

## LEGISLATION'S CULTURE

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## I. INTRODUCTION

German doctors have diagnosed *herzinsuffizienz*—an insufficient heart—a disease that in France is believed not to exist.<sup>1</sup> French medical logic is Cartesian.<sup>2</sup> From a few basic assumptions, it reasons to complex conclusions.<sup>3</sup> British medical logic is cautiously empirical. Without solid evidence that a certain treatment produces good results and no troubling side-effects, British doctors might prefer to do nothing.<sup>4</sup> American doctors are aggressively technological, instinctively ordering tests and prescribing treatments that can be staggeringly expensive and sometimes turn out to be dangerous.<sup>5</sup>

Sometimes you can be cured of a disease by leaving a country where it is medically popular, although in the country you enter you might acquire a new disease that is medically popular there but disfavored in the country you left.<sup>6</sup> You might have both diseases or only one or none at all. Science and the human body are not different from one country to the next. The differences are in medical *culture*.

To see similar phenomena at work in law-making, compare below the ways legislation in three countries defines degrees of homicide.<sup>7</sup> Illinois has a typical American homicide statute and accordingly provides the U.S. example in the comparison. The complete Illinois enactment is closest to the average size, based on word count, among the seven most populous American states' homicide statutes. The seven-state average is 3338 words. The Illinois statute has 3281. The others are California, 7002 words; New York, 5234; Ohio, 3703; Florida,

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<sup>1</sup> LYNN PAYER, *MEDICINE & CULTURE: VARIETIES OF TREATMENT IN THE UNITED STATES, ENGLAND, WEST GERMANY, AND FRANCE* 74–75, 79–85 (1988).

<sup>2</sup> *Id.* at 38.

<sup>3</sup> *Id.* at 37–39.

<sup>4</sup> *Id.* at 28, 102–104, 108–111; T.R. REID, *THE HEALING OF AMERICA: A GLOBAL QUEST FOR BETTER, CHEAPER, AND FAIRER HEALTH CARE* 104–25 (2009).

<sup>5</sup> *See, e.g.*, ELIZABETH H. BRADLEY & LAUREN A. TAYLOR, *THE AMERICAN HEALTH CARE PARADOX: WHY SPENDING MORE IS GETTING US LESS* (2013); SIDDHARTHA MUKHERJEE, *THE LAWS OF MEDICINE: FIELD NOTES FROM AN UNCERTAIN SCIENCE* (2015); VINAYAK K. PRASAD & ADAM S. CIFU, *ENDING MEDICAL REVERSAL: IMPROVING OUTCOMES, SAVING LIVES* (2015); H. GILBERT WELCH, *LESS MEDICINE, MORE HEALTH: 7 ASSUMPTIONS THAT DRIVE TOO MUCH MEDICAL CARE* (2015).

<sup>6</sup> PAYER, *supra* note 1, at 24–25.

<sup>7</sup> Quotations from the *Code pénal* are from Tomlinson's translation: *THE FRENCH PENAL CODE OF 1994 AS AMENDED AS OF JANUARY 1, 1999*, at 94–96 (Edward A. Tomlinson trans., 1999) [hereinafter Tomlinson]. *Code civil* quotations later in this Article are from Crabb's translation: *THE FRENCH CIVIL CODE* (John H. Crabb, trans. rev. ed. 1995) [hereinafter Crabb]. Regarding the Swedish translations, see *infra* note 76. Wary of the French saying that to translate is to betray, I frequently include in text or footnotes wording in the original language.

2255; Pennsylvania, 1158; and laconic Texas, secure in the knowledge that its populace naturally understands homicide, 735 words.<sup>8</sup>

#### France<sup>9</sup>

Art. 221-1. The willful killing of another is murder.

Art. 221-3. Murder committed with premeditation is an assassination.

Art. 221-6. Causing the death of another by carelessness, imprudence, inattention, negligence, or the non-observance of an obligation of safety or prudence imposed by law or regulation, is an unintentional homicide.

#### Sweden<sup>10</sup>

3:1 One who deprives another of life is to be sentenced for murder.

3:2 If the crime referred to in section 3:1 is considered to be less grave, in view of the circumstances that led to the act or for other reasons, imprisonment for manslaughter is to be imposed.

3:7 One who through carelessness causes another's death is to be sentenced for negligent homicide.

#### Illinois<sup>11</sup>

*Sec. 9-1. First degree Murder . . .*

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) he is attempting or committing a forcible felony other than second degree murder.

<sup>8</sup> Provisions on abortion and on criminal procedure are excluded from these word counts and the statutory excerpts in the appendices. As a political issue, abortion is treated differently from one jurisdiction to another. It might be present in one jurisdiction's homicide statute and absent in another's. Procedural provisions are omitted because those issues might be dealt with in one state's homicide statute and in another state's criminal procedure statute. Homicide is used here for comparison because it is the crime most often portrayed in films and on television, and many of the issues would be familiar to anyone exposed to mass media.

<sup>9</sup> The full statute is in Appendix A, *infra*.

<sup>10</sup> The full statute is in Appendix B, *infra*.

<sup>11</sup> The full statute is in Appendix C, *infra*.

*Sec. 9-2. Second degree murder.*

(a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder as defined in paragraph (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:

(1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed; or

(2) at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable.

(b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

*Sec. 9-3. Involuntary Manslaughter and Reckless Homicide.*

(a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle or operating a snowmobile, all-terrain vehicle, or watercraft, in which case the person commits reckless homicide. A person commits reckless homicide if he or she unintentionally kills an individual while driving a vehicle and using an incline in a roadway, such as a railroad crossing, bridge approach, or hill, to cause the vehicle to become airborne.

*Sec. 9-3.3. Drug-induced homicide.*

(a) A person who violates Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act by unlawfully delivering a controlled substance to another, and any person's death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance, commits the offense of drug-induced homicide.

To an American, the French and Swedish statutes say so little that it can be hard to imagine courts being guided by them. But French and Swedish courts *have* been guided by statutes like these for centuries. Those courts fill gaps by

reasoning from the statute's words, which is why the words must be drafted with the utmost care. That cannot happen in an American legislature, which, by European standards, is chaotic.

To a European, the Illinois statute is gibberish because it uses too many unnecessary ideas. The French and Swedish statutes illustrate how the same problems can be solved with fewer concepts—if those concepts are well chosen.

How—and why—are these legislative cultures so different? Discovering the differences and their causes reveals some surprising truths about ourselves.

One of this Article's key findings is that the primary cause of incomprehensibility in American statutes is not verbosity and arcane phrasing. Verbosity—a high ratio of words per concept expressed—and arcane phrasing are problems. But they are not the main problem. In fact, they are obvious and fixable, and they distract us from the main problem. A good drafter can rewrite almost any document for conciseness and clarity. American legislatures employ skilled drafting professionals who are capable of doing that, but they are prevented from doing so by the legislative culture explained in this Article.

The main problem is *the high ratio of concepts per legislative goal*. Defining degrees of homicide, for example, is a relatively simple legislative goal. French legal thinking differs fundamentally from Swedish legal thinking. But each country uses only a handful of concepts to define degrees of homicide. American legislators, however, insist that difficult subjects can be dealt with only through complex statutes that address every conceivable issue a legislature can identify.

Every statutory concept costs money. It creates issues, which must be decided by someone in government. If the issues are decided in litigation, the costs expand. If all else is equal, a 50-issue trial costs the parties—and society—much more money than a 10-issue trial. Every unnecessary statutory concept wastes social and economic resources.

This is not a question of whether government ought to shrink. It could hardly be that if France and Sweden are being used for comparison. In some parts of the American political spectrum, they are assumed, because of government activism, to be burdened by bureaucratic meddling. Sometimes that might be accurate, but in surprising ways it is not. If law is well crafted, a strong activist government can feel like a light one. For example, although Swedes pay substantially more taxes than Americans do,<sup>12</sup> Swedish tax law is so simple—it includes so few concepts—that a Swede can file an income tax return by sending a text message. One of the most popular government agencies is the Swedish equivalent of the Internal Revenue Service. (Part III explains why and how.)

Part II explains French codes through the example of the *Code civil*, which is known for its intellectual elegance. It has been considered literature as well as law. Part III explains a different, almost opposing approach to

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<sup>12</sup> Henrik Jacobson Kleven, *How Can Scandinavians Tax So Much?*, 28 J. ECON. PERSPS., no. 4, Fall 2014, at 77.

codification, based on Swedish pragmatism rather than Cartesian logic, though it is descended from a kind of literature. Parts II and III together could have been subtitled legislation as literature.

Part IV compares the fussy, bossy, and excessively conceptualized legislation of common law countries, particularly the United States, with the fuzzy legislation of continental Europe. “Continental” and “European” here mean Europe without Britain and Ireland. No legal system on the continent is based on common law, and this Article explores differences in legislative culture between common law countries and other legal systems. France and Sweden are examples of two European legal traditions. Others, such as Germany, share some characteristics with France and Sweden but differ substantially in other ways.

Part V compares the American legislative culture and explores the reasons why American statutes are outliers internationally. Part VI describes an example of role reversal in which Americans have behaved like Europeans and Europeans have behaved like Americans. Part VII sums up and concludes.

An American reader must remember that generally the doctrine of *stare decisis* is not officially recognized in continental Europe. Precedent, even from a country’s supreme court, is not legally binding authority. Law is to be made only by democratically elected legislatures or through administrative regulation under the supervision of legislatively chosen cabinet ministers. In France, *Code civil* article 5 prohibits courts from explaining their reasoning through opinions amenable to use as precedent: “Judges are forbidden to pronounce decisions by way of general and regulative disposition on cases which are submitted to them.”<sup>13</sup> A decision by the highest French court—the *Court de Cassation*—“must consist of a single sentence, with the court as its subject and the disposition of the appeal as its verb.”<sup>14</sup> That single sentence will not contain citations to prior judicial decisions, will state only the controlling legal rule with little or no explanation of how the rule is applied to the facts, and will say so little about the facts that they “can often only be guessed at,”<sup>15</sup> which limits later opportunities

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<sup>13</sup> See Crabb, *supra* note 7, at 2. “*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.*” CODE CIVIL [C. CIV.] [CIVIL CODE] art. 5 (Fr.). Under article 1351, a judicial decision binds, for the future, only the same parties seeking the same relief on the same issue. The decision is only *res judicata*. It is not even collateral estoppel. *Id.* art. 1351.

<sup>14</sup> Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L L. 81, 94 (1994). But “opinions of intermediate appellate courts often contain fairly extensive discussions of the evidence” because “civil juries do not exist in France, [and] judges in the lowest courts must evaluate the evidence and make findings of fact. The intermediate appellate courts review these findings *de novo*.” *Id.* at 98.

<sup>15</sup> KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 123 (Tony Weir trans., 3d ed. 1998). Although French precedent is not binding, “[a]ttorneys and court officials regularly argue or analyze previous decisions for their persuasive value, though courts generally do not formally acknowledge the precedent in their published judicial decisions.” Charles Calleros, *Punitive Damages, Liquidated Damages, and Clauses Pénales in Contract Actions: A Comparative*

to analogize or distinguish a precedent. Although “judicial decisions are not a source of law . . . the practice is for judges to be *influenced* by prior decisions”<sup>16</sup> because a judge trying to resolve a difficult issue will naturally want to know how other judges, especially appellate judges, have resolved similar issues. Precedent is at most persuasive authority, although some of it can be very persuasive.

## II. FRANCE

*While writing The Charterhouse, in order to acquire the correct tone I read every morning two or three pages of the Code civil.*

So wrote Stendhal, soon after finishing *The Charterhouse of Parma*,<sup>17</sup> in an 1840 letter to Balzac describing Stendhal's work habits and thoughts on style.<sup>18</sup>

### A. *The Idea of a Code*

The French *Code civil* was widely admired in the 19th century. Intellectuals praised its “luminous simplicity” and called it “a great and beautiful piece of work.”<sup>19</sup> It was drafted, mostly in 1800, by Jean-Étienne-Marie Portalis, François Denis Tronchet, Félix-Julien-Jean Bigot de Préameneu, and Jacques de Maleville. They had been lawyers, judges, and members of various legislatures during the French Revolution.

During five months, these four wrote most of a code that is largely still law two centuries later and has been influential throughout much of the world. In something resembling a writers' retreat, they drafted it at the Château de Fontainebleau, where their large and impressive working table has remained on display.<sup>20</sup> Although those five months might be a world speed record, this was not the smallest drafting committee in history. That would have been a committee

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*Analysis of the American Common Law and the French Civil Code*, 32 BROOK. J. INT'L L. 1, 97 (2006).

<sup>16</sup> JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 48 (1969) (emphasis added).

<sup>17</sup> STENDHAL, *THE CHARTERHOUSE OF PARMA* (C.K. Scott-Moncrieff trans., The New American Library of World Literature, Inc. 1962).

<sup>18</sup> *The Charterhouse of Parma* is one of the finest 19th century French novels. For the entire letter, see *TO THE HAPPY FEW: SELECTED LETTERS OF STENDHAL* 371 (Norman Cameron trans., 1952). This is two great novelists talking shop.

<sup>19</sup> JEAN-LOUIS HALPÉRIN, *THE FRENCH CIVIL CODE* 61 (Tony Weir trans., 2006) (quoting Raymond-Théodore Troplong and Eugène Lerminier).

<sup>20</sup> John H. Crabb, *Introduction*, in *THE FRENCH CIVIL CODE* xix, xxii (rev'd ed. 1995) [hereinafter Crabb, *Introduction*].

of one named David Dudley Field, who drafted five of what Americans call codes.<sup>21</sup> But it took him a lot longer to do it. The *Code civil* was enacted by 1804 and is unmistakably a product of the Enlightenment's rationalism.<sup>22</sup>

The *Code civil* governs, among other things, citizenship, marriage and divorce, family relationships, real and personal property, inheritance, contracts, sales, leases, partnerships, loans, bailments, agency, mortgages, and secured transactions. It is one of the five *grands codes* adopted under Napoleon Bonaparte, the others addressing commerce, civil procedure, criminal law, and criminal procedure.<sup>23</sup> Later legislation—either in *petits codes* or uncodified statutes—addresses modern issues such as highways, social security, and labor.<sup>24</sup>

A code on the French model is meant to be “exclusive, complete, and enduring.”<sup>25</sup> *Exclusivity* means that a code is drafted to be the only source of law on the subjects it governs. *Completeness* means that a code resolves all issues regarding those subjects.

No American legislation is a real code in this sense. American legislation almost always contains gaps which courts are expected to fill from other law sources, and even the most famous American “codes”—the Field Codes<sup>26</sup> and the Uniform Commercial Code<sup>27</sup>—expressly provide for the survival of common law for every issue not resolved by the statutory language. An American code is merely a collection of statutes on related subjects. It is rarely, if ever, exclusive or complete.

Jean-Étienne-Marie Portalis, the lead *Code civil* drafter,<sup>28</sup> later recalled that from “the beginning of our meetings we were struck by the view . . . that the great art is to simplify everything while foreseeing everything. To simplify everything is a work on which one must agree. To foresee everything is an end

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<sup>21</sup> See *infra* text accompanying notes 174–89.

<sup>22</sup> See RENÉ DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 12 (1972); THOMAS GLYN WATKIN, *AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW* 130–32, 134–38 (1999). From 1807 until after the Second Empire collapsed in 1870, the *Code's* official alias was the *Code Napoleon*. HALPÉRIN, *supra* note 19, at 81, 85.

<sup>23</sup> Crabb, *Introduction*, *supra* note 20, at xix, xxvii; ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 118 (1981).

<sup>24</sup> Crabb, *Introduction*, *supra* note 20, at xix, xxvii.

<sup>25</sup> THOMAS LUNDMARK, *CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW* 320 (2012).

<sup>26</sup> For example, “[t]he common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.” CAL. CIV. CODE § 22.2 (West 2016).

<sup>27</sup> “Unless displaced by the particular provisions of the [Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.” U.C.C. § 1-103(b) (AM. LAW INST. & UNIF. LAW COMM’N 2016).

<sup>28</sup> Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 *TULANE L. REV.* 1125, 1125 (1982).



which it is impossible to achieve.”<sup>29</sup> That certainly turned out to be true with the law of negligence.

U.S. negligence law took its modern form in the early 20th century in cases like *Palsgraf v. Long Island Railroad Co.*<sup>30</sup> More than a century earlier, in 1800, the *Code civil* drafters could not have foreseen the world in which negligence law as we understand it would become necessary. They included only these two provisions:

*Art. 1383*

Each one is liable for the damage which he causes not only by his own act but also by his negligence or imprudence.

*Art. 1384*

He is liable not only for the damage which he caused by his own act, but also for that which is caused by act of persons for whom he is responsible, or by things which he has in his keeping.<sup>31</sup>

Article 1383 has not been changed since it was enacted in 1804. During the 20th century, seven sentences were added to article 1384. One is a cross-reference. Another involves liability for fires. The other five concern liability of parents for acts of their children, of teachers for acts of their students, and of employers for acts of employees. With no other legislative guidance, French courts had to invent everything else on their own, pretending that they were interpreting these two articles. “[T]he case law built on *Code civil* article 1384 is a highly exceptional phenomenon” that “has been compared to a pyramid built on a pinhead” and is “more characteristic of the common law than of the jurisprudence of courts applying a code.”<sup>32</sup>

To be considered *enduring*, a code should last at least a century or two, with tinkering limited to requirements created by societal changes the code drafters could not have foreseen. The *Code civil* has been law through the First Empire, the Bourbon Restoration, the post-Bourbon monarchy, the Second Republic, the Second Empire, the Third Republic, the Vichy regime, the Fourth

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<sup>29</sup> JAMES GORDLEY & ARTHUR TAYLOR VON MEHREN, AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW: READINGS, CASES, MATERIALS 50 (2009).

<sup>30</sup> 162 N.E. 99 (N.Y. 1928).

<sup>31</sup> Crabb, *supra* note 7, at 252. Art. 1383: “*Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.*” C. CIV. art. 1383 (Fr.). Art. 1384: “*On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde.*” C. CIV. art. 1384 (Fr.).

<sup>32</sup> André Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 466 (1976).

