

Multilingualism and morality in statutory interpretation

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***Abstract.** This article discusses some of the costs and benefits of multilingual legislation, focusing largely on Canada and the European Union. Courts interpreting these laws must take into account the different language versions, since each version is equally authoritative. Fidelity to the legislature's will comes with very high stakes in this context, because multilingual legislative systems are most typically a means for recognizing the autonomy of minority groups, which, in exchange, cede some of that autonomy to a higher legal order. Thus, there is a special moral duty to ensure that the laws are construed faithfully at the same time that language barriers make it appear, at least on the surface, that it is more difficult to do so. Moreover, the risk of judges substituting their own values for those of the legislature when there is no single, definitive legal text, appears to become magnified in multilingual settings, creating the risk of decision making that would not stand up to moral scrutiny even in monolingual systems.*

This article argues that despite the apparent difficulties inherent in multilingual legislation, it actually reduces uncertainty in meaning by creating additional data points for statutory interpreters to consider. Multilingualism does, however, lead to certain additional problems of ambiguity. These, for the most part, however, are generally resolved fairly easily. It is further argued that the European approach to interpretation, which I call Augustinian Interpretation, is likely to lead to results more faithful to the legislature's intent than is the standard Canadian approach, called the Shared Meaning Rule. Arguments from case law, from linguistics and from the philosophy of language are adduced to support these conclusions.

Keywords: European Union, Canada, Multilingualism, Legislation, Interpretation.

Resumo. Este artigo discute algumas das vantagens e desvantagens da legislação multilingue, baseando-se sobretudo na legislação do Canadá e da União Europeia. Os tribunais que interpretam esta legislação têm que levar em consideração as diferentes versões linguísticas, uma vez que cada uma das versões possui idêntica autoridade. A fidelidade à intenção do legislador assume, neste contexto, uma grande importância, uma vez que os sistemas jurídicos multilingues constituem, tradicionalmente, uma forma de reconhecer a autonomia de grupos minoritários, que, por sua vez, cedem alguma dessa

autonomia a uma ordem jurídica superior. Coloca-se, assim, o dever moral especial de assegurar a construção das leis de forma fidedigna, ao mesmo tempo que as barreiras linguísticas fazem parecer, pelo menos superficialmente, que se torna mais difícil executar essa tarefa. Além disso, o risco de os juízes substituírem os seus próprios valores pelos do legislador dada a inexistência de um texto jurídico único e definitivo parece aumentar em contextos multilingues, com o perigo de uma tomada de decisão incumpridora do escrutínio moral, inclusivamente em sistemas monolingues.

Este artigo defende que, não obstante as evidentes dificuldades inerentes à legislação multilingue, esta reduz, efectivamente, a incidência das incertezas relativamente ao seu significado, criando alguns aspectos adicionais que os interpretadores jurídicos têm que considerar. O multilinguismo origina, porém, alguns problemas de ambiguidade adicionais. No entanto, geralmente estes são, na sua maioria, resolvidos de forma relativamente fácil. Defende-se, ainda, que a abordagem europeia à interpretação, que designo Interpretação Agostiniana, apresenta uma maior probabilidade de produzir resultados mais fiéis à intenção do legislador do que a abordagem canadiana comum, designada Regra do Sentido Partilhado. Estas conclusões são sustentadas por argumentos da jurisprudência, da linguística e da filosofia da linguagem.

Palavras-chave: União Europeia, Canadá, Multilinguismo, Legislação, Interpretação.

Introduction

It is the business of the courts to construe and apply laws. While there is considerable debate about how courts should go about performing that task, it is widely agreed that it is the legislature's will – not the judges' will – that should determine the outcome of a dispute. When the situation at hand plainly fits within the language and the purpose of the statute – or plainly fails to fit within the language and purpose of the statute – the judge's task is typically not a difficult one.

Things change once a statute appears ambiguous, once the situation at hand seems to be at the borderline of a statute's words, or when the statute is silent about the situation. At that point, judges must resolve disputes based upon such considerations as linguistic clues within the statute, legislative history (controversial in the United States, see Scalia and Garner, 2012), and an analysis of what the legislature set out to accomplish when it enacted the statute. This exercise of discretion provides opportunity for judicial mischief. Once a judge is empowered to decide how a statute should apply, the judge is also empowered to take advantage of linguistic accident to steer the law in the direction of the judge's own values, rather than those of the legislature that enacted the law.

When a judge substitutes his or her own values for those of the legislature, legal commentators generally note that the decision constitutes a judicial usurpation of the legislative role. This is generally regarded as an institutional problem, not a moral one. U.S. legal scholars from all political stripes recognize this practice in more or less the same way. (Compare Scalia and Garner, 2012 with Solan, 2010; Eskridge and Ferejohn, 2010).

The stakes are even higher when a judge knows what the legislature would have wished to accomplish by applying a law one way or the other and uses statutory ambiguity to undermine the legislative goal. Such is the case when a judge selects an interpretation that is linguistically acceptable, but at odds with the statute's underlying goal. Thus,

whether one speaks of fidelity to the statute's purpose, as is common in European and other civil law systems that rely on a teleological approach to statutory interpretation (see Lord, 1996), or of the judge as faithful agent of the legislature in the American style (see, e.g., Gluck and Bressman, 2013: 905), a judge has more opportunity to place his or her own values above those of the legislature when more than one interpretation is linguistically available.

