It's All Interpretation, All the Way Down, or, the Reason We Call It the “Practice” of Law: With Observations From Two Different Legal Systems

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Abstract:
This article explores one aspect of the philosophy of law; not what it means to refer to “the law” but what it means to discuss the “practice of law.” That practice is identified as a discursive practice, one where a text is applied to a particular factual context, and thus an interpretive practice. However, the type of interpretation involved in the practice of law is not one of translating one verbal formulation of a rule into another verbal formulation, but the act of bridging the gap between the rule and what that rule means here, and now, in a particular case. That fundamental defining characteristic of the practice of law applies to any legal practice, anywhere, not just our own “common law” tradition, as is illustrated by examples from, and observations of, a superficially very different legal system from that of the United States, that different system being that of the People’s Republic of China.
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John Randolph Prince III*

Jurisprudential theory is filled with a bewildering array of theories of law that at times seem to be speaking past each other; positivists of all different stripes, including those who have directed their focus on a school that might be called the “law as interpretation school,” about which more will be said below.1 Another division in jurisprudence is between, for example, what apparently H.L.A. Hart saw as his own “descriptive” theory of law, doing different work than the “justificatory theory” of Ronald Dworkin—while Dworkin rejected the view that there could be this difference.2 In this article, a different perspective on jurisprudence is offered to add to the conversation; that jurisprudential theory must distinguish between a theory of law and a theory of the practice of law; and that latter study is a study of an often-overlooked style of interpretation.

Accordingly, this article is meant as an exploration about the kind of interpretation that is fundamental to anything that could be called the practice of law. This kind of interpretation is fundamental not to just American law, or common law, but to any given body of law, in any legal system. One form of interpretation, one which seems to have stirred up quite a bit of controversy in legal philosophy,3 is to simply elucidate or elaborate on the text. In effect, this form of interpretation replaces or at least supplements one set of words with another purporting to

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1 See notes 24-54 infra and accompanying text.
3 See notes 24-54 infra and accompanying text.
interpret the original text. That process, though of course it takes place sometimes, is not the practice of law, nor is it what the term “interpretation” means when applied to the practice of law. Rather, the practice of law is a discursive one; it is a conversation about what some sort of general principle set forth in a text means in a particular situation. We attempt to determine what a text, or perhaps, a set of texts, mean, and then determine what they mean when applied here, now, in a particular factual context. It is what one legal document from one of the legal systems we will examine, that of the People’s Republic of China, calls “how to concretely apply laws,” a function of the courts.4

This is not a fact peculiar to American law, or Anglo-American law, or the common law. It is a fact about any legal system whatsoever, including one as seemingly different from the American legal system as the law of the People’s Republic of China. In fact, in this article we will explore the Chinese legal system quite a bit, but not to learn more about China. Instead, that exploration can help us see through to the fundamental character of the practice of law, there, here, or anywhere.

I. All Law, In Any Time or Place, is Practiced Case by Case

It is a commonplace among scholars who attempt to describe the particular characteristics of the common law that it is a legal system deeply dependent on precedent. One judge follows another. Thus, even when the ultimate source of a legal rule is statutory, the law becomes what judges interpret that statutory language to mean, and then the way later judges interpret the first judge, on so on. Ronald Dworkin famously compared this to a “chain novel,” a work a group of authors write by passing the novel from author to author, each adding a new chapter or section to the work, with the rule that each chapter or section should follow and build upon the plotline of

preceding chapters or sections.\textsuperscript{5} This precedentially-grounded process is often contrasted to jurisdictions where the law is to be located, first and foremost, in codes. Specifically, the civil code jurisdictions like those found in continental Europe and other nations that have emulated Europe, for example Japan and China. The authors of these codes attempt, legislatively, to state all the basic rules of an area of law and then to organize those rules in an easily located and researched source. These jurisdictions often explicitly reject the “chain novel” concept, abjuring the use of binding precedent or at least being skeptical of relying too much on it.\textsuperscript{6}

Many a law student, when hearing about the alleged distinction just described, has had a sneaking suspicion the differences were more cosmetic than real. After all, that skeptical student would say, the code jurisdictions sound a lot like what they have tried to do with all law what we have done in the Uniform Commercial Code (“UCC”), on which we students spent time in our first year contracts course, and then even more time in a class called something like “Commercial Law.” The UCC states lots of seemingly quite clear rules, but then courts get their hands on them. When the courts try to apply the UCC to the particular and novel factual situations real disputes between people create, then suddenly it becomes a matter of judicial gloss, precedent and interpretation all over again.

The more learned professor might then respond, however, by emphasizing that many code systems do not give precedential value to earlier judicial decisions. Indeed, some explicitly

\footnotesize{\textsuperscript{5} Ronald Dworkin, "Law as Interpretation," A Matter of Principle at 146-167 (1986), \textit{see also} Dworkin, Law's Empire at 228 (1986).  
\textsuperscript{6} \textit{See, e.g.}, Michel Troper & Christophe Grzegorczyk, “Precedent in France,” in Interpreting Precedents: A Comparative Study 103, 115, 117-19 (D. Neil MacCormick & Robert S. Summers eds., 1997)( noting an article of French Law, N.C.P.C. art. 455, that requires courts to explain the reasoning behind their decisions and makes a judicial decision based solely on precedent illegal.)}
ban the reliance on judicial precedent, though exactly what that means is hard to say.\textsuperscript{7} In the continental code system, creating binding precedents is considered law-making, an improper activity for a court.\textsuperscript{8} Thus, one of the supposed differences between civil code and common law jurisdictions is that code systems purport not to recognize judicial precedent as an “independent source of law.”\textsuperscript{9}

It is hard to say, though, what that last term even means: “an independent source of law.” If law means “rules,” it means one thing; it means that precedent is not a source for rules in civil code jurisdictions. However, it is not necessarily the case that common law jurisdictions will go so far as to say that precedent is an “independent” source of law, at least when the judicial precedent consists of statutory interpretation. After all, common law courts will not say that a higher court’s decision is binding even though it contradicts a statute. Rather, that decision is binding because it is considered to be the authoritative explanation of that statute. That is, the binding precedent is not supposed to replace the statute but simply tell us what it means. The precedent, it is not independent of the statute but a way to help us understand that statute better.

On the other hand, if law means the conversation about what duties and obligations to impose on particular people in particular places, the term “source of law” means another thing entirely. In that case, the law is all about how to apply general legal rules to specific factual circumstances, and it means the precedential decision is to be used as one of the texts we will rely on in determining, not what the rules mean, but what they mean here. That is, we ask how this rule fits these facts (and which rules fit these facts); or better yet, how these facts fit the rule

\textsuperscript{7} See note 6, supra.
(and which rules they fit). We could say it is not simply determining what the rules mean that is the interpretive job of a lawyer, but also what the facts before us mean, when judged against those rules. That is a discursive practice, in the sense that what we do when we practice law, and what we are learning to do when we study law, is to engage in the conversation between a text and how it applies in a particular context. Law is a form of discourse, which is “The process of activation of a text by relating it to an appropriate context, in other words, the reader’s or listener’s reconstruction of the writer’s or speaker’s intended message.” As both parties bring values to the text, and the reader’s activation of that text will often involve interpreting that text through the reader’s value and the reader’s beliefs about the writer’s values, discourse will result in “an ideological construct of particular sociopolitical or cultural values.” This discursive practice is what lawyers do, and what law students learn to do.

Furthermore, if by source of law we mean a text engaged in the conversation that leads to the activation of the primary text in a particular factual context, civil code jurisdictions do rely on precedent to help apply the code sections to particular situations. They even have a formal doctrine explaining how to do so—jurisprudence constant, a phrase referring to a line of consistent decisions are considered worthy of respect, and considered helpful as an aid, in construing a code section. For instance, it has been observed that in Germany most appellate

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10 This task should not be confused with the completely different task of figuring out what the facts were; that is, what actually happened. Even when there is no dispute about what happened, there remains a question about how to evaluate these particular facts in light of the generally applicable rule or doctrine.
12 Id. at 18, 118.
13 Id.
14 As one article tried to explain the distinction, “As a general rule, common law systems are bound by a single precedent [i.e., the doctrine stare decisis], whereas most civil law and mixed legal systems require a continuous line of precedents before recognizing a rule of case law which
decisions cite previous opinions, while judicial precedent interpreting statutory law is relied on more than so-called “substantive reasoning” and academic writings. In other words, precedent often slips in, purposefully or not. Indeed, sometimes some reliance on something like *stare decisis* is intentionally introduced into code systems, a process that is currently taking place, for example, in the People’s Republic of China.

