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## Polysemy and the Law

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# Polysemy and the Law

*Daniel J. Hemel\**

*Polysemy—the existence of multiple related meanings for the same word or phrase—is a frequent phenomenon in legal and lay language. Although polysemy sometimes arises by accident, it also can be strategic: framers of legal rules can advance private and public interests by assigning meanings to terms that are different from—though connected to—the meanings that those terms carry outside the law. Understanding the functions of polysemy can help us design more effective legal rules and can shed light on ways in which legal actors translate language into power.*

*This Article undertakes a comprehensive analysis of polysemy’s origins, uses, and consequences across legal fields. It compares polysemy to monosemy, which arises when a word or phrase has the same meaning in legal and nonlegal language, and homonymy, which arises when a word or phrase has entirely different meanings in and outside law. It also identifies and examines a fourth category: “legalisms,” or legal terms (like “res ipsa loquitur” and “Roth IRA”) that have no colloquial correspondent. The Article goes on to identify circumstances in which polysemy is and isn’t likely to be an effective rhetorical strategy for the law. Polysemy can increase communicative efficiency, reduce decision costs, and enhance law’s expressive effects. But polysemy also can confuse laypeople, mislead legal decisionmakers, and undermine law’s perceived legitimacy. And even when deployed effectively, polysemy can raise entry barriers to legal interpretation, impose negative externalities on adjacent legal systems, and redistribute wealth and status in ways that disproportionately benefit members of the legal profession.*

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## INTRODUCTION

Polysemy—the existence of multiple related meanings for the same word or phrase—is a common phenomenon in the law. Virtually all lawyers and law students have encountered polysemy, even if some are unfamiliar with the technical linguistic term. For instance, “duty” in negligence is generally understood to mean something different from—though still related to—“duty” in morality and ethics.<sup>1</sup> Likewise, “tangible object” in 18 U.S.C. § 1519 carries a legal meaning different from (specifically, a subset of) its colloquial meaning: “A fish is no doubt an object that is tangible,” according to a plurality of the Supreme Court in *Yates v. United States*, but a fish is not a tangible object for purposes of § 1519.<sup>2</sup> The word “take” in the Endangered Species Act, according to the Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, includes “significant habitat modification or degradation” that “kills or injures wildlife”—a definition of “take” that appears in no English language dictionary.<sup>3</sup> And the Supreme Court held in *Shaare Tefila Congregation v. Cobb* that Jews are a “race” under the Civil Rights Act of 1866 even though “Jews today are not thought to be members of a separate race.”<sup>4</sup> Other examples abound.

The relationship between legal and nonlegal language is the subject of a rich literature in philosophy dating back to Bentham,<sup>5</sup> but the economic and political aspects of polysemy remain understudied. The explosion of economically informed scholarship on the design of legal rules in the late twentieth century considered the choice between property rules and liability rules,<sup>6</sup> between public and private enforcement of legal rules,<sup>7</sup> and between “rules” and standards,<sup>8</sup> among numerous other topics. But the law-and-economics literature has had relatively little to say about the specific words and phrases that legal institutions use to frame their rules. When is polysemy a feature of the law, and when is it a bug? Who is enriched—materially or socially—by

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1. See, e.g., *Pulka v. Edelman*, 358 N.E.2d 1019, 1022 (N.Y. 1976) (distinguishing “moral duty” from “legal duty”).

2. 574 U.S. 528, 532 (2015) (plurality opinion).

3. 515 U.S. 687, 708 (1995).

4. 481 U.S. 615, 617 (1987).

5. See JEREMY BENTHAM, *OF LAWS IN GENERAL* (J.H. Burns ed., 1970) (1782).

6. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972) (“[A]rticulating a concept of ‘entitlements’ which are protected by property, liability, or inalienability rules . . .”).

7. See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 3 (1975) (“[T]he area in which private enforcement is in fact clearly preferable to public enforcement on efficiency grounds is more restricted.”).

8. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

polysemy, and who bears its costs? We still lack a general framework for evaluating polysemy's welfare effects, distributive consequences, and political ramifications.

This Article takes a first step toward developing such a framework. In some respects, instances of polysemy are like Tolstoy's unhappy families: each one is polysemous in its own way.<sup>9</sup> But the many manifestations of polysemy fall into a few general categories that share several common features. Identifying and exploring these common features can shed light on the ways in which legal language shapes the law's contents, mediates the law's consequences, and distributes power among legal actors and institutions.

The analysis begins with a motivating example: "duty" in tort law. The key takeaway from the discussion is a recognition of duty's duality. To understand the law of negligence, one must understand—as courts often repeat—that "moral duty" is not the same as "legal duty." As the New York Court of Appeals put it in *Pulka v. Edelman*: "The former is defined by the limits of conscience; the latter by the limits of law."<sup>10</sup> But to understand tort law as it operates in society, one must also understand that the law's label for the first element of negligence is "duty," a word that in ordinary English connotes moral obligation and responsibility. The polysemy of duty—the fact that the word has different but still related meanings inside and outside tort law—helps to explain the economic and political outcomes that tort law generates as well as some of the most significant challenges that tort law encounters.

Generalizing from the "duty" example, the Article places polysemy on a spectrum of semantic relatedness. By "semantic relatedness," I refer to the congruence (or lack thereof) between a term's legal and nonlegal meanings. On one side lies monosemy, which arises when a word or phrase has the same meaning in legal and nonlegal language. On the other side lies homonymy, which arises when a word or phrase has entirely different meanings in legal and nonlegal language. Polysemy lies in the middle. What is distinctive about polysemy is not only the divergence between a term's legal and nonlegal meaning but also the fact that this divergence is not complete. In addition to monosemy, polysemy, and homonymy, there is a fourth possibility lying off the spectrum, which we might call "legalogism": the creation of a law-specific word or phrase with no nonlegal analog. For

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9. See LEO TOLSTOY, *ANNA KARENINA* 1 (Richard Pevear & Larissa Volokhonsky trans., Penguin Classics deluxe ed. 2004) (1878) ("All happy families are alike, each unhappy family is unhappy in its own way.").

10. 358 N.E.2d 1019, 1022 (N.Y. 1976).

example, in tax law, an individual retirement plan that accepts nondeductible contributions and makes tax-free distributions is called a “Roth IRA,”<sup>11</sup> a term that never leads to confusion with its colloquial correspondent because there is no meaning to the term except for its legal meaning.

The Article next charts the various ways in which polysemy might arise. The opening paragraph illustrates four polysemic paths. Polysemy can emerge through the evolution of the common law—for example, the gap between tort-law “duty” and moral duty. Polysemy also can reflect a judicial gloss on a statutory word or phrase, as with “tangible object” in *Yates*.<sup>12</sup> Alternatively, legislators can generate polysemy themselves by giving a nonstandard definition to a statutory term. For example, Congress defined “take” in the Endangered Species Act to mean “to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a species.<sup>13</sup> The *Sweet Home* Court—in construing “take” to include habitat modification—simply took Congress at its word.<sup>14</sup> Finally, a term can start out as monosemous but metamorphose into polysemy as the nonlegal meaning of the term evolves. According to the Court, Jews were considered to be a “distinct race” circa 1866;<sup>15</sup> it is only because of our changing conception of race (and the changing position of Jews in American society<sup>16</sup>) that the description of Jews as a race in *Shaare Tefila* appears polysemous.

The heart of the Article is an evaluation of polysemy’s benefits and costs. Thinking about polysemy in relation to monosemy, homonymy, and legalogism helps to put these benefits and costs into sharper focus. Polysemy allows the law to capture the best features of monosemy—specifically, its communicative, decisional, and expressive economy—while simultaneously achieving the adaptability of homonymy and legalogism. To understand the functional aspects of polysemy, we must consider the alternatives on both sides.

Start with monosemy. The use of ordinary language in the law can increase communicative efficiency: it can make legal concepts easier to convey, both to other lawyers and (especially) to laypeople. Monosemy also serves to reduce decision costs: judges and other interpreters need not master a new vocabulary every time they

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11. I.R.C. § 408A.

12. See *Yates v. United States*, 574 U.S. 528 (2015).

13. 16 U.S.C. § 1532(19) (emphasis added).

14. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995).

15. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 618 (1987).