This article asks how proliferating the number of languages in which a law is written affects the opportunities for judges to substitute their views for those of the legislature. Many legal orders call for statutes to be enacted in more than one language, with each version considered equally authoritative. Among them are the European Union (24 languages from 28 member states), Canada (English and French), Switzerland (German, French and Italian) and Hong Kong (Chinese and English). The moral issue is especially important in this multilingual context, because the different language versions generally represent different constituencies who have agreed to be subject to the same laws, often in exchange for a linguistically-neutral legislative regime.

At first glance, one might think that adding language versions to a single body of law can only be a source of confusion. Many commentators have said as much. For example, quoting Cheung (2000: 251), Leung (2012: 10) comments: "The need to read all versions together has been described as 'an inherent vice of legal bilingualism.'" Here, I take a somewhat different position. It is true that the difficulty in finding equivalence in translation causes problems for the multilingual legal system. But it is also true that adding data points (i.e., multiple versions of the same law) can assist the statutory interpreter by reducing the extent to which an ambiguity found in one language version can cause uncertainty in meaning. In earlier writing (Solan, 2009), I pointed out the interpretive benefits of this proliferation. This article tempers that enthusiasm based on a great deal of excellent work that has been published since.

The high stakes in legal interpretation

Stanley Fish (2005) begins his critique of American textualism with the following story: "Some years ago as I was driving my father back to his apartment, we approached an intersection with a stop light that had turned red. He said, 'Go through the light.'" (p. 629). The statement is ambiguous: It can mean that his father told him, crazily, to risk their lives by driving through the red light into the intersection, or that his father instructed him to go straight through the intersection (turning neither left nor right) once the light turned green.

Fish's story beautifully illustrates his point: Language can be construed only in context. When the context is clear to everyone, it does not feel that it is even there. Yet it is there, and it always plays a role in the interpretation of language, including statutory language. What makes his story most compelling in this regard, I believe, is the nature of the linguistic indeterminacy. Fish's father's statement is not vague. The uncertainty in meaning is not about a borderline case in which his father's instructions lie somewhere between going through the light and not going through the light. Neither is it ambiguous. Rather, it is simply incomplete. Fish's father gave exactly the instruction he intended to give. He just didn't say when Fish should execute the order. It was up to Fish to infer that part of the instruction from the context in which it was given.

Legal theorists have created metaphors for statutory interpretation that regard statutes

as incomplete instructions. Richard Posner (1990) likens a statute to a military command from headquarters to the field general, which gets cut off before all the information can be conveyed, leaving it to the field general to fill in the gaps. Ronald Dworkin (1986) used the metaphor of a chain novel, each decision writing a new chapter that is both faithful to the story's (statute's) past and adds to it in a way that feels coherent.

Most problems of statutory interpretation are about statutory language that conveys more information than did Fish's father. The majority of statutory disputes are about vagueness. They require the judge to decide where some event in the world should be placed as a legal matter when it lies neither clearly inside nor clearly outside the language of a statute. Among the classic U.S. cases are ones that raise the following issues: Should an airplane in 1931 count as a "vehicle" for purposes of a statute that criminalizes the interstate transportation of stolen vehicles? By a 9–0 vote, the U.S. Supreme Court said it was not¹. Is a minister a person performing "service or labor of any kind" for purposes of a law that bans payment of the transportation of such individuals into the United States? Again, the Supreme Court answered in the negative by a unanimous vote². Does a person who attempts to trade an unloaded machine gun for cocaine "use a firearm during and in relation to a drug trafficking crime?" Here, the Supreme Court said "yes" by a vote of 6–3³. Thus, there is a permanent residue of hard cases that plague a plain language regime, and this curse – if one looks at it that way – is an inevitable part of being human.

The problem of semantic uncertainty occurs in legal systems around the world. It is not a peculiarly US phenomenon. In his excellent book, *Word Meaning and Legal Interpretation*, Christopher Hutton (2014) documents cases with similar linguistic issues from India, Hong Kong, the United Kingdom, Australia, and Canada. Basically, wherever judges write opinions about statutory application in the common law tradition, some of those opinions will resolve disputes about borderline cases of word meaning. While the solutions to this problem may differ from one legal system to another, there is no reason to believe that precisely the same issues concerning word meaning are absent from civil law jurisdictions. (See Poscher, 2012 for general discussion of the question of vagueness in legal interpretation; Zippelius, 2006: 65 for discussion in the context of German Law).

Other problems are about ambiguity, in which two quite distinct readings of a statute are linguistically possible, and the choice of reading will lead to different outcomes of a case. Fish's story resembles the cases of ambiguity. To take one classic example, if a statute makes it illegal to "knowingly sell food stamps [i.e., certificates for government entitlement to subsidized food] in violation of this statute," does the person selling the food stamps have to know that the statute prohibited the sale in order to be found guilty? Or does the word "knowingly" apply only to the sale of food stamps? The statute is ambiguous in that respect, and the Supreme Court of the U.S. resolved a case that raised this issue in favor of the defendant⁴. The court applied a well-settled rule in most legal systems that ambiguities are not to be resolved in favor of finding criminality since the accused could not know in advance that his conduct was illegal.

