

## François Géný's *libre recherche scientifique* as a Guide for Legal Translation

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### outline

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What attitude would a lawyer adopt when apprised of the scholarly disagreements over the best way to translate the title to Marcel Proust’s masterpiece into English? For nearly half a century, C.K. Scott Moncrieff’s rendering of *À la recherche du temps perdu* was an uncontested touchstone and, with time, *Remembrance of Things Past* took on a wholly Proustian sound in the ears of its English-language readership. In the 1980s, D.J. Enright and Terence Kilmartin prepared a new translation which revised rather than abandoned the Moncrieff work. In one of the few radical departures from the initial translation, Enright proposed a change of title in a late revision: *In Search of Lost Time* was offered up as the right way to imagine *la recherche* in English.

Ask a jurist: which translation was right? One might expect objections to Moncrieff’s title to come from lawyers who ally themselves, openly or otherwise, with the tradition of literalism that drives the dominant professional ethic in legal translation. *Remembrance of Things Past* evinces an apparent absence of “fidelity to the source text”, the polar star of legal translation. “Remembrance”, “Things”, “Past” – indeed none of these words appears in the *Journal officiel* of Jean-Yves Tadié’s second la Pléiade edition of the *la recherche* “established” in the late 1980s. By employing a metaphor that is not in Proust’s title, Moncrieff raised the suspicion among some readers - famously Vladimir Nabokov - that he had acted *ultra vires* the role of the translator. Moreover Moncrieff left the letter of the *législateur proustien* behind further still in a final affront: his title comes not from Proust at all but is borrowed - a borrowed literary device no less - from Shakespeare. This mix of language and cultural reference is, for a lawyer, the literary equivalent of passing off a *usufruit* as a life estate in English.<sup>1</sup> In striving for familiarity with the target audience, the translator seemed to have sacrificed precision and meaning at the altar of elegance. The literalist legal tradition would hold this as not only a liberty, but as wrong in law.

By contrast, the Enright proposal, which anglicizes Proust’s wording rather than his imagery, seems more in keeping with prevailing attitudes among legal translators. *In Search of Lost Time* is *du mot-à-mot*, or nearly so, a time-honoured (if occasionally decried) technique from which lawyers only depart when the method itself threatens the sense it purports to render.<sup>2</sup> While conventional approaches to legal translation do include some safeguards against the excesses of literalism, it is generally accepted in translation circles that

a trembling reverence is the right mode for the lawyer when beholding the source text. This would appear to be no more than the echo, in the field of translation, of the dominant approach to legal interpretation in western legal culture. Nourished by the primary place accorded to written text and in particular to legislative enactments in the theory of sources of law, the positivist tradition in legal interpretation champions the authority of the legislature as the ultimate source of law and of its meaning. According to this view, the process of discovery of meaning is reduced to what is sometimes called one of “declaration” by the person engaged in interpreting legal text. As applied to statute, this theory of interpretation proceeds from the sense that the legislature fixes its intention and gives it expression in the legislative text; the reader interprets the text by declaring the true sense of what the legislature meant. Leading Canadian scholar Pierre-André Côté<sup>3</sup> has usefully characterized this traditional view of interpretation as an “activité déclarative de sens”, to be contrasted with a competing understanding of interpretation which recognizes the reader’s contribution to a process of constructing or creating meaning. For Côté, when interpretation is understood as an “activité constitutive de sens”, the participative role of the reader in discerning meaning is more plainly acknowledged.

The conventional attitude to legal interpretation mimics the traditional understanding of the manner in which a source texts in law are to be encountered by the translator - reverentially, with a view to discovering meaning through passive reading rather than creating meaning through an active, interpretative appropriation of the text. This positivist instinct, when transposed to legal translation, supports the view of the translator as something of a non-actor for law, whose task is limited to transcribing a legal text from one language to another without participating in the production of new ideas. The translator is often depicted, if at all, as a faceless player in the transmission of legal ideas and his or her work is not understood to be a communicative act distinct from that of the author of the source legal text. Plainly labouring under the weight of the dominant positivist ethic for interpretation in law, the translator is not imagined as a legitimate creative actor but as a simple mediator of legal ideas. The return to the lawyers’ consideration of the proper English title for *la recherche*, the word-for-word proposal is best because it is likely to be most faithful to original intention: *In Search of Lost Time* is, along this view, not just correct but correct in law.

One might well look outside the positivist legal tradition when embarking on the *recherche* – remember this word! – for the right method for legal translation. Even among translation scholars who acknowledge the dangers of literalism in transposing text from one language to another, there is still an uncertainty as to how, from a theoretical perspective, this can be avoided.<sup>4</sup> French legal thinker François Géný provides one possible guide with his theory of *libre recherche scientifique*, anchored in a world view of law - even when construed as positive law - that extended well beyond codes, enactments and other legislative forms. A rough contemporary of Proust who had few of the latter’s gifts<sup>5</sup> and yet apparently enough ambition to match the novelist’s accomplishments<sup>6</sup>, Géný wrote the leading French work in legal hermeneutics of the last century wherein he set out a comprehensive theory for which the *libre recherche scientifique* was the foundation.<sup>7</sup> Géný counselled that a jurist should set out on a relatively unencumbered search for meaning whenever the law, unclear or without a direct answer on its face, had to be interpreted. Where, for example, the legislative intent of a provision of the *Code civil* was not plain from the terms of the text itself, a judge should be free to explore and settle meaning in a wide-ranging though not wholly unconstrained fashion that proceeded according to Géný’s established scientific method of

interpretation. All interpreters of legal text were invited to follow this lead in their own quest for meaning in law. Without forsaking all deference to legislative authority, Gény's approach was a far cry from the servility of some of his French legalist contemporaries; he promoted a theory of interpretation that recognized the authority of the interpreter – the judge, the scholar, the citizen – as relevant to the determination of meaning in law. In this sense, his theory fell outside of the conventional approach to interpretation of the day which, in large measure, considered the role of the person charged with understanding meaning as less important, in service of the positivist ideal that the interpreter was not a creative agent in the theory of sources of law.

Just as Gény provides a counterpoint to the dominant theory of legal interpretation, he might be thought of as setting forth the theoretical basis for a challenge to the conventional view of the role of the translator in deciding on what is appropriate in legal translation. Applying the precepts of *libre recherche scientifique* to legal translation, one might imagine that the translator adopt a more creative posture in shaping the target text as a result of a less constrained method employed in the interpretation of the source text. Gény offers, therefore, a theoretical basis for a cautious departure from literalism in translation that is worthy of study by translators. Gény's own tip of the hat to French legal positivism means that his theory of interpretation cannot be said to ground a free-form approach to translation argued for in some literary circles. But his suspicion of the legislature's monopoly over meaning clears the way for a recognition of the role of the legal translator as an independent source of meaning, perhaps even independent source of law (I).

Gény's idea provides its own litmus test for the legal translator. Before evaluating the potential for *libre recherche scientifique* as a substantive guide for legal translation, one must translate the term itself. Like the title to Proust's novel, Gény's watchword has been baptised differently by translators working in English who "disent le texte" (to invoke Jean-Claude G mar's delightful phrase) quite differently. Gény's *libre recherche scientifique* becomes, *au gr  des fantaisies*, "free scientific research", "free finding in law", "free investigation by the judge", "free scientific inquiry", "liberal and elastic judicial technique" or even "*libre recherche scientifique*" in italics, the latter suggesting that the words (and perhaps the very idea) are incommensurable. But the proposal for translation that bears closest examination is "free objective search for a rule", suggested in 1963 by an expatriate Czech professor of law teaching at the University of Puerto Rico. Jaro Mayda, while working as a visiting scholar at the Louisiana State Law Institute, produced a monumental translation of Gény's work,<sup>8</sup> crowned by a penetrating if highly dyspeptic critical study of Gény's contribution to law<sup>9</sup>. One terrain for testing the potential of this method is the translation of Gény's own work established by Mayda in 1963. Thus after considering *libre recherche scientifique* as a subject of legal translation in the first part of this essay, we move in the second part to an examination of English version of Gény's work as an object of legal translation. Mayda's massive translation – marked by his lively style and his plainly liberal attitude to what it meant to be faithful to the original French text of Gény's book – seems to exemplify and indeed celebrate the creative role of the translator. This brilliant if iconoclastic translation into English of a major work of French legal literature demonstrates the potential – and perhaps some of the failings – of what Mayda called "free objective search for a rule" as a basis for distancing legal translation from the cult of made law (II).

