify why they find that the language was conspicuous, or whether conspicuous language was or was not in all-caps text, they frequently cite all-caps text as all or part of the reason that the language meets the conspicuousness standard. In 2013, a court that was analyzing a disclaimer noted that the "[p]laintiff's contention that the disclaimer language is not sufficiently conspicuous to be operative is unavailing. . . . [t]he disclaimer is printed in all-capital letters, and dominates the conditions of sale set forth at the bottom of the invoice."<sup>139</sup>

Interestingly, although courts routinely chide plaintiffs for failing to read all-caps text, they have often recognized, both implicitly and explicitly, that all-caps typefaces are difficult to read. In court opinions, it is not unusual to see language quoted from contracts or other documents followed by a parenthetical that notes "all caps omitted."<sup>140</sup> Further, some courts state explicitly that they have changed the

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ing that the plaintiff does not "state he cannot read the document—rather, he asserts he did not read the document before he signed it."); *see also* Zacks, *supra* note 2, at 174 ("with respect to assessing contract choices and contract outcomes, judges and juries are inclined to blame the contracting 'victim' and that person's disposition for the poor choice or outcome rather than any situational influences"). *But see* Anderson v. Hedstrom Corp., 76 F. Supp. 2d 422, 443 (S.D.N.Y. 1999) ("the location and conspicuousness of the warnings (whether that be based on label or letter size, color, or other attributes of conspicuousness), and the role those factors played in the plaintiff's failure to read them, as well as the content and clarity of those warnings, are disputed issues in this case, and the plaintiff's failure to read the warnings should not, in and of itself, prevent the 'failure to warn' claim from going before the jury.").

135. *Hadland v. NN Investors Life Ins. Co.*, 24 Cal. App. 4th 1578, 1586 (Cal. App. 4th Dist. 1994) (upholding dismissal of fraud claim because of insureds' failure to read the policy).

136. *Id.*

137. *See Altman v. HO Sports Co.*, 821 F. Supp. 2d 1178 (E.D. Cal. 2011).

138. *Id.* at 1190 ("Altman makes no argument that the warning was too small or insufficiently conspicuous, and that this lack of conspicuousness is the reason that he failed to read the warning.").

139. *W. 63 Empire Assoc., v. Walker & Zanger, Inc.*, 107 A.D.3d 586, 586 (N.Y. App. Div. 2013) (internal citations omitted).

140. *E.g.*, *Plummer Street Office L.P. v. JPMorgan Chase Bank*, 671 F.3d 1027, 1031 (9th Cir. 2012) (noting "all caps omitted"); *Calef v. Citibank*, 11-cv-526-JL, 2013 WL 653951 (D.N.H. 2013) (concluding that plaintiff could not challenge a foreclosure sale after the fact, at least in part because he had been "apprised of his right" to file a petition enjoining the sale before it occurred.) In quoting the notice of his right to file the petition, the court noted that "[t]he original was entirely capitalized; the court has employed lower-case text here for readability's sake." *Id.*

text to lowercase type for the purpose of readability or legibility.<sup>141</sup>

Another judge acknowledged that reading all-caps is “harder,” but refused to find that this difficulty would affect a finding of conspicuousness. The judge criticized a plaintiff who complained that a clause was “buried” on page twenty-six of a thirty page document, noting that:

“[T]he entirety of the provision describing the arbitration agreement, including the class arbitration waiver and limitations on costs, attorney fees, and damages, is written in CAPITAL LETTERS. Together, these stylistic choices call a reader’s attention to the importance of the provision placed in the middle of an extensive document. To be sure, text in all capital letters is harder to read in the sense of taking *longer* to read, but all capitalization does draw attention to the provision. In other words, the provision is not only *not* ‘buried,’ it is actually highlighted.”<sup>142</sup>

If legislators are serious about using mandated communication statutes as a method of transmitting information, they must do more than demand that poorly written language be displayed “conspicuously” in the relevant documents. “Conspicuousness” guarantees only that the reader is able to see that the language exists and is able to discern individual letters and words, with sufficient effort. To ensure that these documents actually inform readers, legislators must make use of current knowledge of human behavior and reader behavior, and they must write and design mandated communication statutes in a way that will actually achieve their communicative goals.

### III. THE RELATIONSHIP BETWEEN HUMAN BEHAVIOR AND READER BEHAVIOR

The legislative and judicial focus on “noticeability” for the language in mandated communication statutes shortchanges readers. As noted, the U.C.C. definition of “conspicuousness” requires mainly that the text be “so written, displayed, or presented that a reasonable person against which it is to operate ought to have *noticed it*.”<sup>143</sup> This standard says, in essence, that the reader should be able to see that the information is on the page. Making sure that text is able to be seen, however, does nothing to make sure that the text is easily readable or easily understandable. After all, text written in all-caps in German would be *noticeable*, but most American consumers would not find it to be readable or comprehensible. By focusing on noticeability, legislatures may ignore the burden of comprehension that their text can impose on readers. Implicit in these “noticeability” requirements

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141. *Randall v. Lady of Am. Franchise Corp.*, 532 F. Supp. 2d 1071, 1075 (D. Minn. 2007) (“Section 12.2 is in all capital letters in the franchise agreement. For the sake of legibility, the Court reproduces the relevant language here in upper and lower case; see Robbins, *supra* note 4, at 115–18 (discussing why text in all capital letters is hard to read).”).

