

AUTHORITY HEURISTICS

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Language is central to the process of acquiring knowledge of foreign law in at least two ways: one obvious, the other perhaps less so.¹ The obvious function is to provide access to information. Language is a tool for acquiring information from and about a foreign legal system, because that information is imbedded in language. Language also performs, however, a second function that is less frequently acknowledged, but no less important: it shapes what the user knows. This knowledge-shaping (or “cognitive”) role is of fundamental importance, because it conditions all knowledge of foreign law. Despite this, however, little attention has been paid to this role.² This Article focuses on one aspect of the role of language in shaping knowledge of foreign law.

Those seeking to know foreign law typically assume that the best source (or at least a very good source) of what they want to know is a text that is considered authoritative in the legal system in which they are interested. In fact, the more authoritative the text, the more valuable it is assumed to be. The strategy is attractive. The knowledge-seeker uses it in her own system, and she is accustomed to valuing it. Moreover, it seems only logical and appropriate to refer to high-authority texts, because they are, by definition, important and influential, at least formally. Other factors remaining constant, the higher the authority value that supports a legal argument within any system, the stronger that argument is likely to be. In general, therefore, the more authoritative a statement of law is, the more valuable it is assumed to be for knowing the law.

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2. For discussion, see David J. Gerber, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language*, in RETHINKING THE MASTERS OF COMPARATIVE LAW 190 (Annelise Riles ed., 2001).

When applied to foreign law, however, this knowledge acquisition strategy is fundamentally flawed. It is based on a misperception of the relationship between language and its referents, and, as a result, it is likely to produce inaccurate knowledge. In this Article, I examine the role of authoritative texts in acquiring knowledge of foreign law, focusing on ways in which uninformed use of them can distort knowledge of foreign law.

My central claim is that the capacity of authoritative language to accurately convey information within a legal system tends to be inversely related to its capacity to create accurate knowledge for those outside the system (system “outsiders”). Put another way, the more authoritative the text, the greater the discrepancy is likely to be between its intra-system value (*i.e.*, to users within the system) and its inter-system value (*i.e.*, its value to an outsider).

The operative factor in producing this counterintuitive result is the role of what I call “authority heuristics” within legal systems. I use the term to refer to specific cognitive tools used in interpreting texts. They consist primarily of assumptions about the influence of texts on decision makers. Each legal system has its own set of such tools and its own “know how” for using them. They enable those within the system to “know” the law. When a system outsider interprets a text, however, she is likely to use the “wrong” authority heuristics—usually because she uses those she has learned to apply in her own system rather than those of the target system. As a consequence, she is likely to misread the text to the extent of the differences between these two sets of heuristics.

This means that effective use of authoritative legal texts by outsiders requires specific translation strategies and tools that are designed to detect authority heuristics and correct the distortions they are likely to introduce. Where heuristics differ, interpretive tools are needed to counteract the knowledge-distorting impact of these differences.

The Article has three main objectives. One is to explore the role of authoritative language in trans-system knowledge acquisition and to identify the consequences of strategies that fail to account for that role. A second is to develop the concept of authority heuristics and explore its implications. Finally, I suggest a means of reducing the knowledge-distorting impact of authority heuristics and thus increasing the accuracy of knowledge of foreign law. It centers on the poten-

tial value of developing “authority templates” for use with authoritative texts.

I. ACQUIRING KNOWLEDGE OF FOREIGN LAW: THE LANGUAGE FACTOR

A. *The Task: Knowing Foreign Law*

It is important to clarify at the outset what I mean by “knowing” foreign law. For our purposes here, I assume that an individual (or group or institution) wants to know foreign law in the sense that she (or they or it) wants to know the consequences that a foreign legal system is likely to attach to particular conduct. In most cases, this is the only information that has value for the outside knowledge seeker. She wants to know what the legal system *does*—*i.e.*, what happens there under the conditions in which she is interested. The knowledge seeker may, of course, have other objectives such as, for example, to earn a fee or to engage in academic analysis, but these are not our concern here.