## I “*Libre recherche scientifique*” as a Subject of Inquiry

Gény’s very language would seem to ally him with the fledgling so-called open tradition of anti-literalism in legal translation: *libre*, in itself, stands in apparent opposition with the servile role generally attributed to the translator in his or her dealings with authorial authority; *recherche* might also be connected with a wandering style of inquiry generally seen as unbecoming a translator whose search is thought to begin and end within the fixed compass of meaning fixed by the author. On the other hand, the *scientifique* character of the process tempers this anti-literalist message in that it suggests a constraint on freedom limiting the translator’s action. These conflicting ideas – creativity, on the one hand, fidelity on the other – are set in an idealized equilibrium by Gény as a method for legal interpretation that is instructive for the translator who looks to the French legal theorist’s work as a guide for legal translation as a discipline.

Understanding the potential of Gény’s contribution to the law of interpretation as a method for legal translation requires some sense of his place in French legal theory.<sup>10</sup> Aptly styled by one leading historian of French legal ideas as a “juriste inquiet”,<sup>11</sup> Gény worked in conscious opposition to the leading school of sources of law in the French civilian tradition of the day. Distancing himself from the so-called *École de l’exégèse*, Gény presented a view of sources that did not shy away from law originating outside the machinery of legislative enactment. His translator Jaro Mayda noted this as the central theme of the work he presented in English: “[t]he *Méthode* was for Gény mainly an exercise in destroying the myth and superiority of legislated law, and in suggesting the ‘possibility’ of a supplementary positive source and method which would allow law to ‘fulfill completely its mission’ ”.<sup>12</sup> While his reputation as an anti-positivist may be exaggerated, Gény did show a rare sensibility for what has come to be styled as informal law - his work, according to one thoughtful commentator, “déplace le centre de gravité du texte au social”<sup>13</sup> - and in particular for the creative powers of the *interprète*, including those charged not just with applying but merely understanding positive law.

In keeping with his sense of the relevance of unwritten law in the legal order, Gény was inclined to stress the role of decided cases in the catalogue of legal sources that made up positive law in France. Here too his work evidenced a break with mainstream thinking where, as one of the supposed hallmarks of the French legal tradition, the judge was seen to have a limited role in creating law given the supposed absence of a principle of *stare decisis* as understood in the English legal tradition.<sup>14</sup> Beyond the importance he placed of jurisprudence as a potential source of law, Gény’s emphasis on the role of the judge and of judging might be seen as part of his general view that legal interpretation is imbued with a creative function. Reading Gény’s work one is left with the impression that he saw the judge as an independent mind – not free from the duty to apply or declare the law as stated, but at the same time not relegated to the role of a passive reader. The judge emerges as a communicator; judging is depicted by Gény as communicative action. Quite naturally, this view of the role of the judiciary suggests that the interpretative function of judging has, as a necessary correlative, something more substantive than the role generally assigned to the judge as one who merely identifies the applicable law and then applies it.

This attitude quite naturally shaped his approach to legal interpretation generally. Given his openness to looking *hors le texte* for authority in law, Gény not surprisingly

showed his inclination towards weakening the grip that enactment had on those charging with identifying and understanding law. From his point of departure that positive law can never be completely accounted for in legislative enactment, Gény surmised that where formal legal sources were silent or incomplete, the interpreter needed direction as to how to decide what the applicable law might be. It is against this backdrop that Gény presented his theory of *libre recherche scientifique*.<sup>15</sup> Gény contended that in these circumstances the interpreter should “search” for the rule of law in a manner that was free without being arbitrary, objective without denying the interpreter’s own creative powers. This *libre recherche scientifique* was presented in particular to the judge – whom Gény viewed as the “organe central de tout système de l’interprétation positive”<sup>16</sup> - but he explicitly extended it to other *interprètes*, notably the “praticien” and the “interprète doctrinal ou critique”<sup>17</sup>. Thus while in many respects Gény’s thesis appears to relate principally to sources of law and its formal institutional actors, he self-consciously styled it as a method of interpretation thereby emphasizing and understanding the creative role played by the person charged with what others saw as the application of the law. This, however, required Gény to set out the fundamentals of what he saw as a process or method of interpretation. If the action of the interpreter is communicative, it must be explained and, more importantly, it must be prescribed and, where necessary, proscribed. Indeed the language Gény employed takes the form of a declaration of the creative powers of the interpreter: “le jurisconsulte ne joue pas un rôle purement récepteur ou mécanique”; “ses facultés propres entrent en scène”; “la position centrale et normale de l’interprète consiste en une activité personnelle”.<sup>18</sup> Evocative of ideas which remain current in the so-called hermeneutic school of contemporary legal thought, Gény plainly was alive to the idea that reading the law involved an active, creative inquiry.

The relevance of Gény’s work for legal translation plainly depends on establishing a connection between the interpreter described by Gény and the translator and, more importantly, the action of interpretation as Gény saw it and the action of translating. It is of course the insight of George Steiner – stated so dramatically in *After Babel* in the assertion that all communication, predicated as it is on a transposition of meaning, is itself a form of translation<sup>19</sup> – that allows the bridge to be established. Insofar as the interpreter and the translator encounter the source text as readers seeking an understanding of the idea expressed therein, they are engaged in a same venture as they both read and appropriate the text to themselves. The Steiner insight has its plainest echo in law in the work of James Boyd White who, in a series of studies designed to weigh the literary values inherent in legal writing, has noted that “the heart of the law is the process of translation by which it must work from ordinary language to legal language and back again”.<sup>20</sup> Yet as important as White’s comment is, the allusion to translation remains one of metaphor and, it may well be observed, there are only isolated voices in the legal academy prepared to ground translation and interpretation in law in a single hermeneutic theory.<sup>21</sup> Generally, the interpreter simply “translates” the text within same language; no doubt the linguistic translator engages in more complex communicative act by appropriating then consigning his or her understanding into the target text. Yet, while perhaps more complex, the “hermeneutic motion”, to revert to Steiner useful idea, is essentially the same.

Gény himself, elsewhere in his scholarly work, set out his abiding interest in the relationship between law and language and legal lexicography,<sup>22</sup> and his footnotes certainly suggest a facility with foreign languages, notably German and Italian.<sup>23</sup> This said, he did not detail in any extended fashion in the *Méthode* the idea that translation of legal texts should be

thought of as a species of interpretation,<sup>24</sup> although it might be observed that some leading translation scholars have noted the relevance of his legal theory to their work.<sup>25</sup> It is possible, however, to see the theory of *libre recherche scientifique* as an invitation to anchor the discipline of legal translation firmly in that of legal interpretation. Lawyers have been shy to make this connection, and the tendency to see the legal translation as something other than interpretation limits, of course, the role that they assign to translators in fixing meaning in law. But when translation as a discipline is viewed from this perspective, legal translation appears as most naturally aligned with the fundamental problem of the appropriate ways and means for understanding meaning in law. Gény's work provides a theoretical framework for this perspective which is predicated on a view of legal translation as what Susan Šarcevic has brilliantly described as "an act of communication within the mechanism of law".<sup>26</sup> Indeed it might be argued that Gény's theory of *libre recherche scientifique* provides a basis for legal translation to free itself from the cult of made law in a resolutely hermeneutic move from source to target text in law.

While this connection between understanding and translation may seem plain to scholars such as Steiner and Šarcevic, traditionalists in legal translation circles tend to minimize the creative role that the interpreter and translator have in understanding law. The cult of the written text and of the legislature has, for both the law of interpretation and legal translation, grounded a dominant view that legal texts are to be read and translated with a view to identifying a single legislative intention to which the interpreter and translator owe a sort of blind fidelity. Fidelity is a constraint upon the interpreter's freedom to fix meaning with other considerations in mind; likewise, fidelity serves as a constraint on the manner in which the text will be transposed from one language into another. Indeed when one links traditionalism in the law of interpretation and traditionalism in legal translation, it is apparent that both the interpreter and the translator are seen as beholden to a single authorial master with a similarly intolerant attitude to insubordination in the two settings. It might well be said that the positivist ideal for law has encouraged both readers and translators to imagine legal text as authorial intention carved in stone; accordingly, the reader and translator receive the text in a manner befitting oracle. On this view, creating meaning is beyond the proper role of the interpreter and translator alike.

