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THE RULE OF TEXT: IS IT POSSIBLE TO GOVERN USING (ONLY) STATUTES?

by Peter Tiersma*

Is it possible to govern a jurisdiction by means of written text, which in today's world refers to statutory law or codes? This may seem a rather strange question. Statutes govern much of our lives. They prohibit us from doing things that we might otherwise be tempted to do, tell us how much tax to pay to the government, and regulate innumerable daily activities, such as how we drive our automobiles, build our homes, or engage in business and commerce. Codes have the same function in civil law jurisdictions, as well as in some American states.

The question that I would like to address in this essay is actually more specific: is it possible to govern a jurisdiction exclusively by means of statutory text? Of course, in a common law system such as

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ours, statutes are not the only source of law. Yet they are covering more and more territory as a result of the adoption of uniform acts, the restatements, and a more textual approach to the writing and interpretation of case law.[1] The rule of text may arrive sooner than we think.

Although we may live in an "age of statutes," courts continue to engage in common-law adjudication, and, in particular, they interpret statutes and often give those interpretations precedential power. As long as judges have the power to authoritatively interpret statutes, and perhaps even expand their reach, as Guido Calabresi has suggested,[2] we are governed not just by statutes, but also by the opinions of judges.

Textualists, of course, are troubled by this state of affairs. Most notably, Justice Antonin Scalia questions the power of American judges to engage in what he calls "judicial lawmaking," believing it to be at odds with the constitutional empowerment of the legislature to make law.[3] Scalia does not argue that the common law should be eliminated, but he is critical of the mindset or attitude of common-law judges, who in his opinion ask themselves: "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?" [4] This, in his view, is the wrong attitude in the "age of legislation" in which we currently find ourselves.[5] It creates a danger that:

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[1] Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187 (2007).

[2] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1985).

[3] ANTONIN SCALIA, A MATTER OF INTERPRETATION 11 (1997).

[4] *Id.* at 13.

[5] *Id.*

> under the guise or even self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.[6]

Justice Scalia is therefore a firm believer in the rule of text. As he puts it: "when the text of a statute is clear, that is the end of the matter."[7] Moreover, "It is the law that governs, not the intent of the lawgiver."[8] In Scalia's view, the rule of text is not just his political preference, but is essential to democracy: "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."[9] If there is some uncertainty in what the lawgiver enacted, judges should "apply the statute as written" and "let Congress make the needed repairs."[10]

Thus, the legislature enacts and promulgates laws in the form of written texts, or statutes. Judges should simply apply those statutes to the facts of a case. Uncertainties or gaps in the laws should be resolved by the legislature. That, in essence, is the "rule of text."

Is such a textual utopia—if it is one—possible?

We will first consider why governing by means of written text seems to be such an attractive idea. Next, we will discuss whether it is possible for human language to express legal concepts so plainly that there is no need for interpretation by judges. We then proceed

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[6] *Id.* at 17–18.

[7] *Id.* at 16.

[8] *Id.* at 17.

[9] *Id.*

[10] United States v. Granderson, 511 U.S. 39, 60 (1994) (Scalia, J., concurring).

to explore some historical precedents for the rule of text, specifically, the codification movement in Europe during the eighteenth and nineteenth centuries. Finally, we will consider in what situations some version of the rule of text can be gainfully employed.

I. ORAL VS. WRITTEN LAW

A preliminary question is, why focus on statutes, or written law? Why not just ask whether it is possible to govern a jurisdiction by means of any type of law, oral or written? The issue would then be whether it is possible to govern by means of language.

The short answer is that at least in the United States, whether by constitution, statute, or custom, both state and federal law require that statutes be enacted as written text. There is no such thing as an oral statute in this country.[11] Nonetheless, speech has many useful qualities, which as a preliminary matter are worth briefly exploring.

Oral language is inevitably embedded in context. Until quite recently, an utterance could only go as far as the sound waves produced by a human voice can travel. Moreover, those sound waves almost immediately disappear, never to return. In most cases, this means that the audience must be physically close to the speaker. The audience can therefore usually see the circumstances in which the speaker is located and the gestures that she makes, as well as being able to hear her intonation and tone of voice, all of which provide a relatively rich extralinguistic context for interpreting the meaning of her words.

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[11] PETER M. TIERSMA, PARCHMENT, PAPER, PIXELS: LAW AND THE TECHNOLOGIES OF COMMUNICATION 158–59 (2010).

Moreover, in an oral conversation the transfer of meaning is a cooperative enterprise.[12] The speaker generally tries to monitor whether the hearer understands her, checking to see whether he nods his head now and then, or says "yeah" or "uh-huh" on occasion, or at least asks a question or makes a comment that indicates comprehension. If the speaker suspects that the hearer may not comprehend, she can repeat herself or make her point in another way. Or, if the hearer does not understand an utterance, he can ask for, and will usually receive, immediate clarification.[13]

Oral lawmaking shares many of these features, at least in smaller communities where it is common. Suppose that the governing council of elders of some village decides that everyone above the age of ten years should spend one day each month working in the communal gardens. A pregnant woman wonders whether the rule applies to her. Rather than fixating on the exact words that were uttered by the council, which people would probably not remember verbatim in any event, she could simply ask the council members whether their decision was meant to include pregnant women. Interpretation is seldom a problem in oral societies. Notice also that oral law is remarkably flexible. If an unanticipated situation arises, it's usually quite easy to adjust the law.