Why, though? Precedent is introduced because of the purpose precedent serves; it creates a richer set of texts on which to rely in interpreting the primary text—the code sections in question—as it applies to a particular factual context. It is needed because texts always must be applied, and there is no way to come up with a rule for applying a rule. There is, as it were, a gap between the general and the specific here, and it is in this gap that the practice of law lives. Precedent can be a tool useful to filling that gap, but it must not be misunderstood. It does not supply that aforementioned “rule for applying a rule.” There never can be any such thing. Precedent simply supplies more to consider before we leap the chasm from rule to reality. That is, precedent can provide a very helpful set of texts to consider in trying to actualize the primary courts should follow under a doctrine of *jurisprudence constante.*” Barbara Luppi & Francesco Parisi, “Judicial Creativity and Judicial Errors: An Organizational Perspective,” 61 Journal of Institutional Economics 91, 92 (2010). Of course, most common lawyers would quibble with the description of *stare decisis* just given; it is not just any old single precedent which is binding, of course. Moreover, in many cases, the common lawyer does not deal with any such single binding precedent, such as a relatively clear, seemingly on point United States Supreme Court decision, but must follow a procedure exactly like how these authors described *jurisprudence constant*—the common lawyer tries to derive some principle from a line of cases, which she argues are all in a consistent line that points to the result she hopes to see.


16 See, e.g., Lin, supra note 8, at 225 (“Whereas in the past the issue was whether the doctrine of *stare decisis* should even be considered in China’s judicial reform, now the differences between the participants in the debate mostly center on how much of that doctrine should be adopted. The latest round of debate within the Chinese legal community indicates that there is now a general consensus that at least some court decisions should be treated as binding precedents for lower courts.”)
text in a given context. However, even where we refuse to use precedent, the job of applying that a text to this particular context remains. In any case, filling the gap is the task of the practice of law in any legal system, whatsoever, including those who eschew *stare decisis*.

In the posthumously collected and published set of notes from Ludwig Wittgenstein, edited by Rush Rhees, entitled *Philosophical Grammar*, Wittgenstein noted that

Thinking plus its application proceeds step by step like a calculus.—However many intermediate steps I insert between the thought and its application, each intermediate step always follows the previous one without any intermediate link, and so too the application follows the last intermediate step. It is the same when we want to insert intermediate links between decision and action.… We can’t cross the bridge to the execution until we are there.17

But the practice of law is just that task of crossing the bridge when we find we are there, facing the facts of a particular human situation that, in at least some sense, is unique.

II. The Practice of Law: All Interpretation, All the Way Down

That activity of explanation for a decision and how a particular result is justified in a given case is what this article means by “interpretation.” That act, of applying the general to the specific, and potentially unique, situation before her, is what the judge has to do in explaining a decision in a case before her. Moreover, because that is what a judge does, that is what it means to practice law. Please bear with an explanation.

The practice of law begins with judging—which is a function, not a title. “Judging” is deciding what the law means for *this case*. Judges are not always engaged in this function, as they sometimes do other things as well, and certainly in many systems persons other than judges perform that function. Whoever performs the act, though, that interpretive act (as this article

uses the term “interpretation”) is the fulcrum on which the practice of law is balanced, and it is an act with profound impact on human lives.

The practice of law then mirrors this judicial function in at least three different ways.

First, lawyers attempt to put themselves in the place of judges and predict what judges would decide to do in a particular case. This is the function of the classic “office memorandum” of first-year legal writing fame (but more rarely actually used in paying practice than law schools will admit), and also, to some extent, the function of crafting good pleadings. Second, when they argue cases, lawyers attempt not only to predict what judges will do but to influence what they do. The purpose of a brief or an oral argument is to influence the decision on what the law means for this case, in vehicles as wide-ranging as motions to dismiss or discovery disputes to Supreme Court amicus briefs. Still further, other lawyers who never sign a pleading or question a witness in their entire lives will craft documents intended to avoid situations that they predict a judge would find to be on the wrong side of the law—specific, predictable situations, though of course a wide variety of unpredictable problems may arise, a fact of the human condition for which litigators are grateful. In all cases, lawyers are doing more than quoting or repeating rules—they are interpreting what those rules mean, here, in their client’s situation, or in the possible situations in which their clients may find themselves. In any legal system, it is all interpretation, all the way down.18

However, it is important to reiterate here how the word “interpretation” is being used. It

18 Cf. Stephen Hawking, A Brief History of Time (Bantam Books, 1998): A well-known scientist (some say it was Bertrand Russell) once gave a public lecture on astronomy. He described how the earth orbits around the sun and how the sun, in turn, orbits around the center of a vast collection of stars called our galaxy. At the end of the lecture, a little old lady at the back of the room got up and said: "What you have told us is rubbish. The world is really a flat plate supported on the back of a giant tortoise." The scientist gave a superior smile before replying, "What is the tortoise standing on?" "You're very clever, young man, very clever," said the old lady. "But it's tortoises all the way down!"
is being used to note the fact that no matter how small it may appear, there is always a radical gap between any text which provides a rule and any other text used to enrich its interpretation, and still another gap between those texts and the new, synthesized “rule” and its application to any given fact situation. There is no way, ultimately, to determine if the rule and our application are commensurate, to use Richard Rorty’s term. There are no self-evident ways to apply rules, as we learned from Ludwig Wittgenstein, except from within a given practice or “form of life,” to use Wittgenstein’s phrase (despite its having become a bit overused and cliché). (Oddly, some have used Wittgenstein’s discussion of rules in the Philosophical Investigations to attack the notion that interpretation in the law is an endless process —but this depends on a confusion between understanding a rule and applying it, a misunderstanding of the type of rule following games Wittgenstein discussed, and a different use of the word “interpretation” than this article suggests is the normal use of that term in law, as well as a misunderstanding of what the term “endless” means here as well. But more on that confusion shortly).

Beyond that, though, within this practice, the one with which we are concerned, the practice of law, there are no self-evident ways to apply rules except in cases we would call trivial, even for those who know how to play the game. That is why, after all, lawyers can find employment and lawsuits continue to be filed. However, “[i]n giving up dependence on the concept of an uninterpreted reality. . . we do not relinquish the notion” of finding answers that

19 Richard Rorty, Philosophy and the Mirror of Nature at 316 ( Thirtieth –Anniversary Edition, Princeton University Press 2009)(“ Thus epistemology proceeds on the assumption that all contributions to a given discourse are commensurable,” which means “able to be brought under a set of rules which will tell us how rational agreement can be reached on what would settle the issue on every point where statements seem to conflict.” But “[h]ermeneutics [Rorty’s preferred way forward] is largely a struggle against this assumption.”)


21 See notes 24-54 infra and accompanying text.
are properly called correct. Some interpretations are more or less justified, and some even are so justified that it is fair that, within this practice, that interpretation is the only one that can be considered justified. But this fact does not depend on their being an absolute criterion for evaluating when a rule is properly applied; interpretation cannot be reduced to a certain foundation.

III. Following a Rule is Interpreting That Rule

As previously mentioned, some disputes in recent years in legal philosophy that have focused on the difference between “interpretation” and “following a rule” oppose the one practice to the other. One side of the divide, the interpretivist insists that all interpretation “begins and ends” with “the assumption or specification of an intention without which there would be no text . . . .” The other side, sometimes referred to as “positivists,” argue that “interpretivism,” is a view that “the application of a [verbal] rule always requires its translation into another [verbal] rule, which is an obvious absurdity.” This would be an absurdity because “if every rule needs an interpretation to be followed, the interpretation also needs and

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23 See Rorty, supra note 19, at 316) where Rorty explains his “notion of interpretation suggests that coming to understand is more like getting acquainted with a person than like following a demonstration. In both cases we play back and forth between guesses about how to characterize particular statements or other events, and guesses about the point of the whole situation, until gradually we feel at ease with what was hitherto strange.”
24 See note 15, supra, and accompanying text.
25 A position associated with persons like Stanley Fish, Drucilla Cornell, and others.
interpretation and we will never get to the action.” 29 That is, they appear to fear infinite regress. As discussed below, though, both sides of this divide have missed the point of the actual interpretive practice that is the practice of law, the activity of bridging the gap between general formulations and particular concrete decisions.