16. See generally KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* (1998) (tracing the history of Jewish racial self-identification and classification in the United States).

encounter or reencounter another area of law, and they can rely on their intuitions about the nonlegal meaning of a term as a heuristic to resolve edge cases. And monosemy can enhance law's expressive power—specifically, its ability to shape behavior and beliefs through means other than legal sanctions.<sup>17</sup>

But monosemy also comes with downsides. Sometimes, legislators and judges may want legal standards to be more nuanced than succinct ordinary language can accommodate. For example, a court may conclude—for potentially valid policy reasons—that a municipal police department ought not be liable to a crime victim for failing to protect her from an assailant, even though police have a *duty* in the colloquial sense to protect citizens from harm.<sup>18</sup> Or for valid policy reasons, a court may conclude that a motorist ought *to* be liable for an accident arising from a “compliance error”—a momentary lapse that could befall even the most conscientious driver<sup>19</sup>—even though “duty” (arguably) implies “ought,” “ought” (arguably) implies “can,” and no one but a superhuman can avoid compliance errors entirely. In other words, courts in duty-to-protect cases may want legal duty to be narrower than moral duty, while courts in compliance-error cases may want legal duty to sweep more broadly than moral duty. In both of those instances, maintaining monosemy would mean accepting outcomes that are potentially undesirable from a policy perspective.

One alternative in those circumstances is to replace monosemy with homonymy. For example, instead of the four elements of negligence being duty, breach, causation, and damages, a court unconstrained by precedent could change the four elements of negligence to be *doodad*, breach, causation, and damages. Lawyers and law students presumably would come to understand that *doodad* in negligence law does not refer to “an ornamental attachment or decoration,”<sup>20</sup> just as they now understand that “consideration” in

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17. “Expressive” is itself a polyseme. See RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 13–14 (2015) (identifying four types of “expressive” claims in legal scholarship). Consistent with McAdams, I am using “expressive” to refer to the way in which law changes beliefs and behavior through channels other than (though potentially parallel to) deterrence. As McAdams notes, this positive view of law's expressive powers is distinguishable from—though not incompatible with—normative theories that “evaluate law by whether it expresses appropriate equal respect for individuals.” *Id.* at 15 (citing Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531–32 (2000)).

18. *Riss v. City of New York*, 240 N.E.2d 860, 860–61 (N.Y. 1968).

19. See Mark F. Grady, *Res Ipsa Loquitur and Compliance Error*, 142 U. PA. L. REV. 887, 902 (1994) (defining “compliance error” as “an inadvertent departure from the required rate of precaution”).

20. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 372 (11th ed. 2003) [hereinafter MERRIAM-WEBSTER'S].

contract law does not refer to “careful thought” or “sympathetic regard.”<sup>21</sup> But if duty were replaced with doodad, the law of negligence would lose some of its communicative efficiency, and the term “doodad” would provide little guidance to judges and other interpreters in difficult cases. Moreover, a court’s conclusion that a particular defendant had a “doodad” to a particular plaintiff would lack the expressive power of duty determinations under current law. The shift from duty to doodad, or from monosemy to homonymy, would give negligence law more leeway to respond to challenges like duty-to-protect and compliance-error cases, but at a nontrivial cost.

Polysemy frequently represents a compromise between monosemy and homonymy. As long as legal meaning does not stray too far from nonlegal meaning, the benefits of monosemy potentially can be preserved, at least in part. Meanwhile, liberating a legal term from its nonlegal meaning may allow courts to achieve more agreeable results in cases where monosemy would have produced problematic policy outcomes. But polysemy entails a delicate balancing act. As interpreters bend a term’s legal meaning farther from its colloquial meaning in order to achieve desirable results in individual cases, they place increasing strain on the term’s ability to convey and encode information. Polysemy potentially leaves legal terms in the linguistic equivalent of the “uncanny valley”—a region on the spectrum between similarity and difference in which objects and concepts are particularly difficult to apprehend because of their not-quite-sameness.<sup>22</sup>

The movement from monosemy to polysemy can cause not only confusion but revulsion. Consider again the example of “duty” in negligence law. When New York City argued that its police had no legal “duty” to protect a subway rider from a stabbing attack in 2011, the City correctly stated New York tort law, but it also potentially undermined public faith in law enforcement institutions.<sup>23</sup> As one fifty-eight-year-old man said to a public radio reporter afterwards, “Why do they have the police in New York then if they ain’t got no duty to protect us?”<sup>24</sup> One doubts whether the case would have elicited the same reaction if

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21. *Id.* at 266.

22. The uncanny valley hypothesis as applied to humanlike robots first appeared in a 1970 Japanese-language essay by Masahiro Mori. For an English-language translation, see Masahiro Mori, *The Uncanny Valley: The Original Essay by Masahiro Mori*, IEEE SPECTRUM (trans. Karl F. MacDorman & Norri Kageki, June 12, 2012), <https://spectrum.ieee.org/the-uncanny-valley> [<https://perma.cc/TWX7-XUU4>].

23. See, e.g., Kathianne Boniello, *City Says Cops Had No Duty to Protect Subway Hero Who Subdued Killer*, N.Y. POST (Jan. 27, 2013, 5:00 AM), <https://nypost.com/2013/01/27/city-says-cops-had-no-duty-to-protect-subway-hero-who-subdued-killer> [<https://perma.cc/LU8L-ULQZ>].

24. *No Special Duty*, WNYC STUDIOS: RADIOLAB (Oct. 2, 2020), <https://www.wnycstudios.org/podcasts/radiolab/articles/no-special-duty> [<https://perma.cc/R7CX-KP96>].



the first element of negligence had been a homonym and the City had argued merely that the police had no “doodad” under the circumstances.

As with the choice between rules and standards, the choice among monosemy, polysemy, homonymy, and legalism reflects a complex trade-off among competing values. Reflecting on polysemy and its alternatives can point us toward general areas in which polysemy is especially useful. These instances of “productive polysemy” come in at least four flavors.

The first, exemplified by “duty” and “cause” in negligence, consists of legal rules for which a crisp statement in ordinary English conveys important information to laypeople but breaks down in a relatively small number of hard cases. We might call this category “approximate polysemy”: the word or phrase is “good enough” to describe the relevant legal concept even though it smooths over some of the law’s texture. Approximate polysemy is especially likely to arise when a single legal rule governs a wide range of social and economic interactions, which makes communicative efficiency a particular virtue but reduces the probability that the succinct rule will suffice in all of its diverse applications.

A second type of productive polysemy involves the use of metaphor. Sometimes, the metaphor serves as convenient shorthand—for example, “ripeness” to describe an issue’s readiness for adjudication.<sup>25</sup> Sometimes, it expresses lawmakers’ attitude toward a particular item or activity—for example, Congress’s use of the term “golden parachute” in the Internal Revenue Code to condemn excessive payments to executives after a corporation is acquired.<sup>26</sup> In other cases, the metaphor is not only mnemonic or expressive but also decision-guiding: it supplies a prototype to guide future adjudicators in the face of factual and/or normative uncertainty.

Consider one of the most familiar passages in American law: “Congress shall make no law . . . abridging the freedom of speech.”<sup>27</sup> Arguably, the Free Speech Clause announces neither a “rule” nor a “standard” in the rules-standards sense but a prototype of the activities that the promulgator seeks to protect or proscribe (e.g., verbal expression). The law directs subsequent adjudicators to reason by analogy from the prototype, determining whether activities that lie outside of the term’s literal meaning share normatively relevant features with the prototype such that they merit the same protection or

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25. See, e.g., *Abbott Lab’s v. Gardner*, 387 U.S. 136, 148–49 (1967).

26. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 67, 98 Stat. 585–86 (codified as amended at I.R.C. §§ 280G, 4999); see *infra* notes 272–275 and accompanying text.

27. U.S. CONST. amend. I.

proscription. The results can be profoundly polysemous—for example, the word “speech” may be extended to the wearing of a black armband<sup>28</sup> or the burning of an American flag<sup>29</sup>—but the decisional pattern follows a familiar common-law path. Prototype polysemy is especially effective as a mechanism for reducing decision costs when the promulgator has strong intuitions about the appropriate treatment of the prototype but cannot yet identify the basis for that intuition with sufficient precision to articulate a “standard.”