This traditional approach to interpretation does indeed conform with the manner in which the method for translation is imagined for law generally. Most scholarly work on the theory and practice of legal translation has used the statute as a model;<sup>27</sup> while other modes of legal discourse have attracted some attention in jurilinguistic theory,<sup>28</sup> the legicentrism of legal culture generally has been an apparent distraction for mainstream scholarly work in this field. (The parallel to be drawn with doctrinal legal scholarship in this respect is striking - contracts, judgments, and legal texts that contribute to law's non-legislative make-up may be the bread and butter of the daily life of legal translators and lawyers alike, but enactment remains at the centre of the legal imagination in both communities.) This perhaps explains, as is often said, why translators approach legal text as if it were a biblical text, bearing a single sacred message revealed to the reader by a close, literalist transcription into the target language.<sup>29</sup>

The idea that a translator might bring to his or her translation a message not literally encoded in the source text certainly runs counter to the legicentric values that inform generally accepted approaches to legal translation. Gény argued, for example, that *libre*

*recherche scientifique* invited the reader to understand the law to be interpreted as infused with what he described as “principles of justice inherent in reason and conscience”.<sup>30</sup> Foreseeing developments in contemporary legal interpretation scholarship,<sup>31</sup> Gény understood that the act of understanding involved a contribution from the reader’s context so that certain general principles of law - equality before the law, for example<sup>32</sup> - were to be thought of as latent in law even when their presence was not patent in the words chosen by the legislature. This anti-literalist approach, when transposed to the context of translation, might be misunderstood as a wrong-headed injunction to the translator to improve or launder text through translation. But this would be a misreading of Gény’s method: he did not counsel his reader to change legal text but how to see it; the translator, when seeking out the appropriate rendering of source text should encounter the text in the same manner, that is informed by what scholars have described as a message attached to the text but less obviously encoded therein. This would extend to considering what one leading expert on law and language has called the “sources muettes” of law that influence the interpretation of legal text and, as a result, can shape legal translation.<sup>33</sup> No one should take this as a suggestion that what Gény saw as meta-values in law should be seen as inherent in all source text. (The translator of Vichy decrees would be doing an undoubted disservice, for example, by sensing the message of equality in those documents).<sup>34</sup> What is important is his sense that text may bear an unwritten message that is relevant to the translator who sees his or her work as part of a hermeneutic motion, for the translator, to identify and articulate it insofar as possible.

It is important to note that Gény’s method is not merely a new way for legal translation to revisit the old and not particularly useful standoff between those who argue for fidelity to the “letter” as opposed to the “spirit” of the source text. Gény was of course sensitive to the same disagreement as it was relevant to legal interpretation, even 100 years ago. Distancing himself from the letter/spirit debate,<sup>35</sup> Gény provided an insight useful for diffusing the same debate in translation circles. By advocating fidelity to the spirit of the source text rather than its letter, partisans of this brand of anti-literalism only suffer from a less acute variant of the literalism disease. While adhering to the spirit of the law rather than the words chosen by the author, the translator is no doubt able to lay claim to a reasoned approach to avoiding the nonsense translations sometimes brought about by the word-to-word method. Yet the notion that a legal text has a spirit tends to be understood as a signal that it has a single, fixed meaning fixed by the author, over which meaning the interpreter or translator has no control. Thus where fidelity to spirit is embraced as the right method for translation, the mode for the translator remains that of the passive mediator of the ideas of another. Gény distanced himself from the letter/spirit debate because neither approach allowed room for the creativity inherent in what he described as *libre recherche scientifique*. Gény stressed in respect of legislated text, for example, that following enactment law is cut loose from whatever legislative intention may or may not have brought it into being.<sup>36</sup> Echoing ideas current in literary theory to the effect that publication entails the death of the author and the birth of the reader, Gény argued not for adherence to any national legislative or textual “spirit” but instead advocated a free search for meaning shaped, in part, by readers and reader context.

Some of Gény’s own flights of narrative, and certainly the instincts of many who have taken him up as a mentor, tend to inflate the “free” character of his method at the expense of the more mainstream or “objective” dimension of *libre recherche scientifique*. Gény was insistent that his free search was not a licence to give in to a purely subjective approach to

interpretation. This note of caution in Gény's thinking has been understood by some to be a sign of his nagging conservatism. It may be observed, however, that translation scholars who reject literalism very often reject free translation as an inappropriate extension of the interpretative method - free translation is actually wrong-headed "freedom from translation"<sup>37</sup> as one scholar has written - encouraging these same theorists to identify a reasoned counterpoint to subjectivity in translation. In this sense, Gény's emphasis on what he described as the *scientifique* may be understood as tempering some of the lack of discipline otherwise accorded to legal translators in a manner that might suggest that Gény's approach carries with it a useful mix of messages of freedom and restraint for translation theory.

For Gény, the interpreter had to lay aside his or her personal prejudices and read the text in a dispassionate manner befitting law as an instrument of social order. Manifest generally in his overall emphasis on rationality in interpretation, the objective character of the search for meaning is predicated on what Gény himself described as his taste for the empirical as a protection against natural law determinism on the one hand subjective rulelessness on the other: "[c]omment donc l'interprétation du droit positif, lorsqu'elle reste abandonnée à elle-même, pourra-t-elle, et devra-t-elle, procéder, sur *données objectives*, de façon à satisfaire les besoins de la vie, sans encourir le reproche de l'arbitraire?"<sup>38</sup> he asked, before advancing the "objective" basis for his search for meaning as the answer. Invoking what he described as the "nature des choses",<sup>39</sup> here Gény referred to supereminent principles of a general law which dictated the whole economy of legal life: a "droit commun" that articulated ideals of "justice" and "utility" anchored in human reason and conscience as well as values and practices inherent in observable fact.

What is important to stress is that despite his general openness to the creative dimension of interpretation, Gény tried to restrain the judge and other interpreters in a manner not dissimilar to those who argue, in the theory of legal translation, that without such restraint, creativity in translation can undermine the rule of law.<sup>40</sup> For the translator, Gény's emphasis on the "objective" meaning of text might be thought of as an injunction to balance the free-form values of creative translation with the sobriety of a shared community sense of linguistic meaning. It is on the content of this latter category that translation scholars should collectively focus their attention. The problem in the Gény position is inherent in the promise of the word *scientifique*, rendered by Mayda as "objective", which suggests that freedom for the interpreter will not produce "wrong" answers in law. As Šarcevic points out in compelling fashion, "objectivity" is impossible, in strict terms, for the translator because the translator is in what she aptly calls "a hermeneutic situation".<sup>41</sup> Gény's contribution here is to suggest that the "objectivity" does not turn on the submission to a mythical "true" authorial intention, but instead a recognition, by the interpreter, that the broader context in which he or she works points to a meaning that will be sensed similarly by other interpreters working in the same context. For the translator, this objective quality is not true legal intention but instead a recognition, by the translator, that others in his or her situation would be moved by their place in the world to render the text in the same fashion in the target language.

However useful Gény's theory of legal interpretation might appear, at first blush, to those seeking a method for legal translation that acknowledges values of creativity and certainty at once, one critical aspect of his world view must be mentioned as casting something of a shadow over his work. For Gény, the liberal *libre recherche scientifique* was

not universally applicable as a method of legal interpretation. In what might be thought of as the high-water mark of his own deference to legislative authority, Gény joined others in espousing the view that when a legal text was clear or free from ambiguity, it was not necessary to interpret it. In these circumstances the judge or other interpreter of law was precluded from pursuing meaning through the *libre recherche scientifique* and constrained to declare the law as it was stated. This perspective, which remains current in academic studies of the law of interpretation,<sup>42</sup> in particular in the civil law tradition, certainly stands in contrast with the view that all reading is an essentially personal appropriation of text. When all reading is seen as inherently interpretative, the literal sense provides one hypothesis as to meaning and as the reader reconstitutes, as opposed to declares, the message encoded in the text, that action is no less interpretative by reason of the text being “clear”. Even where plain language gives rise to a same interpretation by multiple readers it is not because they have failed to interpret, nor is it because the single authorial message has, by reason of its clear expression, imposed itself on them. Instead, their agreed upon interpretation of the “clear text” reflects a shared understanding that they create as readers, and they arrive at that shared understanding by virtue of their common hermeneutic situation rather than as powerless victims of some omnipotent author.<sup>43</sup>

It is not surprising, in this respect, that Gény’s caveat on the scope and application of *libre recherche scientifique* should meet with opposition in circles that are otherwise welcoming of his theory of interpretation. Mayda himself parts company with his mentor, contending that the application of positive law always requires a measure of interpretation.<sup>44</sup> Mayda may be influenced, in this view by his experience as a translator: the argument that clear texts require no interpretation, whether framed in terms of “plain meaning” or necessary literalism, is difficult to transpose to translation. While arguments rooted in fidelity have, on occasion, been invoked to ground similar arguments in legal translation circles,<sup>45</sup> the view that the translator plays a creative or active role in fixing meaning suggests that translation’s hermeneutic motion is never stopped in its tracks by text that is susceptible of a single meaning by multiple readers. “Clear” text is, of course, no less susceptible of multiple renderings in the target language. Moreover where translators agree on a same translation for a term or phrase, that agreement should be thought of as “hermeneutically negotiated” rather than imposed by adhesion by some all-powerful - even sovereign! - legislature. This aspect of Gény’s theory, both for interpretation generally and for translation specifically, seems less helpful to an understanding of interpretation or translation, as the case may be, as rooted in human understanding.