In order to achieve this objective, she needs the capacity to predict decisions that can affect her legal status in that system. Specifically, she needs to be able to predict the decisions of individuals and groups within those legal institutions that can affect relevant legal outcomes. For these purposes, *to know “the law” is to predict the **decisions** that are likely to be made* under particular circumstances. Where, for example, she wants to “know the law” relating to an investment that she plans within a particular legal system, her concern is with the decisions that are likely to be made within that system that may affect her investment. What a particular legal text says is relevant only insofar as it influences those decisions. These decisions are the only meaningful way in which “law” will be operationalized in the situations in which she is interested. This focus on decisions has been insufficiently emphasized, but it is central to our analysis.³

The capacity of an outsider to predict such decisions depends on two main factors. One is access to sufficient information about the factors likely to influence the decision in which she is interested. In

3. For discussion, see David J. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 TUL. L. REV. 949 (2001) [hereinafter *Globalization and Legal Knowledge*]; David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719 (1998) [hereinafter *System Dynamics*].

other words, she must have access to sufficient information (or data) to make an accurate prediction possible. In the above example, she needs to know, *inter alia*, the content of any legal texts that the relevant decision makers may use in making decisions. The other factor is cognitive: she needs the capacity to process that data in ways that will yield the desired knowledge. The data in raw form is seldom of value. To know what a statute or a judicial decision says, for example, conveys little, if any, information that is relevant for these purposes.⁴ It acquires value only to the extent that it is processed appropriately.

The outside knowledge seeker must use language to obtain the information she seeks, because that information is embodied in language and unlikely to be acquired in other ways.⁵ It can seldom, for example, be conveyed through other means of communication (*e.g.*, gestures). Moreover, an outsider is seldom in a position to engage in the kind of empirical observation of the events in a foreign system that would enable her to make predictions about what decisions are likely to be taken there under particular circumstances. That means of acquiring information is likely to take too long and entail costs that are too high. The problem then is how to extract from words the kind of information that enables the user to predict decisions in the foreign system with reasonable accuracy.

Assume, for example, that a legal professional in country A wants to know whether particular conduct in country B will encounter legal problems. Her client would like to exchange with a competitor in country B specific information about prices of a product that both sell in B. She knows that in A such conduct would be considered anti-competitive and violate the antitrust or “competition” laws, and she wants to understand the situation her client faces in B.

She is likely to turn to a source that she considers authoritative as part of her inquiry.⁶ She may, for example, look at official government pronouncements or at legal decisions or at high-status legal

4. See Gerber, *Globalization and Legal Knowledge*, *supra* note 3, at 964–69.

5. This objective is sometimes referred to as “learning the rules” of the foreign system. This codes the task—*i.e.*, gives it a name, and it may represent a reasonable approximation of what the outsider wants to know. The problem is that the term is not always used this way. It may be used to refer merely to the formal rules articulated within the system, regardless of their impact on actual decisions, and it is often difficult to distinguish between the two uses.

6. She may, of course, ask a lawyer in that system for information, but even if she does, she will also often look at sources that are considered authoritative within the system either in preparation for asking questions of the foreign lawyer or in confirming or expatiating upon the information provided by the foreign lawyer. In some cases, the advice of a particular lawyer may itself carry authority within the system.

commentaries. She is particularly likely to investigate whether there is a statute that contains the competition law of B. If there is, she is likely to use its language in assessing the legal situation in which she is interested.⁷ She assumes that the language of the statute provides information that will inform her assessment of the legal situation.⁸

What she is not likely to recognize is that the information represented by the text may be of no value to her and may even be highly misleading. If she does not possess the interpretive tools to give it operational meaning—*i.e.*, unless she has the capacity to predict its influence on decisions in B that may affect her, this is precisely what is likely to happen. We will return to this example, but at this point its role is merely to focus attention on the need to find “operational meaning” in foreign texts.