A third flavor of polysemy involves explicit redefinition. The promulgator defines a term (e.g., “take”) to include an activity that lies outside the nonlegal meaning of that term (e.g., significant habitat modification) in order to emphasize normatively relevant similarities (i.e., degrading an animal’s habitat is *like* capturing or killing it<sup>30</sup>). Or in the reverse direction, a promulgator defines a term to exclude items that normally *would* fall within the nonlegal meaning of that term in order to express a judgment about those items (e.g., the recent move by the Biden administration to define “hospital” under the Medicare and Medicaid Acts so as to exclude hospitals whose staff members are not fully vaccinated against COVID-19<sup>31</sup>). These may seem like strange ways to write laws on first glance, though on further reflection we will recognize them as familiar rhetorical strategies. Redefinitional polysemy is potentially attractive when promulgators seek to use law as a medium through which to influence beliefs and attitudes.

A fourth type of polysemy arises when framers of legal rules seek to convey different meanings to different audiences—what Meir Dan-Cohen calls “selective transmission.”<sup>32</sup> Selective transmission takes advantage of “acoustic separation” between two audiences.<sup>33</sup> Total acoustic separation is difficult to maintain in a monolingual environment because the two audiences—laypeople and legal decisionmakers—can and do communicate with each other regularly. But as we shall see, selective transmission may be a more effective

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28. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

29. See *Texas v. Johnson*, 491 U.S. 397 (1989).

30. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

31. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555 (Nov. 5 2021) (codified at 42 C.F.R. pts. 416, 418, 441, 460, 482–86, 491, 494); *Biden v. Missouri*, 142 S. Ct. 647, 650 (2022) (per curiam); Application for a Stay of the Injunction at 19–20, *Biden v. Missouri*, 142 S. Ct. 647 (2022) (No. 21A240), 2021 WL 8939370 (explaining how the Biden administration’s vaccine mandate for hospital employees follows from the authority of the Secretary of Health and Human Services to define “hospital” under the Medicare statute).

32. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

33. See *id.* at 630 (describing “acoustic separation” as a condition in which the law communicates decision rules to public officials and conduct rules to the general public).

strategy in plurilingual environments, where the use of a polysemous term in one language opens up translation opportunities that can result in subtly different meanings of the same text across languages.

Polysemy can be a powerful tool for good. But polysemy also can generate significant social costs. The prevalence of polysemy makes it harder for laypeople to interpret the law confidently on their own. And of particular concern in the context of U.S. federalism, uses of polysemy by one sovereign (e.g., a U.S. state) can impose negative “interpretive externalities” upon other states or upon federal law. The failure of lawmakers and judges to internalize these interpretive externalities can lead to excessive utilization of polysemy. Polysemy may be productive, but it is also likely to be overproduced.

The Article ends by examining the effect of polysemy on the distribution of wealth and status across legal actors and institutions. One effect of polysemy is to empower judges in constitutional and statutory cases to avoid results that they consider to be undesirable, even when those results follow straightforwardly from the ordinary meaning of the relevant text. Yet courts must rely on polysemy for this purpose only because, within the constraints of American legal culture, courts cannot amend constitutional and statutory text themselves. If not for that constraint, the Supreme Court in *Yates*<sup>34</sup> could have said: “The statute makes it a felony to destroy a ‘tangible object’ with the intent to obstruct a federal investigation, but we think ‘tangible object’ is too broad, so we will amend the statute to limit the prohibition to a ‘tangible object used to record or preserve information.’” Or it could have replaced tangible object with a homonym or legalism—say, “schmangible schmobject”—so as to eliminate dissonance between different legal and nonlegal meanings of the same term. Courts in some other countries have asserted the power to “read in” words, phrases, and even entire paragraphs to statutory text.<sup>35</sup> The absence of a “reading in” power in the United States constrains courts’ choice set.

Yet the linguistic constraint on courts’ choice set also can be a source of social influence and social status. It not only allows but compels judges and justices to deal in terms with deep nonlegal resonance. The stakes of legal debates over words like “duty,” “race,” or—as we shall see—“person” reflect not only the doctrinal consequences of those decisions but also the cultural and ethical significance of those terms. Judges *decide* what “duties” we owe each other, what “race” we belong to, and who is and isn’t a “person.” Polysemy empowers judges and justices to serve not only as legal

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34. *Yates v. United States*, 574 U.S. 528 (2015).

35. *See infra* notes 384–385.

technicians but also to play the part of philosopher-kings and queens. And the elevation of judicial status through polysemy has trickle-down effects for lawyers and legal academics—effects that align with our own self-interest but not necessarily with society’s.

Part I offers the motivating example of “duty” in tort law, which illustrates themes that will run through the analysis that follows. Part II introduces the spectrum of semantic relatedness, situates polysemy alongside its alternatives, and explores polysemy’s origins. It also distinguishes semantic relatedness from the choice between rules and standards, from the debate over textualism versus purposivism in statutory interpretation, and from the concept of “legal fictions.” Part III presents a normative evaluation of polysemy, highlighting polysemy’s sometimes-subtle implications for communicative efficiency, decision costs, and law’s expressive power. It also identifies circumstances in which polysemy is most likely to be “productive”—most likely to advance public and not merely private interests. Part IV shifts focus to the political economy of polysemy and to polysemy’s effect on the distribution of wealth and status.

## I. THE POLYSEMY OF DUTY IN NEGLIGENCE LAW

### A. *Tarasoff on Duty*

Virtually every first-year law student in the United States encounters the four elements of negligence: duty, breach, causation, and damages. Many of those students encounter the definition of “duty” given in *Tarasoff v. Regents of the University of California*,<sup>36</sup> now a staple of 1L syllabi. The tragic facts of *Tarasoff* offer us a lens into the phenomenon of polysemy more generally.

Tatiana Tarasoff, known to her family and friends as “Tanya,” was a student at Merritt College in Oakland in the fall of 1968 when she met Prosenjit Poddar in a folk dancing class on the campus of the University of California, Berkeley.<sup>37</sup> Poddar, who had arrived in the United States from India a year earlier, was working toward a graduate

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36. (*Tarasoff II*), 551 P.2d 334 (Cal. 1976). For facts of the case beyond those included in the *Tarasoff* opinion, see Glenn S. Lipson & Mark J. Mills, *Stalking, Erotomania, and the Tarasoff Cases*, in *THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES* 257 (J. Reid Meloy ed., 1998); Mark A. Rothstein, *Tarasoff Duties After Newtown*, 42 J.L. MED. & ETHICS 104 (2014); and Peter H. Schuck & Daniel J. Givelber, *Tarasoff v. Regents of the University of California: The Therapist’s Dilemma*, in *TORTS STORIES* 99 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

37. Rothstein, *supra* note 36, at 104.

degree in naval architecture at Berkeley.<sup>38</sup> By all accounts, he struggled to adjust to late 1960s U.S. culture and campus life.

On New Year's Eve at the end of 1968, Tarasoff and Poddar attended a party at the International House on Berkeley's campus, where Poddar and Tarasoff's brother Alex both lived.<sup>39</sup> Tatiana Tarasoff and Poddar kissed—an act that Poddar interpreted as a “sign of betrothal” but that Tarasoff certainly did not.<sup>40</sup> After learning that Tarasoff was not interested in an intimate relationship with him, Poddar suffered a mental breakdown. That summer, he sought outpatient psychiatric care at UC Berkeley's campus hospital, where he was treated by Dr. Lawrence Moore, a staff psychologist.<sup>41</sup>

In August 1969, during one of his therapy sessions, Poddar confided to Dr. Moore that he intended to kill a woman readily identifiable as Tatiana Tarasoff when she returned from summer vacation.<sup>42</sup> Dr. Moore asked the campus police to commit Poddar for observation in a mental hospital, but the police released Poddar soon afterwards on his promise to stay away from Tarasoff.<sup>43</sup> Neither Dr. Moore nor the police informed Tarasoff of Poddar's threat.

On October 27, 1969, Poddar went to Tarasoff's home with a pellet gun and kitchen knife. There, he found Tarasoff alone. As she tried to flee, Poddar shot her and then stabbed her repeatedly.<sup>44</sup> She died outside her home from the knife wounds. Poddar called the city police and turned himself in.<sup>45</sup>

Poddar was tried and convicted of second-degree murder, but his conviction was overturned on the ground that the trial judge inadequately instructed the jury regarding Poddar's diminished-capacity defense.<sup>46</sup> Prosecutors declined to retry Poddar, and the state allowed him to return to India, where—by one account—he went on to marry and live an “ostensibly normal life.”<sup>47</sup> While Poddar's criminal case was pending, Tarasoff's parents—Lidia and Vitaly—filed parallel lawsuits alleging negligence against Dr. Moore, three of his psychiatric department colleagues, five campus police officers, and the University

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38. *Id.*; Lipson & Mills, *supra* note 36, at 258.