Republic, and the present Fifth Republic. It has outlasted nine French constitutions.<sup>33</sup>

The 1804 Code had 2,281 articles.<sup>34</sup> As of 1995, 1,052 articles had been amended and 274 new articles had been added. But 1,229 articles—53% of the 1804 Code—had not been changed in any way during 191 years.<sup>35</sup> French “judges have been able, since 1804, to apply the rules of the *Code civil* to millions of individual cases . . . without significant difficulty.”<sup>36</sup>

Because of Napoleon Bonaparte’s conquests, codes derived from the *Code civil* were adopted in Belgium, the Netherlands, and to some extent in Italy.<sup>37</sup> The Spanish *Código civil*, adopted in 1889, borrowed heavily from the *Code civil*.<sup>38</sup> Romania and Bolivia simply translated the *Code civil* and enacted the translation.<sup>39</sup> In 1845, the Dominican Republic enacted it without bothering to translate, and for two generations a Spanish-speaking people were governed in part by law printed in French, until in 1884 when everyone had had enough and a Spanish translation was enacted.<sup>40</sup> Almost all of Latin America has civil codes strongly influenced by the *Code civil*.<sup>41</sup> France sold Louisiana to the United States in 1803. In 1808, Louisiana adopted a civil code based on the *Code civil* as well as Spanish sources.<sup>42</sup> This is the legislation to which Stanley Kowalski refers in *A Streetcar Named Desire*.<sup>43</sup>

The other classic European civil code is the one in effect in Germany since 1900. According to Zweigert and Kötz,

the German Civil Code, although difficult in some areas to understand even for a trained lawyer, is a masterpiece of exactness and clarity in its carefully defined terminology . . . .

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<sup>33</sup> DAVID, *supra* note 22, at 13. The Fifth Republic’s constitution, the tenth to which the *Code* has been subject, was adopted in 1958.

<sup>34</sup> Crabb, *Introduction*, *supra* note 20, at xxix. Europeans tend to use the term *article* for what we would call a section.

<sup>35</sup> *Id.*

<sup>36</sup> Tunc, *supra* note 32, at 459, 464.

<sup>37</sup> HALPÉRIN, *supra* note 19, at 89–93; WATSON, *supra* note 23, at 121–22.

<sup>38</sup> WATSON, *supra* note 23, at 122–23.

<sup>39</sup> *Id.* at 122.

<sup>40</sup> *Id.* at 124.

<sup>41</sup> Crabb, *Introduction*, *supra* note 20, at xix, xxiii; HALPÉRIN, *supra* note 19, at 94; WATSON, *supra* note 23, at 124–25.

<sup>42</sup> WATSON, *supra* note 23, at 123–24; ZWIGERT & KÖTZ, *supra* note 15, at 116; Rodolfo Batiza, *Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code*, 60 TUL. L. REV. 799 (1986).

<sup>43</sup> “Have you ever heard of the Napoleonic code? . . . In the state of Louisiana we have the Napoleonic code according to which what belongs to the wife belongs to the husband and vice versa.” TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* act 1, sc. 2.

The French *Code Civil*, on the other hand, is easier to understand and more popular in its language but at times lacks the scientific precision of the German Code.<sup>44</sup>

Elsewhere, Zweigert and Kötz claim “that the elegant sheen of the wording in the Code civil is often paid for by a lack of substance,” and they quote another German author as saying that “the famed precision of its expression is often quite superficial, not that true inner precision which comes from complete clarity of thought.”<sup>45</sup> These claims are untestable, and there is in them a hint of code envy. It seems implausible that anything, in any language, can both have “clarity” and be “difficult . . . to understand even for a trained lawyer.”<sup>46</sup> Perhaps the French and the Germans have different concepts of verbal precision, each uncomfortable with the other’s version.

How can courts be guided by language as general and open-textured as that in the *Code civil* and other European codes? To Europeans, the real question is how American courts can be guided without *travaux préparatoires*—preparatory materials. This is more than legislative history. In a parliamentary system, legislatures have little role in drafting legislation. The drafting—the choice of both substance and wording—is usually done elsewhere, to be approved or rejected by the legislature. The drafters, in a ministry or in a specially designated commission, prepare reports and other documents to explain the bill to the legislature and the statute, if the bill is enacted, to the courts. Although ministries in a parliamentary system are units of the executive branch of government, they are run by ministers answerable to and usually members of the legislature.

In a system like this, when the legislature enacts a statute, it enacts both its words and the meaning explained the preparatory materials. Although American legislative politicking includes the manipulation of legislative history, that is harder to do with preparatory materials. They are mostly the *prelegislative* history, explanations written by drafters before legislators become involved, although the last part of a set of preparatory materials will often be a report from a legislative committee, which might have made minor or no changes to a bill drafted outside the legislature.

In the United States, enactment is merely law-making’s beginning, as courts have decades to finish the legislature’s job through interpretation. An American statute means what the courts say it means, and we do not know that until the courts tell us. In Europe, a statute’s enactment is considered the end of law-making. If the statute is unclear and the preparatory materials do not clarify

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<sup>44</sup> Konrad Zweigert & Hans-Jürgen Puttfarcken, *Civilian Methodology: Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704, 707 n.11 (1970).

<sup>45</sup> ZWIEGERT & KÖTZ, *supra* note 15, at 92 (quoting BERNHARD WINDSCHEID, ZUR LEHR DES CODE NAPOLEON VON DER UNGÜLTIGKEIT DER RECHTSGESCHÄFTE at v (1847)).

<sup>46</sup> Zweigert & Puttfarcken, *supra* note 44, at 707 n.11.

it, somebody—actually many people—goofed. In Europe, a statute means what it says or, in case of doubt, what the preparatory materials say it means.

### B. *The Code Civil as Literature*

The *Code civil*, said the poet Paul Valéry, is “the greatest book of French literature.”<sup>47</sup>

Compare the U.S. Restatement (Second) of Contracts and the *Code civil* on damages, especially the words italicized and underlined:

Restatement (Second) of Contracts	Code civil
<p>§ 347 <i>Measure of Damages in General</i> Subject to the limitations stated in §§ 350–53, the injured party has a right to damages based on his expectation interest as measured by</p> <p>(a) <i>the loss in the value to him of the other party's performance</i> caused by its failure or deficiency, plus</p> <p>(b) any other loss, including incidental or consequential loss, caused by the breach, less</p> <p>(c) any cost or other loss that he has avoided by not having to perform.<sup>48</sup></p>	<p>Art. 1149 The damages due to the person owed the performance are, in general, the loss which he has incurred plus <u>the gain of which he was deprived</u> with the exceptions and qualifications to be described.<sup>49</sup></p>

There is no imagery or sense of human experience in the Restatement’s “loss in the value to him of the other party’s performance.” At most, we see a balance sheet with numbers and dollar signs. But in article 1149’s “the gain of which he was deprived,” the reader can feel human disappointment.

Often in the *Code civil* the reader sees in the mind real people experiencing, well and badly, life’s events. Other articles convey rules of law as philosophy or political theory. Here is an example, on contracts:

<sup>47</sup> *Id.* at 91.

<sup>48</sup> RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

<sup>49</sup> GORDLEY & VON MEHREN, *supra* note 29, at 536. “*Les dommages et intérêts dus au créancier sont, en général, de la perte qu’il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après.*” C. CIV. art. 1149 (Fr.). Crabb translates *au créancier* as “to a creditor.” Crabb, *supra* note 7, at 223. That seems defensible but in this context inaccurate. Article 1149 is not limited to debt. It applies to all contracts. Gordley and von Mehren translate *au créancier* as “to the person owed the performance”—any performance, not limited to payment of money. GORDLEY & VON MEHREN, *supra* note 29, at 536. For article 1149, I have used their translation rather than Crabb’s.

*Art. 1134*

Agreements legally made take the place of law for those who make them.<sup>50</sup>

This is provocative. It confers on contractual parties a capacity to make for themselves, to govern their transaction, rules that supersede law. The same is true in U.S. common law. But the *Code civil* wording dares you to consider how profound it is that two people, simply by agreeing, can throw much of the law out the window.

French code drafting is expected to be concise and elegantly simple. The ideal is to find the smallest number of concepts that resolve all the issues associated with the legislative subject and to express those concepts in the fewest words. In poetry as well as code-drafting, *compression* is one of the characteristics separating great from mediocre writing.

Legislation can create duties to act, duties not to act, and power or permission to act. A statute can also make things true by declaring them. In common law countries, duties and powers permeate statutes, and declarations play a supporting role. In the *Code civil* and many other European codes, the opposite is true. Declarations might vastly outnumber everything else. To an American, this can seem more like description than law. But it *is* law because without these declarations, the rules would not exist. For example:

*Art. 552*

Ownership of the ground carries ownership above and below.<sup>51</sup>

*Art. 716*

Ownership of a treasure belongs to him who finds it on his own land; if the treasure is found on the land of another, it belongs by moiety to him who discovered it, and by the other moiety to the owner of the land.

Treasure is anything hidden or buried of which no one can claim ownership, and which is discovered purely by chance.<sup>52</sup>

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<sup>50</sup> Crabb, *supra* note 7, at 221. “*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.*” C. CIV. art. 1134 (Fr.).

<sup>51</sup> Crabb, *supra* note 7, at 128. “*La propriété du sol emporte la propriété du dessus et du dessous.*” C. CIV. art. 552 (Fr.).

<sup>52</sup> Crabb, *supra* note 7, at 149.

*La propriété d'un trésor appartient à celui qui le trouve dans son propre fonds; si le trésor est trouvé dans le fonds d'autrui, il appartient pour moitié à celui qui l'a découvert, et pour l'autre moitié au propriétaire du fonds. Le trésor est toute chose cachée ou enfouie sur laquelle personne ne peut justifier sa propriété, et qui est découverte par le pur effet du hasard.*

C. CIV. art. 716 (Fr.).

Certainly this is “simpler and less legalistic”<sup>53</sup> than the statutory style to which we are accustomed. Compare, for example, the following from the federal Labor-Management Reporting and Disclosure Act, chosen almost at random from the U.S. Code:

Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate’s expense campaign literature in aid of such person’s candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution.<sup>54</sup>

This is *one* sentence.

*The Charterhouse of Parma* was the first great novel in French. How could the *Code civil*’s style have inspired Stendhal? “The Code attempts to define legal concepts in their simplest, most direct, and unequivocal form,” wrote a scholar of French literature, “and this attempt to establish a coherent legal procedure for carefully defined situations in human activity carries over into Stendhal’s [role as a] cataloguer of human emotions in the same manner in which the *Code civil* establishes a written catalogue of man’s rights in legal terms.”<sup>55</sup> Compare a passage, chosen almost at random, from Moncreiff’s<sup>56</sup> translation of *The Charterhouse*:

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<sup>53</sup> Crabb, *Introduction*, *supra* note 20, at xix, xxx.

<sup>54</sup> 29 U.S.C. § 481(c) (2012).

<sup>55</sup> M.L. Newman, *Stendhal and the Code civil*, 43 THE FRENCH REV. 434, 437 (1970). Stendhal’s *Code civil* comment has been used as a pretext to dismiss him intellectually. “No doubt the seriousness with which his remark has been interpreted and the impetus it provided for generations of irate critics would have greatly amused Stendhal, yet the remark does constitute a revealing insight into Stendhal’s mind and his work.” *Id.* at 434.

<sup>56</sup> C.K. Scott Moncreiff is better known for the definitive translation of Marcel Proust’s *A la recherche du temps perdu*, which “earned a reputation as one of the great English translations, almost a masterpiece in its own right.” Terence Kilmartin, *Note on the Translation*, in 1 MARCEL

[T]he Conte had a sense of his own valour, he was full of generous impulses, he was easily carried away, and at such times allowed himself to make imprudent speeches. One day when he was out shooting with some young men, one of them, who had served under other flags than his, began to belittle the courage of the soldiers of the Cisalpine Republic. The Conte struck him, a fight at once followed, and the Conte, who was without support among all these young men, was killed. This species of duel gave rise to a great deal of talk, and the persons who had been engaged in it took the precaution of going for a tour in Switzerland.

That absurd form of courage, which is called resignation, the courage of a fool who allows himself to be hanged without a word of protest, was not at all in keeping with the Contessa's character. Furious at the death of her husband, she would have liked Limercati, the rich young man, her intimate friend, to be seized also by the desire to travel in Switzerland, and there to shoot or otherwise assault the murderer of Conte Pietranara. Limercati thought this plan the last word in absurdity, and the Contessa discovered that in herself contempt for him had killed her affection. She multiplied her attentions to Limercati; she sought to rekindle his love, and then to leave him stranded and so make him desperate. To render this plan of vengeance intelligible to French readers, I should explain that in Milan, in a land widely remote from our own, people are still made desperate by love.<sup>57</sup>

The most obviously shared characteristics between this passage and the *Code civil* are compression and precision. So much is expressed about these characters and their relationships and their story, and so clearly—but in so few words.

Why would it have even occurred to Stendhal to read legislation? First, the *Code civil* was written to be read by people exactly like him. It sets out his rights and obligations as a citizen of a civil society. To read it is to learn about himself and how he fits into the whole.

Second, because of their political and social passions, 19th century French novelists often found themselves in contentious dialog with their government. Flaubert was prosecuted for writing criminal obscenity into

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PROUST, REMEMBRANCE OF THINGS PAST ix (C.K. Scott Moncreiff & Terence Kilmartin trans., rev. ed. 1983).

<sup>57</sup> STENDHAL, *supra* note 17, at 27.

*Madame Bovary*.<sup>58</sup> In protest against Napoleon III's coup, Victor Hugo exiled himself,<sup>59</sup> and when the Second Empire collapsed 18 years later, he returned and was promptly elected to the National Assembly,<sup>60</sup> from which he soon resigned when right-wing deputies prevented the Italian revolutionary Garibaldi from taking his own seat in the Assembly even though Garibaldi had been elected from four different French constituencies.<sup>61</sup> In a Paris newspaper, Zola published an open letter to the President of the Republic accusing the French army of framing Dreyfus—"I accuse General Mercier . . . I accuse General Billot . . . I accuse [General] de Boisdeffre and [General] Gonse"<sup>62</sup>—daring the government to prosecute him for criminal libel, which it did.<sup>63</sup> After the failed 1905 Russian Revolution, Trotsky, captured by the Czarists, read French novels in his prison cell.<sup>64</sup>

An English barrister, also an academic scholar, wrote that French statutes have "an order, a logical development, a freshness, a certain elegance, missing from ours" and "an absence of unfamiliar language, and a purity of expression, a clarity of utterance, and an overall quality of readability."<sup>65</sup> French drafting is expected to comply with the linguistic standards of the *Académie française*, the institution responsible for preserving the French language's purity.<sup>66</sup> A nonspecialized statute—one of general applicability—is considered well drafted if it is in perfect French and can be understood by a well-educated citizen of cultured sensibilities.

### III. SWEDEN

*His Majesty the King requires that the Royal Chancellery in all written documents endeavour to write in clear and plain Swedish.*

– King Karl XII's Ordinance for the Royal Chancery (1713)

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<sup>58</sup> See ELISABETH LADENSON, *DIRT FOR ART'S SAKE: BOOKS ON TRIAL FROM MADAME BOVARY TO LOLITA* 17–19, 21 (2007).

<sup>59</sup> MATTHEW JOSEPHSON, *VICTOR HUGO: A REALISTIC BIOGRAPHY OF THE GREAT ROMANTIC* 331–69 (1942). Hugo exiled himself to Brussels after "jeopardiz[ing] his whole fortune by leading in the resistance" to the 1851 *coup d'état*. *Id.* at 348–49.

<sup>60</sup> *Id.* at 464, 472–73.

<sup>61</sup> *Id.* at 475–76.

<sup>62</sup> Émile Zola, *J'accuse*, *L'Aurore* (Paris), Jan. 13, 1898.

<sup>63</sup> Peter Zablotsky, *Considering the Libel Trial of Émile Zola in Light of Contemporary Defamation Doctrine*, 29 *TOURO L. REV.* 59, 61 (2012).

<sup>64</sup> ISAAC DEUTSCHER, *THE PROPHET ARMED: TROTSKY 1879–1921*, at 148 (1980).

<sup>65</sup> SIR WILLIAM DALE, *LEGISLATIVE DRAFTING: A NEW APPROACH* 87–88 (1977).

<sup>66</sup> *Id.* at 88.



Swedish statute-drafting is descended from an ancient tradition in which law was expected to be understandable to an illiterate peasant hearing it recited by another illiterate peasant, who had memorized it. This is law based on a history of agrarian practicality, unrelated to Cartesian rationalism. The modern results, however, can be as impressive, in their own way, as the *Code civil*.

#### A. Words

Ten centuries ago, almost every Swede lived on a farm or in a tiny village. Rare was a person who could read or write. Disputes were decided in the local *ting*, presided over by a *lagman*, chosen for an ability to memorize law, which was passed down over generations—as the *sagas* were—spoken from memory.<sup>67</sup> Rhythm, rhyme, and story permeated law to aid in remembering.

“The past is never dead,” wrote William Faulkner. “It’s not even past.”<sup>68</sup> Just as legislation in common law countries is still constrained by events that began in the year 1066, which Part IV explains, Swedish law is even now influenced by events equally ancient.

Sweden today has been prosperous for barely a century. For most of its history, it was one of the poorest countries in Europe. The term *barkbrod* still has some resonance. As recently as the 19th century, when crops failed, peasants knew well from experience how to scrape bark off trees, elm preferred to pine, to be baked into bread, as “bark bread was everyday fare in the homesteads of those parts of the Swedish countryside which most suffered from crop failure.”<sup>69</sup> The 20th-century novelist Vilhelm Moberg remembered his grandmother telling him her recipe for bark bread.<sup>70</sup>

During the 11th and 12th centuries, law was almost entirely oral in memorized “rhymes or maxims.”<sup>71</sup> “To a great extent these laws were rhythmically constructed, like poems . . . , thereby the more easily to be fixed in memory.”<sup>72</sup> Beginning in the 13th century, a few oral codes were reduced to writing, and “even in their written form alliterations, end-rhyme and internal rhyme have been preserved.”<sup>73</sup> The written law was

expressed in strong and pithy language which in all its severity and simplicity still rings out clearly. As language, it is direct and to the point; full of vivid expressions and forceful basic

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<sup>67</sup> RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 28 (1965).

<sup>68</sup> WILLIAM FAULKNER, REQUIEM FOR A NUN act 1, sc. 3.