Of course, as a society grows larger and more complex, governing by oral language becomes more difficult and less effective. As a result, it is not surprising that the rise of empires and the development of writing systems often go hand-in-hand. To be more exact, once literacy arises, it usually does not take long for people to start writing down laws.

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[12] Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TULANE L. REV. 446–49 (2001).

[13] *Id.*

II. SOME CONSEQUENCES OF WRITING LAW

Although oral law is certainly possible, there are a number of reasons why writing down laws makes sense. One is that writing is durable. As mentioned above, speech is extremely transitory. Writing can last a very long time, depending on the medium. Inscriptions carved into stone on ancient Greek and Roman temples can still be read today.[14]

The relative permanence of writing allows it to reach a vast audience that may be far removed from the drafter in space and time. If you wish to promulgate a written statute throughout the realm, you can have copies made on pieces of papyrus or parchment, and then order messengers to travel and spread the news far and wide, proclaiming the statute wherever groups of people gather. Or, if enough of the population is literate, you could have the statute carved into stone monuments placed at major crossroads and marketplaces.

The durability of writing also gives written texts a virtually unlimited capacity to store information. In oral societies the amount of law can normally not exceed the memory capacity of an official called a remembrancer¸ or perhaps the collective memories of the community (who, besides laws, would have many other things to keep in mind). The development of literacy made it possible to increase the volume of laws, which became necessary as growing populations began dwelling in cities and engaging in commerce.

The durability of writing, and its ability to span distance and time, mean that it is not unusual for a text to be read by someone who has no idea who the writer was nor the circumstances in which the text was written. The writer and reader may share little background information. Other nonlinguistic context, such as gestures

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[14] This section is based on TIERSMA, *supra* note 11, at 13–32.

and tone of voice, which are quite useful in interpreting speech, are also not available. Likewise, strategies for monitoring the transfer of meaning, which as we have seen are commonly used in oral conversations, are much more cumbersome in writing, especially when the writing is essentially a one-way communication, as is the case with statutes.[15]

The lesson for those who draft quintessentially written texts, like statutes or other legal documents, is that you need to place relatively more information about your communicative intentions into the text itself. All those things that might be obvious in a face-to-face conversation need to be explicitly communicated in writing. The text, in other words, must to a large extent be able to stand on its own. As linguist Paul Kay has stated, a writing in such a situation must be relatively autonomous.[16]

Some examples may help illustrate the point. If I want to give a watch to my nephew, I can simply hand it over and tell him, "it's yours." But if I want to do so in writing, by means of my will, which might not be read and implemented for many years, I would have to specify the full name of the nephew and where he lives, as well as a detailed description of the watch—its color, style, brand, and so forth, in order that both my nephew and the watch can be properly identified. Much of what is obvious in a face-to-face setting has to be spelled out in an autonomous written text like a will. A testator, in other words, must place his communicative intentions into the will.

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[15] Modern texting and email exchanges are, of course, very similar to oral conversations in this respect. Until now, however, statutes are essentially one-way communications.

[16] Paul Kay, *Language Evolution and Speech Style*, *in* SOCIOCULTURAL DIMENSIONS OF LANGUAGE CHANGE 21–22 (Ben G. Blount and Mary Sanches eds., 1977).

Another feature of writing is that it can be planned to a far greater degree than can speech. Authors can take their time, picking and choosing their words with care. One reason for carefully selecting one's words, especially in the case of what are basically one-way communications (such as statutes), is that—unlike speech—a writer usually cannot monitor whether the reader properly understands the text, and the reader cannot easily ask for clarification. Because they may have just one chance to get it right, careful writers draft texts in such a way as to reduce the likelihood of ambiguity or uncertainty.

The textual practices of writers of autonomous documents have consequences for their interpretation. If someone says something off the cuff, or dashes off a quick note, we normally do not focus all that much on the person's precise choice of words. We are mainly concerned with what he or she meant. In fact, we may not even remember the exact verbal formulation, since our focus is the speaker's communicative intent. It seems bizarre to engage in a close textual analysis of an informal bit of speech or writing.

Yet when interpreting an autonomous text, we tend to examine the exact words very closely. After all, the writer chose her words carefully. Moreover, if the author is separated from us by distance or time, the text may be the only evidence we have of what she wishes to communicate. It therefore becomes natural to view the text as something that has an existence independent of its author.