142. *Valentine v. Wideopen W. Fin., LLC*, 09 C 07653, 2012 WL 1021809, \*3 (N.D. Ill. Mar. 26, 2012) (citing Robbins, *supra* note 4, at 115–17).

143. U.C.C. § 1-201(b)(10) (1977) (emphasis added).

is the notion of a "rational economic actor" who is presented with text and is "told" that the text is important—usually implicitly, through the presentation of the information in all-caps or bold-faced type. Under a rational economic actor theory, the burden is then imposed on the reader to take all steps necessary to read and decipher that conspicuous text.

As we know, of course, human beings do not always act in their best interests, economic or otherwise.<sup>144</sup> As Sunstein and Thaler have observed, our decisions are often influenced in subtle ways by the context in which we encounter our choices.<sup>145</sup> When we cannot afford the time, energy, or cognitive load to make the best decision, we devise shortcuts that may or may not be rational.<sup>146</sup> Herbert Simon coined the term "satisficing" to describe this behavior, which he characterized as "a more realistic decisionmaking strategy than rational utility maximization: in response to inherent cognitive limitations, people satisfice by searching for personally satisfactory solutions, rather than optimal ones, and they stop when they find an acceptable choice."<sup>147</sup> Another scholar has described "satisficing" as "economiz[ing] on information and search costs by choosing the most satisfactory course of action readily available."<sup>148</sup> Professor Rakoff offers this justification of satisficing behavior when facing form contracts:

Once form documents are seen in the context of shopping (rather than bargaining) behavior, it is clear that the near-universal failure of adherents to read and understand the documents they sign cannot be dismissed as mere laziness. In the circumstances, the rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest. The ideal adherent who would read, understand, and compare several forms is unheard of in the legal literature and, I warrant, in life as well.<sup>149</sup>

It is common knowledge that many readers skip mandatory disclosures and other clauses in contracts. Eric Zacks notes that "[b]ehavioral research shows. . . that

144. See, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1218 (2003) ("Because buyers are boundedly rational rather than fully rational decisionmakers, they will infrequently [incorporate all meaningful information into their decisions].").

145. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3 (2008).

146. See Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 211 (2008) ("Most people rely on cognitive shortcuts, or heuristics, to make decisions under time pressure or when confronted with information that is cognitively challenging.").

147. Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1251 (1994) (citing JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 140-41 (2d ed. 1993); see also Herbert A. Simon, *Rationality as Process and as Product of Thought*, 68 AM. ECON. REV. 1, 1 (1978).

148. Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1025 (1991).

149. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1226 (1983) (citing Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 421 (2003)).

contract warnings or disclosures are largely ignored by contracting parties.”<sup>150</sup> Russell Korobkin “points out [that] the procedural inquiry asks whether the allegedly unconscionable term was presented in such a way as to attract the reader’s attention—was it on the first page? was it in boldface? – but ignores the fact that cognitively overburdened consumers might fail to process even a prominent term.”<sup>151</sup>

Some may wonder why legislatures should take the trouble to revise language that people don’t read. Revision of mandated communication language is worth the effort for at least two reasons. First, the poor presentation of mandated language may be part of the reason that consumers skip these clauses.<sup>152</sup> Revising them will help to assure that consumers, courts, and perhaps more importantly, consumer advocates can understand precisely what these disclosures do and do not say. Any subsequent changes to disclosure mandates can then be made more knowledgeably. Second, mandatory disclosures are not the only mandated communication that readers encounter. Court orders and other documents contain mandated communication, and the readers of those documents may neglect important duties if they skip this information due to poor writing or presentation.

To improve the readability of mandated communication, legislatures should merge knowledge of behavioral biases with knowledge of reader behavior. Although almost all human beings are readers (and vice versa), scholars who study behavioral biases are just beginning to give weight to the physical and intellectual realities of reading when they study how human beings interact with written documents such as contracts. As White and Mansfield observed in 2002, “[t]he law of contracts and consumer protection has yet to take account of the data now available regarding adult literacy and the readability of contract forms.”<sup>153</sup>

More recently, another scholar analyzed potential pitfalls in a plain English presentation of contract drafting. He observed that disclosures are “presented in an explicit fashion, whether through the use of capital letters and boldfaced type or by being set aside in separate paragraphs or pages.”<sup>154</sup> He goes on to note that “[e]vidence suggests, however, that investors routinely ignore these warnings,” despite their “explicit” presentation.<sup>155</sup> Other scholars have recognized that the method of presentation may not be sufficiently explicit for all readers. Reporting results of a survey that sought to discern in part why people might choose not to read contracts, Professors Stark and Choplin concluded that reading and comprehension issues could be to blame, as influenced by the way the material was presented:

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150. Zacks, *supra* note 2, at 171-72.