<sup>69</sup> VILHELM MOBERG, A HISTORY OF THE SWEDISH PEOPLE: FROM RENAISSANCE TO REVOLUTION 47 (Paul Britten Austin trans., 1972).

<sup>70</sup> *Id.*

<sup>71</sup> GINSBURG & BRUZELIUS, *supra* note 67, at 28.

<sup>72</sup> MOBERG, *supra* note 69, at 13.

<sup>73</sup> *Id.*

words . . . . The authors . . . use an effective trick: they vividly depict imaginary cases. The sentences begin with *nu*—”now”—or, as one might say: “let us suppose . . .” and continue in the present tense. The case they envisage comes alive before our eyes. *Now* a man makes ready for his wedding; *now* the peasants wish to build a church; *now* a woman commits whoredom. And instantly we are in the midst of a lively occurrence. We have the impression of it’s all happening right *now*, in this very instant.<sup>74</sup>

Moberg wrote that something of this style “is still heard in our present Statute Book.”<sup>75</sup> Published translations of current Swedish law into English sometimes obscure that style by converting the Swedish into legalistic English. Compare a literal translation of the modern Swedish murder provision (on the left) with one of the published translations (on the right)<sup>76</sup>:

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<sup>74</sup> *Id.* at 187.

<sup>75</sup> *Id.* at 186–87.

<sup>76</sup> The version on the right is from THE PENAL CODE OF SWEDEN 17 (Thorsten Sellin & Jerome L. Getz trans., 1972).

Two Swedish criminal code translations have been published. The earlier, primarily by Thorsten Sellin, is the one quoted here. *Id.* It is over 40 years old and was published through the Comparative Law Project’s American Series of Foreign Penal Codes at New York University. *Id.* The latter, by Norman Bishop, is dated 1999. It is available on a Swedish government website along with a disclaimer that it is unofficial. *The Swedish Penal Code*, GOV’T OFFS. SWED., <http://www.government.se/government-policy/judicial-system/the-swedish-penal-code/> (last visited Oct. 10, 2016). Sellin’s is excellent, and Bishop’s is quite good. But neither can be used for this Article except for the example to which this footnote is attached.

Initially because both needed updating, I checked them against current Swedish law and discovered that Moberg’s observation is still accurate a half-century after he made it: something of the ancient style “is still heard in our present Statute Book.” But the two published translations do not fully capture it. Both of them accurately show the Swedish use of fewer concepts than Anglo-American law uses. But they convert the plain and simple Swedish style into vocabulary and tone that evoke legalistic English.

Even the translations’ titles do that. Both are titled *Penal Code* although the current code’s drafters rejected that term’s Swedish equivalent. The predecessor code, enacted in 1864, was *Strafflagen*, “the Penal Law.” The current code is *Brottsbalken*, “the Criminal Code.” Crime is a problem to which the current code considers punishment to be one possible response but not the only one.

All this is not a criticism of Sellin and Bishop. Their goal was to convey Swedish criminal law’s substance in terms familiar to an audience of Anglo-American lawyers and legal academics. Distorting the style may have been necessary to making the substance more accessible to that audience. Sellin and Bishop might have chosen *Penal Code*, for example, because that is the title of many U.S. statutes, as well as the Model Penal Code.

For the *Brottsbalk* sections quoted in this Article, I used, where needed, wording in English that more accurately conveys the Swedish statutory style. To make sure that I got the sense accurately, I consulted several people who are skilled in both languages and whose background and judgment I respect. They are among those listed in the author’s footnote. Any faults in the result, however, are mine.

One who deprives [or robs] another of life is to be sentenced for murder.

A person who takes the life of another shall be sentenced for murder.

In the literal Swedish, the murderer is a protagonist, as though in a tragic play, standing spot-lighted stage-center, having done something awful and awaiting fate. Consider each of the ways in which the literal translation on the left differs from the previously published one in legalistic English on the right.

*One vs. A person:* The Swedish begins *Den om—He who* or *She who* or, neutral as to gender, *One who*. In legalistic English, a provision classifying people often begins coldly with *A person*, followed by a list of elements. In logic, *a person* accurately conveys the Swedish meaning. But it does not convey the tone, mood, or style: out of many people, it is he or she or one who has done this terrible thing.

*Deprives [or robs] vs. takes:* The Swedish is *berövar*, which can be translated as *take*, *deprive*, or, in some contexts, *rob*. Some of the specialists I consulted<sup>77</sup> feel strongly that *rob* is the most accurate word to capture *berövar*'s force and image in this context. Because that view was not unanimous, I used both *deprive* and *rob*. The strength of feeling among those who prefer *rob* seems to corroborate Moberg's observation about imagery "in our present Statute Book."

*Another's life vs. the life of another:* In English, both *another's life* and *the life of another* are grammatically correct, but they are stylistically different. English has two ways to express a possessive. In everyday speech and writing, the vast majority of possessives are formed by adding an apostrophe and an *s* to the possessor noun. For reasons explained in Part V.A, the opposite is true in documents created by lawyers, who feel compelled to form possessives using the preposition *of*.<sup>78</sup> Constant use of that form, with other legalisms, creates an officious tone. Although both forms are available in Swedish, the *av (of)* form is hardly ever used in everyday life or in statutes.

*Is to be vs. shall be:* In Swedish, the main verb is *döms*, which seems to express a guilty defendant's inevitable fate, a dooming judgment. It does not expressly state a court's duty to convict or sentence. The duty is inherent in the situation. In Anglo-American statutes, a duty to act is nearly always expressed, although often in the passive (*shall be sentenced*). One legislative culture habitually expresses a duty while the other often implies it.

## B. Codes

Early Swedish law was literature, though not in the French sense. It was narrative and poetry. Moberg reports that the communities law portion in one

<sup>77</sup> See *supra* the last paragraph of note 76.

<sup>78</sup> See *infra* notes 175–83 and accompanying text.

provincial code ended with “a poem, directed at those who later must interpret in light of *legislative policy*”<sup>79</sup>:

Now hath this statute so been said and meant,  
that each with his own lot may be content.  
How each shall live in his own right,  
and they all build in common plight.<sup>80</sup>

In 1350, the local codes, both oral and written, were superseded by two national codes, one governing towns, which were few and small, and the other governing the countryside. In 1734, these were superseded by a single national code, *Sveriges Rikes Lag*, which is still in effect, although nearly all of it has been rewritten over the succeeding 280 years.<sup>81</sup> The 1734 code was drafted as “a lawbook for the people, in plain language and susceptible of comprehension by laymen.”<sup>82</sup> In editions updated annually, it was sold for generations in general bookstores for the public. The government now puts statutes on websites. When ordinary citizens want to know their law, they can read it online.

*Sveriges Rikes Lag* is divided into 12 *balkar*, a word that itself causes a translation problem. *Balk* is an archaic word for “book.” *Sveriges Rikes Lag* is a code made up of 12 books—not in the sense of volumes, since all the *balkar* are published in one volume. But *balk* is usually translated as “code,” and for lack of a better English word, “code” is sometimes used in this Article as well. The 12 *balkar* are:

Marriage,  
Parental,  
Inheritance,  
Land,  
Environmental,  
Town Land Use,  
Commerce,  
Judicial Procedure,  
Criminal,  
Execution of Judgments, and  
Debts.

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<sup>79</sup> MOBERG, *supra* note 69, at 19 (emphasis added).

<sup>80</sup> *Id.*

<sup>81</sup> Stig Strömholm, *General Features of Swedish Law*, in *SWEDISH LAW IN THE NEW MILLENNIUM* 31, 39–40 (Michael Bogdan ed., 2000).

<sup>82</sup> Anders Bruzelius & Ruth Bader Ginsburg, *Introduction*, in *THE SWEDISH CODE OF JUDICIAL PROCEDURE* 1, 12 (Anders Bruzelius & Ruth Bader Ginsburg trans., 1968) [hereinafter Bruzelius & Ginsburg, *Introduction*].

The sequence still reflects a narrative view of law. “After the individual has married, started a family, inherited her parents’ land and built a house, she goes into trade,” but it all ends badly “in crime and bankruptcy.”<sup>83</sup>

Most *balkar* have been replaced since 1734 with entirely new versions.<sup>84</sup> The *balk* on crimes has been replaced twice—in 1864 and again in 1962.<sup>85</sup> The *balkar* are supplemented with non-code statutes. For example, most contract issues are resolved not in the Commerce Code but instead in separate later statutes on contracts and goods sales.<sup>86</sup>

Swedish codes are somewhere between the French model and the American. A Swedish code is meant to be enduring. It will be more complete than an American one. But it will not necessarily be exclusive.

As a young academic in 1961 and 1962, Ruth Bader Ginsburg began learning Swedish and researching Swedish civil procedure.<sup>87</sup> Her collaboration with Anders Bruzelius, a Swedish judge, produced a treatise on Swedish judicial procedure, published in 1965<sup>88</sup> while she was an assistant law professor teaching American civil procedure at the Rutgers law school in Newark. In 1968, she and Bruzelius published a translation of the Judicial Procedure *balk*’s 1942 recodification.<sup>89</sup>

They felt a special challenge putting into English the straightforward Swedish wording, which its drafters had crafted so that “laymen would be able to read and understand” a *procedural* code<sup>90</sup>—as though anyone walking into a federal courthouse would be able to read the Federal Rules of Civil Procedure and know what to expect. In an introduction to their translation, Bruzelius and Ginsberg spent two pages explaining, down to sentence structure and verb tense, how they tried to reproduce that style in English.<sup>91</sup> It is a model of the respect for the text being translated—a respect that gives the translation intellectual authority and integrity.

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<sup>83</sup> LAURA CARLSON, *THE FUNDAMENTALS OF SWEDISH LAW* 44–45 (2012).

<sup>84</sup> Hans-Heinrich Vogel, *Sources of Swedish Law*, in *SWEDISH LAW IN THE NEW MILLENNIUM* 53 (Michael Brogdan ed., 2000).

<sup>85</sup> *Id.* at 48, 53.

<sup>86</sup> Jan Hellner, *Contracts and Sales*, in *AN INTRODUCTION TO SWEDISH LAW* 201, 201 (Stig Strömholm ed., 1981).

<sup>87</sup> Wendy Webster Williams, *Justice Ruth Bader Ginsburg’s Rutgers Years: 1963–1972*, 31 *WOMEN’S RTS. L. REP.* 229, 231–32 (2010). Ginsburg taught Civil Procedure, Comparative Law, Federal Jurisdiction, Conflict of Laws, and Remedies at Rutgers. *Id.* at 233.

<sup>88</sup> GINSBURG & BRUZELIUS, *supra* note 67; *see also* Ruth Ginsburg & Anders Bruzelius, *Professional Legal Assistance in Sweden*, 11 *INT’L & COMP. L.Q.* 997 (1962).

<sup>89</sup> *THE SWEDISH CODE OF JUDICIAL PROCEDURE* (Anders Bruzelius & Ruth Bader Ginsburg trans., 1968).

<sup>90</sup> Bruzelius & Ginsburg, *Introduction*, *supra* note 82, at 1, 13.

<sup>91</sup> *Id.* at 12–13.

Ginsburg's research in Swedish law was her first significant professional accomplishment. The treatise and translation were her first and second books.<sup>92</sup>

Her work in Sweden also had a direct influence on the development of American law of sex discrimination and gender equality. At that time, feminist points of view were ridiculed in the United States but treated respectfully in Sweden. *Roe v. Wade*<sup>93</sup> had not yet been decided. Although abortion was illegal in the U.S., it was legal—and not controversial—in Sweden. Fifty years later, it is still disputed in the United States, where its legality is constantly under assault. Ginsburg experienced living in a society where government “had begun to take an active interest in freeing men and women from prescribed gender roles.”<sup>94</sup> That was a revelation. It became an image and a benchmark for what she later fought to establish in her home country.

### C. Process

Although the American legislative process is animated by lobbying, the Swedish process is not. American-style lobbyists would have little or no leverage. Individual legislators cannot legally accept private campaign contributions. They can hear arguments on the merits by interest groups. But paying a lobbyist to obtain access would be pointless. Interest groups *automatically* have access, and they get it for free.

What makes that possible are *Statens Offentliga Utredningar* (“SOU”), commissions appointed to investigate and report on questions that may or may not need legislation. The literal translation is “The State’s Public Investigations.” Because *state* suggests a different meaning in the United States, an American might want to say Government Public Investigations. But in a parliamentary system, the word *government* does not mean the same thing it does to us. When a newscaster says, “The Italian government fell today,” that does not mean that revolutionaries have seized Rome. “The government” is the political cabinet made up of ministers. When a parliamentary government falls, the ministers are replaced by other ministers, perhaps from other parties. Thus, a “government” commission might be a politicized one, which SOU commissions definitely are

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<sup>92</sup> Herma Hill Kay, *Ruth Bader Ginsburg, Professor of Law*, 104 COLUM. L. REV. 1, 10–11 (2004). Even though Ginsburg was tied for first in her class when she graduated from Columbia’s law school in 1959, no law firm, because of sex discrimination, would hire her. *Id.* at 59. She received only one clerkship offer, and she got that only because her mentor on the Columbia faculty threatened never to send the judge another clerk. *Id.* at 9. When Rutgers hired her in 1963, fewer than 20 tenure-track law professors in the United States were women. *Id.* at 20. In 1969, Lund University in Sweden awarded her an honorary degree—an extraordinary distinction for a junior faculty member who had not yet received tenure in her own country. Williams, *supra* note 87, at 236. Rutgers gave her tenure later that year. *Id.* at 229, 239.

<sup>93</sup> 410 U.S. 113 (1973).

<sup>94</sup> IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG (2015).

not. We can call them SOU commissions.<sup>95</sup> That is faithful to the Swedish terminology—*Statens Offentliga Utredningar*—and their reports are published in a series called SOU, numbered by year.

Dozens of SOU commissions are at work at any given time.<sup>96</sup> In 2009, a typical year, 95 separate SOU reports were published. SOU commissions are made up of disinterested experts, representatives of major stakeholders in the issues, a judge or senior lawyer, and sometimes a member of the *Riksdag* (Parliament). A ministry will issue a *directiv*, terms of reference which charge the commission with the issue to be investigated and set out parameters for its inquiry.<sup>97</sup> The commission will perform a real investigation. It will evaluate evidence. It might do some empirical research of its own. It will hold hearings, and it will invite the views of interested groups and entities.<sup>98</sup>

The commission's report may include a draft of proposed legislation, as well as a book-length analysis of the reasons why the legislation is needed and exactly how the draft, if enacted, will have the desired effect.<sup>99</sup> Each report is published. This is done as bound volumes in the SOU series, and commission reports are also available online as book-length PDFs, downloadable from a government website.<sup>100</sup>

Unlike the supporting materials for a congressional committee report, these are not scrap-booked witness transcripts and exhibits. An SOU commission report might be hundreds of pages of analysis written by the commission together with the supporting data. These are professional investigations.

Through a process called *remiss*, the minister who charged the SOU commission will invite evaluation of the report by interested groups and entities, including government agencies. The number invited might be as few as a handful or as many as a hundred.<sup>101</sup> Large organizations have full-time employees whose job is to respond to SOU reports and write comments on them.<sup>102</sup> Because the

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<sup>95</sup> English-language commentaries and translations sometimes call them Royal Commissions, but that is not an accurate translation of the words or the concept. *Kunglig* (royal) is not in the name. Commentaries and translations are more often done by British writers than by Americans, and Swedes learn British English in school. The Royal Commission misnomer comes from the British habit of attaching *royal* to public entities' names, such as the Royal Mail and the Royal Navy.

<sup>96</sup> Less important matters are investigated by officials in the relevant ministry, who may draft legislation accompanied by small reports published in the *Ds* series. See Stig Strömholm, *Introduction*, in AN INTRODUCTION TO SWEDISH LAW, *supra* note 86, at 21, 38; see also DALE, *supra* note 65, at 101.

<sup>97</sup> DALE, *supra* note 65, at 98–99; Strömholm, *Introduction*, *supra* note 96, at 21, 35.

<sup>98</sup> DALE, *supra* note 65, at 99.

<sup>99</sup> Strömholm, *Introduction*, *supra* note 96, at 21, 36.

<sup>100</sup> See STATENS OFFENTLIGA UTREDNINGAR, SOK PA WEBBPLASTEN, <http://www.sou.gov.se/> (last visited Oct. 6, 2016). A few reports include short English summaries.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

commission's report has been published online, the public has easy access to it as well. *Remiss* forces interest groups to put all their arguments into the public record, where other interest groups and the public can read and respond to them.

The commission's report, its proposed draft legislation, and the *remiss* comments are then reviewed in the ministry, which will usually do some redrafting in light of the *remiss* comments.<sup>103</sup> A draft of significant legislation would be referred to a law council (*Lagrådet*) of select appellate judges to review the draftsmanship quality as well as consistency with existing statutes.<sup>104</sup> When the ministry and cabinet (and where it is involved, *Lagrådet*) are satisfied with the draft, it is sent to the *Riksdag* as a government bill.

The reports generated up to this point are the preparatory materials on which a court relies in interpreting a statute.<sup>105</sup> They are so detailed that legislation, despite its general language, is usually clearer in meaning than an American statute would be.

Preparatory materials are not legislative history in the American understanding of that term. The *Riksdag* has legislative committees, but their purpose is to give a bill a final vetting before enactment. A committee will write its own report and can recommend amendments to a government bill or that the bill be returned to the ministry for rework.<sup>106</sup> In European lawmaking, a legislature's function is to approve or reject on behalf of the public. A *Riksdag* committee does not investigate a need for legislation. It does not originate legislation. And it does not draft legislation. The big thinking goes into a statute before the wording reaches the legislature for approval or rejection.

Judicial reliance on preparatory materials is not without criticism. "The fact that the courts tend to follow faithfully the views indicated in the preparatory materials has resulted in the appearance of the somewhat disparaging phrase 'legislation by explanatory statement' as an expression for something which inherently conflicts with the principle of legality."<sup>107</sup> The counter-argument is that when the elected legislature enacted the statute, it enacted the meaning explained in the preparatory materials. And nothing is considered to be in the preparatory materials unless it appears in a formal report.<sup>108</sup>

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<sup>103</sup> Strömholm, *Introduction*, *supra* note 96, at 21, 37.

<sup>104</sup> *Id.*; *see also* DALE, *supra* note 65, at 101–02.

