True Confessions of a Diddle-Diddle Dumb-Head

Richard C. Wydick

Last month, while walking the dog, I passed a brother and sister playing in their front yard. The brother (about eight) watched as his little sister (about five) ran headlong into a tree. She was dazed but not badly hurt — until her brother started laughing and calling her "Diddle-Diddle Dumb-Head." She looked around, but there was no object or stranger to blame for her crash. Tears welled in her eyes, and I am sure she was thinking: "I really *am* a Diddle-Diddle Dumb-Head!"

Don't all of us feel, on occasion, that we really *are* Diddle-Diddle Dumb-Heads? Homer Simpson and I certainly do. Homer's famous *D'oh* has even made it into the online Merriam-Webster's Dictionary, which offers the following definition: "used to express sudden recognition of a foolish blunder or an ironic turn of events."[1] In the following pages, you will find three confessions of ignorance that qualify me as an authentic Diddle-Diddle Dumb-Head.

Confession One: The Difference Between *That* and *Which*

Almost 30 years ago, while my family and I were on sabbatical leave in New Zealand, I wrote a law-review article that eventually

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[1] Merriam-Webster, Inc., *Merriam-Webster Online*, http://www.merriam-webster.com/dictionary/doh (accessed Dec. 6, 2007).

became a book, *Plain English for Lawyers.*[2] When the manuscript was finished, I sent it to the California Law Review, where it landed on the desk of a bright young Boalt Hall articles editor, Brian Gray.

Mr. Gray was an enthusiastic editor, and he suggested many changes. I accepted all of them, as I recall, but I remember being puzzled by one group of changes. In a dozen or so sentences where I had written *which*, Mr. Gray had substituted *that*. The puzzling part was that he left my *which* unchanged in other sentences that to me seemed similar. Apparently, Mr. Gray was navigating by some principle of English usage that I'd never learned. And I can't claim lack of opportunity to learn it, because it is concisely stated by Strunk & White.[3] One who presumes to write an article on writing should have learned such things, but I hadn't. D'oh . . .

In an effort to understand *that*s and *which*es, I consulted the best English-usage book that was available in New Zealand in the late '70s — the second edition of H.W. Fowler's *Dictionary of Modern English Usage*, revised by Sir Ernest Gowers. Fowler is not a book to consult in haste, when you need a concise answer to a usage question. Fowler is like chocolate mousse, something best enjoyed in small bites. In Fowler I found two and a half pages (double columns of small type with little white space) devoted to the difference between *that* and *which* when they are used to introduce a modifying clause. The first four sentences will give you the flavor:

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[2] Richard C. Wydick, *Plain English for Lawyers*, 66 Cal. L. Rev. 727 (1978). The current edition of the book is *Plain English for Lawyers* (5th ed., Carolina Academic Press 2005).

[3] William Strunk, Jr. & E.B. White, *The Elements of Style* 59 (4th ed., Allyn & Bacon 2000).

> **Relation between *that* and *which*.** What grammarians say should be has perhaps less influence on what shall be than even the more modest of them realize; usage evolves itself little disturbed by their likes and dislikes. And yet the temptation to show how better use might have been made of the material to hand is sometimes irresistible. The English relatives, particularly as used by English rather than American writers, offer such a temptation. The relations between *that*, *who*, and *which* have come to us from our forefathers as an odd jumble, and plainly show that the language has not been neatly constructed by a master builder who could create each part to do the exact work required of it, neither overlapped nor overlapping; far from that, its parts have had to grow as they could.[4]

After that beginning, Fowler takes a long paragraph to debunk the notion that *that* is acceptable to introduce a modifying clause in colloquial speech, but that *which* is the correct word for that purpose in formal writing. He concedes that *which* is used less in colloquial speech than in formal writing, but he explains that colloquial speech — which consists of short sentences and sentence fragments — seldom includes the *kind of clause* that ought to be introduced by *which*, not *that*.[5]

Kind of clause? What kinds are there? After two-thirds of a page of ruffles and flourishes, Fowler introduces the key distinction. *That* is usually the correct word to introduce a *restrictive* clause, but *which* is the correct word to introduce a *nonrestrictive* clause.[6]

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[4] H.W. Fowler, *A Dictionary of Modern English Usage* 625 (Ernest Gowers ed., 2d ed., Oxford U. Press 1965).