## II “Free Objective Search for a Rule” as an Object of Inquiry

What does the extraordinary translation of the work in which Gény developed his theory of interpretation by Jaro Mayda – two massive volumes of dense source text transformed into 569 pages of somewhat airier target prose – itself say about the potential for “free objective search for a rule” as a technique for legal translation? While it is, of course, not the case that Mayda expressly took it upon himself to press Gény’s theory of interpretation into service as a guide for the preparation of his own translation, it seems unlikely that he did not make the connection between the role of the interpreter in establishing meaning and his role as the translator in seeking to discover what Gény set about to say in the book. Certainly he was alive to the idea that translation is a species of interpretation, and he was especially conscious of the misinterpretations that other scholars –

including luminaries such as Roscoe Pound and Karl Llewelyn – had visited upon Gény as they translated bits and pieces of his French in their scholarly work. Moreover, there are signs in the liberal, non-literalist attitude he took in preparing the translation itself that, wittingly or unwittingly, Mayda had adopted, at least in part, his subject’s free approach to the search for meaning in the English version of the book which appeared in 1963.

There has been a number of important French legal thinkers translated into other languages - famously Pothier,<sup>46</sup> for example - and the French civil code has been translated, with varying degrees of skill, many times. But twentieth century French legal literature has not yet been systematically mined by translators, and the works that are available often reflect choices that may well reflect considerations other than greatness.<sup>47</sup> Gény was chosen by Mayda for reasons of personal taste but that choice seems eminently defensible as Gény’s work continues to fascinate scholars inside and outside France.

Mayda’s tour de force was not undertaken as an exercise in translation alone. It was no doubt a deeply personal gesture of homage to Gény whom Mayda viewed as one of the principal legal thinkers of the century and to whom he had and would devote considerable scholarly energies.<sup>48</sup> Convinced as he was that Gény was a father of modern legal theory, he was surer still that Gény’s message was particularly relevant to an Anglo-American legal audience.<sup>49</sup> He felt, as others had before him, that Gény’s approach to legal interpretation was of meaningful interest to common lawyers, not merely as a far-off example of continental legal thinking, but more immediately given the sophisticated treatment Gény offered of the manner in which the judge participated in the law-making process. Here was, for Mayda, a coherent, tightly argued thesis bearing on the appropriate exercise of judicial authority in the interpretation of law that outstripped what he appears to consider to be a looser, less careful analysis offered by antiformalists and legal realists at the peak of their form while Mayda worked on the translation. This said, Mayda was by no means uncritical of his subject – frankly, in his work on Gény and others he rarely shies away from name-calling, and it would seem the bigger the name, the more attractive the target.

Professing to be “less concerned with pleasant tribal relations” in the academy and more with “dialectic rigor”,<sup>50</sup> Mayda himself was, by reason of the circumstances of his coming to the American legal academy and the mix of tastes and interests his background suggested to him, something of an outsider.<sup>51</sup> He was an immensely well-read and plainly prolific author, with talents for basic civil law, public international law, environmental law and, of course, legal theory, wielding in all these fields a self-consciously literary and occasionally poisonous pen.<sup>52</sup> His criticism of others was particularly strong in scholarly disciplines closest to his own fields of endeavour: he could be biting about comparative lawyers’ notorious approximations,<sup>53</sup> he voiced a marked distaste for legal “philosophy” as opposed to the more noble study of legal “theory”,<sup>54</sup> and was most sensitive about views others had about Gény<sup>55</sup> or who tried a hand at translating him.<sup>56</sup>

Importantly for our purposes, Mayda was one of the preeminent translators of twentieth century French legal literature and, working in the United States’ only mixed civil law-common law jurisdiction, Mayda’s translation from French to English had something more than an audience of erudite comparatists. His translations published by the Louisiana State Law Institute are probably among his most enduring,<sup>57</sup> sustained, ironically, by the same positivist understanding of which he and his mentor Gény were so sceptical.<sup>58</sup> In

particular his collaboration on the translation of an edition of Marcel Planiol's treatise on the law of obligations<sup>59</sup> remains not only influential in Louisiana but in many respects stands as a benchmark in the cottage industry of civil law scholarship in English elsewhere where it has attracted the sustained attention of experts in legal lexicography.<sup>60</sup> Convinced that "the art of translation is perhaps the least accomplished among the less than perfectly developed literary arts in law," Mayda plainly had himself in mind when he denounced the "inferior importance in the allocation of personnel"<sup>61</sup> in legal translation in his introduction to the Gény work in English.

Mayda was the furthest thing from the invisible translator whose identity is protected behind the author's *page de garde*. Openly critical of Gény's heavy prose – Mayda called it "purple" and a "translator's nightmare" – he set his own effort on a creative rather than a merely technical plane. Allying himself precociously with Steiner, Mayda explained in an introductory note that he understood his work as "interpretation rather than translation",<sup>62</sup> no doubt in service of his healthy sense - which was justified by his critical study of Gény - that he was a legal theorist rather than a "mere" translator. His general approach to the translation reflects the freedom that, as a scholar in his own right, he saw was his due. Indeed it is in the attitude that Mayda brings to the translation that one can draw out a first lesson: as some experts in literary translation have observed, the tendency to dismiss translation as less than a scholarly or creative activity is in part the consequence of the discipline's own bashfulness.<sup>63</sup> For translation, including legal translation, to be recognized as a communicative activity, the translators have to start talking about it as such to others than themselves. To practice legal translation is, Mayda might say, to engage in what he called "comparative jurisprudence".<sup>64</sup> Mayda was certainly no literalist: he mocked the *mot à mot* that twisted Gény's idea into "free scientific research" in existing English and American translations and, in his critical introduction to his English version of the *Méthode* and elsewhere, he set forth a series of explanatory notes as to how adequate translation in law should be undertaken. Was this method in fact the *libre recherche scientifique* applied to the interpretative endeavors of legal translation? Certainly, as Mayda distanced himself from literal translation, he consciously amplified the creative role that was his due as a leading authority on Gény's work. His own "free search" in translation moved him to prefer what he called "concept-idiom" translation rather than the word-for-word method. Striking out for what he called, in his lively if somewhat overwritten style, "[t]he passage the Scylla of faithfulness to the author and the Charybda of idiomatic meaning",<sup>65</sup> Mayda often allowed himself to stray from the source text as he translated and explained - using "concepts, not terms" he would insist - all at once. Terminology should "overlap as much as possible with the original", according to Mayda, but as he was bent on making ideas in the source text plain as much as translating them, he was moved, on occasion, to employ "explanatory description instead of translation in the narrow sense."<sup>66</sup> While Mayda denounced the "myth" of untranslatable or incommensurable text in law, he never hesitated to paraphrase or rephrase Gény's laborious prose to make it accessible to the English-language reader. Notwithstanding this refusal to adopt a literalist method, or perhaps because of it, the translation is, as Mayda's colleague Denson Smith noted, both "accurate and sympathetic"; it is certainly a "traduction souple" as one leading French expert observed.<sup>67</sup> It plainly reflects both a preoccupation in achieving what Mayda described as a meaningful cultural transfer from the French legal culture to the American while, at the same time, seeking to respect what he called, delightfully, "the flavor of the author's diction."

