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Citation: 1987 BYU L. Rev. 335 1987



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## The Universal and the Particular in Legal Discourse\*

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My target in this article is a set of views that I shall call the functionalist perspective of comparative law. Of course, the word "functionalist" stands for a number of different theories. In order to be precise about the view that I oppose, I shall set my sights on the arguments developed in Otto Kahn-Freund's inaugural lecture *Comparative Law as an Academic Subject*,<sup>1</sup> published two decades ago.

Kahn-Freund's argument is that because developed legal systems tend toward the same substantive solution to particular problems, the concepts and forms in which these solutions are expressed are of little importance in the comparative study of law. What counts for the purpose of comparison is the fact of a solution and not the ideas, concepts, or legal arguments that support the solution. If on a given set of facts the victim of an accident in a friend's apartment can recover damages from the landlord, the fact of recovery overwhelms, in significance, the rationale for the decision. As compared with the hard fact of wealth transferring from one party to the other, the ideas and arguments explaining the flow are of little significance. The rationale could lie in tort; it could rest on an implied warranty of habitability; it could rest on an interpretation of the actual lease between the owner and the tenant. None of this, Kahn-Freund argues, is of great interest to the comparative legal scholar. The important point, reminiscent of Holmes, is that "the social need demands satisfaction."<sup>2</sup> As Kahn-Freund put it, "[t]he satisfaction of the felt needs of society through the law is, in my sub-

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\* This article is based on a speech by Professor Fletcher at the Brigham Young University Law School International and Comparative Law Symposium on October 19, 1986.

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1. Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW Q. REV. 40 (1966).

2. *Id.* at 51.

mission, the cardinal subject of all academic legal studies."<sup>3</sup> Apparently, it is a matter of contingent form only whether this satisfaction is expressed in one doctrinal medium or in another.

True, Kahn-Freund reserves a place in comparative law as an academic subject for the study of divergent strategies for satisfying these felt social needs. The range of his interest in this regard includes such questions as whether a particular society seeks to protect shareholders in infant companies against their fraudulent promoters by providing an *ex post* damage remedy or by instituting an *ex ante* regulatory system. But the emphasis should always be "not [on] that which is formulated and said but [on] that which is being done."<sup>4</sup>

He thought it admirable that the English, as contrasted with his German colleagues, regarded doctrinal forms as but "intellectual tools to be used and, if necessary, to be cast aside."<sup>5</sup> Thus, the functionalist perspective includes some concern for the machinery by which a legal system seeks to satisfy social needs—but the notion of machinery must be understood narrowly. This perspective includes the institutions that occupy lawyers, but not the ideas, concepts, arguments and doctrinal forms by which lawyers make sense of what they are doing and with which they seek to persuade officials and each other of the justice of their cause.

The functionalist perspective carries forward the teachings of Jerome Frank, Karl Llewellyn and other skeptics called legal realists. If doctrinal forms verge on fetishistic thinking,<sup>6</sup> if they are nothing but the "pretty playthings"<sup>7</sup> of lawyers, then surely they could not be the object of fruitful academic study. These skeptics were realists about only one thing: the reality of power in the legal system. What attracted them, and what attracts Kahn-Freund, is the use of official power to alter peoples' lives. Whether this use of power is domesticated in legal forms and perceived as an expression of justice apparently matters less than the salient fact that governments acting through legal systems respond to the "felt necessities of the time."<sup>8</sup>

The functionalist perspective has generated numerous

3. *Id.*

4. *Id.* at 54.

5. *Id.*

6. See J. FRANK, *LAW AND THE MODERN MIND* 273-74 (1970).

7. K. LLEWELLYN, *THE BRAMBLE BUSH* 14 (1960).

8. O. HOLMES, *THE COMMON LAW* 1 (1881).

worthwhile studies in comparative law. The work that stands out from other American efforts is Rudolph Schlesinger's multi-volume study of contracts across legal systems. His method of research stresses the judicial response of various legal systems to particular sets of facts.<sup>9</sup> The theory of contract and its doctrinal basis is of the lower rank of importance.