Whether the case involves vagueness, ambiguity, or simply not conveying enough information to lead to a single interpretation, linguistic uncertainty can lead to mischief.

¹ *McBoyle v. United States*, 283 U.S. 25 (1931).

² *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

³ *Smith v. United States*, 508 U.S. 223 (1993).

⁴ *Liparota v. United States*, 471 U.S. 419 (1985).

Assume that a person in Fish's situation (let's call him "Stanley Wish") had wanted to have his father declared incompetent in order to control his father's wealth for the ultimate purpose of increasing his own inheritance. At a hearing to determine the father's competence, Wish testifies: "My father's crazy. I was driving him home and he told me to run through a red light, knowing that this would cause an accident." His characterization of what his father said would be a plainly immoral thing to do. Yet it would not be a lie. It would not be a lie because Wish would have accurately characterized a perfectly legitimate interpretation of his father's instruction. But intentionally mischaracterizing a speaker's communicative intent in order to achieve some personal gain is an ugly thing to do. The philosopher Bernard Williams (2002: 100-110) refers to the ability to hide behind literal meaning to justify such an act as "fetishizing assertion."

For that matter, it would be only slightly better for Wish to have mischaracterized his father's intent for benevolent reasons. Assume he was concerned about his father's behavior, and wanted to have a guardian or conservator appointed solely to protect his beloved parent. It would still be wrong to accomplish this by intentionally misstating the communicative intent of his father's instruction. Language is an imperfect instrument for communication. Dishonestly taking advantage of the imperfection by misrepresenting someone's communicative effort is wrongful. Moreover, to the extent that one finds such behavior more acceptable in situations where the motives are good and a little dishonesty seems to be the lesser of two evils, dishonesty by lying and dishonesty by causing someone to believe something to be true that the speaker knows to be false are on a moral par. (See Saul, 2012 for excellent discussion).

A court acts dishonestly in this way when it intentionally mischaracterizes a speaker or writer's intent in order to justify a decision consistent with the judges' (or judge's) own values. It is not immoral for a judge to reject the intent of a legislature in favor of other considerations, such as the principle that ambiguity in criminal statutes should be resolved in favor of the accused, regardless of whether the enacting legislature would have favored a conviction in the case at hand. However, it is immoral to use language as a means to undermine intended meaning by adhering to a literal interpretation in order to pretend that one is actually deferring to the legislature's intent when one knows differently, or should know differently. Once that happens, we are in Stanley Wish territory.

Courts act in this same immoral manner when they "fetishize assertion" by construing statutory language in a manner that undermines the authors' intent. (See Solan, 2011. That happens when an ambiguity leaves open a linguistically legitimate interpretation which, if adopted, would undermine the goal of the legislature, when another linguistically legitimate interpretation would advance the purpose of the law. Legislative purpose is not the only value about which judges should care. However, when judges act opportunistically to use interpretive openings to undermine communicative intent, they have acted in real life like our fictional Stanley Wish.

*Ledbetter v. Goodyear Tire & Rubber Co.*⁵, decided by the U.S. Supreme Court in 2007 illustrates the practice. Ledbetter claimed that she had been discriminated against based on her sex. The law set a time limit of 180 days to bring such a "discrimination" claim. Thus, Ledbetter claimed that she was entitled to damages for the most recent six months

⁵550 U.S. 618 (2007).

of receiving a lower salary even though the discrimination had been going on for some time.

In a 5–4 decision, the Supreme Court held that the word “discrimination” is volitional in nature and should be construed as applying to the initial decision to discriminate – not to the continual payment of reduced income because of gender. As Justice Ginsberg’s dissenting opinion pointed out, the result of this interpretation is that once an employer has kept discriminatory pay secret for six months, it is free to continue the practice forever, secretly or overtly. Soon after the decision, the Congress overrode the decision by clarifying the law⁶. To the extent that the justices who voted with the majority knew that they were undermining intended meaning, but took advantage of a linguistic opening to accomplish this task, they acted immorally for precisely the reasons that we saw above.

Now if language leaves openings for statutory interpreters to find a linguistic “hook” to assign a meaning to a law that is linguistically sanctioned but at odds with the outcomes that the enacting legislature would have intended, we may ask how much worse (or better) a legal system would be if the system were multilingual rather than monolingual. One possibility – perhaps the intuitively obvious one – is that multiplying the languages in which a legal system writes its laws will only serve to create more opportunity for interpretive mischief. As translators know, the ideal of precise equivalence between an original language and a target language cannot be the reality. (See, e.g., Bellos, 2011). On the other hand, it is at least possible that by presenting the interpreter with more than one authoritative text, all of which attempt to capture the same meaning, the multilingual legislature will have multiplied the data points that the judges must consider, thereby reducing the likelihood that some kind of linguistic accident – such as we’ve seen in the Fish/Wish story – can control the outcome of a case. If judges look at more than one version of a law and then triangulate, they may be able to sort out the intended meanings from the odd accident that occurs in one language version, but not the others. As we will see, both things happen.

Why multilingual legislation is not as difficult to interpret as we might expect

Deciding whether a borderline case fits into statutory language is the principal task of a court confronting a statutory case in a monolingual system. Because syntactic ambiguity creates only the occasional problem, we may ask how these problems manifest themselves in multilingual legal systems. For purposes of this discussion, consider a legal system to be multilingual when its laws are written in more than one language, and each language version is considered equally authoritative as a matter of law. Canada (French and English), Switzerland (German, French and Italian), Belgium (Flemish and French), Hong Kong (Chinese and English) and the European Union (24 official languages of 28 member states) are all examples of multilingual legal systems in this sense.