If we are unsure of the communicative intentions of a speaker in ordinary conversation, we generally ask, "what do you mean?" But if we are examining an autonomous written text, like a statute, asking the author what he meant may be impossible. Moreover, when we know little about the author and his situation, it seems odd to ask oneself what a stranger might have meant by a text drafted ten years ago at a distance of hundreds or thousands of miles. It is far more natural to ask, "what does the statute mean?" or "what does the statute say?" In other words, we often seem to conceive of statutes as speaking and intending. This is only a metaphor, of course, but it is a very natural one. Recall that in creating an au-

tonomous text, a writer must place her communicative intentions into the text itself. So the text is, in fact, expressing the author's intentions in a very real sense.

III. WRITING THE LAW

A. THE ANCIENT WORLD

It should be evident that the features of writing make it a natural medium for encoding the law. And that is exactly what happened historically. Leaving aside Chinese writing, the origins of which are still somewhat controversial, the earliest known writing systems arose in Mesopotamia and Egypt. The ancient Egyptians used writing for commercial and legal purposes, but they seem not to have written down their laws in any systematic way.[17]

In Mesopotamia, however, kings like Ur-Nammu and later Hammurabi had scribes write down some of their laws roughly 4000 years ago, producing the oldest known codes of law.[18] Hammurabi also had his laws inscribed in stone and placed in public places. Most scholars agree that the purpose of these laws was not to legislate or to educate the public, since law was still mostly customary and literacy was confined to a very small proportion of the population.[19]

In classical Greece, and particularly in Athens, the use of written law assumed more modern contours. At least in some instances, the language of a proposed law was put on a board in a public place, where people could read it and comment on the text. After it was adopted, the law was inscribed in stone and courts would

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[17] RUSS VERSTEEG, LAW IN ANCIENT EGYPT 7–11 (2002).

[18] RUSS VERSTEEG, EARLY MESOPOTAMIAN LAW 18 (2000).

[19] *Id.* at 13–32. For discussion of the possible purposes of writing down law in Mesopotamia, *see id.* at 13–18.

sometimes refer to it. Although much law in Athens remained oral, magistrates were required to follow a written law if there was one. Thus, the writing of law not only made it better known among an increasingly literate population, but also served to limit the power of magistrates.[20]

Somewhat later, the Roman Empire also made great use of writing, for legal as well as other purposes, but writing down the law itself was never a great priority. The emperors governed by written laws when it pleased them, or by other means when they preferred.[21] After the empire disintegrated, Europe entered a period of hundreds of years in which writing was mostly done by members of the clergy for religious purposes. Writing law—with some notable exceptions like Justinian's Corpus Juris Civilis--was a relatively sporadic activity.[22]

B. CODIFICATION IN EUROPE

The great era of codification in Europe coincided with the age of enlightenment and revolution during the latter half of the eighteenth and early nineteenth centuries. Much of the inspiration came from the work of the French philosopher Montesquieu, who wrote that laws should be concise and that the style should be "plain and simple" and "designed for people of common understanding."[23] Moreover, "the words of the laws should excite in everybody the

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[20] TIERSMA, *supra* note 11, at 136–137.

[21] ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY 14 (1984) (observing that the wishes of the emperor had the force of law).

[22] DAVID JOHNSON, ROMAN LAW IN CONTEXT 2–24 (1999).

[23] 2 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 165–66 (Thomas Nugent trans., The Colonial Press 1949).

same ideas."[24] He suggested that judges in monarchies generally conform to the law if it is explicit, but that otherwise they follow the spirit of the law.[25] In republics, however, judges must follow "the letter of the law."[26] Montesquieu did not explicitly propound codification, but he did set the stage for it.

The main aim of the codification movement was to state all of the law in one or more books, or codes, in contrast to the previous state of affairs in which the law was scattered among many disparate sources. Monarchs and other rulers would themselves be bound by the codes, a principle that has come to be regarded as an important component of the rule of law. In addition, governing by means of written text was viewed as a way to limit the discretion of judges, who at the time largely came from aristocratic backgrounds. Some proponents, including the philosopher Jeremy Bentham, viewed codification as a way to educate the public, or even to allow ordinary citizens to be their own lawyers.[27]

Thus, under this view it was important that the laws be stated in the vernacular, not Latin, and be phrased in clear and ordinary language, so that citizens could consult the code and perfectly understand their rights and obligations, without having to go to lawyers and judges. The codes needed to be organized logically so that people could readily find the relevant laws. And the provisions

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[24] *Id*.

[25] 1 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 75 (Thomas Nugent trans., The Colonial Press 1949).

[26] *Id*.