<sup>105</sup> CARLSON, *supra* note 83, at 42.

<sup>106</sup> DALE, *supra* note 65, at 102; Strömholm, *Introduction*, *supra* note 96, at 21, 37.

<sup>107</sup> Suzanne Wennberg, *Criminal Law*, in *SWEDISH LAW IN THE NEW MILLENNIUM*, *supra* note 84, at 158.

<sup>108</sup> DALE, *supra* note 65, at 304.



*D. Empiricism, Accessibility, Accountability*

Hard facts supported by data or other empirical evidence are highly valued. Simple solutions are preferred over convoluted ones. Special privileges and backdoor influence are thought to be disreputable. To be considered good legislation, a generally applicable statute would have to be understandable to an educated Swede. Specialized legislation, such as statutes regulating insurance or financial markets, would have to be understandable to an educated Swede who knows something about the subject being regulated.

People more easily trust law when they can understand it and can see it being created through a transparent process that promotes consensus and minimizes favoritism. The World Values Survey is a comprehensive database surveying values across cultures.<sup>109</sup> Social scientists in 60 countries use common questionnaires to discover prevailing public assumptions. Below are the responses, during the 2010–2014 survey cycle, from Sweden and the United States, when respondents were asked how much confidence they have in their national legislature.<sup>110</sup>

	<i>A great deal of confidence or quite a lot</i>	<i>Not very much</i>	<i>Not at all</i>
Sweden	59.3%	31.2%	6.7%
United States	20.2	57.1	19.6

Law loses some of its moral authority when people cannot understand it and when they distrust those who make it. To the extent law lacks moral authority, people feel less inhibited about violating it.

An American might not easily appreciate the extent to which public accountability is valued. An illustration from *Brottsbalken* might help:

**20:1** One who, intentionally or carelessly, by act or omission in the exercise of public authority, disregards his office's responsibilities will be sentenced for breach of duty [*tjänstefel*] to a fine or to imprisonment for at most two years. If the offense is considered petty in view of the perpetrator's authority or his position's relationship in other respects to the exercise of public power, or other circumstances, punishment is not to be imposed.

<sup>109</sup> For an example of its use in public policy analysis, see BRADLEY & TAYLOR, *supra* note 5, at 20, 83–87, 92–94, 97, 101.

<sup>110</sup> *World Values Survey Data Analysis Tool*, WORLD VALUES SURVEY, <http://www.worldvaluessurvey.org/WVSONline.jsp> (last visited Oct. 6, 2016).

If a crime mentioned in the first paragraph has been committed intentionally and is regarded as grave, a sentence for grave breach of duty [*grovt tjänstefel*] to imprisonment of at least six months and at most six years shall be imposed. In assessing whether the crime is grave, special attention is to be given as to whether the offender seriously abused his position or whether the crime caused serious harm or a substantial improper benefit to a private person or the public.

The Swedish term *tjänstefel* has no English equivalent, even approximately. *Tjänste* in this context means government employment. This is a crime that only a government employee can commit, and it applies to all government employees except legislators. Backe, Bruzelius, and Wångstedt translate *fel* as defect or error, as in *skrivfel*, error in writing—or what we would call a scrivener’s error.<sup>111</sup> The leading general purpose Swedish–English dictionary translates *fel* as fault, error, mistake, blunder, omission.<sup>112</sup> Backe, Bruzelius, and Wångstedt translate *tjänstefel* as “breach of (official) duty” or “service irregularity.”<sup>113</sup> Grave breach of duty (*grovt tjänstefel*), the crime defined in article 20:1’s second paragraph, amounts to abuse of authority. But simple breach of duty—defined in the first paragraph and punishable by up to two years’ imprisonment—is the crime of not doing one’s job properly.

During the 22 years from 1989, when the current wording was adopted, to 2011, article 20:1 has been at issue in 43 reported appellate decisions<sup>114</sup>—in a country with a population smaller than North Carolina’s. As with any crime anywhere, many other prosecutions would have been resolved in trial courts without appeals. Appellate courts did not need to clarify statutory meaning. The 1989 amendment merely revised, in a straightforward way, wording that was in *Brottsbalken* when enacted in 1962.<sup>115</sup>

<sup>111</sup> TORILD BACKE, ANDERS BRUZELIUS & ERIK WÅNGSTEDT, KORTFATTAD SVENSK–ENGLSKA JURIDISK ORDLISTA, CONCISE SWEDISH–ENGLISH GLOSSARY OF LEGAL TERMS 38 (1973). Anders Bruzelius was Ruth Bader Ginsburg’s coauthor and cotranslator. *See supra* notes 87–94 and accompanying text.

<sup>112</sup> PRISMA’S SWEDISH–ENGLISH DICTIONARY 79 (1993).

<sup>113</sup> BACKE, BRUZELIUS & WÅNGSTEDT, *supra* note 111, at 97.

<sup>114</sup> Below are the citations in the two appellate reporters. (As in much of Europe, Swedish cases are not known by the parties’ names.)

NJA (*Nytt juridiskt arkiv*): 1990 s. 542; 1992 s. 310; 1992 s. 555; 1992 s. 812; 1992 s. 838; 1993 s. 216; 1993 s. 360; 1994 s. 108; 1994 s. 304; 1994 s. 325; 1996 s. 237; 1996 s. 307; 1996 s. 806; 1997 s. 186; 1997 s. 368; 2001 s. 35; 2001 s. 188; 2001 s. 336; 2001 s. 342; 2003 s. 291; 2004 s. 164; 2005 s. 385; 2006 s. 145; 2008 s. 470; 2009 s. 567.

RH (*Rättsfall från hovrätterna*): 1993:45; 1994:70; 1994:86; 1995:144; 1996:24; 1997:23; 1997:73; 2000:90; 2003:45; 2004:42; 2007:31; 2007:40; 2007:46; 2007:51; 2008:51; 2008:62; 2011:27; 2011:31.

<sup>115</sup> *See* THE PENAL CODE OF SWEDEN, *supra* note 76.

Often defendants are police officers. Judges are covered by article 20:1 and have been prosecuted.<sup>116</sup> Many defendants are acquitted, and the convicted ones are usually let off with a fine or no sentence at all. The true punishment, even for those acquitted, is the embarrassment of a public prosecution in an accountability culture.

#### IV. COUNTING CONCEPTS: FUZZY VS. FUSSY

*[T]he more words there are, the more words there are about which doubts may be entertained.*

– Lord Halsbury, Preface, *The Laws of England* (1907)

The distinction between *fussy logic* and *fuzzy logic* began in philosophy<sup>117</sup> and migrated through scientific and mathematical applications into a distinction between two approaches to legislative logic.<sup>118</sup>

A fussy personality obsesses over details, many of them trivial. Fussiness means picky, finicky, exacting, excessively concerned with cleanliness, petty, and hard or impossible to please. In some instances, the result can be claustrophobia-inducing clutter, otherwise known as too much, or in Yiddish *ungapatchka*. A fussy statute is usually a bossy statute. And it invariably contains large numbers of concepts. It is filled with exhaustive detail addressing a problem's every conceivable aspect and thus creating many litigation issues, which become expensive to resolve.

Fuzziness, when referring to self-expression, means blurry, foggy, hazy, unclear, and indistinct. Sometimes fuzzy wording is caused by a writer's confusion and the absence of clear thought. But sometimes fuzzy wording has been chosen wisely to express clear insights about big concepts. A fuzzy statute contains little detail and addresses a problem with broad concepts. Sometimes people subject to a fuzzy statute can feel that the statute is a helpful guide rather than a hectoring nuisance.

Fussiness is about grains of sand. Fuzziness is about the whole beach. The distinction concerns both expression and substance. Fussiness can be too many ideas—or just the right amount if the situation truly needs to be fussed. Fuzziness might be too few ideas—or just the right amount if the situation needs big-picture thinking. These are a continuum's opposite ends. In the middle are statutes with specifically worded sections but without overdone detail.

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<sup>116</sup> See, e.g., NJA (*Nytt juridiskt arkiv*) 2004 s. 164.

<sup>117</sup> See SUSAN HAACK, *DEVIANT LOGIC, FUZZY LOGIC* (1974).

<sup>118</sup> See Lisbeth Campbell, *Legal Drafting Styles: Fuzzy or Fussy?*, 3 MURDOCH UNIV. ELEC. J.L. No. 2 (1996), <http://www.austlii.edu.au/au/journals/MurUEJL/1996/17.html>; John M. Greene, *Fuzzy Law: A Better Way to Stop Snouts in the Trough*, 9 CO. & SEC. L.J. [Australia] 144 (1991).

Fussy, over-conceptualized statutes are filled with duties. But duties are not the solution to all problems, or even most of them. Every duty imposes costs. If a statute creates too many duties, those subject to it will resist enforcement and resent what is being done to them. Many duties are necessary and unavoidable. But others are ineffectual. They do not accomplish a legislature's goals, or their costs exceed their value.

Conditioning a benefit on compliance gets results through encouragement and reward. Imposing a duty gets results by threats. Sometimes conditioning a benefit is more effective, and sometimes a duty is necessary.<sup>119</sup> But in a fussy and excessively conceptualized legislative culture, the default is to create duties, and the power of incentives is underappreciated.

A. *Two Statutes Requiring Drafting in Plain Language*

In the left column below is a fussy, over-conceptualized statute—the U.S. Plain Writing Act—and in the right column is a fuzzy one—the corresponding portion of the Swedish Language Act.<sup>120</sup>

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<sup>119</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

<sup>120</sup> The rest of the Language Act (not quoted here) establishes Swedish as “Sweden’s principal language.” (art. 4) as well as the language of government (art. 10); establishes as “the national minority languages” Finnish, Yiddish, Meänkieli, Romany Chib, and Sami (art. 7); and imposes on government “a special responsibility to protect and promote the national minority languages” (art. 8) as well as Swedish sign language (art. 9). Meänkieli is a Finnish dialect. Romany Chib is the language of the Romany people, whom Americans call Gypsies, a term the Romany consider derogatory. Sami is a group of languages spoken by the Sami people, whom Americans call Lapps, a term the Sami consider derogatory. On a website, the Swedish government provides translations of the Language Act in all five official languages, including three versions of Sami, as well as in English. See *Other Languages*, GOV’T OFFS. OF SWEDEN, <http://www.government.se/other-languages/> (last visited Oct. 6, 2016).

Plain Writing Act (U.S.)  
124 Stat 2861

§ 3. DEFINITIONS. IN THIS ACT:

(1) AGENCY—The term “agency” means an Executive agency, as defined under section 105 of title 5, United States Code.

(2) COVERED DOCUMENT—The term “covered document”—

(A) means any document that—

(i) is necessary for obtaining any Federal Government benefit or service or filing taxes;

(ii) provides information about any Federal Government benefit or service; or

(iii) explains to the public how to comply with a requirement the Federal Government administers or enforces;

(B) includes (whether in paper or electronic form) a letter, publication, form, notice, or instruction; and

(C) does not include a regulation.

(3) PLAIN WRITING—The term “plain writing” means writing that is clear, concise, well- organized, and follows other best practices appropriate to the subject or field and intended audience.

§ 4. RESPONSIBILITIES OF FEDERAL AGENCIES.

(a) PREPARATION FOR IMPLEMENTATION OF PLAIN WRITING REQUIREMENTS—

(1) IN GENERAL—Not later than 9 months after the date of enactment of this Act, the head of each agency shall—

(A) designate 1 or more senior officials within the agency to oversee the agency implementation of this Act;

(B) communicate the requirements of this Act to the employees of the agency;

Language Act (Sweden)  
SFS 2009:600

Art. 11. The public sector’s language is to be correct, simple, and understandable.

(C) train employees of the agency in plain writing;

(D) establish a process for overseeing the ongoing compliance of the agency with the requirements of this Act;

(E) create and maintain a plain writing section of the agency's website as required under paragraph (2) that is accessible from the homepage of the agency's website; and

(F) designate 1 or more agency points-of-contact to receive and respond to public input on—

(i) agency implementation of this Act; and

(ii) the agency reports required under section 5.

(2) WEBSITE—The plain writing section described under paragraph (1)(E) shall—

(A) inform the public of agency compliance with the requirements of this Act; and

(B) provide a mechanism for the agency to receive and respond to public input on—

(i) agency implementation of this Act; and

(ii) the agency reports required under section 5.

(b) REQUIREMENT TO USE PLAIN WRITING IN NEW DOCUMENTS—

Beginning not later than 1 year after the date of enactment of this Act, each agency shall use plain writing in every covered document of the agency that the agency issues or substantially revises.

(c) GUIDANCE.—

(1) IN GENERAL—Not later than 6 months after the date of enactment of this Act, the Director of the Office of Management and Budget shall develop and issue guidance on implementing the requirements of this section. The

Director may designate a lead agency, and may use interagency working groups to assist in developing and issuing the guidance.

(2) INTERIM GUIDANCE—Before the issuance of guidance under paragraph (1), agencies may follow the guidance of—

(A) the writing guidelines developed by the Plain Language Action and Information Network; or

(B) guidance provided by the head of the agency that is consistent with the guidelines referred to in subparagraph (A).

#### § 5. REPORTS TO CONGRESS.

(a) INITIAL REPORT.—Not later than 9 months after the date of enactment of this Act, the head of each agency shall publish on the plain writing section of the agency's website a report that describes the agency plan for compliance with the requirements of this Act.

(b) ANNUAL COMPLIANCE REPORT—Not later than 18 months after the date of enactment of this Act, and annually thereafter, the head of each agency shall publish on the plain writing section of the agency's website a report on agency compliance with the requirements of this Act.

Congress cannot restrain itself from over-complicating the issues—even *in a statute requiring plain language drafting*. Fussing is in American legislatures' DNA.

Sweden adopted the Language Act in 2009. Its article 11 was preceded by equally fuzzy provisions in government administration statutes in 1982, 1986, and 1995.<sup>121</sup> The 1986 version, for example, required government agencies to

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<sup>121</sup> Barbro Erhrensberg-Sundin, *The Quality of Legislation: The Swedish View*, Address before the Legal Revisers Group, European Commission Legal Service 5 (Sept. 27, 2002). The earliest provision, however, appears to be the 1713 royal decree quoted at the beginning of this Article's Part III.

“express themselves in a comprehensible manner.”<sup>122</sup> The prime minister’s office now employs a small group of language experts and lawyers to review proposed administrative regulations and legislation to make sure they are “as clear and user-friendly as possible.”<sup>123</sup> Nothing “may be sent to the printer without [their] approval.”<sup>124</sup>

A 2001 evaluation of government texts showed that “archaic, difficult, and obscure words as well as long and complicated sentences have almost disappeared from the bureaucratic language.”<sup>125</sup>

The over-conceptualized U.S. Plain Language Act, however, has changed little or nothing. An exhaustive study of documents from 35 federal agencies found that “compliance has been poor.”<sup>126</sup> Fuzziness changed behavior where fussiness is failing.

The U.S. Plain Writing Act imposes costs by requiring, in detail, conduct of questionable value that must be paid for from taxes. If all the costs associated with unnecessarily detailed requirements over thousands of statutes, state and federal, could be totaled and diverted, the sum might be used instead to help repair crumbling infrastructure, help improve education, and provide other public benefits.

Out of distrust, Congress piled on make-work requirements. One imagines legislators sitting around a table thinking up ways to badger administrators into submission on the plain language issue while staffers take notes. “Make ‘em do X!” says a legislator. “Yeah and make ‘em do Y, too!” says another. It did not happen exactly like that. But it might as well have. Congress has overdone duties so many times in so many fields that administrators have become skilled at making perfunctory shows of compliance while continuing to do whatever they have been doing in the past.

Here is how an agency could comply: It would designate some senior official to oversee plain writing, which section 4(a)(1)(A) requires. That person will already have so many other responsibilities that this new one will get lost in

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<sup>122</sup> *Id.* at 5.

<sup>123</sup> Anne-Marie Hasselrot, *The Swedish Approach to Clear Legislation*, CLARITY, Nov. 2012, at 36.

<sup>124</sup> *Id.*

<sup>125</sup> Barbro Erhrensberg-Sundin, *Plain Language in Sweden: The Results After 30 Years* (Oct. 5, 2004) (speech to “600 high-level Mexican public servants” by a Swedish Justice Ministry senior advisor charged with compliance), <http://www.plainlanguage.gov/usingPL/world/world-sweden.cfm>. *Regeringskansliet*—the Swedish equivalent of the U.S. Office of Management and Budget—has published a 16-page two-column list: in the left column, words and phrases to be replaced, and in the right column, their plain language equivalents. *Svarta listan: Ord och fraser som kan ersättas i författningsspråk* (2011) (“The Black List: Words and Phrases That Can Be Replaced in Statutes and Administrative Regulations”), <http://www.regeringen.se/sb/d/243/a/19775/dictionary/true>.

<sup>126</sup> Rachel Stabler, “*What We’ve Got Here Is Failure to Communicate*”: *The Plain Writing Act of 2010*, 40 MIAMI J. LEGIS. 280, 296 (2013).



the shuffle, except that to comply with section 4(a)(1)(B) and (C), the official will send to everyone in the agency a manual on plain writing with a cover memo reciting the Act's requirements. If the memo quotes the Act at length, the recipients will not be able to finish reading it because the Act itself is incomprehensible. They might glance at the manual but will leave it on a shelf or in a drawer and forget about it because they have so much else to do. To comply with section 4(a)(2), the agency will add a page to its website on plain language requirements. The agency will designate someone to receive public complaints about incomprehensible agency documents and regulations. That person will already have many other responsibilities, and if anybody ever complains, she or he will pass the complaint up a command chain, where it will be ignored. The agency will receive a document from the Office of Management and Budget detailing some requirements. The agency has received many documents like this in the past, and agency employees who read this one will sigh because they are overworked already, and this will be more distraction from getting their jobs done. Someone in the agency will write the reports required by the Act. The reports will be in plain English and list the employees who were designated to do things; list the things they did (but in bland wording obscuring the fact that they did not really do much); mention the webpage; and say that few or no complaints have been received. A congressional employee will read the reports and write a memo to a supervisor saying the agency complied with the Act.