It is important for our analysis here to draw a distinction between “information” and “knowledge.” I use the term “information” to refer to data in an objective sense—outside of its relation to a particular knower. Facts, rules, and procedures in a legal system exist as data and outside of any relationship to a knower. In contrast, I here use “knowledge” to refer to that which an individual (or group) subjectively knows—*i.e.*, her images of the objective world.⁹ It consists of information that has been processed by a particular knower.¹⁰ The act of knowing relates the information to a knower, thereby transforming information into knowledge.¹¹

The concept of system is central to this analysis. I have referred to acquiring knowledge about another “system,” and I need, therefore, to explain briefly how I am using the term. In general usage, the term “system” refers to the legal institutions within a particular political unit or sub-unit and the operation of those institutions.¹² The

7. For an analysis of legal language that focuses primarily on English and American experience, see PETER M. TIERSMA, *LEGAL LANGUAGE* (1999); see also DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963); LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993).

8. How she proceeds in seeking to know the foreign legal situation may depend on a variety of factors. She may wish to rely on her own reading of the foreign text in making some decisions, but for other decisions turn to sources such as foreign legal experts for elaboration or confirmation. In either case, the knowledge that she acquires from the text plays a role in her decision making.

9. These images are usually multi-layered. For an insightful and now classic discussion, see KENNETH E. BOULDING, *THE IMAGE: KNOWLEDGE IN LIFE AND SOCIETY* (1956).

10. For a somewhat similar distinction, see JOHN SEELY BROWN & PAUL DUGUID, *THE SOCIAL LIFE OF INFORMATION* (2000).

11. The terms “objective knowledge” and “subjective knowledge” are sometimes used to describe a related distinction, but I find that usage cumbersome and potentially misleading.

12. See Gerber, *System Dynamics*, *supra* note 3, at 729.

“Italian legal system” is generally understood to refer to the legal institutions of the Italian state and their operations. This definition is useful, but our objectives here call for somewhat more precision. I use the term to refer to: (1) a political entity that expresses its authority in a form that is intended to be interpreted and applied (*i.e.*, in a written or spoken legal “text”), (2) the legal texts and norms that represent that authority, (3) the institutions, groups and individuals that have authority to interpret and apply the texts, and (4) the individuals and groups that regularly influence those institutions in interpreting and applying those texts. I use the term “insider” to refer to an individual who is either educated in a system or has extensive experience with its operations. I use the term “outsider” to refer to an individual who is neither educated in the system nor has extensive experience with its operations.

B. Distorting Factors: Obstacles to Knowing Foreign Law

The task of the outsider who seeks knowledge about a legal system is then to extract meaning from language. But how? Three factors can impair the capacity of language to provide an accurate image of a system’s law to an outsider. One is the lack of conceptual correspondence between the legal language of the two systems. Each legal language contains its own concepts, structures (relationships among concepts), and meaning units, and they do not necessarily correspond to those of any other system. When an outsider uses her own legal language to interpret information from another legal system, she naturally processes that information in the categories of her own system. In effect, she translates the concepts, structures, and institutions of the foreign system into her own legal language, and this inevitably creates distortions.¹³ For example, a “trust” (a legal institution created and developed in the English common law tradition) does not exist as such in most civil law systems, but somewhat similar terms in other legal systems (*e.g.*, *Treuhand* in the German system) are sometimes used to translate it. This form of “translation” inevitably distorts knowledge, often in ways that are hard to detect. This problem has

13. For a recent study of specific instances of this, see Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated . . .*, 50 AM. J. COMP. L. 201 (2002).

been studied with much insight in recent years, most notably by Rodolfo Sacco, Antonio Gambaro, and their students.¹⁴

A second obstacle involves the methods or conventions used in interpreting texts. Where an outsider employs methods from her own system in interpreting texts from another system, those methods are likely to differ from those used within the target system. As a result, she is likely to “read” the texts differently than if she used the methods of the target system, and this also distorts her knowledge. Where, for example, a lawyer trained in the U.S. reads the text of the German civil code, the interpretive methods that she employs in reading the text will differ significantly from those that German lawyers use in reading it. All German lawyers are trained to apply a well-defined and well-structured interpretive methodology of which she will be unaware. As a result, her reading of that text is likely to produce distorted knowledge of what the language “means” within the German system.

These two sources of distortion are not specific to legal texts, but inhere in the process of translation itself. Whenever a text is translated from one language into another, some distortion is inevitable, because there is never perfect conceptual correspondence between languages. Moreover, all readers apply interpretive methods in reading texts, and differences in those methods lead to differences in interpretation.