The greatest threat to equivalence in multilingual legal systems is that people will construe terms differently even when they appear to be equivalent at the time of translation. Quine (1960: 26) pointed out some half century ago that this kind of communicative breakdown is always a lurking possibility. He imagines a linguist doing fieldwork, trying to learn the language of a person in a distant place. His only evidence comes from matching the informant’s words to events perceived in the physical world. The two see a rabbit

⁶42 U.S.C. 2000e-(2)(a)(1) (2006).

running, and the informant says, “Gavagai.” The linguist notes that “Gavagai” is the word for rabbit, or for, “look, a rabbit.” Quine then asks:

Who knows but what the objects to which this term applies are not rabbits after all, but mere stages, or brief temporal segments, of rabbits? In either event, the stimulus situations that prompt assent to “Gavagai” would be the same as for “Rabbit.” Or perhaps the objects to which “Gavagai” applies are all and sundry undetached parts of rabbits; again the stimulus meaning would register no difference. When from the sameness of stimulus meanings of “Gavagai” and “Rabbit” the linguist leaps to the conclusion that a Gavagai is a whole enduring rabbit, he is just taking for granted that the native is enough like us to have a brief general term for rabbits and no brief general term for rabbit stages or parts. (29)

This obviously does not happen much in real life when it comes to rabbits. The reason is not that Quine’s logic is faulty. The reason, rather, is that people tend to interpret movement in terms of whole objects. (See, e.g., Bloom, 2000; Markman, 1989). The same holds true for Quine’s suggestion that we may regard the rabbit as a collection of “temporal segments.” That is why the Rene Magritte’s 1936 painting, “Clairvoyance,” is a surrealistic commentary – not something we interpret as realistic. The painting is a self-portrait of the artist looking at a still life containing an egg, but painting onto the canvas the bird that the artist imagines the egg becoming. We do not regard an egg as equivalent to an early stage of the mature bird. Rather, we perceive the world as reflecting a particular moment in time.



Thus, Quine is right as a logical matter, despite the fact that neither the Gavagai nor the Magritte painting present us with serious interpretive problems in real life. Yet, the problem of radical translation remains a classic description of how to measure the efficacy of multilingual communication, and we shall return to a few actual Gavagai cases in the European Union. Surprisingly, such cases are not easy to find.

Why might the proliferation of languages not cause a flood of serious interpretive dilemmas? I explain the relative success in respect to two observations. The first is that we are designed to categorize things more or less the same way, depending upon our experience. The philosopher Jerry Fodor (1998) puts it this way:

We conceptualize a doorknob as “the property that our kinds of minds lock to from experience with good examples of doorknobs,” “by virtue of the properties that they have as typical doorknobs.” (137)

The second observation is that doorknobs do not differ that much from culture to culture. If Canadian doorknobs are more or less the same whether one lives in Anglophone Canada or Francophone Canada, then everyone will lock to more or less the same properties of doorknobs regardless of which language they speak. That is because all Canadians are human – they have “our kinds of minds” to use Fodor’s term.

Not all cultures have the same folk taxonomy for animals, but they all have folk taxonomies, and those of Europe or of Canada or of Hong Kong are not likely to differ sufficiently from culture to culture to create much of a “Gavagai” problem. Just as we all lock to doorknobs the same way as each other, we lock to rabbits, eggs, and birds the same way as each other. This does not mean that Quine was wrong in his claim that the relationship between the characterization of an event in one language and the characterization of that same event in another is a one-to-many relationship. What it does mean, however, is that the problem does not occur as often as we might expect because we see the world in fairly similar terms, notwithstanding cultural and linguistic differences that result in disparate interpretations.

Two approaches to interpreting multilingual legislation

Let us continue with Fodor’s doorknob example. Consider a regulation that either taxes doorknobs or creates tax-free commerce in doorknobs. In either event, it will be important to separate door knobs from non-door knobs. The word for door knob in Portuguese is “maçaneta.” But maçaneta is a broader term than door knob. Many doors in Brazil have handles, rather than knobs. Portuguese uses the same word to describe both, illustrated below. The reason English has a narrower interpretation, it seems, is that we use a compound noun, and the word “knob” is part of it. This impedes the expression’s expansion into door opening devices that are not knobs. German works like English with Knopf (knob), Griff (immovable handle) and Klinke (moveable handle) all in play, and without the compounding⁷.



Thus, the addition of Portuguese to a statute written originally only in English is likely to cause a Gavagai problem. A law that regulates maçanetas in Portuguese would almost certainly be translated into English as applying to doorknobs and into German as applying to Knöpfe, creating a discrepancy in meaning if the law were to come under examination in the context of a case involving handles. Yet at the time of translation, no one would be likely to notice the problem. Roderick MacDonald (1997: 1234) put it right, speaking of Canada’s bilingual legal system: “The fact that we can communicate despite differences in language points to the possibility of a shared human knowledge beyond language.”