The only part of the Plain Writing Act that might actually cause a real change in agency behavior is section 4(b), which is similar to—but less than—Sweden's Language Act article 11. Section 4(b) covers only specified agency documents, and it specifically exempts regulations. The Swedish statute's article 11 applies to everything. At first glance, section 4(c) looks like it would change practice, but it merely ordered the executive branch to do what it was already doing. The federal government already had a working group called the Plain Language Action and Information Network, which developed plain language guidelines in the 1990s.<sup>127</sup>

Would the Plain Writing Act have been less effective if it had been limited to section 4(b) and a compressed version of the section 3 definitions? Actually a stripped-down statute might have been more effective because the goal—the thing Congress really wanted—would have been undeniably obvious if not surrounded by badgering and nuisance clutter. When a statute imposes half a dozen requirements, only one of which truly matters, the targets of the legislation will spread their compliance efforts over all the requirements rather

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<sup>127</sup> *Federal Plain Language Guidelines*, PLAINLANGUAGE.GOV, <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/index.cfm?CFID=4491114&CFTOKEN=6b8820677392a62-335EFD16-C9F6-8FCD-F1145FB4513DB2AF&jsessionid=9DDDFEFA9689AE156EE99A6FF8E907AD.chh> (last visited Oct. 12, 2016).

than concentrating on what Congress really wants. Legislation can expand legal requirements. But it cannot expand an employee's day beyond 24 hours.

*B. Suspicion and Trust*

In common law countries, legislatures have long histories of suspicion. They do not trust administrative agencies, and for centuries they have not trusted judges. Part IV(B) describes the history behind that distrust and suspicion. American legislators often talk about giving guidance to courts. But the original—and continuing—function of legislative fussiness in common law countries is to control courts through detail. Suspicion, however, can become dysfunctional when *every* statute is overly detailed regardless of whether fussiness is appropriate to the problem being addressed by legislation.

A fuzzy statute, on the other hand, assumes cooperation. The Swedish Language Act's drafters trusted that administrators would do what the statute requires, and their trust seems to have been rewarded.

One of the World Values Survey's questions is "Generally speaking, would you say that most people can be trusted or that you need to be very careful in dealing with people?" Below are the responses from Sweden, the United States, the other two common law countries surveyed, plus Iraq and Russia.<sup>128</sup> (The United Kingdom and France were not surveyed.)

	<i>Most people can be trusted</i>	<i>Need to be very careful</i>
Sweden	60.1%	37.2%
New Zealand	55.3	42.1
Australia	51.4	47.8
United States	34.8	64.3
Iraq	30.0	63.8
Russia	27.8	66.2

Americans are as suspicious and distrustful as Iraqis and Russians, who for generations have been spied on by secret police.

Suspicion is a perception, which might—or might not—be justified by reality. Americans are as suspicious as people living in authoritarian societies—even though Americans do not live in an authoritarian society. There is no evidence that Americans have genuine reasons to distrust each other. In fact, of the populations surveyed recently by the World Values Survey, those who would seem most similar to us are Australians and New Zealanders, who speak our language and whose law and history resemble ours, with Britain as a common

<sup>128</sup> See WORLD VALUE SURVEY, <http://www.worldvaluessurvey.org/WVSONline.jsp> (last visited Oct. 6, 2016).

ancestor. But Australians and New Zealanders are more willing than we are to trust each other.

Because suspicion is so pervasive in American culture, a legislator here might react with incredulity at the idea that people can be trusted to do what a statute asks them to do. Fussy, bossy, hectoring, and badgering legislation might seem to be the only way to get people to behave. Sometimes it is. But American legislators typically proceed on the assumption that it *always* is.

### C. *Income Tax*

Although fuzzy statutes are usually simple ones, fuzziness and simplicity are not the same thing. An ordinance prohibiting driving faster than 35 miles per hour within city limits is simple legislation, but numbers are never fuzzy. The real issue in a tax code is the quantity of concepts. A legislature might over-conceptualize a tax code to capture as much tax as possible (fussing). Or a legislature might over-conceptualize for the opposite reason: to create opportunities to avoid tax.

American-style individual income tax adjustments and deductions do not exist in Swedish law, except for items like pension contributions and unreimbursed work expenses such as tools and overnight travel; commuting expenses are also deductible.<sup>129</sup> This is a very simple tax system.<sup>130</sup> It is so simple that the government performs the service of preparing the taxpayer's return for taxpayer approval or rejection.

*Skatteverket*, the Swedish equivalent of the Internal Revenue Service, receives from employers and financial institutions the same information IRS does in the United States, and, like any other country's tax agency, it knows the taxpayer's home and work addresses. *Skatteverket* computes the taxpayer's income tax, including the pension contribution and commuting deduction, along with any real property tax, which *Skatteverket* also collects, and sends a proposed tax return to each taxpayer. If the numbers on the return are accurate, the taxpayer accepts it. If not—for example, if the taxpayer claims unreimbursed work expenses that *Skatteverket* would not know about—the taxpayer rejects the return and submits one that the taxpayer generates, often online. Several other countries

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<sup>129</sup> See *Tax Liability in Sweden for Individuals*, SKATTEVERLET, <http://www.skatteverket.se/servicelankar/otherlanguages/inenglish/individualsandemployees/declaringtaxesforindividuals.4.7be5268414bea064694c5df.html> (last visited Oct. 6, 2016); *Common Deductions in the Tax Return*, SKATTEVERLET, <http://www.skatteverket.se/servicelankar/otherlanguages/inenglish/individualsandemployees/declaringtaxesforindividuals/commondeductionsinthetaxreturn.4.7be5268414bea064694c75e.html> (last visited Oct. 6, 2016).

<sup>130</sup> For an example of a typical individual's tax computation, see SWEDISH TAX AGENCY, TAXES IN SWEDEN 2013: AN ENGLISH SUMMARY OF TAX STATISTICAL YEARBOOK OF SWEDEN 22 (Dec. 2013) [hereinafter TAXES IN SWEDEN].

with simplified tax codes use similar systems.<sup>131</sup> Because *Skatteverket*'s numbers are usually accurate—which is possible because the tax law is so simple—most Swedes accept the return and file it.

A Swedish taxpayer can file by sending a text message from a cell phone to *Skatteverket* or by making a telephone call or by using an iPhone app.<sup>132</sup> For most taxpayers with salaried-only income, checking *Skatteverket*'s math and then filing the return takes little time or effort. The government did the paperwork for them in the first place with *Skatteverket*'s proposed return, which was computer generated from data *Skatteverket* already has.<sup>133</sup>

There is nothing of what we experience—detailed record-keeping, rifling through checkbooks and credit card statements looking for deductible expenses, TurboTax, H&R Block, and tax accountants. IRS estimates that a U.S. taxpayer who files using Form 1040EZ (the “easy” version of Form 1040) takes, on average, *five hours* and spends \$40 to prepare it, and a taxpayer who files with Form 1040 itself takes *16 hours* and spends \$270.<sup>134</sup>

Over-conceptualization in U.S. tax law is not caused by Congress's suspicion that people will not pay. Instead, the tax system is being used as a Christmas tree to satisfy interest groups with special tax treatment for everything from mortgage borrowing to carried interest income earned by hedge fund managers. The giveaways are so many and so complicated that the tax system as a whole is incomprehensible to anyone who is not a tax specialist. Excessively conceptualized statutes damage public confidence in government. Pew Research

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<sup>131</sup> Among them are Spain, Denmark, Finland, Norway, Iceland, and Estonia. *Tax Policy Center Briefing Book: How Could We Improve the Federal Tax System?*, TAX POLICY CENTER, <http://www.taxpolicycenter.org/briefing-book/what-other-countries-use-return-free-filing> (last visited Oct. 6, 2016) [hereinafter *Tax Policy Center Briefing Book*].

<sup>132</sup> By phone: dial 020-567-100. If calling from outside Sweden add the country code. Press 1 to start filing the return. Or use the iTunes *Skatteverket* app, obtainable at <https://itunes.apple.com/us/app/skatteverket/id419081244?mt=8>. Instructions in English for filing by text, phone, or with the app are also available. See *How to File Your Tax Return*, SKATTEVERLET, <http://www.skatteverket.se/servicelankar/otherlanguages/inenglish/individualsandemployees/declaringtaxesforindividuals/howtofileyourtaxreturn.4.7be5268414bea064694c620.html> (last visited Oct. 6, 2016).

<sup>133</sup> *Skatteverket* has an up-to-date computer system, unlike the IRS, which uses antiquated hardware and software because Congress starves the agency with inadequate appropriations.

<sup>134</sup> U.S. INTERNAL REVENUE SERVICE, 2015 FORM 1040 INSTRUCTIONS 98-99 (2016). The Urban-Brookings Tax Policy Center estimates that if the U.S. Tax Code were somewhat less complex, the IRS would be able to prepare returns for “between 8 million and 60 million households,” saving them the time and money they now waste. *Tax Policy Center Briefing Book*, *supra* note 131. But if the IRS were to do that, profits would shrink for the companies that sell tax preparation software. Intuit, which sells TurboTax, lobbies ferociously against legislation that would permit the IRS to do so. Senator Elizabeth Warren, TAX MAZE: HOW THE TAX PREP INDUSTRY BLOCKS GOVERNMENT FROM MAKING TAX DAY EASIER 8-13 (2016), [https://www.warren.senate.gov/files/documents/Tax\\_Maze\\_Report.pdf](https://www.warren.senate.gov/files/documents/Tax_Maze_Report.pdf).

polling has shown that the IRS is among the least trusted parts of the federal government.<sup>135</sup> Congress itself is in last place.

But polling in Sweden shows *Skatteverket* to be the second most popular of 26 government agencies<sup>136</sup>—even though Swedes pay much more in taxes than Americans do.<sup>137</sup> When the legislation is simple, the public can actually feel that an enforcement agency is helpful.

#### D. Citation Codes

According to the New York University Journal of International Law and Politics' *Guide to Foreign and International Legal Citations*, "France does not have a uniform citation manual. There are some accepted practices, but they are not followed by all authors."<sup>138</sup> For the benefit of American authors writing in English about French law, the NYU *Guide* distills ten guidelines from French publishing customs.<sup>139</sup> "There is no uniform code of citation in Sweden," and the NYU *Guide* abstracts four guidelines from Swedish customs.<sup>140</sup> In Germany, "[c]itation is quite uniform, although there are neither binding rules regarding citation nor a national citation manual."<sup>141</sup> The NYU *Guide* suggests nine guidelines for American authors writing in English about German law.<sup>142</sup> The *Guide*'s entries are similar for Australia, Brazil, Denmark, Finland, India, Italy, Japan, Mexico, the Netherlands, New Zealand, Spain, Switzerland,<sup>143</sup> and most other countries.

The University of Chicago *Maroonbook* contains 41 rules and subrules for U.S. law citations, and it expresses them, with appendices, in 85 pages.<sup>144</sup>

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<sup>135</sup> *IRS Among Least-Popular Federal Agencies*, PEW RESEARCH CENTER (May 16, 2013) <http://www.pewresearch.org/daily-number/irs-among-least-popular-federal-agencies/>.

<sup>136</sup> David Wiles, *Why Swedes Are Okay With Paying Taxes*, SWEDEN (Jan. 8, 2016), <http://sweden.se/society/why-swedes-are-okay-with-paying-taxes/#start>. In 2012 and 2013 polling, 66% of individuals and 78% of businesses "have confidence" in *Skatteverket*; 72% of individuals and 47% of businesses believe "it is easy to file tax returns and provide information" to *Skatteverket*. TAXES IN SWEDEN, *supra* note 130, at 16–17.

<sup>137</sup> Kleven, *supra* note 12.

<sup>138</sup> NEW YORK UNIVERSITY SCHOOL OF LAW, JOURNAL OF INTERNATIONAL LAW AND POLITICS' GUIDE TO FOREIGN AND INTERNATIONAL LEGAL CITATIONS 66 (2006) [hereinafter NYU GUIDE].

<sup>139</sup> *Id.* at 67–69.

<sup>140</sup> *Id.* at 196–97.

<sup>141</sup> *Id.* at 73.

<sup>142</sup> *Id.* at 73–77.

<sup>143</sup> *Id.* at 11–13, 26–28, 46–49, 62–64, 90–95, 111–13, 116–19, 125–28, 134–37, 141–42, 192–94, 200–03.

<sup>144</sup> UNIVERSITY OF CHICAGO LAW REVIEW & UNIVERSITY OF CHICAGO LEGAL FORUM, MANUAL OF LEGAL CITATION (MAROONBOOK) (2013) [hereinafter MAROONBOOK].

In American law, the crown of fussiness might belong to the *Bluebook*, which has a nearly uncountable number of rules and subrules expressed, with appendices, in 560 arabic-numbered pages, not counting italic-numbered front matter.<sup>145</sup> To compare the *Bluebook* with the *Maroonbook* and with citation practices in other countries is to understand fussiness at its most basic level. Below is a comparison of the *Bluebook* and *Maroonbook* rules on a very simple issue: book titles.

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<sup>145</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) [hereinafter THE BLUEBOOK].

Bluebook  
Rule 15.3

Title. Cite the full main title as it appears on the title page, but capitalize according to rule 8 (unless the title is not in English, in which case follow rule 20.2.2(b)). Give a subtitle only if it is particularly relevant. Do not abbreviate words or omit articles in the title. Use large and small capitals:

CAPITAL FLOWS IN THE APEC REGION (Mohsin S. Khan & Carmen M. Reinhart eds., 1995).

6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.10 (3d ed. 1999).

When citing a single volume of a multivolume work, give the main title of the volume cited. If the title of a work ends with a numeral, or if distinguishing between the title and page number could otherwise be confusing, the page number should be set off by a comma and the word "at" (see rule 3.2(a)):

J.A.S. GRENVILLE, THE MAJOR INTERNATIONAL TREATIES, 1914–1973, at 114–15 (1974).<sup>146</sup>

This is only a mild comparison. The *Bluebook* rule quoted here is 152 words, and the *Maroonbook* rule is 55 words, a ratio of 2.8 to 1. In page count, the ratio between the *Bluebook* and the *Maroonbook* is much higher—6.1 to 1.

The *only* reason to regulate in this area is to provide citations that communicate what a reader needs to know.<sup>148</sup> To turn the *Bluebook*'s 560 pages

Maroonbook  
Rule 4.5(A)(c)

Title. Generally, use the title of the book as it appears on the title page. Never shorten the title. Secondary titles (subtitles) should be included in the citation after a colon. Do not add a colon if the primary title ends with an exclamation point or question mark. Book and treatise titles should be italicized.<sup>147</sup>

<sup>146</sup> *Id.*, R.15.3, at 151.

<sup>147</sup> MAROONBOOK, *supra* note 144, at R.4.5(A)(c).

<sup>148</sup> The Official Rules of baseball, football, and basketball are three complicated industrial codes, drafted like statutes and governing complex activities about which disputes are frequent and

is to find example after example of requirements that have little or nothing to do with that purpose. A period is

so tiny that only the keenest eye can discern whether [one] is in roman or italic typeface. Often, if a sentence ends with an italicized word (it might be the name of a case), in italicizing the word the writer will inadvertently have italicized the period. This is “wrong” [and is corrected], if necessary with the aid of a magnifying glass.<sup>149</sup>

A writer is required to insert a space between a section sign and a number<sup>150</sup> but forbidden to insert one between a dollar sign and a number.<sup>151</sup> Mathematical formulae must be italicized.<sup>152</sup> The following is a violation:  $E = mc^2$ . A writer must “use commas to separate groups of three digits when those numbers contain five or more uninterrupted digits.” Writing “9,876” is strictly forbidden. It must be written “9876.”<sup>153</sup> Authors and editors are not permitted to make these decisions—and many others—on their own. Their discretion is untrustworthy.

This is the hectoring and badgering of fussy legislation, imposing high compliance costs for little gain. Time and effort that an editor must spend trying to figure out whether a comma following an italicized word must itself be italicized<sup>154</sup> is time and effort not spent learning law and how to practice it even though the editor typically is going into large sums of debt to pay for that learning, which are needed for a career and for the clients to whom the editor

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on which millions of dollars can sometimes rest. MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES (2016), [mlb.mlb.com/mlb/downloads/y2016/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2016/official_baseball_rules.pdf) (last visited Oct. 7, 2016); NATIONAL BASKETBALL ASSOCIATION, OFFICIAL RULES (2015), <http://www.slideshare.net/monitorsaham/nba-official-rules-201516> (last visited Oct. 7, 2016); NATIONAL FOOTBALL LEAGUE, OFFICIAL PLAYING RULES (2016), [operations.nfl.com/media/2224/2016-nfl-rulebook.pdf](http://operations.nfl.com/media/2224/2016-nfl-rulebook.pdf).

Added together, the three books of Official Rules total 517 arabic-numbered pages (not counting italic-numbered front matter). The *Bluebook* is 560 arabic-numbered pages. But the comparison is really worse because the *Bluebook*'s pages are taller and wider. Multiplying height by width by number of pages, the combined three Official Rules books add up to 14,264 square inches of rules. The *Bluebook* is 24,976 square inches of rules.

A sport's Official Rules regulate everything that can happen on a playing field—what is allowed, what is prohibited, how rules interact with each other, and everything's consequences—as well as how events are classified and entered into the sport's official records. But the only legitimate reason for regulating law citation is to make sure that a reader gets information from names, numbers, and abbreviations.

<sup>149</sup> RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 126–27 (2016).

<sup>150</sup> THE *BLUEBOOK*, *supra* note 145, R.6.2(c), at 88.

<sup>151</sup> *Id.*, R.6.2(d), at 88.

<sup>152</sup> *Id.*, R.7(e), at 90.

<sup>153</sup> *Id.*, R.6.2(a)(vii), at 88.

<sup>154</sup> *Id.*, R.2.1(f), at 67, 2.2(c), at 69.



will owe a fiduciary duty. And the compliance costs multiply. Author time and effort spent on italicized punctuation issues is time not spent teaching law.

Addressing a real issue, the *Maroonbook* has this rule:

Rule 2.2 Abbreviating Source Names in Citations

(a) Step one: Check appendices . . .

(b) Step two: Use your judgment . . .

*Use your judgment.* The fuzzy legislator trusts those governed to do the right thing in gray areas. Later in 2.2(b), the *Maroonbook* even uses the word *please*. Nearly all American law reviews have adopted the *Bluebook*.