Some of these “positivists,” rather ironically, have relied on the work of Ludwig Wittgenstein in the Philosophical Investigations30 to support their argument that rules “often [can] be simply understood, and then applied, without the mediation of interpretative hypotheses about the rules’ purposes,” a statement that might be true but is beside the point when evaluating interpretation in the law.31 There must be something misguided about those who attack the notion that following a rule requires an act of interpreting that rule by relying on Wittgenstein’s arguments when one of Wittgenstein’s goals was to attack the notion that all future applications of a rule are or ever could be determined in the rule’s initial formulation.32 As Rorty pointed out, Wittgenstein was among those “in our time” who “hammer away at the holistic point that words take their meanings from other words rather than by virtue of their representative character, and the corollary that vocabularies acquire their privileges from the men who use them rather than from their transparency to the real.”33

The problem with the anti-interpretivist use of Wittgenstein arises from a failure to focus carefully on how we actually are using words, and what we are actually trying to talk about. Part of the problem, specifically, is some equivocation in the use of the term “rule.” The “anti-interpretivists” quoted in the paragraph before the previous one appear to have an oddly non-

30 Hopefully, the reason for the adverb “ironically” will become clear in a few paragraphs.
31 Marmor, supra note 28, at 154.
32 Philosophical Investigations, supra note 20, at §230.
33 Rorty, supra note 19, at 368.
legal use of the word “rule” in mind. They refer, frequently, sections 198-201 of the

*Philosophical Investigations*—in fact, they often cite that work and that particular section of

the work. But Wittgenstein was speaking of rules in very specific types of what he

famously called “language-games”—specifically, debates in the philosophy of mathematics and

epistemology. and such confusion of different language-games and how they are played was, in

Wittgenstein’s own view, one of the primary sources for philosophical bewilderment and

confusion. Thus, the example of “following a rule” Wittgenstein himself used in the anti-

interpretivist’s favorite section, was one in which a student is asked to continue forward with a

mathematical series after watching the teacher do the first part of the series.

It is worth looking at what Wittgenstein actually wrote. Wittgenstein begins his

exposition about rules by introducing an example: “… we get [a] pupil to continue a series (say

‘+ 2’) beyond 1000—and he writes 1000, 1004, 1008, 1012.” What do we do, and what does it

mean, when the student, upon being corrected, answers “But I did go on in the same way’?”

After discussing how to deal with the student for several sections, Wittgenstein wrote, in section

201, the section the anti-interpretivists will quote: “This was our paradox: no course of action

could be determined by a rule, because every course of action can be made out to accord with the

rule. The answer was: if everything can be made out to accord with the rule, then it can also be

made out to conflict with it. And so there would be neither accord nor conflict here.” This has

led to a great deal of heated debate over exactly where Wittgenstein was heading with this

34 *Philosophical Investigations, supra* note 20. The broader discussion of following a rule is

found in sections 185 to 242.

35 See, e.g., Marmor, supra note 28, at 151.

36 *Philosophical Investigations, supra* note 20, §§ 116-117.

37 *Id.* at § 201.

38 *Philosophical Investigations, supra* note 20, at § 185.

39 *Philosophical Investigations, supra* note 20, at § 201.
observation, but one thing is clear. Wittgenstein was contrasting the reasoning process of interpretation with the practical activity of actually following a rule. This is all well and good, but it has nothing to do with the anti-interpretivist stance that the judge can “follow” the rule by “understanding” it without mediation.

Wittgenstein would reject any attempt to conflate following a rule with understanding its meaning, as if the meaning of a rule is prior to its uses, with a meaning that somehow encloses all events to which it might be applied, as shown by his attack on the idea that the meaning of a word can be grasped, “as it were, in a flash.” Indeed, like many after him who find him an inspiration, Wittgenstein should be read as finding the notion of meanings as independent “Platonic” entities as confused and unhelpful. Rather, as the meaning of a word, including the words of a rule, depends on its use in a language, the meaning of a rule is part of an ongoing social practice.

As one commentator explained,

a rule, on the concept of it emerging from Wittgenstein's later work, is not completely reducible to its linguistic formulation; . . . For Wittgenstein, a rule is nothing like a general unchangeable formula to be put into effect squarely and plainly, a linguistic formula whose meaning is determined entirely by its constituent words, as legal positivists [i.e., what this article is calling the “anti-interpretivists”] argue. It is rather a stratified complex of uses and applications, always under construction (or potentially so), fluid and ever changing with slight but constant improvement, such as enable the rule to accommodate particular circumstances not initially provided for in the general statement.”

40 See, as an example of this controversy, the so-called “Kripkenstein” discussion, originating with Saul Kripsky’s skeptical reading of Wittgenstein’s rule-following arguments, which he acknowledged may have not been Wittgenstein’s own, and the heated responses thereto. Saul Kripke, Wittgenstein on Rules and Private Language (1982); John McDowell, “Wittgenstein on Following a Rule,” 58 Synthese 4 (1984).
Philosophical Investigations, supra note 20, at §190.
43 See Bertea, supra note 27, at 26-27.
Part of the point of the current article is to supplement the last sentence quoted by observing that the “general statement” of a rule contemplates virtually none of the particular cases to which the rule must apply, and that this process of adjustment occurs in every case.

Wittgenstein’s discussion of rule-following in the *Philosophical Investigations* was extended and it appears many have not read it in light of its close connection to a broader point, Wittgenstein's investigation into the notion of “meaning” of words. The connections may be easier to see in another work published posthumously from his notes, *Philosophical Grammar*. These points illustrate the main reason it was, for Wittgenstein, worth spending so much time talking about following rules. When he questioned the notion that the best way to understand a rule was to restate it in new words— that is, give another rule— he was questioning a more generally applicable point, that there is some entity existing before the mind that is the “meaning” of the rule against which we can compare it—that is, the view that “the meaning [of a word exists] as something which comes before our minds when we hear a word.” Thus, he wrote:

> But an interpretation is something that is given in signs. It is this interpretation as opposed to a different one (running differently). So if one were to say ‘Any sentence still stands in need of an interpretation’ that would mean: no sentence can be understood without a rider.

But what is said of “interpretation” there can be extended to the notion of meaning, generally—the “meaning” of a word or a sentence is not to be viewed as some ghostly mental or ideal presence that co-exists with that word or sentence:

> But I might also say: the meaning of the word is what the explanation of the meaning explains. . . Our proposition ‘meaning is what an explanation of meaning explains’ could also be interpreted in the following way: let’s only bother about

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45 Id. at § 75 (italics in original).
46 *Philosophical Grammar, supra* note 17, at § 9.
what’s called the explanation of meaning, and let’s not bother about meaning in any other sense.⁴⁷

Thus, “[o]ne can say that meaning drops out of language; because what a proposition means is told by yet another proposition”⁴⁸ when and if they meaning needs to be explained; otherwise “[t]he use of a word in the language is its meaning” in the way “this use meshes with our life.”⁴⁹

If the meaning of our language is in its use in our form of life, that is, in the particular ways in which we interact and create our world together, then surely the meaning of a rule about how to behave in this socially created world is in how it is used to evaluate and guide behavior. In turn, that means that what it means to interpret a rule is to know how to use it here, and now, in a particular place and time. Each different place and time is a new use, simply because it is a new place and time.

What makes Wittgenstein so much more subtle a thinker than most of his interpreters, though, is that while he wrote aphoristically his thought cannot be reduced to slogans, like “meaning is use.” He understood that we can use meaning in different ways, which means we can use “interpretation” in different ways, too. To interpret a rule may mean to explain it when the meaning is unclear, but to follow it is something quite different. On the other hand, to interpret what a rule means in a particular case is something else quite different again; and when applying the rule to a particular case is expected to include a justification of that application, then we are always being asked to “explain the meaning” of the rule, as it applies here and now. This last, of course, is exactly what it means to be engaged in the discourse of law.

Putting aside what Wittgenstein’s point of the discussion on a student following a rule to create a mathematical series even was in the sections of the Investigations so often cited, note

⁴⁷ Id. at §§ 23, 32.
⁴⁸ Id. at § 3.
⁴⁹ Id. at §§ 3, 29 (italics added).
that this is not an activity analogous to what we are doing when we “interpret” the law. He
posed the case of asking her to follow the rule, to obtain results. What would the analogue to
that use of the term “rule” be, for instance, in basketball, and how could we compare interpreting
a rule and following it? We should not confuse the basketball player’s ability to follow a rule
(that is like the student who “goes on with a mathematical series”) and a referee’s job of
applying the rule—and later, justifying what he or she did. It is the referee who is engaged in the
sort of interpretation that the lawyer and judge must do, not the player.

One of the rules of basketball, or rather one set of rules in basketball, define what counts
as “charging”—an offensive foul—and what counts as “blocking”—a foul that a defender
commits. To summarize the rules, “A defensive player is permitted to establish a legal guarding
position in the path of a dribbler regardless of his speed and distance [but, on the other hand, a]
defensive player is not permitted to move into the path of an offensive player once he has started
his shooting motion.”