A little sophistication about legal argument yields the view that the study of doctrinal forms is important only as a means of debunking and demystifying the use of raw political power. For every doctrine, there is an equally powerful anti-doctrine; for every thrust, as Llewellyn put it, an equally powerful parry.<sup>10</sup> If fault is important, so are the values underlying strict liability; if consideration is a necessary channeling device, so too we cannot ignore the justice of protecting reasonable reliance. If lawyers ever worshiped the law as a set of controlling algorithms, this vision was for the realist-skeptics, the God that failed.

Following the spirit of Holmes and Llewellyn, Kahn-Freund would probably dissent from the pejorative term "raw" as a description of the political power used behind doctrinal forms. These skeptics embraced the use of power for good purposes. As Ackerman has argued, systematic skepticism about traditional legal categories cleared the ground for the New Deal and the acceptance of an activist, interventionist legal system.<sup>11</sup> When the law functions as "social engineering," the political power that it expresses is not raw power; it is hardly power at all. More antiseptic than coercion, it is a lever of change that harms no one, that has no harmful side effects, that generates no plausible dissent.

From our current perspective, the notion that a legal system can simply respond to social problems and "solve" them represents an extraordinary form of political naivete. Looking back on the era before Vietnam, before the Burger and Rehnquist courts, before the religious revival, the right to life movement, and the dismantling of welfare programs, one can only be amazed at the childlike innocence of those who regarded the law as a politically neutral device for the "satisfaction of the felt needs of society."<sup>12</sup>

Given our understanding today of the moral and political fissures in all Western societies, we can no longer talk about "so-

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9. 1 R. SCHLESINGER, *FORMATION OF CONTRACTS* 32 (1968).

10. K. LLEWELLYN, *supra* note 7, at 67-68.

11. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 17-19 (1984).

12. *See* Kahn-Freund, *supra* note 1, at 51.

ciety" as a single organic entity that has definable needs. We consist of numerous societies rent along intersecting axes of philosophical, class, religious, and political commitments. There is no way to satisfy the needs of the religious or the secular without alienating the other. There is no economically neutral way of promoting the ecological views of the established middle class without frustrating the aspirations of the rising lower middle class. Within the confines of legal theory, there is no way of promoting the utilitarian views of the economists without incurring the criticism of those committed to individual rights. As the planning of a subway requires a satisfactory environmental impact statement, the assertion of any legal solution should also require analysis of the resulting impact on those who suffer by the supposed solution. There is no longer a neutral goal of policy, but only conflicting policies and no shared standard for choosing among them.

The view that I wish to develop in this article differs from the naive politics expressed in the literature of the realists and the comparative functionalists. It differs as well from the total critique and the total commitment to politics that moves the followers of Roberto Unger<sup>13</sup> and Duncan Kennedy. There is nothing to fear in the claim that law is politics. "So what!" is the appropriate reply. There are many ways of doing politics. Primitive forms of coercion and manipulation give way, in a legal system, to argument and the effort of lawyers to persuade each other on a restricted range of debatable issues.

The intellectual conceit of demystifying the law ignores the difference between the politics of coercion and the politics of principled persuasion. When the "real" consists not in discourse, but in action, we distort the reality of our own experience. We toss aside as unimportant those constructs and concepts through which we perceive and seek to develop principled solutions. The assumption is that talk, legal talk, cannot by itself control the actions of officials. Any belief that holds talk as important is scorned as conceptualism or formalism.

It is undeniable that deploying power is a critical feature of the law's unfolding, but it is not the only feature. From Jewish law as expressed in the Talmud, to Roman law, to the schools of jurisprudence that developed in Italy, France and Germany, to

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13. On the "total critique" of liberalism, see R. UNGER, KNOWLEDGE AND POLITICS 1-3 (1975).

the common law from Coke to the bicentennial of the American Constitution, the moving force of the law has not been the writ but the brief, not the seizure of body and property but the effort to persuade. Skeptics make the mistake of assuming that if the sources of law do not determine or even direct the outcome of disputes, these sources must be irrelevant. The significance of statutes, cases and theoretical doctrines is not that they dictate the uses of power, but rather that they circumscribe the field of debate. They provide the starting points for argument among those who have domesticated their urge for power in shared assumptions about justice and the rightful structure of social cooperation.