The competing strands of both a “free” and “objective” search are apparent at many levels in Mayda’s text. The translation of the very term *libre recherche scientifique* is said to reflect “a concept-idiom not forcing the reader to re-translate”; he criticizes literalisms, for example, that plague other translations of Gény’s omnipresent term “*donné*”; “notions - conceptions - constructions” are carefully chosen by Mayda to reflect variously “*concept, conceptions, constructions*” in French, the whole no doubt sufficient to send even most francophones back to their Larousse in significant number. Similarly, Mayda did not content himself with denouncing the false friendship between jurisprudence and *jurisprudence*: he went on to draw fine distinctions between “*jurisprudence, science, théorie and doctrine*” that only the most alert scholar would have detected in Gény. What is important to note is that Mayda felt entitled - in point of fact, he intimated that he felt obliged - to reach “beyond” the text (he speaks regularly of Gény’s “*au delà*”) in order to capture the right idiom for translation. His reconstruction of the message is a fine example of Steiner’s hermeneutic motion - the interpretative turn inherent in the process of rendering Gény in English pushed Mayda beyond the text without destroying Gény’s original message.<sup>68</sup>

Perhaps the most serious charge that a critic might bring against the Mayda translation is that he manipulated something of Gény’s “culture-bound” message in bringing it to an American audience.<sup>69</sup> Certainly the English text has a more congenial style than does the French - Mayda took pains to denounce Gény’s ten-ton prose at every turn, inviting the reader to compare the relative ease with which Gény’s ideas could be encountered in Mayda’s English. Here Mayda sends a mixed message to his readership: on the one hand, he noted his objective to respect the language and concepts of the French legal culture of the day while, on the other, he sought to achieve a measure of stylistic and conceptual elegance absent from the original. He has, to be sure, actively “Americanized” his source text for his target audience. Did he go too far? In a recent translation of French legal literature, the editors boldly commented that a certain awkwardness was intellectually sought out in the final product;<sup>70</sup> in translation circles outside law there are disagreements about whether awkwardness is or is not a value.<sup>71</sup> Indeed it may be that the “foreignness” of a legal text is a proper signal to send, insofar as the foreign character of the idea is part of the message that one might seek to send. Comparative lawyers preparing on translations in their work have struggled to find the right balance between strangeness and accessibility in the past, certain among them contending that comparative work is incompatible with encountering law in translation.<sup>72</sup> Overall, Mayda seems to have found something of a middle ground. Certainly no American reader would mistake the translation as original Anglo-American legal scholarship: the vocabulary is novel; the arrangement and presentation of the ideas is atypical for American legal writing. He displayed a special sensitivity and taste for what he called – again presciently given recent literature in translation studies – the importance of rendering “cultural [...] associations, echoes and overtones”<sup>73</sup> embedded in the source text. Yet Mayda has managed to reach his English-language readership - this is even verifiable in an impressionistic way<sup>74</sup> - providing perhaps another example of a search for meaning where values of freedom and objectivity are sought to be set in equilibrium.

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Lawyers other than Jaro Mayda might be surprised at the welcome that Moncrieff’s proposal for the title of *la recherche*, notwithstanding its questionable faithfulness to the original. There were certainly readers who objected to the exercise of translator license by Moncrieff, but prior to Enright’s suggestion in 1981 to adopt the title *In Search of Lost Time*,

most readers generally considered *Remembrance of Things Past* to have an “official” character,<sup>75</sup> such that, like a statute, it was not to be tinkered with lightly. It is perhaps less surprising that Jaro Mayda, as translator, made his own connection between the *recherche* in the title of the Proust novel and that at the centre of *libre recherche scientifique*.<sup>76</sup> One might well speculate which of Moncrieff’s “remembrance” or Enright’s “search” that Mayda might have preferred;<sup>77</sup> it seems plausible at least that the free and artful 1932 translation would fit Mayda’s understanding of “concept-idiom” rather than term-bound translation. Whatever Mayda’s view, he no doubt would have agreed with his colleagues that the object of the translation, to use Kilmartin’s phrase, should be to do “justice” to Proust.<sup>78</sup> Disagreements would have arisen, if at all, over method.

Two tentative conclusions may be drawn from this examination of Gény’s theory of *libre recherche scientifique* as a guide for legal translation.

Firstly, it seems right to appropriate Gény’s central thesis on interpretation in law for legal translation. When understood as a hermeneutic motion for law, legal translation must ally itself with the full scope of scholarly insight into legal interpretation, particularly those which are premised on a recognition that interpretation participates in law in the making. Gény’s view of the creative role of the interpreter is based on the idea that the meaning of legal text does not reflect a single, fixed authorial intention over which the interpreter has no control. The corollary for the legal translation is that interpretation thrusts an active role on the translator in a process of creation of meaning necessarily inherent in linguistic transposition. The idea that interpretation and translation in law are two features of a common creative endeavours, stated on occasion,<sup>79</sup> bears repeating. One of the unhappy effects of legal positivism is that it trivializes the role that all interpreters, including translators, have in the production of legal ideas. Gény’s work, as brought to the fore by Jaro Mayda and applied to legal translation, helps overcome this. The problems are the same whether one works in one or more languages – the transposition by the interpreter or the translator, as an ostensibly creative act, may depart from the meaning intended by the author. Whether this treachery, to invoke the nonsense of the ancient adage, takes full shape in the source language or in some other language chosen by the interpreter-translator does not change the fact that the two actions are premised upon fundamentally the same reach for understanding.

Our second conclusion flows from the examination of Mayda’s translation of Gény’s work itself. It is tempting, given the plainly interpretative method adopted by Mayda for his English version of the *Méthode*, to see the work as an example of *libre recherche scientifique* in itself. But a note of caution should be sounded: the idea that Gény’s method should find application in the translation of his own book might obscure the point that legal translation of scholarship might not be wholly comparable to translation of other legal texts. By evaluating Mayda’s translation on the basis of *libre recherche scientifique*, we may be invoking a method designed to explain interpretation for formal sources of law that is not an appropriate model for translating legal scholarship. Jean-Claude Gémard has argued convincingly that translation of statutes is but one species of legal translation, and has sensibly signalled the dangers of using the legislative model for all of the discipline.<sup>80</sup> Other scholars have joined him in drawing useful distinctions between legal discourses - legislative, judicial, scholarly, *etc.* - each of which deserving of different attention and energies from the translator. Certainly, the prescriptive ambitions of legal texts vary,<sup>81</sup> although one should not discount

scholarly writing's normative weight, just as one should not overestimate the non-normative vocation (pedagogical, aesthetic, *etc.*) that might be inherent in an enactment.<sup>82</sup> In this sense, it is difficult to say, as a matter of general principle, that the method for legal translation should always be different in respect, say, for translating the French civil code and François Gény's scholarship. Mayda's translation - itself so far removed from techniques of formal equivalence most prevalent among legal translators - has the merit of calling the question. The appropriate method for translating legal scholarship is a rich avenue for future research.

Just as legicentrism in western legal culture has meant that too little attention is devoted to measuring the role of scholarship in the genesis of law, so too has the cult of made law distracted translation scholars from studying legal translation as it is practised in a non-legislative setting. Gény's own anti-positivist world view, while not to be exaggerated, may ground a theory of interpretation and legal translation that is not enactment-bound. Gény certainly did not content himself with a description of the interpretation limited to what Mayda called legislated law. He purported to set out a map for the proper exercise of the notional authority with which the interpreter is invested by the mere fact of his or her encounter with law in all its shapes, textual or otherwise. When *libre recherche scientifique* is measured for its prescriptive worth as a method, it becomes apparent that Gény's theory was in fact presented as a rule itself, having, ironically enough, many of the characteristics of positive legal enactment about which Gény himself claimed to be so circumspect. Jaro Mayda's translation - lively, creative, interpretative - is perhaps too personal to meet Gény's own standards of objectivity. In this sense, Mayda may have made a two-edged contribution to translation theory: first, in identifying *libre recherche scientifique* as a potential law for legal translation; and second, by demonstrating, through the violation of that law, that free objective search for a rule is, at best, an aspiration rather more than rule for interpretation and translation alike.

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<sup>1</sup> For a word of warning from a comparative lawyer alive to the false friendships between legal traditions, and how they can confound legal translation, see Paul-André Crépeau, "La transposition linguistique" in G. Snow & J. Vanderlinden, eds., *Français juridique et science du droit* (Brussels: Bruylant, 1995) 51, who spoke of transfers from one language to another across legal traditions as "une transposition linguistique 'complexe'" (p. 53). Compare J. Balleyste, ed., *Dictionnaire juridique / Legal Dictionary* (Paris: Éd. de Navarre, 1977) at p. 299 where, at least for the French and English, it is suggested that usufruct and life estate are equivalents, even though the French legal concept provides the bare owner with a present right of ownership which, it might be thought, is not the legal lot of the remainderman in English law.