[5] *Id.*

[6] *Id.* at 626.

Fowler used the terms "defining" clause and "nondefining" clause, but later writers substitute the terms "restrictive" clause and "nonrestrictive" clause.[7]

A *restrictive* clause is one that gives us information about the preceding noun or noun phrase (called the antecedent) in order to distinguish the antecedent from other items in the same category. For example:

> Plaintiff and defendant have long regarded the oak tree *that stands just north of the dry creekbed* as marking the boundary line of defendant's pasture.

In that sentence, the antecedent is "oak tree," but until we read the clause in italics, we don't know which oak tree the parties regarded as the boundary-line marker. The clause in italics restricts the category to one particular oak tree — the one that stands just north of the dry creekbed. Therefore, the clause is restrictive, and it is properly introduced by *that*.[8] Notice that the clause in italics is not preceded by a comma. Fowler barely mentioned that feature, but years later Bryan Garner and Douglas Laycock pointed out that the introductory comma, or the lack of it, can be used as a telltale, to help distinguish restrictive clauses from nonrestrictive ones.[9]

A *nonrestrictive* clause does not narrow the category covered by the antecedent. Rather, it gives us some additional information

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[7] *See* R.W. Burchfield, *The New Fowler's Modern English Usage* 774 (3d rev. ed., Oxford U. Press 1996); Bryan A. Garner, *Garner's Modern American Usage* 782–83 (2d ed., Oxford U. Press 2003); Bryan A. Garner, *A Dictionary of Modern Legal Usage* 765–67 (2d ed., Oxford U. Press 1995); Douglas Laycock, *"That" and "Which,"* 2 Scribes J. Legal Writing 37 (1991).

[8] Fowler, *supra* n. 4, at 626; Laycock, *supra* n. 7, at 39–40.

[9] Garner, *Modern Legal Usage*, *supra* n. 7, at 765–66; Laycock, *supra* n. 7, at 44–45.

about the entire category. The correct word to introduce a nonrestrictive clause is *which*. For example:

> The boundary-line oak, *which defendant's great-grandmother grew from an acorn and planted north of the creek in the late 1880s*, constitutes a "natural monument" that prevails over the flawed metes and bounds stated in the deed.

In that sentence, the category covered by the antecedent consists of a single tree — the boundary-line oak. The nonrestrictive clause gives us some additional information about that tree: it grew from an acorn planted by defendant's great-grandmother in the late 1880s. Notice that the nonrestrictive clause is preceded by a comma, which helps identify it as nonrestrictive. (The clause has a comma at the end, too, because it appears in the middle of the sentence and is punctuated as a parenthetical.)

Unfortunately, it's sometimes hard to tell whether a clause is restrictive or nonrestrictive.[10] Moreover, many writers don't know and don't care about the distinction[11] — I was one of them until Brian Gray caught me. But Garner warns us that *legal* writers ought to care:

> Legal writers who fail to distinguish restrictive from nonrestrictive clauses — and especially *that* from *which* — risk their credibility with careful readers. It's therefore worthwhile to learn the difference so well that, when writing, you use the correct form automatically.[12]

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[10] *See* Fowler, *supra* n. 4, at 626–28; Burchfield, *supra* n. 7, at 774–75; Laycock, *supra* n. 7, at 41–47.

[11] *See* Fowler, *supra* n. 4, at 626; Garner, *Modern American Usage*, *supra* n. 7, at 782.

[12] Garner, *Modern Legal Usage*, *supra* n. 7, at 765.

A legal writer who introduces a restrictive clause with *which* instead of *that* risks creating an ambiguity.[13] Consider the following three statements in the context of a price-fixing case:

1. The association meetings *that were prohibited by the earlier consent decree* were immediately followed by jumps in the spot-market price.

2. The association meetings, *which were prohibited by the earlier consent decree*, were immediately followed by jumps in the spot-market price.

3. The association meetings *which were prohibited by the earlier consent decree* were immediately followed by jumps in the spot-market price.

Statement 1 is not ambiguous. The italicized clause is restrictive, and it is correctly introduced by *that* without an introductory comma. The antecedent is "association meetings," and the italicized clause tells us that we are concerned with only one kind of association meeting — the kind that was prohibited by the earlier consent decree.