Negotiation on legal issues, legal argument and judicial opinions define an ongoing discourse of legal criticism and justification. This discourse is constrained by a set of assumptions both about what constitutes a good argument and about what, in principle, is irrelevant. The conventional sources of law—be they statutory material, case law or scholarly theories—provide the foundations of good arguments. The quality of these arguments depends, of course, on a whole set of implicit interpretative principles that constitute the craft of lawyerly rhetoric. Lawyers learn as well that certain appeals—such as those to mercy, love, the will of God, the beauty of Keats and a host of others too numerous to conjure up—simply do not belong in the discourse either of negotiation or of formal argument.

This discourse lies at the core of the lawyerly experience. It is more basic, in my view of the law, than the availability of sanctions to enforce judicial judgments. I can imagine legal discourse that does not generate enforceable judgments. In systems without judicial review, such as the Soviet Union, the applicable constitution generates this kind of lawyerly exchange. Unenforceable legal claims still shape the discourse of international relations. I cannot, in contrast, imagine an official use of power that we would call law if official decisions were not informed by arguments reflecting the interests and alleged rights of the affected parties.

The first proposition I wish to maintain, then, is that the life of the law is closely linked to a species of disciplined discourse that we call legal argument. This proposition stands opposed to the functionalist perspective, for if we focus on legal argument we are invariably led to serious reflection about the forms of the argument. It makes a difference whether the case

for a particular result is cast in the language of tort or of contract, whether it bespeaks the language of utility or of rights, whether it invokes precise rules enacted by some governmental body, or whether it rests on unenacted commonly-accepted principles of law. This view stands Kahn-Freund's position roughly on its head: What counts is not only what is done, but "that which is formulated and said."<sup>14</sup>

The conclusion that law is primarily discourse encapsulates the movement and development of two decades of jurisprudential thinking. It takes its lead from H.L.A. Hart's innovative suggestion that in seeking an account of legal experience, we consider the internal as well as the external point of view.<sup>15</sup> The latter external perspective leads to the preoccupation with sanctioning and dovetails well with functionalist theories of law. The internal point of view requires that we focus on the way in which participants in the legal system invoke the materials of the law to justify their behavior and to criticize others. This is but the first step toward a full consideration of the matrix of legal argument.

Dworkin's work carries the internal perspective further—initially, by turning our attention to the relevance of legal principles and other factors that ought to bear on legal decision-making,<sup>16</sup> and in his most recent work by stressing the problem of interpretation as the center of legal argument and justification.<sup>17</sup> My argument extrapolates from the trend toward the internal point of view: The neglected heartland of the law is the linguistic interaction by which we explain to ourselves and to others why the state should intervene on behalf of one party in a dispute.

Thinking of law as a system of discourse requires more, rather than less, attention to the medium in which we express our arguments. The nexus between language and legal culture is far stronger than we ordinarily assume in teaching and writing about comparative law. If we compare the strength of French legal thinking in Quebec and its progressive demise in Louisiana, there is no doubt that the bedrock of language explains the difference. Legal cultures are embedded, more than we realize, in particular languages. This is most evident in the theoretical

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14. Kahn-Freund, *supra* note 1, at 54.

15. H. HART, *THE CONCEPT OF LAW* 97-120 (1961).

16. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967).

17. R. DWORKIN, *LAW'S EMPIRE* 410-11 (1986).

treatises that one finds in multilingual jurisdictions. There is only one South African criminal law, but you get an entirely different view of what that law is if you read an Afrikaner text inspired by German sources and an English text relying on common law methodology. There is only one Swiss criminal law, but that single law is refracted differently under the looking glasses of French and German writers. Discussing law in a particular language commits the speaker to a set of concepts and expressions that affect not only the form but the substance of legal argument.

Now I must admit that there are aspects of this connection that I do not completely comprehend. Language shapes cultural identity and part of that identity seems to be an indigenous style of legal argument and legal theory. Of course, as an act of choice, a developing legal culture can choose to identify with one of the traditional cultures and transplant its conceptual terminology and theoretical orientation to a new language. We witness this phenomenon in the attachment of Japanese scholars to the German conceptual style; and of Israelis to the pragmatism and anti-theoretical bent of the English common law. This phenomenon is much easier to document than to explain, and at this stage of my thinking, I can, at most, describe what I take to be the close connection between language, on the one hand, and legal argument and legal theory, on the other.