151. James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 219 (2013) (citing Korobkin, *supra* note 144 at 1268-1272).

152. Admittedly, other issues are at play, including the length of the documents and the timing of the disclosure. See generally Gibson, *supra* note 151.

153. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 234 (2002).

154. Zacks, *supra* note 2, at 202.

155. *Id.*

[o]ne reason why consumers might not read contracts is that the contract forms are often user-unfriendly. Font sizes are often very small, and the clauses within sentences can be very long, which can make it physically difficult and taxing for consumers to read. These user-unfriendly features increase fatigue, particularly among the elderly, stroke survivors, and anyone who is even moderately visually impaired. In addition, the long length of what the consumer is expected to read can cause consumers to decide to at most skim, rather than carefully read, the documents they sign.<sup>156</sup>

We know that human beings often "satisfice," or seek shortcuts, when they are cognitively or visually challenged. As will be discussed below, the ineffective presentation of written information can impose those challenges.

What should legislatures do with this information? When it comes to disclosures that are drafted by sellers or mortgage lenders, legislatures could try to identify ways to require or incentivize these actors to provide useful and meaningful disclosures.<sup>157</sup> But secondhand steps are not needed when it comes to the dozens of statutes that mandate specific language and presentation methods in consumer and government documents. These legislatures have decided to exercise almost total control over this communication; they should exploit current knowledge about effective communication to do all they reasonably can to make sure that their readers understand the mandated communication.

Medical professionals have faced a similar problem in the creation of Patient Education Materials.<sup>158</sup> Patient Education Materials, not to be confused with informed consent documents,<sup>159</sup> are meant to educate patients before or after surgery or other medical interventions.<sup>160</sup> The medical and information design

156. Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617, 656-57 (2009) (internal citations omitted).

157. See, e.g., Sovern, *supra* note 25, at 821 (discussing techniques to get lenders to improve their forms).

158. E.g., Rennie L. Rhee, et. al., *Readability and Suitability Assessment of Patient Education Materials in Rheumatic Diseases*, 65 ARTHRITIS CARE & RES. 1702 (2013) ("More attention is being placed on health care professionals and health systems to provide usable health information") (citing United States Dep't. of Health and Human Servs., NATIONAL ACTION PLAN TO IMPROVE HEALTH LITERACY (2010)), available at [http://www.health.gov/communication/hlactionplan/pdf/Health\\_Literacy\\_Action\\_Plan.pdf](http://www.health.gov/communication/hlactionplan/pdf/Health_Literacy_Action_Plan.pdf). These materials are also known as "Printed Education Materials," or "Parent Education Materials," and are often known by the acronym "PEM."

159. See, e.g., Lawrence H. Brenner, Alison Tytell Brenner & Daniel Horowitz, *Beyond Informed Consent: Education the Patient*, CLINICAL ORTHOPEDICS AND RELATED RES. (Feb. 2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628520/> (discussing informed consent as part of patient education, but noting study of consent forms at five hospitals that found that the readability of the forms "was approximately equivalent to that of the material intended for upper-division undergraduate and graduate students. Four of the five forms were written at the level of a scientific journal, and the fifth at the level of a specialized academic magazine.").

160. See generally Judy Singh, *The Readability of Educational Materials Written for Parents of Children with Attention-Deficit Hyperactivity Disorder*, 4 J. CHILD & FAM. STUD. 207, 208 (1995) ("Health and mental health brochures are typically used to supplement instructions given by health care professionals and

professionals who develop these materials devote much of their energy to determining what makes people more likely to read and understand relevant medical information. The documents that result, unlike those mandated by all-caps and conspicuous type statutes, are meant to be inviting, easy-to-read documents that impose few demands on the reader.<sup>161</sup> If this type of document is necessary for patient education – if we cannot expect people to act as “rational economic readers” when their physical health is at stake – it is even more unrealistic to expect them to expend extra effort to be sure they comply with the law, or to protect their fiscal health.

Understanding how readers behave, therefore, will help legislatures to draft effective mandated communication statutes. Reader behavior has long been a focus of legal writing scholarship and teaching; the “social perspective” school of writing theory “offers techniques for analyzing a document’s context and the bases for individual writers’ design decisions.”<sup>162</sup> Scholars know which writing and typographic techniques speed and slow comprehension.<sup>163</sup> If mandated communication statutes are written to speed comprehension, they will by definition reduce the time and cognitive costs that readers must invest and increase the chance that readers will read and understand the information.

This article is far too short to provide a comprehensive discussion of current knowledge about how people read. Scholars have studied reading for decades, and the study of reading crosses several fields, including legal writing, which has developed a sub-field in legal reading.<sup>164</sup>

Psychologists, linguists, and information designers, among others, have studied reading behaviors.<sup>165</sup> Some scholars study the physical act of reading, noting how readers’ eyes move back and forth across the page or screen,<sup>166</sup> while others analyze which sentence structures and organizational methods promote

provide directions for self-care or enable patients and their families to be better informed about their particular condition.”).