Because they are common to translation of any kind, these sources of distortion are likely to be at least recognized by anyone who has had significant experience with a foreign language.¹⁵ For example, where I use a translation of a Turkish legal text, I am likely to be aware that Turkish lawyers might interpret the text differently than I interpret it and that the chances of an exact correspondence between the Turkish original and my translation are remote. I may choose not to pay attention to these distorting factors, but the problem is at least readily recognizable.

14. See, e.g., Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (pt.I) & 343 (pt.II) (1991); ANTONIO GAMBARO & RODOLFO SACCO, *SISTEMI GIURIDICI COMPARATI* (2d ed. 2002).

15. For discussion, see *THEORIES OF TRANSLATION* (Rainer Schulte & John Biguenet eds., 1992).

II. AUTHORITY AND LEGAL LANGUAGE

A third source of distortion is, however, specific to legal language. It results from the role of authority in legal language, a role that does not exist, at least in the same form, in other types of texts.¹⁶ The relationship between authority and legal texts affects the capacity of an outsider to acquire accurate knowledge of foreign law, but that role is seldom noted.¹⁷ Its impact may be as fundamental as the two other distorting factors just mentioned, and its effects may be more insidious because they are less likely to be recognized.

As noted above, texts that are considered authoritative within the target system are frequently central to the strategies used in acquiring knowledge of law. These may include, *inter alia*, official legislative or administrative acts, the decisions of courts, and certain pronouncements of particular individuals or institutions. For the system insider such texts are often of value, because their authoritative status means that they often have extensive influence on decision-making, and the insider typically knows which decisions they are likely to influence and in what ways. They are, therefore, an important guide to what is likely to happen.

In a continental European legal system, for example, a civil code typically has extensive influence on several aspects of decision making related to private law. It is a source of specific guidance in particular cases. Courts, scholars, and legal practitioners turn to it to determine whether it provides an answer to specific questions. In addition, however, it often provides the language of the private law—its concepts, structures, and grammar—and thus provides a means of understanding how decision makers think about legal issues and how they conceptualize and evaluate the decisions they must make. In order to predict its influence on decisions, therefore, an insider must undergo extensive training in the structure and content of the code, and she must also learn who uses it and how they use it. She must learn, for example, how the methods of statutory interpretation are applied by the courts and other institutions to find answers to legal questions.

16. The languages of some religions such as Islam play similar roles insofar as they seek to establish and enforce norms of social conduct.

17. For discussion of the concept of authority, see BRUCE LINCOLN, *AUTHORITY: CONSTRUCTION AND CORROSION* (1994).

Outsiders often also rely on authoritative texts in seeking knowledge of law. One reason is the natural tendency to use knowledge-acquisition strategies with which one is familiar. Authoritative texts have formal weight and status in all legal systems, and thus they seem to represent a particularly reliable source of information in any system. Having learned to rely on authoritative texts in one's own system, the outsider has strong incentives to assume that this will be a useful strategy in a foreign system. A further reason for this reliance on authoritative texts is that few knowledge seekers know any other way to proceed in seeking knowledge from a foreign legal system. They are not likely to be aware of alternative strategies.¹⁸ Even if an outsider is willing to invest the mental and other resources to acquire such knowledge, she is often simply unaware of the elements of such an alternate strategy. Finally, it seems efficient and reasonable to assume that whatever is valuable to an insider is valuable to an outsider.

The problem is that this strategy is likely to provide a distorted image of foreign law. The factors that make an authoritative text valuable to the insider who is seeking legal knowledge are often the same ones that distort that knowledge for the outsider.

III. AUTHORITY HEURISTICS: CONCEPT AND ROLE

A closer look at the role of authority in legal texts reveals why this is so. I take as a starting point for this analysis that the language of an authoritative text does not *by itself* tell a reader anything about *what happens* in a legal system. It cannot (by itself) contain the operational meaning of the text—*i.e.*, its influence on decisions. Consequently, by itself it is of no necessary value to someone who seeks to know what consequences are likely to attach to conduct in a foreign system. Its impact on decisions can be assessed only if one knows how and by whom the text is used.