The actual rules, of course, specify more detail—provide further textual “interpretation”
—of the basic rules, but as the text describes, what they “mean” is never capable of being fully
specified:
“A defensive player is permitted to establish a legal guarding position in the path of a dribbler
regardless of his speed and distance.
A defensive player is not permitted to move into the path of an offensive player once he has
started his shooting motion.
A defensive player must allow a moving player the distance to stop or change direction when the
offensive player receives a pass outside the lower defensive box.
A defensive player must allow an alighted player the distance to land and then stop or change
direction when the offensive player is outside the lower defensive box.
A defensive player is permitted to establish a legal guarding position in the path of an offensive
player who receives a pass inside the lower defensive box regardless of his speed and distance.
A defensive player must allow an alighted player who receives a pass the space to land when the
offensive player is inside the lower defensive box.
A defensive player must allow a moving offensive player without the ball the distance to stop or
change direction.
The speed of the offensive player will determine the amount of distance a defensive player must
What does it mean to “follow” this rule? That seems to be a question directed towards a player. That is, how should a player model his or her behavior to both succeed in the task at hand, defending another player or shooting or driving with the ball, and avoid being called for a foul? Referees do not “follow” rules, they apply them to individual events, and it is not always easy to do; indeed, it is sometimes controversial in how they do so.51

When a referee applies a rule, he or she implicitly suggests an interpretation of how that rule fits those facts; but maybe we do not want to rely on implicit suggestions and unspoken intentions and purposes, given the notoriety of such things in modern philosophical discourse. But what happens when the referee is asked to explain that application of the rule and justify his decision?

The explanation may refer to different portions of the rules related to this event and draw comparisons, but it is the referee who decides what comparisons to make and how they fit. The explanation may refer to commentary about the rules, but the referee decides what the commentary means for the situation at hand. The explanation may refer to previous decisions in

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similar situations and the desire to “call a consistent game”—that is, to basketball’s own *stare decisis*—but again, the referee must decide what counts as “similar.” Now, notice one thing; there may be a great deal of dispute about the referee’s interpretation of the rule, but no one criticizes him for engaging in an act of “infinite regress.” He certainly “gets to the action,” and does so almost instantly.

The more accurate description of what referees do when they interpret a rule has very little to do with substituting a new verbal formulation for an old one. Every rule does need an interpretation to be followed; the act of following the rule is an interpretation of it. The interpretation given is in this form: “Given the rule X, and all the other related texts (other rules, commentaries about X, other attempts to apply X in situations I choose to call similar), and given the facts here, I say X applies *this way, here.*” Providing the interpretation for this case is the action in this case; but the next case will require a new interpretation because it is the next case, and not the same one. Interpretation of the rule for any given case does not supply the result for another case, no matter how similar. At the very least, the decision to count the cases as indistinguishably similar in all material respects is required, and that decision is an act of interpretation.

In other words, in law at least, interpretation is not simply “another formulation of the rule, substituting one rule for another.” It is saying, ultimately, what this rule means in *this particular* case, with these facts. For this case, interpretation ends with a decision, and infinite regress is not something to be found. Still, though, the process of further interpretation awaits us when the next case arises.

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52 *Cf.* Endicott, *supra* note 29.
53 Marmor, *supra* note 28, at 151. That might be an adequate description of some sorts of interpretation, though it may be a caricature that applies to nothing at all. As the text points out, though, it certainly cannot be describing legal interpretation.
Now, just as this article's account of the centrality of interpretation rejects the anti-interpretivist stance, it also is not intended to endorse the so-called “interpretivist” position associated with, for example, Stanley Fish. The “anti-interpretivist” criticism is that the position Fish and others at least at times take seems to simply invite constantly restating a rule in different words, *ad infinitum*. The point here, in this article, is that we need to use the term “interpretation” differently, the way it is actually used in practice. To interpret a rule is not to restate it. Rather, to interpret a rule is to apply it to this particular set of circumstances, and then, perhaps, to explain why we found it applied that way.

In the dispute between those who argue that it is always possible or even unavoidable to ask, “But what does that rule mean?” and those who are horrified at the possibility of infinite regress, thus arguing that interpretation must be “kept in its place,”54 both seem to be missing the point of what goes on in the practice of law. Of course no one disagrees that interpretation of rules is part of the process of determining what the law is, and most would agree a big part. The disagreement is just over whether that process comes to an end at some point.

The point here, though, is a different one; without taking sides on the question of whether the *type* of interpretation this dispute has in mind ever ends, the point here is that another, more fundamental type of interpretation, deciding what the facts mean and what the rules require *in this case* is what makes up the practice of law. This more fundamental interpretation ends, in one sense, in every case, when a result is reached; and never ends, in another sense, as there is always the next case, and always the next prediction a lawyer must make about a potential case she envisions arising. This is a discursive practice, in which texts as given, ranging from statutes and codes through prior judicial decisions and even authoritative commentary on principles, are

54 See, Endicott, *supra* note 29 at 465.
activated in a particular factual context. In this discourse, there is always an element of interpretive decision required to bridge the gap between text and context. We are not, in any given case, simply asking what a given rule means; we are asking what it means for this set of facts. It might even be better to say, we ask what these facts “mean.”

IV. **The Interpretation of “Interpretation”**

As we can see in the way the word is being used in this debate over “interpretivism” in jurisprudence, the very word “interpretation” requires its own interpretation. The term seems to be used rather recklessly, without much thought to the implications of its use, and this can cause confused thinking. It is used recklessly in all sorts of different legal discussions, without care for what it means.

For example, certainly it is the case that the disputes concerning who and what has the power to “interpret” the law in China show some of this confusion—though of course, a lot of that might be considered the confusion of those who have translated Chinese legal documents into English. In the 1981 Resolution on Strengthening the Legal Interpretation of Laws (hereinafter, the “1981 Resolution”), the National People’s Congress delegated the power of “statutory interpretation” to the Supreme People's Court and the Supreme People's Procuratorate, something like the Office of the Attorney General in the United States, but this delegation itself shows that the theory is that “interpretation” is, in the first place, a function of the National People’s Congress. These interpretations are supposed to be binding on the lower courts and

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55 The characters translated as “interpretation” are 解释, or, in Pinyin, jiě shì.
56 The Resolution on Strengthening the Legal Interpretation of Laws (the "1981 Resolution"), passed by the Standing Committee of the Fifth National People's Congress as an amendment to the 1955 Standing Committee Resolution on the Interpretation of the Law, Item 1; and PRC Constitution, Arts. 62 and 67.
This function is to “clarify” and “strengthen” laws “without altering their original meanings.”

The 1981 Resolution uses a set of characters (解 释), expressed in Pinyin as jiě shì, that can be, and usually are, translated as “interpretation,” but which could just as easily be translated as “explanation” or “resolution.” The two zi (characters) separately viewed mean “to solve or analyze” and “to release or liberate,” respectively. The characters are used in noting that various departments of government were continually posing questions requiring statutory “interpretation”—that is, “explanation.” This use of the term “interpret” means, of course, both a verbal re-formulation of the “rule” found in the statute or code section, and a set of subsidiary rules that give guidance on particular examples. This is the same task that, for example, administrative agencies will perform in providing their interpretations of the statutes they help to enforce, such as where the Equal Employment Opportunity Commission gives enforcement guidance on applying the general principles found in the equal employment statutes it enforces in documents such as its Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions. However, in the 1981 Resolution it recognizes that the work of the judiciary requires it to “concretely apply” the law in cases before it—a different task entirely. It is this latter task that is the irreducible element in the practice of law.

Now, in the United States courts, the EEOC’s interpretation, though due deference, is not binding on the courts, but even if it were, the courts still would need to interpret the statute in the sense mentioned in the 1981 Resolution—they would need to “concretely apply” the statute.

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57 52 Item 2, the Resolution; Organic Law of the People's Courts of the PRC, as revised by the NPC Standing Committee on 9 February 1983, Arts. 32 and 33, at 277.
58 Id. at 278.
59 The author again thanks Mr. He for his assistance, see supra note 1.
60 EEOC Notice No. 915.002.
including the extra verbiage and caveats added to it by agency interpretive guidance, to particular facts and cases.

The exact way in which precedent is to function in the Chinese system is hotly debated. 61 That debate, however, as significant as it is in helping determine what texts the lawyer must interpret as part of the task of actualizing the body of texts in a given context, does not affect the fundamental character of judging and lawyering, which is that some texts, whatever they are, must be applied here and now. Indeed, the role that was originally set out in the 1981 Resolution tips off the different ways in which the word “interpretation” can be used — the courts’ roles were there limited to “only” providing interpretations arising from application of the law to concrete cases.62 Thus, as one legal academic in China has noted, whatever you call it, “when courts and judges apply statutes to particular cases, they are also interpreting laws [and] making rules for effective application of the statutes for the future.”63

Unfortunately for clarity of thinking about the practice of law, this dispute about the extent of precedent gets confused with the extent of judicial interpretive power; and that same confusion is exacerbated by the discussion of the power of statutory interpretation as divided between three organs—the National People’s Congress, a legislative body; the Supreme People’s Court, a judicial body, and the Procurator, seemingly an executive body. That is, the division of powers is very interesting, and whether it really works as advertised or really works at all is even more interesting. However, the power to “interpret” statutes is not, in the last analysis, interpretation in the sense that makes law “the law” and not simply a list of verbal commands.