Bringing the significance of language into focus—returning to the text, as it were—changes our perception of the universal and the particular in legal thought. For Kahn-Freund, the universal consisted in the convergence of Western legal systems on the same solution to the same social problem. If we keep in mind the internal point of view, however, the critical importance of language and rhetoric undermines this perception of universality. We must attend more to the particularities of the concepts and arguments we use both to perceive problems and to propose solutions.

Many of the basic terms of legal discourse are truly universal. The legal systems of the industrialized world share the discourse of rights, duties, contract, property, breach, fault, causation and responsibility. These terms readily translate from one system of discourse into another. Further, all systems of private and criminal law comprehend the basic distinction between corrective and distributive justice. They base liability on transac-

tions that raise questions of corrective justice rather than on assessments of the actor's background and personality.

For all this similarity in basic structure, there are differences in detail that are so profound they call into question the extent of a shared foundation of legal thought. I want to discuss some of these details, which have happened to come to my attention, and then reflect on the deeper significance of this cross-section of particularities.

The place to begin, I would suggest, is with obvious problems of translation. Take the basic standard of negligence, used in one fashion or another as a standard for responsibility in torts and criminal law all over the world. Whenever we in the common law think about negligence, our minds turn to the notions of reasonable care or, in the full standard definition, to the notion of care that a reasonable person would exercise under the circumstances. The German civil code relies on the equally lapidary formula: *die im Verkehr erforderliche Sorgfalt* [the degree of attentiveness required or necessary in the transaction].<sup>18</sup> In most and perhaps in all cases, these two formulae—the common law and the German—have the same pragmatic impact on litigation. I have no way of knowing whether someone regarded as non-negligent in one system would be treated as negligent in the other. That, of course, is the question that would occupy the functionalist in his comparison of the two systems. Even if we could not establish a distinction in practice, it would be a mistake to treat these verbal approximations of negligence as equivalent or interchangeable. These words, recited ritualistically in English and in German, testify to significant differences in legal culture. Let us take a closer look at the words used in these respective formulae for negligence.

Americans rely in this context, as well as in innumerable others, on the notion of reasonableness; Germans invoke the standard of necessity to get at the same point. This is a significant difference, for the term "reasonableness" more clearly signals the process of evaluation, particularly the process of trading off the costs and benefits of taking risks. This process of evaluation remains concealed under the supposed objectivity of "necessary attentiveness."

At an even more basic level, the American reliance on the word "care" invites the kind of debate we witnessed several gen-

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18. Bürgerliches Gesetzbuch [BGB] § 276.

erations ago about whether negligence is a standard for assessing risks or a standard for assessing attentiveness to creating risks.<sup>19</sup> We now use the term to refer to both. The standard of “reasonable care” directs our attention first to the question of whether the risk created is justified or reasonable in light of its possible benefits; and second, to the subjective posture of the actor relative to the externalized risk.<sup>20</sup> The German term *Sorgfalt* directs our attention more to the subjective side of negligence.

The multilayered meaning of “reasonable care” has proved to be significant in the evolution of American legal thought. The critical turn came in the use of cost/benefit analysis in assessing negligence. Generations of law students absorbed this way of thinking from the Learned Hand formula first articulated in 1947.<sup>21</sup> The economists seized upon this practice and used it as the beachhead for their effort to reduce as much legal thinking as possible to economic modalities. The German formula—rooted as it is to the subjective side of negligence—resists economic reinterpretation. In the German sources I have checked,<sup>22</sup> one does not even find the principle of balancing interests, or assessing costs and benefits, as the appropriate approach to assessing negligence.<sup>23</sup>

Even the difference between the American word “circumstances” and the German reliance on *Verkehr* carries significance. Circumstances are protean. They bear upon the assessment of the risk in context as well as on gauging the personal responsibility of the actor for not apprehending the risk. The notion of *Verkehr*, more limitedly, applies to the transaction and thus excludes, so far as I can tell, personal features of the actor that might excuse his not perceiving and appreciating the risk implicit in his conduct.

