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## Translating & Interpreting Foreign Statutes

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# TRANSLATING & INTERPRETING FOREIGN STATUTES

Andrew N. Adler\*

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## INTRODUCTION

U.S. courts increasingly must decide issues involving the laws of foreign nations. Since statutes comprise most countries' predominant source of written law, U.S. lawyers and judges with growing frequency are called upon to translate and interpret such unfamiliar legislation. Fortunately, the topics of comparative law and statutory interpretation have enjoyed a recent renaissance in the law reviews. Still, no publication to date has attempted to establish a comprehensive theoretical methodology that combines these two topics in a way that U.S. practitioners can adapt to make real decisions.<sup>1</sup>

This article takes a small step towards that end. It aspires to address academics and anyone who must translate or interpret foreign statutes without previous in-depth education in the alien language and law.<sup>2</sup> To make matters more interesting, I concentrate on the plight of the minority of judges who want to arrive at independently reasoned interpretations of foreign law when given the opportunity. Most judges strive mightily to avoid even having to glance at foreign laws.<sup>3</sup> And, when it becomes absolutely necessary to read a foreign code, most judges and litigators retain the centuries-old habit<sup>4</sup> of relying too slavishly on tendentious expert

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1. In January 1996, Daniel Farber noted, "The full implications of comparative research for theories of statutory interpretation are undoubtedly yet to be explored. Unfortunately, there has been little dialogue between serious scholars of interpretation theory and well-grounded experts in comparative law so far." Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 529 (1996) (book review).

2. I use "foreign" and "alien" interchangeably to denote other nations. (Other authors use "foreign" to indicate a non-forum jurisdiction within the United States.)

3. See *infra* text accompanying notes 101-106 discussing some techniques of evasion.

4. A 1611 case from England states:

[I]f at the common law one matter comes in question upon . . . [an] instrument made beyond the sea: according to the course of the civil law, or other law of the nations where it was made; the Judges ought to consult with the civilians or others which are expert in the same law; and according to their information, give judgment, though that it be made in such form, that the common law cannot make any construction of it.

testimony.<sup>5</sup> Furthermore, while most states and the federal courts currently allow proof of foreign law in a manner similar to domestic law,<sup>6</sup> vestiges of the old approach remain, wherein parties must prove foreign law as an issue of fact.<sup>7</sup> Commentators have long criticized this outmoded approach.<sup>8</sup>

Finally, when U.S. judges do resort to independent research, they often mistakenly tend to perceive foreign law as quite similar to domestic law, and they tend to give naive "plain" meanings to foreign provisions. A judge might mistakenly believe that she must use a "plain meaning" method of statutory interpretation from the outset and then compound this error with the "discovery" of a mistaken "equivalence" of domestic and alien statutory terms. Most likely, judges merely apply such practices as the path of least resistance. Often, this occurs unconsciously: judges who optimistically search for similarities between familiar and unfamiliar law tend to "find" what they seek, in a self-deceiving process of "wish-fulfillment." Practitioners would thus benefit from a methodology that gives them the confidence and competence to assume more responsibility for their decisions.<sup>9</sup>

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Anon., 123 Eng. Rep. 789, (Admiralty Ct. 1611).

5. See *infra* note 77; ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 365 (1962) (the culmination of oral testimony of experts "can easily produce a caricature of the institution of medieval oath helpers"); John Henry Merryman, *Foreign Law as a Problem*, 19 STAN. J. INT'L L. 151, 157-59 (1983); Milton Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470, 473 (1978).

6. See RUDOLF S. SCHLESINGER ET AL., COMPARATIVE LAW 78-81 (5th ed. 1988) (for a brief survey of pertinent American procedure regarding proof of foreign law). See also John G. Sprankling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT'L L. 3, 4-30 (1983) (for a more detailed overview).

7. See Rudy J. Peritz, *Determination of Foreign Law Under Rule 44.1*, 10 TEX. INT'L L.J. 67, 88 (1975); Edwin P. Carpenter, Note, *Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1*, 10 WASHBURN L.J. 296, 304-05 (1971).

8. See discussion of some disadvantages to this approach analyzed *infra* note 229 and Part VI.D.

9. For better or for worse, in most of the world's nations, judges have an affirmative obligation to discover and rule on the substance of any foreign law presented to them. This compares to the obligation imposed upon most state courts with respect to the law of sister states. In contrast, states with "judicial notice statutes" for proving foreign law allow, but do not mandate, that judges take notice of other nations' laws. One article surveys more than fifty national legal systems and concludes that, "[w]ith the exception of the common law countries, a definite trend can be traced everywhere moving toward *ex-officio* application of foreign law." Stephen L. Sass, *Foreign Law in Civil Litigation: A Comparative Survey*, 16 AM. J. COMP. L. 332, 365-66 (1968). See also Carpenter, *supra* note 7, at 300-04. Germany's system requires judges to know or learn all law everywhere, but aid in this respect comes from national institutes devoted to foreign law research. See generally Douglas R. Tueller, *Reaching and Applying Foreign Law in West Germany: A Systematic Study*, 19 STAN. J. INT'L L. 99 (1983). For a number of reasons, the German program probably would not transplant effectively to the United States. *Id.* at 145-49; Merryman, *supra* note 5, at 161-62.

Part I of this article defines two major paradigms of statutory interpretation—the “plain meaning” rule and “dynamic” interpretation (my proposed default method). Part II discusses the pitfalls of legal translation and explicates the analogous problem of interpreting foreign law. Next, Part III introduces the techniques of comparative law as the essential tools of the statutory interpreter. In Part IV, I investigate whether the interpreter’s task is less burdensome due to the existence of universally espoused methods of statutory interpretation. The article begins to focus specifically on statutes, as opposed to foreign law generally, in Part IV.C. These first four parts set the groundwork for my suggestion in Part VI that interpreters should engage in a far-ranging yet brief study of the values underlying the foreign legal system as the best first step on the road to optimal interpretation. In particular, interpreters should look to such underlying values in order to determine which canons or methods of statutory interpretation fit the case at hand.

I proceed to analyze dynamic interpretation and the plain meaning doctrine and then touch upon a foreign law application in which the latter paradigm works well. Crucially, I argue that one can determine whether plain meaning will “work well” only by first invoking a generalized dynamic theoretic as outlined in Part V and justified systematically in Part VI. Tangentially, I inquire whether judges who adopt my proposals for translation and interpretation should openly discuss such stances in their opinions. Hence, Part VII initiates a search into the thorny problem of judicial candor. Finally, I turn to an application, summarizing the benefits of the English version of the plain meaning doctrine and suggesting how a U.S. judge interpreting an English statute should modify the doctrine for her own purposes. I collaterally discuss an example of how to approach a “syntactic” canon using my proposed methodology.

This article contains a comprehensive strategy: it presents similarities among translation, comparative law, and statutory interpretation. Roughly speaking, someone laboring in any of these three areas must stake out a position along a textualist-contextualist continuum. Thus, the more the reader of this article becomes convinced of the analogy among the three areas, the more I can reinforce my contextualist stand in any given area by marshaling the advantages of contextualism in a related area.

Another undercurrent running throughout this article treats foreign law as an area of controlled experiment, in which judges can learn to become discerning interpreters in a more general sense. I intend merely to provoke a preliminary discussion. Still, my approach, which discourages judges from totally forsaking their customary terminology and methods, hopefully stands less open than some to the following critique:

Calabresi's [and other contemporary liberal scholars' vision of the] heroic judge, who can digest an extraordinary variety of materials—legal doctrine, popular belief, science, history, and so forth—and transform them into a coherent vision that will educate the legislature along with the rest of the laity . . . has more to do with a scholar's heroic ideal of a deep judicial mind and spirit brooding over a rich scholar's universe of legal principles than it does with the world of real judges.<sup>10</sup>

Instead, I believe that judges can rise to the occasion.<sup>11</sup>

## I. DEFINING TWO METHODS OF STATUTORY INTERPRETATION

The long jurisprudential history of statutory interpretation<sup>12</sup> is characterized by continual warfare between textualist and contextualist methodologies. In this article, I concentrate on one representative pair of such enemies: the plain meaning rule (often used by U.S. judges ascertaining foreign law) and dynamic statutory interpretation (a sophisticated tool which, I will argue, should replace plain meaning as the default doctrine in this area). For convenience, I broadly sketch the contours of the two methodologies here. Later, some problems involved in using broad definitions will become apparent.

### A. *The Plain Meaning Rule*

The simplest statement of the plain meaning rule is: "[F]ollow the plain meaning of the statutory text, except when [the] text suggests an absurd result or a scrivener's error."<sup>13</sup> But, before plunging into the doctrine, it is well to listen to Professor Summers, who warns that, "The argument from ordinary meaning is exceedingly complex. . . . There is much about the argument that we do not yet fully understand."<sup>14</sup> I use "plain meaning

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10. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 256–57 (1983).

11. See Richard A. Posner, *Legislation and its Interpretation: A Primer*, 68 NEB. L. REV. 431, 450 (1989) (a pragmatic approach is "taken by the best judges and is thus an attainable ideal").

12. For a "short jurisprudential history," beginning in the Western tradition with Aristotle, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 2–5 (1994).

13. *Id.* at 323 (citations omitted).

14. Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302, 1319, 1324–25 (1991). A study of statutory interpretation techniques of several nations frequently notes that when courts speak of "literal meaning," they "can refer to several entirely different things." See, e.g., Michel Troper et al., *Statutory Interpretation in France*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 182 (D. Neil MacCormick & Robert S. Summers, eds., 1991) [hereinafter MACCORMICK & SUMMERS] (collection of works each

doctrine" to refer to a set consisting of two separate methodologies. One method declares that if the statutory provision in question is "unambiguous," the interpreter will look no further. The other method tries to discern "ordinary" meaning. This latter technique admits that ordinary meaning can prove ambiguous at times and that a text deemed unambiguous by an extraordinary community can remain ambiguous when construed by ordinary people. Thus, a crucial difficulty for the "ordinary meaning" method involves defining the relevant interpretive community:

Should the standard for ordinary meaning be set by how a lay person would understand the disputed statutory terms? Should it rather be set by the standard of a lay person who is a "competent and informed user of ordinary language"? Or perhaps a nonlegal technical usage . . . ? On the other hand, is a nonspecialist lawyer's reading the proper norm? Or . . . a specialist in the legal area that a statute addresses?<sup>15</sup>

Another problem with the "ordinary"- "unambiguous" dichotomy is that judges often conflate the two strands.

The plain meaning rule can sometimes stake out an originalist position. In that case, the user will examine legislative history to verify that what she believes constitutes the plain meaning that had been equally "plain" to members of Congress. The user follows plain meaning because it best indicates legislative purpose or intent.<sup>16</sup> Or, a public choice theorist can cleave to a "harder" version of the rule, seemingly uninterested in the actual expectations of the enacting legislature.

Then again, according to another typology, the plain meaning doctrine varies according to the scope of its permissible sources. Deployed at its least sophisticated level, the doctrine examines a word or phrase without recourse to the rest of the statute, related statutes, or any other contextual information.<sup>17</sup> As my empirical study reveals, courts apparently quite often resort to this rudimentary technique when trying to interpret foreign law.<sup>18</sup> Regarding the other extreme of interpretive sophistication, I will not discuss under the rubric of plain meaning doctrine the idea that the ordinary

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discussing statutory interpretation in an individual country; MacCormick & Summers oversaw "The Comparative Statutory Interpretation Group"); *infra* Part IV.E.

15. George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 374-75 (1995) (footnotes omitted). MacCormick and Summers assume the *nonspecialist lawyer's* reading. See MACCORMICK & SUMMERS, *supra* note 14, at 517.

16. *Id.* at 521.

17. "There is what we might call an immature textualism—a textualism that just ignores the context in meaning, as if meaning were carried in the words." Lawrence Lessig, *The Limits of Lieber*, 16 CARDOZO L. REV. 2249, 2250 (1995).

18. See *infra* note 126.

meaning of a text always remains one fundamental aspect to its correct interpretation.<sup>19</sup>

Neither will this article dwell on the so-called new textualism. On the one hand, new textualism falls between the two extremes just delineated. That doctrine does not permit resort to legislative history except perhaps under some unusual circumstances, although it does permit investigation of the whole statute, related statutes, and perhaps other materials. Its adherents search for "ordinary" meaning.<sup>20</sup> On the other hand, the doctrine is "a consciously dynamic approach," if an "excessively narrow" one.<sup>21</sup> Instead of joining the ranks of Scalia-analyzers, I devote a subsequent portion of the article to England's use of legislative history, in which a Scalia-inspired focus on political structure generates additional insights and frustrations without, however, engaging most of the subtleties of the new textualism.

### B. Dynamic Statutory Interpretation

This section summarizes the view of the dynamic interpreter *par excellence* William Eskridge, primarily as synthesized in his 1994 book. One can define this approach by its negation of originalism; dynamic interpretation does not seek to divine the intent of the enacting legislature or to glean meaning from the statutory language *per se*.<sup>22</sup> To put the matter affirmatively, the dynamic approach maintains the desirability of interpretations of a given statute changing over time to reflect evolving societal norms. The approach charts a definite hierarchy of permissible sources, graphically depicted as a "funnel of abstraction." "Interpretive inquir[ies]" from the most to least abstract (the least abstract being at the apex of the funnel) are hierarchized as follows:

Current values

Evolution of statute

Legislative purpose

Imaginative reconstruction & legislative history

Whole act

Statutory text<sup>23</sup>

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19. Discussed *infra* in text accompanying note 27.

20. Justice Scalia, at least, does so. See *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

21. ESKRIDGE, *supra* note 12, at 118-19.

22. See John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2215 (1995) (reviewing ESKRIDGE, *supra* note 12).

23. ESKRIDGE, *supra* note 12, at 56 (original diagram in William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990)).



Eskridge emphasizes that the interpreter should always start with the statutory text, which plays a prominent role and will prove controlling in many if not most cases. She should give particular deference to the text when the statute has been recently enacted or tightly drafted.<sup>24</sup>

Yet the interpreter should "slide up and down the funnel,"<sup>25</sup> granting each contextual factor some weight, for "[t]he funnel assumes that the strongest interpretation is one that, like a cable, weaves together several mutually supporting threads."<sup>26</sup> Indeed, Eskridge notes that the historical, evolutive, and textual vectors interconnect and mutually influence each other:

[T]he statutory interpreter's understanding of the plain meaning of a . . . text depends on her understanding the whole story of the statute, including its historical circumstances and its evolution, which themselves cannot be understood without reference to the statute's plain meaning.<sup>27</sup>

Here, Eskridge refers to the plain meaning not of ordinary speakers of English but rather of those lawyers who know (at least some of) the legislation's history. He suggests on occasion that legislated texts should remain the primary source for interpretation because "citizens" rely on such texts.<sup>28</sup> That claim, however, is highly doubtful unless we mean that citizens sometimes rely on their lawyers' interpretations. With few exceptions, then, it suffices to consider meaning in light of "legal insiders' understandings."<sup>29</sup>

The insiders' perspective, however, is by definition conservative, and Eskridge does not hide his preference for the interpretive status quo. The judge should not abandon the prevailing canons of construction or social order without due justification. Those justifications most pertinent to foreign statutes will be analyzed in Part VI below.

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24. See *infra* Parts VI.F and VIII.B.

25. ESKRIDGE, *supra* note 12, at 56.

26. *Id.* at 200.

27. *Id.* at 63, 64. Notoriously, Stanley Fish would go even further in claims for the socially constructed nature of background conditions of "obvious" textual intelligibility. See, e.g., STANLEY FISH, *DOING WHAT COMES NATURALLY* 300-02, 329-30 (1989).

28. See William N. Eskridge, Jr. & Philip P. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26, 57 (1994).

29. See Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057 (1995), and *infra* text accompanying notes 207-214 ("rule of law" values upheld by insiders constrained by rich contextual understandings).

## II. TRANSLATION & INTERPRETATION

### A. Translation

Scholars and professional linguists realize that translation is an extremely complex and creative activity. It thus sets a treacherous trap for the naive.<sup>30</sup> Yet few in the U.S. legal profession appreciate or discuss the translation process.<sup>31</sup> Since anglophone judges have been given little scholarly guidance about how to scrutinize other people's translations of foreign statutes, since they rarely possess bilingual competency themselves<sup>32</sup> or have the resources to demand competent new translations from relatively impartial parties, it is not surprising that the cases sometimes make glaring translation errors.<sup>33</sup>

30. See John C. McKenzie & Antonio R. Sarabia, *The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353, 368, 373 (1956); Fritz Moses, *International Legal Practice*, 4 FORDHAM L. REV. 244, 248-53 (1935) (giving examples); Otto C. Sommerich & Benjamin Busch, *The Expert Witness and Proof of Foreign Law*, 38 CORNELL L.Q. 125, 158 (1953).

31. See, e.g., Peter W. Schroth, *Legal Translation*, 34 AM. J. COMP. L. 47 (1986 Supp.) ("Despite its great practical importance, legal translation is little discussed; despite its difficulty, it is frequently assigned to translators without legal training. Plainly both the importance and the difficulty are commonly underestimated."); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 20 (1991) ("The complexity of the problems involved in legal translation makes the carelessness with which they are approached seem incredible."). A federal district judge recently suggested that translation is a simple, mechanical process. See *Williams v. Arndt*, 626 F. Supp. 571, 577 (D. Mass. 1985) (comparing the allegedly "mere clerical function" of a computer programmer writing source code to someone translating "any foreign language").

32. See Sprankling & Lanyi, *supra* note 6, at 35. See also SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 17 (1990). An exception: a federal district judge whose fortuitous knowledge of Romanian helped him to understand the governing Romanian law. See *In re The Prahova*, 38 F. Supp. 418 (S.D. Cal. 1941).

33. See William B. Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CAL. L. REV. 23, 33 n.68 (1957). See also Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1031 & n.76 (1941) (listing the "inevitabl[e] . . . few instances in which courts, because of errors in translation or for other reasons, have made incorrect findings of foreign law"); Sommerich & Busch, *supra* note 30, at 158-59 n.141; Andrew N. Adler, *Pleading and Proof of Foreign Law in American Courts: A 1983-1995 Supplement to Adrien Wing's Annotated Bibliography* § 4 (1997) (unpublished manuscript, on file with author).

A 1953 examination of available English and New York cases "indicates persuasive precedent for the conclusion that expert witnesses on foreign law need not be members of the Bar of the foreign jurisdiction with respect to which the testimony is given, and indeed, need not even be lawyers." Sommerich & Busch, *supra* note 30, at 150. The incompetence of such witnesses has been manifest for some time. In *McFadden v. Mitchell*, 61 Cal. 148 (1882), portions from a Spanish law dictionary were introduced into evidence, as translated by a non-lawyer who claimed to be "acquainted . . . to some extent" with Mexican law. Nobody objected. See also *Banco de Sonora v. Bankers' Mut. Casualty Co.*, 100 N.W. 536 (Iowa 1904) (party offered to present as evidence definition from a law dictionary allegedly in

Understanding even the basic conclusions of contemporary translation theory could significantly assist monolingual lawyers and judges. To make discussion of translation a little less daunting, Lawrence Lessig separates the process of translation into two components, "familiarity" and "equivalence." Familiarity requires that the translator feel "at home" in the wider cultures of each language (i.e., the source *and* the target language). Ideally, she should "develop modes of thinking that reconnect her with the dynamic fields of words, modes of thinking that will allow her to explore meaning associations within a word and meaning connections created by words in a specific context."<sup>34</sup> In fact, experience shows that even if one hopes to master a specialized vocabulary within a foreign language, the best way to do so involves first studying that language much more generally.<sup>35</sup>

Next, translation endeavors to find "equivalence in meaning" between the two familiar contexts. Two problems, however, immediately confront the translator.<sup>36</sup> First, languages never exactly "map" onto one another. For example, to translate "I hired a worker" into Russian, one must know whether the worker was male or female. Conversely, consider the task of translating into English what appears to be "female worker" in Russian. From the perspective of the English speaker, the fact that the sex of the worker was specified suggests that it is significant; but from the perspective of the Russian, because it is necessary to specify the sex, the sex is not significant.<sup>37</sup>

Of course, more significant and subtle translative "gaps" exist. For instance, the French word *contrat* includes agreements that Americans would instead regard as "conveyances" or "trusts," and excludes various other documents that we call "contracts."<sup>38</sup> The trap of similar spelling is compounded here by the relatively abundant use by the French of synecdoche, the figure of speech in which a part substitutes for the whole (e.g., a "hired hand"). Thus, French jurists define *contrat* by mentioning the

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common use in civil law countries, as interpreted by a so-called expert who had studied the civil law in general, but not the law of the country in question).

34. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1194-96 (1993) (quoting Rainer Schulte & John Biguenet, *Preface*, in THEORIES OF TRANSLATION xi (Rainer Schulte & John Biguenet eds., 1992)).

35. See William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1947 (1995).

36. The ensuing discussion derives primarily from Lessig, *supra* note 34, at 1200-07.

37. *Id.* (citations omitted). For a more interesting example of gendered translation (in the Swiss Civil Code), see Schroth, *supra* note 31, at 55.