39. Schuck & Givelber, *supra* note 36, at 102–04.

40. Lipson & Mills, *supra* note 36, at 259.

41. Schuck & Givelber, *supra* note 36, at 99, 102.

42. *Id.*

43. *Id.* at 103; Rothstein, *supra* note 36, at 105.

44. Rothstein, *supra* note 36, at 105.

45. Lipson & Mills, *supra* note 36, at 267.

46. *People v. Poddar*, 518 P.2d 342 (Cal. 1974).

47. *See* Schuck & Givelber, *supra* note 36, at 106.

of California. The trial court dismissed the parents' claims without leave to amend, and the intermediate appellate court affirmed.<sup>48</sup>

When the case reached the California Supreme Court, the central issue was whether the campus therapists and campus police owed a "duty" to Tarasoff. In December 1974, the state supreme court issued its first of two opinions in the case (*Tarasoff I*), holding that Tarasoff's parents could state a claim against both the therapists and the police for breaching a duty to warn Tatiana of Poddar's threats.<sup>49</sup> The court subsequently reheard the case, withdrew its *Tarasoff I* opinion, and issued a new opinion in July 1976. That decision (*Tarasoff II*) held that the campus therapists had a "duty to exercise reasonable care to protect Tatiana" but that the police did not.<sup>50</sup>

The California Supreme Court's decision was extraordinarily controversial at the time and remains so nearly a half-century later. Shortly after *Tarasoff II*, psychiatrist and legal scholar Alan Stone predicted in the *Harvard Law Review* that the duty imposed on therapists by *Tarasoff* would "result in a lower level of safety for society."<sup>51</sup> Stone and other critics anticipated that patients would be less likely to seek mental health treatment or to discuss their darkest thoughts with therapists if they feared that those thoughts might be disclosed to acquaintances or to the police.<sup>52</sup> Stone and other critics also predicted that *Tarasoff* would discourage mental health professionals from taking on high-risk patients because of the liability and insurance implications.<sup>53</sup> Most states nonetheless adopted *Tarasoff*-type rules by judicial decision or statute,<sup>54</sup> but empirical analysis offers support for Stone's predictions. Applying a difference-in-differences methodology, economist Griffin Edwards estimates that the presence of a *Tarasoff*-type requirement for therapists causes an increase in state homicide rates of approximately five percent<sup>55</sup> and an increase in teen suicide rates of eight to ten percent.<sup>56</sup> Those estimates imply—perhaps improbably—that thousands of excess deaths in the United States in

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48. *Tarasoff v. Regents of Univ. of Cal.*, 108 Cal. Rptr. 878 (1973).

49. *Tarasoff v. Regents of Univ. of Cal.* (*Tarasoff I*), 529 P.2d 553, 561 (Cal. 1974).

50. *Tarasoff II*, 551 P.2d 334, 340, 353 (Cal. 1976).

51. See Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 365 (1976).

52. See, e.g., *id.*

53. See, e.g., *id.* at 359.

54. Griffin Sims Edwards, *Database of State Tarasoff Laws* (Feb. 11, 2010), <https://ssrn.com/abstract=1551505> [https://perma.cc/E8KX-SF7B].

55. Griffin Edwards, *Doing Their Duty: An Empirical Analysis of the Unintended Effect of Tarasoff v. Regents on Homicidal Activity*, 57 J.L. ECON. 321, 322 (2014).

56. Griffin Edwards, *Tarasoff, Duty to Warn Laws, and Suicide*, 34 INT'L REV. L. ECON. 1, 7 (2013).

recent decades are attributable to *Tarasoff* and parallel developments in other states.

Among tort theorists, the debate over *Tarasoff* focuses less on the specific outcome than on the California Supreme Court's language regarding duty. In both *Tarasoff I* and *Tarasoff II*, Justice Matthew Tobriner wrote for the majority that "legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done."<sup>57</sup> Tobriner then quoted a line from William Prosser, a longtime dean of UC Berkeley's law school who died while the *Tarasoffs'* tort case was working its way through the California courts: "[Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."<sup>58</sup>

Some scholars cheer the triumph of the Prosserian conception of duty in *Tarasoff*.<sup>59</sup> According to their view, "duty" always has been a stand-in for policy considerations—Justice Tobriner simply acknowledges reality.<sup>60</sup> Others lament Prosser's victory. For example, John Goldberg and Benjamin Zipursky write that *Tarasoff* and other Prosserian precedents transformed "duty" into a "blank check" for judges to decide which negligence cases go to trial and which ones are dismissed at an earlier stage.<sup>61</sup> Goldberg and Zipursky argue that courts should use the element of "duty" not as an invitation for open-ended policymaking but as an opportunity to articulate and enforce mutual obligations—obligations that have an ethical as well as legal dimension.<sup>62</sup>

My goal in this introductory example is not to resolve the debate over therapists' duties or the Prosserian conception of duty but to highlight the practical role that the word "duty" *did* play in *Tarasoff*. Even in the case that marks the apogee of Prosser's conception of "duty," the word was not "only an expression of the sum total of those

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57. *Tarasoff I*, 529 P.2d 553, 557 (Cal. 1974); *Tarasoff II*, 551 P.2d 334, 342 (Cal. 1976).

58. *Tarasoff I*, 529 P.2d at 557 (quoting WILLIAM LLOYD PROSSER, HANDBOOK OF THE LAW OF TORTS 332–33 (3d ed. 1964)) (alteration in original); *Tarasoff II*, 551 P.2d at 342 (quoting PROSSER, *supra*).

59. See, e.g., John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 870 (proposing that "courts should impose upon a defendant nothing more nor less than an obligation to act reasonably under the circumstances").

60. See, e.g., Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 152 n.356 (1994) (stating that the *Tarasoff* court is "notable" for articulating a "frank" rationale for its decision).

61. See John C. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 334–35 (2006).

62. *Id.*

considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”<sup>63</sup> “Duty” was a *particular* expression of those policy considerations that took the form of an ordinary English word meaning “obligation” or “responsibility.”<sup>64</sup> In that sense, “duty” was not—and never is—a blank check. It is a check with a key term already filled in.

Indeed, we can see—or at least imagine—the effect of the word “duty” at each stage of the *Tarasoff* case. Tort law typically intervenes at traumatic moments in plaintiffs’ lives—after they have been the victim of a medical error, after they have been involved in a car crash, or after they have lost a family member to one of those two causes.<sup>65</sup> (*Tarasoff* might be described as a particularly traumatic medical malpractice case.) And many of these plaintiffs have no prior exposure to the civil justice system. The language of duty helps to render tort law intelligible to lay plaintiffs who are likely at a lifetime low in terms of mental and emotional bandwidth.

We don’t know much about Lidia and Vitaly Tarasoff’s lived experience as plaintiffs, but we do know a bit about their lives: Vitaly was an auto mechanic,<sup>66</sup> and the couple had moved to the United States from Brazil only six years before their daughter’s death.<sup>67</sup> When Lidia and Vitaly initially spoke with an attorney to discuss the possibility of a lawsuit, the attorney likely explained that U.S. tort law allowed them to sue the University of California and its employees for breaching a *duty* to Tatiana and thus causing her death. “Duty” is a word that likely would have registered for them in a way that Prosser’s “sum total of policy considerations” almost certainly would not.

Intelligibility matters on the defendant side as well. Some tort defendants, like the University of California, are legally sophisticated repeat players, but others are—in Marc Galanter’s terminology—“one-shotters.”<sup>68</sup> Consider Dr. Moore, the thirty-four-year-old UC Berkeley staff psychologist who treated Poddar and tried to have his patient

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63. See *supra* note 58 and accompanying text.

64. See MERRIAM-WEBSTER’S, *supra* note 20, at 388.

65. In 2005, the most recent year for which nationwide data is available, motor vehicle and medical malpractice cases constituted 72.5 percent of all tort trials in state courts. See LYNN LANGTON & THOMAS H. COHEN, CIVIL BENCH AND JURY TRIALS IN STATE COURTS 2 tbl.1 (2009), <https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf> [<https://perma.cc/3ME5-A6E2>].