[27] Helmut Coing, *An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries*, *in* PROBLEMS OF CODIFICATION 19–20 (S.J. Stoljar ed., 1977).

ought to be short, so that people could more easily remember them.[28]

The Prussian Allgemeines Landrecht, drafted under the philosopher-king Frederick the Great, was perhaps the most ambitious attempt to govern a state exclusively by written text. To be more exact, the text consisted of around seventeen thousand separate provisions that set out precise rules that applied to specific fact situations.[29] It superseded all previous law. It was written in German, so that ordinary people could read and understand it. Judges were forbidden to interpret the law, since that would involve them in legislation. If they did so, they could be punished.[30]

Ultimately, the Landrecht proved a failure. Even in a technologically simpler world, the code could not answer all questions that came before the judges, so they were inevitably forced to "interpret."[31] The code also is considered a failure as a means of educating the public regarding the law and thus allowing people to act as their own lawyers.[32]

The French had similar ideals, which were strongly shaped by their revolution. The Civil Code of 1804 was to be a handbook for citizens, logically organized and written in accessible language, so that lawyers would become superfluous or, at least, less necessary. Yet because the French efforts at codification came somewhat later, they could learn from the Prussian experience. They wrote down

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[28] JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 28 (2d ed. 1985); Coing, *supra* note 27, at 21.

[29] MERRYMAN, *supra* note 28, at 29.

[30] *Id.* at 39; *see also* O.F. ROBINSON ET AL., EUROPEAN LEGAL HISTORY 257–260 (3d ed. 2000).

[31] MERRYMAN, *supra* note 28, at 39.

[32] Coing, *supra* note 27, at 25.

the law in terms of more general principles and maxims, rather than a large number of very specific provisions.[33]

Like the Prussians, the French were not eager to have judges "interpret" their civil code (later known as the Code Napoléon). So the legislature created a special governmental body, the Tribunal of Cassation, which had the power to quash (casser) incorrect interpretations by the judges.[34] Later, the tribunal was renamed the Court of Cassation, essentially an admission that it had become part of the judiciary, although even today it remains limited to its original power to quash incorrect decisions, rather than make new law.[35]

The Code remains in force in France and other parts of the world, in large measure because its provisions are relatively general in style and modest in number (somewhat over 2000 in total).[36] This means that French judges inevitably need to apply those provisions to the factual scenarios before them—and sometimes need to interpret them in the process.[37] Napoleon was apparently not happy about it, commenting that "[t]he Code had hardly appeared

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[33] MERRYMAN, *supra* note 28, at 27–30.

[34] *Id.* at 40.

[35] *Id.* at 41.

[36] *Id.* at 39.

[37] *See id.* at 39–40. Under Article 4, judges are required to resolve cases, which inevitably will sometimes require them to interpret the Code. CODE CIVIL [C. CIV.] art. 4 (Fr.). The immediately following provision states that "judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them." *Id.* at art. 5. Taken together, these articles seem to state or imply that judges must decide the case, may need to interpret the code to do so, but that their decisions are not precedent.

when it was followed almost immediately...by commentaries, explanations, developments, interpolations, and what not."[38]

Over a hundred years ago, the president of the Court of Cassation pointed out that when the text of the code is clear, precise, and unambiguous, a judge must follow its literal meaning. But if there are doubts about its meaning, the judge has "the widest power of interpretation."[39] Nonetheless, in the words of John Henry Merryman, "the folklore" that judges do not interpret the codes has had "surprising persistence in the civil law world."[40]

Clearly, the concept of governing by means of written text has many attractions. It seems to be especially popular when people do not have a great deal of confidence in judges. The implementation of the idea has been problematic, however, as is evident in the case of Prussia. The French civil code, on the other hand, has been quite durable. Yet the original ideal—that it would not need to be interpreted by judges, since its plain meaning covered all the bases--was eventually dropped in practice.

These historical antecedents do not bode particularly well for recent attempts to institute the rule of text in the United States. Yet perhaps, as they say, "the third time is the charm." Or will a more apt metaphor be, "three strikes and you're out?"

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[38] *Quoted by* C.J. Friedrich, *The Ideological and Philosophical Background*, *in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD 1, 15–16 (Bernard Schwartz ed., 1956).

[39] RENÉ DAVID & JOHN E.C. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 109 (2d ed. 1978).

[40] MERRYMAN, *supra* note 28, at 43.

IV. IS WRITTEN TEXT SUFFICIENT?

It's obvious that written law can be very useful in governing a country. But can it do the job on its own? Or do we inevitably need to give judges interpretive discretion to make the system work?

Essentially, the rule of text requires making the assumption that legislators can encode all of their communicative intentions into a written statute, thus making the text fully autonomous. What I would like to do now is test this assumption by examining a few of the cases that have received scholarly attention during the past decades.[41] Could the problems presented by these cases have been avoided by more careful drafting? Can they be corrected after the fact by legislative amendment? Or is written text simply an inadequate means of representing human intentions? The cases are not a representative sample, but were chosen to present some differing scenarios in which interpretation of statutory language has been an issue.

A. MISTAKES

For the most part, it seems that mistakes or scrivener's errors, once they become apparent, can be easily remedied. If a statute lacks a "not" or contains an incorrect date, fixing it should be a simple matter. A well-known case involving what was probably just a careless drafting mistake is *United States v. Locke*.[42] The statute in question related to the renewal of certain types of mining claims on federal land. Such claims had to be filed with a specified federal

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[41] Most examples in this section have been discussed by, among others, LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES (2010), and also LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993) [hereinafter SOLAN, JUDGES].