38. See Sacco, *supra* note 31, at 12-13. See also Sacco's example of "trespass to land," *id.* at 20, and Alexander's of the word "source" in tax law. See George S. Alexander, *The Application & Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U. L. REV. 602, 629 n.121 (1975).

will without mentioning the need for the will to be declared or the requirement that there be a cause (roughly speaking, a good reason for the parties to declare their will and for the law to respect it).<sup>39</sup> A translator not aware of the synechdochal formulation will render a literal translation that leaves out key elements of the French concept.

Examples abound of other legal *faux amis*, words that look similar but mean different things. Thus, the French *hypothèque* is not an exact synonym for the common law mortgage on real property (viz., "hypothecation"), contrary to what *Black's Law Dictionary* implies.<sup>40</sup> Another illustration, the slight difference between "act of God" and *cas fortuit ou de force majeure*, had an "important effect" on a judicial holding in Québec.<sup>41</sup> In Louisiana, importation of the civil law tradition has resulted in some notorious mistranslations from originally French statutes. The French word for "cause" has been mistranslated as "cause of action,"<sup>42</sup> and the word "support" in a Louisiana statute is an erroneous rendering of *secours* (help or aid).<sup>43</sup>

Two identically spelled words sometimes require mapping, too. Schroth notes the danger in "assum[ing] that 'consideration' has the same meaning in Connecticut and England, or that *jurisprudencia* is the same concept in Mexico and Spain."<sup>44</sup> In fact, as a commentator on translations of civil codes cautions, "Every legal term carries a variety of secondary associations conjured up from the lawyer's accumulated knowledge of law, giving the term a different coloring than it has in the foreign legal system."<sup>45</sup> Another lawyer further notes, "An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces, and hence the similarity may be due to the purest coincidence."<sup>46</sup>

The examples mentioned above represent the tip of an iceberg which leads judges insidiously to presume all sorts of identical concepts supposedly shared among diverse legal systems. In the realm of linguistics,

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39. See Sacco, *supra* note 31, at 14–15.

40. See BLACK'S LAW DICTIONARY 742–43 (6th ed. 1990).

41. See Michael Beaupré, *La Traduction Juridique: Introduction*, 28 LES CAHIERS DE DROIT [C. de D.] 733, 742 (1987) (discussing Gulf Oil Canada Ltd. c. Canadien Pacifique Ltée, [1979] C.S. 72, 73, 75).

42. See, e.g., *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 619 (8th Cir. 1994) (most recent of several cases noting the mistranslation).

43. *Smith v. Smith*, 382 So.2d 972, 974 (La. App. 1980).

44. Schroth, *supra* note 31, at 53.

45. Charles Szladits, *Note on Translations of Foreign Civil and Commercial Codes*, 3 AM. J. COMP. L. 67, 71 (1954).

46. Pierre Lepaulle, *The Function of Comparative Law*, 35 HARV. L. REV. 838, 853 (1922).

several scholars have proposed various semantic or syntactic universals. The search for any invariant core across translations, however, has proven fruitless thus far.<sup>47</sup> Unfortunately, then, a translator cannot rely on any facile formulae to dodge the problem of "false similarities." Indeed, two countries can speak closely related languages yet cultivate markedly different legal systems. Such is the case of Germany and the Netherlands, between which a high incidence of false similarities in legal vocabulary exists.<sup>48</sup> Furthermore, very dissimilar legal cultures still present the problem of false similarities in translation, as exemplified by William Jones' careful treatment of classical Chinese texts:

[O]ne of the dangers in using Western legal categories as the basis for analyzing Chinese law is that we will tend to concentrate our attention on those aspects of the Chinese legal order that seem most similar to our own legal doctrines and practices, regardless of whether these aspects are indeed central in the Chinese legal context. . . . [T]he elements of crimes as defined in the Qing Dynasty legal code are remarkably similar to those in the equivalent Western criminal laws . . . . [T]he concept of "criminal law" inherent in the Qing Code is fundamentally different from that in Western culture. Whereas Western criminal law sees crime as a violation of the right of individuals to be secure in their persons and property, the imperial Chinese legal order saw crime as a disruption of governmental control. Taking surface similarities between Chinese and Western law at face value, then, obscures the fundamental differences that may exist between these two legal order.<sup>49</sup>

Mapping, say, *contrat* onto "contract" demands creativity. Options for the translator may include (1) listing some or several of the specific discrepancies in a footnote; (2) trying to find general values or principles in the French and Anglo-American legal systems that explain the origin and persistence of the terminological discrepancy; (3) inventing a new word; (4) refusing to translate; or (5) ignoring the inexactness—i.e., construing the isomorphic terms as identical. Under the circumstances,

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47. See SUSAN BASSNETT-MCGUIRE, *TRANSLATION STUDIES* 26–27 (rev. ed. 1991) (Popović); EDWIN GENTZLER, *CONTEMPORARY TRANSLATION THEORIES* 63–67 (1993) (Wilss); *id.* at 70 (Neubert). The hope for constructing a "legal metalanguage," as a practical goal for the future, seems somewhat less hopeless. See G-R de Groot, *La Traduction Juridique: The Point of View of the Comparative Lawyer*, 28 *LES CAHIERS DE DROIT* [C. de D.] 793, 804 (1987).

48. De Groot, *supra* note 47, at 800 n.25.

49. Janet E. Ainsworth, *On Seeing Chinese Law from the Chinese Point of View: An Appreciative Look at the Scholarly Career of Professor William Jones*, 74 *WASH. U. L.Q.* 547, 555–56 (1996) (citations omitted).

perhaps the most useful advice one can give to professional legal translators asks them to craft "slightly unusual vocabulary and diction . . . to preserve distance, to maintain the reader's suspicion."<sup>50</sup> This suggestion does not meet with universal approval among practitioners. For instance, an article from the mid-1950s advocates the opposite procedure:

[I]t is essential that the final draft of the translation be completed by a person who knows no language other than English. That is, the final version in English must not have a construction or ring that is foreign to the English-speaking judge or juror.<sup>51</sup>

Nevertheless, among (non-legal) translators, such intentionally strange translations are widely advocated by a spectrum of different theoretical schools.<sup>52</sup>

The second "equivalence" problem, related to the "mapping" problem, is that various norms of equivalence inhere in various institutional practices. One of the key contributions of translation theory in the 1980s was "the discovery of the importance of first establishing what norms govern translation behavior before analyzing specific translations," since "every instant of the translation process is governed by norms."<sup>53</sup> In other words, translation is conceptualized as a cultural, not merely linguistic, phenomenon.<sup>54</sup> For example, it may suffice for certain purposes and audiences to translate *contrat* as "contract," but we cannot find a practice-independent guide to what suffices and what does not. Different translations of the same phrase may be required depending upon

50. Schroth, *supra* note 31, at 58; *see also id.* at 59, 65; JAMES BOYD WHITE, JUSTICE AS TRANSLATION 300 n.18 (1990); Ainsworth, *supra* note 49, at 549 (when translating classical Chinese laws, Professor William Jones "consciously avoided legal terminology 'too charged with precise legal meaning for English-speaking lawyers . . .'). *See generally* Sacco, *supra* note 31, at 14-20 (suggestions include that the translator can retain the source word or create her own, new word).

51. McKenzie & Sarabia, *supra* note 30, at 367 (emphasis omitted). This claim met with immediate criticism, although it was later resurrected. *See* Stern, *supra* note 33, at 34. To give McKenzie & Sarabia their due, these lawyers did recognize the useful "startle effect" derived from emphasizing the "distortion of meaning that is inevitable in literal translation." McKenzie & Sarabia, *supra* note 30, at 369.

52. For a history of the "defamiliarization" procedure, *see* BASSNETT-MCGUIRE, *supra* note 47, at 67-68, 71-72. Walter Benjamin and José Ortega y Gasset are two of the more influential proponents of this shock-effect technique. For Benjamin, *see* John Johnston, *Translation as Simulacrum*, in *RETHINKING TRANSLATION* 42, 44-45 (Lawrence Venuti ed., 1992); *THEORIES OF TRANSLATION* 4, 8 (Rainer Schulte & John Biguenet eds., 1992); GENTZLER, *supra* note 47, at 194. For Gasset, *see* José Ortega y Gasset, *The Misery and the Splendor of Translation*, in *THEORIES OF TRANSLATION*, *supra*, at 93, 108-12.

53. GENTZLER, *supra* note 47, at 136.

54. *See id.* at 185, 188.

whether one translates a statute or a contract, or in a brief as opposed to a memorandum.<sup>55</sup>

It follows logically yet crucially from these components of translation that "legal translation really means a lesson in comparative law."<sup>56</sup> Someone fluent in a foreign language will not necessarily be able to competently translate legal documents,<sup>57</sup> for the familiarity and equivalence skills required must be specifically legal. The U.S. practitioner confronted by the alien text must *self-consciously* confront the unfamiliarity of both language and law. That is, compared with a lawyer who interprets a law without first having to translate it, the translator occupies a position of greater power. If this power is used well, the translation process will alert the translator to potential problems and point the way to potential solutions.

For example, no monolingual English-speaking lawyer presented with a contemporary Turkish statute, a Turkish-to-English dictionary, and a Turkish legal dictionary for Turks would presume to divine with any alacrity the "meaning" of the statute or the "intent" of the Turkish legislature. (In comparison, the same lawyer might well jump to conclusions, based upon a single reading, about a two hundred year-old U.S. law.) In the former case, the "startle effect" of the language barrier would immediately convey to anyone the grave dangers of each stage of the enterprise—viz., "literal" (bilingual dictionary) translation and facile (legal dictionary) interpretation.<sup>58</sup> In fact, the more information at the U.S. practitioner's disposal about the Turkish interpretive community, including the higher degree of *familiarity* with the foreign cultural matrix, including language and law, the easier will be the search for *approximate equivalences* between the foreign and domestic systems. One can apply a foreign statute only if one can understand it, and one can understand it only if one has some basis for comparison.

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55. This discussion is somewhat prefigured in Beaupré, *supra* note 41, at 739. Much more generally, it is prefigured in the work of reader-response critics, including but not limited to those cited below (Riffaterre, Fish, Culler, W. B. Michaels). See generally Vincent B. Leitch, *Reader-Response Criticism*, in READERS & READING 32–65 (Andrew Bennett ed., 1995).

56. Schroth, *supra* note 31, at 49. See also *id.* at 53 ("The problem of legal translation is the problem of comparative law . . ."); de Groot, *supra* note 47, at 797, 798.

57. Beaupré, *supra* note 47, at 744; de Groot, *supra* note 48, at 811.

58. The language barrier hopefully would also alert that person to the interrelationship between translation and interpretation. Several mid-twentieth century law review articles share the naive assumption, discarded in my discussion just below, that in practice one can separate "translation" from "interpretation" and should assiduously try to avoid the latter while plying the former. See, e.g., Stern, *supra* note 33, at 33, n.69, 34; McKenzie & Sarabia, *supra* note 30, at 360–61.

Yet, if the novice U.S. lawyer knows little about Turkey, I will argue that she should initially search for a "basis of comparison" at the level of political values which will help to explain the relationship between the Turkish legislature and courts. The reason why this level of initial comparison is optimal for dealing with statutes will unfold in my later discussion of comparative law, but here I link this procedure for translation of statutes to an analogous strand of translation theory. We should consider adopting Michael Riffaterre's suggestion that a translation must somehow show—but not necessarily in the same way as the original—that the text belongs to a particular *genre* and tries to achieve particular *formal functions*.<sup>59</sup> Although Riffaterre and virtually all others who discuss genre, formalism, or functionality in this context concern themselves solely with *literary* translation,<sup>60</sup> it pays to see how one can conform this approach to statutory translation as well<sup>61</sup>—if only ultimately to indicate again the perils of legal translation.

Here is an example of a formal function that could possibly avail as one basis for statutory translation. "Ambiguity" constitutes one of the "categories of expression" that translators of literary texts frequently want to preserve.<sup>62</sup> Yet ambiguity is a functional device for statutes, too. According to some legal process and public choice theorists, legislators sometimes effect compromise by deliberately writing ambiguous laws, so that the courts later must decide the issues that the legislators cannot or will not decide for themselves.<sup>63</sup>

Let us now assume that someone needs to translate a rather vaguely worded statute adopted by Nation S. We know that not every ambiguous phrase in the source language can be translated into ambiguous terms in the target language. Therefore, the translator hoping to preserve a pervading vagueness in the overall text may opt to turn some unambiguous source phrases into ambiguous target phrases. This is not an easy task.

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59. Michael Riffaterre, *Transposing Presuppositions on the Semiotics of Literary Translation*, in THEORIES OF TRANSLATION, *supra* note 52, at 204, 205.

60. Indeed, Riffaterre begins his article by distinguishing literary from non-literary translation in three ways. *Id.* at 204; *see also* GENTZLER, *supra* note 47, at 99 (formalist translation studies, despite protestations to the contrary, really focus only on literary translation). *But see* Octavio Paz, *Translation: Literature and Letters*, in THEORIES OF TRANSLATION, *supra* note 52, at 152, 154–55 (concluding that all translation is literary translation).

61. Compare Taylor's comment that statutes can be viewed as a genre of law. Taylor, *supra* note 15, at 345.

62. Hugo Friedrich, *On the Art of Translation*, in THEORIES OF TRANSLATION, *supra* note 52, at 11, 16; GENTZLER, *supra* note 47, at 85.

63. *See* Jeffrey W. Barnes, *The Odd Couple: Statutes and Literature*, in J. NEVILLE TURNER & PAMELA WILLIAMS, *THE HAPPY COUPLE: LAW AND LITERATURE* 296, 303–04 (1995); Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911, 920 (1996). *See generally* ESKRIDGE, *supra* note 12, at 141–73.



In general, this "functional" approach works poorly when translating entire legal instruments such as statutes or treaties:

A translator of a novel has the luxury of making up for what is omitted here by developing it there. But in translating a treaty or a contract, one must consider the very likely possibility of interpretation of a sentence or a section out of context. Hence whatever clarification there is to be must accompany the very passage to be clarified.<sup>64</sup>

We can add: "Whatever ambiguity there is to be should ideally accompany the very passage to be rendered ambiguous."<sup>65</sup>

Nevertheless, given that attempting literal translation can result in ponderous, clumsy, and biased results,<sup>66</sup> the functional approach has an advantage: it forces the translator more openly to confront her biases, rather than to assume (always erroneously) that she does not harbor any. In the above example, it turns out that the very concept of "ambiguity" is unstable because it is subject to bias. If the translator believes that the source-text vagueness is merely accidental, akin to successive drafting errors, then she might try to annotate every ambiguous word in the source text, explaining each probable meaning. This process might involve a cumbersome if not overwhelming task, except that a translator who does not initially read a text expecting to find massive ambiguity is unlikely to "discover" it. In contrast, a translator who firmly believes that Nation S's legislature is prone to compromise and hence to deliberate vagueness will unconsciously generate or emphasize equivocality in the source, much as the New Critics manipulated poetry.<sup>67</sup>

That is, the translator herself helps determine *sub silentio* how vaguely worded the final translation will be. But, if she knows beforehand that her theory of legislative behavior will color her work, she stands a step closer to producing the best translation possible under the circumstances. To put the lesson more generally, the translator should always strive to remain self-conscious about the methods she embraces.

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64. Schroth, *supra* note 31, at 57.

65. Moreover, even literary translators have heaped criticism upon the functional approach. See, e.g., BASSNETT-MCGUIRE, *supra* note 47, at 26; GENTZLER, *supra* note 47, at 72, 88, 98.

66. Vladimir Nabokov is the only major commentator who has insisted that only literal translation is valid. THEORIES OF TRANSLATION, *supra* note 52, at 6; Vladimir Nabokov, *Problems of Translation: Onegin in English*, in *id.*, at 127. Many others argue that the goal is always elusive. Further, Nabokov's translation of Pushkin's *Eugene Onegin* requires "footnotes reaching up like skyscrapers" in order to achieve intelligibility. See *id.* at 143.

67. The New Critics highly praised ambiguity in poetry, and consequently they managed to ferret out such ambiguity wherever they looked. See, e.g., R. S. Crane, CRITICS & CRITICISM: ANCIENT & MODERN 20 (R. S. Crane ed., 1952).

If, say, she has to “ignore the plain language of the text in one context to convey the same meaning in a second,”<sup>68</sup> she should realize that she has made choices about what constitutes “plain language” or “the same meaning” based upon her perceptions of the norms and functions of statutory translation. Every statute is a formal, legislative document, “an artifact rather than a plain representation of reality,”<sup>69</sup> and it needs to be translated as such.

In fact, the translator ideally must exercise even greater legal imagination than already intimated in the above example. For, not only should the translator take a stance about the desirability of ambiguity in the alien code as applied by an alien court, but she should also consider the audience for the translation. The technique of “defamiliarizing” the target audience can progress only so far before it backfires. For instance, suppose that the original law is normally interpreted by Nation S courts which are adept at construing very vague legislation. A “literal” translation may seriously confuse a Nation T court which interprets only relatively exact statutes.<sup>70</sup> The best solution for an S-to-T translation will keep as much of the Nation S statutory style as remains comprehensible to Nation T judges. In other words, the final result will be a “hybrid” between two styles, perhaps representing two different substantive approaches to the legislative process.

Although these statements beg a variety of questions, much of the remainder of this article will devote itself to such concerns. I will discuss below how all statutory interpretation, not just translation, shares this problem of specifying an audience. Here, I simply note that a great deal of contemporary translation theory reflects upon this problem. As mentioned above under the rubric of “norms of equivalence,” scholars now understand that “equivalence,” and “acceptability” in the receiving culture, are empirical (practice-dependent) matters, and that translations remain valid only for a given time horizon within a given receiving culture.<sup>71</sup> I now list two ramifications of this insight addressed at greater length below (with reference to interpretation, not just translation):

1. *Improvement*—Should the translator of statutes try to “improve” the text to be translated—making it clearer or even fairer? Often, translation theorists frown upon efforts to improve the original; yet particularly in certain eras, various individuals have waxed poetic about

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68. Lessig, *supra* note 34, at 1206.

69. Riffaterre, *supra* note 59, at 205 (referring to literary texts).

70. England is such a Nation T. See discussion *infra* Part VIII.A. Compare, for example, Germany, where federal legislation often has the character of compromise. See MAC-CORMICK & SUMMERS, *supra* note 14, at 116–17 (explaining why).

71. See, e.g., GENTZLER, *supra* note 47, at 128–34; Henry Schogt, *Semantic Theory and Translation Theory*, in THEORIES OF TRANSLATION, *supra* note 52, at 193, 199–201.

the potential enrichment of the target language and culture initiated by the audience-oriented component of translation.<sup>72</sup> Lessig has introduced a useful distinction between two kinds of "humility" that a judge (and her agents and witnesses) arguably should exercise when translating:<sup>73</sup> "structural humility" which will limit the scope of the translation when political reasons so dictate<sup>74</sup> and "humility of capacity" which will cabin the judge's efforts towards improvement when she does not have the resources or knowledge to accomplish the task competently.<sup>75</sup> Not coincidentally, these are precisely the restraints on contextualism that I stress below.

2. *Unconscious Bias*—Above, I have maintained that the problem of unconscious bias is critical when considering translation as an institutional practice. When translating, as elsewhere, people tend to find what they seek. In general, commentators have become increasingly mindful that even well-meaning experts—including those appointed by the court—can harbor unconscious biases.<sup>76</sup> Even law professors (whom at least two scholars recommend as the least partisan experts<sup>77</sup>) have theoretical predilections which color their translations. Yet scholars have produced case studies demonstrating the unconscious manipulations in various translated texts,<sup>78</sup> and the legal community should take heed of such work and spearhead analogous studies. Meanwhile, judges should

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72. The "dominant characteristic" of Renaissance European translation theories involved the effort to surpass the original, "to go beyond the appropriation of content to a releasing of those linguistic and aesthetic energies that heretofore had existed only as pure possibility in one's own language . . . ." Friedrich, *supra* note 62, at 13. Some features of this sentiment are taken up by J. B. White in his aptly named book, *JUSTICE AS TRANSLATION* (1990). Today, deconstructionists argue not only that translation opens up new avenues and extends boundaries within language, but also that the source text is dependent upon the target text—with each new translation helping to reconstruct or enlarge the source text. See GENTZLER, *supra* note 47, at 144–62. Thus, the *originating* community can also learn about itself by examining the manner of its translation.

73. Lessig, *supra* note 35, at 1207–11, 1251–52. The author primarily discusses translation as a metaphor for interpretation. See *id.* at 1190–91.

74. See *id.* at 1252–61.

75. See *id.* at 1261–62.

76. Sprankling & Lanyi, *supra* note 6, at 52–53, 60. Writing more generally, Lawrence Solan notes that "enormous amounts of interpretation occur without our ever noticing it." LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 186 (1993); cf. ESKRIDGE, *supra* note 12, at 65 ("The statutory interpreter is constrained—often unconsciously—by the traditions of the surrounding culture and of her professional culture, just as all interpreters are.").

77. Hans W. Baade, *cited in* Sprankling & Lanyi, *supra* note 6, at 52 n.306; Thomas F. Bridgman, *Proof of Foreign Law & Facts*, 45 J. AIR L. & COMM. 845, 859–60 (1980).