Several factors are relevant to determining the influence of the text on decisions. They include the following: Who applies the text? What is the role and influence of those persons and institutions? Where do particular decision makers turn for guidance in applying the text? What methods do they use to extract linguistic meaning from the text? What are their incentives in making particular decisions? What is the status of the text? Answers to these questions pro-

18. In many countries (including the U.S.) relatively few students take courses in comparative law, and comparative law courses often do not deal with the issues raised here.

vide the basis for assessing what decisions are likely to be made in that system under specific circumstances.

Texts generally exercise influence on decision making in systematic ways—*i.e.*, in ways that follow patterns. It is this patterning that makes prediction possible. For example, methods used in interpreting texts tend to be highly standardized, albeit at varying levels of precision. In many systems, teaching the standard methods of statutory interpretation is a major focus of legal education.¹⁹ Those who make decisions within the system tend to apply these methods or at least orient their decisions according to them, not only because they have learned them, but also because the system rewards those who do so. As a result, these methods tend to play a major role in determining outcomes, and the person who knows these methods and recognizes the patterns of usage that they entrain has a powerful tool for predicting decisional outcomes.²⁰ These patterns and regularities are the key to analyzing the influence of texts on decisions. All else being equal, the greater the degree of patterning, the higher the potential predictability.

A. *The Concept*

Where they are used for this purpose, these patterned influences become tools of interpretation. The term “heuristics” captures this role.²¹ The patterns represent tools for interpreting the operational meaning of texts—*i.e.*, for predicting how they are likely to influence outcomes. In this sense they “translate” the text. The term “heuristic” highlights the interpretive character of the analysis. More fundamentally, the term labels this form of analysis, making it recognizable and giving it independent status.

19. This is typically the case wherever a civil code is central to the operation of private law. For Germany, see KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* (5th ed. 1983).

20. This merely recognizes that all institutions rest on patterns of behavior and that these patterns effectively construct meaning within those institutions. For a now classic discussion of this issue, see PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE ON THE SOCIOLOGY OF KNOWLEDGE* 47–92 (1966). The role of language in this context is discussed in JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 59–79 (1995).

21. In this Article, the term “heuristic” is used in the traditional sense of a tool used for interpretive purposes. Since the early 1970s, it has also been used in cognitive psychology to refer to cognitive tools that represent deviations from rational decision making. Our usage here does not carry that implication. See *SIMPLE HEURISTICS THAT MAKE US SMART* (Gerd Gigerenzer et al. eds., 1999).

Using “authority” with “heuristics” signals that this form of interpretation relates to the influence or “authority” of the text. It is precisely these patterns of authority or influence that are the tools of interpretation. The form of meaning involved is not the more traditional sense of deriving linguistic “content” from the text.²² Rather it is the capacity to predict the probable influence of the text on decisions within the system. This is, as noted above, the only meaning that most users of legal knowledge value.

Each system has its own set of authority heuristics, and system insiders typically know how to use them to help predict decisions in particular circumstances. This knowledge is a kind of “know-how” about the operations of the system.²³ In order to know what the operational impact of a text is, one needs to apply the appropriate “authority heuristics” to it.

B. Knowledge Distortion and Authority Heuristics

Herein, however, lies the problem for an outside knowledge-seeker: she is not likely to know what the authority heuristics of the target system are. She is unlikely to be aware of the patterns of influence of texts and the ways in which they are used. As a result, she is likely to apply heuristics that generate distorted knowledge.

The heuristics she is likely to apply instead are those from her own system. The factors that lead her to rely on authority heuristics from her own system are similar to those that cause her to rely on authoritative texts in the first place. Her authority heuristics are part of her cognition. They are, in effect, the only tools that she has for this purpose, and, unless she is aware that they are likely to distort the knowledge she acquires from reading the text, she is likely to use them. Given that there is little awareness of the problem we are investigating, however, she is not likely to be aware of the distorting effects of using such heuristics. Moreover, language is such a basic tool of knowledge-acquisition that she has little incentive to question her own practices. Self-examination of one’s language practices is likely to entail significant mental and perhaps emotional costs. To use the same heuristic strategies in the foreign system that one uses in one’s own system is, therefore, both convenient and efficient.