In Portuguese, the regulation would apply to both of the devices pictured above. In English and German, one could argue either way. Either “door knob” (Knopf) can be understood as generic for all door-opening devices, or more narrowly to include only proper knobs. If one can argue either way, a gap is left open. A court may adopt an innocently unfaithful interpretation, one that the enacting legislature would not have wanted, but which seemed the better interpretation to the judge who later had to construe the statute without adequate additional information about the legislature’s intention. Even worse, the law is now open to a court’s intentionally undermining the legislature’s intention while staying within the limits that the language imposes.

⁷Thanks to Silvia Dahmen for this data.

Significantly, we cannot tell from our hypothetical *maçaneta* case whether adding languages helps or hurts the interpretation of laws as a general matter. If we begin with Portuguese, and intend to regulate both kinds of devices, then adding an English version that uses the word “door knob” complicates matters. What was clear in Portuguese is not clear in English, and if both are equally authoritative, a judge will be faced with interpretive work as a result of the bilingualism. If the regulation has a clear purpose, no harm will be done. But if it does not, the proliferation of languages has created room for error and mischief.

In contrast, if we start with English and then add the Portuguese, the opposite occurs. It becomes easier for a litigant seeking broad interpretation of the regulation to include both knobs and handles to argue that such an interpretation was exactly what the legislature had in mind. So whether adding additional language versions to a legislative scheme aids interpretation or makes it more difficult depends on which language came first, and must be considered on a case-by-case basis.

Courts do not, however, look at multilingual legislation that way. Rather, they engage in the fiction that no version is a translation of another, but rather, that they are all originals that share both equal authoritative status and the same drafting history. (See Leung, 2012 for discussion of legal fictions in multilingual legal systems.) This leaves interpretation rather uncertain when legislation is written in two languages, each version being given equal status. There is more than one way for a court taking this stance to resolve conflicts between the different language versions of the same law. Here I will compare two: The Canadian “shared meaning” approach, and the European “Augustinian” approach. Canadian courts employ a “shared meaning rule,” tempered by subsequent inquiry as to whether the shared meaning furthers the purpose of the statute. If not, purpose can trump shared meaning. The Court of Justice of the European Union (formerly the European Court of Justice) employs a somewhat different approach. It looks at the various language versions and triangulates in an effort to capture the legislative intent. As does the Canadian approach, it uses the purpose of the law as a safety valve when the linguistic analysis produces uncertainty or produces a result at odds with furthering the law’s goals.

Not many cases would turn out differently in the two systems because both methods ultimately concern themselves with purpose (sometimes called the “teleological approach” to statutory interpretation). Nonetheless, I will attempt to demonstrate here that there is a significant conceptual difference between the two approaches. The EU approach better addresses Quine’s Problem. I will further argue that the proliferation of languages, contrary to what is typically assumed, actually reduces the interpretive uncertainty of Quine’s Problem, although it cannot eliminate the problem entirely. There is a price to pay, however. Multilingual legal systems create syntactic ambiguity where there was none, and suggests a lack of ambiguity where there might have been some intent to permit broader interpretation.

Canada’s shared meaning rule

The Supreme Court of Canada has stated the rule thusly:

First, the English and French versions may be irreconcilable. . . . Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous. Third, one version may have a broader meaning than the other. . . . “[W]here one of the

two versions is broader than the other, the common meaning would favour the more restricted or limited meaning”⁸.

Once this analysis takes place, it must be determined whether the shared meaning is consistent with Parliament’s intent. If so, the shared meaning – which is the narrower meaning – prevails. Thus, the shared meaning rule is a defeasible rule. A number of scholars have pointed out the inadequacies of mechanical application of the shared meaning approach (Beaupré, 1988; Macdonald, 1997; Sullivan, 2004).

To see how the rule applies, consider the following case that construed a law that permits the incarceration of a minor only in limited circumstances. In *R. v. S.A.C.*⁹, the issue was whether a child whose conduct in the case before the court was seriously criminal in nature may be incarcerated under a statute, the English version of which reads: “[Incarceration is permitted if] the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years *and has a history that indicates a pattern of findings of guilt.*” (emphasis added). If the child’s behavior in the current case counts toward determining the pattern, then the statute would permit incarceration in this case. If not, then the earlier history of the child’s conduct would not justify imprisonment. The French version reads in relevant part: “il [l’adolescent] a commis un acte criminel pour lequel un adulte est passible d’une peine d’emprisonnement de plus de deux ans *après avoir fait l’objet de plusieurs déclarations de culpabilité.*” The word “après” (after) clearly means that only criminal conduct that occurred earlier than the case at hand should count toward determining the youngster’s criminal history. Applying the shared meaning rule, the French version trumps the English version and the child may not be sent to prison.

The problem with the shared meaning rule occurs when it is relatively clear that the purpose of a law would be undermined by imposing a narrow interpretation. Consider *R. v. Sinclair*¹⁰, a 2010 decision of the Canadian Supreme Court. The English version of the Canadian Charter of Rights and Freedoms contains the following provision:

Everyone has the right on arrest or detention: . . .

b) to retain and instruct counsel without delay and to be informed of that right.

In *Sinclair*, the question was how long this right lasts. The preposition “on” in English suggests that it expires shortly after the arrest or detention begins. But the French version is broader. It begins: “Chacun a le droit, en cas d’arrestation ou de détention:” “En cas de” is not limited to the time immediately upon the arrest. The Supreme Court of Canada decided that the French version better reflected the legislative goal and adopted it, even though its meaning is broader than the English version.