61 See, e.g., Lin, supra note 8, 225-235 (2003).
62 See the 1981 Resolution.
The power to interpret statutes to which the Resolution refers is functionally like the power to promulgate regulations that fills in the gaps of broad legislation, as Rule 10b-5 filled in the gaps in the Securities and Exchange Act of 1934. It ought not be controversial to note this sort of “interpretation’ is simply another act of legislation. One set of rules, intended to shape future behavior, is supplemented by another set of rules intended to do the same. Interpretation in the sense that creates the law arises in a particular case, in a particular situation.

This is an important point—oddly enough, though legislation creates laws and legislators are those who write laws, but the act of legislation is not the practice of law. We tend, rather, to think of the practice of law as something associated with courts. Now, what makes law a practice is closely connected, as a matter of empirical fact, to courts, and what they do, but it is not just courts that practice law, and just because a court does it will not make what the judge does law either. Again, the legal system in China is illustrative. As already noted, the National People’s Congress has the function of supervising the enforcement of the Constitution, which function is perceived to include providing interpretation of Constitutional provisions. The Congress has not done much of this work, though, which thus, according to one commentator, “left the Court the power to construe laws, with or without the presence of lawsuits,” making the Court “almost exclusively as law interpreting authorities rather than determiners of litigants’ rights.”

That is a great deal of power for the Supreme People’s Court, a power its judges may well enjoy having. Construing law without lawsuits, though, is ultimately another form of legislation, because it is truly just replacing one statement of a rule with another, new rule. That

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64 Organic Law of the People's Courts of the PRC, as revised by the NPC Standing Committee on 9 February 1983, Arts. 32 and 33.
legislation may operate within constraints (i.e., being “true” to the original legislation) but most 
legislation as such constraints (i.e., being “true” to constitutional limitations. No matter how 
much of it any official body does, it is not the same thing as judging. To be a judge is to interpret 
the text or texts that we call the law to decide what that text means in a particular factual 
context—in a real dispute—and give the text life in that situation. Someone wins, someone 
loses, and the law does what law is supposed to do, controlling the outcome of disputes over 
people’s behavior.

V. Learning Laws is not Learning the Law: or, Thinking Like a Lawyer

Now, though, it is time to return to the more practical discussion of the practice of law as 
a discursive activity, in which we try to “activate” various texts in particular factual contexts. In 
the earlier discussion of that activity, quite a bit of time was spent discussing why legal systems, 
whether they explicitly adopt stare decisis or shun it, tend to rely on precedent as an interpretive 
tool. The point of that discussion was not to argue that all legal systems rely on precedent (if that 
is true, it is only accidentally so, not necessarily so) but that all legal systems are engaged in the 
difficult task of legal discourse. Practicing and learning the law is not about learning rules; it is 
about applying them to this case, and in performing that task we can use all the help we can get.

Of course, the requirement that codes require significant interpretations and thus could 
use a richer set of texts to help provide interpretive material than simply the written code itself 
could simply be ascribed to the way they are written. As one commentator put it, “Codes can be 
notoriously vague - the French tort provisions are the favorite example of teachers of 
comparative law - requiring extensive judicial elaboration.”66 But again, this vagueness is 
probably inevitable; “Codes must also be, by definition, sufficiently general to handle a variety 

of unforeseen circumstances (‘feconde en ses consequences,’ as the French put it).”\textsuperscript{67} The two statements may not be intensionally synonymous but extensionally so-- one person's “vagueness” is another's “generality.” But what if there were codes that were much more specific, just hundreds and even thousands of carefully organized and outlined code sections with subsection and still more subsections? No matter how specific the particular code sections were, there would still be some space between the rule and its application. Any rule that is not purely \textit{ad hoc} is more general than any specific situation to which it is applied, and there is always that little gap between rule and application that provides the practice of law its living space.

Perhaps the point can be seen more clearly if we approach from yet another angle. Several years ago, while the author was teaching first-year students in an American law school, one of his students approached him during office hours, one day in late November. The student looked very concerned. She asked, earnestly, when she and her classmates would begin to learn the law. My response was puzzlement, and I asked what she meant. She explained that for months, she had been reading all these judicial decisions (of course, she called them “cases”), but what she wanted to know was when she would start learning the law.

It took a while, but eventually I realized she wanted to know when she would start to read and memorize something like statutes or codes. Of course, as a properly indoctrinated common lawyer, I explained that much of our law, especially the law studied in first year, arose more or less entirely through judicial decision-making independent of legislative involvement. Furthermore, I explained, even statutes required explanation and interpretation through such judicial decision-making, and that then the judicial gloss on the statute was as much the law as the original statute, if not more so. I actually contrasted this procedure with the continental civil

\textsuperscript{67} \textit{Id.}
law, or “code,” tradition.

But perhaps this student had a point. She might well have been operating on a definition of “law” that was not unlike that readily found in any dictionary, which sure sounds like a synonym for “rules you can memorize.” For example, one dictionary definition states that law is “the system of rules that a particular country or community recognizes as regulating the actions of its members and may enforce by the imposition of penalties.”  

Similarly, another frequently cited dictionary defines law as,

1. a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority
2. the whole body of such customs, practices, or rules. . . .

The Austinian definition of law, which certainly has been the dominant one for quite some time, defined law as a "command" issued by one political superior to a political inferior or subordinate, with a sanction attached in the event of failure to obey or abide by the "command." Dr. Arthur Goodhart, Master of University College, Oxford University, Professor of Jurisprudence defined law "a body of rules recognized as binding within an organized society." Of course, there remains a group of holdouts for “natural law” or the like, but they seem only to arguing for some yardstick against which to evaluate those commands.

Whatever variation there is, though, it is a variation on the same theme, that law is a set

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of rules. That would naturally lead to the belief that to study law is to learn rules, and then to practice law is to know those rules. But of course, knowing something is not normally considered practicing it. First, whether these rules are derived from precedent (and then taught to us in hornbooks that read much like a code) or directly from a code, there are way too many of them to memorize. But more importantly, what difference would it make if someone could learn all those rules? Not much, surely. Simply knowing a rule is not practicing law. Practicing law is, always, figuring out what rule or rules apply to a particular situation, and even more fundamentally, what that rule means in that situation.

In any case, this student left my office slightly mollified, but both of us probably also were thinking that if we were in a “code” law jurisdiction, like the civil code countries of Europe (also Japan and, critically for the remainder of this article, China), we would be doing things quite differently. Now, though, I am not sure that would be true. Irrespective of whether stare decisis is a foundational principle or precedent is given very little weight, or whether one has the convenience of a codified set of “laws” at hand or must undergo the more elaborate research required to study the common law, when lawyers anywhere talk about “the law” they necessarily cannot be talking about reading rules but about telling stories.

Note the term just used was “the law”—not “laws,” which is a term some use to talk about specific rules and statutes. “The law” is how any set of rules or principles that might be considered authoritative, the rules which could be considered the lawyer’s text, find life in a given context through the discourse of a judicial decision. (Again, “judicial” refers to function, not title—other people besides judges sometimes preform this judicial function, which is, simply, the function of saying what the law means right here, in this case, in this set of circumstances.)

According to one recent commentator, various jurisprudences and legal philosophers like
Larry Alexander, and before him (to a lesser extent) Gregory Kavka and John Rawls emphasized that we have law not just to keep others from acting like brutes. Rather, even if we all agree on an appropriate standard of behavior, disputes about the application of that standard to individual cases would be inevitable.\textsuperscript{73}

Thus,

law is a system of rules that pre-empts debate about such topics in everyday life. Legal rules give us guides for action because of their status as law independently of their content, and thus we need not debate the merits of those rules in every instance in order to know how to act.\textsuperscript{74}

But the second part of the quoted language does not address the concerns of the first. Rules do not pre-empt debate about their application to individual cases. We could just as easily say, “even if we all agree on an appropriate legal rule, disputes about the application of that rule to individual cases would be inevitable,” with the words” legal rule” replacing “standard of behavior,” and the questions remain the same. Law, as practiced, is not about rules, but about “the application of the rules to individual cases.”

In other words, although some would view “law . . . as a practical solution to the problems associated with moral disagreement,”\textsuperscript{75} law as a set of rules still leads to the practical problems associated with interpretive disagreement in particular cases. And that’s why we have lawyers.

This is not a peculiarity of the common law system but an inevitable and fundamental fact about any conceivable legal system. The practice of law is always, everywhere, an


\textsuperscript{74} Id. at 1458.