[42] 471 U.S. 84 (1985).

agency "prior to December 31 of each year."[43] The issue was whether a claim filed on December 31 was timely.[44] Logic dictates that the drafters in fact meant "by" December 31, rather than "prior to." In other words, the intention seems to have been that a claim should be filed before the end of the year.

While the question of how to deal with this type of problem after the fact is quite interesting, my point here is simply that the issue could easily have been avoided before the fact with proper drafting and can readily be fixed afterward via amendment. This is so because it is not caused by any indeterminacy of language. Rather, the problem is conceptual. Whoever drafted this language was not paying sufficient attention to the meaning of the words he chose. Written text could have governed this situation in a more satisfactory way, if only the drafter had been more careful. That, of course, is why we call them "mistakes." Because legislative drafters tend to choose their words with care, mistakes are not all that common in statutes.

B. AMBIGUITY: THE SCOPE OF ADVERBS

Consider next the problem of adverbs relating to the mental state of an actor, including knowingly, willfully, or intentionally, all of which are extremely common in statutes. Unfortunately, they can also be quite ambiguous. Too often it is not entirely clear what the actor must know or intend. An example is a 1934 false statement statute:

> Whoever shall knowingly and willfully . . . make . . . any false or fraudulent statements . . . in any matter within the

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[43] *Id.* at 89.

[44] *Id.* at 93.

> jurisdiction of any department or agency of the United States . . . shall be fined . . . or imprisoned.[45]

As Lawrence Solan has pointed out, this statute is syntactically ambiguous.[46] It surely requires that the actor must have known that he was making a false or fraudulent statement. What is not so clear is whether he must also have known that that it related to a matter within the jurisdiction of a federal department or agency.[47] As Solan explains:

> The statute was later amended in a way that clarified the meaning:
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false . . . statements . . . . shall be fined . . . or imprisoned.[48]

The reason that this amended statute is not ambiguous is that the jurisdictional requirement now precedes the adverbs. The scope of adverbs like knowingly or willfully can only extend to material that follows the adverb.[49] Consider a statute that makes it illegal "to knowingly carry a pistol while not having a valid license." It clearly requires knowing that you are carrying a pistol, and might or might not require knowledge of lack of a license. But suppose

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[45] Act of June 18, 1934, ch. 587, 48 Stat. 996 (codified as amended at 18 U.S.C. § 1001 (2006)).

[46] SOLAN, JUDGES, *supra* note 41, 70–71.

[47] *Id*.

[48] *Id*. at 70 (citing 18 U.S.C. § 1001(a)).

[49] *Id*. at 71.

that the statute instead makes it unlawful "while not having a valid license, to knowingly carry a pistol." All the statute now requires is knowing that you are carrying a pistol. It clearly does not mandate that you know that you lack a license. Thus, one means of avoiding the ambiguity is to take material intended to be outside of the scope of an adverb such as knowingly and to place it in front of that adverb.

Another approach is to break down the statute into elements. Thus, if knowledge of the jurisdictional requirement is essential:

> Whoever shall knowingly and willfully (1) make . . . any false or fraudulent statements (2) in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined . . . or imprisoned.

If such knowledge is not required:

> Whoever shall (1) knowingly and willfully . . . make . . . any false or fraudulent statements (2) in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined . . . or imprisoned.

Cases involving adverbs like knowingly arise with surprising regularity, even though it is not difficult to specify what the defendant must have known in order to be found guilty.[50] It is thus a simple matter to avoid this type of syntactic ambiguity, as we have just seen. This is not a problem attributable to the indeterminacy of language. The drafters may not have understood that their choice of

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[50] Another well-known example is United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

language was ambiguous, or they may for some reason have intended the ambiguity.

C. ADJECTIVAL AMBIGUITY

A similar issue can arise when an adjective is followed by more than one noun. Does the adjective modify only the first noun, or all of them?

This question came before the courts in a death penalty case, *California v. Brown*.[51] A California jury instruction informed jurors not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[52] Did this mean that jurors should not be influenced by "mere sentiment" or "mere conjecture" or "mere sympathy"? That is how the majority read it, and in that sense the instruction would have been constitutional.[53] According to the dissent, however, "mere" did not extend to "sympathy," and the instruction could therefore be understood in an unconstitutional sense, as a prohibition on taking any sympathy into account.[54]

This is a very common ambiguity. Does the phrase "old men and women" mean old men and old women, or old men and any women? Sometimes context or culture provides a clue: if a ship's captain declares that "old men and women" should be the first to enter lifeboats, he most likely means all women. But if you comment that there were a lot of "old men and women" playing shuffleboard at the retirement center, you probably meant old women.

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[51] 479 U.S. 538 (1987).

[52] *Id.* at 538.

[53] *Id.* at 542.

[54] For discussion, *see* SOLAN, JUDGES, *supra* note 41, at 55–59.