Once one determines that fulfilling the law’s purpose is more important than the shared meaning rule, it may turn out that the purpose is better furthered by some kind of compromise that fits somewhere between the French and English versions. That is what happened in the 1985 case, *Aeric, Inc. v. Canada Post Corporation*¹¹. The English version of a regulation allowing for second-class postal rates referred to the “principal business” of an organization, suggesting that the rates apply only to profit-making enterprises. The

⁸*R. v. Caisse Populaire*, 2009 S.C.C. 29 at paragraph 84 (internal citations omitted).

⁹2008 S.C.C. 47.

¹⁰[2010] 2 S.C.R. 310.

¹¹*Aeric Inc. v. Chairman of the Bd. of Dir., Canada Post Corp.*, [1985] 1 F.C. 127.

French version, in contrast, applied to “l’activité principale,” which could be just about anything. The court held that the rates are available only to businesses, but the businesses need not be for-profit in nature. Neither version actually carries this understanding as its literal meaning.

What all of this suggests is that the critics of the shared meaning approach make a good point: The courts care only about the shared meaning when they believe that the coincidence of meanings best reflects the purpose of the statute and the will of the legislature. Thus, the approach does little work in its own right. As Sullivan (2004: 1014) notes:

Let us suppose that the primary duty of interpreters is to give effect to the law that the legislature intended to enact insofar as that intention can be known. The legislature’s intention is necessarily an inference. Let us suppose that the primary duty of interpreters is to give effect to the law that is drawn from reading the text (whether unilingual or bilingual) in context, having regard to the purpose of the legislation, the consequences of adopting a proposed interpretation, and admissible extrinsic aids.

Of course, the examination of the different language versions in Canada does something to reduce uncertainty in its own right: When the different versions would lead to different results, it forces the statutory interpreter to come up with justifications that go beyond the plain language of the text, since there is no single text and the language is not plain when the two are compared. This forces an analysis of purpose when there may have been none had there been only one version. As we have seen, though, it is entirely possible that one or the other version fails to capture the intent of the drafters. We can take this argument much further when we expand the number of language versions from two to 24, which is the number of versions in which legislation is written in the E.U.

Augustinian interpretation in the European Union

The Court of Justice of the European Union, with its obligation to give effect to all 24 versions of every act of legislation, takes a somewhat different approach. Like its Canadian sister, the CJEU is willing to forgo the application of formal interpretive procedure when doing so appears necessary to effectuate the purpose of the statute. Unlike, the Canadian courts, however, the CJEU does not presume that the narrowest interpretation is the presumptive one. Rather, the European Court looks at a number of language versions and then triangulates, using the various versions to come up with an essential sense of what communicative act was intended. The method relies crucially on the fiction that the language versions were all drafted independently, so that none is a translation of another. This fiction will hide distortions that result from a particular language version propagating similar versions when they are the source language for translation in actual practice. Nonetheless, with 24 languages available to compare, it is likely that the range of expressions will provide at least some useful information as to what the European Commission intended to accomplish by enacting a directive.

I have called the process “Augustinian Interpretation,” after the procedure for reading multiple translations of the scripture that Augustine developed in late antiquity. In *On Christian Doctrine*, he noted:

For either a word or an idiom, of which the reader is ignorant, brings him to a stop. Now if these belong to foreign tongues, we must either make inquiry about

them from men who speak those tongues, or if we have leisure we must learn the tongues ourselves, *or we must consult and compare several translators.*

According to Augustine, ambiguity in a text may remain unnoticed, especially if it results from bad translation. Even worse, incorrect translation can lead to mistakes as to the actual content of the Divine Scripture. The surest way to discover such problems is to place competing versions (both in Latin and in predecessor languages) side by side and look for differences. Ambiguity should be resolved in favor of promoting core religious values, such as charity.

The Augustinian method of the CJEU largely adopts this methodology, although it diverges from it in some interesting ways. First, the EU does not recognize that the various language versions emanated from multiple translations of an original text. Acknowledging the translation history in which one version was the source of another violates the principle of equal authenticity that is so much a part of EU legislative culture. Thus, examining multiple texts and then triangulating is more or less a necessity. When there are discrepancies, the court has no choice but to compare language versions and to examine extra-textual material. (See Lachacz and Mańko, 2013).

Second, while Augustine resolved discrepancies in favor of the interpretation that best promoted the value of charity, the CJEU resolves discrepancies in favor of the interpretation that best furthers the law's legislative goals. Both, then, apply what is called a substantive canon of interpretation in current legal parlance. (See, e.g., Eskridge and Ferejohn, 2010: 1253 ("There are more substantive canons of statutory construction than you can shake a stick at;")).

The Augustinian method works best when the question is one of word meaning. For example, in *E.C. Commission v. Italy*¹², the European Court of Justice was asked to interpret an EU directive that requires member states to exempt from VAT "the provision of medical care in the exercise of medical and paramedical professions . . ." The Italian law implementing this directive was worded in such a way to allow for the exemption of veterinarians. A look at other versions showed that the Italian one was an outlier¹³. After making the comparison, the Court held that the directive does not apply to veterinary services.