78. Edwin Gentzler suggests that: "[p]erhaps the single greatest asset of Translation Studies . . . is the increasing awareness by scholars in other fields that, in the analysis of translation, elements of the functioning of the unconscious can be seen." GENTZLER, *supra* note 47, at 194–95. Gentzler then summarizes some scholarly work that potentially exposes such unconscious manipulations within cultural/literary translations. *Id.* at 195–96.

responsibly monitor the translations not only of court interpreters<sup>79</sup> but also of expert witnesses, clerks, special masters, alien courts (via certification), and so forth.

### B. Interpretation

Interpretation constitutes another component of the important inter-relationship between translation and comparative law. In many respects, legal translation is a special case of legal interpretation. James Boyd White and Lawrence Lessig are the two most forceful recent advocates of this insight.<sup>80</sup> White states boldly that:

Interpretation is directly continuous with translation, for one who seeks to make a text in response to a text in his *own* language must inhabit his own version of the translator's uncertain space, knowing that it is impossible fully to reproduce the meaning of the prior text except in the words of the prior text, in its context, yet knowing as well that conversations *can* take place about such texts in which they are for some purposes, and in some ways, usefully represented in other terms.<sup>81</sup>

Lessig also envisions a continuum:

Every act of communication, the theorist of translation asserts, is an act of translation. And if so, then what distinguishes among communications is simply the extent to which this process of translation is more or less self-conscious, or the extent to which the translators are conscious of the role the background has on meaning in the foreground. So as a matter of description,

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79. See BERK-SELIGSON, *supra* note 33; and sources listed in Schroth, *supra* note 31, at 62 n.33.

80. Lessig traces the idea's legal history through the 1980's. Lessig, *supra* note 34, at 1172 n.32. Lessig also suggests that a century ago Francis Lieber "may have captured the essence of translation in his distinction between 'interpretation' and 'construction.'" *Id.*; see also Lessig, *supra* note 17, at 2249.

Specialists in comparative law frequently invoke the term "translate" in the double sense of traditional translation *and* interpretation. See, e.g., Sprankling & Lanyi, *supra* note 6, at 43 (The expert witness on foreign law "must 'translate' the foreign law into terms comprehensible to non-experts. Since foreign law must undergo a double interpretation—once within its own legal framework and again when it is brought into the American legal system—before it can be applied, the expert must be trained and fluent in both languages and legal cultures.") (citations omitted). In the following sentence lifted from a judicial opinion interpreting the Warsaw Convention, one can discern only in context that the source text of the treaty is in English: "The crux of the problem is that the Appellate Division reached its conclusion by applying mechanically the *literal* translation of a phrase without an analysis of the treaty." *Eck v. United Arab Airlines, Inc.*, 203 N.E.2d 640, 641 (N.Y. 1964).

81. WHITE, *supra* note 51, at 236 (emphasis added); see generally *id.*, pt. 3 (for a nuanced elaboration).

we could array cases along a dimension that tracks the closeness of the interpretive contexts between the source and target texts (so that at one end stand cases of translation between languages, and at the other cases of communication within a community). And when so arrayed, we would also have aligned cases by the extent to which a process of translation is ordinarily self-conscious or apparent.<sup>82</sup>

Lessig then concentrates on intermediate cases, "where the language is nominally the same but the interpretive contexts are radically different."<sup>83</sup>

As I now justify, however, one must dive into philosophy, history, and the social sciences in order to gain pragmatic familiarity with foreign law. It turns out that an apprehension of the values underlying legal institutions represents the key to accurate legal translation *and* interpretation. Therefore, the first task that the interpreter should tackle, possibly even before she realizes that she must deal with a foreign statute (as opposed to other foreign sources of law),<sup>84</sup> is to search for foreign "institutional values."

### III. SEARCHING FOR "INSTITUTIONAL VALUES" VIA COMPARATIVE LAW

The above sketch of the complex interrelationship between language and law provides only one of several kinds of attacks one could launch against the so-called textualist approach to comparative law. Such an approach, in its crude form, attempts to match foreign black letter rules to functional equivalents in the domestic realm without first examining the extralegal context in which any such rules flourish. In contrast, a contextualist approach would wisely enlist overarching "principles" to help explain and predict the rules. One can conceive of contextualism to include principles derived either from the social sciences perspective, from a philosophical or historical perspective, or from all of these perspectives.

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82. Lessig, *supra* note 34, at 1190-91. Judge Posner critiques Lessig's 1993 article, averring that "literal translation" and "literal interpretation" are possible and sometimes desirable. See RICHARD A. POSNER, *OVERCOMING LAW* 492-97 (1995). Lessig further develops his treatment of "fidelity theory," including "structural translation," in Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997).

83. Lessig, *supra* note 34, at 1191.

84. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

A book-length work by Professor William Ewald provides a striking recent denunciation of both textualism and social science contextualism. Ewald's dominant conclusion is that to understand foreign law one necessarily must first grapple with "the *philosophical* principles that lie behind the surface of the [legal] rules"—i.e., "the how and why and whence of the legal system, and not just the black letter what."<sup>85</sup> Comparativists therefore routinely "discover" false similarities between legal systems.<sup>86</sup> Ewald hopes to show through a detailed example that only by studying the origins and development of modes of thought within a given system—elucidating how someone in an alien system thinks—can we avoid such embarrassments. The mere "piling up" of social science facts or "black letter rules" comprises a misguided methodology from the start.<sup>87</sup> Hence, learning (in the best practical sense) a given black letter rule demands attention to a web of interrelated, broad abstractions.<sup>88</sup>

In a subsequent article, Ewald claims additional support for his brand of anti-contextualism in the work of Alan Watson. I will have reason to further consider this approach below.<sup>89</sup> Here, I simply note that Ewald continues to marshal evidence that "the causal relations between law and society will prove to be reciprocal, interactive, and multi-layered," even to the extent that "the phenomena may be too complex for a tidy description, even in principle."<sup>90</sup>

Such work in comparative legal theory, if sound, has this consequence for our purposes: superficial research on foreign legal *rules* (as opposed to superficial research on *principles* or *values*) probably causes more serious misinterpretations than previously imagined. An unadorned "plain meaning" methodology currently reigns over the majority of cases interpreting foreign statutes—precisely the kind of approach that lacks engagement with the foreign countries' "conceptual wiring" and hence falls most prone to unnoticed yet potentially profound error. So, an attorney or judge unfamiliar with either the "rule" or the broader context may actually do better to focus on learning the context, and then piece together the rule as best she can.

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85. Ewald, *supra* note 35, at 1896, 1987.

86. *Id.* at 2044, 2081. Cf. Ewald's discussion of "false abstractions," *id.* at 2112, 2137.

87. *Id.* at 1988, 2052.

88. Ewald notes the "analogy" to learning a foreign language: "The enterprise is not just a matter of memorizing a collection of words, but of acquiring a certain kind of ability—the knack of knowing how to participate in a complex social practice. A language, like a set of principles, is *interconnected*, so that any two people who study Italian will inevitably learn much the same thing . . ." *Id.* at 2141.

89. See *infra* text accompanying notes 98–100.

90. William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 509 (1995).

Yet before elaborating upon this approach, I first take care to define the relevant "context" more broadly than Ewald does.<sup>91</sup> In doing so, I take a syncretic view of an inevitable future battle pitting Ewald against those commentators whose work he dismisses. For, many enlightened social science contextualists perceive the limits of social science interpretation of unfamiliar regimes. These writers delve into and contest some background assumptions of their disciplines while already following some promising new and broad pathways in comparative law.<sup>92</sup> A lawyer unfamiliar with a foreign legal system who reads such contextualists may well encounter the best balance, that is, she heeds the spirit of some crucial Ewaldian admonitions yet stays within the realm of what she can comprehend, rather than straining towards a realm that will always evade "tidy description." It seems best, then, at least in the context of statutory interpretation, to visualize a *continuum* from the most abstract Ewaldian "principles" to the most specific "rules":

Beliefs/Philosophical Principles  
Political & Institutional Values  
Methods/Canons  
Rules

"Political and institutional values" include many of the underlying rationales currently held by members of a legal community. These rationales are not reducible to sociology per se, yet neither are they as nebulous or difficult to study as, say, Kantian metaphysics. After all, every U.S. law school teaches students to construct institution-based arguments. Thus, political and institutional values arguably represent the optimal level of abstraction with which U.S.-trained lawyers should grapple. Examples below will indicate how learning such values imparts useful explanatory power.

Of course, as mentioned above, I address only lawyers who have not attained prior specialized knowledge regarding any stage along the above continuum. Someone who has already comprehensively examined the Kantian foundations of German legal thought or the German Civil Code probably should not resort to studying German "values." She can safely overlook this article.

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91. See Ewald, *supra* note 35, at 2129–36, for his psychological and philosophical definitions of "principles" and "rules"; see *id.* at 2142–43 for an important distinction between "internal" and "external" principles.

92. See, e.g., Symposium, *Comparative Law in the United States—Quo Vadis?*, at the University of Michigan (Sept. 20–22, 1996).

Furthermore, since we must take the idea of a continuum seriously, the distinction between “values” and Ewaldian “principles” or “habits of thought”<sup>93</sup> will often blur. The precise level of abstraction at which a novice lawyer should commence her foreign law research is a matter not readily answerable. This article does draw an arbitrary bright line, however, between “values” and interpretive “canons,” and suggests that as a practical matter, novice lawyers should always first familiarize themselves with areas of the alien system more abstract than canons.

Interpretive canons lie intermediate along the continuum between values and rules.<sup>94</sup> Below, I try to employ consistent terminology: “canons,” “methods of interpretation,” and “‘rules’ of construction” all fall within the same analytic category along the continuum. (I often use the words interchangeably.) “Maxim” is synonymous with “canon,” except when I discuss Grice’s maxims of implicature, which arguably count as “philosophical principles.” By contrast, a legal “rule” denotes the specific proposition of “black letter” law, as defined by cases and secondary sources.

The term “rule” subsumes “statutory rules,” by which I mean any interpretation of a specific statutory section, phrase, or word. I assume, however, that the original-language text of the statute needs to be interpreted via methods and canons in order to discover or construct a statutory rule. Therefore, this article makes a two-fold suggestion when a novice reads a ready-made statutory rule (i.e., one created by someone else). Instead of accepting the rule without further analysis, the novice should first look at sufficient “institutional values” to ascertain whether a dynamic or textualist method of statutory interpretation should be employed next. I call this stage “pre-dynamic” interpretation.<sup>95</sup> Second, the interpreter should use the chosen method to come to her own understanding of the textual provision. This second step always begins with a

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93. Ewald, *supra* note 35, at 2045.

94. Apparently, Ewald would agree that canons form a middle category:

What I needed to know was something more elusive and fundamental—the prevailing attitude towards the law, the style of legal analysis, what it means for a European to ‘think like a lawyer.’ By these amorphous phrases I mean to include, not just the way lawyers reason about a particular set of facts or *interpret a statute*, but also such matters as the prevailing attitude towards courts, the legislature, legal scholarship, legal education, legal practice, jurisprudence, the basic constitutional rights, and so on. And I needed not just an exposition of these attitudes and styles . . . but more importantly an explanation of the reasons, both historical and philosophical, that have brought them into existence.

Ewald, *supra* note 35, at 1986 (emphasis added).

95. See *infra* Part V.



close reading of the provision, whereas the first step draws upon a wide range of external sources.<sup>96</sup>

By concentrating on "institutional values," the novice clearly will not avoid the compromise and approximation that necessarily accompany a concrete decision about a particular statutory provision. The net result will inevitably display qualities of a "hybrid" between the foreign and the relatively familiar, domestic law. For the remainder of this article, I explore whether such a hybrid might serve the purposes of the litigants and the court better than the ignorant or insincere undertaking to match black letter foreign rules to plain meaning local equivalents, or to predict the exact outcome that a foreign tribunal would reach on the identical facts, or blithely to presume that foreign methods correspond to domestic ones.<sup>97</sup>

#### IV. UNIVERSAL VALUES?

##### *A. Shared Values, Shared Rules, & Manufacturing Universality*

Initially, we should consider possible shortcuts. If our own legal system shares underlying values with those of other regimes, then, happily, we could expect one of two results. At best, legal rules might have developed along parallel routes, so that rules (or terms) that *appear* similar might actually represent near-equivalents. Such homologization domesticates the task of translation and interpretation. Alternatively, even if the foreign rule seems incomprehensible to us, we could try to reconstruct a crude approximation to the rule by reasoning from the shared value down, that is, by imagining how the rule most likely would have evolved in the foreign environment.

When an interpreter has little relevant and reliable evidence or specialized knowledge concerning the foreign rule itself, she should proceed to work with the shared value. To anticipate later discussion, if the interpreter cannot recognize any shared values, then she should next try to learn and to adapt the strange explanatory value in a "hybrid" with domestic law. Finally, if the unfamiliar values only cause confusion, she should resort to a relatively textualist approach. A major impasse, discussed throughout this article in some of its myriad incarnations (e.g.,

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96. Granted, the statutory text may point obviously to a single interpretation, i.e., a single statutory rule. That possibility, though, is peripheral when a specific foreign statute appears confusing to most U.S. lawyers. In the purely domestic realm, the possibility and its implications become more interesting. See, e.g., POSNER, *supra* note 82, at 492-97.

97. See *infra* text accompanying notes 111, 124-126, 226-227.

“wish fulfillment”), asks how to discern if one’s evidence is “relevant” and “reliable”—or how the supposedly “shared” value (or word) is “recognizable” as such. That is, how do you know if the value is really shared or just seems that way? One must watch for many traps.

For example, part of the process of gathering evidence about rules should involve ascertaining whether the rule in question has been “transplanted” from the interpreter’s native regime. Systems that do not share values can still share rules, because systems borrow from each other at the level of rules. Professor Ewald, distills and clarifies the idea of “legal transplants,” inaugurated by Alan Watson, as follows:

History shows that, because of the [conservative, prestige-seeking, formalistic] nature of the legal profession, legal change in European private law has taken place largely by transplantation of legal rules; therefore, law is, at least sometimes, insulated from social and economic change.<sup>98</sup>

Ewald perceives that Watson has studied this empirically testable thesis mainly with regard to the transplantation of Roman private law to Western Europe, and that other regions of the law must be examined on a case by case basis.<sup>99</sup> Other commentators also doubt the prevalence of transplants.<sup>100</sup> As reported above, Ewald insists more generally on the enormous complexity of comparative law—for law neither “mirrors” society nor stands wholly insulated from it, and hence the search for common ground at any level whether in principles, values, or rules will prove arduous. We need not share the degree of Ewald’s pessimism, but we must nevertheless refrain from assuming that any given rule qualifies as a transplant until we cast beyond the statutory text per se.

### B. Judicial Presumptions & Independent Research

Domestic courts often presume, in the absence of sufficient evidence presented by the parties, that foreign law is identical to domestic law.<sup>101</sup> Such presumptions take various forms. For instance, a court could presume that domestic statutory law as well as common law prevails in the foreign nation, or that certain fundamental principles of law exist in

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98. Ewald, *supra* note 91, at 503. For the “nature of the legal profession,” see *id.* at 499–500.

99. *Id.* at 490, 500–04.

100. See Eric Stein, *Uses, Misuses—And Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 203–04 (1977).

101. Such presumptions have survived modern procedural reform. See generally Carpenter, *supra* note 7.

all civilized nations.<sup>102</sup> These presumptions, however, usually stand as a "thin disguise" for the forced application of forum law.<sup>103</sup> The "fundamental artificiality" of the presumption becomes especially pronounced when a statute is involved.<sup>104</sup>

Informal assumptions operate comparably to such fictional presumptions. Judge Milton Pollack assumes that, regarding foreign law issues, "[I]f what is relied upon is *law*, and not some primitive religion or the whim of a tyrant, the form of reasoning will be familiar."<sup>105</sup> Occasionally, courts even ignore expert witnesses' expositions of differences "apparently . . . [on] the unspoken rationale . . . that domestic law is applicable by analogy."<sup>106</sup> These judges typically make little or no effort to ascertain similarities upon which they fictionally rely.

A few tribunals, however, do conduct *sua sponte* examinations of the pertinent foreign law.<sup>107</sup> Some others perform a "cursory independent research" in order to decide if they are competent to form an opinion (or should instead invoke the presumption).<sup>108</sup> Depending primarily upon the extent of the presentation by the parties and the perceived familiarity of the foreign legal system, other courts have investigated the legal authorities cited by the parties or engaged in "limited independent research . . . to supplement the presentation of the parties."<sup>109</sup>

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102. See Sprankling & Lanyi, *supra* note 6, at 87. Cf. Statute of the Int'l Ct. of Justice, art. 38, § (1)(c) ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . (c.) the general principles of law recognized by civilized nations.").

103. See Alexander, *supra* note 38, at 610; Nussbaum, *supra* note 33, at 1037.

104. EHRENZWEIG, *supra* note 5, at 367.

105. Pollack, *supra* note 5, at 474.

106. Sprankling & Lanyi, *supra* note 6, at 83 (citing cases). As numerous commentators have pointed out, a court seeking to avoid dealing with foreign law altogether can often do so by consciously or unconsciously manipulating conflict-of-laws, *forum non conveniens*, or comity doctrine.

107. See *id.* at 80 & nn.459-61; Sommerich & Busch, *supra* note 30, at 155 n.126; Alexander, *supra* note 38, at 616 n.63, 618 n.73 (all of these sources citing cases).

108. See, e.g., Seguros Tepeyac, S.A. v. Bostrom, 347 F.2d 168, 174 n.3 (5th Cir. 1965), *modifying* 255 F. Supp. 222 (N.D. Tex. 1963) (refusing to indulge in presumption that foreign law bore any similarity to local law); Watts v. Swiss Bank Corp., 265 N.E.2d 739, 742 (N.Y. 1970) (involving court's performance of independent research to check whether foreign law differs so radically as to render a presumption unjustified). This approach is praised in Rudolf S. Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 15 (1973) (stating that under judicial notice statute, court should do some preliminary research; "no real clash" between foreign and forum law constitutes a factor favoring application of forum law); see also Peritz, *supra* note 7, at 76 (citing case where "court made a prima facie finding of Turkish law for purposes of motion under consideration").

109. Sprankling & Lanyi, *supra* note 6, at 79 & n.457; see also Sommerich & Busch, *supra* note 30, at 156.

Most judges consider their own research highly reliable. In a 1983 survey, sixty-two percent of judges claimed that such independent research was a "most effective" method to establish foreign law; the remaining thirty-eight percent called it "somewhat" effective.<sup>110</sup>

The courts' inquiries, however, very often (implicitly or explicitly) conclude that alien and forum rules correlate quite closely.<sup>111</sup> One benign explanation for these findings of similarity holds that seemingly diverse legal rules may sometimes be more comparable than they appear or may have borrowed one another's rules. Another benign explanation recognizes that courts more frequently choose to pursue legal research when they already know that the alien system lies in relatively familiar terrain. While these explanations remain indisputable, they present an incomplete picture. The general methodological problem of "wish-fulfillment" mars the universality thesis. Put simply, interpreters tend to spot false similarities. Notwithstanding their flattering self-appraisal, jurists who do not contemplate this problem display a troubling lack of knowledge.

### C. False Similarities in Comparative Statutory Interpretation

This article now begins to specialize in statutes and to focus on canons of statutory interpretation. As defined above, interpretive canons lie intermediate along the continuum between principles and rules. As such, canons act functionally like *rules* vis-à-vis underlying institutional values, but canons act like *values* vis-à-vis the rule formed by interpreting the statute. Consequently, proof that a canon is universally respected would provide evidence, but not conclusive proof, of a universal value underlying that canon. To rephrase the matter: if a lawyer tries to use a canon without grasping *why* it exists—without first searching for values that explain and justify the canon—she runs the danger of misapplying it and thus misconstruing the statutory text. Thus, the problem of false similarities only worsens in the setting of statutory interpretation.

First, consider how searching for a rule of construction *with* a rule of construction can cause slanted results. Someone who conscientiously hopes to "find the foreign law" often will initially search out the methods by which the foreigners interpret their own statutes.<sup>112</sup> But, a judge accustomed to "plain meaning" interpretation will more likely convince

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110. Sprankling & Lanyi, *supra* note 6, at 82 n.471, 94. But, commentators typically worry that judges "may do a half-baked job of research in totally unfamiliar materials and come to a conclusion without basis in foreign or domestic law." Bridgman, *supra* note 77, at 854 n.38; see also Alexander, *supra* note 38, at 616.