In England—the mother of American law—“[t]here is no uniform code of citation,”<sup>155</sup> no equivalent of the *Bluebook* or even the *Maroonbook*. The NYU *Guide* suggests eight rules for English cites,<sup>156</sup> but notes that English publications follow inconsistent practices on “common abbreviations (chapter, section, etc.).”<sup>157</sup> This appears to cause no harm. And there is no evidence that harm was caused in the United States before the first *Bluebook* was published. John Marshall, Oliver Wendell Holmes, Louis Brandeis, and Benjamin Cardozo all did what English writers still do: observe the most basic citation customs gracefully out of kindness for the reader rather than out of obedience to hundreds of rules, most of which readers do not care about.

*E. The Net Effect of Over-Conceptualization*

Excessively conceptualized statutes impose compliance costs that accumulate into substantial drags on an economy. When the executive branch is required by statutes like the Plain Writing Act to perform pointless tasks, government is less efficient and provides fewer services to the public per revenue dollar. When the public itself must comply with needlessly complicated statutes like the federal tax code, money is sucked into industries like tax preparers that do not contribute to prosperity.

A fussy, over-conceptualized statute can include so much detail that it is unreadable. And there is little predictability in a statute that is hard to comprehend. Try reading the statute in Appendix C. Read the whole thing, to the end, even though it will be—as Tennyson said of reading Ben Jonson—like wading through glue.<sup>158</sup> No skimming; read every word. There is no surplusage

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<sup>155</sup> NYU GUIDE, *supra* note 138, at 223.

<sup>156</sup> *Id.* at 223–26.

<sup>157</sup> *Id.* at 223.

<sup>158</sup> JAMES CHARLTON, FIGHTING WORDS: WRITERS LAMBAST OTHER WRITERS—FROM ARISTOTLE TO ANNE RICE 5 (1994).

in statutes. This is not the worst American homicide statute. It is only average.<sup>159</sup> California's is twice as long.

When you are finished—or have given up in frustration—read for comparison the statutes in Appendices A and B.<sup>160</sup>

People governed by fussy, bossy, over-conceptualized statutes sometimes find them repulsive. Stendhal would not have been inspired by the Illinois homicide statute's drafting style. It could not be sold in general interest bookstores, as *Sveriges Rikeslag* has been, or read and understood by the public on websites. Educated French citizens and educated Swedes can read and comprehend much of their law. Educated Americans cannot.

The United States is fussy and excessively conceptualized not just in legislation, but also in contracts.<sup>161</sup> American transactional lawyers are not satisfied unless the contracts they draft address every contingency on the assumption that the other side will eventually behave badly. Outside the United States, contracts tend to be shorter and address fewer issues. There is no evidence that contracts drafted outside the United States are, on the whole, less effective than those drafted by American lawyers.<sup>162</sup>

## V. THE UNITED STATES

*You oughtta hear the Senate when they're drawing up a bill.  
"Whereas's" and "to wit's" are crowded in each codicil.  
Such legal terminology would give your heart a thrill.  
There's phrases there that no one understands.  
The country's in the very best of hands.*

– Gene de Paul & Johnny Mercer<sup>163</sup>

No one would ever confuse an American statute with literature. But there is an abundant literature *about* American statutes, and it is almost entirely ridicule.<sup>164</sup>

<sup>159</sup> See *supra* text accompanying note 8.

<sup>160</sup> Do not imagine that “grave” (*grovt*) in the Appendix B Swedish homicide statute is so vague that a court would not know what to do with it. New York uses the same word. N.Y. PENAL LAW §§ 125.20(1), 125.25(b)(2), 125.25(d)(4) (McKinney 2016).

<sup>161</sup> “Written agreements drafted by English and especially American lawyers are often much longer than those written by their Continental European colleagues.” Thomas Lundmark, *Verbose Contracts*, 49 AM. J. COMP. L. 121, 121 (2001).

<sup>162</sup> Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words*, 79 CHI.-KENT L. REV. 889 (2004).

<sup>163</sup> GENE DE PAUL & JOHNNY MERCER, *The Country's in the Very Best of Hands*, in LIL' ABNER (1956).

<sup>164</sup> A few examples from Mark Twain and Will Rogers (citations at the end of this footnote): **1:** “Suppose you were an idiot. And suppose you were a member of Congress. But I repeat myself” (Twain). **2:** “Congress and the Senate . . . are just children that's [sic] never grown up” (Rogers). **3:**

A. *History: Subduing the Majority*

After the 1066 Norman invasion, William the Conqueror established the continental brand of feudalism in England by transforming his followers into barons and carving up the country into their fiefs.<sup>165</sup> Pre-invasion England had been vaguely feudal but much more loosely than this.<sup>166</sup> The new rulers spoke Norman French, and their subjects spoke Old English.

William promised the English that their law would continue as before. That law was custom: traditions reflecting community views on what was right and wrong. Before the Conquest, law had been conducted partly in Old English but mostly in Latin.<sup>167</sup> In both England and Normandy, educated people could read and speak Latin, and after the Conquest, Latin became even more dominant in English law because the invaders were not fluent in English, although they later learned it.<sup>168</sup> “Educated” had a different meaning then. Most people were illiterate, and education was a luxury for the truly wealthy. Eventually Latin was joined by Norman Law French, pushing what had become Middle English into third place in law and courts.

When English was heard in post-Conquest law settings, the purpose was to give English-speakers at least a clue about what was transpiring in a language they did not understand. Latin and Norman Law French were elite club talk. Their effect was to exclude the overwhelming majority of the population, who spoke neither language. To learn Latin or Norman Law French required the luxury of education. It is still true in England that one’s accent marks one’s social class. Centuries ago one’s language did that.

This was the opposite of what was happening in Sweden at the same time. In Sweden, law was accessible to everyone—at first from the *lagman*, a neighbor who recited it from memory in words everyone could understand, and later in writings that could be read aloud to and understood by uneducated people.<sup>169</sup> In England, law was being mystified from the public by two languages, Latin and Norman Law French. Only those educated enough to know both of

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“To my mind Judas Iscariot was nothing but a low, mean, premature Congressman” (Twain). **4:** “[E]very time they make a joke it’s a law. And every time they make a law it’s a joke” (Rogers). **5:** “[T]here is no distinctly native American criminal class except Congress” (Twain). **6:** “This country has come to feel the same when Congress is in session as when the baby gets hold of a hammer” (Rogers). **Sources:** **1:** Twain in YALE BOOK OF QUOTATIONS 782 (Fred R. Shapiro ed., 2006). **2:** Rogers, letter to Franklin D. Roosevelt, December 2, 1932. **3:** Twain in YALE BOOK OF QUOTATIONS *supra*, at 774. **4:** ROGERS, AMBASSADOR OF GOOD WILL, PRINCE OF WIT AND WISDOM, Ch. 9 (1935). **5:** Twain in YALE BOOK OF QUOTATIONS *supra*, at 779. **6:** Rogers, Daily Telegram #1230, *Congress Session, Rogers Says, Is Like Baby Getting A Hammer* (July 4, 1930).

<sup>165</sup> DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 62 (1963).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 65.

<sup>168</sup> *Id.* at 67.

<sup>169</sup> See *supra* text accompanying notes 71–73.

them could understand their law. Today terms of art from Latin and Norman Law French continue to make law a mystery to the public.

During the 15th and 16th centuries, Middle English and French gradually merged to become modern English.<sup>170</sup> But law went in the other direction: French took over.<sup>171</sup> Coke's hornbook (1614) "was mostly in Latin, the language of the writs[, and] he published *Reports* (1600–1615) in French—he said—because that was their customary language."<sup>172</sup> His commentary on Littleton was in parallel French and English columns.<sup>173</sup> This was during and after the time of Shakespeare. The public could understand their playwrights—but not their law.

An American statute is considered exceptionally well drafted if a lawyer can understand it after one reading. But if a lawyer must do some billable hours of research to find the true meaning, that is not a particularly regrettable flaw—at least not to lawyers. Whether a *non-lawyer* can understand it is irrelevant. Lawyers would be needed less, and there would be fewer of them, if a typical American statute could be read and understood by any educated person. Law drafters do not *deliberately* mystify. There is no conspiracy. It is merely a centuries-old habit, unchanged because the people involved have no incentive to change and no clear model for how to change.

Centuries-old habits are very hard to break. They have become hard-wired into a culture. For example, consider this Article's title: *Legislation's Culture*. It could have been *The Culture of Legislation*. English has two ways of forming a possessive. One is to state the possessed thing first (*The Culture*), followed by the preposition *of*, followed by the possessor (*Legislation*). This resembles a passive construction even though no verb is involved. It is the French method of forming a possessive—*La culture de la législation*—and it entered the English language when French and Middle English merged. As a passive equivalent, it is boring and verbose. Lawyers love it. *Of*-possessive overuse is a marker of legalistic writing. In a document written by a typical lawyer, it infects nearly every sentence, or at least one sentence in every two.

The other method is to identify the possessor first, add an apostrophe and an *s*, and then identify the thing possessed: *Legislation's Culture*. This comes straight from Old English, which was a quasi-Scandinavian language. An *s*-possessive is concise, and, like an active verb, can be vivid—someone or something is in the act of possessing.

Ordinary people use either form, at whim, but mostly *s*-possessives. Lawyers, however, use *of*-possessives at every opportunity, avoiding them only where the result would seem ridiculous. They would not say "the little lamb of

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<sup>170</sup> MELLINKOFF, *supra* note 165, at 95–96.

<sup>171</sup> *Id.* at 99.

<sup>172</sup> *Id.* at 123.

<sup>173</sup> *Id.*

Mary,” for example. In the Illinois statute in Appendix C, *of*-possessives occur unnecessarily 46 times (plus a few instances where they truly are necessary). That is one of several reasons why that statute is almost unreadable. (The most important reason is that the Illinois statute uses *too many concepts*—which is immediately apparent when compared with the French and Swedish statutes on the same subject.)

Look at the Illinois statute's last section, section 9-3.3(a), which was added after the rest of the statute had already been enacted:

A person who violates Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act by unlawfully delivering a controlled substance to another, and any person's death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance commits the offense of drug-induced homicide.<sup>174</sup>

You might be nodding off by the third line because of the two unnecessary *of*-possessives.

That is part of the mystification in American legislation culture. But in the fourth line an *s*-possessive unexpectedly appears—“person's death.” To wear out the reader, it should have been “the death of any person.” We do not know whether this *s*-possessive was an accident or deliberate. It does not really change anything. After 46 unnecessary *of*-possessives together with so many other types of legalisms, a lay reader would not have gotten this far anyway.

With some other rewriting, you might still be awake:

A person commits drug-induced homicide by delivering a controlled substance to another person to violate the Illinois Controlled Substances Act, § 401, or the Methamphetamine Control and Community Protection Act, § 55, followed by a person's death caused by exposure to any amount of that controlled substance.

Two things make this rewrite understandable. One is converting the possessives. The other is reducing the number of concepts. Four concepts in the enacted statute (“by the injection, inhalation, absorption, or ingestion of”) were replaced in the rewrite above by one concept (“by exposure to”).

Law is filled with terms of art from Latin and Norman Law French that mystified lay people centuries ago and still mystify them today. Some Latin examples are *amicus curiae*, *corpus delicti*, *de minimis*, *et al.*, *ex parte*, *in forma pauperis*, *in personam*, *in re*, *in rem*, *malum in se*, *mandamus*, *mens rea*, *quantum meruit*, *res gestae*, *res ipsa loquitur*, and *respondeat superior*. These all have English equivalents, but lawyers use the Latin anyway. Some common French

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<sup>174</sup> 720 ILL. COMP. STAT. 5/9-3.3(a) (2014); *see also infra* Appendix C.

examples are *battery, cause of action, covenant, decedent, devise, easement, lien, promissory note, and tort.*

Swedish law is entirely in Swedish. French law is entirely in French. Only in English does linguistically foreign terminology mystify and alienate people from their own law. “Though English is the official language” in the United States, wrote David Mellinkoff, “the language of the law is not officially English.”<sup>175</sup>

### *B. More History: Attempts at Subduing Judges*

Rather than establishing national law through codes, William’s descendants did it by appointing judges to a national court and letting them figure out what national law should be. Enacted law came much later, and until the 20th century it was a stepchild. The processes and skill sets needed to write true codes like the *Code civil* never developed. And common law courts historically viewed legislatures as excitable amateurs apt to enact foolishness.<sup>176</sup>

Legislatures in common law countries have had to use fussy, over-conceptualized statute-drafting to subdue courts. Until legislatures expressly forbade it, common law courts had a policy of narrowly construing statutes in derogation of the common law. Although judges no longer treat legislators as stepchildren, courts still behave sometimes like post-enactment shadow legislatures, construing statutes to mean what the judges would have voted for if they had been in the legislature themselves. This is not typical judicial behavior, but there is a history to it, and it still happens often enough that legislatures feel they need to control judges by fussing.

An example is the Supreme Court’s sabotage of a statute enacted to prevent discrimination against the disabled. The 1990 Americans with Disabilities Act<sup>177</sup> (“ADA”) contains this definition:

- The term “disability” means, with respect to an individual—
- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
  - (B) a record of such an impairment; or
  - (C) being regarded as having such an impairment.<sup>178</sup>

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<sup>175</sup> MELLINKOFF, *supra* note 165, at 10.

<sup>176</sup> For example, according to Frederick Pollack, 19th century English lawyers tended to believe that “Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds.” Hein Kötz, *Taking Civil Codes Less Seriously*, 50 MOD. L. REV. 1, 10 (1987) (quoting FREDERICK POLLACK, *ESSAYS ON JURISPRUDENCE AND ETHICS* 85 (1882)).

<sup>177</sup> 42 U.S.C. §§ 12101 et seq. (2012).

<sup>178</sup> 42 U.S.C. § 12102(1) (2012).

The word *or* at the end of (B) makes this a three-alternative test. A person is disabled if (A) *or* (B) *or* (C) is satisfied. Any one of them is enough. Nevertheless, in three cases, the Supreme Court held that a person is not disabled under the Act if medical treatment or other measures make it possible for that person to live as nondisabled people do<sup>179</sup>—as though (A) must be satisfied in virtually every ADA claim.

Employment discrimination against the disabled has two ingredients: first, a disabled person is qualified to do the job, sometimes because medical treatment or other measures mitigate the disability, and, second, the employer makes an adverse decision based on the disability even if it is mitigated. For example, an epileptic who is seizure-free due to medication is qualified to drive a truck, but an employer fires her because the employer dislikes epileptics. Under the Supreme Court's *Catch-22* logic, if the epilepsy is not mitigated, the epileptic is not qualified for the job and therefore is not being discriminated against when fired. If the epilepsy *is* mitigated, the epileptic is not disabled under the Act and therefore is not being discriminated against in violation of the statute.<sup>180</sup>

By standing an anti-discrimination statute on its head—and pretending that Congress had not enacted (B) and (C)—the Court's ruling precluded, in this common situation and others, the remedy the statute had been enacted to provide. The Court did so even though committee reports in both the Senate and the House specifically stated that (B) and (C) were in the statute to reach situations like the epileptic's and other people whose disabilities had been mitigated.<sup>181</sup>

To rebuild what the Court had demolished, Congress had no choice but to fuss by enacting the ADA Amendments Act of 2008.<sup>182</sup>

A different method was used in France to subdue courts. Before the French Revolution, courts could legally make law, and the law they made

<sup>179</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *superseded by statute*, Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), Pub. L. 110-325, 122 Stat. 3553 (2008); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), *superseded by statute*, ADAAA, Pub. L. 110-325, 122 Stat. 3553 (2008); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), *superseded by statute*, ADAAA, Pub. L. 110-325, 122 Stat. 3553 (2008).

<sup>180</sup> From the novel *Catch-22*:

Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. . . . If he flew them[,] he was crazy and didn't have to; but if he didn't want to, he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of *Catch-22* and let out a respectful whistle.

"That's some catch, that *Catch-22*," he observed.

"It's the best there is," Doc Daneeka agreed.

JOSEPH HELLER, *CATCH-22*, at 52 (S&S Classic ed. 1999).

<sup>181</sup> *Sutton*, 527 U.S. at 499–501 (Stevens, J., dissenting) (citing H.R. REP. NO. 101-485, pt. 1, at 28 (1990); S. REP. NO. 101-116, at 22–24 (1989)).

<sup>182</sup> ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

avored wealth and nobility. Napoleon Bonaparte commissioned codes in part to reduce courts into subservience. Codification obliterated, at least formally, all the law judges had made. Article 4 threatened judges with criminal prosecution if they declined to adjudicate on a pretext of a code's "silence, obscurity, or insufficiency."<sup>183</sup> From then on they obeyed and applied the codes, which, through broadly general wording, destroyed almost all preceding law.

Karl Llewellyn was the guiding influence and principal drafter for Articles 1 and 2 of the Uniform Commercial Code.<sup>184</sup> In a speech to the Tennessee bar, he said,

You all have a hangover from law school; you feel that the proper way to draw a statute is to mark it out as if it was written for dumbbell judges whom you are trying to corral . . . .

The way to write good law is to indicate what you want to do, and you assume within reason that the persons the law deals with will try to be decent; then after that, you lay down the edges to take care of the dirty guys and try to hold them in.<sup>185</sup>

Llewellyn believed that most people, including judges, will do the right thing if they are given enough information about the difference between right and wrong. For most people, legislation succeeds by *informing*—by setting out benchmarks in language everyone can understand. At "the edges," effective legislation adds some consequences for the few "dirty guys." But most of a statute's effectiveness is its appeal to the better parts of human nature.

This is the way European code drafters go about making law. Llewellyn studied law in Germany and taught there,<sup>186</sup> which is often dismissed as an odd diversion in his youth. But it was much more than that. The experience influenced him for the rest of his life. And as Part V(D) explains, it led to the drafting methods for Articles 1 and 2, which are unique in American law.

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<sup>183</sup> See Crabb, *supra* note 7. "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." C. CIV. art. 4 (Fr.).

<sup>184</sup> See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV L. REV. 465 (1987).

<sup>185</sup> Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 782 (1953).

<sup>186</sup> See Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705 (1992); Herman, *supra* note 28; James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).