Statement 2 is not ambiguous either. The italicized clause is nonrestrictive, and it is correctly introduced by a comma and *which*. The antecedent is "association meetings." The italicized clause tells us that we are concerned with *all* association meetings because all of them were prohibited by the earlier consent decree.

Statement 3 is ambiguous. We can't tell whether the italicized clause is restrictive or nonrestrictive because the author incorrectly introduced it with *which* without a comma in front. Are we concerned with *all* association meetings, or only the kind that were prohibited by the earlier consent decree? We simply don't know.

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[13] *See* Laycock, *supra* n. 7, at 41–44.

In the spirit of confession, I must tell you that Brian Gray, the Boalt Hall student who fixed my *that*s and *which*es, later became the law review's editor in chief, then a federal appellate-court clerk, then a practicing lawyer at one of San Francisco's best firms, and then a professor at Hastings College of the Law, where he continues today. I don't know him in person, but his writing reveals that he never, ever muffs a *that* or *which*.[14]

Confession Two: Whiz and Complement Deletions

A few months after my *Plain English* article appeared, I got a telephone call from two strangers, Veda Charrow (a linguist) and her husband, Robert Charrow (a lawyer and law teacher). They had just published an article in the *Columbia Law Review*, reporting the results of their empirical study of canned jury instructions that were then used in California civil cases.[15] The study has since become a landmark and is widely praised for its contributions to the nationwide movement to reform the language of jury instructions.[16]

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[14] *See, e.g.*, Brian E. Gray, *The Modern Era in California Water Law*, 45 Hastings L.J. 249 (1994); Brian E. Gray, *No Holier Temples: Protecting the National Parks Through Wild and Scenic River Designation*, 58 U. Colo. L. Rev. 551 (1988).

[15] Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979).

[16] *See, e.g.*, Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37, 46-52 (1993); *see also* Peter M. Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook. L. Rev. 1081, 1084–85 (2001); Judicial Council of California, *Civil Jury Instructions Resource Center*, http://www.courtinfo.ca.gov/jury/civiljuryinstructions/plain_english.htm (accessed Dec. 6, 2007) (comparing samples of old instructions with new plain-English instructions).

The Charrows' study demonstrated, first, that the canned instructions were confusing to a randomly chosen sample of potential jurors. Second, their study demonstrated precisely how the canned instructions could be rewritten to make them easier to understand. The Charrows chose 11 specific language constructions that they suspected of breeding confusion, such as using the passive voice in subordinate clauses and using strings of near-synonyms (such as *knowledge, skill, experience, training, or education* in an instruction about expert witnesses). In rewriting the canned instructions, the Charrows avoided the 11 suspect constructions. As they predicted, the potential jurors could understand the new, rewritten jury instructions significantly better than the old, canned instructions.

The Charrows telephoned to tell me about their article and to gently suggest that my *Plain English* article contained a stunningly bad piece of advice. In explaining how to chop out surplus words, my article told readers: "The words *which*, *who*, and *that* often signal an opportunity to reduce a clause to a phrase."[17] One of my examples was this:

Clause	**Phrase**
The title search did not disclose the easement that had been granted six years before.	The title search did not disclose the easement granted six years before.

That example, the Charrows explained, incites readers to commit "whiz deletion." *Whiz deletion*? I had no idea what that meant, but it sounded serious. D'oh . . . Diddle-Diddle Dumb-Head. I scurried off to the law library to find the Charrows' article, which explains "whiz deletion" this way:

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[17] Wydick, *supra* n. 2, at 733.

> The [old, canned] instructions contain several examples of subordinate clauses that are missing relative pronouns ("that," "which," "who," etc.) and "copula" verbs ("Be" verbs, such as "was," "is," "am," "are," etc.). . . . This grammatical phenomenon is known to linguists as "whiz" (short for "which is") deletion, because what is missing is the implied phrase "which is" [or "that was," or "which had been," etc.]. While whiz deletion is normal in English, in some instances it appears to add to the listener's processing load. Because some of the grammatical information is missing, the mind has to work harder to reconstruct it.[18]

Notice that the Charrows say that "in some instances" whiz deletion makes a passage harder to process, not that it invariably does so.[19] Here are four examples. In each example the deleted words are a relative pronoun (*which*, *who*, *whom*, *that*, etc.) plus some form of the verb *to be* (*is*, *am*, *are*, *was*, *were*, *had been*, *will be*, etc.). In which of the four examples do you think the whiz deletion creates a problem?