111. See Adler, *supra* note 33, § 5.

112. Bridgman, *supra* note 78, at 860–61; Adler, *supra* note 33, § 6.

herself that the foreign sources also favor the "plain meaning" paradigm. When she reads a French court claiming to predicate its ruling upon the *doctrine du sens clair*, she may take the opinion at its word, for "*sens clair*" plainly means "plain meaning." Or does it? Diverse doctrines operate in different regimes under the rubric apparently quickly translated as "plain meaning."<sup>113</sup> The danger I describe here actually exists: indeed, amazingly, the jurisprudential foundation for the plain meaning rule in the civil law derives from an erroneously "plain" reading of a maxim in Justinian's *Digest*.<sup>114</sup>

Even more importantly, some courts mention the doctrine only to divert attention from the true rationales for their decisions.<sup>115</sup> In France, for example, the extremely concise judicial opinions, which are rarely published, typically state formal conclusions without acknowledging the priorities among conflicting arguments.<sup>116</sup> "[J]ustification is reduced to the skeleton of a judicial syllogism. The court states only the legal rule, the relevant facts and the conclusion."<sup>117</sup> When the court refuses to openly recognize its evaluative and creative role,<sup>118</sup> however, it still covertly retains that role. (It is debatable how often insincerity plays a role here. Later, I make the distinction between conscious and unconscious manipulation of canons.)<sup>119</sup>

When reading primary sources, however, the researcher should always suspect that the purported rationales might hide the actual. On the one hand, "elaborate [non-plain meaning] opinions can seduce the

113. See *supra* Part I.A and *infra* text accompanying notes 149–159.

114. "*Cum in [v]erbis nulla ambiguitas est, non debet admitti [v]oluntatis quaestio.*" DIG. 32.25.1 (Paulus, Neratius 1) (Theodor Mommsen & Alan Watson trans., 1985). "[I]n its original context, this maxim refers to the interpretation of a will rather than of a statute . . ." Konrad Zweigert & Hans-Jürgen Puttfarcken, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704, 712 & n.23 (1970).

115. See, e.g., Zweigert & Puttfarcken, *supra* note 114, at 713–15; Taylor, *supra* note 15, at 357–58, n.165; Farber, *supra* note 1, at 524, nn.58–60 (citing articles).

116. See MACCORMICK & SUMMERS, *supra* note 14, at 172, 177, 184, 190, 199.

117. *Id.* at 492.

118. See *id.* at 501.

119. See *infra* text accompanying note 272. Solan believes that judges choose to distort rules to suit their ends. See, e.g., SOLAN, *supra* note 77, ch. 3; cf. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES & MATERIALS ON LEGISLATION* 626–27 (1995) (stating that judges manipulate originalist arguments). Other commentators express this view more harshly: "Deciding a case on the basis of the plain meaning of a rule is, in terms of logic, a tautology; psychologically speaking, it is hypocrisy, for the judge who renders judgment on this ground pretends to give a reason for his decision, when actually he gives none." Zweigert & Puttfarcken, *supra* note 114, at 713 (citing Y. Esser, *Die Interpretation im Recht*, 7 STUDIUM GENERALE 372, 375, 378 (1954)). Many judges, however, probably sincerely attempt to apply the plain meaning rule—they simply do not know how to contrive better results. See Book Note, *New Dress, Old Hat*, 107 HARV. L. REV. 1795, 1798 (1994) (reviewing SOLAN, *supra* note 76). In that case, plain meaning is the "true rationale" for their decisions, even if that method yields poor, unpredictable, or strange results in practice.

reader into thinking that the discussion reflects the true reasoning behind the result."<sup>120</sup> On the other hand, Nicholas Zeppos has analyzed United States Supreme Court decisions whose "originalist rhetoric was used to mask a dynamic interpretation."<sup>121</sup> If foreign courts deploy similarly misleading rhetoric, then dynamic interpretation as a true basis for decisions may prove more universal than one might first surmise.

Nevertheless, in contrast to the textualist's investigation, the meta-search conducted by a "dynamic" interpreter will potentially meet with an opposite but still self-fulfilling conclusion. The dynamic interpreter's own cultural traditions and preconceived search techniques necessarily dominate her perceptions. Hence, in her zeal, she may unconsciously overlook the subtle constraints by which foreign tribunals feel bound. The most obvious trap arises when a U.S. interpreter analyzes a civil law case engaging in "reasoning by analogy." She might not realize that counterpoised against the case's inquiry into current values stands a strong respect for the historic legislator.<sup>122</sup> More generally, Stanley Fish seems to capture a lurking stubbornness even in postmodern sophisticates when he writes:

Someone like me . . . who is firmly convinced of the circumstantiality of his own convictions will nevertheless experience those convictions as universally, not locally true.<sup>123</sup>

A second reason why false similarities may surface in the statutory arena is that, empirically, several kinds of interpretive stances co-exist within any given legal system. Different judges employ different approaches, and especially in nations that downplay *stare decisis*, a diversity of approaches may flourish, no one of which stands out as the correct strategy. Therefore, a shallow empirical search for a universalized method of interpretation will, in any event, prove futile or, worse, lead to an accidental finding of similarity.

Third, a certain percentage of judges do not take the extra step of tracking down a (perhaps distasteful) alien rule of construction. "Even when it applies foreign law, the forum frequently applies only so much

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120. James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 83 (1994); cf. Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 330 (1994).

121. Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 367 (1989).

122. See *infra* text accompanying notes 163-164.

123. FISH, *supra* note 27, at 467; but see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 917 (1989) ("Fish believes that we can 'just see' similarity between particulars without seeing (and perhaps without there being) any of the universals that such particulars share as properties.").

of that law as suits its purposes."<sup>124</sup> Courts, then, use accustomed canons of statutory interpretation.<sup>125</sup> A judge acquainted with "plain meaning" interpretation will often deliberately choose that method when calculating the meaning of words in a foreign code.<sup>126</sup> But, that sort of method is particularly susceptible to wish-fulfillment. Arguably, there is no surer way to mistranslate a word than to isolate and fixate upon the word itself.

#### *D. Empirical & Theoretical Evidence of Universality in Statutory Interpretation*

Nevertheless, some comparativists vigilant for false similarities and other hermeneutical snares maintain that there are universal methods and canons of statutory interpretation. First, an empirical study conducted in nine different (industrialized Western) countries has concluded that these various legal systems share many interpretive modalities:

These similarities consist mainly of: (1) a set of major types of arguments that figure in the opinions; (2) the materials incorporated into the content of such arguments; (3) the main patterns of justification involved; (4) the modes of settling conflicts between types of arguments; and (5) the role of precedents interpreting statutes.<sup>127</sup>

The MacCormick survey found in the highest courts in all nine systems a "common core" of at least eleven "basic types of argument," includ-

124. Alexander, *supra* note 38, at 620 (discussing interstate conflicts of law). As discussed above, we have at one extreme judges who presume the equivalence of foreign and forum law writ at large.

125. See, e.g., *Nicholas E. Vernicos Shipping Co. v. United States*, 349 F.2d 465 (2nd Cir. 1965); *Royal Exch. Assurance v. Brownell*, 146 F. Supp. 563 (S.D.N.Y. 1956), *aff'd*, 257 F.2d 582 (2nd Cir. 1958) (ignoring expert testimony, but then applying common law methods of statutory interpretation).

126. I reviewed dozens of American cases that interpreted foreign statutes, as selected from compilations in Adrien K. Wing, *Pleading and Proof of Foreign Law in American Courts, A Selected Annotated Bibliography*, 19 STAN. J. INT'L L. 175, 188-206 (1983), and Adler, *supra* note 33, § 4-10. I employed a methodology similar to that of Nehf, *supra* note 120. This approach has its limitations, as Nehf concedes. See *id.* at 45 n.157. In my review, eighty percent invoked the statutory text as the primary source supporting the decision. Seventy two percent invoked the text as the only source. Several of these cases applied the most stringent of plain-meaning approaches, interpreting particular words or phrases apparently without considering the rest of the statute or any other contextual information. Dictionaries were cited in fifteen percent of the decisions, a significantly greater percentage than in Nehf's study of lower courts' interpretations of state consumer protection statutes. *Cf. id.*, at 44 tbl.1.

127. MACCORMICK & SUMMERS, *supra* note 14, at 462.

ing, for instance, arguments based upon purpose, ordinary meaning, and statutory analogies.<sup>128</sup>

The authors contend that these common features “impl[y] a deep common rationality rooted in shared values,” which include “separation of powers” and “rule of law” values.<sup>129</sup> The authors further aver that courts try to maintain a complex yet rational, coherent, and reflective “equilibrium” among these shared values, and that courts deploy a mosaic of second-level directives such as canons in response to a coherently thought-out view of legal values.<sup>130</sup> It follows, for these scholars, that one can explain the reported differences between systems’ interpretive methodologies by reference to political, cultural, and institutional differences.<sup>131</sup>

MacCormick and Summers realize, but do not accentuate, that they have participated in a somewhat self-fulfilling wish for universality. Their stated objective, to “rationally reconstruct . . . coherent modes of justificatory reasoning,” depends upon the same qualities that good translation requires—imagination, sensitivity to context, and detachment (self-consciousness)<sup>132</sup>—yet such qualities do not elude irrationality.<sup>133</sup> Moreover, according to Ewald, appeal to politics and institutions—the first causes of MacCormick’s alleged “shared values”—may mislead us if we do not explore even deeper, into philosophical origins.

Unfortunately, too, the particular methodology of the survey invites skepticism about the equivalences that its contextualist authors have “rationally reconstructed.” Different scholars wrote each of the nine chapters describing each country’s interpretive practices; then, the final section of the book tries to distill the individually authored descriptions into a grand theory. As Edward Rubin notes, this procedure stifles the ongoing interaction among facts and theorizing essential to obtaining new insights.<sup>134</sup> Realizing this flaw, the book’s authors then avoid making any truly provocative or robust claims in the concluding section. Indeed, Rubin declares that the section has a “least-common-denominator character about it.”<sup>135</sup>

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128. *Id.* at 464–65. The countries under investigation included: Argentina, Germany, Finland, France, Italy, Poland, Sweden, the United Kingdom, and the United States.

129. *See id.* at 462, 479–87, 534–35.

130. *See id.* at 536–39.

131. *See id.* at 4.

132. *See id.* at 19; *see generally, id.* at 18–27.

133. *See supra* note 123 and accompanying text.

134. *See* Edward Rubin, Book Review, 41 AM. J. COMP. L. 128, 134–35, 140–44 (1993) (reviewing MACCORMICK & SUMMERS, *supra* note 14).

135. *Id.* at 142; *see generally id.* at 139–142.



Still, any articulable "least common denominator" of institutional values can give the novice interpreter a key to working with and legitimately simplifying the foreign statutory equation. We should also bear in mind that the search for common ground within other areas, especially within European contract law, has recently yielded encouraging, masterful results.<sup>136</sup>

One scholar has taken seriously the ideas of coherence, constitutional constraints, and rational legal justification and used them to build a theory of statutory interpretation.<sup>137</sup> Professor Buchwald's theory jettisons the customary interpretive methods in favor of an abstract, formal coherentist structure. If developed further, his theory could perhaps replace all current initiatives aimed at "disentagl[ing] the countless threads of statutory interpretation."<sup>138</sup> The theory does fit within my main suggestion in this article—namely, that an interpreter look to important shared values and then approach a "dynamic" solution within her own coherent mode of justification. So far, however, Buchwald's theory remains pitched at too high a level of generality to move anyone but other academics. Therefore, given that judges certainly will continue to frame their opinions in the language of "ordinary meaning" and other standard vocabulary for some time to come, it still behooves us to submit a foreign statute to those standard frames and compare their respective efficacy.

In another effort to ground statutory interpretation in universal principles, Miller and Sinclair have applied the work of philosopher Paul Grice on the social constraints on conversation to the "conversation" between legislatures and courts.<sup>139</sup> Grice's maxims of implicature, at least as a group, bear resemblance to a jurisprudential "principle," i.e., to the kind of principle that Ewald privileges.<sup>140</sup> As linguistic principles, the Gricean maxims supposedly enjoy world-wide usage. Wherever ordinary conversations occur, the maxims operate. Every culture, in other

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136. See Symposium, *The Unidroit Principles of International Commercial Contracts*, 69 TUL. L. REV. 1121 (1995).

137. See Delf Buchwald, *Statutory Interpretation in the Focus of Legal Justification: An Essay in Coherentist Hermeneutics*, 25 U. TOL. L. REV. 735 (1994).

138. *Id.* at 751.

139. See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179; M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985).

140. See Sinclair, *supra* note 139, at 382 n.39 (comparing Grice to Dworkin); Ewald, *supra* note 35, at 2129 n.513 (comparing his own conception of "principles" to Dworkin's).

words, has “figured out” how to use the maxims to communicate more effectively.<sup>141</sup>

The next step ponders whether Grice’s maxims provide a predictable foundation for the canons of statutory interpretation. To put the critique most simply, there may be critical differences between interpreting ordinary speech acts and interpreting (written) legislative texts.<sup>142</sup>

Miller delimits, and thus convincingly reaches, his stated goal—to show the “homology” between some traditional canons of statutory interpretation and Grice’s maxims. But, Miller adds that, because Grice’s maxims apply universally, one can “infer,” from the homology, that the canons embody features of substantial generality. Miller fortifies this conclusion with circumstantial evidence in the form of the “remarkable coherence” of the canons over time and space. For example, St. Augustine espoused the plain meaning rule and its “absurdity” exception; a Hindu text from circa 500 B.C. recommends the “whole statute” maxim; and so forth.<sup>143</sup> Of course, Miller sounds a cautionary note, too:

This is not to say that maxims of interpretation display perfect conservation of form across legal systems. There are many variants. . . . Nevertheless, sufficient continuity exists across systems to suggest that the maxims must reflect some relatively universal principles for interpreting legal rules.<sup>144</sup>

Bearing in mind the uncertainty of Miller’s inference of universality—including uncertainty born of wish-fulfillment—the inference remains appealing. As with the MacCormick results and other recent empirical work, it grants us hope that some shared “conceptual wiring” exists which will allow us to explain unfamiliar, transcultural texts. That is, the fact of shared methods such as the use of canons often supports the notion of shared underlying legal values, (e.g., “rule of law” or the linguistic structure of legislature-court communication), which serve as the preferred starting point for interpreting such unfamiliar texts.

Before I propose how to reach this hypothesized starting point, I must deal a blow for chaos: even knowing with certainty which of Grice’s maxims apply universally to written legal conversations will not,

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141. We need not speculate about when the maxims came into existence or about whether speakers notice the maxims working; principles need not be articulated as historically and cognitively derived beliefs.

142. See Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990). In another article, I analyze these differences as manifest in fictional representations of legally-effective speech acts. See Andrew N. Adler, *Oaths, “Deeds,” & Other Legal Speech Acts in Five English Renaissance Plays*, 72 ST. JOHN’S L. REV. (forthcoming 1998).

143. Miller, *supra* note 139, at 1183–91.

144. *Id.* at 1182.

by itself, propel us very far in practice. For, the maxims (like translation procedures) depend heavily upon social conventions. To apply them at all, one will "always require full use of the context, the intent of the [statutory] provision, and the purpose of the legislation."<sup>145</sup> Yet delineating conversational conventions already requires intimate acquaintance with the interpretive community and its myriad background principles.<sup>146</sup> For example, even assuming (counterfactually) that every regime invokes the same plain meaning methodology, the relevant community always defines such key words as "plain," "unambiguous," and "ordinary language."

### *E. Universality of the Plain Meaning Rule—Revisited*

Three of Grice's maxims, which, as a group, constitute a universal principle, support the plain meaning doctrine: The maxim "Avoid obscurity" corresponds to the canon, "Courts should interpret words according to their ordinary common senses." Similarly, "Avoid ambiguity" corresponds to, "The plain meaning of a statute ordinarily governs"; and "Do not say anything false" correlates with, "Interpret statutes to avoid absurdity."<sup>147</sup> Unfortunately, however, the correlation between maxims and canons does not show that the canons derive from universal principles or values. As discussed generally above, a principle concerning ordinary speech-acts may not apply in the context of written legal texts created by the legislative process. Besides, Grice's maxims will not help us in practice without supplemental knowledge of the foreign culture's conventions.

Still, we can check if plain meaning empirically constitutes a universal method. If universal, then, the method more likely, than if it were not a universal, derives from a common underlying value, and we can then profitably employ the method as a proxy for the value. As detailed above, though, wish-fulfillment comprises a significant problem here.

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145. Sinclair, *supra* note 139, at 383, 416. The context also determines which maxims take priority and other strategic choices. See Miller, *supra* note 139, at 1216. Furthermore, Grice's theory expressly assumes that the parties to the conversation are sufficiently informed to engage in "cooperative" behavior. Farber has noted that, "In certain situations a drafter may wish to approach a statute as a communication with an uncooperative or uninformed party." Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 551 (1992).

146. For a critique of the narrowness of Grice's emphasis on ideologically "normal" discourse, see THE JOHNS HOPKINS GUIDE TO LITERARY THEORY & CRITICISM 686 (Michael Groden & Martin Kreiswirth, eds., 1994).

147. Miller, *supra* note 139, at 1226–27.

That is, those who seek plain meaning in other nations often unearth tainted evidence.<sup>148</sup>

All of the countries canvassed in the MacCormick study press the argument from plain meaning into action as the simplest pattern of justification in judicial opinions. Yet the argument surfaces in various forms and frequencies, and it incorporates various exceptions.<sup>149</sup> Grossly generalizing, one could summarize the situation as follows: in the United States, the rule may still flourish in some state courts<sup>150</sup> and in certain kinds of cases such as bankruptcy in the United States Supreme Court.<sup>151</sup> Germany, Italy,<sup>152</sup> and the United Kingdom<sup>153</sup> all relatively favor the rule, as compared with the United States.

Yet such generalizations encourage one to apply one's own monolithic definition of plain meaning to foreign situations which merit little comparison.<sup>154</sup> It is too easy for U.S. practitioners to overlook subtle yet significant variations. For example, Professor Farber, in reviewing the MacCormick investigation, underscores the universality of resort to legislative history, i.e., all nations surveyed by MacCormick permit *some* citation of legislative history *some* of the time.<sup>155</sup> So while Farber

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148. Apparently fairly often, for example, foreign opinions mention plain meaning as a deliberate smoke-screen when "judicially legislating." See *supra* notes 115-118 and accompanying text.

149. See, e.g., MACCORMICK & SUMMERS, *supra* note 14, at 182, 533; cf. the myriad definitions of the doctrine, *supra* Part I.A.

150. See Nehf, *supra* note 120, at 9, 46; but see ESKRIDGE & FRICKEY, *supra* note 119, at 576 n.1 (recognizing that some states, especially California, "have looked beyond the plain language . . . more and more," and listing numerous articles tracing the decline of the plain meaning rule in state courts).

151. On bankruptcy decisions, see discussion *infra* notes 243-244 and accompanying text. The Supreme Court's alleged tendency to rely increasingly upon plain meaning has been much debated. See, e.g., Nehf, *supra* note 121, at 46 n.160; Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 716-22 (1992).

152. See MACCORMICK & SUMMERS, *supra* note 14, at 224; see also *id.* at 217, 245, 252.

153. See discussion *infra* Part VIII.A.

154. Moreover, the MacCormick study cannot stand as the final authority on doctrine. For example, one article claims, contrary to MacCormick, that the plain meaning rule "has fallen into almost complete disfavor in civil law jurisprudence. . . . [I]n practice, it does reappear now and then, and when it does, it usually meets with severe criticism." Zweigert & Puttfarcken, *supra* note 114, at 712-13 (citation omitted). Note that the MacCormick study limits itself to published opinions of the highest courts in each country surveyed. See MACCORMICK & SUMMERS, *supra* note 14, at 13.

155. See Farber, *supra* note 1, at 527-29. The extreme cases are Sweden, where "very great weight and force" is accorded legislative history, and England, which was classified as the only country of the nine investigated that "generally proscrib[ed]" legislative history. MACCORMICK & SUMMERS, *supra* note 14, at 355, 470-77. But see *infra* text accompanying notes 281-283.

certainly admits that systems differ,<sup>156</sup> he downplays the complex heterogeneity illuminated by MacCormick.<sup>157</sup> Thus, for instance, Germany favors an "objective" conception of legislative intent, although "with less emphasis on the purely linguistic conception" than in England, while in Sweden, actual subjective intention is overwhelmingly dominant.<sup>158</sup> Furthermore, Italians rarely cite legislative materials.<sup>159</sup>

#### F. *Universality of Dynamic Statutory Interpretation—Revisited*

Unlike the case of plain meaning, a wealth of introductory textbooks and articles nurture a transnational perspective on dynamic approaches to statutory interpretation. From such sources, one immediately perceives that many foreign countries have long legitimized non-originalist, evolutive interpretation similar in important respects to Eskridge's approach.<sup>160</sup> In general, a hierarchy similar to Eskridge's funnel of abstraction operates in European civil law.<sup>161</sup> And, with the exception of the United States and the United Kingdom, every nation studied by MacCormick and Summers widely deploys the so-called argument from statutory analogy.<sup>162</sup> This argument allows a statute to be construed on analogy to the way other provisions of the same statute, or of a separate statute, are construed.

Moreover, each of the seven nations consistently invokes a bolder use of analogical reasoning, called "analogy of law" in Germany. Analogy of law involves the distillation of an overarching principle from several, and not necessarily interconnected, provisions contained in a number of diverse statutes. The principle can be as abstract as, say, a prohibition against "unjust enrichment." The idea is that, once a judge discovers a "gap" in the statutory law, general values underlying the existing legislation should provide a foundation for filling the gap. Note that one does not justify analogical reasoning by reference to actual legislative intent, for, by definition, the method presumes that the situation to be addressed lies outside the (actual) contemplation of the legislature. If the "gaps" come about due to changes in extrinsic circumstances, the

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156. Farber, *supra* note 1, at 518, 527–29.