### C. *The Field Codes*

Inspired by the *Code civil*, the idea of a comprehensive code intrigued many Americans in the mid-19th century.<sup>187</sup> David Dudley Field wrote five codes.<sup>188</sup> His civil procedure code merged law and equity and simplified pleading (hence, “code pleading”)<sup>189</sup> and started a trend that ended in 1938 with adoption of the Federal Rules of Civil Procedure.<sup>190</sup> Thirty states adopted Field’s civil procedure code or codes based on his code.<sup>191</sup> Eighteen adopted his penal code.<sup>192</sup> Four<sup>193</sup> adopted all his codes: civil, civil procedure, penal, criminal procedure, and political.<sup>194</sup> These are not true codes in the European sense, for reasons explained earlier in this Article.<sup>195</sup> But they are extraordinary intellectual achievements.

Field wrote a fair portion of his codes in a declaratory style similar to the *Code civil* and free of mystifying terminology. For example, from the California version of Field’s civil code, still law today:<sup>196</sup>

§ 22. *Law defined*

Law is a solemn expression of the will of the supreme power of the State.<sup>197</sup>

Field was influenced by the Louisiana version of the *Code civil*.<sup>198</sup> In *Code civil*-influenced codes, torts and contracts are not separate bodies of law.

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<sup>187</sup> Roscoe Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 3, 9 (1949).

<sup>188</sup> Field did not work in complete isolation. Other people participated at times on various commissions. *Id.* at 9; Charles E. Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS, *supra* note 187, at 55, 56; Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS, *supra* note 187, at 17, 33, 39; Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 361 (1999).

<sup>189</sup> Clark, *supra* note 188, at 55; Reppy, *supra* note 188, at 34.

<sup>190</sup> Clark, *supra* note 188, at 55; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 931–40 (1987).

<sup>191</sup> Clark, *supra* note 188, at 55.

<sup>192</sup> LUNDMARK, *supra* note 25, at 308.

<sup>193</sup> *Id.* at 308–09 (referencing California, Montana, North Dakota, and South Dakota).

<sup>194</sup> *Id.*

<sup>195</sup> See *supra* text accompanying notes 25–27.

<sup>196</sup> It has been amended to address modern issues, though not more extensively than the *Code civil*. For example: “Notwithstanding any other provision of law, a mother may breastfeed her child in any location, public or private, except the private home or residence of another, where the mother and child are otherwise authorized to be present.” CAL. CIV. CODE § 43.3 (West 2016) (adopted 1997).

<sup>197</sup> *Id.* § 22.

<sup>198</sup> See Batiza, *supra* note 42, at 804; see also *supra* text accompanying notes 42–43.

They are both part of the law of obligations, and the only difference between them is how the obligation is created: by agreement (contracts) or by operation of law (torts). Contracts and torts are not taught separately in law schools in civil code countries. They are taught together in a course usually called Obligations.<sup>199</sup> Field drafted his civil code that way, providing general rules, such as conditions, that govern all obligations,<sup>200</sup> followed by rules unique to obligations created by agreement<sup>201</sup> and those unique to obligations created by operation of law<sup>202</sup> and those created by particular transactions.<sup>203</sup> From Field's California Civil Code, still law today:

*§ 1434. Conditional obligation defined*

An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.<sup>204</sup>

(Although Field drafted this way, California case law on contracts is entirely separate from the case law on torts.)

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<sup>199</sup> Louisiana is a mixed jurisdiction in which common law and civil code law co-exist. At the Louisiana State University Law Center, first-year students take common law Contracts and Torts in the fall and a civil law course called Obligations in the spring. 2013-2014 LSU LAW CATALOG 29 (Paul. M. Herbert Law Center, La. St. Univ. ed., 2013). In the first-year fall semester, they also take a required course in Legal Traditions and Systems. Here is the catalog course description:

This course will examine the impacts of the Roman civil law and the Anglo-American common law, the two great legal cultures of the Western world, on the Louisiana legal system. The course will first describe the distinctive methodologies of the civil law and the common law and the historical contents in which those methodologies emerged. It will then explore how these two cultures have influenced Louisiana law. In particular, the latter portion of the course will focus on the significance of merging a private law governed by a civil code with public law and judicial institutions with Anglo-American roots as well as the scope of content of Louisiana's Civil Code. To the extent time permits, the course will also make appropriate comparisons with other jurisdictions (e.g., Quebec and Puerto Rico) that have combined private law governed by the civilian tradition and a public law with roots in the Anglo tradition.

*Id.* at 29, 38–39.

<sup>200</sup> *See, e.g.*, CAL. CIV. CODE §§ 1427–3272.9 (1872).

<sup>201</sup> *See, e.g., id.* §§ 1549–1701.

<sup>202</sup> *See, e.g., id.* §§ 1708–1725.

<sup>203</sup> *See, e.g., id.* §§ 1738–3273.

<sup>204</sup> An uncertain event is one that might not happen. An obligation could be conditioned on whether it rains next March 15. But it cannot be conditioned on sunrise that day. Sunrise can only schedule the obligation (begin it or end it) unconditionally. CAL. CIV. CODE § 1434 (West 2016).

*D. The Uniform Commercial Code, Articles 1 and 2*

Karl Llewellyn left his stamp especially on Articles 1 and 2. He believed that commercial statutes should be free of unnecessary technicality so that the rules would seem intuitive to ordinary business people.<sup>205</sup> He got this insight as a young part-time academic in the early 1920s when he tried to educate bank clerks on the law governing their work and, in so doing, experienced their frustration.<sup>206</sup> When later he took a leadership role in development of the UCC, Llewellyn devoted much effort to see that

[a]s far as possible the draftsmen treated businessmen, as well as lawyers and judges, as the principal addressees of the Code. An attempt was made to use concepts familiar to businessmen; technical legal terms and complex clauses were avoided where possible. . . . Where appropriate, too, sections dealing with transactions were organized with the needs of lay participants in mind. For example, § 2-502(2) presents the seller's duties in the form of a catalogue of acts which the seller must perform, unless otherwise agreed, and this can be read as a set of instructions addressed directly to sellers.<sup>207</sup>

Llewellyn also wanted the UCC drafted for every lawyer, not just specialists. In a speech to the Ohio State Bar Association, he said, "We are not trying to draw it for the experts themselves; we are trying to draw it for the unilluminated, ordinary guy of the bar [so] he can read our statute while he has trouble with the other," meaning its predecessor, the Uniform Sales Act.<sup>208</sup>

The UCC includes extensive drafters' notes explaining what the words of each section are meant to accomplish. When a state legislature enacts the UCC, it unavoidably adopts the drafters' notes—just as a European legislature enacts a statute with the meaning explained by the statute's *travaux préparatoires*.

Some parts of Articles 1 and 2 are admirable compressions of thought and expression. Compare the UCC with the *Code civil*<sup>209</sup> on the parties' duties in goods sales.

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<sup>205</sup> WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 304 (1973).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 304–05.

<sup>208</sup> *Id.* at 305, 335–36.

<sup>209</sup> Both the UCC and the *Code civil* have provisions concerning the buyer's acceptance or rejection of delivered goods. One of the *Code civil* provisions, article 1587, reflects not legislative culture but instead national culture: "With regard to wine, oil and other things which it is customary to taste before making purchase thereof, there is no sale so long as the buyer has not tasted and accepted them." Crabb, *supra* note 7, at 307; *see also* C. CIV. art. 1587 (Fr.).

*UCC*

2-301. The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.<sup>210</sup>

*Code civil*

Art. 1603. [The seller] has two principal obligations, that of delivering and that of guaranteeing<sup>211</sup> that which he sells.

Art. 1650. The principal obligation of the buyer is to pay the price on the day and at the place regulated by the sale.

## Advantage Llewellyn.

Actually, it is not clear whether Llewellyn drafted these words or only influenced them. In the long and convoluted story of how Article 2 came to be, with so many ladles in the pot over years, we know only a little about who contributed which words.<sup>212</sup> But the difference between Article 2 and other American legislation—even other UCC articles—is striking to anyone familiar with European code drafting.

Here is another example:

§ 2-202. *Final Written Expression: Parol or Extrinsic Evidence.*

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.<sup>213</sup>

<sup>210</sup> U.C.C. § 2-301 (AM. LAW INST. & UNIF. LAW COMM'N 2012).

<sup>211</sup> “The guaranty which the seller owes to the buyer has two objectives: the first is peaceful possession of the thing sold; the second, hidden defects of such thing or vices of an annulling character.” C. CIV. art. 1625 (Fr.).

<sup>212</sup> Soia Mentschikoff, *Reflections of a Drafter*, 43 OHIO ST. L.J. 537, 539 (1982). For section 2-207, the one where the drafting has been most controversial, we know something but not as much as we would like to. John D. Wladis, *UCC Section 2-207: The Drafting History*, 49 BUS. LAW. 1029 (1994).

<sup>213</sup> U.C.C. § 2-202 (AM. LAW INST. & UNIF. LAW COMM'N 2001).

Packed into this one sentence are four rules that replace in goods sales everything in the common law of parole evidence and extrinsic evidence.

1. Two things “may not be contradicted by evidence of any prior agreement” (whether oral or written) “or of a contemporaneous oral agreement.” One is terms “set forth in a writing intended by the parties as a final expression of their agreement.” The other is terms on which “the confirmatory memoranda of the parties agree” (for situations where their agreement is expressed in more than one writing).

2. A final expression of the parties’ agreement or their confirmatory memoranda “may be . . . supplemented . . . by evidence of consistent additional terms” (evidence that the parties agreed on additional terms) unless the parties intended a writing to be “the complete and exclusive statement” of their agreement.

3. A final expression of the parties’ agreement or their confirmatory memoranda “may be . . . supplemented” (new terms added) by evidence showing course of dealing, usage of trade, or course of performance.

4. A final expression of the parties’ agreement or their confirmatory memoranda “may be explained” by extrinsic evidence showing course of dealing, usage of trade, or course of performance.

#### *E. There-Oughta-Be-a-Law Muddling*

American law making can seem irrational and chaotic. Because American legislation does not originate outside the legislature, there are no preparatory materials. There is only legislative history, which can be subject to manipulation and gives courts little guidance. Those who do the drafting—legislative staff in Congress and the state legislatures—are skilled and conscientious professionals who do the best they can. They have produced a number of thoughtful manuals on statute drafting.<sup>214</sup> But they work in a system that makes well-crafted legislation unlikely.

American legislatures constantly tinker with statutes, adding and subtracting whenever legislators become aroused by something that grabs their attention. New York General Obligations Law section 9-103(a) is an example (additions by amendment are italicized and underlined):

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<sup>214</sup> See U.S. HOUSE OF REPRESENTATIVES, OFF. OF THE LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE (1995), [http://legcounsel.house.gov/HOLC/Drafting\\_Legislation/draftstyle.pdf](http://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf); LAWRENCE E. FILSON & SANDRA L. STROKOFF, THE LEGISLATIVE DRAFTER’S DESK REFERENCE (2d ed. 2008); UNIFORM LAW COMM’N, DRAFTING RULES (2012), [http://www.uniformlaws.org/Shared/Publications/DraftingRules\\_2012.pdf](http://www.uniformlaws.org/Shared/Publications/DraftingRules_2012.pdf); see also REED DICKERSON, LEGISLATIVE DRAFTING (1977); ROBERT E. KEETON, GUIDELINES FOR DRAFTING, EDITING, AND INTERPRETING (2002); ARTHUR J. RYNEARSON, LEGISLATIVE DRAFTING STEP-BY-STEP (2013); JACK STARK, THE ART OF THE STATUTE (1996).

1963 — *as enacted*

An owner, lessee or occupant of premises . . . owes no duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, or training of dogs.

as of 1972  
— *amended five  
times in nine years*

An owner, lessee or occupant of premises . . . owes no duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, hiking, horseback riding, bicycle riding, motorized vehicle operation for recreational purposes, snowmobile operation, or training of dogs.

as of 2014  
— *amended 13  
times in 51 years*

An owner, lessee or occupant of premises . . . owes no duty to keep the premises safe for entry or use by others for hunting, fishing, organized gleaning as defined in section seventy-one-y of the agriculture and markets law,<sup>215</sup> canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs.<sup>216</sup>

It keeps growing and growing—and in the future will keep growing—because of *there-oughta-be-a-law* legislating. Whenever a few legislators become concerned about something, perhaps to satisfy constituent complaints or interest-group lobbying, they get a bill written and sent to a committee, which then might send it back to be tossed into a hopper for a floor vote. This is amateurish, immediate-gratification legislating rather than making law for the ages.

The problem, again, is not verbosity—too many words. It is lack of clarity—too many concepts. If the legislature had enacted the following in 1963, it would have gotten the section right the first time and need not have amended it at all, not even once, during the half-century afterward. The words would have been sturdy and enduring.

A premises owner, lessee, or occupant owes no duty to keep  
the premises safe for entry or use by others for recreation, the

<sup>215</sup> N.Y. AGRIC. & MKTS. LAW § 71-y (Consol. 2014) (“‘Organized gleaning’ means the harvest of an agricultural crop that has been donated by an owner, lessee, or occupant of premises or occupant of a farm by persons who are sponsored by a charitable not-for-profit organization.”).

<sup>216</sup> N.Y. GEN. OBLIG. LAW § 9-103(a) (Consol. 2014).

taking of wildlife, charitable agricultural work, or non-commercial wood cutting or gathering.

Could anyone doubt that “the taking of wildlife” includes hunting, fishing, and trapping? Or that “recreation” includes canoeing, boating, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, dog training, bicycle riding, hang gliding, “motorized vehicle operation for recreational purposes,” and snowmobiling? French or Swedish law-makers would not have rushed a statute to satisfy constituent complaints. They would have examined the problem as a whole, foreseen the issues that later occurred, and chosen durable wording.

In tax law, Congress can outdo any state legislature. From 2000 through 2012—a mere 13 years—Congress made *4,680 changes* to the Internal Revenue Code.<sup>217</sup>

#### VI. AN EXAMPLE OF ROLE REVERSAL: ANTITRUST

Here is a comparison of the U.S. Sherman Antitrust Act and the corresponding provisions in the Treaty on the Functioning of the European Union (TFEU). Omitted are legislative findings and statements of purpose; provisions allocating liability for damages or other relief; and enforcement and procedural provisions, such as those authorizing lawsuits and prosecutions, assigning venue, and setting burdens of proof. Reproduced below are *only* the prohibitions, exceptions to prohibitions, and relevant definitions.

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<sup>217</sup> Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725, 773 (2015).

*Sherman Antitrust Act*

## 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

## 15 U.S.C. § 6a

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section. If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

## 15 U.S.C. § 7

The word “person”, or “persons”, wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the

*Treaty on the Functioning of the European Union*

## Art. 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

– any agreement or category of agreements between undertakings,

– any decision or category of decisions by associations of undertakings,

– any concerted practice or



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laws of any State, or the laws of any foreign country.

category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Art. 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

TFEU articles 101 and 102 are fussier—more conceptualized—than 15 U.S.C. § 1, 6a, and 7. But on both sides, the provisions quoted above are just the beginning.

*The U.S. statute:* Because there are no preparatory materials—nothing like the French *travaux préparatoires* or the Swedish SOU process—members of Congress had no idea what the statute meant when they enacted it. When pressed to explain during floor debate what a combination in restraint of trade would be, Senator Sherman admitted that he did not know. “All that we as lawmakers can do is to declare general principles.”<sup>218</sup> That was in 1890. Since then, a vast case law has grown up interpreting 15 U.S.C. § 1. The squibs alone fill 596 pages in the hardbound West annotated U.S. Code and its 2014 paperbound pocket part.<sup>219</sup> In a system without real preparatory materials, law-making continues in the courts after enactment because courts have not been told what the statute means. In this instance, even the senator who sponsored it, and for whom it is named, did not know what it meant.

Congress subsequently added detail in the 1914 Clayton Antitrust Act and later statutes, which regulated specific types of combinations in restraint of trade and created exceptions such as the ones for labor unions,<sup>220</sup> baseball,<sup>221</sup> and post-graduate medical residencies.<sup>222</sup> Those later statutes total 4,983 words, not counting recitals and remedies and enforcement provisions.<sup>223</sup> Unlike the Sherman Act, they are verbose and fussy.

*The European Union treaty and regulations:* The European Commission out-fusses Congress by many miles. TFEU article 101(3) authorizes exemptions to the article 101(1) prohibitions. The Treaty is the equivalent of the European Union’s constitution. European Union regulations perform a role similar to statutes. The two regulations discussed below total 5,380 words, but the complexity is not in the number of words. It is in the number of concepts and their byzantine relationship to each other.

EU Regulation 330/2010 creates an exemption to the TFEU article 101(1) prohibitions for:

vertical agreements entered into between an association of undertakings and its members, or between such an association

<sup>218</sup> 21 CONG. REC. 2460 (1890), [http://www.appliedantitrust.com/02\\_early\\_foundations/3\\_sherman\\_act/cong\\_rec/21\\_cong\\_rec\\_2455\\_2474.pdf](http://www.appliedantitrust.com/02_early_foundations/3_sherman_act/cong_rec/21_cong_rec_2455_2474.pdf); see RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS* 202 (2008 ed.).

<sup>219</sup> 15 U.S.C.A. §§ 1–2 (West 2009 & Supp. 2014).

<sup>220</sup> Walter L. Daykin, *The Status of Unions Under Our Antitrust Laws*, 11 LAB. L.J. 216, 217 (1960).

<sup>221</sup> 15 U.S.C. § 26b (1998).

<sup>222</sup> *Id.* § 37b.

<sup>223</sup> *Id.* §§ 12, 13, 13a, 13b, 14, 17, 18, 19, 26a, 26b, 37, 37a, 37b, 38.

and its suppliers [but] only if all its members are retailers of goods and if no individual member of the association, together with its connected undertakings, has a total annual turnover exceeding EUR 50 million,<sup>224</sup>

and that exemption applies if

the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.<sup>225</sup>

The regulation also creates *exceptions to this exemption*.