\textsuperscript{75} Id at 1466.
interpretive activity, predicting, influencing and participating in the act of deciding what some text means in this particular context.

VI. **Practicing the Law on Two Sides of the World**

To use one concrete example of why law is always a particular kind of interpretive activity, in which the general is made concrete, the puzzled American law student, who wanted to know when she would begin to “learn the law,” had a learning experience would not have been particularly different in a so-called code jurisdiction, like that found in continental Europe, or even one so presumptively foreign as that of the People’s Republic of China, which for the sake of convenience will simply be referred to as China hereinafter. China has a self-proclaimed “socialist legal system.” That system, moreover, was built on a foundation of millennia of indigenous legal history and when adopting foreign models, the system opted to model itself on the continental codes and not the common law tradition. It could not seem more different than, say, the system in the United States of America.

Yet the similarities are as noticeable as the differences. I have now had the opportunity to teach a course intended to introduce Chinese students to the basic principles of law. This course has been offered to these students at a university formed in partnership between a local Chinese university in Zhejiang Province and an American university. This university by definition emphasizes globalization and the interrelatedness of knowledge-- even knowledge of something that can seem so parochial as the law. China is a code jurisdiction, and since most of its current

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codes (e.g., the Contract Law of the Peoples' Republic of China, the Tort Law of the People's Republic of China) were enacted on the last decade or less, China has had a chance to borrow from the most successful legal systems around the world when drafting those codes. To teach a class introducing the principles of law to Chinese students, much of the time the course should be focused on these codes.

This was a task to be faced with trepidation, given the apparent difference in the sources and nature of Chinese law from that of the United States. The Chinese legal tradition traces back to at least the Xia Dynasty, beginning in 2070 B.C.E. During the Xia era, the Chinese legal system began to develop from the Shan Huang & Wu Di Dynasties. The tradition was based on a set of rules of etiquette that became behavioral norms, called li, for the state as a whole. The related concept of xing, or “punishment,” also arose during this time to provide sanctions for violations of li. Li and xing developed into the combination of li and fa (law) during the imperial period, he more than two thousand years that passed from the beginning of the Qin Dynasty (221 B.C.E) to the fall of the Qing Dynasty and the creation of the Republic (1911 C.E.). The law increasingly was codified and these codes were themselves the primary source of law.

In 1911, when the Chinese Republic replaced the Empire, it adopted and adapted legal codes modeled after the European civil codes of nations like Germany (and like the code already adopted by Japan during its Meiji Restoration). When the Revolution led to the People’s

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78 Xin Chunying, Chinese Legal System and Current Legal Reform 2, 310 (Law Press 1999).
Republic of China being created in 1949, China adopted Soviet-style socialism and annulled all laws enacted by the Nationalist government before 1949 and attempted to replace them with "the people's laws" to be enacted thereafter. This effort did not get very far, and in fact during the era of the Cultural Revolution some would say China was essentially lawless.\footnote{Laszlo Ladany, Law and Legality in China, the Testament of a China-watcher 52 (Univ. of Hawaii Press 1992).} Since Mao Zedong’s death in 1976, however, economic and legal changes in China have been rapid, almost breathtakingly so. In 1982, China rewrote its Constitution, attempting to bring the country back to a society of legality, and it has been amended several times since.\footnote{Xin Chunying, Chinese Legal System and Current Legal Reform 354 (Law Press 1999).}

In summary, the Chinese legal system is the heir to a strain of thought going back thousands of years that is unrelated in any way to Western legal thinking, with an overlay of continental code law, interpreted through the lens of its current, rather unique version of socialist ideology. Thus, if any legal system would seem foreign to a common lawyer, it ought to be that of China.

Despite all these historical differences, it turned out to be surprisingly easy for an American-trained lawyer to use Chinese codes as the primary textual material for a course in Business Law, with only passing references to American law or common law in general, for one simple reason. By and large, the differences are astonishingly small. Even where the two systems have different answers to a question, they ask the same questions. That is, they share their basic terms of discourse. More than this, though, the most fundamental similarity is one that is inevitable, in any robust legal system. In China, just like in common law jurisdictions, it is all interpretation, all the way down.\footnote{See note 18, supra.} Furthermore, as already stated, the inescapability of interpretation is a fundamental feature of any fully formed legal system. Again, as a reminder, this does not mean that the code sections need to be expressed in different verbal formulations;
they need to be applied to concrete factual situations.

To illustrate the inevitability of interpretation, all one needs to do is take a quick look at some selections from the Contract Law of the People’s Republic of China, which the Second Session of the Ninth People’s Congress promulgated on March 15, 1999. To avoid low-hanging fruit, we can pass by such articles of the code as Article 5, “The parties shall abide by the principle of fairness….” and Article 6, “The parties shall abide by the principle of good faith….” Rather, we can turn to meatier, more concrete provisions, like Article 14, the code section which defines what counts as an offer.

The Contract Law of the People’s Republic of China, in effect since 1999, includes three articles in a row that read as if they come from an American contracts law outline; Articles 13 through 15. These articles concern the hoary and fundamental concept of offer and acceptance. As translated into English, they read:

Article 13 Offer-Acceptance
A contract is concluded by the exchange of an offer and an acceptance.

Article 14 Definition of Offer
An offer is a party's manifestation of intention to enter into a contract with the other party, which shall comply with the following:
(i) Its terms are specific and definite;
(ii) It indicates that upon acceptance by the offeree, the offeror will be bound thereby.

Article 15 Invitation to Offer
An invitation to offer is a party's manifestation of intention to invite the other party to make an offer thereto. A delivered price list, announcement of auction, call for tender, prospectus, or commercial advertisement, etc. is an invitation to offer. A commercial advertisement is deemed an offer if its contents meet the requirements of an offer.

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86 Translations, again, with the assistance of Mr. He, see note 2, supra.
87 As in the common law, the Chinese law considers the formation of a contract to require the “exchange of an offer and an acceptance.” (Article 13, PRC Contract Law).
88 PRC Contract Law. Here is a fun game for a graduate of an American law school to play—what cases did you read first year that were selected to illustrate those very same principles?
How hard would it be to learn those code sections? It would not be hard at all. Teaching that code to students in China, young people who are not law students but twenty year old undergraduate sophomores, nearly every one of the 125 students were able to memorize every word quoted with no trouble and without even being asked or encouraged in any way to do so. Those students hoped, apparently, that when tested, they would be asked to identify somehow, on a short answer or multiple choice test, the definition of offer and acceptance.

That is not how their test looked, though. Instead, they read a story about how the CEO of an American clothing retailer, on a trip to Hong Kong, saw an advertisement on the side of a bus for an exhibition about Bruce Lee’s life then on display at the Hong Kong Heritage Museum. That advertisement used a design with three silhouettes of Lee in action. The American then engaged in negotiations with the museum to obtain a license for that design, and further negotiations with a mainland Chinese manufacturer to make T-shirts using that design. The questions the students were asked included questions about when, in these negotiations, the contract was formed; that is, at what stage was an offer and an acceptance exchanged. All the students could quote the rule, but many discovered quoting the rule, even when they believed they really, truly understood each and every word in that rule, was insufficient knowledge to help them apply that rule to the story. They discovered the gap between the general rule and specific events where, as already noted, the practice of law lives.

Of course, the students probably saw all this as an academic exercise, but of course it was not simply that, as there are cases which require courts to determine when an offer and acceptance were made. For example, in Plastech Engineered Products v. Grand Haven Plastics,

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89 The question was inspired by an actual advertisement on a Hong Kong bus.
In 2005, the Court of Appeals of Michigan considered a dispute between Plastech and GHP, both competitor-suppliers to JCI, which produces and supplies molded plastic component for the automotive industry. In 2001, JCI outsourced control of its supply contracts to Plastech, including JCI's purchase orders placed with GHP. When GHP refused to accept new terms and conditions that Plastech imposed, Plastech cancelled all production the orders issued to GHP.

The court considered whether a certain key clause, an integration clause, was part of the parties’ contract, and in so doing wrote as follows:

> the integration clause was contained only in JCI's PO [purchase order], presumably the "acceptance" in this case, and not in GHP's quotation, presumably the "offer." Unlike cases in which the parties' agreement is contained in a single writing, which includes an integration clause to which both parties unquestionably agreed, in this case, it is disputed whether the clause becomes part of the contract.

Based on what it “presumed,” the court continued to evaluate the dispute by applying the Uniform Commercial Code’s “battle of the forms” provision, section 2-207, but note that it failed to explain why it made those presumptions. Why was GHP’s quotation the offer? There was actually a fairly long history of documentary exchanges between the parties. In any event, the court could not and did not simply restate one rule with another verbal formulation, but applied the rule of what counts as an offer to the particular facts of that case. Irrespective of how well it explained its decision, the act of decision was an act of interpretation that ended the discourse.