157. Compare Rubin, who is somewhat surprised at the "odd exclusions" from the list of materials used in statutory interpretation that "certain national courts insist upon." Rubin, *supra* note 134, at 132–33.

158. MACCORMICK & SUMMERS, *supra* note 14, at 470, 476.

159. *Id.* at 253.

160. See ESKRIDGE, *supra* note 12, at 48, 345 n.2 (citing original-language secondary sources of many Western European nations, South Africa, and Argentina).

161. See Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2209 (1991).

162. MACCORMICK & SUMMERS, *supra* note 14, at 471. Each chapter of this study devotes a section to describing dynamic techniques of the respective sample nations. Such sections form the basis of several of the generalized comparative conclusions stated below.

court might in fact be obliged to fill the gaps in the legislative "scheme" under such changed circumstances. Thus, judges use the method more often for older statutes,<sup>163</sup> just as Eskridge recommends.

One can stress other correspondences between "analogy" as practiced abroad and "dynamic interpretation" as occasionally practiced at home. For example, if a law expressly enumerates specific fact situations, must it be read thereby to forbid extension to other situations by analogy? This preliminary question requires interpretation of legislative purpose<sup>164</sup> and hence requires the foreign judge to travel to the middle region of the funnel of abstraction. The judge must also closely read the precise wording of the statute. One might well conclude, by thus explaining foreign technique in understandable vocabulary, that the civil law and common law statutory interpretation remain "very similar . . . except for theoretical concepts."<sup>165</sup>

But, as Ewald illustrates, it is precisely the *conceptual* apparatus that saves the novice comparative lawyer from error. Therefore, while undeniably the rest of the world, as a totality, resorts to dynamic methods more frequently than U.S. jurisdictions do, the climate within any given country should, if time permits, be investigated as unique.

To see why, one merely needs to ponder that many legal systems once shared a common conceptual basis for evolutive interpretation, yet these same systems now treat evolutive interpretation quite differently. That is, the philosophy underpinning dynamic technique in the West derives from Aristotle and, later, Roman law.<sup>166</sup> For political and cultural reasons, adumbrated below,<sup>167</sup> the English never widely recognized the dynamic "equity of the statute" approach. In Shael Herman's classification, the British became "legislative agnostics," while the civilian inheritors of the same tradition became "true believers" in the equity of the statute (there denominated *ratio scripta*)—and willing partners with their legislators.<sup>168</sup> Later, the United States took its own relatively anti-formalist route, diverging from England's distinctive form of textualism. As Jerome Frank realized, "equity of the statute" and its civil law counterpart potentially represent a pair of false similarities. We must

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163. See Zweigert & Puttfarcken, *supra* note 114, at 710–12.

164. See *id.* at 714–15.

165. See *id.* at 717–18 (discussing role of case law).

166. See *supra* note 12.

167. See, e.g., *infra* text accompanying notes 296–303.

168. See Shael Herman, *The "Equity of the Statute" and Ratio Scripta: Legislative Interpretation Among Legislative Agnostics and True Believers*, 69 TUL. L. REV. 535, 537–41, 548–51, 555–60 (1994); KONRAD ZWIEGERT & HEIN KÖTZ, 1 INTRODUCTION TO COMPARATIVE LAW 274 (Tony Weir trans., 2d rev. ed. 1987) (comparing English judges' skeptical outlook with civilian judges' "real partnership with the legislature").

perceive the disparate habits of thoughts within each regime to appreciate why and how the methodological differences arose and hence remain.<sup>169</sup>

Logically and quite obviously, this warning also applies when comparing any two nations, each classified as civilian. That is, if England, Germany, and France all once shared the same interpretive posture but now England differs from Germany and France, it follows that Germany and France may no longer share an identical stance, either. Empirically, the situation is suitably complex. MacCormick and Summers downplay the civil-common law dichotomy, noting that "many important differences" between the interpretive schemes of the countries studied "do not follow the traditional distinction."<sup>170</sup> In fact, some systems are not usefully categorized at all. For instance, Herman describes Israel's eclectic views on statutory interpretation, established over the years via its heritage of English common law, European civil law, and authoritative religious codes.<sup>171</sup>

When Zweigert and Kötz categorized the "legal families of the world," they chose *style* as the prime criterion.<sup>172</sup> Importantly, the crucial factors contributing to style included:

- (1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) especially distinctive institutions, (4) the kind of legal sources it acknowledges and the way it handles them, and (5) its ideology.<sup>173</sup>

In this fashion, these distinguished scholars analyzed the vagaries of the world's jurisprudentia on the basis of principles.<sup>174</sup> When a beginner feels that she must divide in order to conquer, she should categorize by style. She should not shy away from dynamic interpretation. Yet she must shoulder the burden of analyzing, for instance, the effect of Germany's

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169. See Jerome Frank, *Civil Law Influences on the Common Law—Some Reflections on "Comparative" and "Contrastive" Law*, 104 U. PA. L. REV. 887, 889–90 (1956) (reviewing partial English reception of equity of the statute influenced by continental law), 894–95 (discussing debate over the extent of the influence of civil law on common law "equity"), 904–07 (stating false universalities), 910–11 (holding that rules are intelligible only when we "re-live again the experience of the classifier").

170. MACCORMICK & SUMMERS, *supra* note 14, at 508.

171. See Herman, *supra* note 168, at 551–55; see generally SCHLESINGER ET AL., *supra* note 6, at 321–22.

172. ZWIGERT & KÖTZ, *supra* note 168, at 68.

173. *Id.* at 69.

174. Ewald, however, is relatively dismissive of some of Zweigert's work. See generally Ewald, *supra* note 36.

constitution or of Japan's non-legal restraints upon each country's respective dynamic methodology.<sup>175</sup>

## V. PRE-DYNAMIC INTERPRETATION

My strategy will now involve deciding which methods and canons of statutory interpretation works best in practice. I concentrate on (what appears *prima facie* to be) two definable points along a (universally existing) spectrum—dynamic interpretation and plain meaning. Above, I have recounted tentative evidence of each method's universality. Now, whether or not the method is applied by many different courts in many different countries, I ask how someone examining a particular foreign country's legislation might rationally prefer one method over the other.

I take for granted that different rules of construction work best in different contexts.<sup>176</sup> For example, as indicated below, a plain meaning approach might work best when the United States Supreme Court must decide bankruptcy cases. So, too, we conceivably should prefer a textualist paradigm when deciding the content of an unknown British statute but prefer dynamic interpretation when looking at a German law. I will argue, however, that the choice to invoke textualism in the British setting should depend only partly upon evidence that the British themselves would appear to apply the "same" method for the same statute. Instead, the U.S. interpreter should rely upon her own understanding of universalizable, unfamiliar, and domestic values, and of the costs and benefits of that method compared with alternative methods. These reasons will be discussed below.

I now rephrase my proposal in terminology invented for the occasion: the U.S. interpreter should create "principled hybrids" via the strategy of "pre-dynamic" interpretation. The latter term tries to convey that the interpreter should initially apply the values underlying the dynamic method of interpretation to decide which method(s) of interpretation will serve best in context. Moreover, the interpreter should presumptively rely upon the dynamic method throughout the interpretation process unless she has articulable reasons to prefer the textualist alternative. These reasons will be discussed below.

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175. For Germany, see, for example, Ewald, *supra* note 35, at 2145 *passim*; MAC-CORMICK & SUMMERS, *supra* note 14, at 109–14; Farber, *supra* note 1, at 519–20. For Japan, see generally SCHLESINGER ET AL., *supra* note 6, at 332–34.

176. Empirically, the United States Supreme Court chooses different interpretive regimes depending upon the particular substantive area at issue. Taylor, *supra* note 15, at 346 n.113 (citing prohibition of analogical interpretation in criminal statutes, treatment of legislative history in tax codes, and the Supreme Court's bankruptcy decisions).



In any event, an exemplary translation or interpretation of a different culture's laws by someone not well-versed in the alien culture must remain sensitive to large issues—especially, to the conceptual wiring of the alien system. The way to maintain this perspective is to start at the most abstract inquiries in Eskridge's "funnel of abstraction." That is, the most useful clues to what a foreign statute means often arise from a study of the foreign system's "current values," especially institutional values, and secondarily, from a study of the "evolution" and "purpose" of the foreign statute.<sup>177</sup> The interpreter should "slide up and down the funnel;" yet initially, she should not concentrate on the more textual aspects, but rather on the values.

Applied to a statutory problem, a clear comprehension of values, if feasible, will lead to a correspondingly clear idea of the general relation between the foreign legislator and courts and to a suitable general interpretive methodology (dynamic or textualist). If the domestic interpreter then looks to the legislative purpose, she will gain insights that legal experts in the foreign country already possess about how the specific law fits into the broader system. These additional insights might help her choose a methodology appropriate to the specific legislation at hand.

Whichever method she eventually chooses, the interpreter first acquires a pre-dynamic overview and then begins again at the concrete apex of the funnel and engages the statute's text as her fundamental source. If by this point she has acquired cogent reasons to restrict source materials, then the U.S. interpreter will try to ignore such sources as best she can when arriving at a coherent holding concerning the specific provision *sub judice*.<sup>178</sup>

I call the above suggestion "pre-dynamic interpretation," rather than simply "a search for values underlying statutory canons of interpretation," because I want to align my method with Eskridge's general approach. Above, I have already alluded to how a self-consciously contextualist, multiculturally informed method might succeed for translators and comparative lawyers. Below, I enumerate more specific advantages to Eskridge's method. It is well to affirm here, however, the universality and usefulness of the philosophical ideas underlying

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177. See *supra* text accompanying note 23. Below, my examples will reflect this procedure of starting at the most abstract interpretive inquiry of the funnel. Hence, to interpret a British statute, one should first study the British political framework; to interpret the U.S. Bankruptcy Code, the Supreme Court should (and apparently does) look at the evolution and purpose of the Code.

178. Of course, we face the ubiquitous question (which pervades the law of evidence as well): To what extent can a judge ignore materials she has already analyzed? Some commentators have accused the new textualists of "peeking." See *infra* note 308 and accompanying text.

Eskridge's system. Critical pragmatism and the dynamic hermeneutic represent the most sophisticated translation tools at our disposal. This approach acknowledges that we create meaning via a web of cultural, historical, and linguistic contexts. Countless commentators have affirmed this fundamental insight of context-dependency.<sup>179</sup>

This paramount insight about context is built-in, so to speak, in the dynamic method. But, since this insight is downplayed or entirely ignored by plain meaning methods, criticism of the plain meaning rule began over 150 years ago<sup>180</sup> and has so intensified of late that only a few professors still defend the rule in any form.<sup>181</sup> The least sophisticated variant of the rule is particularly suspect, for, again, meaning becomes "ordinary" or "unambiguous" only in light of numerous and complex extrinsic understandings, never on the basis of reading a single sentence wrenched from the page. This caveat should assert itself with particular force when we must first translate the code from another language.<sup>182</sup>

Dynamic doctrine not only serves us better in theory, but also in our everyday tasks as lawyers, for competent decisions about U.S. law require competent knowledge of institutional values. Within any legal specialty, memorizing the black letter rules (in, say, a bar-review outline) will leave one very ill-prepared to analyze any novel case especially the kind of case actually litigated. This is why law schools highlight above all else that a slight change in the facts of a case should often send one back to the conceptual drawing board—back to social

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179. See, e.g., ESKRIDGE, *supra* note 12, at 38–47; Taylor, *supra* note 15, at 362–66 (citing works demonstrating that "the ramifications of these [contextualist] insights align with much recent legal and philosophic scholarship"); FISH, *supra* note 27, at 329–30; STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 141–79 (1994). Several writers like to tender the example of the "chicken" case, *Frigalimont Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) (Friendly, J.). See, e.g., Walter Benn Michaels, *Against Formalism: Chickens and Rocks*, in *INTERPRETING LAW & LITERATURE: A HERMENEUTIC READER* 215–25 (Sanford Levinson & Steven Mailloux eds., 1988) ("To read is always already to have invoked the category of the extrinsic . . . ." *Id.* at 223); and most recently, Paul F. Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178, 2186 (1996).

180. Taylor, *supra* note 15, at 355.

181. For citations to recent criticism of the plain meaning rule, see Zeppos, *supra* note 121, at 369 n.97. For a critique of plain meaning from a lawyer trained in linguistics, see SOLAN, *supra* note 76, at 108–117. Naturally, the academics (beginning with Schauer) who have recently defended plain meaning in some environments realize that the doctrine is not "value-free." See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, SUP. CT. REV., 1990, at 231, 251–52. Schauer would completely agree with the next sentence of my article. See Schauer, *supra* note 151, at 740.

182. For the evils of overreliance on dictionaries, see most recently Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1614–16 (1994) (reviewing SOLAN, *supra* note 76); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994); Taylor, *supra* note 15, at 375–76. Of course, resort to, say, a Turkish-to-English dictionary intensifies the woes of an already terrible situation.

science, ethics, and innumerable ideas and methods, including "practical reason" (cognitive skills that transcend intuition, induction, and deduction).<sup>183</sup> Yet the voice of formalism, the view that a pre-existing set of rules can and should dictate legal outcomes, still makes itself heard in academia and in the U.S. courtroom. I now turn to various defenses of textualism and formalism and ask whether these defenses might retain particular merit in the context of interpreting foreign statutes. (Clearly, proving that one should not learn domestic law solely via bar review outlines hardly refutes that admittedly rudimentary tactic when an overworked judge must pronounce upon the intricacies of Swiss Civil Code.)

In the ensuing discussion, the reader should keep in mind that the pre-dynamic method which I eventually hope to justify contains two steps: (1) initial research regarding institutional values; and (2) dynamism as the default method of statutory interpretation once step one is completed. Below, I often conflate the two steps, because some arguments show that plain meaning is the wrong route to follow both generically in all foreign law situations and specifically when confronting foreign legislation. At other times, however, I will shift gears and discuss advantages and disadvantages of the plain meaning approach as applied particularly to statutes.

## VI. JUSTIFYING PRE-DYNAMIC INTERPRETATION

### A. Resource Allocation

The most obvious advantage to textualism from our viewpoint is its comparative ease of application with little investment of judicial and litigant resources.<sup>184</sup> After all, a court that spends enormous amounts of time researching a foreign law issue squanders resources at the expense of its remaining caseload.<sup>185</sup> Because decisionmakers "are likely to over-assess their own competency,"<sup>186</sup> fewer errors might result if they must follow a simple rule rather than "immersing themselves in highly complex, technical areas where the probability of error is particularly

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183. See Farber, *supra* note 145, at 537-40, 554-58.

184. Nehf, *supra* note 120, at 83; see also Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 595 (1993).

185. See Alexander, *supra* note 38, at 635 (generally, on forum's interest in its procedures, including efficient administration of justice and in ensuring fairness).

186. Schauer, *supra* note 151, at 732.

high.”<sup>187</sup> We know that U.S. judges highly rate their own ability to interpret foreign law; yet foreign law sets hidden dangers for the unwary. Consequently, we may want to take the cynical position that, since judges likely will make unpredictable mistakes in this area regardless of their approach, we (the People) might as well constrain them and save the expenditures associated with extrinsic interpretive aids. This argument does not admit that plain meaning procedure achieves better results, but simply that, for other, more sophisticated methods, the costs outweigh the marginal benefits.<sup>188</sup>

This article responds in part to the above charge by proposing to educate judges about how they can educate themselves. My theoretical hypothesis suggests that a small, inexpensive, and quick amount of knowledge about underlying foreign values could fuel better judicial decisions than an intimidated plain meaning approach would. I elucidate this reasoning in the following sections.

### B. Neutrality & Universality

The plain meaning rule may seem purer than other interpretive schemes because it appears as if one could derive it from neutral first principles of linguistics or philosophy of language. If true, this neutral foundation would set plain meaning apart from, and perhaps raise it above, its messy, pragmatic rivals, which were designed to reach particular substantive outcomes. However, the deconstructionists have relentlessly exposed the illusory quality of plain meaning's apparent foundation.<sup>189</sup> Further, Zeppos has demonstrated that the new textualism, “[a]s much as any other theory of statutory interpretation . . . has a clear normative agenda.”<sup>190</sup> For example, “the public choice strand of textualism, in urging that statutes be given a narrow interpretation [to reign in special-interest legislation], seeks to correct what it perceives as the shortcomings of the legislative process.”<sup>191</sup> Also, especially since the

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187. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 658 (1992); see also Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1368 (1990) (arguing that questions of cost, access, and implementation are relevant to choice of theory).

188. Much more speculatively, one could contend that courts should deliberately use greater resources for cases involving only local interests. Arguably, a moral imperative dictates that judges should learn their ethics and jurisprudence in the most familiar contexts first, in the expectation of perfecting their skills before worrying as much about foreign litigants. Such priority arguably is natural, and beneficial for all parties in the long run.

189. See, e.g., *supra* note 180.

190. Zeppos, *supra* note 187, at 1331.

191. *Id.* at 1323. See generally *id. passim*; William D. Popkin, An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation, 76 MINN. L. REV. 1133 (1992).

normative component varies according to the political structure and other conventions of each regime, textualism cannot and has not achieved a definable universality among all nations.<sup>192</sup>

Even the plain meaning rule's "absurdity escape hatch," recognized by virtually every nation in the MacCormick study,<sup>193</sup> does not only rule out statements which are formally illogical. Rather, it excepts from literalism statements contrary to vague notions of common sense and reasonableness, and it does so upon rule of law rationales.<sup>194</sup> These underlying norms stay in tension with norms of legislative supremacy (i.e., democratic values).<sup>195</sup> Thus, the rule actually varies across systems. Unsurprisingly, the French courts only extremely rarely invoke the absurdity exception, for fear of "judicial activism."<sup>196</sup> In Germany and Italy, the exception is constitutionalized and thus formulated to invalidate both absurd and "manifestly unjust" results.<sup>197</sup> Notice also that where the absurdity argument is invoked very frequently, the plain meaning doctrine starts to resemble dynamic interpretation and absurdity becomes akin to "clear inconsistency with current values."<sup>198</sup> Hence, neither the plain meaning rule nor its principal exception attain neutrality.

Finally, neutral statutory canons are not necessarily even desirable, even if they were feasible. The flexibility, practicality, and self-revising nature of anti-foundationalist methodology can benefit the legal system that adopts it. I expound this benefit in Section G below.

### C. Predictability & Coherence—Domestic Law

The "rule of law" and "democracy" comprise two of the most important values held by all of the nations in the MacCormick study. Neither value is well-defined,<sup>199</sup> each is open to forceful attack,<sup>200</sup> and, to

192. See *supra* text accompanying notes 14, 154–159.

193. MACCORMICK & SUMMERS, *supra* note 14, at 485.

194. Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 134, 152, 163 (1994).

195. *Id.* at 164–65.

196. MACCORMICK & SUMMERS, *supra* note 14, at 192.

197. *Id.* at 485.

198. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 359 (1990).

199. "[T]here is no consensus in our polity as to the precise value and implications of democratic theory and the rule of law." ESKRIDGE, *supra* note 12, at 108. "[T]he Rule of Law is an internally complex doctrine . . ." MACCORMICK & SUMMERS, *supra* note 14, at 535.

200. See, e.g., John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199; MACCORMICK & SUMMERS, *supra* note 14, at 534. ("[I]t should be stressed that the appeal to democracy as a standard underpinning reason that justifies the legislature's authority is always tendentious and contestable, since there are several rival conceptions of democracy, in particular as between the socialist and liberal visions . . .").

some extent, the two values remain in tension with each other.<sup>201</sup> This article, however, will assume the basic validity and universality of these values, and it queries whether the plain meaning rule can better generate them. Under the rubric of "rule of law" values, predictability and coherence of the law are crucial and related<sup>202</sup> components. This article first addresses these components in the arena of purely domestic law and then in the arena of a domestic forum interpreting foreign law.

Predictability of judicial decisions is desirable. Probably all legal systems aspire to protect parties' reliance interests, in order to prevent forum-shopping and to foster equal treatment, fair notice, stability, and security in private affairs. "Horizontal coherence" of a legal system means "consistency with the rest" of the current law as a whole.<sup>203</sup> According to Ronald Dworkin and to the legal process theorists, such coherence is central to governmental legitimacy.<sup>204</sup> More generally, the very idea of systematizing the "law as a whole" falls within rule of law goals of "norm-based" theories of law. This classification "includes a great variety of legal theories," all of which share a:

belief in legal rights and duties independent of what a court will order someone to do in a particular case. . . . Although not universally endorsed, the norm-based view better reflects lay attitudes toward the nature of law than does the decision-based view, and also has a wider acceptance among legal scholars.<sup>205</sup>

The process of shaping a coherent body of laws concomitantly encourages judges to aspire towards impersonal justice by writing reasoned justificatory opinions grounded in continuous legal traditions, not idiosyncrasies.<sup>206</sup>

The pre-dynamic approach arguably engenders more predictability and coherence in decisions involving purely domestic law than does a pervasive textualism. Most sources of law originate from educated law-

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201. See *infra* note 209 (law as equilibrium).