I will not provide additional examples here, since this practice is well-documented in the literature. (see Baaij, 2012, forthcoming; Cao, 2007; Leung, 2012; Solan, 2009 and references cited in these works). Instead, I wish to focus on the issue of how well this method works. By this standard, I mean to say that the method works when, after comparing the various language versions, it becomes relatively clear which version (or versions or hybrid interpretation) best reflects the intent of the enacting body and thus best furthers the legislative purpose.

The best indication of how well Augustinian interpretation has worked comes from the excellent work of C.W.J. Baaij (2012; forthcoming). In a study of 50 years of ECJ opinions (1960-2010), Baaij found that 246 of them involved a comparison of language versions (Baaij, forthcoming: 5.2.2). Of these, only twenty involved disputes over the meanings of ordinary words. Of those, the Court resolved thirteen by choosing the majority of the

¹²Case 122/87, *E.C. Comm'n v. Italy*, 1988 E.C.R. 2685.

¹³The Italian version read in relevant part: "le prestazioni mediche effettuate nell'esercizio delle professioni mediche e paramediche quali sono definiti dagli Stati membri interessati."

versions, and seven by resorting to the purpose of the law by means of external evidence. Let us accept the proposition that all of the seven cases in which the Court considered, but rejected an interpretation based upon the meanings of the provision in a majority of languages are, indeed, Gavagai problems, that is, examples of cases in which the non-equivalence of similar terms in different languages creates a failure of communication. (See Leung, 2012; Cao, 2007).

One such case is a real-life multilingual version of the “No Vehicles in the Park” hypothetical law that has been part of Anglo-American legal lore for half a century (see Hart, 1961 for original discussion). In the actual case¹⁴, an EU directive regulated “the letting of premises and sites for parking vehicles.” A Danish company, which was letting a site for boats, claimed that it was not covered by the regulation since the word “vehicles” is best understood as referring to land vehicles. Reviewing various language versions, the ECJ found no consensus. In some languages (French, English, Italian, Spanish, German and Finnish) the word seemed to apply to all modes of transport. In others (Danish, Swedish, Dutch and Greek), its most common meaning is limited to vehicles that run on land. Thus, the court resorted to the teleological approach and decided that the purpose behind the directive would be better served if boats were included within the scope of the directive. (See Cao, 2007: 74–75).

In another such case, *Commission of the E.U. v. United Kingdom*¹⁵, the question was the essence of fishing. The English version of a regulation exempting EU products from VAT in the member countries referred to “products taken from the sea in vessels registered or recorded in that country and flying its flag.” Before Poland became a member of the EU, Poland and the United Kingdom engaged in a venture whereby Polish ships would catch fish in Polish waters in nets, then turn the nets over to the British fishing fleet, which would, in turn, drag them into EU waters before removing the nets from under the sea. The UK claimed that it had not “taken products from the sea” other than within the EU. So the question became whether the English version properly captured the intended meaning of the regulation. The court looked at many language versions, and was unable to find adequate consensus. It then applied the teleological approach and held against the UK on the theory that the purpose behind the regulation was not furthered by permitting fish to be brought into the EU under water, but not in vessels above the water. (See Cao, 2007; Engberg, 2004; Solan, 2009).

Something must be going right when over a 50-year period, there have been only 20 cases in the Court of Justice of the European Union in which the dispute was over the meaning of an ordinary language term. What goes right is exactly what Fodor (1998) says should go right: most of the ordinary words that are subject to dispute denote concepts about which Europeans have relatively common experiences. Since our cognition is designed to form similar concepts from similar experiences, words used in ordinary language are not likely to create many legal problems. But sometimes they do cause problems of interpretation. And when they do, the proliferation of language versions increases the likelihood that an Augustinian solution can be successfully found by determining whether the problem exists at all in a significant number of language versions.

I do not mean to paint too rosy a picture, however. For one thing, the Danish com-

¹⁴Case C-428/02, *Fonden Marselisbord Lysthådehavn v. Skatteministeriet*, 2005 ECR I-1527.

¹⁵Case 100/84, *Comm’n of the E.U. v. United Kingdom*, 1985 E.C.R. 1169.

pany that lost its case over the facility for parking boats may well have acted in good faith based upon its understanding of Danish law and the Danish version of the EU directive. This, as Leung (2012) points out, creates a legal paradox. The multiplicity of languages enables each state to maintain its identity by having all European laws written in the official language of each state. A French person need not worry about not reading Swedish to have access to European law. It is right there in the French. In doing so, however, each state forfeits the ability to predict the outcome of disputes decided by comparing various language versions in the Augustinian manner. For that requires not only familiarity with the relevant languages in a nuanced way, but also access to the laws in these languages, and the time to study and compare them. For the most part, financial players will be left in the dark and simply take their chances. The fact that Baaij found only twenty cases in which the meanings of ordinary words across languages was the issue at hand suggests that while the problem is real, and while it is likely to result in periodic injustice (unless the court begins to engage in prospective rulings), it is only occasional. Moreover, translation decisions are not always clear, and there cannot ever be a methodological consensus capable of producing uniform results (Kjaer, 2007).