66. *Vitaly Tarasoff Obituary*, S.F. CHRONICLE (Feb. 2, 2015), <https://www.legacy.com/us/obituaries/sfgate/name/vitaly-tarasoff-obituary?id=17099177> [<https://perma.cc/AF88-QFG5>].

67. *TARASOFF, Lidia*, SFGATE (Apr. 24, 2002), <https://www.sfgate.com/news/article/TARASOFF-Lidia-2846332.php> [<https://perma.cc/LK43-4LX7>].

68. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97 (1974).



committed.<sup>69</sup> The Tarasoff case appears to be his first experience as a tort defendant. When Dr. Moore found out that he was being sued, he likely wondered, “for what?” The answer—for breaching a *duty* to protect Tarasoff from harm at Poddar’s hands—might not have been satisfactory to Moore, but at least it would have been intelligible. No doubt Dr. Moore would have been even more baffled if the university’s general counsel had told him that he was being sued because “the sum total of policy considerations” led the law to say that he should bear liability for Tarasoff’s death.

The impact of the word “duty” on the *Tarasoff* case continued throughout the litigation. Even Justice Tobriner seems to have been swayed by its nonlegal meaning. Consider Tobriner’s reaction to defense counsel’s argument that the suit should be dismissed on no-duty grounds: “Defendants . . . contend,” Tobriner paraphrased, “that in the circumstances of the present case they owed no duty of care to Tatiana or her parents and that, in the absence of such duty, they were free to act in careless disregard of Tatiana’s life and safety.”<sup>70</sup> Tobriner appears to be almost scandalized by the defense counsel’s no-duty assertion, even though—as Tobriner well understood—“no duty” in this context is a shorthand way of saying that the sum total of policy considerations weigh against the imposition of tort liability. The lack of a tort-law duty wouldn’t have left the campus therapists “free to act in careless disregard” of Tatiana: they still could have been subject to disciplinary action before the California Board of Psychology if they violated professional ethics rules, and they very likely felt a moral obligation toward Tarasoff whether or not that moral obligation was backed by the threat of tort damages. It tells us something about the power of the word “duty” that even Justice Tobriner—the judge most single-handedly responsible for embedding the Prosserian conception of duty into California law—still understood the words “no duty,” at least when uttered by someone else, to imply a license for “careless disregard.”

Much of the rest of Tobriner’s opinion sounds in the register of obligation and responsibility.<sup>71</sup> Tobriner makes no attempt to tally up the costs and benefits of liability—few judges ever do. Instead, he focuses his analysis on the obligations that individuals in different roles owe to others—on “duty” in the colloquial, pre-Prosserian sense. “[B]y entering into a doctor-patient relationship,” Tobriner writes, quoting a

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69. See Tracey Taylor, *Lawrence Earle Moore, Brilliant Doctor, Caring Man*, BERKELEYSIDE (Jan. 26, 2014, 5:39 PM), <https://www.berkeleyside.org/2014/01/26/remembering-lawrence-earle-moore> [<https://perma.cc/WA48-3GLG>].

70. *Tarasoff II*, 551 P.2d 334, 342 (Cal. 1976).

71. *Id.* at 339–450.

*California Law Review* article, “the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient.”<sup>72</sup> Rightly or wrongly, Tobriner is leaning on intuitions about professional responsibility in order to define the limits of legal liability. He is, in other words, using the nonlegal understanding of “duty” as a heuristic that allows him to economize on decision costs.

The nonlegal understanding of “duty” also affects the way that laypeople respond to court decisions. We do not know how Lidia and Vitaly Tarasoff reacted to Justice Tobriner’s pair of opinions, but one can imagine how the court’s holding might have resonated with plaintiffs in their position. In a survey of wrongful death and medical malpractice plaintiffs, Tamara Relis finds that fifty-nine percent say they are motivated—at least in part—by a desire for the defendant to “admit fault” or “accept responsibility.”<sup>73</sup> Here, employees of an elite state university had effectively decided that they bore no responsibility to warn a vulnerable twenty-year-old community college student about a clear threat to her life. With the California Supreme Court’s ruling, the state’s highest tribunal countermanded that message, concluding that the UC Berkeley employees *did* bear responsibility to Tarasoff—that they owed her a duty.

To be sure, a determination of duty does not amount to a finding of fault or liability. The immediate procedural significance of the court’s holding was that the Tarasoffs gained the opportunity to amend their complaints. Yet for lay plaintiffs, a court’s statement that “the defendant owed your daughter a duty” likely carries weight well beyond its procedural significance. This, after all, was the state, albeit through a different branch, acknowledging that state employees bore a duty—a *responsibility*—to Tatiana Tarasoff.

The power of the term “duty” also potentially enhances tort law’s ability to shape the beliefs and behavior of individuals beyond the immediate litigants. Psychiatrists, psychologists, and social workers quickly assimilated “*Tarasoff* duties” into their own descriptions of their professional responsibilities. As one introductory clinical psychology textbook states, “since the *Tarasoff* case set the legal precedent, clinical psychologists (and other therapists) have understood that . . . they have a duty to warn people toward whom their clients

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72. *Id.* at 437 (quoting John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist’s Dilemma*, 62 CALIF. L. REV. 1025, 1030 (1974)).

73. See Tamara Relis, “*It’s Not About the Money!*: A Theory on Misconceptions of Plaintiffs’ Litigation Aims”, 68 U. PITT. L. REV. 701, 723 fig.4 (2007).

make credible, serious threats.”<sup>74</sup> A survey of California therapists in 1977 found that a higher percentage had warned victims about a threat in the year since *Tarasoff II* than in the thirteen-year period before.<sup>75</sup> To be sure, it is possible that some of the therapists who changed their behavior in response to *Tarasoff* did so primarily for fear of liability. Yet the semantic intersection between “duty” in *Tarasoff* and “duty” in the sense of professional responsibility very likely increased the probability that the former would diffuse into the latter.

In short, to understand the role of “duty” in *Tarasoff*—and in tort law more generally—it is not enough to understand that duty is “the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”<sup>76</sup> One also must understand that the law’s label for this element is *duty*, a word that to laypeople—and apparently even to Justice Tobriner—still connotes “obligation” or “responsibility.”<sup>77</sup> The polysemy of duty, moreover, is *functional*. The correspondence between the element name and the ordinary English word renders the law more intelligible to laypeople, provides a heuristic for judges, and enhances the law’s expressive power. At the same time, the Prosserian conception of duty allows judges to respond—maybe for worse, but plausibly for better—to a wide range of policy considerations that weigh in favor of expanding or contracting the scope of liability.

Yet there are darker sides to polysemy. Arguably, the colloquial meaning of “duty” misdirected the majority in *Tarasoff*. The justices imposed a “duty” on therapists because they (rightly) believed that therapists owe a responsibility to individuals who are the targets of patients’ threats. But the sum total of policy considerations may *not* favor tort liability—for the reasons Professor Stone anticipated and Professor Edwards’s analysis appears to bear out. The correspondence

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74. ANDREW M. POMERANTZ, CLINICAL PSYCHOLOGY: SCIENCE, PRACTICE, AND CULTURE 88 (2008).

75. See Toni Pryor Wise, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 179 tbl.1 (1979).

76. See *supra* note 58 and accompanying text.

77. One might question whether “duty” is a polyseme if it means the same thing—obligation or responsibility—in legal and nonlegal contexts. We would not say that “noodles” is a polyseme when one refers to “Italian noodles” and “Thai noodles”: the work of differentiation is being done by the adjective, not by different meanings of the noun. In the same vein, one might think of “moral duty” and “legal duty” as two different types of duty (and “tort duty” as a particular subtype of legal duty).

Polysemy more clearly arises when legal actors use the term “duty,” sans adjective, to refer to legal duty or tort duty. To continue the noodle analogy: If a server at a Thai restaurant told you that the restaurant was “out of noodles,” but there was a Strega Nona-sized pot of spaghetti noodles boiling over in the background, we would say that the server was using “noodles” polysemissively. Cf. TOMIE DE PAOLA, STREGA NONA (1975). Here, as in the moral duty/tort duty context, it is the omission of the adjective that gives rise to clear polysemy.

between the element name and the ordinary English word reduced decision costs—it directed judges to rely on their intuitions about obligation and responsibility rather than conducting a ground-up cost-benefit analysis—but the heuristic may have led the majority in *Tarasoff* astray. As we will see in the next Section, the polysemy of duty also generates costs when courts move in the other direction: when they set aside their intuitions about obligation and responsibility, instead allowing the sum total of policy considerations to control.