161. *See, e.g.*, Stonecypher, *supra* note 87, at 463 (“Health care information must be presented in an easy to read and user-friendly format so that all patients can comprehend it.”).

162. Rideout & Ramsfield, *supra* note 16, at 708–713 (noting that the social perspective helps faculty and students – and thus, lawyers – to ask the right questions, including “Who are the audiences for this document? Who will use it? What are their needs and expectations?”).

163. *See generally, e.g.*, Kiernan-Johnson, *supra* note 15.

164. *See, e.g.*, Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993) (this article is widely considered to be a foundational article in the field of legal reading); *see also* James F. Stratman, When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection, 34 DISCOURSE PROCESSES 57 (2002) (discussing how reading with a purpose affects the act of reading); RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* (2d ed. 2012).

165. *See, e.g.*, ROBERT E. HORN, INFORMATION DESIGN: EMERGENCE OF A NEW PROFESSION, in INFORMATION DESIGN 15, 22 (Robert Jacobson ed., 1999) (Noting that information design as a field “rests . . . on a variety of research foundations, including such disciplines and subject areas as human factors in technology, educational psychology, computer interface design, performance technology, documentation design, typography research, advertising, communication, and structured writing.”).

166. *See, e.g.*, GEOFFREY B. DUGGAN & STEPHEN J. PAYNE, SKIM READING BY SATISFYING: EVIDENCE FROM EYE TRACKING, PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 1141–1150 (2011).

comprehension.<sup>167</sup> Still others study whether the substantive context in which the information appears (for example, in a "story" as opposed to "objectively") will affect how the reader processes information and decides whether to believe it.<sup>168</sup>

There are many ways to manipulate the presentation of written information that can change the way the writer perceives it (for example, framing, artful vocabulary choices, level of detail, and so forth).<sup>169</sup> For the very basic communicative tasks that are at the foundation of mandated communication statutes, however, the most important techniques are those that speed comprehension.

To grossly summarize current reading theory: When we read, our eyes sweep over a few words at a time in motions known as "saccades."<sup>170</sup> Pauses for comprehension are known as "fixations."<sup>171</sup> During saccades, our peripheral vision seeks to speed our reading by discerning letters we have read and that we will read, and to help our brains to figure out words that these letters make up.<sup>172</sup> If we have trouble with comprehension during a fixation, we may re-read to increase comprehension.<sup>173</sup> Of course, if we have too much trouble with comprehension, we may stop reading. Implicit in the activity of reading is the decision to read any piece of text and the necessity of finding each line of text and each word as we proceed through a document. Implicit in the activity of comprehension is the ability of the brain to store the information from the page.

To speed comprehension for readers of mandated communication—and thus to avoid satisficing behaviors like skimming or ignoring information—legislatures that are drafting or revising mandated communication statutes should focus on three aspects of the writing: (1) the document design, that is, how the information is presented on the page; (2) the word and sentence-level readability; and (3) the way the information is organized, and the way in which it signals that organization to the reader.

### A. Document Design

Document design is simply the way that the information is arranged on the page. Three significant aspects of document design are font, alignment, and white

167. See, e.g., Leonard G. Doak & Cecilia C. Doak, *Writing for Readers with a Wide Range of Reading Skills*, 25 AM. MED. WRITERS' ASS'N J. 149 (2010).

168. See, e.g., RUTH ANNE ROBBINS ET. AL., *YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING* (2012).

169. Judith D. Fischer, *Got Issues? An Empirical Study about Framing Them*, 6 J. ASS'N LEGAL WRITING DIRECTORS 1, 2–3 (2009) ("Framing theory, which has informed scholarship in several fields in recent years, helps explain why an issue statement's wording is so important. Framing theory holds that people identify and label their experience through their mental frames.") (internal citations omitted).

170. Derek H. Kiernan-Johnson, *supra* note 15, at 108.

171. *Id.*

172. Ralf Herrmann, *How Do We Read Words and How Should We Set Them?* WAYFINDING & TYPOGRAPHY (June 14, 2011), available at <http://opentype.info/blog/2011/06/14/how-do-we-read-words-and-how-should-we-set-them/>.