Whatever its implications, the definition of negligence as

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19. See Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927).

20. See MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962).

21. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

22. II J. VON STAUDINGERS, KOMMENTAR ZUM BÜRGERLICHES GESETZBUCH § 276 (M. Lowisch 12th ed. 1979); O. PALANDT, BÜRGERLICHES GESETZBUCH § 276 (P. Bassenge 39th ed. 1980).

23. This is not to say that the notion of balancing interests is unknown in contemporary theory. See SCHONKE-SCHRODER-LENCKNER, STRAFGESETZBUCH KOMMENTAR § 34 (1985) (Balancing interests as the standard for necessity as a justification). The balancing of interests also enters into the judgment in private law whether the risk taken is wrongful (contrary to the Right). See the path-breaking precedent in Bundesgerichtshof in Zivilsachen [BGHZ] §§ 21, 24.

the failure to heed *die im Verkehr erforderliche Sorgfalt* is engraved in the mind of every German lawyer. It is as much a part of his catechism as is the liturgy of reasonable care in the church of the common law.<sup>24</sup> His way of speaking minimizes a German lawyers' receptivity to cost/benefit approaches to negligence and it also disinclines him to use standard hypothetical figures in elaborating the concept of necessary care. The standard of reasonable care lends itself to identification with the conduct of a reasonable person. But the notion of "necessary attentiveness" does not link up with any readily definable hypothetical actor. There is no standard of the attentive person or of anyone else who knows what is necessary in the particular transaction.

Ways of speaking do not determine ways of thinking. I am not subscribing here to the Whorf hypothesis that thought follows syntax<sup>25</sup> or to the less sophisticated argument that the available vocabulary circumscribes the possible range of thought.<sup>26</sup> Yet ways of speaking do incline us toward particular associations; words—particularly words that are repeated over and over again—invoke the culture of which they are a part. In referring to these definitions of negligence as liturgical, I am completely serious. Lawyers ritualistically repeat these and other standard definitions and thereby invest the phrases with special meaning. The use of this ritualized language creates a mood in which the lawyerly mind may address the facts and classify them as within or without the ambit of negligence. The liturgy of definition brings into focus other occurrences of the same problem and concentrates this accumulated experience on the problem at hand.

There is no place that we rely more heavily on the liturgical value of language than in our Constitution. We cherish the particular language of the Constitution so much that when we amend the basic document we leave the original language intact

24. There is an additional reason why German lawyers are attached to the formula laid down in BGB § 276. The word *Verkehr* also means "intercourse", including that of the sexual variety. When German students first read BGB § 276, they must smile at the pun: negligence is defined as "the failure to exercise the attentiveness required in sexual intercourse."

25. See generally LANGUAGE, THOUGHT AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF (J. Carroll ed. 1956). For a succinct summary and critique of Whorf's views, see Black, *Linguistic Relativity: The Views of Benjamin Lee Whorf*, 68 PHIL. L. REV. 228 (1959).

26. For earlier discussions of this issue, see Fletcher, *The Presumption of Innocence in the Soviet Union*, 15 UCLA L. REV. 1203 (1968).

and add the amendment as a supplement. Even when an amendment is repealed, as was the case with the eighteenth, we publish it thereafter as a part of our constitutional history never to be forgotten.

Particular crystallizations of words prevail not only in the Constitutional text, but in the doctrinal theory that we use to explain the Constitution to ourselves. These features of constitutional theory came to my attention recently as I was examining a new Soviet text on the American Constitution.<sup>27</sup> Some provisions such as the first amendment lend themselves to direct translation into Russian. Others, such as the fourth amendment, pose problems of translation that enable us to distinguish the universal from the particular in our legal culture. The universals can be captured in other legal languages; the particulars of our tradition are bound, far more than we realize, to the English language.