202. It should be noted, however, that the goals of predictability and coherence are also somewhat in conflict with each other. Creating a coherent body of laws necessarily involves a search for generality, see Kelch, *supra* note 120, at 304, especially in civil law countries, where judges prefer to distill abstract propositions rather than distinguish factual situations. Coherence might thus produce predictability in the long run, as lawyers learn the generalized canons; but, in individual cases, predictability might suffer.

203. ESKRIDGE, *supra* note 12, at 239.

204. See generally *id.* at 146-47, and references contained therein. Ernest Weinrib's defense of legal formalism is another theory currently under debate that relies upon a notion of juridical coherence. See DENNIS PATTERSON, LAW AND TRUTH 28-35 (1996) (discussing and criticizing Weinrib's theory).

205. Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 669-70 (1995).

206. See *id.* at 668, 683, 686-87.

yers who expect that their audience will approach their texts "with a rich contextual understanding of previous law, the politics of the enactment, the affected business activity, and the dynamics of legal implementation in the area."<sup>207</sup> While sharing background understandings, the lawmaker and various audience members will arguably reach relatively dissimilar, incoherent results if an interpreter decides to become a willful outsider to the community by ignoring everything but the rules laid down or the words on the page.<sup>208</sup>

That is, except with regard to "willful outsiders," a host of shared (domestic) pre-dynamic conventions already confines both textualists and dynamic statutory interpreters, and these conventions lead to relatively predictable outcomes. Law amounts to a cultural understanding, constrained by an equilibrium among conflicting traditions, which presupposes a cooperative community of interpreters.<sup>209</sup> Since conservative doctrine (textualism, originalism, formalism) in the hands of a sophisticated ("insider") judge serves as an "efficient organizing device"<sup>210</sup> and not as a wooden formula, the judge ideally will always retain her sensitivity to the legislature's policy-making prerogatives, and yet will read expansively when the legislature intentionally leaves an area open.<sup>211</sup>

So, too, Eskridge envisions a host of restraints already reining in dynamic judges. Indeed, it has been claimed that, "Eskridge has painted

207. Farber, *supra* note 145, at 553 (discussing legislation).

208. *See id.*; *supra* text accompanying notes 145–146; Ross, *supra* note 30; David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 942 (1992) (stating that most legislation "occurs against a background of customs and understandings of the way things are done," and that this fact has ramifications for judges hoping to "cooperate" in a conversation with the legislature).

209. *See* ESKRIDGE, *supra* note 12, at 65, 196–97 (summarizing Stanley Fish). *See also* Eskridge & Frickey, *supra* note 28; Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1090–91 (1995) ("The faithful interpreter, then, is not merely a literal reader, but faithful to the many broader concerns wrapped up in the established practices of the legal interpretive community."); Allan Hutchinson & Derek Morgan, *The Semiology of Statutes*, 21 HARV. J. LEGIS. 583, 594 (1984) (book review) ("Communities of interpretation have their own bonding mechanisms, a mixture of moral values and social customs. Interpretation is inextricably bound up with values . . ."); Dougherty, *supra* note 194, at 164 (asserting equilibrium among rule of law and democratic values in other countries' systems).

210. Zeppos, *supra* note 121, at 411 n.317 (discussing originalism); *cf.* Farber, *supra* note 145, at 548 (stating that formalism is "more of a 'mood' than a theory," since it does not wholly reject non-literalistic methods).

211. *Cf.* Nagle, *supra* note 22, at 2236 (positing that a textualist judge must use dynamic methods when the statutory language is not plain in its immediate context). Nagle believes that the "absurdity" exception works well in that it rationally constrains judges more than a (dynamic) "unreasonability" exception. *Id.* at 2229–30. But, as mentioned above, deciding what is absurd depends mainly upon deciding what the particular culture conceives as unreasonable.

a picture of dynamic interpretation by a nondynamic judiciary.”<sup>212</sup> We should see this constraint as both empirical and normative. Judges both do and should try under most circumstances to respect deeply embedded values and to preserve continuity over change.<sup>213</sup> In this light, many well-established canons of interpretation implicitly conserve current social practice and the reliance interest of commercial parties.<sup>214</sup>

Empirically, textualism does not reach its main goal of predictable outcomes. For instance, a recent survey of lower court interpretations of state consumer protection statutes found that textualism grants just as much discretion as the evolutive approach.<sup>215</sup> Also, even the most infamous of new textualist jurists sometimes reach opposing conclusions about the alleged single “true” meaning of a statute.<sup>216</sup> Some commentators, however, dispute these findings and claim that dynamic interpretation is even less predictable.<sup>217</sup> Therefore, no clear winner emerges here, in the domestic realm, between the two methods—although, as explained below, judges may well write increasingly better dynamic opinions once they obtain more practice with the dynamic mode.

#### D. Predictability & Coherence—Foreign Law

Now let us turn our attention to interpreting foreign law. Here, the chance of either interpretive method delivering predictable or coherent results further declines. Serious questions then emerge: Should the judge consciously reach a “hybrid” result, mixing elements of domestic and foreign law? Or, should the judge chart a strict plain meaning design from the onset, thereby resisting hybridization and trying to remain a “willful outsider” to the foreign system? Which alternative fosters relatively greater predictability and coherence?

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212. William D. Popkin, Book Review, 45 J. LEGAL EDUC. 297, 301 (1995) (reviewing ESKRIDGE, *supra* note 12).

213. For the empirical component, see Shapiro, *supra* note 208, at 927–41. *See also* Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546, 1553, 1557 (1996) (reviewing ESKRIDGE, *supra* note 12) (stating that some dynamic interpretation is inevitable, but “even seemingly disruptive legal interpretations ultimately may serve the long-term maintenance of the legal order”). Others, however, believe that Eskridge overestimates the amount of dynamic interpretation in the status quo. *See* Nagle, *supra* note 22, at 2220, 2230, 2236 (arguing that dynamic interpretation is not inevitable). For the normative component see, for example, ESKRIDGE, *supra* note 12, at 200–06; Farber, *supra*, at 1554–56; Shapiro, *supra* note 208, at 941–45.

214. ESKRIDGE, *supra* note 12 *passim*; Farber, *supra* note 213, at 1556.

215. Nehf, *supra* note 120, at 83. *See generally* Taylor, *supra* note 15, at 357–58.

216. *See* ESKRIDGE, *supra* note 12, at 119; Eskridge & Frickey, *supra* note 28, at 77. The absurd result exception gives Scalia play—indeterminacy results. ESKRIDGE, *supra* note 12, at 134; John Polich, Note, *The Ambiguity of Plain Meaning: Smith v. United States and the New Textualism*, 68 S. CAL. L. REV. 259 (1994).

217. *See, e.g.,* Kelch, *supra* note 120, at 329–30, n.225.



First, consider the case for a deliberate "hybridization" strategy. While no one has heretofore systematically applied the idea to statutory interpretation, some comparativists have announced various formulations of hybridization.<sup>218</sup> As an example of the "adaptation" of foreign law, Professor Gregory Alexander discusses a Learned Hand opinion:

Finding that the French law of prescription did not provide for the substance-procedure distinction inhering in U.S. law, the court attempted to adapt the foreign law to the domestic law of limitations in the manner most faithful to the essence of the foreign rule. As the court acknowledged, it did not strictly apply the foreign law, but only its idea of the Civil Code provision on prescription, which, admittedly, may be quite different from the intention of the French statute. But in these instances the court does not apply its own interpretation of foreign law by choice, but rather out of necessity. . . . Judge Hand nevertheless considered it to be the forum's responsibility to confront the foreign law on its own terms.<sup>219</sup>

In applying that part of domestic law which is most similar to the foreign law, the court tries to the greatest extent possible to preserve the "essence" of the foreign law. (The "essence" of the foreign law is grasped by pragmatic observation, not by mysterious revelation.) But, in doing so, the court inevitably creates new law, integrating its own values with the foreign. In the terminology of translation theory, the forum court forges an approximate "equivalent" to the alien law ("on its own terms"), and the amount of approximation required is measured by the court's "familiarity" with the alien law. Arguably, though, the court ideally should first seek out familiarity in the abstract area of Ewaldian principles and values, and not, as Judge Hand and other judges do, in the area of rules.<sup>220</sup>

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218. See, e.g., EHRENZWEIG, *supra* note 5, at 361-62; ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 6 (2d ed. 1993); Alexander, *supra* note 38, at 626-38; Frank, *supra* note 169, at 913, 915-16; Alexander Nekam, *The Law of Conflicts and Comparative Law: Some Similarities and Limitations*, 34 LA. L. REV. 1077, 1078-80 (1974). This idea is implicit in the proliferating practical calls for international "harmonization" of laws, too. See, e.g., *supra* notes 47 (on legal metalanguage), 136 (on *Unidroit* goal of harmonization).

219. Alexander, *supra* note 38, at 627, 628 (discussing *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1930)).

220. Few scholars have advocated that judges burden themselves with research on foreign principles. Sass, however, did recommend that judges who wish to apply foreign law should try to grasp not just the substantive law but also the flavor and character of such law. See Stephen L. Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMP. L. 97, 117 (1981).

The judge should recognize that all identification of universal underlying values betrays a reconstruction of such values based partly on local conventions, and that her own perspective will be dominated by the conventions of her own culture. Thus, when a particular domestic judge grapples with a particular foreign statute, her interpretation will resemble not so much idiosyncratic prejudices as distinctively U.S. ones. Although one can strive to join a new interpretive community, in practice the old familiar norms will constrain one a great deal.

I can concede as much while still maintaining that the pre-dynamic methodology will help interpreters shift their perspective to one fairly in tune with the workings of the foreign community. The conventionalist declaration that such a paradigm shift is impossible can be parried in two ways. First, we can recharacterize the study of foreign law as an effort by the dynamic judge to keep her (already active) deeply held beliefs about the desirability of coherence and predictability. In adopting the pre-dynamic enterprise, she simply applies these existing beliefs to a larger (international) canvas.<sup>221</sup> Second, a broader critique faults conventionalism for lacking a convincing account of imaginative innovation.<sup>222</sup>

Let us assume, then, that it is theoretically possible to form a coherent hybrid. Is this result desirable? It lies beyond the scope of this article

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221. Discussing the requirement that interpretations conform to the intent of the enacting legislature, Schanck states:

Conventionalism also, however, observes that within the conventions of an interpretive community there will be standards for evaluating performance and results, and that it is possible to persuade community members that a particular convention should be changed or replaced by another because it will better satisfy more deeply held assumptions. . . . To the extent that the evolutive approach can replace previous interpretive constructs . . . and . . . become deeply embedded in our interpretive community, judicial decisions should more closely reflect . . . democratic ideals.

Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 U. KAN. L. REV. 815, 861 (1990). The change in outlook, if characterized as such, is "built into" any interpretive community: "[T]here are always tacit understandings about change itself that are ingrained in the psyches of its members." *Id.* at 839; see also Roger Kimball, *The Contemporary Sophist*, THE NEW CRITERION, Oct. 1984, at 5, 10

But why should we insist that reflection, in order to be effective, in order to be liberating, must be utterly free from the 'norms and standards' out of which it arises? Does not the simple fact of our being able to entertain a point of view very different from our own show that we can meaningfully transcend our taken-for-granted interpretive schemes?

222. For two critiques of Stanley Fish's 1980's output based upon the work of Alasdair MacIntyre, see Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 665-87 (1990) and S. Alan Jacobs, *The Unnatural Practices of Stanley Fish: A Review Essay*, 55 S. ATLANTIC REV. 87 (1990). As evidence of successful paradigm shifting, consider the many translators praised for their "defamiliarization" technique.

to defend a detailed analogy to Ronald Dworkin's or any other norm-based legal theories for foreign law. Instead, I defend a relatively conservative coherence scheme against the status quo.

The scheme I envision and defend would not automatically castigate judges for their tendency to deliberately tip the balance in favor of familiar doctrines and methods. We can begin by recalling the above discussion of translation theory. When the translation yields a crude approximation due to the translator's lack of information or skill, one can make a virtue of the necessity to capitulate to a more audience-centered model.<sup>223</sup> Similarly, when a court cannot fully comprehend the foreign system, it should still try to incorporate the foreign law into its decision-making process, but it should concentrate on coining an opinion that makes sense to U.S. practitioners. After all, the domestic decision will have no precedential weight abroad. Litigators, laypersons, courts, and legislatures<sup>224</sup> on alien soil most likely will never consult the U.S. ruling, even if it evidences superior skill and issues from a high appellate court. Consequently, less pressure exists to produce a globally coherent, or even globally comprehensible, text. In contrast, U.S. courts increasingly rely on previous U.S. foreign law decisions.<sup>225</sup> Thus, uniformity among such decisions is a worthy goal, protecting domestic reliance interests.

In some cases, too, procedural aspects of the U.S. legal system promise better overall jurisprudence. For instance, federal judges in the United States command far greater resources and time to make intelligent decisions than even the courts of last resort in England. As remarked below, one should press this distinct advantage into service, even if one's methodology and the substantive outcomes might change due to such resource access.

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223. See *supra* text accompanying notes 72–75 (improvement during translation).

224. Another suggested advantage of plain meaning purports that the rule discourages legislators from sending different signals to their constituents and the courts. See MAC-CORMICK & SUMMERS, *supra* note 14, at 437–38; Rasmussen, *supra* note 184, at 597; Shapiro, *supra* note 208, at 932.

In effect, the rule allegedly forces the legislature to write clearly. Eskridge & Frickey, *supra* note 28 at 37 & n.37 (legislative reversal of United States Supreme Court); *but see* Popkin, *supra* note 212, at 298 (one of several scholars who questions whether American legislatures react to court interpretations).

As discussed below, this interaction actually seems to work in England, but since the English Parliament will not bother to peruse U.S. cases, a domestic forum must modify its weighing of this factor. See *infra* text accompanying notes 301–307.

225. See Sprankling & Lanyi, *supra* note 6, at 66 (“With the increasing number of foreign law disputes confronting U.S. courts, the use of prior domestic decisions is likely to expand.”); *id.* at 63, 66 (foreign law questions, especially of particular patterns, are repeated in domestic courts); *id.* at 63–64 (traditional rule against stare decisis in questions of foreign law has been “ignored more often than followed” in recent years).

Yet, to reiterate, my proposed plan would ask that, even if domestic courts should concern themselves primarily with the consequences for U.S. law and its overall coherence, they should nevertheless research foreign values and resolve (not unlike Learned Hand) to fashion a coherent hybrid solution commencing with such foreign values. Currently, a majority of judges seem to do something quite different from this plan. But, their rhetoric belies this disparity, and so we must examine both.

U.S. judges frequently claim that they venture to predict outcomes. That is, they attempt to apply substantive foreign law (as exactly as possible) as it would be applied by the courts of the foreign jurisdiction.<sup>226</sup> Expressions of this prescription abound in the academic literature.<sup>227</sup> But, in reality, our judges still in many ways treat foreign law as a question of fact.<sup>228</sup> This mind-set allows a judge easily to avoid the onus of conducting her own research. Moreover, as Alexander notes, "[A]dherence to the fact approach serves to rationalize a court's consideration of the precise foreign rule pleaded *in isolation* rather than as it relates to other provisions in the foreign legal system."<sup>229</sup> Strangely, some courts even claim that if the statute "alone" is before them, construction is a matter of law, but the question of how a foreign tribunal would construe the statute is one of fact.<sup>230</sup> These practices often result in a primitive plain meaning reading. The judge typically defers to experts and takes their words literally, without appreciating the context that might demonstrate the bias of the experts' interpretations.

In theory, this behavior might bring about perfectly tolerable results. If, say, practically all U.S. judges mistranslate the French word *secours* for our "support," then the error will potentially achieve a brand of domestic uniformity. Schauer suggests that the plain meaning rule serves a "coordination" function for multi-member panels, allowing the court to reach amicable decisions on relatively unimportant cases.<sup>231</sup> Farber considers the argument that formalism might help ordinary citizens learn about statutes.<sup>232</sup> Analogously, the plain meaning rule here effectuates

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226. See Adler, *supra* note 33, §§ 5-6.

227. Sass, *supra* note 220, at 97; Hilding Eek, *Peremptory Norms and Private International Law*, 139 RECUEIL DES COURS [R.C.] 1, 18 (1973) (admitting exceptions, including procedural rules and "some questions of 'adaptation' of the foreign law"); Imre Zatzay, *The Application of Foreign Law*, in 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 14-1, 14-24 (1972).

228. See *supra* note 7.

229. Alexander, *supra* note 38, at 606 (emphasis added).

230. See, e.g., *Gallagher v. Leefers*, 274 P.2d 239, 244 (Cal. App. 1954).

231. Schauer, *supra* note 181, at 255; Schauer, *supra* note 151, at 724.

232. Farber, *supra* note 145, at 552, n.100.

coherence among the set of judges (in their own parochial interpretive community) who encounter similar foreign law questions.

Yet, if we further reflect upon this, we discover that the current dispensation produces neither predictability nor coherence. First, plain meaning domestic law decisions have not produced uniformity,<sup>233</sup> so the "willful outsider" stance probably will not succeed for complex alien law, either. Some minor empirical evidence points towards such failure.<sup>234</sup> Second, the frivolous way in which judges often treat foreign law bears little relation to lawmaking expressly based on coherent norms. The standard opinion gives one the impression of a sterile fact-finding mission, guided by absurd legal presumptions—not of a legal mind delving into a system of law. If anything, this augurs a shriveled kind of coherence.<sup>235</sup>

Tentatively, we can conclude that the dynamic, hybrid alternative should prevail. One advantage, which however cannot readily be quantified, is that once U.S. judges accord foreign regimes the respect that accrues from studying comparative law, those regimes will likely reciprocate this respect, such that U.S. litigants abroad will find their native law treated as a living whole. Certainly, many countries (such as France and Germany) already possess national institutes devoted to reporting foreign law to the judiciary. However, it is better to join the rule of law club late rather than never.

More importantly, rule of law values will crystallize back home, in a similar way as discussed above for purely domestic law; as judges gain greater understanding of the (foreign) law's conceptual wiring and source materials, false similarities and other errors fall away, leaving the resultant decisions confident, better reasoned, and more coherent. Even when a judge does not feel confident, dynamic interpretation is relatively likely to succeed, since most countries invoke dynamic reasoning routinely.

U.S. jurists will nonetheless sometimes have to choose whether or not to disregard a particular principle of the alien system. Already, judges are accustomed to occasionally ignoring sister-state law on

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233. See *supra* text accompanying notes 215–217.

234. This claim is speculative, given the relative scarcity of reported decisions repeatedly confronting the same foreign law provisions. But, Sprankling and Lanyi have unearthed six California rulings, all issued within a seven-year period, which split evenly on the issue of whether American citizens could inherit under German law. See Sprankling & Lanyi, *supra* note 6, at 63, n.376.

235. But see Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992), and especially *id.* at 898–900 (proposing view that law should be proved in a legal proceeding like any ordinary fact). For critical responses, see Larry Alexander, *Proving the Law: Not Proven*, 86 NW. U. L. REV. 905 (1992) and Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916 (1992).

grounds of "public policy," particularly in conflict-of-laws contexts. But, as a judge self-consciously adapts alien law, she will more likely come across this difficult problem. International law will provide some satisfactory answers.<sup>236</sup> Dynamic statutory interpretation provides other solutions. As formulated by Eskridge, that method will rarely jettison settled understandings, yet in some corners of the world, the likelihood of encountering rank discrimination<sup>237</sup> or revolution<sup>238</sup> (among other situations) will coax the dynamic interpreter to make exceptions to that rule.

### E. Democratic Values

When confronting a foreign legal order, the judge ideally will already hold reasoned allegiances in the current vigorous debate over "legislative supremacy" and statutory interpretation.<sup>239</sup> Then, in the pre-dynamic process, the judge can decide if the foreign situation merits similar treatment as the domestic. The legions of defenders and detractors of dynamic interpretation focus primarily on the issue of democratic values. But, unlike the rest of the arguments presented in this article for choosing dynamic interpretation as a default, one cannot readily generalize internationally from the arguments from democratic values given that each country carries its own unique political structure. Consider, for instance, the salient question of whether economic self-interest compels legislators to write "rent-seeking" laws, and if so, whether courts retain a constitutional mandate and institutional competence to correct for this political dysfunction. Certainly, one cannot reasonably answer for, say, Argentina, until one knows something about lobbying practices in that country, not to mention its conception of the separation of powers.

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236. See, e.g., Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (stating that domestic statutes should be construed in light of international law whenever possible); Symposium, *The Interaction Between National Courts and International Tribunals*, 28 N.Y.U. J. INT'L L. & POLITICS 1 (Fall 1995–Winter 1996).

237. See R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L.J. 91, 113 (1995) (reviewing ESKRIDGE, *supra* note 12).

238. Doctrinal or practical upheaval, swift change of the sweeping kind, presents problems for Shapiro's presumption of continuity. See ESKRIDGE, *supra* note 12, at 137–38. One district court stated that, in the interest of effective justice, it would not apply Libyan law, due to the pitfalls of interpreting the laws of a country mired in political unrest. See *Couch v. Mobil Oil Corp.*, 327 F. Supp. 897, 903 (S.D. Tex. 1971). In *Bamberger v. Clark*, discussed below, the court explicitly refused to change its construction of German law to align with any possible outcome that a Nazi court might have reached on the same facts. 390 F.2d 485, 489 (D.C. Cir. 1968).