### *B. Duty Beyond Tarasoff*

#### 1. Responsibility Without Liability

During the period between *Tarasoff I* and *Tarasoff II*, California’s intermediate appellate court decided a similarly tragic—though not nearly as famous—case: *Hartzler v. City of San Jose*.<sup>78</sup> The *Hartzler* case arose out of an emergency call to the San Jose police department from Ruth Bunnell, who reported that her estranged husband, Mack Bunnell, had threatened over the telephone to come to her home and kill her. The police had responded to at least twenty calls from Ruth Bunnell’s home in the prior year and had arrested Mack Bunnell once. This time, the police refused to send an officer to protect Ruth, telling her to call again when Mack showed up. Forty-five minutes later, Mack came to Ruth’s house and stabbed her. By the time the police arrived, Ruth was dead.<sup>79</sup>

Hartzler, the administrator of Ruth Bunnell’s estate, sued San Jose for its police department’s negligence. The trial court dismissed the complaint, and the Court of Appeal affirmed.<sup>80</sup> The appellate court distinguished the facts of *Hartzler* from cases in which the police explicitly promised to protect a particular individual from a potential attacker and then reneged on that promise.<sup>81</sup> According to the appellate court: “The allegation that the police had responded 20 times to her calls and had arrested her husband once does not indicate that the department had assumed a duty toward decedent greater than the duty

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78. 120 Cal. Rptr. 5 (Ct. App. 1975).

79. *See id.* at 8.

80. *Id.* at 10.

81. *Id.* at 9–10. For example, in *Morgan v. County of Yuba*, 41 Cal. Rptr. 508 (1964), the county sheriff arrested a man, Ashby, who had threatened the life of Elizabeth Morgan, and the sheriff allegedly promised Morgan to warn her when Ashby was released on bail. The sheriff later released Ashby without warning Morgan, and Ashby killed her. *Id.* at 510. The court in *Morgan* held that the sheriff’s promise established a special relationship with Morgan and that the promise took the case out of the general no-duty rule for police. *Id.* at 512.

owed to another member of the public.”<sup>82</sup> In the absence of a special duty, Hartzler’s complaint failed to state a claim.

Ruth Bunnell’s story would soon intersect with Tatiana Tarasoff’s, when Justice Tobriner’s opinion in *Tarasoff II* explicitly adopted the intermediate appellate court’s holding in *Hartzler*.<sup>83</sup> In concluding that the police owe no tort-law duty to protect members of the public absent some “special relationship,” the California Supreme Court joined the New York Court of Appeals, which had reached the same conclusion eight years earlier in *Riss v. City of New York*, another staple of torts syllabi.<sup>84</sup>

As a matter of judicial policy, the rule that police owe no tort-law duty to protect individual citizens absent a “special relationship” can be justified on several grounds. Arguably, the legislature and executive—not the judiciary—ought to be in charge of allocating limited police resources, and the shadow of tort liability would intrude upon the political branches’ sphere.<sup>85</sup> Also arguably, the potential for tort liability would encourage the police to respond more quickly to calls from residents of higher income neighborhoods, who are likelier to have access to lawyers and likelier to win larger awards for lost wages and property damage. On top of that, the police potentially err too far on the side of intervention already—a rule that imposes liability on the police for nonintervention would simply exacerbate the problem. Finally, police liability for failure to protect citizens from crime might drain public resources, leading in turn to even less protection (though some readers might see the last possibility in a more favorable light as a backdoor way to “defund the police”).<sup>86</sup>

But while the sum total of policy considerations may support the holding in *Hartzler* and the New York Court of Appeals’ parallel decision in *Riss*, the polysemy of duty generates dissonance. As Judge

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82. *Hartzler*, 120 Cal. Rptr. at 10.

83. See *Tarasoff II*, 551 P.2d 334, 349 (Cal. 1976) (“Turning now to the police defendants, we conclude that they do not have any such special relationship to either Tatiana or to Poddar sufficient to impose upon such defendants a duty to warn respecting Poddar’s violent intentions. See *Hartzler v. City of San Jose* . . .” (parentheses omitted)).

84. See 240 N.E.2d 860 (N.Y. 1968). The plaintiff in that case, Linda Riss, called the police after her ex-boyfriend, personal injury lawyer Burton Pugach, threatened to have her killed or maimed. *Id.* at 862 (Keating, J., dissenting). The police declined to send protection, and a thug hired by Pugach threw lye in Riss’s face the next day, leaving her blind in one eye. *Id.* Startlingly, after Pugach’s release from prison, Riss married him. See Margalit Fox, *Linda Riss Pugach, 75, Whose Life Was Ripped from the Headlines, Dies*, N.Y. TIMES, Jan. 24, 2013, at A1, A18. She would later testify in his defense when he was tried for sexually abusing and threatening to kill another woman. *Id.* at A18.

85. *Riss*, 240 N.E.2d at 860–61.

86. On the potential unintended consequences of municipal and officer liability, see generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

Kenneth Keating of the New York Court of Appeals wrote in dissent in *Riss*, “surely it must come as a shock” for citizens to hear that “the city has no duty to provide police protection to any given individual.”<sup>87</sup> Those same citizens might not be so shocked to learn that they cannot recover money damages from the police for failing to protect them from violent crimes—the shocking part is the no-duty shorthand rather than the no-liability conclusion.

The moral philosopher Michael Huemer would later react to *Hartzler* in much the same way that Judge Keating did in *Riss*. Consider the following passage from Huemer’s essay on the moral right to gun ownership:

[Y]ou might assume that *Hartzler* had an open-and-shut case: surely the police were duty bound to respond to Bunnell’s plea for protection; surely their failure to do so caused her death. You would be mistaken. . . . The city simply claimed that they *never had any duty to protect* Ruth Bunnell in the first place—and the court agreed. . . . Having refused to accept any obligation to protect you, the government cannot justly turn around and prohibit you from taking reasonable and effective measures for your own defense. For many Americans, that means a gun.<sup>88</sup>

Some readers might say that Huemer is misunderstanding the holding of *Hartzler*. Neither the City of San Jose nor the California Court of Appeal was asserting that the police had no obligation or responsibility to individual citizens—they were asserting that police obligations to individual citizens are better enforced through institutions other than the tort system. Nor were the city or the court saying that the police officers’ refusal to aid Bunnell would be without consequence: the individual officers still could face departmental discipline; the police chief still could be fired by the city’s elected officials; and those elected officials could be booted out of office by voters in the next election. Huemer is (arguably) confused by duty’s polysemy: “duty” in California tort law is the sum total of policy considerations that favor or disfavor tort liability, whereas Huemer is interpreting “duty” in the colloquial sense to mean “obligation” or “responsibility.”

But Huemer’s “error”—if we can call it that—is not a confusion among homonyms. It is not like, say, the error of a layperson who believes that the “consideration” requirement in contract law requires her to think carefully before signing. The correspondence between duty in California tort law and obligation or responsibility is not a matter of etymological happenstance. As we saw above, tort law draws upon the colloquial connotation of “duty” all the time: to communicate its

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87. *Riss*, 240 N.E.2d at 862 (Keating, J., dissenting).

88. Michael Huemer, *Why Guns Shouldn’t Be Outlawed*, in *THE RIGHT THING TO DO: READINGS IN MORAL PHILOSOPHY* 271, 272–73 (James Rachels & Stuart Rachels eds., 8th ed. 2019).

contents, to reduce judicial decision costs, and to enhance its expressive power. Huemer's reaction reflects an inevitable consequence of polysemy: If we want individuals to associate the tort-law element of duty with obligation or responsibility in some contexts, we cannot expect them to disassociate duty from obligation or responsibility in other contexts.