Both common law and code systems frequently have principles that seem to be vague and open-ended. Common law has the principle that contract contrary to public policy are

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91 Id.
93 Id. at *16-17; the actual Michigan statutory section was MCL 440.2207.
unenforceable, for instance; while a code might impose the duty not to violate “social ethics.”

Moreover, some codes, like the Uniform Commercial Code, are part of a legal system with the common law heritage that relies on judicial precedent as a relevant text to incorporate into the discourse applying the code’s provisions, while other codes, like those in China, exist in a system that has been skeptical of precedent. Yet both types of code can contain very similar provisions, such as the U.C.C.’s requirement that, “Every contract or duty within the Act imposes an obligation of good faith in its performance or enforcement” and the Contract Law of the People’s Republic of China’s statements that, “The parties shall abide by the principle of fairness in prescribing their respective rights and obligations,” and “The parties shall abide by the principle of good faith in exercising their rights and performing their obligations.”

These rules are “the law” according to the traditional definitions of law, but what do they mean in any given case? How does that text actualize in a given context? Those of us from common law jurisdictions are tempted to say that the question means something very different in a system of precedent and stare decisis than in a code system; we tend to believe that our system has a significantly richer set of subsidiary texts on which the interpretive discourse can rely. The number and types of subsidiary texts may be quite different, it is true, but perhaps the discourse in the common law and code jurisdictions is not as different as one might assume.

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95 See, e.g, PRC Contract Law Article 7: “In concluding or performing a contract, the parties shall abide by the relevant laws and administrative regulations, as well as observe social ethics, and may not disrupt social and economic order or harm the public interests.”
96 U.C.C. §1-203.
97 PRC Contract Law, Article 5.
98 PRC Contract Law, Article 6.
In common law jurisdictions, these rather vague statements about “good faith” or “fair dealing” or “contract against public policy” need not be the last statement of the rule. Instead, courts further specify the rule by making judgments about different sets of facts. Over time, courts fill in what it is that the rule that immoral contracts [i.e., those against public policy] are not to be enforced means so that now "any text book can tell you which contracts the law disapproves of."  

Note what counts as a synonym for further specification of a rule— that of which a court disapproves. In China, there are other interpretive aids Article 33 of the Organic Law of the Supreme People's Court gives that court the power to interpret how laws and decrees should apply during a trial—that is, what the law means in concrete application to disputes. In Article 4 of the Various Provisions of the Supreme People’s Court Concerning the Work of Judicial Interpretation, the court has stated that its interpretations have the “force of law” as far as the people’s court under its authority are concerned. These interpretive efforts are published in the Gazette of the Supreme People’s Court, and come in different varieties. First, the Supreme People’s Court selects and publishes illustrative cases from lower courts—in effect, persuasive precedent, unofficially binding on lower courts. The Court also publishes its opinions rendered in response to requests for advice from the lower court, and again are unofficially binding precedent. In addition, China is experimenting with introducing explicitly binding systems of judicial precedent, although that is foreign to the continental code philosophy China adopted.

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99 Bridgeman, supra note 73, at 1458.
100 Organic Law of the People's Courts of the PRC, as revised by the NPC Standing Committee on 9 February 1983.
103 Lin, supra note 8, at 225-235.
in the early twentieth century.\textsuperscript{104}

At the end of the process, we have similar positions—a text book seemingly could tell us the rules in fair specificity, after these authorities have been to work on the rules to create more specificity. But the question still remains, when a particular case comes before a court, or to a lawyer who may need to take it to court, or to a lawyer who needs to advise a client about how to avoid going to court and what negotiating position to take knowing what a court would likely do—what does even the most specific of rules reasonably conceivable have to say about this case? ”For a rule, it may plausibly be said—at least any rule of sufficient generality and definiteness—is nothing if not something that precisely does mandate (or allow, or forbid) determinate courses of action in an indefinite range of cases that its practitioners will never have explicitly considered or prepared for.”\textsuperscript{105} But in what way can the rule “contain” that determinate course of action, unless we subject the rule to interpretation?

Again, another concrete example might help. Take a moment to look at Article 31 of the Contract Law of the People’s Republic of China, which states:

\textbf{Article 31 Acceptance Containing Non-material Changes}

An acceptance containing nonmaterial changes to the terms of the offer is nevertheless valid and the terms thereof prevail as the terms of the contract, unless the offeror timely objects to such changes or the offer indicated that acceptance may not contain any change to the terms thereof.\textsuperscript{106}

Of course, this will look familiar to anyone who has ever had occasion to read the similar language in the Uniform Commercial Code in the United States at § 2-207, which provides in part:

\textbf{Additional terms in acceptance or confirmation.}

\textsuperscript{105} Crispin Wright, draft paper for Boghossian/Horwich Language and Mind seminar, NYU April 9 2002, retrieved from <http://www.nyu.edu/gsas/dept/philo/courses/rules/papers/Wright.pdf>, on April 26, 2014.
\textsuperscript{106} PRC Contract Law.
(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
(a) the offer expressly limits acceptance to the terms of the offer;
(b) they materially alter it; or
(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.107

The two sections are similar, though the American version is a bit more complicated, involving "Byzantine complexities" with “confusing interpretation and construction.”108 As one commentator noted, this discussion of material and nonmaterial alterations was seen to address …the paradigm transaction, [in which] a buyer sends a purchase order (offer) and the seller's response is an acknowledgment form that appears to be an acceptance but contains variant terms in the boilerplate clauses such as a disclaimer of warranty, an arbitration clause or an exclusion of consequential damages.109

Yet even in the paradigm situation, it is hard to say what “material” means. One court, faced with the seller’s response containing a variant, boilerplate term that excluded consequential damages, stated that the exclusion would” materially alter the existing contract” because, as consequential damages are a standard remedy, “[d]efendant's additional terms would operate to prevent plaintiffs from taking advantage of the remedies otherwise available to them under Pennsylvania law.”110 In reaching that decision, it cited precedent to the effect that material alterations do not become part of the contract automatically, but the precedent had little if any effect on the result reached. Rather, the court’s interpretive technique for deciding this change

107 Uniform Commercial Code. §2-207.
109 Murray, at 2-3.
was “material” was predicated on the fact that it deprived a party of an otherwise standard remedy. The court cited no authority other than, apparently, its own sense of what “material” means (something like significant or important) to explain why that characteristic of the change was equivalent to materiality. The use of precedent was not the point of the decision, but the decision itself, to find the deprivation of standard remedies to be material.

One could, of course, characterize that decision as adding a new verbal formulation to the previous one—just as “material” terms are not added automatically, from now on “terms that deprive a party of an otherwise standard remedy” are not either. But other decisions on that same UCC section show that what counts as “material” cannot always be determined by yet another “verbal formulation.” For instance, in the decision discussed above, Plastech Engineered Products v. Grand Haven Plastics, Inc.,111 the Court of Appeals of Michigan showed how very big the gap between any rule’s verbal formulation and its application to a particular factual context can be. Recall that a critical issue in that case was whether an integration clause was a part of the parties’ contract. After assuming that the document containing that integration clause was the document that counted as an acceptance of the contract, the court had to decide whether an integration clause was material.

In so doing, it first confessed precedent to be of no help, writing, “[w]e find no Michigan case” on point.112 Finding no decision telling it whether it should count integration clauses as material, the court then fell back on the “verbal reformulation” style of interpretation, noting that “the general rule for determining whether an additional term is a material alteration is whether the alteration ‘results in surprise or hardship if incorporated without the express awareness by

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the other party.’ \textsuperscript{113} That may be a somewhat more specific statement of the rule, but it did not answer the question needed to complete this discursive act—did adding the integration clause result in surprise or hardship to anyone? Rather than answer, the court simply noted that this is a question that “depends on the unique facts of each particular case,” and remanded the matter to the trial court. \textsuperscript{114}

What is the point of the decision, then? The point was that the appellate court felt the rule was not ready for its final interpretation for the case before it; that is to say, the point was that the rule did not yet apply one way or the other. What did the rule about “battling forms” say for that case? Nothing, yet. The job was not yet complete.