The notions of search and seizure translate readily into Russian as well as into other civilian legal languages. The problematic word in the fourth amendment proves to be the term that lies at the core of our legal culture: "unreasonable" searches and seizures violate the constitution.<sup>28</sup> The Russian translators, whom I have every reason to believe are sophisticated in their sense of language, rendered the notion of unreasonableness as the equivalent of "unfounded."<sup>29</sup> Why should they have done that? They have a word *nerazumnyj* that precisely translates the English word "unreasonable." It derives from the root meaning "reason." In ordinary discourse, *nerazumnyj* means roughly the same thing as "unreasonable." Yet the translator balked at rendering our legal notion of "unreasonableness" with the seeming equivalent in ordinary Russian. Obviously, there are problems in translating legal language as subtle as those that distort poetry as it passes from one language to another. The word "unreasonable" (*nerazumnyj*) will not do in legal Russian because it does not have the same liturgical value as a word like "unfounded" (*neobosnovannyj*) that readily comes to the lips of lawyers.

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27. A. MISHIN & V. VLASIKHIN, *KONSTITUTSIYA SSHA: POLITKO-PRAVVOVOY KOMMENTARIY* [The Constitution of the USA: A Political-Legal Commentary] (1985).

28. For further reflections on the centrality of "reasonableness" in our legal thinking, see Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985).

29. A. MISHIN & V. VLASIKHIN, *supra* note 27, at 209 (the Russian word is *neobosnovannyj*).

Of course, there is a radical difference between the question whether a search is unreasonable and whether it is unfounded or ungrounded. The American term gives vent to our tendency to regard all legal questions not as absolutes, but as invitations to balancing competing interests. That particular sense of reasonable equilibrium is lost in asking the question whether the search is well founded. The ambiguous relationship between the first and second clauses of the fourth amendment—between the standard of reasonableness and the warrant requirement—is lost on the Russian ear. Indeed, the authors of this commentary on the Constitution, who generally understand the dynamics of American law, failed to grasp this ambiguity as it has unfolded in the case law. They explain the notion of a “well founded search” as equivalent to a “lawful search”<sup>30</sup> and then treat the warrant clause as further elaboration of what it means for a search to be lawful.<sup>31</sup> They missed the line of cases treating the warrant clause as but one of many ways in which a search might qualify as reasonable. This leads them to the position that permissible searches without warrants, such as automobile searches, testify to politically motivated circumventions of the fourth amendment.<sup>32</sup> Perhaps this misreading is driven by the pleasures of political self-righteousness. But perhaps it is simply a consequence of not understanding the latent ambiguity between the first and second clauses of the fourth amendment.

If the term “reasonable” gets lost in translation, imagine what happens to “probable cause”—the standard of evidence required for the issuance of a warrant. There is no way to capture this term of art in Russian or in any other European language. The Soviet translators render this elusive standard as “sufficient foundation,”<sup>33</sup> which is very similar to the term that the RSFSR Code of Criminal Procedure uses as a standard for opening a preliminary investigation and classifying a suspect as an accused.<sup>34</sup> Because this stage in Soviet procedure is equivalent to

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30. *Id.* at 210. The choice of words here is illuminating. The Soviet writers gravitate to the word *pravomernjy* or “in accordance with the Right” in order to account ultimately for the constitutional concept of “reasonableness.” This illustrates my general thesis on the parallel functions of “reasonableness” in the common law and the notion of the “Right” in civilian systems. See Fletcher, *supra* note 28.

31. A. MISHIN & V. VLASIKHIN, *supra* note 27, at 210-11.

32. *Id.* at 216-17.

33. *Id.* at 209 (*dostatochnoye osnovanie*).

34. UGOLOVNO-PROTSESSUALNII KODEKS RSFSR [UPK RSFSR] § 143 (Code of Criminal Procedure).

our issuing an indictment and because we use "probable cause" as the standard for issuing indictments as well as warrants, it makes good sense to translate "probable cause" by the term that Soviet lawyers would use in the equivalent legal context.

Yet the term "sufficient foundation" seems to convey much less information than does our beloved standard "probable cause." American lawyers actually think of probable cause as a discernible standard of evidence. It belongs in the spectrum of standards including "preponderance of the evidence" and that standard that seems to everyone to require more, "clear and convincing evidence." It would be difficult for us to accept the idea that these supposedly objective standards of evidence are all chimerical. Yet if it were not for our ritualistically invoking the standard of probable cause as though it were coherent and discernible, our curious expression—which has nothing to do either with probability or with causation—would seem as vacuous as the Soviet standard of "sufficient foundation."