22. For discussion of different forms of meaning, see MICHAEL POLANYI & HARRY PROSCH, *MEANING* (1975).

23. For discussion, see, for example, HERBERT H. CLARK, *ARENAS OF LANGUAGE USE* (1992).

The result, however, is a distortion of the outsider's knowledge of the relevant law in the target system. The authority heuristics that give operational meaning to a text within a system tend to obscure that meaning in an intersystemic context—*i.e.*, for an outsider.

IV. EXAMPLE: THE (OFTEN) ILLUSORY VALUE OF STATUTES

The use of statutes by outsiders seeking knowledge of foreign law illustrates some of these issues. The practice is common, the advice almost universal: If you want to know what the law is in a foreign jurisdiction, statutes are the best source. Widespread reliance by outsiders on texts of foreign statutes as a source of knowledge about foreign law has led publishers to invest heavily in producing compilations of such statutes in both print and digital formats.

The reasons that outsiders often rely on statutes include those just mentioned in relation to authoritative texts generally, but include others as well. One involves the status of statutes. They represent authoritative commands by the law-giving institutions of the polity. Formally, they are “the law,” and this encourages outsiders to rely on them.²⁴ Another reason is their form. They tend to be generally applicable or at least applicable to large categories of factual situations. The language typically refers not to specific conduct by specific persons, but to a general category of conduct. If one “knows” the abstract legal formulation, one can easily suppose that she knows “the law” applicable to all conduct that she considers to fall within that category. Except in the relatively rare cases where a statute appears to specifically address the fact situation in which the knowledge seeker is interested, it is more efficient and potentially valuable to know a general proposition than it is to look for answers in fact-dense judicial opinions. There it is also often difficult to know which case(s) to look at and how to relate them to other cases. As a result, outsiders often assume that statutes produce the easiest, quickest, and cheapest way of acquiring the knowledge that is sought. Their “authority” is the basis for that assumption.

To read a foreign statute appears to provide useful information, but the appearance is often misleading. As we have noted, the operational “meaning” of the statute cannot be derived from its language.

24. I use the term “rely” to specify a particular way in which the text is used. The problem noted here arises where the user relies on a text to know the law, but a text may also be used in other ways such as, for example, a starting or orientation point for assessing the legal situation.

What the knowledge-seeker wants to know is not encoded in the words of the statute, and application of appropriate authority heuristics is necessary to acquire this operational meaning.

We can now return to the example used earlier in which a legal professional in country A wants to know whether particular conduct in country B will encounter antitrust problems in that system.²⁵ Recall that she believes that she has identified a possible antitrust problem in B, because she knows that such a problem exists under the laws of her own system. Her knowledge of her own legal system has a further effect, however, because it imbeds system-specific authority heuristics in her perception of the text, and this can significantly impede her capacity to acquire accurate knowledge of the legal situation in B.²⁶

She knows who applies the statutory texts in A that are the basis for her antitrust concerns there, and she knows how these texts influence decisions. For example, she knows that the text is applied in two quite different institutional contexts. It is applied by a government authority and by the regular courts in the context of private litigation. The government office is an independent, well-funded competition authority that can use the text to authorize an order not to engage in what it considers to be anticompetitive conduct. In addition, a private party injured by such conduct can also file a lawsuit in the regular courts to prevent the conduct. She also knows that the decisions of specific courts in prior cases serve as the primary source of guidance for all relevant decision makers. Finally, she knows that a particular type of economic theory will largely control the outcomes reached. She uses these pieces of information in reading the text for its operational meaning. They represent, in other words, authority heuristics.

In system B, however, the outsider does not know how the antitrust (or competition law) statute is used—or by whom. She is likely to assume, therefore, that the authority heuristics which she uses in her own system also apply here, and she will read the text accordingly. This leads her to assume that the text can be applied by the regular courts as well as by an administrative body. In system B, however, there is no private enforcement of competition law texts. This by itself radically changes the legal situation. Her home heuristics also lead her to assume that the government office applying the statute is

25. *See supra*, text accompanying note 6.