Similarly, if you order "red wine and cheese" in a restaurant, you presumably are not ordering red cheese.

Yet often enough context does not settle the matter. As was the case with adverbs, we can clarify this ambiguity by moving one of the nouns outside the scope of the adjective. Thus, "women and old men" makes it clear that the adjective applies only to the men. To emphasize that the adjective applies to both, it can be repeated: "old men and old women."

Returning to the Brown case, to ensure that the jury understands the instruction in a constitutionally permissible way, it could be rephrased to prohibit the jury from basing its decision on "mere sentiment or mere sympathy, or on conjecture, passion, prejudice, public opinion or public feeling."

Thus, careful drafters should generally be able to avoid ambiguities (and, in light of the large volume of state and federal legislation, they are usually successful). When an ambiguity manages to slip in, it can usually be corrected. A certain amount of ambiguity is inevitable in all speech and writing, but our linguistic competence also provides us with the tools we need to discuss the ambiguity and to reformulate the language in a way that makes the speaker's meaning plain.

D. VAGUENESS: "USING" OR "CARRYING" A FIREARM

Compared to mistakes and ambiguities, vagueness presents far more formidable challenges. In this area language is indeed indeterminate to some extent. As a result, vagueness poses a greater problem for the rule of text, especially if one insists on limiting the interpretive discretion of judges.

There is an interesting set of cases that revolves around the meaning of a federal statute providing for an elevated sentence for

people who use guns during the commission of certain crimes.[55] Specifically, the statute applies to "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm . . ."[56]

In one case, the question was whether the statute applied to someone who tried to exchange a gun for drugs.[57] The defendant certainly "used" a firearm in a broad sense, but he did not use it as a weapon, which one would imagine to be the concern of the statute at issue. Nonetheless, a majority of the U.S. Supreme Court held that the statute applied.[58] The dissent, authored by Justice Scalia, argued that the statute plainly referred only to use of the gun as a weapon.[59]

The problem here might be described as either ambiguity or vagueness. One can argue that the word "use" has at least two meanings: (1) broadly, to apply an object in any way whatsoever; and (2) more narrowly, to apply an object for its intended purpose. My sense is that these are really just manifestations of a single meaning: to apply something for a purpose. When you use something, you always do so to accomplish some purpose. Using an object or tool for its intended purpose seems like the most basic meaning, while using it for some other, unintended or unusual purpose, is more peripheral. The most obvious way to use a car is to transport people and cargo, but it can also be used as a place to sleep or to protect yourself from the elements.

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[55] For further discussion of these cases, *see* SOLAN, JUDGES, *supra* note 41, at 47.

[56] 18 U.S.C. § 924(c)(1)(A) (2010).

[57] Smith v. United States, 508 U.S. 223, 225 (1993).

[58] *Id.*

[59] *Id.* at 242–244 (Scalia, J., dissenting).

It would probably have been possible to avoid the issue by more careful drafting. If a more expansive meaning was intended, the statute could have referred to someone who "uses a firearm in any way whatsoever" or "for any purpose whatsoever." That would include buying drugs, it seems to me. Or it could be limited to someone who "uses a firearm as a weapon," which would exclude using a gun as cash. Although it requires some additional words and is not particularly elegant, we can generally make the meaning of a vague or general word more precise.

The sentencing enhancement also applies to "carrying" a firearm. So, what if a person is arrested with illegal drugs in the front of the car and a gun in the truck? Was he "carrying" a gun during the commission of a drug crime? You can certainly carry things in the trunk of a car that you are driving, although in my view the word is most naturally used to refer to transporting something on your person, especially in your hands or arms. Nonetheless, the Supreme Court held that having a gun in your trunk does qualify as "carrying" a firearm during the commission of a drug crime.[60]

Like "use," it is possible to refine the meaning of the rather broad or vague term "carry," but again the solution is not terribly elegant and would most likely fail to resolve all uncertainties. For instance, the statute could be amended to specify that the enhanced sentence applies to any person who "carries a firearm on his body or within the vehicle in which he is an occupant . . ."

The bottom line is that it is possible to reduce the vagueness that is inherent in many words. For instance, you can add language that expands or limits the general sense of a word, or perhaps define the word in terms of necessary and sufficient conditions, or

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[60] Muscarello v. United States, 524 U.S. 125 (1998).

insert some examples. Yet even the most meticulous drafter can never eliminate entirely the problems posed by vagueness.

V. IMPLEMENTING THE RULE OF TEXT

So, is it possible to govern solely by means of statutes or a law code, without giving interpretive discretion to judges or other officials? The conclusion that appears from the previous section is that, at least in theory, someone with unlimited time and brainpower may be able to draft statutes in a way that avoids mistakes and ambiguities. The problem, of course, is that human beings, none of whom have unlimited time and brainpower, sometimes make mistakes. And although some types of ambiguities are well known and should be easy enough to avoid, others as a practical matter may not become obvious until a legal issue exposes them. We thus need some mechanism to fix such problems when they inevitably arise.