173. Kiernan-Johnson, *supra* note 15, at 108 ("If, upon landing on a new place in the text, the brain is unable to process what it has read, it jumps back, in 'regression saccades,' to see what it has missed.") (internal citations omitted).

space.<sup>174</sup> Font size and presentation affect the reader's ability to discern letters and words.<sup>175</sup> Alignment affects the reader's ability to find information on the page, and to move from one part of the text to another.<sup>176</sup> White space affects overall appearance of the page; if there is insufficient white space, the text may appear dense and off-putting, leading the reader to skip the text.<sup>177</sup>

The use of all-caps versus mixed case is still an area of controversy in typography. As noted above, many mandated communication statutes mandate all-caps text. This mandate is surprising, because most people with even minimal knowledge of document design agree that all-caps in any font is less effective, both because most people read all-caps more slowly and because most people find it visually unappealing.<sup>178</sup> When the Navy recently gave up its more than century-long use of all-caps in certain communications,<sup>179</sup> an officer from another service commented, "[t]here is nothing worse than trying to read crap in all caps."<sup>180</sup>

Although most design experts agree that lower case letters are more legible, the reasons behind the conclusion have varied over the years. Currently, two theories hold sway. The first theory, often referred to as the "word shape theory" notes that there is much more variety in the shape of lower case letters than in that of upper case letters.<sup>181</sup> Upper-case letters, and words made up of upper-case letters, would all fit into rectangular box, more or less.<sup>182</sup> Lower case letters, in contrast, have what are known as "ascenders" (parts of the letter that rise above the middle of the text line) and "descenders" (parts of the letter that descend below the text line). Thus, words made up of mixed-case type are not purely rectangular, and are thus more individually distinguishable.

Eight lower-case letters have ascenders: b, d, f, h, i, k, l, and t. Five lower-case letters have descenders: g, j, p, q, y. Thirteen lower-case letters have neither

174. See generally, Robin Williams, *THE NON-DESIGNERS' DESIGN BOOK* (2d ed. 2004)

175. E.g., Dmitry A. Tarasov, Alexander P. Sergeeva, *The Leading as a Factor of Readability: Development of the Methodology for Educational Use*, 106 *PROCEDIA: SOC. AND BEHAV. SCI.* 2914, 2915 (2013).

176. E.g., Williams, *supra* note 174, at 31–48.

177. E.g., Ros Dowse, Thato Ramela, & Sara H. Browne, *An Illustrated Leaflet Containing Antiretroviral Information Targeted for Low-Literate Readers: Development and Evaluation*, 85 *PATIENT EDUC. AND COUNSELING* 508, 509 (2011) ("Problems [with a leaflet considered user-unfriendly] included incomprehensible technical language, use of medical jargon, small print size, insufficient white space, order of presentation of the information and an overall information overload").

178. Miles A. Tinker, *supra* note 8, at 167 ("Most individuals prefer to read material printed in lower-case. The subjective reaction of annoyance in reading text in capitals or italics may be significant for this material is read appreciably slower than text printed in lower-case type.").

179. Julian E. Barnes, *NOW HEAR THIS: NAVY ABANDONS ALL CAPS*, *WALL ST. J.* (June 13, 2013), available at <http://online.wsj.com/article/SB10001424127887324049504578541813637044462.html>.

180. *Id.*

181. MARCIA LAUSEN, *DESIGN FOR DEMOCRACY: BALLOT AND ELECTION DESIGN* 24–25 (2007) ("Unlike the simple rectangles formed by groups of all capital letters, groups of lowercase letters form distinctive silhouettes. . . . [t]he decision to use all capital letters for candidate names is often made with the intent of signifying importance. However, there are better ways to achieve this. . . . [l]arger and bolder type [can be] used to place greater emphasis on candidate names [and]. . . . [w]ords set with lowercase letters have a unique shape, providing visual cues for identification.").

182. *Id.*



ascenders nor descenders: a, c, e, m, n, o, r, s, u, v, w, x, z. Every capital letter, in contrast, has ascenders that reach the top of the line; likewise, no capital letters have descenders. Word shape theorists argue that mixed case words have shape variations that are not available in all-caps words, and that readers use the word shape (or "bouma")<sup>183</sup> to help them identify known words.<sup>184</sup>

This theory has come under fire recently, due to evidence that word shapes per se are meaningless.<sup>185</sup> Kevin Larson, a psychologist at Microsoft, analyzed current research extensively and concluded that "[w]ord shape is no longer a viable model of word recognition. . . . [t]he bulk of scientific evidence says that we recognize a word's component letters, then use that visual information to recognize a word."<sup>186</sup>

Larson and others argue that mixed case text is preferable not because of the bouma, or word shape, but because of the shapes of the letters. As we saccade through the text, we use our direct vision to see only about five letters of text clearly, through the fovea, or center of our retina.<sup>187</sup> Our peripheral vision is taking in other letters, but the images are blurred. It follows, then, that we prefer lower-case text, because our blurred peripheral vision can more easily discern those letters and use them to build words.<sup>188</sup> For example, if you pick up a plastic bottle while you are in the shower without your glasses on, you may have trouble differentiating the uppercase word "SHAMPOO" from the word "CONDITIONER," but you would have less trouble distinguishing the lower case "shampoo" from "conditioner" because you would be more likely to recognize—even with limited eyesight—the differing ascenders and descenders in the two familiar words.<sup>189</sup> The ability to use peripheral vision more effectively with mixed-case text may explain why most of us just don't like all-caps writing. It slows us down because our comprehension is restricted to the four or five letters visible to our fovea; our peripheral vision sees just rectangular blurs.<sup>190</sup> Accordingly, the "word shape theory" might be renamed the "letter shape theory."