26. These examples are based on numerous discussions in which I have participated and in which U.S. lawyers (country A) have talked about competition law with non-U.S. lawyers, particularly European lawyers (country B).

well-funded and independent. In system B, this is not true. Competition law is applied only by a small staff of administrators, and they are interested in applying it only to the conduct of very large firms. Their actions are often also politically influenced. She may further assume that decisions by courts in system B which are in some sense similar to courts with which she is familiar in A provide the main authority for decision makers. In B, however, commentaries on the statute by academics, officials, and private lawyers often provide the main reference point for those making competition law decisions. And, finally, she is likely to assume that the economic analysis used in her own system will control the application of the legal principles in system B. In B, however, economic analysis plays a far less important role in applying competition law than do broader conceptions of market integration, market access, and fairness.

As a result, without awareness of the authority heuristics that should be applied to the foreign statute, she would fundamentally misread the statute. The statute would provide for her a significantly distorted and highly misleading picture of its role and of the legal situation in the system in which she is seeking to know the law.

V. THE EXTENT OF COGNITIVE DISTORTION

Three factors are likely to influence the degree to which using the wrong authority heuristics distorts knowledge of foreign law. One is the degree of dissimilarity between the authority heuristics that would be applied to a text or category of texts in the outsider's home system and those that are typically used for similar texts or categories of texts in the target system. We can use the term "heuristic distance" to capture this factor. The greater the differences between the two sets of authority heuristics, the greater the distortion is likely to be. Using the example given above, the assumption that antitrust law provisions are applicable in private litigation represents one degree of distortion. The additional assumption that the antitrust authority is politically independent increases the extent of distortion.

A second factor is the extent of influence of the text. The more extensive the influence of a particular text or category of text on decision making in the target system, the greater the distortion that is likely to be produced by applying the wrong authority heuristics to it. If a text has high authority value for many decisions within a system, applying inappropriate authority heuristics to it creates more extensive distortions than if the role and influence of the text are minor.

The complexity of the text's influence represents a third factor. The more complex the influence of a text within a system, the greater the distorting effects of using inappropriate authority heuristics are likely to be. For example, a civil code typically exerts its influence not only in obvious ways that are tied directly to particular language, but by shaping thought about many overlapping categories of situations and by creating, as noted above, a language for talking about and thinking about law that is used throughout the legal system (or at least its private law component). It becomes a pervasive means of structuring thought and exerts influence in innumerable, often little noticed or unconscious ways. Applying inappropriate authority heuristics to the text may thus distort knowledge in many contexts, and limited awareness of its many levels of influence is likely to reduce opportunities for the user to correct for the distortions. In contrast, a text prescribing how a military tribunal should apply a particular punishment has a direct, limited, and straightforward influence on a well-defined class of decisions. Here the distortion that is likely to be caused by applying inappropriate authority heuristics is limited, and correcting for it is likely to be relatively straightforward.

VI. AN AUTHORITY TEMPLATE?: ROLE AND POTENTIAL VALUE

One means of counteracting the distorting effects of using the wrong authority heuristics is to provide what I call an "authority template" for specific texts and/or categories of texts. This could include basic information regarding the influence of the text on selected types of decisions. If, as I argue here, outsiders often use inappropriate authority heuristics in interpreting a text and thereby acquire inaccurate knowledge of the law in that system, then such a template should reduce the distortion and produce more accurate knowledge.

The template for a particular text or category of texts could provide information relating to who uses the text, how it is typically used, what influence it typically has on decision making within particular institutions and so on. This would provide, in effect, a set of signposts that could guide readers toward the use of more appropriate authority heuristics and thus more accurate knowledge.

Let us return to the above example. The (private or public) publisher of the competition statute in system B could attach to that statute a template containing basic information about the way the statute influences decision makers in the system and which decisions it influences. The template could note that the statute is applied only by a

specific government office and that office is often subject to political pressure. It could point out that in applying the statute, decision makers look for guidance primarily to statutory interpretations provided in certain commentaries. It could clarify that the guiding principles for interpretation are based primarily on considerations such as the control of power and long-term fairness, particularly to smaller enterprises, and that pure economic theory plays little role in interpreting the statute.