Now fast-forward from *Tarasoff* and *Hartzler* in the 1970s to the morning of February 12, 2011. At the time, the New York Police Department was engaged in a citywide manhunt for Maksim Gelman, the "Butcher of Brighton Beach," who was wanted for killing four people with a knife. Around 8:45 a.m., NYPD officers entered the motorman's booth in the front-end of a No. 3 subway car in midtown Manhattan and observed Gelman inside the car.<sup>89</sup> According to court documents, Gelman then lunged at one of the passengers in the car, Joseph Lozito.<sup>90</sup> Gelman repeatedly stabbed Lozito with an eight-inch knife, but the 6-foot, 2-inch, 270-pound Lozito wrested the knife from Gelman and subdued his attacker on the subway floor.<sup>91</sup> Alfred Douglas, a carpenter who was riding in the same car, rushed to Lozito's aid.<sup>92</sup> The two police officers allegedly waited until after Gelman was subdued before they intervened.<sup>93</sup>

Lozito later sued the city and its police department on account of the officers' negligent failure to intervene during the attack. The trial court dismissed his complaint in an unpublished opinion. According to the court:

The attack on Mr. Lozito was shocking and horrific. . . . The crimes against Mr. Lozito were made even more compelling by his own narrative provided in his opposition. Mr. Lozito's *pro se* opposition papers are thoughtful, eloquently written, and demonstrated his zest and love of life which propelled him to survive the attack by Gelman and defend himself. . . . His statements ring true and appear highly credible.

However, it is well settled that absent a special relationship, discretionary governmental functions such as the provision of police protection are immune from tort liability. Despite even very sympathetic facts, public policy demands that a damaged plaintiff be able to identify the duty owed specifically to him or her, not a general duty to society at large. . . . Mr. Lozito conceded that he had no communication or contact with the police officers before the attack took place. . . . No direct promises of protection were made to Mr. Lozito

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89. See *Lozito v. City of New York*, Index No. 101088/12, slip op. at 1 (N.Y. Sup. Ct. July 25, 2013), [https://decisions.courts.state.ny.us/fcas/fcas\\_docs/2013JUL/3001010882012002SCIV.pdf](https://decisions.courts.state.ny.us/fcas/fcas_docs/2013JUL/3001010882012002SCIV.pdf) [<https://perma.cc/8FAQ-F87K>].

90. See *id.* at 2.

91. See *id.*; Jen Chung, *Murder Suspect's Stabbing Victim Shows Off Stab Wounds*, GOTHAMIST, <https://gothamist.com/news/murder-suspects-stabbing-victim-shows-off-stab-wounds> (last updated Feb. 18, 2011) [<https://perma.cc/CG6Z-63HG>].

92. See Chung, *supra* note 91; WNYC STUDIOS: RADIOLAB, *supra* note 24.

93. See WNYC STUDIOS: RADIOLAB, *supra* note 24.

nor were there direct actions taken to protect Mr. Lozito prior to the attack. Therefore, a special duty did not exist.

Ultimately, this case must be dismissed as a matter of law. The dismissal of this lawsuit does not lessen Mr. Lozito's bravery or the pain of his injuries.<sup>94</sup>

In light of *Riss v. City of New York* and numerous other New York precedents that bound the trial court, the result in Lozito's case was eminently predictable. That is likely why no New York personal injury lawyer was willing to take Lozito's high-profile, highly sympathetic case on contingency. Yet the conclusion that the police officers had "no special duty" to intervene—even as they watched from a few feet away while Gelman repeatedly stabbed Lozito—still will come to some as a shock. The *New York Post* thought it was a scandal that the city even raised the no-duty argument: "CITY SAYS COPS HAD NO DUTY TO PROTECT SUBWAY HERO WHO SUBDUED KILLER," a headline in the tabloid read.<sup>95</sup>

*Radiolab*, the two-time Peabody Award-winning public radio program produced by WNYC, later ran an episode—"No Special Duty"—that used the Lozito case as a jumping-off point.<sup>96</sup> On the show, producer B.A. Parker reads an excerpt from the trial court's decision in *Lozito v. City of New York*, and Jad Abumrad, the show's MacArthur genius grant-winning host,<sup>97</sup> reacts:

**Jad:** What? I'm confused. What does that mean?

**B.A. Parker:** Well, she [the judge] basically says the cops had no duty to protect Joe in that situation.

**Jad:** What?

**B.A. Parker:** Yes. . . . Despite what you think, legally, it turns out protecting you is not their [the police's] job.

**Jad:** Protecting me is not their job. How is that even possibly true? That's not true. Is that true? How is that true?<sup>98</sup>

For the show, the *Radiolab* producers tracked down Alfred Douglas, the fellow rider who came to Lozito's assistance. Below is an excerpt from that interview:

94. *Lozito*, Index No. 101088/12, slip op. at 2–3 (citations omitted).

95. See Boniello, *supra* note 23 (capitalization added).

96. WNYC STUDIOS: RADIOLAB, *supra* note 24; WNYC Wins Two 2014 Peabody Awards for *Radiolab* and *WNYC News*, WNYC (Apr. 20, 2015), <https://www.wnyc.org/press/peabody2015/> [<https://perma.cc/VUF3-NW5R>] (noting that *Radiolab* won its second Peabody Award).

97. MacArthur 'Genius' Award Winner Jad Abumrad, WNYC (Sept. 20, 2011), <https://www.wnycstudios.org/podcasts/takeaway/segments/159660-macarthur-genius-award-winner-jad-abumrad> [<https://perma.cc/GL9Y-H7WT>].

98. WNYC STUDIOS: RADIOLAB, *supra* note 24.



**Alfred Douglas:** My name is Alfred Douglas and I was originally born in Jamaica. I came here at 26 years old and I've been living in New York ever since.

**B.A. Parker:** What was it like to witness something like that, to see someone get attacked?

**Alfred:** Miss, I could tell you that, I'm 58 years old. I've never seen somebody so viciously slashed before. . . .

**B.A. Parker:** Had you heard that Joe sued the city?

**Alfred:** No, I haven't heard anything about that. How did that go?

**B.A. Parker:** The judge threw the case out citing that the police has no special duty to protect him.

**Alfred:** Yes? The transit cop that walk the beat down there didn't have no duty to protect the consumers?

**B.A. Parker:** Essentially, yes.

**Alfred:** Damn. That's news to me. Why do they have the police in New York then if they ain't got no duty to protect us?

**B.A. Parker:** That's what I'm trying to figure out.

**Alfred:** We're paying our taxes. That's what I thought they were employed for. This is new to me, I didn't know the police doesn't have a duty to protect the citizens of a country or a state. I don't. I got to process this. I didn't know something like this exists. If this is the case, they should free up the gun laws in New York. Everybody could have that protection. I was living all my life, all this time, thinking that the police are there to serve and to protect. . . .

I can't see how they could say that it wasn't their job to protect the citizens. I don't know. It's a strange world, man. I got to process this, and I got to let my kids know. Whoever will listen to me, I got to let them know about this, because this is news to me.<sup>99</sup>

As with the philosopher Michael Huemer, we might say that the producers of *Radiolab* are making a category mistake: they are confusing the existence of tort liability with the existence of an obligation or responsibility. The New York City Police Department still acknowledges a responsibility to “protect the people”;<sup>100</sup> individual officers (at least theoretically) may face administrative discipline for “neglect of duty”;<sup>101</sup> and voters who are dissatisfied with the level of police protection may (not so theoretically) elect a mayor who promises a more robust law enforcement presence.<sup>102</sup> The *Radiolab* producers are taking advantage of the polysemy of duty (and of Alfred Douglas) by informing Douglas of the trial court's no-duty holding without telling

99. *Id.*

100. *Mission*, NYC: N.Y. CITY POLICE DEP'T, <https://www1.nyc.gov/site/nypd/about/about-nypd/mission.page> (last visited Feb. 3, 2023) [<https://perma.cc/KS5V-J4RJ>].

101. N.Y. CITY ADMIN. CODE § 14-115(a).

102. See Katie Glueck, *Adams Is Elected to Lead New York in Time of Change*, N.Y. TIMES, Nov. 3, 2021, at A1 (noting that “Mr. Adams emerged as one of his party's most unflinching advocates for the police maintaining a robust role in preserving public safety” and “often clashed with those who sought to scale back law enforcement's power”).

him that “no duty” in the language of tort law simply means that a policy-based predicate for liability has not been satisfied.