A second justification for the difference in reading speed between upper and lower case letters is based on the use of eye-tracking technology to study the way people read. Some scientists have concluded that readers read mixed case words

183. See generally James Robert Watson, *Bouma: A Weird Word, But an Important Concept*, <http://www.jamesrobertwatson.com/bouma.html> (last visited Jan. 21, 2013) ("The term bouma appears in Paul Saenger's 1997 book *Space between Words: The Origins of Silent Reading*. We recognize words from their word shape and psychologists call this image the Bouma shape based on the Dutch psychologist Herman Bouma who researched word-shape-based reading.")

184. See Robbins, *supra* note 4, at 117 ("Although in normal reading people do not read solely by shape perception, we do tend to recognize more 'sight words' by shape than by individual letters.")

185. See Herrmann, *supra* note 172.

186. Kevin Larson, *The Science of Word Recognition, or How I Learned to Stop Worrying and Love the Bouma*, MICROSOFT TYPOGRAPHY (July, 2004), available at <http://www.microsoft.com/typography/ctfonts/WordRecognition.aspx>.

187. Herrmann, *supra* note 172.

188. See *id.*

189. I have conducted personal research on this issue.

190. For a convincing visualization of the readability of blurred mixed-case text versus blurred all-caps text, see generally Herrmann, *supra* note 172.

more quickly not because they are reading shapes, but because most prose is written in mixed case, and so they are more familiar with it.<sup>191</sup> This analysis would explain why some old salts in the navy are dismayed at the Navy's recent departure from all-caps: they are very familiar with the all-caps style, and so for them it is as easy to read as mixed case.<sup>192</sup>

All-caps is typically used to provide emphasis; in mandated communication statutes, it is typically a method to draw the reader's eye. Other than all-caps, there are three typographic methods of emphasis: Underlined text, *italicized text*, and **bold-faced text**. Scientists have tested each of these methods for reading speed and reader preferences. Underlined text can slow reading speed, especially if more than a couple of words are underlined, because the underline interferes with descenders.<sup>193</sup> Similarly, italics can change the shape of a letter enough so that the reader has to spend a bit more time discerning the words being read. Bold-faced type slows reading the least and tends to be preferred as the method of emphasis by most readers.<sup>194</sup>

Larger fonts speed reading.<sup>195</sup> Although readers *can* read ten-point fonts and even eight-point fonts (with reading glasses as appropriate), larger fonts speed comprehension in a couple of ways. First, the words are bigger and just objectively easier to read. Second, the text does not appear as dense when there are fewer words per line and per page, thus making it more inviting to the reader. Those who create Patient Education Materials recommend fonts of twelve points or larger.<sup>196</sup>

Alignment is the second crucial design element. Effective alignment enables readers to find information on the page, and to move from one line of text to the next without needless difficulty. When documents use alignment effectively, readers know where to look. Once again, the differences can be subtle. With many word-processing programs, full-justified text creates uneven spacing between words; this uneven spacing in turn slows down the reader, who must make constant minute re-adjustments in pacing to find the next word.<sup>197</sup> Likewise, if a paragraph is

191. *E.g.*, DENNIS R. PROFFITT & MELISSA M. WADE, CREATING EFFECTIVE VARIABLE MESSAGE SIGNS: HUMAN FACTORS ISSUES 8 (1998), available at [http://www.virginiadot.org/vtrc/main/online\\_reports/pdf/98-cr31.pdf](http://www.virginiadot.org/vtrc/main/online_reports/pdf/98-cr31.pdf).

192. Barnes, *supra* note 179.

193. Robbins, *supra* note 4, at 118.

194. See Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 374 (2008) (citing Karen A. Schriver, DYNAMICS IN DOCUMENT DESIGN: CREATING TEXT FOR READERS 274 (1997)) ("Reading speed is optimal when uppercase and lowercase letters are used . . . [w]hen extra emphasis is needed, bold has been found to be a better cue than uppercase."). But see Jim Felici, THE COMPLETE MANUAL OF TYPOGRAPHY, (2d ed. 2011) who finds bold to be "obtrusive" as compared with italics, but does not address its legibility.

195. See Mary Jane Bernier, *Developing and Evaluating Printed Education Materials: A Prescriptive Model for Quality*, 12 ORTHOPAEDIC NURSING 39, 44 (1993) ("Most readers prefer at least a 12 point print; visually impaired readers and the elderly prefer larger print.").

196. *E.g.*, *id.*; Judith Hong et. al., *Compassionate Care: Enhancing Physician-Patient Communication and Education in Dermatology* 68 JOUR. OF THE AM. ACAD. OF DERMATOLOGY, 364-65 (2013) ("Use larger font, at least 12 points").