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[18] Charrow & Charrow, *supra* n. 15, at 1323; *see also* Frederick Bowers, *Linguistic Aspects of Legislative Expression* 288–303 (U. British Columbia Press 1989); Daniel B. Felker, Frances Pickering, Veda R. Charrow, V. Melissa Holland & Janice C. Redish, *Guidelines for Document Designers* 39–40 (Am. Insts. for Research 1981); John Gibbons, *Forensic Linguistics: An Introduction to Language in the Justice System* 57, 171, 176–77, 196 (Blackwell Publg. 2003); Edwin S. Williams, *Small Clauses in English*, in *Syntax and Semantics* vol. 4, 249, 249–52 (John H. Kimball ed., Academic Press 1975).

[19] Charrow & Charrow, *supra* n. 15, at 1323, 1338; *see also* Janice C. Redish & Susan Rosen, *Can Guidelines Help Writers?* in *Plain Language: Principles and Practice* 83, 88–90 (Erwin R. Steinberg ed., Wayne St. U. Press 1991); Thomas N. Huckin, Elizabeth H. Curtin & Debra Graham, *Prescriptive Linguistics and Plain English: The Case of "Whiz-deletions,"* in *Plain Language: Principles and Practice*, *supra*, at 67, 68–78.

	Full Clause	Whiz Deletion
1.	The settlement *that is* proposed by the mediator is unacceptable.	The settlement proposed by the mediator is unacceptable.
2.	This pocket watch, *which is* gold, once belonged to James Madison.	This gold pocket watch once belonged to James Madison.
3.	The soldier captured the sniper *who was* in civilian clothes.	The soldier captured the sniper in civilian clothes.
4.	The lawyer *who was* assigned to assist you is in the hospital.	The lawyer assigned to assist you is in the hospital.

To me, the whiz deletion in 1 seems harmless; it saves two words, and it doesn't seem harder to process. In 2, I prefer the whiz deletion, not just because it saves two words, but also because it turns the stuffy clause into one adjective, *gold*. In 3, the whiz deletion may not be harder to process, but it is harmful for a different reason: ambiguity. We can't be sure who was wearing civilian clothes, the sniper or the soldier. (If the writer was careful, the modifier would do its work on the closest referent, the sniper, but we are left to wonder whether the writer was careful.) In 4, the whiz deletion creates ambiguity of a different kind. In the full-clause version, the past-tense *was* gives me some hope that, because my original lawyer is in the hospital, a substitute lawyer might be assigned to help me now. The tense marker is absent from the whiz-deleted version, which could be read as either *who was assigned* (maybe I'll get a substitute) or *who is assigned* (I'll have to wait until the original lawyer gets well).

The Charrows' article also casts suspicion on *complement deletion*, by which the authors mean "clauses from which the complementizers *that* or *which* have been omitted."[20] For example,

[20] Charrow & Charrow, *supra* n. 15, at 1323.

"Harriet reported her car radio was stolen." The missing complement is *that*, which ought to be inserted between *reported* and *her.* When the complement is missing, the reader thinks at first that Harriet reported her car radio; that reading makes no sense, so the reader must pause to figure out that Harriet reported a theft, not a radio. The reader is not seriously inconvenienced, just momentarily jarred, rather like taking an extra step upward in the dark to climb a top stair that isn't there.

Bryan Garner calls this kind of writing flaw a "miscue," which he defines this way:

> A miscue is an inadvertent misdirection that causes the reader to proceed momentarily with an incorrect assumption about how — in mechanics or in sense — a sentence or passage will end. The misdirection is not serious enough to cause a true ambiguity because, on reflection, the reader can figure out the meaning.[21]

A patient reader will probably forgive a writer for the first one or two deleted complements, but some writers make a perverse sport of it:

> On appeal he contends [read *that*] it was error to admit evidence of battered woman's syndrome and evidence of his prior acts of domestic violence. He contends [read *that*] the trial court erred in ordering the defense to turn over a tape recording . . . . Defendant contends [read *that*] his convictions for aggravated assault and felony battery must be vacated under principles of double jeopardy. Finally, defendant contends [read *that*] his sentence of the upper term on count one and a consecutive sentence on count four violates *Blakely v. Washington* . . . .