The situation is different with respect to vagueness or generality. Such language is inherently somewhat uncertain. It is usually feasible to reduce the amount of vagueness in various ways, and that goal may often be worth pursuing. Yet some degree of vagueness will always be with us, and often enough it is quite useful. Once again there needs to be a mechanism for dealing with the vagueness that is inherent in much of the lexicon.

It should be evident that if we truly wish to govern by a code of written laws, and if we also limit judges to the task of mechanistically applying those laws to the facts of a case, then every time an interpretive question arises, judges would have to refer the issue to the legislature, which would then have to resolve the matter and amend the statute to reflect its decision. As noted above, this is exactly what we would do in the case of oral language—if your conversational partner says something that is ambiguous or vague, you ask her to clarify. Or if the village elders make an oral decree that later turns out to be unclear, people can simply ask them what they meant.

Although it was probably never a common practice, there is a report that in 1366 some English judges went to Parliament to ask what it meant by an uncertain statute.[61] It is not clear whether Parliament then amended the statute in question, but modifying or correcting the original language of the statute is an essential step in a government that acts exclusively through written laws.

Something of this kind happens with jury instructions. I am a member of both of California's jury instruction committees (civil and criminal). Most of the other members are judges and practicing lawyers, but each committee also has a research attorney who tracks recent legislation and judicial opinions that relate to the instructions. In addition, the committees routinely receive comments from members of the bench and bar who advocate for additions, modifications, and deletions. Based on this input, the staff attorney recommends changes to the instructions (or no change, if the existing language is deemed sufficiently clear and accurate). The committee then acts on the recommendations and writes new instructions or edits existing ones where necessary. Because the amendments are printed and incorporated into online databases only once or twice a year, there is necessarily somewhat of a lag, but overall the process insures that the instructions are always current. All that a trial judge needs to do is select the correct instructions to read or give to the jury, which then applies those instructions to the facts of the case to reach a verdict.

If this works for juries, could it not work as well for judges, who also need to apply the law to the facts in order to decide a case? Statutes in a very real sense are judicial instructions: rules that tell judges how to decide cases. Moreover, with a government run purely by statutes, judges should be permitted only to identify an

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[61] R.E. MEGARRY, MISCELLANY-AT-LAW: A DIVERSION FOR LAWYERS AND OTHERS 358 (1958).

ambiguity or uncertainty. They should not be allowed to resolve it, as they now routinely do, since then they would be making law.

How might such a system operate? Suppose that a potential interpretive issue arises in a case. The statute as written does not plainly resolve the question. In that event the judge, to avoid engaging in lawmaking, would have to forward the issue to the legislature for resolution. As Bentham wrote, "If a judge or advocate thinks he sees an error or omission, let him certify his opinion to the Legislature."[62] The trial in which the issue arose would be held in abeyance until the legislature has acted.

While this might seem an odd and inconvenient way of resolving interpretive problems, it is a logical requirement in a government that is truly committed to the rule of text. The Prussian Landrecht contained a procedure of this kind. Recall that Prussian judges were forbidden to interpret the code. If an uncertainty arose about the meaning of a provision, the judge had to refer it to a special Statute Commission that had been established inter alia to answer such questions:

> In deciding contested cases, the judge may ascribe to the statute no other meaning than that which clearly appears from the words, and the context of the same, in relation to the disputed object, or from the incontestable purpose of the statute.
>
> If the judge finds that the meaning of the statute is doubtful, then he must, without naming the litigating parties,

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[62] 3 JEREMY BENTHAM, *General View of a Complete Code of Laws*, in THE WORKS OF JEREMY BENTHAM 210 (Bowring ed. 1843).

> present his doubt to the Statute Commission, and await their judgment.[63]

The theory was that allowing judges to decide how to apply unclear provisions in the code would license them to interpret. Thus, a special body—the Statute Commission--would have to step in to avoid judicial interpretation. In actuality, it appears that little use was made of this procedure.[64]

The French Code Napoléon was also an attempt to create a clear and complete text of the law, as well as to limit the discretion of judges, who were often associated with the Ancien Régime. Inspired by Montesquieu's notion that judges should be merely "the mouth of the law," they devised a procedure known as the référé legislatif, which required judges to refer doubtful cases to the legislature.[65] Under the Constitution of 1791, this function was assumed by the Tribunal de Cassation, which at the time was considered a division of the legislature.[66] As noted above, the Tribunal was later

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[63] 1 ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN §§ 46–47 (1794) (Prussia) (Peter Tiersma trans.), *available at* http://books.google.com/books?id=DHdBAAAAYAAJ&printsec=frontcover&dq=allgemeines+landrecht&hl=en&ei=rhNsTYTIDZK8sQO23NmECA&sa=X&oi=book_result&ct=result&resnum=2&ved=0CCwQ6AEwAQ#v=onepage&q&f=false. Thanks to Silvia Dahmen for checking the translation.

[64] MERRYMAN, *supra* note 28, at 39.