197. See SEC DISCLOSURE, *supra* note 4; see also M.A. Lewis & J.T. Newton, *An Evaluation of the Quality of Commercially Produced Patient Information Leaflets*, 201 BRIT. DENTAL J., 114, 116-17 (2006).

centered rather than left-justified, the reader must adjust to a new starting point for each line of text.<sup>198</sup>

Finally, documents are harder to read if they don't have enough white space. Readers perceive tightly-packed sentences as being difficult to read, and so they may be more likely to ignore dense text.<sup>199</sup> Likewise, eye-tracking studies show that density of text (in addition to complexity of vocabulary) requires readers to spend more time reading the text. Of course, readers who are not participating in an eye-tracking study may be unwilling to spend the extra time, and may just refuse to read or stop reading the document.

Many typographic factors can affect the amount of white space on a page. The obvious methods are width of margins and line spacing (that is, single versus double-spaced). More sophisticated methods include adjusting kerning, which refers to the spaces between letters; and leading (rhymes with "sledding"), which refers to the space between single-spaced lines of text.<sup>200</sup>

### B. Readability

Readability refers to the ability of the reader to understand the substance of the words read. It is not to be confused with legibility, which refers to the ability to discern letters and thus words. Several factors may affect readability, including vocabulary, sentence length, and sentence structure.<sup>201</sup> Related to all of these factors is the *cohesion* of the text: reading comprehension is higher when the writing makes its points explicitly and when readers can easily understand how the different sentences relate to each other.<sup>202</sup>

As noted above, readers do not read word-by-word; rather, their eyes sweep a few words at a time, interrupted by stops for comprehension. If text is difficult to read or understand, reading is slowed because the reader's eyes must sweep over the words again.<sup>203</sup> A reader who is slowed too often may decide that time costs are too great; a reader who must struggle to comprehend difficult prose may decide that cognitive costs are too high. In either situation, the reader may give up and stop reading.

Writers can speed comprehension (or avoid slowing it), by using simpler vocabulary and by presenting familiar information to provide context for unfamiliar

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(noting better legibility for documents that follow guidelines recommending left-justified text, and noting that "text [should be] left-justified only as it is easier for the partially sighted to follow writing and in addition keep[s] the space between words even, [which] helps reading.").

198. See SEC DISCLOSURE, *supra* note 4, at 45.

199. See SEC DISCLOSURE, *supra* note 4, at 46.

200. E.g., Robbins, *supra* note 4, at 123. "Leading" is a retronym; it originally referred to the thin piece of lead that printers would place between lines of hand-composed text. *Id.*

201. E.g., Hong *et al.*, *supra* note 196, at 365 ("readability is generally calculated on some combination of sentence length, syllables, and/or word difficulty").

202. See generally WILLIAMS & COLOMB, *supra* note 9, at 66-81.

203. See Kiernan-Johnson, *supra* note 15, at 108. (If, upon landing on a new place in the text, the brain is unable to process what it has read, it jumps back, in 'regression saccades,' to see what it has missed") (internal citations omitted).

information.<sup>204</sup> Those developing patient education materials are advised to analyze the educational level of the audience for the materials<sup>205</sup> and to use one or more readability formulas to test the readability of the proposed materials.<sup>206</sup> One author notes that writing to “sixth grade or lower” reading level is appropriate because “[a]t least 75% of adult Americans will be able to read the materials written at this level without difficulty.”<sup>207</sup> Although we may presume that more sophisticated readers will read some documents containing mandated communication—for example, stock market prospectuses—many others may be directed at a widely diverse audience. People of all educational levels may be subject to a child support order, for example.

Syntactic structures also affect readability. We know, for example, that readers understand concrete subject-verb combinations more easily than they understand abstract nouns, or over-nominalized verbs. The theory behind this knowledge is that people create mental pictures when they read. The more often sentences are heavy on characters and actions in the subject and verb positions, the more easily people will be able to picture, and thus understand, the information in those sentences.<sup>208</sup> Thus, people will understand “you can cancel this contract if you wish,” more quickly than they will understand “a right of cancellation is part of this contract.” Even though the word “cancellation” is an obvious nominalization of the word “cancel,” our brains process “cancel” more quickly than “cancellation.”

Reading can also be slowed by other substantive issues. When text requires readers to make an inference, their reading may be slowed as they take the time to do so.<sup>209</sup> For example, if a child support order says “notice of change of address must be provided,” the reader must make an inference to determine whose address must be provided and who must do the providing. Further, in some contexts, some readers will not have the background experience or knowledge to make all of the needed inferences.<sup>210</sup> Currently, many mandated communication statutes require readers to make at least one crucial inference: that certain text is vitally important because it is displayed in “bold and conspicuous,” “all caps and conspicuous,” or “large and conspicuous” type. Legislatures could speed comprehension significantly if they used a heading that explicitly stated, for example, “**These paragraphs are important: they explain that if you sign this document, you will**

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204. Benjamin, *supra* note 115, at 72.