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[21] Garner, *Modern Legal Usage*, *supra* n. 7, at 564; for examples of wrongly deleted complements, see *id.* at 876; *see also* Joseph Kimble, *A Modest Wish List for Legal Writing*, in *Lifting the Fog of Legalese: Essays on Plain Language* 151, 158 (Carolina Academic Press 2006) (encouraging writers not to drop *that* after most verbs).

By order of the state's supreme court, the opinion from which this quote is taken is superseded and uncitable, so I won't cite it. This has the happy side effect of not embarrassing the author, who is otherwise a careful and lucid writer.

Confession Three: *Hereby* Can Be Useful

This third confession won't make sense unless you know its background, but the background is long in the telling, and you may think you have mistakenly strayed into an article on a different subject. Please be patient — the confession part will come along eventually.

Before retiring, I taught evidence law for 30-odd years. For the first dozen years, I had trouble teaching so-called verbal acts, a type of out-of-court statement that is routinely classed as "not hearsay." You may recall from law school that "hearsay" is an out-of-court statement that is offered to prove that what it asserts is true. A verbal act is an out-of-court statement, but it is not hearsay because it is not offered to prove that what it asserts is true. Rather, it is offered to prove that that statement was made, because the *making* of that statement is an operative fact that needs proving in the litigation.

In the 1970s (and long before), many evidence teachers taught verbal acts by using an old chestnut, *Hanson v. Johnson*.[22] Hanson was a landowner who leased a cornfield to a sharecropper named Schrik. As rent, Schrik agreed to pay Hanson two-fifths of the corn grown on the field. One autumn day, Schrik husked all the corn and divided it into separate cribs. Later, Hanson came out to the barnyard; Schrik pointed to two specific cribs and said this: "Mr.

[22] 201 N.W. 322 (Minn. 1924).

Hanson, here is your corn for this year. This double crib here and this single crib here is your share for this year's corn; this belongs to you, Mr. Hanson." Mr. Hanson did or said something that manifested his agreement with Schrik's division of the corn.

Schrik had pledged his three-fifths of the corn to the bank as security for a loan. Schrik failed to repay the loan, and eventually a bank auctioneer came out to the farm and sold part of the corn crop to a stranger named Johnson. Now comes the rub: apparently the auctioneer sold some of the wrong corn. He sold part of Hanson's share to Johnson. Hanson sued Johnson for conversion, and in that suit Hanson had to prove which cribs of corn were his. To prove that fact, Hanson offered his own testimony and the testimony of a bystander to what Schrik said on the day the corn was divided. Schrik said the words quoted above, closing with "this belongs to you, Mr. Hanson." Johnson's lawyer objected to the testimony as hearsay: Schrik's statement was made out of court, and it said that certain corn belonged to Hanson. It was offered to prove that that corn did belong to Hanson, and therefore it had to be hearsay. Right? Wrong.

It's not hearsay because Hanson was using Schrik's out-of-court statement (plus Hanson's own manifestation of agreement) to prove that a special transaction took place that day in the barnyard. Before that transaction, Schrik owned a three-fifths undivided interest in the corn crop, and Hanson owned the other two-fifths undivided interest. Before that transaction, nobody could know whether a particular ear of corn belonged to Schrik or to Hanson because no division had occurred. But when the transaction occurred, suddenly some particular ears belonged to Schrik and other particular ears belonged to Hanson. The making of Schrik's statement and Hanson's manifestation of agreement *were* the transaction.

In my first dozen years of teaching *Hanson v. Johnson*, about half the students caught on and left the classroom happy. Another quarter left in their usual somnambulant stupor. The last quarter got mad and came to the podium after class to argue — Schrik's statement had to be hearsay because Schrik said it was Hanson's corn, and it was used to prove that it *was* Hanson's corn — ergo, hearsay. I usually couldn't convince them otherwise; perhaps I didn't understand verbal acts well enough myself to come up with parallel examples that were easier to understand.