239. See generally Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995) (arguing that all statutory interpretation involves choice of perspective about democracy).

Instead of writing abstractly, therefore, I will present below the case of England, where a U.S. judge must ask, in effect, whether England has something analogous to our constitution's bicameralism, presentment,<sup>240</sup> and separation of powers requirements. Only if this is the case will she then have to indulge her predilection regarding whether such requirements necessarily impugn the authority of legislative history.<sup>241</sup>

Two abstract metaphors, however, may marginally help the domestic interpreter to think about her role vis-à-vis the foreign legislature. These metaphors are: (1) interpreter as "relational agent" and (2) interpreter as "translator." Scholars invoke both to justify dynamic interpretation in situations where altered conditions arguably should cause the court to construe the statute contrary to specific orders from a temporally remote enacting legislature.

As Eskridge explains, the relational agent stays contractually bound in an ongoing relationship with her principal. Of necessity, the contract embodies both general directives and specific orders, and the agent must try in good faith to carry out both. In contexts unforeseen at the time of contracting, however, a given specific order may no longer remain rational or moral, and "the agent must exercise creativity in applying prior legislative directives," i.e., the legislature's general as opposed to its specific intent.<sup>242</sup>

In the domain of this current article, we subsume the problem of changed circumstances under the more pressing problem of unfamiliarity; here, the agent is relatively aloof and uninformed. To the extent that the lower domestic courts have an ongoing relationship at all with foreign legislatures, it is rather like hiring an outside contractor to repair any and all distant equipment whenever any emergency arises. The principal cannot expect perfection in such a thankless, strenuous undertaking, yet the agent still has an obligation to use her best efforts and whatever rags and twine are at her disposal to fix the broken equipment.

Translation represents a more apt metaphor, and the close relationship between translating and interpreting foreign law has been broached above. As mentioned in Part II.A, Lessig cautions that a translator must exercise "humility" and decline to translate when separation of powers concerns overwhelm the effort to craft a functional equivalent of a legislative directive under changed circumstances. A very similar concern operates to restrict translation of institutional values—and thus subsidiary canons, rules, and statutes—across international boundaries. Refusal to

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240. See U.S. CONST. art. I, § 7.

241. See generally ESKRIDGE, *supra* note 12, at 230–33 (criticizing Scalia's constitutional justifications for new textualism).

242. *Id.* at 125–26.

translate at all (evading the case) should comprise the last resort, not the easy way out.

#### F. Miscellaneous Characteristics of the Statute

Within any given nation, interpretive practice will vary depending upon the characteristics of the statute under consideration. The more aware we become of the different kinds of domestic statutes, the more we can fruitfully apply these very distinctions to foreign law as well.

Two helpful recent articles have praised the United States Supreme Court for its plain meaning constructions of the Bankruptcy Code.<sup>243</sup> Thomas Kelch describes eight justifications for textualism. His sub-headings for these justifications read as follows:

(1) the accepted meaning of language; (2) the pervasive nature of the Bankruptcy Code; (3) the nature of substantive rights and duties under the Code; (4) established historical meaning in the Code; (5) the newness of the Code; (6) certainty and predictability in commercial law; (7) the tyranny of punctuation; (8) the dilemmas of policy-based analysis.<sup>244</sup>

These justifications do not represent sensible reasons to abstain from reckoning on one's own (via pre-dynamic interpretation) what "accepted" or "established" meaning means. One can invoke Kelch's justifications even when foreign courts have not already cited them. Nevertheless, they depend entirely upon the specific statute under consideration. For instance, the Uniform Commercial Code, another "pervasive commercial code" in the United States, seems to demand dynamic interpretation.<sup>245</sup>

#### G. Improvement Via Experiment

The dynamic approach outlined in this article might improve with use. Once a judge attunes herself to the relevant conceptual traps and their solutions, her subsequent foreign law decisions will also improve, and the initial investment in education will more likely prove worthwhile. Moreover, the conceptual framework of "translation" and

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243. See Kelch, *supra*, note 120; Rasmussen, *supra* note 184. Other recent commentators have also noted and analyzed these decisions. See Peter H. Carroll, III, *Literalism: The United States Supreme Court's Methodology for Statutory Construction in Bankruptcy Cases*, 25 ST. MARY'S L.J. 143 (1993); Bruce A. Markell, *Conspiracy, Literalism and Ennui at the Supreme Court: An Examination of Bankruptcy Cases Decided from 1990 to 1993*, 41 FED. B. NEWS & J. 174 (1994); Adam J. Wiensch, Note, *The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law*, 79 GEO. L.J. 1831 (1991).

244. Kelch, *supra*, note 120, at 314-38.

245. See Frier, *supra* note 161; Zweigert & Puttfarcken, *supra* note 114.



"coherent hybrids" can improve interpreters' dealings with purely domestic statutes, such as statutes promulgated by sister-states or by a nineteenth-century congress.<sup>246</sup>

Eskridge also believes that his methodology, although vague to many,<sup>247</sup> can provide a template for enlightened new thought about institutional values. For instance, Eskridge contends that, "[t]here is no consensus in our polity as to the precise value and implications of democratic theory and the rule of law." Yet:

[d]ynamic statutory interpretation theory helps us evaluate theories of jurisprudence, for this discussion impels us to ask what the rule of law ought to mean, and how law ought to work in a democracy.<sup>248</sup>

More generally, Popkin has taken as Eskridge's "fundamental point" that "interpretation doctrine itself evolves as theories of interpretation change."<sup>249</sup> This is the critical pragmatism favored by many post-structuralists. Indeed, some scholars advocate a general practice of adopting interpretive structures that remain inherently open to revision.<sup>250</sup> If all goes well, intelligent and self-consciously open-minded U.S. judges (to whom this article is addressed)<sup>251</sup> will develop a style to interpret foreign codes that will transcend the vague and tentative guidelines already proposed for them. With this intention in mind, a judge might seize the opportunity to practice dynamic interpretation. True, the foreign law case will deal important consequences to the immediate parties. Such a case, however, has little precedential or signaling effect. Hence, it can profitably serve as a controlled experiment in a new methodology which, once mastered, could benefit

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246. It is a truism among comparativists that one can learn about one's own country by self-consciously studying the foreign. *See, e.g.,* Farber, *supra* note 1, at 521-22 ("In any event, the materials on German law, like the other studies of individual legal systems in *Interpreting Statutes*, cannot help but expand the imaginative space open to us when we contemplate our own legal system."); Ewald, *supra* note 35, at 2145-46.

247. *See, e.g.,* Nagle, *supra* note 22, at 2247.

248. ESKRIDGE, *supra* note 12, at 108.

249. Popkin, *supra* note 212, at 302 (discussing especially ESKRIDGE, *supra* note 12, at 199-201). Farber also sees an educative component of "practical reason." *See* Farber, *supra* note 145, at 558 (characterizing judge as problem-solver).

250. *See generally* Zeppos, *supra* note 187, at 1362, nn.315-16.

251. I must agree with Robert Weisberg's admonition that, "[t]he poorer judges had best remain either mystified or begrudgingly restrained by the old fictions of statutory interpretation." Weisberg, *supra* note 10, at 256. The worst judges will produce irresponsible results with the pre-dynamic method, wasting money and time along the way. Since it is unlikely that any but the most inquisitive judges will catch wind of the ideas in this article or related works in the field, however, I need not worry that I am instilling an undesirable dynamism in judges relatively ill-equipped to handle it. *Cf.* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 351 n.156 (1990).

numerous purely domestic decisions, too, and even lead to the "method of the future."

Such controlled experimentation has arisen in other legal areas. For instance, Lee Bollinger has analyzed the starkly divergent First Amendment standards for print versus broadcast media, and he concludes that the two fields provide a continuing experiment in the risks and benefits of relatively untrammelled versus limited freedom of expression.<sup>252</sup> And, it is not uncommon for an innovative legal trend to grow to maturity within a very specialized space.

## VII. JUDICIAL PSYCHOLOGY & CANDOR

Articles such as this one often peer optimistically beyond the pale of current judging practice. Sprankling and Lanyi assumed in 1983 that the quality of foreign law decisions would "inevitabl[y]" improve as judges' foreign law caseloads increase.<sup>253</sup> Yet judges have not become noticeably more sophisticated in this respect during the years since 1983.<sup>254</sup> It is necessary, then, to investigate how one might expect judges to take the first confident steps down the road towards glorious dynamic interpretation.

U.S. practitioners might be surprised at the increasing quality and quantity of textbooks and practice guides outlining many of the world's legal principles and values.<sup>255</sup> There is also a growing availability of foreign law translations and bibliographies. Additionally, CD-ROM technology and on-line databases have proliferated original-language source materials.<sup>256</sup> We cannot reasonably expect the judge to conduct all of her research *sua sponte*. She must actively seek assistance by clerks, masters, and certification such as help from civil law legal institutes.<sup>257</sup> Also, counsel should cooperate and take co-responsibility, in conjunction with the court's active role.<sup>258</sup> Hopefully, too, Sprankling

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252. LEE C. BOLLINGER, IMAGES OF A FREE PRESS 85 (1991); cf. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986) (permitting extremist speech provides a controlled preserve in which Americans can tease out the implications for unlimited freedom of expression and thus become generally more tolerant).

253. Sprankling & Lanyi, *supra* note 6, at 92.

254. See Adler, *supra* note 33.

255. In addition to the treatises already cited, see MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS (1985); JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, & EAST ASIA (1994).

256. See generally MORRIS L. COHEN & KENT C. OLSEN, LEGAL RESEARCH IN A NUTSHELL ch. 15 (6th ed. 1996) (introduction to research in the civil law system).

257. See *supra* note 9 (on foreign law institutes).

258. See Peritz, *supra* note 7, at 80.

and Lanyi's many perspicacious suggestions for reform in this area will eventually be implemented.<sup>259</sup>

Once a U.S. practitioner gathers together research aids, it may turn out that a few hours' reading in secondary material will impart a useful quantum of knowledge about foreign institutions. Here, the interpreter's attitude will prove as important as obtaining reliable sources. Optimally, a judge would display the foresight regarding "adaptation" of foreign law displayed by the Learned Hand decision extolled above. Additionally, we can hope that judges will become increasingly accustomed to capturing the abstract, broad principles of alien systems. *Bamberger v. Clark* is one simple but notable example.<sup>260</sup>

In that case, the Jewish appellant fled from Nazi Germany and settled in the United States. He then successfully applied to a federal agency, the custodian of his former employer's property, for funds owned to him by such employer. The United States government contested the agency's award, arguing that controlling German law designated Germany as the sole place of payment of the funds. This aspect of the case turned on the "meaning and interrelation" of two provisions of the German Civil Code. Section 269 yields the default rule that a creditor "shall render performance at the place where the debtor resided at the time the obligation arose." Section 242, however, provides that "the debtor is obliged to effect his performance as required by good faith with reference to the customs of social intercourse."<sup>261</sup>

The employee naturally contended that conditions had changed in Nazi Germany so radically that to demand the necessity of his return there to collect compensation owed him would contravene Section 242's "good faith" requirement. The government, in response, called an expert on German law, who concluded that Section 242 "did not apply because no German case could be found which invoked the provision to alter the place of performance."<sup>262</sup>

The case made its way to the appellate court in 1967, just after a new federal rule declared that foreign law must be treated as a question of law rather than of fact.<sup>263</sup> Even without experience in interpreting foreign law, though, the court was not intimidated by lack of judicial precedent for its holding, especially since German jurisprudence "is traditionally said to focus on statutory language rather than decisional precedent." Although the panel displayed some hesitation—by qualifying its

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259. See Sprankling & Lanyi, *supra* note 6, at 91-92.

260. *Bamberger v. Clark*, 390 F.2d 485 (D.C. Cir. 1968).

261. *Bamberger*, 390 F.2d at 487.

262. *Id.* at 488.

263. *Id.* at 488 n.6 (citing current FED. R. CIV. P. 44.1).

language with the word “probable” while needlessly repeating its holding—it ruled that Section 242 was “intended to invest the German courts with broad equity powers.”<sup>264</sup> Finally, the court even refused to make a decision based on an unfair and wooden prediction of how a German court might have disposed the question “while that unhappy land was under the sway of a regime that essentially flouted rather than implemented the rule of law.”<sup>265</sup>

Avoiding overindulgence in expert testimony, the court thus took responsibility to use a comparatively unfamiliar statutory framework. The court wrote of the dynamic spirit of the German Civil Code and its equity provisions, and of the role of precedent in Germany, with comprehension born not of detailed exploration but rather of sound elementary research. This opinion, then, can serve as a model for overcoming the fear of vast labor and eventual error when extracting foreign values. The judges in *Bamberger* seemed to gain confidence in the process of learning about German law.

But, what psychology induces such felicitous judicial confidence in the first place? As discussed above, a “shock effect” accompanies any attempt to translate and learn foreign law. The (previously textualist) judge will (suddenly) realize that words are unruly beyond immediate repair. Two different responses might ensue. On the one hand, the judge might boldly choose a dynamic paradigm, looking at the statutory language in light of values, history, social science, and so forth. Such a response obviously calls for creativity and work, but it also provides illumination. Alternatively, the judge’s extreme uneasiness might cause her to evade the responsibility with such tools as *forum non conveniens* or else to resort with renewed energy to the conventional mode centered around plain meaning. The judge should resist that mode if she can, perhaps by reminding herself of the strong possibility of false similarities or of the alien regime itself condoning dynamic interpretation.

A significant difficulty crops up, though, because judges cannot simply “resist” an accustomed mode of thought, for, as remarked above, unconscious biases play an important role in the complex psychology of judicial decisionmaking.<sup>266</sup> True, “paradigm shifts,” of the kind prerequisite to competent pre-dynamic interpretation, prove feasible in many instances;<sup>267</sup> for example, many people learn to become fine translators. Nevertheless, empirically we do not know what percentage of judges

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264. *Id.* at 488.

265. *Id.* at 489.

266. See *supra* text accompanying notes 76–79. For legal commentary on the important topic of the psychology of judging, see Altman, *supra* note 251; Farber, *supra* note 145, at 554–58; Moore, *supra* note 123, at 914–15; Zeppos, *supra* note 121, at 407–10.

267. See *supra* notes 221–222 and accompanying text.

who grasp the pre-dynamic method will react against it (in the psychological sense of "reaction formation") with greater formalism than ever.<sup>268</sup>

One might well dread the opposite scenario as well—namely, that pre-dynamic judges will take the experiment too far and conclude that universal indeterminacy prevails. Along these lines, Scott Altman fears that encouraging jurists to dwell upon their own mental processes might disastrously disillusion those who now (beneficially) deceive themselves into believing that they are acting under constraint of law when in fact they are acting according to their personal preferences.<sup>269</sup>

Yet my approach demands neither deep introspection<sup>270</sup> nor the view that judges stand free from constraint. Indeed, they should ideally feel constrained by both the domestic interpretive community and the foreign community into which they must imaginatively interpose themselves. That is, rather than feeding personal preferences, judges should diligently ferret out unfamiliar sources of conventional authority. The pre-dynamic process will by definition also seek out legitimating rationales for those sources. Thus, if used in anything resembling the appropriate spirit, the method will not promote the perception of indeterminacy.

Now, possibly, a little knowledge fares worse than none, and a U.S. judge might, after overly hasty reading in wide-ranging treatises, "transplant" ill-suited jurisprudence for generalized domestic use. Whether sparked consciously or unconsciously, whether fostering too much formalism or too little, the risk exists, although it seems rather far-fetched and probably does not outweigh the potential benefits of experimentation.

Linked inextricably with the issue of unconscious rationalization is the issue of conscious insincerity in judging.<sup>271</sup> A judicial opinion or legal

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268. Cf. Gail Heriot, *Way Beyond Candor*, 89 MICH. L. REV. 1945, 1949 (1991) (arguing that judges who learn that they are relatively unconstrained de facto "may well react by attempting to *increase* the constraint imposed by law"); Zeppos, *supra* note 121, at 410, 412 (noting that conclusions by adherents of dynamic interpretation based upon theories of judicial decision-making process are premature, since the process is complex and currently unmapped).

269. See Altman, *supra* note 251. For criticism of Altman's article, see Heriot, *supra* note 268.

270. Even Altman believes that judges should be self-conscious. "Self-consciousness means having and trying to use a theory about the nature of one's actions. . . . [Judges] do and ought to have views about their roles as judges. These theories affect their decisions. Opposing introspection means only that these role conceptions need not always be consistent with a perfectly accurate view of a judge's own mental processes." Altman, *supra* note 251, at 302-03.

271. See Zeppos, *supra* note 121, at 406-07 (arguing that judging is not a two-step process, whereby the judge makes a decision and then justifies it in a written opinion); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1316-21 (1995).

brief that begins with references to the background values of an alien legal system would present a radical enough departure from the norm that one might seriously question whether judges should candidly desecant upon this procedure in their opinions. At first glance, one might suspect that judges should almost always display as much sincerity as possible.<sup>272</sup> In the last decade, though, a large literature on judicial candor has emerged and complicated the analysis. Scott Idleman recently wrote the most comprehensive article yet, neatly setting out many factors both for and against candor.<sup>273</sup> Moreover, other recent scholarship has addressed candor specifically in relation to statutory interpretation.<sup>274</sup>

Foreign statutory interpretation could provide an interesting and serviceable application of Idleman's apparatus. For example, although it might seem that the experimentation advantage should yield the best fruit in an open environment, Idleman cogently questions the co-extensiveness of judicial sincerity and "progress."<sup>275</sup>

I will not attempt a treatment of these issues here. Instead, as an example of the broader concern, I simply defend one maxim for judges encountering an alien legal system: When interpreting a given country's laws, a U.S. court need not feel obliged to mimic an insincere writing style of that country's courts. Rather, the U.S. court should arrive at an independently reasoned stance on whether to conceal its true rationales. This maxim represents a corollary of the pre-dynamic approach: the foreign substance and style are often inseparable,<sup>276</sup> but the U.S. practitioner should adopt neither substance nor style until coherent reasons for doing so come to light. (This corollary can be tested in the interstate theater: Why should not a Vermont court imitate the distinctive style of the New Hampshire Supreme Court when construing New Hampshire law? Both because one cannot readily articulate a principle underlying New Hampshire law that correlates with the supposed New Hampshire

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272. Eskridge and MacCormick & Summers, for instance, assume that candor is a key value. See ESKRIDGE, *supra* note 12, at 238; MACCORMICK & SUMMERS, *supra* note 14, at 6.

273. Idleman, *supra* note 271.

274. Citations to such scholarship are listed in Idleman, *supra* note 271, at 1311 n.8; for citations to other works on judicial candor, see *id.* at 1309 n.2. Most pertinent here are Zeppos' two articles. Zeppos, *supra* note 121; Zeppos, *supra* note 187. See also Schauer, *supra* note 151, at 725-26; Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995) (concerning the practice of the United States Supreme Court).

275. Idleman, *supra* note 271, at 1370-73.

276. For example, some foreign courts (e.g., Poland and Italy) frequently justify their opinions with the "legs of a chair syllogism," where each premise is justified by several arguments. MACCORMICK & SUMMERS, *supra* note 14, at 492. The preference for this form of reasoning, as opposed to "linear" analysis, *id.*, can affect the result. Judges do not make up their minds and then simply fit the result into a justificatory style. The processes of reasoning and writing interrelate. See *supra* note 271.

style and because the Vermont forum retains a minor interest in cultivating its own style.)

MacCormick and Summers note that courts in the United States, the United Kingdom, Argentina, and Sweden tend to acknowledge the necessity for interpretive choice and to fashion elaborate, discursive opinions. In contrast, other systems, notably the French, deliver opinions in a form which hides the "genuine justification" behind a magisterial "façade."<sup>277</sup> One can easily explain, by reference to French history, why the French judiciary feels that it must strive at least to appear subservient to the legislature.<sup>278</sup> But, a U.S. tribunal discussing French law need not fear losing legitimacy for clearly noting why it rationally chooses to deviate from plain meaning. The luxury of judging from a remote location (far from potential reprisal of any sort) comprises one factor in favor of candor. In short, the relative strength of several of Idleman's rationales for candor, including "accountability," "power," "authoritativeness," and "notice," depend upon the venue.

## VIII. APPLICATION—THE ENGLISH COURTS & LEGISLATURE

### A. *Justifying Textualism*

One of my main points in this article is that terms such as "literalism" or "textualism" vary in meaning across legal systems. For example, as discussed below, England cultivates its own species of plain meaning which seeks "unambiguous" meaning and "objective" legislative purpose, and prohibits some specific sources of legislative history. Since we cannot necessarily depict the plain meaning doctrine as stable or fixed across national boundaries, it becomes especially important to probe whether one should submit to a particular plain meaning rule in a given situation. Instead of (perilously) trying to discover if a rule is generally accepted abroad, or applying it notwithstanding such empirical data,<sup>279</sup> one should instead query: (1) What are the merits and deficiencies of the doctrine as applied to statutes in general? (2) What factors should one consider when deciding whether the doctrine will work well

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277. See MACCORMICK & SUMMERS, *supra* note 14, at 16–18, 177, 501, 508; Farber, *supra* note 1, at 527; *supra* notes 116–118 (describing French judicial style).