<sup>2</sup> On literalism and its close cousins as a dominant mode for legal translation, see Michael Beaupré, "La traduction juridique: Introduction" (1987) 28 C. de D. 735 at p. 739 who observed the marked tendency toward literalism in legal as opposed to ordinary translation, particularly in the legislative setting.

<sup>3</sup> See Pierre-André Côté, *Interprétation des lois*, 3<sup>rd</sup> ed. (Montreal: Éd. Thémis, 1999) at pp. 315-6.

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<sup>4</sup> For a rich exploration of various experiments with theory among scholars associated with different schools of legal translation, predicated on a desire to establish a “dialogue des chercheurs des Écoles différentes,” see Claude Bocquet, “Traduction spécialisée: choix théorique et choix pragmatique” (1996) 16 *Parallèles* 67, esp. p. 74.

<sup>5</sup> Roscoe Pound, in praising what he considered to be a first-order contribution to legal philosophy, commented that Gény’s style in French was “complex and somewhat laborious” such that it often detracted from the author’s meaning: “Fifty Years of Jurisprudence” (1938) 51 *Harv. L. Rev.* 444 at p. 466.

<sup>6</sup> One source of insight into Gény’s sense of self comes from his final work, written at age ninety, in which he sets out his main scholarly contributions as a series of principles – in the very form of made law that he professed to be sceptical of from the start of his career – as an *Ultima verba* (Paris: Pichon & Durand-Auzias, 1951).

<sup>7</sup> François Gény, *Méthode d’interprétation et sources en droit privé positif*, t. 1 and 2 (Paris: L.G.D.J., 1899). Written by Gény at age 38 – Proust, who was ten years older than Gény, published *la recherche* when he was 43 – this book appeared in a second edition under the same title in 1919, and later revised by the author for reprint in 1954.

<sup>8</sup> François Gény, *Méthode d’interprétation et sources en droit privé positif, second edition* [:] *An English Translation by the Louisiana State Law Institute* ([Baton Rouge, La.]: L.S.L.I./West Publishing Co., 1963). Jaro Mayda is identified as translator by J. Denson Smith, director of the Louisiana State Law Institute, in the book’s “Foreword” (p. III).

<sup>9</sup> Jaro Mayda, “Gény’s Méthode After 60 years [:] A Critical Introduction”, *ibid.*, pp. V-LXXVI.

<sup>10</sup> The proceedings of a recent colloquium marking the centenary of the publication of *Méthode* include a number of excellent studies which provide this theoretical context, notably Anne Saris, “La teneur de la norme selon Gény et son actualité en droit international privé” in Claude Thomasset *et al.*, *François Gény, Mythe et réalité* (Cowansville (Qué): Éd. Yvon Blais, 2000). I am grateful to Ms. Saris, a research scholar at the Quebec Research Centre of Private and Comparative Law, for help on this point.

<sup>11</sup> See Marie-Claire Belleau, “The ‘juristes inquiets’: Legal Classicism and Criticism in Early-Twentieth Century France” (1997) *Utah L. Rev.* 379. For a rich study of how Gény’s personal circumstances and philosophy manifested themselves in an ambiguous attitude to questions of social justice, see Marie-Claude Prémont, “François Gény et les enjeux de la responsabilité civile” in Thomasset, *et al.*, *ibid.*, 101.

<sup>12</sup> Mayda, *supra*, note 9 at p. XXVIII. Mayda and others have noted that many of the ideas of the first edition of *Méthode* were perfected in Gény’s multiple-volume *Science et technique en droit privé positif* (Paris: Sirey, 1914-1924).

<sup>13</sup> Christophe Jamin, “François Gény d’un siècle à l’autre” [résumé], *supra*, note 10.

<sup>14</sup> On this basis, Gény’s work attracted relatively wide attention of Anglo-American scholars, notably legal realists and scholars of the common law of precedent: see, as examples of each of these tendencies, Albert Kocourek, “Libre recherche in America” and B.A. Wortley, “La théorie des sources en droit privé positif considérée dans son rapport avec la jurisprudence anglaise” in E. Lambert, ed., *Recueil d’études sur les sources du droit en l’honneur de François Gény*, t. II (Paris: Sirey, 1935) at 459 and 16 respectively.

<sup>15</sup> The technique is explained over some thirty pages of the book and while Gény gave no definition as such, he explained the theory as follows: “ [...] l’activité qui lui [the judge] incombe m’a paru pouvoir être justement qualifiée: *libre recherche scientifique*; recherche *libre*, puisqu’elle se trouve ici soustraite à l’action propre d’une autorité positive; recherche *scientifique*, en même temps, parce qu’elle ne peut rencontrer ses bases solides, que dans les éléments objectifs que la science peut seule lui révéler” – *Méthode*, *supra*, note 7 at para. 156.

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<sup>16</sup> *Ibid.* at para 223.

<sup>17</sup> *Ibid.* at para. 156.

<sup>18</sup> *Ibid.* at para. 155.

<sup>19</sup> Steiner, *After Babel*, 2<sup>nd</sup> ed. (Oxford: Oxford U.P., 1992): “*After Babel* postulates that translation is formally and pragmatically implicit in every act of communication, in the emission and reception of each and every mode of meaning ... To hear significance is to translate ... Translation between different languages is a particular application of a configuration and model of human speech even where it is monoglot” (p. xii).

<sup>20</sup> White, *Heracles Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: U. Wisconsin Pr., 1985) at p. 36 and by the same author, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: U. Chicago Pr., 1990). See also Lawrence Lessig, “Fidelity in Translation” (1993) *Texas L. Rev.* 1165 who also connects interpretation in law and translation metaphorically and includes an injunction for “structural humility” for interpreter-translators not to improve legal texts (p. 1252).

<sup>21</sup> The connection is made by one legal theorist versed in translation: Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990) at pp. 51-2.

<sup>22</sup> This is especially plain in Gény, “Le langage (mots et phrases) instrument de la technique juridique”, in *Science et technique en droit privé positif*, t. III, *supra*, note 12, chap. 8. *Adde* Gény, “La technique législative dans la codification civile moderne” in *Le Code civil (1804-1904). Livre du centenaire*, vol. II (Paris: Sirey, 1904) 993.

<sup>23</sup> Mayda’s remark – verifiable in the footnotes of the *Méthode* – that the Alsatian Gény spoke German and read Italian, concludes “[b]ut the *Méthode* would possibly have been a different book had he had a comparable facility in English”: Mayda, *supra*, note 9, p. XXVIII note 97.

<sup>24</sup> Quite often, however, Gény invoked the common metaphor of translation as a means of explaining interpretation in law: see, e.g., “[...] les mots qui traduisent fidèlement [la] pensée” of the legislature – *Méthode*, *supra*, note 7 at para. 101 or, more generally, “[...] il paraîtra même souvent malaisé de séparer la pensée de sa traduction verbale, qui, seule, la parfait en l’acheminant à son but”: *Science et technique*, *supra*, note 22 at para. 254.

<sup>25</sup> See Claude Bocquet, “Signes du droit et traduction juridique” (1998) 20 *Parallèles* 93 who invokes Gény’s sense of the “caractère scientifique de l’analyse juridique” (p. 94); and Jean-Claude Gémard, “La traduction juridique et son enseignement: aspects théoriques et pratiques” (1979) *Meta* 35 at p. 42 who cites Gény to anchor legal technique in legal terminology. It might be noted that these two Swiss scholars have studied and taught in a legal system particularly sensitive to Gény’s contribution. On Gény in Switzerland, see generally Walter Yung, “François Gény et la jurisprudence en Suisse” in W. Yung, *Études et articles* (Geneva: Georg, 1971) 49.

<sup>26</sup> Susan Šarcevic, *New Approach to Legal Translation* (The Hague: Kluwer Law Int., 1997) at pp. 3-4.

<sup>27</sup> Few scholars openly acknowledge the problem of developing a general theory of legal translation from the statute model. See, however, the sensible note of caution of Šarcevic, *ibid.*, at p. 10.

<sup>28</sup> The importance of taking the type of legal discourse into account in developing an approach to the relationship between law and language is most typically recognized by legal pluralists interested in the languages of law originating outside the institutions of the state. See, for a recent overview, Jacques Vanderlinden “Harmonisation et dissonance: Langue et droit au Canada et en Europe ou de l’intérêt éventuel des synthèses” (2000) 3 *Rev. common law en français* 217 at pp. 267-8 and Roderick A. Macdonald, “Regards sur les rapports juridiques informels entre langues et droit” (2000) *Rev. common law en français* 137 at pp. 147-8.