Fourth amendment jurisprudence brings to bear at least two central concepts that do not lend themselves to precise translation into Russian. *Katz v. United States*<sup>35</sup> brings into relief conflicting views about the nature of searching another's premises. According to the traditional way of thinking, there was no search without a trespass. According to the modern approach, the issue is not whether the intruder physically enters a protected zone, but whether his efforts to snoop violate reasonable<sup>36</sup> expectations of privacy. The problem is captured nicely in the issue posed in *Katz*: A bugging device attached to the outside wall of a telephone booth does not constitute an intrusion, but it might well violate the speaker's reasonable expectations of a private telephone conversation. Does it constitute a search that might be unconstitutional under the fourth amendment? *Katz*, as we know, seemingly expanded the scope of the fourth amendment to include non-trespassory invasions of privacy.

My concern here is with the expressions "trespass" and "privacy." Both are among the richest expressions of the English language. The former is rooted in the earliest manifestations of

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35. 389 U.S. 347 (1967).

36. Note the significance again of "reasonableness" in formulating the modern theory of protectible autonomy. The term here obviously requires more than what one would ordinarily expect under the circumstances; for if that were the standard, those generally denied privacy would have a lesser claim than those who enjoy higher expectations.

legal thought in, for example, the writs of trespass and trespass on the case. The latter is one of the fecund figures to come upon the legal stage in this century. Not only has privacy emerged as a new tort and the central value in the fourth amendment, it has become a constitutional rubric in its own right and serves as the verbal marker separating protected procreational and sexual freedom from the legitimate regulatory sphere of the states.

What intrigues me is that neither of these basic terms in American legal thought, neither the notion of trespass nor that of privacy, has a counterpart in Russian. In order to capture the idea of trespass, the Soviet translators must resort to the circumlocution "violate possession."<sup>37</sup> It is difficult to know whether this insipid formula captures the special charge loaded into the notion of trespass. Would a Russian-speaking judge classify the slightest physical intrusion as a violation of possession, as common law judges are quick to see a trespass? Whatever particular speakers of Russian might say in response to a questionnaire, it is clear that the absence of an analogue to trespass gives them a different orientation to the problem. In thinking about whether a spike microphone or an influx of light rays constitutes the violation of possession, they are not likely to have the sense that some very fundamental tradition of affirming and protecting boundaries is at stake.

When it comes to the concept of privacy, the gap between English and Russian speakers is even greater than in the contexts already discussed. In order to talk about privacy as the foundation of the fourth amendment, the Soviet translators must transliterate "privacy" as *prajvesi* and use it without translation. "Ah! I knew it," we are quick to respond; "That is because there is no privacy in the Soviet Union." I am afraid the matter is not so simple. The Russian language has the panoply of terms necessary to talk about freedom and human dignity, but the concept of privacy remains a gap. The issue is not political. It is deeper than transient patterns of surveillance and repression. The problem lies in the very language used to talk about politics. The only way Soviet lawyers and citizens can talk about privacy—whether they have it or not—is to use the English word. This is true not only of Russian speaking people in the Soviet Union, but of emigres to the United States who adhere to their native language.

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37. A. MISHIN & V. VLASIKHIN, *supra* note 27, at 210 (*narushat' valdenie*).

I have referred to four problems of translations from English to Russian, four concepts that signal particularities of the English legal language. It is worth reflecting again on these four terms and considering the differences among them. "Reasonableness" is different from the other three terms, for its counterpart in Russian is used widely in daily speech. The Russian term does not carry the same legal liturgical force, and therefore lawyers resist using it. Significantly, what is true in this regard about the Russian language and Soviet law applies as well to German, French and indeed, so far as I know, to all the continental European languages. I would not assert that the term "reasonableness" could not acquire the force in these languages that it has in English legal discourse. As a matter of practice, however, English distinguished itself as the language that has made reasonableness a legal term of art.