205. E.g., Karin Gracey Menghini, , *Designing and Evaluating Parent Educational Materials*, ADVANCES IN NEONATAL CARE, Vol. 5, No. 5, 273, 275–76 (2005).

206. *Id.* at 278. Note that readability formulas are currently mandated in some legislation already, in particular insurance contracts. E.g., N.C. GEN. STAT. ANN. § 58-38-30 (West, Westlaw through 2013 session) (“Any policy filed with the Commissioner must be accompanied by a certified Flesch scale readability analysis and test score and by the insurer’s certification that the policy is, in the insurer’s judgment, readable based on the factors specified in G.S. 58-38-20 and G.S. 58-38-25”).

207. Menghini, *supra* note 206, at 278.

208. See, e.g., RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS 27–31 (5th ed. 2005).

209. Benjamin, *supra* note 115, at 70 (evaluating readability formulas and focusing on propositions and inferences as a marker for text difficulty analysis).

210. *Id.* (when readers have to make more inferences, the text is more difficult because “a novice reader may not have the schema in place to make the necessary inferences to comprehend the text”).

**not have the right to a jury trial if you ever need to sue Acme, Inc. for any of the reasons listed below."**

Making text appropriately explicit is worth the trouble; if the text makes too many demands on the reader, the reader may "satisfice" by abandoning the document, and completely frustrate the communicative goal.

### C. Organization and Organizational Signals

Comprehension can also be affected by poor organization and poor organizational signals. As noted above, cognitive psychologists understand that people comprehend new information better when they can mentally attach it to "old" information. By using headings to signal organization, writers can "provide the super-structure of the document, which leads to better concept recall."<sup>211</sup> Headings help in concept recall because they provide category names that aid in "chunking," which is a technique that "seeks to accommodate short-term memory limits by formatting information into a small number of units."<sup>212</sup> Chunking is particularly useful when readers need to recall or retain information, as might be the case with certain government-related mandated communication.<sup>213</sup> When readers are given categories to attach the new information to, they are more likely to remember that information; the categories give the readers a mental location in which to store the information. The process of drafting the headings may also lead to better organization, because it requires the writer to identify appropriate categories, which will almost always lead to a more useful organizational structure.

Those who prepare educational materials find that using an FAQ format for headings engages the reader more directly with the text and thus encourages reading.<sup>214</sup> In addition, writing the FAQ-style questions often forces writers into a writing style that has more concrete subjects and verbs and that is, therefore, more effective stylistically.

These methods, of course, are far from the only techniques writers can use to speed reading and improve comprehension. In particular, there are more sophisticated design techniques that writers can use (e.g., color, shorter lines, columns, icons, pictures). However, the techniques discussed here are well-accepted and easy to accomplish, even within the limits of widely available word processing programs. These techniques can help legislatures to speed reader comprehension of mandated communication in three ways: (1) They can make the

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211. Robbins, *supra* note 4, at 125.

212. WILLIAM LIDWELL ET. AL., *UNIFORM PRINCIPLES OF DESIGN* 30 (2003).

213. *Id.*; see also Leslie C. Hussey, *Strategies for Effective Patient Education Material Design*, 11 J. CARDIOVASCULAR. NURSING. 37, 39 (1992). ("Organizing materials into categories and using category names can increase recall and understanding.") Note that Sample B, at the beginning of this article, used chunking to organize the information into three "chunks": (1) the information that needs to be provided, (2) the duration of the obligation to provide the information, and (3) the penalties for failing to provide that information.

214. See Anca Micheti, Jacquelyn Burkell, & Valerie Steeves, *Fixing Broken Doors: Strategies for Drafting Privacy Policies Young People Can Understand*, 30 BULL. OF SCI., TECH., & SOC'Y 130, 131 (2010). ("Headings should be formulated as questions or verbal phrases that reflect the language used in the associated text").

mandated communication *noticeable* through the use of sufficient white space and concrete, headings in bold-faced type. (2) They can ensure that the communication is *easily legible* through the use of mixed-case font, large enough to be read by most readers. (3) They can help to *promote comprehension* of the mandated communication by writing explicitly, using concrete subject-verb structures, writing at an appropriate reading level, and signaling organization with category-focused headings.

#### IV. CONCLUSION

Some courts seem to have the attitude that we should not have to encourage readers to read important information, that these readers should recognize when reading information is in their own interest, and that if they fail to read or to read carefully, they are neglecting some sort of duty. Readers in certain contexts may indeed have a duty to read carefully. But this article is addressing writing in contexts where legislators have decided that it is very important to get specific information to specific people at a specific time, and that it is so important that they are going to mandate the words used and how they are presented. In that context, it is not rational for legislators to write in a way that imposes a comprehension burden on the reader; instead, they should do everything they can to ease both reading and comprehension. If they don't have the expertise to write in a way that speeds comprehension, they should hire people who do.<sup>215</sup>

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215. They may well be able to get such work at a reasonable cost by consulting legal writing faculty who teach in law schools in or near state capitals.