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<sup>29</sup> Interestingly, translator Mayda explicitly denounced linking theological and legal translation which would bring “word-for-word” rather than “sense-for-sense” rendering of translated legal text: Mayda, *supra*, note 9 at p. IX. He also made the point in connection with his presentation of Gény’s disagreement with “the ideology of the exegetes [which was] identical with the dogmatic interpretation of biblical texts” (p. XIX).

<sup>30</sup> *Méthode, supra*, note 7 at para. 164.

<sup>31</sup> For an influential account of a development in legal interpretation based on “théorie non intentionnelle du texte littéraire” which seeks to locate and contain the creative role of the reader of legal text, see Paul Ricoeur, “Le problème de la liberté de l’interprète en herméneutique générale et en herméneutique juridique” in Paul Amselek, ed., *Interprétation et Droit* (Brussels : Bruylant, 1995) 177 esp. pp. 181 *et seq.*

<sup>32</sup> *Méthode, supra*, note 7 at para. 165.

<sup>33</sup> Rodolfo Sacco, “Langues et droit” (part 5: “La traduction juridique. Ses problèmes”) in R. Sacco and L. Castellani, eds., *Les multiples langues du droit européen uniforme* (Turin: L’Harmattan Italia, 1999) 163 at pp. 169-70.

<sup>34</sup> One scholar pointed to the “responsibility of the translator to moral and social truths which require him or her to convey completely defects in the source text: Peter Newmark, “The Translation of Authoritative Statements: a discussion” in J.-C. Gémard, ed., *Langage du droit et traduction* (Montreal: Linguatex/Conseil de la langue française, 1982) 283 at p. 298.

<sup>35</sup> Compare, on this point, *Méthode, supra*, note 7 at paras 164 *et seq.* and the work of George Steiner, *supra* note 19 at p. 251 who made a similar point for translation generally.

<sup>36</sup> Mayda used the colourful expression that when the statute is detached from legislative will, “the umbilical cord is severed”: *supra*, note 9 at p. XXV.

<sup>37</sup> Di Jin, “What is Perfect Translation?” (1997) 43 *Babel* 267 at p. 269.

<sup>38</sup> *Méthode, supra*, note 7 at para. 157.

<sup>39</sup> *Ibid.*, para. 158 and 159. The term – which nearly always appears in italics in the second edition of *Méthode* – was the focus of much later criticism of Gény and was acknowledged to be “à la fois imprécise et féconde” by Gény himself (para. 159).

<sup>40</sup> The advantages and disadvantages of creativity in legal translation are usefully canvassed in Christine Durieux, “La créativité en traduction technique” (1991) 6 *TEXTconTEXT* 9.

<sup>41</sup> Šarcevic, *supra*, note 26 at p. 16.

<sup>42</sup> See, for a particularly high-minded expression in Canadian scholarship, Paul-André Crépeau, “Essai de lecture du message législatif” in *Mélanges Jean Beetz* (Montreal: Ed. Thémis, 1995) 199 who explained this perspective as having its justification in the “nature même du texte législatif” (p. 205).

<sup>43</sup> For a complementary argument, leading to the same conclusion, to the effect that the recognition of a text as clear amounts to interpretation that masks “un choix entre une pluralité d’acceptions usuelles possibles”, see Michel van de Kerchove, “La doctrine du sens clair des textes et la jurisprudence de la Cour de cassation de Belgique” in van de Kerchove, ed., *L’interprétation en droit* (Brussels: Pub. Fac. univ. St-Louis, 1978) 13 at p. 37.

<sup>44</sup> Mayda, *supra*, note 9 at p. LXIX, esp. note 244. But compare his earlier held view to the opposite effect: Mayda, “The Korean Patriation Problem and International Law” (1953) 47 *A.J.I.L.* 44.

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<sup>45</sup> See Dominique Favre, “Le point de vue de l'utilisateur des traductions juridiques: constatations et souhaits” in J. Esteves-Ferreira, *et al.*, eds., in *équivalences 98: Die Akten / Les actes* (Bern (Switzerland): ASTTI, 1999) 9 for one such a perspective rooted in a view of the interpretative mission of the translator as the search for “le sens vrai” (p. 10).

<sup>46</sup> Pothier, *A Treatise on the Law of Obligations or Contracts, translated from the French with an Introduction, Appendix and Notes illustrative of the English Law on the subject*, 3<sup>rd</sup> ed. [William David Evans, transl.] (Philadelphia: Robert Small, 1853) which is remarkable as a book of lexicography and comparative law.

<sup>47</sup> See, *e.g.*, the explanation offered for the decision to translate Léon Julliot de La Morandière, eminent Parisian law dean no doubt but, in fairness, only a secondary legal scholar, by a team of Soviet jurists: E.A. Fleitchitz, “Pourquoi nous avons traduit en russe le Précis de droit civil de Léon Julliot de La Morandière” in *Études juridiques offertes à Léon Julliot de La Morandière* (Paris: Dalloz, 1964) 169 (the progressive character of the French author's work was alleged to be consonant with Soviet ideology).

<sup>48</sup> Mayda's attachment to Gény's work – a fascinating mix of admiration for the man and frustration at how Gény (and legal theory generally) had been trivialized in the legal academy – is most apparent in a later book (Jaro Mayda, *François Gény and modern jurisprudence*) (Baton Rouge / London: Louisiana State U. Pr., 1978)), in which he wrote characteristically (p. 4):

To devote a series of lectures to Gény seventy years after he published his first and probably most important work, *Méthode d'interprétation*, is no exercise in legal papyrology or in history of philosophy. Nor is it a superfluous exercise. Gény is a true classic. He is more talked about than read. His reputation is worldwide, yet it rests often on superficial awe rather than on profound understanding.

<sup>49</sup> The full reasons why Mayda took on the project are obscure: one supposes the mammoth effort reflected his appreciation of Gény's work, although while Mayda professed admiration, he was quick enough to criticize Gény ruthlessly for his “mistakes” and “bad prose” as well as his acolytes for their “flowery” tributes. My own sense is that Mayda was moved by a combination of personal culture in law – a continental civilian with an interest in theory – and his palpable sense of the injustice that American legal academy had shunted him to the scholarly margins of Puerto Rico and Louisiana civil law. Certainly his protracted introduction to the translation suggests that his main concern was to point to American legal realists and “jurisprudes” (his word!) that it had all been done far better before and that Americans lacked the culture to understand this *en version originale*. Explicitly, however, Mayda wrote that he undertook the work to bring Gény's great contribution to an English-speaking audience through an adequate translation: Mayda, *supra*, note 9 at p. VIII.

<sup>50</sup> Mayda, *supra*, note 48, “Author's Preface” at p. XII.

<sup>51</sup> For a thumbnail presentation of Jaro Mayda see *Directory of [United States] Law Teachers 1979-80* (n.p.: West Pub./Foundation Pr., 1979) at p. 542. Further material may be found in Joseph Dainow, “Foreword” in Mayda, *supra*, note 48.

<sup>52</sup> His publications, in English, French, Spanish and Czech, are widely scattered, although his penchant for self-citing is of some assistance. See, in particular, the bibliography of works relevant to Gény which include many references: Mayda, *supra*, note 48 at p. 257.

<sup>53</sup> See, *e.g.*, Mayda, “Quelques réflexions critiques sur le droit comparé contemporain” (1970) 22 R.I.D.C. 431 and Mayda, “A Critical Look at ‘Comparative Law’ Teaching in the United States” (1964) 17 J. Legal Ed. 193. Typical is his dismissal of an article by the renowned comparatist Gutteridge, entitled “The Comparative Aspects of Legal Terminology” (1938) 12 Tulane L. Rev. 401, as a “lame causerie”: Mayda, *supra*, note 9 at p. VIII note 2.

<sup>54</sup> One recurring motif in his work is his contrasting of legal theory with “the innocuous pastime which, with a few exceptions, is legal *philosophy*”: Mayda, “Book Review (*Le centenaire du Doyen Gény*)” (1966) 14

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Am. J. Comp. L. 713 at p. 715. Adde Mayda, “Book Review: J. Friedrich, *The Philosophy of Law in Historical Perspective*” (1960) 35 Tulane L. Rev. 290 esp. pp. 291-2.