[65] For more on the référé legislatif and the prohibition against interpretation by judges, which had antecedents in Roman law, *see* Paolo Alvazzi del Frate, *The origins* of the référé législatif and the cahiers de doléances of 1789, http://www.istituzionipubbliche.it/index.php?option=com_docman&task=doc_download&gid=13 (last visited Sep. 21, 2011).

[66] *See* Franz Neumann, *Introduction* to MONTESQUIEU, *supra* note 25, at lxiii; MONTESQUIEU, *supra* note 25, at 159 ("the national judges are no more than the mouth that pronounces the words of the law").

converted into a type of court and relegated to quashing incorrect decisions by the lower courts.

The state of Louisiana—historically a civil law jurisdiction--considered a similar measure in 1823.[67] A group of Code Commissioners needed to decide how judges should resolve ambiguities or gaps in a proposed new code. They recommended that judges in such an event should decide the case "according to the dictates of natural equity," but that "such decisions shall have no force as precedents unless sanctioned by Legislative will." Judges were therefore to periodically present to the General Assembly an account of all the cases in which they exercised interpretive discretion, thus enabling the legislature to "explain ambiguities, supply deficiencies and to correct errors that may be discovered in the Laws." By this means:

> [O]ur Code, although imperfect at first, will be progressing towards perfection; it will be so formed that every future amendment may be inserted under its proper head, so as not to spoil the integrity of the whole; every judicial decision will throw light on its excellencies or defects. Those decisions will be the means of improving legislation, but will not be laws themselves; the departments of government will be kept within their proper spheres of action.[68]

It appears that the proposal was never implemented.[69]

A more modern proponent of having the legislature correct gaps and ambiguities in the law is Alan Watson, a noted legal histo-

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[67] Peter G. Stein, Book Review, 46 LA. L. REV. 189, 193 (1985) (reviewing ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY (1984)).

[68] *Id.* at 194.

[69] *Id.*

rian and expert on Roman and civil law. Although it is somewhat more complex, an important part of his proposal to reform legislation is the establishment of a special legislative committee whose function it would be to resolve interpretive difficulties in statutory law and, more generally, to keep statutes up to date. After receiving referrals from trial judges, the committee would suggest revisions of the law to the legislature, which would then enact them. Judges could thus simply follow the text of the law, which would always be relatively current. The public would be able to rely on it also.[70]

Of course, such a method of updating statutes is more fitting, and perhaps more necessary, in a legal regime that has a code intended to embody all its law. It therefore seems more natural in a civil law system, where judicial decisions interpreting the laws are not binding precedent.

Besides Louisiana, various American states have at times discussed codifying some or all of their law. In the mid 1800s New York appointed a commission to "reduce into one written and systematic code the whole body of the law of this state, or so much or such parts thereof as to the said commissioners shall seem practicable and expedient."[71] The stated purpose was that "people may know the legal and equitable rules by which they must be governed--that litigation may be diminished, and justice more speedily administered."[72] The codification movement succeeded only sporadically in the United States, however. [73]

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[70] WATSON, *supra* note 21, at 112–134.

[71] MAURICE EUGEN LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 118 (1927).

[72] *Id.*

[73] TIERSMA, *supra* note 11, at 200–03.

Unlike the situation in Europe, limiting the interpretive discretion of judges was not a prominent goal of the codification movement in the United States. It seems likely that Americans simply had more confidence in the common law and the judges who administer it, including traditional common-law methods of interpreting statutes.

VI. CONCLUSIONS

Textualism has generally been viewed as a revival of the plain meaning rule, which was followed for many decades in England and, with varying degrees of rigidity, in the United States. What I hope to have shown in this essay is that it can also be fruitfully compared to the codification movement in eighteenth and nineteenth century Europe, with which it shares many goals.

Making this comparison suggests that there will always be a role for judges to play in determining the meaning of legislation. Of course, we have seen that it may be possible to promote the rule of text, and to reduce the interpretive role of judges, by careful initial drafting and by amending statutes when uncertainties or novel situations arise. This is especially important in areas where rule of law values are important, such as the criminal law, tax, or property law. In those arenas there are excellent reasons for insisting that government act by means of properly-enacted written statutes that are publicly available, clearly worded, and prospective in application, and also that judges faithfully follow the governing texts. Justice Scalia and his fellow textualists are in good company, standing alongside the ancient Athenians, Frederick the Great, and Jeremy Bentham, all of whom viewed written codes of law as a barrier against oppression and errant judges. Yet the judges survived and have learned to peacefully coexist, not just with the codes in Europe, but also with the "age of statutes" in the United States.

In response to the question posed by the title of this essay, I conclude that it is indeed possible to govern by means of written text, but only if that text is continually updated by the legislature

whenever problematic issues arise in actual cases. Most modern legislatures do not have the time and resources to do so, however. Thus, they essentially delegate some of their legislative authority to judges. Most lawmakers, I suspect, are perfectly happy to let judges decide the often thorny questions that can arise when abstract statutes must be applied to actual factual situations.