Then, one day in 1985, while poking around in the language section of a beautiful old bookstore near the University of London, I found a little paperback book called *How to Do Things with Words*, by an English philosopher named J.L. Austin.[23] The book re-creates the William James Lectures that Austin delivered at Harvard in 1955. The book's title conveys Austin's key idea: sometimes words *do* things. For example, at a wedding, the groom says "I do," the bride says "I do," and the official says "I pronounce you husband and wife." Those are three "speech acts," or "verbal acts." Saying those words does something: it creates the bond of marriage between those two people. Austin called that kind of speech act a "performative" because speaking the words performs the action. Austin himself noted that American lawyers exempt performatives from the hearsay rule because they are not narrative statements, but rather *acts* in word form.[24]

Armed with Austin's idea, one can easily think of other examples of performatives:

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[23] J.L. Austin, *How to Do Things with Words* (2d ed., Oxford U. Press 1975).

[24] *Id.* at 13.

- In a baseball game, after a close play at third base, the umpire raises his right hand with thumb extended and bellows, "Y're out!" Those words are a performative; by speaking them, the umpire *did* something. His words *made* the runner out. What if the same two words had been bellowed at the same moment by a beer-soaked fan in the stands? Then they would not be a performative, but merely a narration of what the fan perceived.

- In a dispute over a gift, there is evidence that at A's birthday party, B handed A a small package and said: "Here is my birthday gift to you, A." B's words will not be hearsay if offered to prove that B gave the contents of the package to A as a birthday gift. Why? Because under the law of gift, the donor's manifestation of intent to make a gift is an important element. When B spoke those words while handing over the package, he manifested his intent to make a gift.

- In a suit for anticipatory breach of contract, P offers bystander X's testimony that X heard D say to P: "The price we agreed to is just too low, P. I won't be selling you those widgets after all." D's words are a performative. The speaking of those words is a repudiation of the contract, and X's testimony would not be hearsay.

After finding Austin's book in 1985, I learned to introduce *Hanson v. Johnson*, the corn case, by telling the students about Austin and giving them the hypothetical about the umpire and the beer-soaked fan. Never again was the corn case a troublemaker.[25]

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[25] For more about speech acts in legal analysis, see Bernard S. Jackson, *Making Sense in Law* 47–60 (Deborah Charles Publications 1995); Lawrence M. Solan, *The Language of Judges* 154–63 (U. Chicago Press 1993); Lawrence M. Solan & Peter M. Tiersma, *Speaking of Crime: The Language of Criminal Justice* 25–26 (U. Chicago Press 2005).

Now, at last, comes the confession part of this story, which concerns the little word *hereby*. Until five or six years ago, I had never given *hereby* much thought. If I had thought about *hereby*, I'd probably have lumped it with *hereinabove*, *hereunder*, *herewith*, and all the other useless *here-* words that deface lawyers' writing.[26] Then, five or six years ago, I had the privilege of reading the page proofs of two excellent legal-writing books — Peter Tiersma's *Legal Language*[27] and Kenneth Adams's *Legal Usage in Drafting Corporate Agreements*.[28] Both Tiersma and Adams discuss *hereby* as a useful way to signal (here comes the magic word) a performative![29] Why hadn't I previously seen the connection between performatives in hearsay law and performatives in legal writing? D'oh . . . Diddle-Diddle Dumb-Head!

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[26] For unkind comments about poor *hereby* by distinguished critics, see Garner, *Modern Legal Usage*, *supra* n. 7, at 402 (*hereby* is often a "flotsam phrase," one that "can be excised with no loss of meaning"); Law Reform Commission of Victoria (Australia), *Plain English and the Law*, app. 1, *Guidelines for Drafting in Plain English: A Manual for Legislative Drafters* 59 (1987) (*hereby* is "generally unnecessary," and it should be omitted with verbs such as *agree*, *amend*, *declare*, and *promise*); David Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* 283 (West 1992) ("*hereby* is superfluous"); David Mellinkoff, *Legal Writing: Sense and Nonsense* 3 (West 1982) (in Richard Nixon's resignation letter, *hereby* "is pure legal kneejerk," telling us only that "a lawyer had a hand in the writing"); G.C. Thornton, *Legislative Drafting* 93 (4th ed., Butterworths 1996) (when *hereby* is used in legislation with verbs such as *repealed*, *amended*, *appointed*, and *established*, it is "unnecessary" and "fusty"); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 Thomas M. Cooley L. Rev. 1, 21 (1992) (*hereby* "does not add an iota of precision").