And it creates *exceptions to the exceptions to the exemption*. For example, the regulation's article 4(a) creates an *exception to the exemption* for "vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object . . . the restriction of the buyer's ability to determine its sale price," and it creates an *exception to the exception to the exemption* for agreements that "do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties."<sup>226</sup>

Article 4(b) creates *four separate exceptions to an exception to the exemption* from the TFEU article 101(1) prohibitions.<sup>227</sup>

A different EU Regulation—772/2004—provides a separate exemption to the TFEU article 101(1) prohibitions for technology transfer agreements as well as *exceptions to that exemption and exceptions to those exceptions*.<sup>228</sup>

This is over-conceptualization on steroids. It is typical of EU drafting. It conflicts with most member states' historic legislative cultures. And it seems to grow out of distrust. EU legislation is enforced by the 28 member states' domestic courts, which, the drafters seem to believe, will render inconsistent decisions unless told exactly, in excruciating detail, what to do. But over-conceptualization, once started, becomes uncontrollable, just as in the United States. If EU Regulations 330/2010 and 772/2004 had been placed before Portalis, Tronchet, de Prémeneu, and de Maleville at their table at

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<sup>224</sup> Commission Regulation (EU) No. 330/2010, art. 2, 2010 O.J. (L102) 4.

<sup>225</sup> *Id.* at art. 3

<sup>226</sup> *Id.* at art. 4(a).

<sup>227</sup> *Id.* at art. 4(b).

<sup>228</sup> Commission Regulation (EU) No. 772/2004, 2004 O.J. (L123) 11. This Regulation was promulgated under Article 81 of the Treaty establishing the European Community (TEC), which was identical to current TFEU Article 101. Regulations authorized by TEC provisions that have been carried over into the TFEU are enforced as TFEU Regulations. Essentially TEC Article 81 was simply renumbered TFEU Article 101.

Fontainebleau, they probably would have asked whether it is truly necessary to have exceptions to exceptions to exemptions. They would have pointed out that true legislative genius is finding the simplest way to solve a problem.

## VII. CONCLUSION

American trial judges complain about excessively conceptualized statutes. Unnecessary complexity imposes costs on them with few rewards. Appellate judges are in a better position to complain in published opinions. But they complain little, and legislators rarely read appellate opinions anyway. Lawyers have no reason to object. Clients pay them to unravel legislative mysteries. And inside over-conceptualized statutes lurk arguments and loopholes to be found and used in creative lawyering.

Voters are hurt because increased compliance costs are incorporated into taxes and consumer prices, with ripple effects through the economy. Legislation's culture, however, is too nuanced to become an election issue.

Legislators elected on end-big-government platforms change nothing. Instead, through any legislation they vote for on any subject, they perpetuate what they themselves are complaining about. They do not realize that the problem is not *big* government. In a big, modern country, big government is unavoidable. The problem is *unnecessarily complicated* government.

Perhaps American legislators should impose on themselves a standard, sometimes heard in the sciences, that only after a researcher has been able to explain something to a grandmother does the researcher really understand it. This is not a sexist thought. Because women have longer life expectancies, a researcher is more likely to have a living grandmother than a living grandfather. Whenever a bill is put before legislators, perhaps a small note should be attached to every copy:

Please remember, as Portalis said, that the great art is to simplify everything. Unless I can read and understand everything in this bill, don't vote for it.

*[signed]* Your Grandmother<sup>229</sup>

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<sup>229</sup> Supreme Court Justice Hugo Black believed that his opinions should be written so clearly that "your momma" could understand them. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 325 (1994). Warren Buffett said, "When writing Berkshire Hathaway's annual report, I pretend that I'm talking to my sisters. I have no trouble picturing them: Though highly intelligent, they are not experts in accounting or finance." Warren E. Buffett, *Preface*, U.S. SECURITIES AND EXCHANGE COMMISSION, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS 2 (1998).

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The only solution to these problems is to change the way we and our legislators think. The fault, as Cassius points out to Brutus, is not in our stars. It is in ourselves.<sup>230</sup>

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<sup>230</sup> WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 1, sc. 2 (1599).

## APPENDIX A

**France: *Code pénal* on Homicide<sup>231</sup>  
(1999)**

**Art. 221-1.** The willful killing of another is murder. It is punishable by thirty years of felony imprisonment.

**Art. 221-2.** A murder which precedes, accompanies, or follows another felony is punishable by felony imprisonment for life.

A murder which has for its purpose either to prepare or to facilitate a misdemeanor, or to promote the escape or assure the immunity of the perpetrator or an accessory thereto, is punishable by felony imprisonment for life.

The first two paragraphs of Article 132-23 relating to the security period are applicable to the offenses specified in this Article.

**Art. 221-3.** Murder committed with premeditation is an assassination. It is punishable by felony imprisonment for life.

The first two paragraphs of Article 132-23 relating to the security period are applicable to the offense specified in this Article. However, when the victim is a minor less than fifteen years of age and the assassination is preceded by rape, torture, or barbarous acts, the assize court may, by a special decision, either raise the security period to no more than thirty years or, if it imposes felony imprisonment for life, decide that none of the measures enumerated in Article 132-23 will be granted to the convicted person; in case of commutation of the penalty, and except if the decree of reprieve otherwise provides, the security period is equal to the period of penalty resulting from the measure of reprieve.

**Art. 221-4.** Murder is punishable by felony imprisonment for life when it is committed:

1. On a minor less than fifteen years of age;
2. On an ascendant, either legitimate or natural, or on a father or mother by adoption;
3. On a person whose special vulnerability, due to age, sickness, infirmity, physical or mental deficiency, or pregnancy, is apparent or known to the perpetrator;
4. When the status of the victim is apparent or known to the perpetrator, on a magistrate, juror, lawyer, public or ministerial officer, officer of the gendarmerie, agent of the national police force, customs official, prison administration official, or any other person exercising governmental authority or entrusted with a mission in the public service, in the performance or on the occasion of performing his or her duties or mission;

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<sup>231</sup> See *supra* note 8 for reasons for exclusion of provisions on abortion and on criminal procedure. See *supra* note 7 regarding the translation.

5. On a witness, victim, or civil party, either to prevent him or her from exposing conduct, instituting a legal action, or presenting evidence, or because of his or her disclosures, legal action, or evidence.

The first two paragraphs of Article 132-23 relating to the security period are applicable to the offense specified in this Article. However, when the victim is a minor less than fifteen years of age and the assassination is preceded by rape, torture, or barbarous acts, the assize court may, by a special decision, either raise the security period to no more than thirty years or, if it imposes felony imprisonment for life, decide that none of the measures enumerated in Article 132-23 will be granted to the convicted person; in case of commutation of the penalty, and except if the decree of reprieve otherwise provides, the security period is equal to the period of penalty resulting from the measure of reprieve.

**Art. 221-6.**

Causing the death of another by carelessness, imprudence, inattention, negligence, or the non-observance of an obligation of safety or prudence imposed by law or regulation, is an unintentional homicide punishable by three years of misdemeanor imprisonment and a fine of 300,000 francs.

In the case of deliberate non-observance of an obligation of safety or of prudence imposed by law or regulation, the penalties incurred are raised to five years of misdemeanor imprisonment and to a fine of 500,000 francs.

## APPENDIX B

**Sweden: *Brottsbalken* on Homicide<sup>232</sup>  
(2014)**

**3:1** One who deprives another of life is to be sentenced for murder to imprisonment for a fixed term, of at least ten and at most eighteen years, or, if the circumstances are aggravated, for life.

**3:2** If the crime referred to in section 3:1 is considered to be less grave, in view of the circumstances that led to the act or for other reasons, imprisonment for manslaughter is to be imposed for at least six and at most ten years.

**3:3** A woman who kills her child at birth or at another time when, because of the birth, she is in a distraught mental condition or deep distress, is to be sentenced for infanticide to imprisonment for at most six years.

**3:7** One who through carelessness causes another's death is to be sentenced for negligent homicide to imprisonment for at most two years or, if the crime is minor, to a fine.

If the crime is grave, the sentence is to be imprisonment for at least one and at most six years. In determining whether the crime is grave, special consideration is to be given to

1. whether the act included intentionally taking a serious risk or
2. whether the perpetrator, in a situation requiring special vigilance or skill, was intoxicated by alcohol or another substance or otherwise made himself responsible for negligence of a grievous nature.

**3:10** If a crime referred to in sections 3:7–3:9 has been committed by intentionally or carelessly breaching a duty to prevent illness or accidents under the Workplace Environment Act, the perpetrator is to be sentenced for a workplace environment crime to punishment as provided under the above-mentioned law.

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<sup>232</sup> See *supra* note 8 for reasons for exclusion of provisions on abortion and on criminal procedure. See *supra* note 7 regarding the translation.



## APPENDIX C

**Illinois Compiled Statutes on Homicide<sup>233</sup>  
720 ILCS 5/9-1 to 5/9-3 (2014)****Sec. 9-1. First degree Murder — Death penalties — Exceptions False**

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) he is attempting or committing a forcible felony other than second degree murder.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if:

(1) the murdered individual was a peace officer or fireman killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or

(2) the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, or the murdered individual was an inmate at such institution or facility and was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

(3) the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another; or

(4) the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

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<sup>233</sup> See *supra* note 8 for reasons for exclusion of provisions on abortion and on criminal procedure.

(5) the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

(6) the murdered individual was killed in the course of another felony if:

(a) the murdered individual:

(i) was actually killed by the defendant, or

(ii) received physical injuries personally inflicted by the defendant substantially contemporaneously with physical injuries caused by one or more persons for whose conduct the defendant is legally accountable under Section 5-2 of this Code, and the physical injuries inflicted by either the defendant or the other person or persons for whose conduct he is legally accountable caused the death of the murdered individual; and

(b) in performing the acts which caused the death of the murdered individual or which resulted in physical injuries personally inflicted by the defendant on the murdered individual under the circumstances of subdivision (ii) of subparagraph (a) of paragraph (6) of subsection (b) of this Section, the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was an inherently violent crime or the attempt to commit an inherently violent crime. In this subparagraph (c), “inherently violent crime” includes, but is not limited to, armed robbery, robbery, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnapping, aggravated vehicular hijacking, aggravated arson, aggravated stalking, residential burglary, and home invasion; or

(7) the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

(8) the defendant committed the murder with intent to prevent the murdered individual from testifying or participating in any criminal investigation or prosecution or giving material assistance to the State in any investigation or prosecution, either against the defendant or another; or the defendant committed the murder because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against the defendant or another; for purposes of this paragraph (8), “participating in any criminal investigation or prosecution” is intended to include those appearing in the proceedings in any capacity such as trial judges, prosecutors, defense attorneys, investigators, witnesses, or jurors; or

(9) the defendant, while committing an offense punishable under Sections 401, 401.1, 401.2, 405, 405.2, 407 or 407.1 or subsection (b) of Section 404 of the Illinois Controlled Substances Act, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or

counseled, commanded, induced, procured or caused the intentional killing of the murdered individual; or

(10) the defendant was incarcerated in an institution or facility of the Department of Corrections at the time of the murder, and while committing an offense punishable as a felony under Illinois law, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual; or

(11) the murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom; or

(12) the murdered individual was an emergency medical technician-ambulance, emergency medical technician-intermediate, emergency medical technician-paramedic, ambulance driver, or other medical assistance or first aid personnel, employed by a municipality or other governmental unit, killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, and the defendant knew or should have known that the murdered individual was an emergency medical technician-ambulance, emergency medical technician-intermediate, emergency medical technician-paramedic, ambulance driver, or other medical assistance or first aid personnel; or

(13) the defendant was a principal administrator, organizer, or leader of a calculated criminal drug conspiracy consisting of a hierarchical position of authority superior to that of all other members of the conspiracy, and the defendant counseled, commanded, induced, procured, or caused the intentional killing of the murdered person; or

(14) the murder was intentional and involved the infliction of torture. For the purpose of this Section torture means the infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering or agony of the victim; or

(15) the murder was committed as a result of the intentional discharge of a firearm by the defendant from a motor vehicle and the victim was not present within the motor vehicle; or

(16) the murdered individual was 60 years of age or older and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

(17) the murdered individual was a disabled person and the defendant knew or should have known that the murdered individual was disabled. For purposes of this paragraph (17), "disabled person" means a person who suffers from a permanent physical or mental impairment resulting from disease, an injury, a functional disorder, or a congenital condition that renders the person incapable of adequately providing for his or her own health or personal care; or

(18) the murder was committed by reason of any person's activity as a community policing volunteer or to prevent any person from engaging in activity as a community policing volunteer; or

(19) the murdered individual was subject to an order of protection and the murder was committed by a person against whom the same order of protection was issued under the Illinois Domestic Violence Act of 1986; or

(20) the murdered individual was known by the defendant to be a teacher or other person employed in any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes; or

(21) the murder was committed by the defendant in connection with or as a result of the offense of terrorism as defined in Section 29D-14.9 of this Code.

(b-5) Aggravating Factor; Natural Life Imprisonment. A defendant who has been found guilty of first degree murder and who at the time of the commission of the offense had attained the age of 18 years or more may be sentenced to natural life imprisonment if (i) the murdered individual was a physician, physician assistant, psychologist, nurse, or advanced practice nurse, (ii) the defendant knew or should have known that the murdered individual was a physician, physician assistant, psychologist, nurse, or advanced practice nurse, and (iii) the murdered individual was killed in the course of acting in his or her capacity as a physician, physician assistant, psychologist, nurse, or advanced practice nurse, or to prevent him or her from acting in that capacity, or in retaliation for his or her acting in that capacity.

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

(3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

(4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

(5) the defendant was not personally present during commission of the act or acts causing death;

(6) the defendant's background includes a history of extreme emotional or physical abuse;

(7) the defendant suffers from a reduced mental capacity.

*[(d) through (k) are omitted here because they're procedural]*

**Sec. 9-2. Second degree murder.**

(a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder as defined in paragraph (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:

(1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed; or

(2) at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his or her belief is unreasonable.

(b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(c) When evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. The burden of proof, however, remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code.

(d) Sentence. Second degree murder is a Class 1 felony.

**Sec. 9-3. Involuntary Manslaughter and Reckless Homicide.**

(a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle or operating a snowmobile, all-terrain vehicle, or watercraft, in which case the person commits reckless homicide. A person commits reckless homicide if he or she unintentionally kills an individual while driving a vehicle and using an incline in a roadway, such as a railroad crossing, bridge approach, or hill, to cause the vehicle to become airborne.

(b) (Blank).

(c) (Blank).

(d) Sentence.

(1) Involuntary manslaughter is a Class 3 felony.

(2) Reckless homicide is a Class 3 felony.

(e) (Blank).

(e-2) Except as provided in subsection (e-3), in cases involving reckless homicide in which the offense is committed upon a public thoroughfare where children pass going to and from school when a school crossing guard is

performing official duties, the penalty is a Class 2 felony, for which a person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years.

(e-3) In cases involving reckless homicide in which (i) the offense is committed upon a public thoroughfare where children pass going to and from school when a school crossing guard is performing official duties and (ii) the defendant causes the deaths of 2 or more persons as part of a single course of conduct, the penalty is a Class 2 felony, for which a person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 6 years and not more than 28 years.

(e-5) (Blank).

(e-7) Except as otherwise provided in subsection (e-8), in cases involving reckless homicide in which the defendant: (1) was driving in a construction or maintenance zone, as defined in Section 11-605.1 of the Illinois Vehicle Code, or (2) was operating a vehicle while failing or refusing to comply with any lawful order or direction of any authorized police officer or traffic control aide engaged in traffic control, the penalty is a Class 2 felony, for which a person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years.

(e-8) In cases involving reckless homicide in which the defendant caused the deaths of 2 or more persons as part of a single course of conduct and: (1) was driving in a construction or maintenance zone, as defined in Section 11-605.1 of the Illinois Vehicle Code, or (2) was operating a vehicle while failing or refusing to comply with any lawful order or direction of any authorized police officer or traffic control aide engaged in traffic control, the penalty is a Class 2 felony, for which a person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 6 years and not more than 28 years.

(e-9) In cases involving reckless homicide in which the defendant drove a vehicle and used an incline in a roadway, such as a railroad crossing, bridge approach, or hill, to cause the vehicle to become airborne, and caused the deaths of 2 or more persons as part of a single course of conduct, the penalty is a Class 2 felony.

(e-10) In cases involving involuntary manslaughter or reckless homicide resulting in the death of a peace officer killed in the performance of his or her duties as a peace officer, the penalty is a Class 2 felony.

(e-11) In cases involving reckless homicide in which the defendant unintentionally kills an individual while driving in a posted school zone, as defined in Section 11-605 of the Illinois Vehicle Code, while children are present or in a construction or maintenance zone, as defined in Section 11-605.1 of the Illinois Vehicle Code, when construction or maintenance workers are present the trier of fact may infer that the defendant's actions were performed recklessly where he or she was also either driving at a speed of more than 20 miles per hour in excess of the posted speed limit or violating Section 11-501 of the Illinois Vehicle Code.

(e-12) Except as otherwise provided in subsection (e-13), in cases involving reckless homicide in which the offense was committed as result of a violation of subsection (c) of Section 11-907 of the Illinois Vehicle Code, the penalty is a Class 2 felony, for which a person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years.

(e-13) In cases involving reckless homicide in which the offense was committed as result of a violation of subsection (c) of Section 11-907 of the Illinois Vehicle Code and the defendant caused the deaths of 2 or more persons as part of a single course of conduct, the penalty is a Class 2 felony, for which a person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 6 years and not more than 28 years.

(e-14) In cases involving reckless homicide in which the defendant unintentionally kills an individual, the trier of fact may infer that the defendant's actions were performed recklessly where he or she was also violating subsection (c) of Section 11-907 of the Illinois Vehicle Code. The penalty for a reckless homicide in which the driver also violated subsection (c) of Section 11-907 of the Illinois Vehicle Code is a Class 2 felony, for which a person, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years.

(f) In cases involving involuntary manslaughter in which the victim was a family or household member as defined in paragraph (3) of Section 112A-3 of the Code of Criminal Procedure of 1963, the penalty shall be a Class 2 felony, for which a person if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years.

### **Sec. 9-3.3. Drug-induced homicide.**

(a) A person who violates Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act by unlawfully delivering a controlled substance to another, and any person's death is caused by the injection, inhalation, absorption, or ingestion of any amount of that controlled substance, commits the offense of drug-induced homicide.

(b) Sentence. Drug-induced homicide is a Class X felony.

(c) A person who commits drug-induced homicide by violating subsection (a) or subsection (c) of Section 401 of the Illinois Controlled Substances Act or Section 55 of the Methamphetamine Control and Community Protection Act commits a Class X felony for which the defendant shall in addition to a sentence authorized by law, be sentenced to a term of imprisonment of not less than 15 years and not more than 30 years or an extended term of not less than 30 years and not more than 60 years.