<sup>55</sup> Mayda did not suffer those he considered to be fools gladly: of one leading scholar’s reading of *Libre recherche scientifique* he wrote that it “would have to be considered a typographical error if it were not expressed in a whole paragraph”: Mayda, *supra*, note 9 at p. XVII. Later Holmes is described as one of “two writers who speak of Géný without admiration [which] practically means without understanding (p. XVIII).

<sup>56</sup> Mayda decried the “inferior quality of most partial and total translations”, including those into Spanish and Italian: Mayda, *supra*, note 9 at p. XXXVII.

<sup>57</sup> On the work of the Louisiana State Law Institute, in particular on its role in translating major works of French civil law scholarship, see John H. Tucker, “Tradition et technique de la codification” in *supra*, note 46.

<sup>58</sup> So important were translations of basic French scholarly texts to the practice of law in Louisiana that certain among them were “distributed by the publisher as an integral part of the Louisiana Statutes Annotated”: J. Denson Smith, “Foreword” to Louisiana State Law Institute (Jaro Mayda, *et al.*, transl.), Aubry & Rau. *Cours de Droit civil français, vol. II – seventh edition (1961) by Paul Esmein* [Baton Rouge (La)]: L.S.L.I./West Pub.,) at p. III.

<sup>59</sup> Louisiana State Law Institute (J. Mayda et al., transl.), *Treatise on the Civil Law, vol. III (Parts 1-3) by Marcel Planiol with the collaboration of George [sic] Ripert, 11<sup>th</sup> ed., 1938* ([Baton Rouge, (La.)] L.S.L.I./West, 1959). On the significance of this work, see the book note by a leading French expert in American law André Tunc, (1960) R.I.D.C. 470.

<sup>60</sup> Mayda’s translations have been mined by those seeking to stake out an English-language lexicon for the civil law in Louisiana and beyond. See, *e.g.*, Quebec Research Centre of Private and Comparative Law, ed., *Private Law Dictionary and Bilingual Lexicons*, 2<sup>nd</sup> ed.; (Cowansville (Que.): Éd. Yvon Blais, 1991) which includes numerous quotations from Mayda’s Planiol translation as examples of terms defined for Quebec private law in English.

<sup>61</sup> Mayda, *supra*, note 9 at p. VIII.

<sup>62</sup> *Ibid.*, at p. IX.

<sup>63</sup> See the provocative study of Lawrence Venuti, *The Translator’s Invisibility* (London: Routledge, 1995) who went as far as to indict the translator as an accomplice to this crime, as he or she seeks invisibility in trying to pass the translation of as original (the “illusory effect”) (see chap. 1).

<sup>64</sup> Mayda, *supra*, note 48 at p. xi described the confluence of comparative law and legal theory as such.

<sup>65</sup> Mayda, *supra*, note 9 at p. IX.

<sup>66</sup> J. Denson Smith described Mayda’s technique as such in respect of his translation of Aubry & Rau, *supra*, note 58 at p. IV. (It is a small irony that Aubry & Rau’s original 19<sup>th</sup> century work in French was itself a translation and – adoption – from German).

<sup>67</sup> Denis Tallon, “Actualité de l’oeuvre de Géný” (1965) R.I.D.C. 735 at p. 736. In this rare and friendly review of this book, Professor Tallon fairly challenged Mayda on some of his reading of French law, notably his view on the limited role of decided cases as a source of law on the continent. (Tallon, it should be noted, has been one of France’s leading experts in the common law and a fine legal translator in the international setting in his own right. On his contribution, see N. Kasirer, “Lex-icographie mercatoria” (1999) 47 Am. J. Comp. L. 653).

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<sup>68</sup> The examples and quotations in the preceding paragraph are taken from Mayda's own explanation of his translation, *supra*, note 9 at pp. VII-XV.

<sup>69</sup> See generally Susan Šarcevic, "Translation of Culture-Bound Terms in Law" (1985) *Multilingua* 127 who argued that by avoiding calques and by adapting such terms to the target-language, translators may facilitate denotative equivalence.

<sup>70</sup> See George A. Bermann and Vivian Grossward Curran, *French Law: Constitution and Selective Legislation* (New York: Juris Pub., 1998) who expressly prefer "literalness" over style and not that the intentional awkwardness of their English translation is designed "to remind the reader that he is not dealing with a familiar institution but with one that might be quite distinct" (p. I-3).

<sup>71</sup> Compare Douglas Robinson, *What is Translation? Centrifugal Theories, Critical Interventions* (Kent State U.P., 1997) who argued that foreignness in translation was an elitist mode who would appeal only to a small class of elitist readers.

<sup>72</sup> See the rich exchange on this issue between two prominent comparative legal polyglots, the first arguing against work in translation, the second seeing it as a necessary evil: Pierre Legrand, "Questions à Rodolfo Sacco" (1995) *R.I.D.C.* 943 at p. 951.

<sup>73</sup> Mayda, *supra*, note 9 at p. IX.

<sup>74</sup> Recently one scholar linked U.S. Supreme Court Justice Harry A. Blackmun's thinking on the Bill of Rights to Gény's *libre recherche scientifique*, citing Jaro Mayda as the linguistic go-between: Paul R. Baier, "Mr. Justice Blackmun: Reflections from the Cours Mirabeau" (1999) *59 La. L. Rev.* 647 at p. 648.

<sup>75</sup> In his book *Marcel Proust* (Boston: Twayne/G.K. Hall, 1977) p. 10, Patrick Brady referred to the Moncrieff text as "the official English translation" without further explanation. See also the translator's note justifying George Hopkins' decision to render André Maurois' biography as *A Quest for Marcel Proust* (London: Jonathan Cape, 1950): "No attempt has been made to reproduce Monsieur Marois's title. That, in view of Mr Scott Moncrieff's choice (*Remembrance of Things Past*) would have been impossible. Monsieur Marois has called his book *À la recherche de Marcel Proust*, and our English name for the series of volumes that make up the novel permits no such adaptation" (p. 7).

<sup>76</sup> In denouncing the tendency to translate Gény's *recherche* by "research", Mayda observed that "Proust was certainly not engaging in *research* in his *À la recherche du temps perdu*; rather it was a *search* in his memory, remembering times past (or 'things lost' as the English translation goes)": Mayda, *supra*, note 9 at p. XI note 9.

<sup>77</sup> It is the source of small irony that, unlike Moncrieff and Enright, Mayda chose not to translate the title of the *Méthode* on the frontispiece of the 1963 publication, *supra*, note 8, apparently contradicting his view expressed in the introduction that translation is always possible and desirable (The publisher's typographical error in the title on p. I – *Methode* has no accent – no doubt enraged him).

<sup>78</sup> Ironically, Terence Kilmartin and D.J. Enright's later translation, despite the *mot-à-mot* title, may well be less literalist than the Moncrieff version. Kilmartin wrote: "[a] pervasive weakness of Scott Moncrieff's is perhaps a defect of virtue. Contrary to a widely held view, he stuck very closely to the original", thereby producing syntax in "oddly unEnglish shapes" and "a whiff of Gallicism." Kilmartin preferred idiomatic English to do – legal translators take note! – "the fullest possible justice to Proust": Terence Kilmartin, "Note on the Translation (1981)" in Marcel Proust, *In Search of Lost Time*, vol. I [C.K. Scott Moncrieff & Terence Kilmartin, transl., revised by D.J. Enright] (London: Vintage, 1996) vii at pp. ix-x.

<sup>79</sup> The point is made for jurilinguistics generally in J.-C. Gémar and Vo Ho-Thuy, *Difficultés du langage du droit au Canada*, 2<sup>nd</sup> ed. (Cowansville (Que): Éd. Yvon Blais, 1997): "le rôle du jurilinguiste consiste à interpréter [le droit] sur tous les plans, le plus fidèlement et le plus profondément possible pour en retrouver le sens (p. VIII).

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<sup>80</sup> Gémar, “Book Review / Compte rendu: *Langues et langages du droit* par Emmanuel Didier” (1993) 72 Can. Bar Rev. 403 esp. at p. 405: “La traduction des lois, aussi exemplaire soit-elle, n’est qu’un type particulier de traduction, pas LA traduction. La traduction juridique est un système général composé d’une multitude de sous-ensembles [...] dont la loi et le règlement ne sont qu’une partie, aussi importante soit-elle.”

<sup>81</sup> See Šarcevic’s account of the prescriptive versus the descriptive functions of different legal texts, *supra*, note 26 at p. 10.

<sup>82</sup> It is hard to overestimate the prescriptive influence of Aubry & Rau’s translation of Zachariae’s work on the patrimony, for example: see generally the text of Claude Bocquet in this collection.