In addition as multilingualism reduces legal uncertainty resulting from vagueness, it appears to increase legal uncertainty resulting from syntactic ambiguity. Recall my earlier observation that syntactic ambiguity is a far less frequent problem for monolingual courts than is vagueness. Yet Baaij's analysis appears to demonstrate that the opposite happens when it comes to syntax: Fully 25 percent of the cases in which the ECJ analyzes multiple versions of a law involve syntactic ambiguity. On reflection, this should not be surprising. While individual words may be subject to literal translation, languages often differ in their syntax, making literal translation impossible. Thus, ambiguities are likely to "spring up" in the course of translating documents by virtue of differences in such things as word order and phrasal structure. (See Cao, 2007 for additional examples of syntactic ambiguity in multilingual legislation).

Consider the following case¹⁶. A Directive regulates transportation by truck. It contains exceptions. The English version of the relevant exception is ambiguous: "transport of animal carcasses or waste not intended for human consumption." It is not clear whether "not intended for human consumption" modifies both "carcasses" and "waste" or only the latter. But in Dutch, as Baaij points out, there is no ambiguity – it modifies both, meaning that the transportation of animal carcasses is not exempt unless the carcasses being transported are not intended for human consumption¹⁷.

This leads to an awkward problem for those evaluating the consequences of multilingual legislation. If we start with the English version, the Dutch version helps because it disambiguates – two languages are better than one. If, however, we start with the Dutch version, adding the English version serves only to muddy the waters. But it would not muddy them much, because we would still have to ask which of the English readings should be applied. Whether we rely on the teleological approach or the shared meaning

¹⁶Case 90/83, *Paterson v. W. Weddel & Co.*, 1984 E.C.R. 1567.

¹⁷The Dutch version says, in relevant part: "... vervoer van niet voor menselijke consumptie bestemde geslachte dieren of slachtafvalven." Both the language of the Dutch version and the data concerning the proportion of EU cases involving syntactic ambiguity come from Baaij's power point presentation from his lecture at Princeton University, October 2013. The slides are on file with both Baaij and this author. The opinion of the Court refers to the Dutch and German versions, but does not reproduce the actual language.

rule, we are likely to be driven to the interpretation that the court accepted. Add other languages that act like Dutch with respect to this construction, and the Augustinian approach leads to the same result.

Thus, I do not see as much room for judicial mischief in the multilingual context as I do in the monolingual context. Yet, the same problem we saw in the context of vague statutes also applies to ambiguous ones. Whether the addition of language versions makes things better or worse appears to depend in part on what the starting language is. If the purpose of the law is better fulfilled with a broad interpretation, adding a language with a narrow interpretation as one possibility among several does nothing to help and creates litigation opportunities.

All of this looks a bit chaotic. No rule tells a court when it must apply one approach and when it must apply another, as writers such as Baaij (2012) and Leung (2012) aptly point out. Yet the same holds true for monolingual statutory interpretation. Let us say that a regulation were written only in English, and used the compound word “doorknob.” A textualist judge may not apply it to door handles because handles are not knobs. An intentionalist would be somewhat more comfortable with the expansive interpretation, but would have to justify ignoring the “ordinary meaning rule,” which says that courts are to assume that the legislature intended the words of statutes to be construed in their ordinary sense. (See Slocum, 2012; Solan, 2010; Scalia and Garner, 2012).

From the perspective of an English-speaking legal community, the choices, then, seem to be between a legal system that gives us the information about Portuguese, and a legal system that does not. If all versions of the regulation are considered authoritative and equal, then it is difficult to see how multiplying languages can make things any worse than the textualist/intentionalist dispute that might occur if only the English version were subject to interpretation. Knowledge of the Portuguese version can only serve to diffuse the apparent importance of the linguistic nuance that limits the interpretation in English, but not in Portuguese.

A final note on statutory interpretation and morality

All of this is especially important in the context of multilingual regimes. The goal in creating such regimes is in large part to balance the ceding of political power to a higher order governmental structure, while at the same time showing respect for the autonomy of the individual groups whose power has been ceded. It is bad enough in monolingual legal systems for judges to pervert the power to construe laws by pretending to be deferential while taking advantage of linguistic accident as a vehicle for promoting their own personal values surreptitiously.

When the question is a matter of respect for national sovereignty as it is in the EU, or of respect for a large minority in exchange for their remaining in the larger legal order, as it is in Canada, the stakes go up. The CJEU is known to place the opportunity to develop European legal doctrine above fidelity to language. (See Lachacz and Mańko, 2013 and references cited therein). Thus, the primacy of the teleological approach. This is not necessarily a bad thing (see, e.g., Paunio and Lindroos-Hovinheimo, 2010, but it does come at some cost, especially in times when less populated or less wealthy EU members already feel disrespected. In those situations, the Court will act with far more legitimacy than when the linguistic and teleological analyses converge. My sense is that they do converge quite often, with very few cases of indeterminacy that a comparison of language

versions does little to resolve. And they are more likely to converge in a multilingual regime employing the Augustinian approach than they are in a bilingual regime employing the shared meaning rule, because there will be cases in which the narrower meaning is not the one that furthers the legislative goals.

Nothing is perfect. Quine's problem is the reality at least some of the time. Moreover, when multilingualism increases the likelihood of syntactic ambiguity, cases of uncertainty give rise to interpretive opportunism. This challenges rule of law values and subjects the CJEU to concerns about its moral fiber. Fortunately, for reasons I have attempted to describe, these opportunities are surprisingly few even in the scheme of as complex a multilingual legal order as the European Union.

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