One might suspect that code systems, unlike the common law, is more inimical to the notion of judges taking on the active role of interpretation in the sense of figuring out what a rule means in a particular case. The evidence suggests otherwise, however. The Chinese code rather clearly recognizes the need for a significant amount of judicial interpretation, in the sense that term is used in this article, in order to make its legal system flexible enough to respond to the unforeseeable, nearly infinite variations of human interaction. For example, the PRC Contract Law, as translated into English, uses the word “reasonable” thirty-seven different times. \textsuperscript{115} That word is a more than an invitation to judicial discretion, it shouts out a demand for interpretation. One particular example from the Contract Law will suffice. Article 49 discusses contracts formed by persons who have what the Contract Law, like the common law in the United States, calls “apparent authority”:

\begin{quote}
Article 49. Contract by Person with Apparent Agency Authority
\end{quote}

\textsuperscript{113} Id at *15-16, citing American Ins Co v El Paso Pipe & Supply Co, 978 F.2d 1185, 1189 (CA 10, 1992), in turn quoting Official Comment 4 to UCC 2-207.
\textsuperscript{114} Id. at * 17.
\textsuperscript{115} PRC Contract Law.
Where the person lacking agency authority, acting beyond his agency authority, or whose agency authority was extinguished concluded a contract in the name of the principal, if it was reasonable for the other party to believe that the person performing the act had agency authority, such act of agency is valid.116

It is of course possible to rewrite that rule with many different alternative verbal formulations, each specifying some paradigmatic situation which strikes the rule writer as an example of when reliance was reasonable, but no such attempt could capture every situation and every nuance of each situation. The only way to have a rule about apparent agency at all is to have a rule in which judges are invited to decide what facts fit the rule.

One might ask if this need for interpretation only arises in those Chinese code sections that appear to borrow heavily from common law traditions, based on similarity to common law doctrines. A fair question, but the answer in fact is that the same need for interpretation arises in areas of the Chinese law that are fundamentally dissimilar to the common law. One clear example of such a fundamentally different approach is in the way Chinese law treats the ownership and use of the land.

First, as a code jurisdiction, to the extent China borrow from Western law at all, it is the continental civil law, a legal system which does not see property as “real” or “personal” but “immovable,” “movable,” and “land.”117 Second, as a self-professed “socialist legal system,”118 it certainly views property differently, so as China’s Property Rights Law puts it, “During the primary stage of socialism, the State shall adhere to the basic economic system, with public

116 PRC Contract Law Article 49 (emphasis supplied).
ownership playing a dominant role. . ."\(^{119}\) Moreover, this is not just a socialist legal system, but a "socialist legal system with Chinese characteristics."\(^{120}\) China has never been a country with a strong tradition of private ownership, especially of land.\(^{121}\)

In today’s Chinese law, the land either belongs to the State, or to a local collective.\(^{122}\) No private person or company ever has or will own it. What private persons and entities own are land use grants; residential, commercial and industrial, all for a set term of years. In turn, the grant holder may contract with another to grant that other person some limited use of his property for the benefit of the other’s adjoining property\(^{123}\)—what in the common law would be called an easement appurtenant.\(^{124}\) What the common law calls the “servient estate”\(^{125}\) is, in China, called the Land for Easement,\(^{126}\) while what the common law calls the “dominant estate”\(^{127}\) is, in China, called the Land Needing Easement.\(^{128}\) In establishing the rights and duties of these parties, the Property Rights Law of China once again issues an invitation to interpretation in using that ubiquitous word “reasonable”:

\(^{119}\) PRC Property Rights Law Article 3.
\(^{120}\) Jiang Report.
\(^{121}\) The Book of Songs (contains a song named "Bei Shan" (North Mountain which includes a very famous verse: "All land under the heaven belongs to the King, and all people on the earth are the subjects of the King." See Bei Shan, in The Book of Songs (Shi Jing). For an English translation, see Arthur Waley, The Book of Songs: The Ancient Chinese Classic of Poetry (Grove Press 1996). The verse has been widely cited as showing that the traditional Chinese view always has been that a ruler is not only the governor of the people, but also the sole owner of the land of the country. See Zhang Jinfan, Evolution of Chinese Legal Civilization 54 (China University of Politics and Law Press 1999).
\(^{123}\) PRC Property Rights Law Article 156, 157.
\(^{124}\) Black’s Law Dictionary.
\(^{125}\) Black’s Law Dictionary.
\(^{126}\) PRC Property Rights Law Article 156.
\(^{127}\) Black’s Law Dictionary.
\(^{128}\) PRC Property Rights Law Article 156.
Article 160
The easement owner shall make use of the Land for Easement in conformity with the purpose and methods agreed upon in respect of the utilization of the Land for Easement and make reasonable efforts to reduce restriction upon the property rights of the obligee of the Land for Easement. 129

The next section discusses potential losses of the easement for “abuse” of the right. 130 The same Chinese students in a Business Law course who had no trouble learning the rules of offer and acceptance had no problem learning this rule either, though by the time we discussed it in class they were familiar enough with the word “reasonable” for it to elicit groans. As a rule, these students liked math, and numbers, and quantifiable facts, and they had grown to hate the word “reasonable.”

The students were also sophisticated enough, by this time, to realize that the rule’s simplicity did not make it any easier to apply. They had no trouble deciding, for example, that a right of way type easement was being abused if the person on the Land Needing Easement decided to turn his home into a parking lot with dozens of cars passing to and fro each day. When faced with less extreme potential abuses, heated discussions arose over what was a “reasonable effort.” Of course, none of the students were wrong in their views; they were doing exactly what they should be doing, trying to jump the gap between the general rule and various particular (hypothetical) factual situations.

In fact, the students were given a number of factual scenarios taken directly from older judicial decisions gather in the American Law Reports. 131 Was this an inappropriate mixing of legal systems? No, because the decisions were used not for any particular reasoning or results of the American courts, but for the factual situations about which to argue how the Chinese code

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129 PRC Property Rights Law Article 160.
129 PRC Property Rights Law Article 160.
130 PRC Property Rights Law Article 161.
section would apply. Although quite possibly both legal systems would reach the same results—or rather, judges acting within those systems might reach the same results—the key point is this one: Judges in both legal systems would have to bridge the gap between the general statement of the rule concerning reasonable use as opposed to abuse of an easement, and the actual application of that rule to some very particular set of potentially unique facts.

VII. Practice Never Ends

Perhaps, after all of this, the reader may simply infer that it appears China, in adopting a code, made the decision to adopt the sort of open-ended language that invites interpretation, but it could have done better. That skeptical reader might suggest more detail in the code could take care of that “problem.” (The word “problem” appears in quotation marks in recognition of this article’s position; interpretation is no more a problem for law than gravity is for earth-dwellers. What is inevitable should not be viewed as a problem, but simply a feature of the world as it is constructed). The point of this article, however, is that nothing can take away the need for interpretation. All attempts to apply a text in a given factual context are interpretive acts. There is no avoiding the act of interpretation, only a choice in how we do it.

At the end of all this, though, the question might be, so what? What difference does this make, especially given a point that to many might seem obvious? One reason is pedagogical. All legal education, including the sort of legal education given to non-lawyers such as in undergraduate courses like “Business Law,” should be viewed as, on the one hand, a form of training in a practice. It is not simply learning material, but a process of judgment. Lawyers help judges make law, if law is understood as the rules for what restraints and controls society will impose on its members in particular cases. This requires judgment.

This training, though, is a peculiarly intellectual kind, and should, perhaps, be compared
to a form of applied philosophy in the sense that Richard Rorty suggested philosophy be viewed, as a hermeneutic.\textsuperscript{132} Given his distinction between systematic philosophy and edifying philosophy—the former something which we can respect but since the latter is all about “curing” us of the delusion that the systems are the last word on anything—systematic philosophy is hard to engage in for someone who takes Rorty seriously, while edifying philosophy itself is, in a way, parasitic on systematic philosophy.\textsuperscript{133} One way to read Rorty’s views is that philosophy contains two elements—the history of thought, with some sensitivity and appreciation for the contributions of the past, and the current conversation in which we are engaged. In this view, we should not” treat[ ] philosophy as a subject, a Fach, a field of professional inquiry” but rather as a “voice in a conversation.”\textsuperscript{134} If what is left, then, is simply a conversation, and philosophy can be seen as a conversational skill. Its coin is not, ultimately, any particular content, but the reflective skills used to address whatever content arises. What philosophy provides is focus on argumentation, and on what does and does not count as justification in an argument,\textsuperscript{135} including a self-conscious focus on how well we can justify our techniques of justification.

The same is true of law, which thus can be seen as a very concrete form of applied philosophy. The conversational tools of reflective judgment, including the techniques and evolution of justification, apply to something that at bottom, is as much a human creation as any speculative philosophical system, that creation being our “law.” To practice law is not to become intimately familiar with the “law” any more than doing philosophy is simply learning the history of thought. The practice of law is reflective engagement with the content of some set of legal

\textsuperscript{133} Id. at 365-372.
\textsuperscript{134} Id. at 391.
texts—any content, of any sort—justifying particular applications of general principles set forth in those texts or derived from those texts. We often emphasize the interpretive task of deriving those general principles from the texts, especially in our own common law tradition. However, the true practice of law comes at the other end, in bridging the gap from the general principle to particular application. This process can never end, unless and until we give up the entire notion of a general legal system intended to govern and evaluate specific events and actions.