Such a template is likely to be of immediate, significant, and low-cost value to outsiders using the text (as well as insiders unaware of some of these factors). Above all, it would immediately flag for the user the need to consider issues of decisional influence in assessing and using the text. It would immediately signal that the outside user's authority heuristics were not applicable in B. By specifying who applies the text, the template dramatically narrows the range of potential issues of application to which she has to attend and reduces the cost of her search to know what kinds of legal consequences are likely to attach to her client's conduct. By specifying what types of factors influence the decision makers who apply the text, the template reduces the scope of potential misinterpretations of information provided about law in the area, enhances the capacity of the outsider to understand information she receives from others, and facilitates effective discussion of the relevant issues. In short, such a template provides tools for interpreting the text's influence on decisions within the system, and thus its operational meaning and thus has the potential to enhance significantly the capacity of outsiders to "know" the law as it operates in system B.

Providing such templates entails risks and problems, of course, because a template can be "corrupted." A template may contain inaccurate information, either because its creator erred in good faith in preparing it or because her own personal interests influenced what she included. In other words, both inadequate quality control and intentional bias could lead to inaccuracy. This risk attaches to the publication of any information, however, and effective use of the information contained in templates would depend on informed use of templates as an information source.

Detailed examination of ways of reducing such inaccuracies and ways of avoiding reliance on them is beyond the scope of this Article, but I note a few of the issues that may arise. Where a template is provided by a public source, it would be subject to whatever public

scrutiny is available in that system, and a user would be advised to apply whatever cautions are appropriate for the use of government materials there. Where it is provided by a private source such as a commercial publisher, market mechanisms would tend to reduce inaccuracy, because the demand for a template would be a function of its utility to the user. The greater the value to the end user, the higher the potential profits to the producer would tend to be.²⁷

An additional risk in using templates arises where a template itself acquires influence within a system.²⁸ Here a kind of infinite regress problem arises: would one always need a template to explain the use of a template? In some cases, this may limit the utility of templates, but even where it occurs this does not eliminate the value of the template; it merely reduces it. Moreover, in a wide range of cases the problem will not arise because the template will not acquire influence over decision makers within the system. In general, it is likely to arise only where a template is provided by a public authority. Privately issued templates may, for example, be of much value to outsiders, but they are not likely to have influence on decisions within the system. Finally, the information that is provided in templates will often be objective and not require additional information for its interpretation. For example, a template that contained the information that private litigation is not available in a competition law system would provide the user with valuable data about the influence of a text, but that value would not depend on the acquisition of additional information for its interpretation.

Costs could be a deterrent to developing authority templates, but they need not be. An institution (or person) must prepare the information and “attach” it to the text, and this entails potentially significant costs. The extent and distribution of costs would, however, depend on who provided them and how much information they contained. If government institutions provide “official” templates for a large number of statutes, the public cost could be significant. There is, however, no reason that a government would have to provide templates for all statutes. It could provide them only for the most impor-

27. Assessment of utility may be difficult to measure in the short run, but with Internet communications, this problem should normally be of limited duration.

28. It is important to note how this problem differs from the one just described. Here the problem arises precisely because the template influences decisions within the system and may, therefore, call for additional information relating to that influence. In the prior case, the problem does not involve the authority of the template, but only the accuracy of the information it contains.

tant or difficult statutes. Moreover, private publishers could provide such templates and thereby internalize the costs to the users.

VII. CONCLUDING COMMENTS

This brief Article has focused on a specific problem that arises in the use of language to acquire knowledge of foreign law. It has identified the potential risks of using a strategy that is common throughout the legal world—reliance on authoritative texts from a foreign system in gaining knowledge of law in that system. It has shown that this strategy is likely to produce distorted knowledge.

It has also identified the cause: it lies in a feature of language that is specific to law—namely, its role in influencing legal decisions. Legal texts acquire meaning insofar as they influence legal decisions, and thus their authority or influence with respect to relevant decision makers is central to understanding the text. In order to interpret a text effectively, the user must use interpretive tools (“heuristics”) that are based on knowledge of this authority. An outside user of the text is likely to use the wrong heuristics in predicting the influence of the text and therefore acquire distorted knowledge of law in the target system. By recognizing that the capacity of a text to produce accurate knowledge to an outside user tends to be *inversely* related to its authority within that system, strategies can be developed that will reduce this distortion.