"Probable cause" resists translation both into daily speech and the legal language. The translation into other European languages would resemble the Russian phrase "sufficient foundation." The reason for this concurrence in the civil law languages is that they share a rejection of the system of legal proofs and its tendency, expressed in the notion of probable cause, to think of evidence in objective, quantitative terms. Evidence for civilians is important so far as it bears on the formation of an *intimate conviction* of truth. As they have a hard time translating our reified conceptions of evidence, we have difficulty rendering in English what they mean by a subjective "intimate conviction" in response to the evidence.

"Trespass" differs from these other terms as a venerable institution of common law thinking. It is surprising that there is no analogous term in Russian or, so far as I know, in other European languages. The most one can do is partially to capture the meaning of the term as "violating" or, as the Germans say, "breaking possession."<sup>38</sup>

The treatment of "privacy" is distinctive, for, as we have seen, the term is not translated at all into Russian. It is simply borrowed bodily into Russian as it is into Japanese.<sup>39</sup> French

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38. The term *Gewahrsamsbruch* has some of the richness of the English term and it plays a similar role in infusing the law of theft with the symbolism of crossing a forbidden boundary. See Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469 (1976).

39. My Japanese colleague, Professor Kato, informs me that both the term "privacy"—used as a borrowing from English—and the European term "right to personality"

and German lawyers rely on an analogue to the term privacy based on the notion of "personality." Called the general right of personality in these languages, this concept has had a history parallel to the emergence of privacy in common law jurisdictions. The major codifications are silent on the general right to personality. The concept developed later after the codes were in place. In German as in American law, the concept plays a central role both in constitutional theory and in the development of tort law. And again in both jurisdictions, the moving force in the development and refinement of the new right has been the discovery of a general principle underlying long-recognized instances of protection, such as securing the use of one's name or picture against unwanted exploitation in advertising. The general right of personality has a reach different from that of privacy, for it lacks the image of spatial separateness suggested by the notion of privacy. One can invoke the German right of personality to explain why entrapment or surreptitious tape recordings should be impermissible, but the notion of personality lends itself less well to explaining the sanctity of one's home. The right of personality is more a right to flourish as a person than it is a right, as Brandeis and Warren said, "to be let alone."<sup>40</sup>

I am advocating an approach to comparative law that takes these linguistic particularities as the starting point for an analysis of our divergent legal cultures. There are differences among the legal systems of the industrial world which are greater than they appear to the functionalist eye. There is little to be gained by ignoring the richness of legal languages. There is admittedly some confirmation in realizing that certain trends cut across doctrinal and political systems. If everyone is inclined to protect tort plaintiffs, or impose pollution controls, we are inclined to believe that we are all doing the right thing. But this functional resemblance, I would argue, remains superficial unless we know the doctrinal depths from which the instances of convergence emanate. The only way to plumb these depths is to recognize linguistic divergence as clues to deeper disagreements of instinct and inclination in reasoning about legal problems.

The implications of this approach for teaching comparative law are far-reaching. We should not make a fetish of the linguis-

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are used in contemporary Japanese law. This leads to difficult and intriguing problems of deciding what the respective boundaries of the two concepts should be.

40. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (quoting T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)).

tic particularities of French, German, Russian, Japanese and the other languages that figure prominently in our comparative teaching. But neither should we be quick, as are the casebooks in use now, to treat foreign concepts as readily translatable into English. The problem of translation should be of highest priority in every course that relies on comparative analysis as a method for expanding our consciousness of the possible in legal thought.

The stress on language raises some philosophical problems of its own. Stressing the liturgical use of language does not account for the way in which this ritualized reliance on stock phrases actually issues in legal decisions. My operating hypothesis, confirmed in part by the attachment of lawyers to their definitions, is that liturgy leads to a special kind of focus on the problem at hand. There is more to be done, however, in generating a phenomenological account of the way in which language and argument generates this focus and limits the range of possible decisions.

If the ritualized use of language has a place in the law, it has no role in comparative law as an academic subject. Repeating a theory until it becomes a slogan hardly substitutes for reasoned argument. What we can hope for in the theory of comparative law is fewer methodological slogans and more reasoned debate about what we learn from mastering the details of another legal system.