[27] Peter M. Tiersma, *Legal Language* (U. Chicago Press 1999).

[28] Kenneth A. Adams, *Legal Usage in Drafting Corporate Agreements* (Quorum Bks. 2001).

[29] Tiersma, *supra* n. 27, at 104–05, 207; Adams, *supra* n. 28, at 19–22.

Here's an example of what Tiersma and Adams have in mind. Suppose the king writes an open letter to his subjects, stating: "For the sake of love, I hereby abdicate the throne." The *hereby* signals that the king is using *abdicate* as a performative. He's not intending to abdicate next Tuesday; he is abdicating right now, and he does it by writing those words to his subjects.

Tiersma and Adams point out that *hereby* is surplusage when the verb that it modifies is *obviously* being used as a performative.[30] For instance, a letter that nominates someone for an elective office might state: "I nominate Felicity Fudd for the office of Secretary–Treasurer." In that context, the writer is obviously using *nominate* as a performative, and inserting *hereby* in front of *nominate* would be surplusage.

Similarly, the lead-in clause of a business contract might state: "The parties therefore agree as follows." Because *agree* is obviously being used as a performative, one need not say *hereby agree*. This example, incidentally, follows Adams's recommended wording.[31] Notice how crisp his wording is, compared with the old incantation some lawyers still use:

> NOW THEREFORE, in consideration of the mutual covenants and agreements set forth herein and in the Merger Agreement, and for other good and valuable consideration, the adequacy of which is hereby acknowledged, the parties hereto agree as follows:

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[30] Tiersma, *supra* n. 27, at 104–05; Adams, *supra* n. 28, at 19–22.

[31] *See* Adams, *supra* n. 28, at 11; *see also* Thornton, *supra* n. 26, at 200 (making a similar point that a legislature doesn't need to say *hereby enacts*, because it is obviously using *enacts* as a performative).

Adams says that verbs that connote speaking are obvious performatives and don't need *hereby* as a signal.[32] That's helpful as a rule of thumb, but be aware that Adams is using "speaking" to include both written and spoken words. Also be aware that some verbs are hard to classify as speaking or nonspeaking. For example, *revoke*, *blame*, *resign*, *warrant*, *terminate*, *withdraw*, *object*, and *reinstate* seem to me to be on the borderline. In case of doubt, a careful writer should preface such verbs with *hereby* if they are intended as performatives. As further insurance against ambiguity, Adams recommends expressing performatives in the simple present tense and in the active voice rather than the truncated passive.[33] Thus, if Donald Trump were a more careful man, he would say, "I hereby fire you," rather than "You're fired."

Lessons Learned?

It's not nice to take pleasure in someone else's Dumb-Headedness — unless it teaches you something. To test what you have learned from my three confessions, try your hand at revising the following sentences. Some are acceptable as written, but others need changing. Suggested revisions begin on page 76.

Examples to Try:

1. Defendant's damage calculations assume a 4% annual cost-of-living increase will not be warranted.

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[32] *See* Adams, *supra* n. 28, at 21; *see also* Kenneth A. Adams, *A Manual of Style for Contract Drafting* 21 (ABA 2004).

[33] Adams, *supra* n. 28, at 21–22; for an explanation of the truncated passive voice, see Richard C. Wydick, *Plain English for Lawyers* 30–32 (5th ed., Carolina Academic Press 2005).

2. Under the company's bylaws, no "new business" could be brought before the annual shareholder meeting except as specified in the agenda which was mailed to shareholders on November 1.

3. Putting a housing development on the Burnett Ranch tract, which includes 3,000 acres of native grassland which has never been touched by a plow, would destroy a unique and irreplaceable piece of our state's heritage.

4. It is therefore ordered that attorney Theodore Atkinson be, and hereby is, censured and suspended from law practice for three years for willfully violating Professional Rule 4-604. He is further hereby directed to give written notice of his suspension to each of his present clients and their respective counsel.