278. See MACCORMICK & SUMMERS, *supra* note 14, at 503–08.

279. Cunningham et al. have devised a way to determine empirically if a particular word's meaning can be considered obvious. These authors surveyed a community of speakers to arrive at a principled plain meaning methodology. See Cunningham et al., *supra* note 182, at 1596–613. This approach does not meet our current needs. When we must translate from an interpretive community with which we have no intimate contact, we will not have the skills necessary to conduct an accurate Cunningham-type survey.

when faced with a given country's laws? and then, (3) Taking these factors into account, are there any underlying values in the particular alien legal system that lead us to favor the rule in this specific case?

In this section and the next, which discusses punctuation of English statutes, I use England as a thought experiment. Because of the relatively minor language and culture barrier, one can proceed through the steps of pre-dynamic interpretation with ease, a sort of trial run for more remote travels in the future. In this relatively simple case, the time expended to research and study the following information would not oppress a busy lawyer. For this section, I have relied heavily upon just two articles describing the English legal system. Once someone has determined what sources of authority to consult in her interpretation of English statutes, research aids are readily available to guide her through those sources.<sup>280</sup>

The task here requires us to move beyond the frequently dispatched but bald statement that, "The English [are] champions of the plain-meaning approach. . . . The English formulation presents the most extreme view."<sup>281</sup> In late 1992, after years of criticism and debate, the House of Lords ruled that the English courts may consider parliamentary materials where:

- (a) legislation is ambiguous or obscure, or leads to an absurdity;
- (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together with such other parliamentary material as is necessary to understand such statements and their effect;
- (c) the statements relied on are clear.<sup>282</sup>

To sufficiently understand the importance and limitations of this decision, however, one must understand its history.<sup>283</sup>

Even a relatively superficial reconstruction of the English system shows that in some ways the English system is strikingly different from the U.S. system at the level of principles and "flavor." As William Jordan summarizes, "However interconnected their roots may seem, each

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280. See, e.g., COHEN & OLSEN, *supra* note 256, ch. 14. In this section, I assume that no English cases on point have been located, so that the foreign individual must resort to the statutory text and other sources.

281. Kelch, *supra* note 120, at 310. Many other U.S. articles make similar claims.

282. Pepper v. Hart, [1993] 1 All E.R. 42, 69 (H.L.).

283. For details about this decision, see, for example, Gordon Bale, *Parliamentary Debates and Statutory Interpretation: Switching On the Light or Rummaging In the Ashcans of the Legislative Process*, 74 CAN. B. REV. 1, 13-17 (1995).



system derives from very different historical trajectories."<sup>284</sup> English legal history has tended to follow a formalist approach, emphasizing authoritative sources of law—both precedent and legislation. In part, this preference derives from the fact that English lawyers “consciously threw all their weight behind Parliament” in its political struggles against the prerogatives of the monarch:

The Common Law became a mighty weapon in the hands of the Parliamentary party . . . , for in its long history it had developed a certain tenacity, its very cumbrous and formalistic technique serving to make it less vulnerable to direct attack from above. Ever since then, Englishmen have thought of the Common law as being the essential guarantee of freedom, serving to protect the citizen against the arbitrary inroads of absolute authority. . . .<sup>285</sup>

In the nineteenth century, the views of Jeremy Bentham had an “enormous influence” and solidified this formalist perspective.<sup>286</sup> Today, the English continue to “believe that the best way to achieve justice is to follow the rules as plainly written. Although injustice may occur in some cases, reliance upon plain meaning is seen as ‘the best way of minimizing risk of error.’”<sup>287</sup> On the contrary, we can grossly simplify (yet retain a useful distinction) by declaring that the U.S. interpreter will tend to concern herself with the need to achieve justice and retain individual autonomy.<sup>288</sup>

Numerous political, judicial, and cultural institutions dynamically interact with theoretical doctrine to produce England’s own plain meaning approach. At best, we want to reconstruct as many such reasons as we can to explain why the system adhered to formalist views and developed its current doctrine. But, with limited time for background reading, we should concentrate on current political institutions. We should try to reconstruct a notion of the entire English political system in a manner that stands comprehensible to any conscientious U.S. judge. If we find that we do not yet possess a coherent perspective on the basic system, we should delve further into background sources such as the rudiments of medieval statute-creation procedure and Benthamite

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284. William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1, 18 (1994).

285. ZWEIGERT & KÖTZ, *supra* note 168, at 202 (emphasis omitted).

286. *Id.* at 204; *see also* Jordan, *supra* note 284, at 19.

287. Jordan, *supra* note 284, at 19 (quoting P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS 106 (1987)).

288. *Id.*

philosophy. Consider, then, the following five contrasts of English with U.S. institutions.

### 1. Legislative Bodies

The fundamental difference between the U.S. and English legislatures involves their relationship to their respective executive branches. "In England, the executive has virtually complete control over the legislature."<sup>289</sup> The Prime Minister and his cabinet are all members of the House of Commons; they lead the dominant party in the House. Party discipline is also very strong in England. Consequently, bills proposed by the executive usually pass in Parliament without substantial alteration. Since the government need not compromise with the (weak) opposition, it can pen relatively unambiguous laws. That is, the government can aim to and often succeed in resolving issues "plainly."<sup>290</sup>

In the past four decades, the English have moved back towards an effort to find legislative "purpose."<sup>291</sup> While the English courts speak in terms of Parliament's objective intent, the relevant intent is effectively that of the incumbent government forging party policy. Hence, government proclamations and statements of ministers or others proposing legislation seem relatively reliable indicators of "legislative intent." We must contrast such statements of the proposers with declarations made on the floor of Parliament, which often represent mere posturing, since the outcome of the debates hardly matter. *Pepper v. Hart* rationally suggests a "middle ground" where the courts should consider only particularly probative material, such as committee reports, and only if that material provides a reasonably clear answer to the question at hand.<sup>292</sup>

### 2. Legislative Committees

In the United States, congressional committees play a "central role in developing legislation." But, in England, by the time a bill is introduced into the House of Commons, the government has "already achieved the policy development and political bartering that happens in U.S. legislative committees. This fundamental difference is reflected in the subservient and transitory position of the primary legislative committees in the House of Commons."<sup>293</sup> They propose only minor emendations.

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289. *Id.* at 21.

290. *Id.* at 22.

291. Bale, *supra* note 283, at 17. The timing and extent of this shift to a "purposive" approach has been contested. See Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151, 1156 (1993).

292. Jordan, *supra* note 284, at 27.

293. *Id.* at 28, 29.

The result for our purposes is that English legal history registers no near-equivalent to the U.S. debate about whether to exclude consideration of congressional committee reports. A U.S. practitioner searching for parallels to congressional committee reports will find them in a perhaps unexpected place. Even before *Pepper v. Hart*, English courts allowed consideration of two types of extrinsic materials roughly comparable in some respects to our legislative history: (1) Royal Commission reports, to the extent that they form the basis or impetus for parliamentary enactments, may be considered in judicial efforts to interpret those enactments;<sup>294</sup> (2) *White Papers* or other statements of the government concerning proposed or impending legislation were also permitted. All of these materials constitute the legislature's primary explanation of the statute and its goals.<sup>295</sup>

By delving into the political structure of the nation, one avoids the "false similarity" between congressional committees and the House of Commons' committees. Conversely, by such study one realizes the profitable "true similarity" between the U.S. committee reports and the two English sources just described.

### 3. Legislative Drafting

Virtually all legislation introduced into Parliament is drafted by an elite office devoted to that task.<sup>296</sup> This practice perpetuates a tradition of careful drafting that reaches back hundreds of years. In medieval England, no one paid much attention to the precise wording of most legislation, for parliamentary acts were available only in unofficial versions, often corrupt or incomplete or altogether spurious.<sup>297</sup> Yet prominent medieval English jurists actually helped draft some statutes. This role probably led to relatively restrictive readings of those statutes. Moreover, by the sixteenth century, "Legislative drafting was . . . carried out with such skill by Crown lawyers . . . that judges were manifestly being discouraged from the creative exegesis they had bestowed on medieval statutes."<sup>298</sup> The nineteenth century then saw a helpful restructuring of the statutes as a whole.<sup>299</sup>

In contrast to the general experience of the United States, then, English statutes are now drafted by a very small, highly qualified, and

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294. The Royal Commissions are independent advisory bodies of recognized experts assigned to examine and report upon particular issues.

295. *See id.* at 32.

296. *See id.* at 33.

297. *See* JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 235-37 (3d ed. 1990).

298. *Id.* at 237.

299. *See* CARLETON K. ALLEN, LAW IN THE MAKING 423-28 (7th ed. 1964).

homogeneous group, and such drafting is not much adulterated in compromise-seeking committees. The result is relatively greater clarity in English legislation, and hence less need to examine extrinsic sources.<sup>300</sup>

#### 4. The Constitutional System & the Judiciary

In contrast to the United States, the English courts have no authority to invalidate an act of their legislature. Since the executive leads the dominant party in the legislature, the problem is not so much how to keep each branch within its proper sphere but rather "how to assure the dominance of Parliament as a democratically legitimate body and protect individual liberties against a nearly omnipotent government."<sup>301</sup>

The English courts have confronted this problem by, among other solutions, refusing to consider various statements of a bill's proponents except when the statements comprise an official explanation by the executive to Parliament. Such refusal helps curb excessive government power.<sup>302</sup> Although *Pepper v. Hart* now permits the consideration of previously excluded materials, it appears to do so in a limited manner consistent with this constitutional concern.<sup>303</sup> Thus, this specific advantage of the plain meaning approach becomes particularly germane in the English system. Analogous values underlie new textualist and legal process arguments for holding the legislature narrowly to its texts. Yet in our own regime of checks and balances, the same argument, while cogent, does not carry as much weight.

Statutory correction of perceived judicial errors occurs relatively frequently in England. As a result, there is less need for judges to struggle to discern legislative intent. If literalism produces an unwanted result, Parliament may well correct the problem.<sup>304</sup> Parliament, however, will rarely if ever correct a misreading by a U.S. court, which is one factor discouraging such literalism by a U.S. interpreter.

On the other hand, lack of parliamentary control should give a dynamic U.S. interpreter pause, too. English judges' background, education, and training reinforce a common judicial culture. They are

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300. See Jordan, *supra* note 284, at 34. But see S.H. BAILEY & M.J. GUNN, THE MODERN ENGLISH LEGAL SYSTEM 251 (2d ed. 1991) (summarizing a 1975 report which noted that drafters worked under considerable "pressures and constraints that made it very difficult to produce simple and clear legislation").

301. Jordan, *supra* note 284, at 35.

302. See *id.*; *supra* note 224 (citing legislative signaling as one advantage of plain meaning approach).

303. The courts may consider only "statements by a minister or other promoter of the Bill, together if necessary with such other parliamentary material as is necessary to understand such statements and their effect." *Pepper v. Hart* [1993], 1 All E.R. 42, 69 (H.L.).

304. See Jordan, *supra* note 284, at 38; cf. *supra* note 224.

"predominantly wealthy white males of late middle-age, a very large percentage of whom were educated at the same two universities."<sup>305</sup> Also, "English judges rise through the ranks largely by virtue of their ability as legal technicians."<sup>306</sup> The typical English "insider" (legislator and jurist) will thus be imbued with the "profoundly conservative,"<sup>307</sup> formalist outlook delineated above.

Consequently, it would be unwise for a U.S. practitioner who has just familiarized herself with the rudiments of current English values to skip over legislative history after confronting an unclear statute and hence to interpret with reference solely to values, even if the British themselves would not inspect that legislative history for the answer. For, part of the English values, ignored by such a judge, assumes that judicial political will does not need much restraint, because English judges already have a tradition of restraint, and because English legislators have a tradition of overruling maverick judges.

As an outsider, the U.S. practitioner must attempt to discern this whole system. Then, she should approximate its perspective as best she can. If some text is unclear to her, she might well be missing some semantic clue available to insiders that makes the text seem clear to them. Moreover, the English rarely deal with compromise statutes, and hence they rarely "discover" severe ambiguity. If no unbiased insider can give advice, the judge who feels that she is missing something obvious to insiders should glean clues from "forbidden" sources rather than hazard a guess, grounded on non-legislative sources, about the legislation's purpose. It remains within the spirit of the English system to hold to any legislative source, if helpful, rather than guessing or ignoring Parliament's purpose. In fact, before *Pepper v. Hart* (and no doubt continuing thereafter), English judges themselves frequently "cheat," looking to forbidden sources "for guidance or to check that their interpretation accords with the purpose of the statute."<sup>308</sup>

Part of the task of the good U.S. translator or agent involves laying aside the urge to inject politics into a decision that must fit within a system of relatively technical and conservative judging. Moreover, if the statutory meaning does seem clear to the U.S. practitioner, she should typically trust the text and not search too assiduously for ambiguity. If this conclusion seems anticlimactic after pages of examination of a different regime, we should bear in mind that the conclusion follows from the examination, and not vice-versa. As Eskridge declares, the strongest

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305. Jordan, *supra* note 284, at 39.

306. *Id.* at 40.

307. Bale, *supra* note 283, at 26.

308. *Id.* at 17.

interpretation is one that, like a cable, weaves together several mutually supporting threads. So, after the initial search for abstract institutional values, the U.S. interpreter will then come to grips with the basic outline of legislative purpose and the whole act under consideration. Jumping now to the level of the particular statutory phrase at issue, she will still remain acutely aware of any strangeness of the statute in its context. Yet, simultaneously, the larger investigation may condition her to expect relative textual clarity in England—compared with, say, the clarity of a statute prepared by a divided legislature which then is translated by someone with a discernible bias towards vague translations. Therefore, if what she reads still seems unambiguous—at this late stage of the investigation—such a reading is supported by a cable of understandings, not the thread of a monolithic plain meaning practice.

### 5. Legal Resources

Some institutional differences between England and the United States need not deter U.S. judges from fashioning improved hybrid law. English judges, even at the highest level, have far fewer resources than U.S. judges. For instance, English judges do not hire law clerks, and the courts of last resort usually sit continuously. Thus, they simply do not have the same amount of time as their U.S. counterparts to ponder the intricacies of legislative history or to write long opinions.<sup>309</sup> Certainly, U.S. judges can use their “extra” time to learn about the unfamiliar legal system and to write full opinions. These luxuries support rule of law values by making the final decisions more trustworthy. But, such factors do not imply that the domestic judge should often quote from forbidden sources. The litigants would not reasonably expect that consequence.

#### B. *The Punctuation Canon*

Every canon of construction conceals some underlying institutional values, even the so-called grammar or syntax canons.<sup>310</sup> Consider the punctuation canon, which in the United States has assumed “at least three forms”:

- (1) [A]dhering to the strict English rule that punctuation forms no part of the statute;
- (2) allowing punctuation as an aid in statutory construction; and
- (3) looking on punctuation as a less-than-

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309. See Jordan, *supra* note 284, at 37. English judges typically render their decisions from the bench at the close of argument. See *id.*

310. Cf. Shapiro, *supra* note 208, at 925 (arguing that there is more to unify than to divide the canons in statutory interpretation).

desirable, last-ditch alternative aid in statutory construction. The last approach . . . seems to have prevailed as the majority rule.<sup>311</sup>

The "strict English rule" that interpreters should disregard punctuation made sense during the several centuries during which England enacted statutes primarily in unpunctuated form. In fact, punctuation was sometimes inserted by clerks or printers after parliamentary action.<sup>312</sup> But, as Raymond Marcin has argued, the rule makes little sense in contemporary England, where punctuation is included as a matter of course in every bill.<sup>313</sup> While several commentators now urge that punctuation be treated as an indispensable part of the text, equal in status to the words themselves,<sup>314</sup> a general reluctance to do so persists both in the United States and in England.

Such reluctance, even where punctuation is included prior to every enactment, can be predicated upon a couplet of rational arguments. First, if we cannot trust legislators to know and follow the basic conventions of grammar, then we should not necessarily allow grammar to be determinative, especially if we can discover legislative intent in some more secure manner.<sup>315</sup> Second, if, at any point in the legislative and printing process within a given jurisdiction, careful editing takes a back seat, then punctuation becomes suspect. In parliaments where compromise is rife, lack of drafting clarity may consistently result. Italy, for example, often displays contradictory or inconsistent drafting, due partly to a decline in technical ability, partly to increasing complexity of subject matter, and largely to the "fact that law texts are proposed by coalition governments representing four or five political parties, which means that the texts produced are almost always the outcome of compromises (which at times are only verbal)."<sup>316</sup> (Incidentally, where bad drafting is endemic, various actions can help solve the problem. In Mexico, for example, subsequent issues of the official gazettes frequently

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311. Raymond B. Marcin, *Punctuation and the Interpretation of Statutes*, 9 CONN. L. REV. 227, 240 (1977).

312. One old statute (written in Law French) was punctuated by traverse lines on the Rolls of Parliament. A fascinating case sent a man to the gallows on the basis of that punctuation. See *id.* at 227-33.

313. *Id.* at 234-35.

314. See Kelch, *supra* note 120, at 331-32, and references contained therein; DC PEARCE, STATUTORY INTERPRETATION IN AUSTRALIA 55 (1981) (bemoaning the continued use of the English rule in Australia).

315. See Marcin, *supra* note 311, at 243 (citing New York law).

316. MACCORMICK & SUMMERS, *supra* note 14, at 217.

correct errors in statutory texts.<sup>317</sup> This is also the sort of information that a U.S. interpreter needs to know.<sup>318</sup>)

We can safely conclude that neither of these two rationales holds true in the British legislature. For, we now know that statutes there are drafted by highly professional, highly educated people at the behest of a political party assured of success. Suppose, then, that we are convinced that the strict English rule is illogical. Should a U.S. court still invoke it, when gaping at an English comma, simply because the English courts and lawmakers often do so? Only if the court believes that the legislature deliberately uses punctuation carelessly, since the legislature assumes that courts will ignore, or at least subordinate, the punctuation.

In exploring this matter, suppose that the U.S. researcher hunts down a 1996 English law review article establishing that the strict rule still constitutes the clear majority position, but that the modern trend pushes against it. I argue that the U.S. practitioner should not hesitate to adopt the modern trend. From what we have learned about its procedures, we cannot seriously infer that the English Parliament continually and confidently relies upon sloppy grammar. Furthermore, given contemporary procedures, the old rule is incoherent. It flies in the face of the (coherent) English practice of privileging the legislature's literal text as enacted. Taking the plain meaning of Parliament makes sense; taking the plain meaning of the strict punctuation rule does not. Perhaps in Italy, if courts there wield the structural power to encroach like this upon the legislative branch, one might rationally choose to subordinate punctuation. The pre-dynamic approach can test such speculative propositions.

Features of comparative legal culture aside, it is imperative to translate punctuation and other graphological information. Different languages have different punctuation standards, and disaster could result from a reckless attitude towards this fact.<sup>319</sup> Finally, whether to adopt a canon may depend upon the specific statute. For instance, one might place particular reliance on punctuation of a statute that has been repeatedly reenacted without alteration in the punctuation.<sup>320</sup> Alternatively, one might suspect punctuation in any piece of hurriedly enacted legislation. Congress once

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317. See Stern, *supra* note 33, at 33.

318. Another example, diametrically opposed: Bills of the federal government in Germany are prepared in "a highly professional manner," and then at least three readings in parliament are necessary in order to pass a statute. MACCORMICK & SUMMERS, *supra* note 14, at 117.

319. Perhaps one should think of the process as involving not just translation but also "decoding." See Ainsworth, *supra* note 49, at 548 ("Written in an archaic style without punctuation and frequently lacking obvious syntactic or morphological cues to sentence structure, classical Chinese texts are not so much read as decoded.").

320. See NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.15 (5th ed. 1992).



passed a bill composed in part from photocopied memoranda and last-minute hand-written additions, which contained "accidental entries such as a name and phone number—Ruth Seymour, 225-4844—standing alone as if it were a special appropriation item."<sup>321</sup>

### CONCLUSION

This article has tentatively linked theory of translation and of comparative law to the specific apparatus of dynamic statutory interpretation theory. Along the way, easy practical solutions have not surfaced; no facile formulae exist for dodging the problem of false similarities. While we must therefore "reconstruct" coherent institutional values as a basis for foreign statutory interpretation, we should greet all such reconstructions cautiously. Yet the key to effectively facing the diversity of hermeneutical approaches within a given foreign regime and across regimes is not to abandon our (extant but sporadic) attempts at independent research, but rather to undertake such research more boldly. Imagination and sensitivity to context should be celebrated. Hence, the confident state of mind prerequisite to such traits should also be encouraged.

While risks inhere in encouraging judicial imagination, a dynamic stance in this area seems well worth the risks. An interpreter who ultimately realizes that plain meaning constitutes a better way to deal with a difficult foreign statute will nevertheless have achieved important advantages by not having prematurely closed off a wide-ranging inquiry. My proposed approach not only helps the interpreter to choose the best method under the circumstances, but it also enlightens her about the very task of interpretation writ large.

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321. ESKRIDGE & FRICKEY, *supra* note 119, at 652 (quoting *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 867 (1986)).