5. Evelyn Kringle hereby guarantees the payment of Farley Kringle's debt to Carolina National Bank.

6. The United States Supreme Court decision that upholds attorney IOLTA accounts against challenge under the Takings Clause is directly on point in the present case.

7. I hereby bequeath to my dear friend Belinda my grandmother's diamond ring in my yellow Fabergé egg.

8. The dissent proposes torture should be allowed in extreme cases.

9. The insurance company was in bad faith in refusing to compensate the insured for loss of the Modigliani portrait that was destroyed in the November fire.

10. My elder son Jethro is appointed as my health-care agent to make all health-care decisions for me if I cannot make them for myself.

Suggested Revisions:

1. The complement deletion creates a miscue. The solution is to add *that* after *assume*. The revised sentence would then read: "Defendant's damage calculations assume *that* a 4% annual cost-of-living increase will not be warranted."

2. The sentence is ambiguous because we can't tell whether *which was mailed to shareholders on November 1* is restrictive or nonrestrictive. If the clause merely adds a bit of extra information, then there should be a comma in front of *which.* But if the clause specifies the November 1 agenda, as distinct from some other agendas, then the sentence should be revised to read: "Under the company's bylaws, no 'new business' could be brought before the annual shareholder meeting except as specified in the agenda *that* was mailed to shareholders on November 1."

3. Native grassland is fairly common in the U.S., but native grassland that has never been ripped open by a plow is all too rare. Being unplowed is probably what makes this land "unique and irreplaceable." If that is so, then the clause was probably intended to be restrictive, and the sentence could be revised to read: "Putting a housing development on the

Burnett Ranch tract, which includes 3,000 acres of native grassland *that* has never been touched by a plow, would destroy a unique and irreplaceable piece of our state's heritage." Or one could avoid the nested modifier by revising the sentence this way: "The proposed housing development would destroy a unique and irreplaceable piece of our state's heritage because the Burnett Ranch tract includes 3,000 acres of native grassland that has never been touched by a plow."

4. These sentences appear to be part of an order entered by a court or disciplinary agency. The order is a performative: when the order is entered, it effects the censure and suspension of attorney Atkinson. The performative would be clearer and shorter if it were expressed in the active voice, like this: "We hereby censure attorney Theodore Atkinson and suspend him from law practice for three years for willfully violating Professional Rule 4-604. We also order him to give written notice of his suspension to each of his present clients and their respective counsel." On the other hand, some would argue that the *censure* in the first sentence is an obvious performative, as in *the legislature enacts.*

5. This one is acceptable as written. The *hereby* is useful to signal that *guarantees* is being used as a performative.

6. This one is acceptable as written. The clause that begins with *that upholds* is restrictive, so it correctly begins with *that.*

7. A whiz deletion makes this testator's sentence ambiguous. Will Belinda get the Fabergé egg as well as the ring? Belinda's claim to the egg would be weaker if the whiz were restored,

like this: "I bequeath to my dear friend Belinda my grandmother's diamond ring, *which is* in my yellow Fabergé egg." Better yet, the sentence could be revised to read: "I bequeath to my dear friend Belinda my grandmother's diamond ring, which I keep in my yellow Fabergé egg. I bequeath the egg itself to my nephew Olaf." (Note that the *hereby* has been removed because in a will, *bequeath* is obviously being used as a performative.)

8. The complement deletion creates a miscue; at first we might think that the dissent proposes torture generally, not just in extreme cases. The sentence should be revised to read: "The dissent proposes *that* torture should be allowed in extreme cases."

9. This one is acceptable as written. The clause at the end of the sentence is apparently intended to be restrictive, so it correctly begins with *that*.

10. Taken out of its context, this sentence is ambiguous because *appointed* may or may not be a performative. If the sentence were part of a newsy letter to the writer's sister-in-law, then it would not be a performative. If the sentence were part of an advance health-care directive, then the sentence would be a performative, but it would be better expressed in the simple present tense and the active voice, accompanied by the signal *hereby*, like this: "I hereby appoint my elder son Jethro as my health-care agent, to make all health-care decisions on my behalf if I become unable to make them for myself."