Yet if the *Radiolab* producers are taking advantage of the polysemy of “duty,” the tort system also is leveraging the polysemy of duty in order to achieve the benefits that come from a correspondence between the element name and the ordinary English word. In this case, the consequence was that tens of thousands of public radio and podcast listeners *heard* that the New York Police Department has no duty to protect the city’s residents. Did this one *Radiolab* podcast destroy public trust in the police department? Not nearly as much as the torture of Abner Louima, the shooting of Amadou Diallo, the fatal chokehold of Eric Garner, and numerous other incidents over the last several decades.<sup>103</sup> But it certainly doesn’t bolster the police department’s perceived legitimacy<sup>104</sup> when courts announce that cops have “no duty” to protect ordinary civilians from intimate-partner violence, subway stabbings, and other crimes, even if “no duty” is tort-law shorthand for a choice about *which institutions* ought to police the police.

## 2. Liability Without Responsibility

So far, we have seen that the correspondence between “duty” in the tort law sense and “duty” in the colloquial sense of obligation or responsibility serves a number of functions: it renders the law more intelligible to laypeople; it offers judges a heuristic that reduces decision costs; and it enhances tort law’s expressive power. But in *Hartzler v. City of San Jose*, *Lozito v. City of New York*, and countless other cases involving the police’s duty to protect, courts have plausible reasons for construing “duty” to cut off liability even when the existence of an obligation or responsibility seems clear. The resulting polysemy of duty potentially undermines trust in legal institutions when the tort system’s “no duty” shorthand clashes with deep intuitions about duty in the colloquial sense.

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103. See, e.g., *Notable Cases Involving Police Brutality Complaints*, N.Y. TIMES (Aug. 14, 2014), <https://www.nytimes.com/interactive/2014/08/04/nyregion/notable-brutality-cases-in-new-york.html> [<https://perma.cc/NU6E-9ZSA>]; J. David Goodman, *Difficult Decisions Ahead in Responding to Police Chokehold Homicide*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/nyregion/after-eric-garner-chokehold-prosecuting-police-is-an-option.html> [<https://perma.cc/W2EX-X69Z>].

104. Since “legitimacy” is a polyseme, I should clarify that I am using it here in the sociological sense. Cf. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005) (defining “sociological legitimacy” as the extent to which an institution’s claim of authority “is accepted (as a matter of fact) as deserving of respect or obedience”).

Sometimes, the dissonance between legal and moral duty runs in the opposite direction. Consider *Dashiell v. Moore*,<sup>105</sup> a 1940 case that legal philosophers Nico Cornell and Jeremy Waldron both highlight in a recent pair of generative essays on the nature of “duty.”<sup>106</sup> Dashiell was driving on Maryland’s Eastern Shore early one winter evening when—yielding to a “kindly and generous impulse”—he picked up two nineteen-year-old hitchhikers, Moore and Porter.<sup>107</sup> As Dashiell drove southbound, he failed to see a mule astray in the road. The car struck the mule and then spun into the northbound lane, colliding with another vehicle. Dashiell and Moore both suffered injuries in the collision.<sup>108</sup> Afterwards, Moore sued Dashiell for negligence.

According to the court:

The lights on Dashiell’s car were in good condition, and were turned on at the time. He was driving on the right side of the road at about forty-five miles an hour, a lawful speed, the road was straight and level, so that the only negligence charged is his failure to discover the mule in time to avoid the collision.<sup>109</sup>

Dashiell testified that he kept his eyes always on the road. He had been adjusting the car radio at the time of the collision, but he said that he was so familiar with the radio that he “could find the tuning knob by touch without glancing at it.”<sup>110</sup> Neither Moore nor Porter contradicted Dashiell’s testimony.

Dashiell appears to have suffered a momentary lapse. Most of us probably have experienced similar moments while driving down an open road, but we lucked out: when we had our lapse, there was no mule ahead. The law-and-economics literature has a name for lapses like Dashiell’s: “compliance errors.” A compliance error is “an inadvertent departure from the required rate of precaution.”<sup>111</sup> As Mark Grady observes, although a compliance error is “not a deliberate failure to use due care,” courts generally impose liability for compliance errors like Dashiell’s.<sup>112</sup> The policy rationale is straightforward: Courts cannot distinguish the careless driver from the careful driver who suffers a momentary lapse. Faced with a choice between excusing carelessness or imposing liability for momentary lapses, courts opt for the latter. In

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105. 11 A.2d 640 (Md. 1940).

106. Nicolas Cornell, *Looking and Seeing*, in *NEW CONVERSATIONS IN PHILOSOPHY, LAW, AND POLITICS* (forthcoming), <https://ssrn.com/abstract=3943602> [<https://perma.cc/H3LE-C86L>]; Jeremy Waldron, *On Duty* (N.Y.U. Sch. Of L., Pub. L. Rsch. Paper No. 21-48, 2021), <https://ssrn.com/abstract=3931034> [<https://perma.cc/T76F-53DP>].

107. *Dashiell*, 11 A.2d at 642–44.

108. *Id.*

109. *Id.* at 642.

110. *Id.* at 643.

111. See Grady, *supra* note 19, at 902.

112. *Id.* at 903.

Grady's words: "Courts do not inquire whether a defendant was looking carefully for pedestrians"—or mules—"before she forgot to look for the one she hit."<sup>113</sup>

From a Prosserian perspective, a case like *Dashiell* is easy: the sum total of policy considerations clearly favors liability. For philosophers, the case is potentially more difficult. As Cornell writes:

What exactly was the duty that Dashiell breached? What was the standard of due care to which Dashiell failed to conform? One can say that he had a duty to look. But . . . he may have fulfilled that duty. For liability, we need something further; we would need a duty to see. . . . [W]e can demand that people do things that are within their control—like looking—but how can we demand something—like seeing—that may be beyond their voluntary control?<sup>114</sup>

To be sure, tort law often imposes liability on defendants for accidents that lie beyond their voluntary control. That is the domain of strict liability. What makes compliance-error cases like *Dashiell* difficult is that the court does not *say* it is holding the defendant strictly liable—the court says it is holding the defendant liable for breaching a duty of care and causing harm.<sup>115</sup> The use of negligence language in compliance-error cases exposes potential defendants to an additional risk beyond the risk of strict liability. Potential defendants can buy insurance to protect themselves from monetary liability, but they cannot buy insurance against the sense of personal guilt and social opprobrium associated with a court finding that they breached a *duty*.

The discomfort that we feel in compliance-error cases about saying that the defendant has breached a duty of care is an additional cost of polysemy.<sup>116</sup> The cost of the discomfort felt by tort scholars and legal philosophers is trivial in the social analysis, but the cost to real-world defendants may not be. That does not necessarily mean we should drop the "duty" label from the first element of negligence, nor does it necessarily mean that we should excuse defendants from liability in compliance-error cases. Rather, it underscores the fact that although the use of the word "duty" in negligence serves specific functions, it also creates real complications.

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113. *Id.* at 906.

114. Cornell, *supra* note 106, at 4–5.

115. *See Dashiell*, 11 A.2d at 644–45.

116. Both Cornell and Waldron offer creative reconceptualizations of "duty" that align with the result in *Dashiell*. *See* Cornell, *supra* note 106; Waldron, *supra* note 106. For present purposes, I wish to stress the potential misalignment between the holding of *Dashiell* and notions of moral responsibility (while acknowledging that there are potential resolutions).

## II. THE STRUCTURE OF SEMANTIC RELATEDNESS

The motivating example of “duty” served to illustrate the importance of polysemy, as well as to highlight—impressionistically—some of the benefits and costs of using the word “duty” to describe the first element of negligence. This Part seeks to develop a more rigorous set of definitions and distinctions, ultimately with the hope of facilitating a focused evaluation of polysemy’s benefits and costs in Part III.

*A. Semantic Relatedness and the Mapmaker’s Dilemma*

“Semantic relatedness” is the extent to which multiple objects (i.e., words or phrases) are understood to share similar meanings. In computational linguistics, semantic relatedness can refer to the similarity or distance between orthographically identical objects (e.g., “duty” in tort law vs. “duty” in moral philosophy), or it can refer to the similarity or distance between orthographically distinct objects (e.g., “duty” in moral philosophy vs. “responsibility” in moral philosophy).<sup>117</sup> My focus here is on the former type of semantic relatedness—relatedness between the same object (word or phrase) in different contexts.

Semantic relatedness arises both outside and inside law. Consider, again, the example of “duty.” Outside law, “duty” may mean (among other things) a moral obligation or responsibility, an assigned task, or a measure of the effectiveness of an engine (e.g., “heavy duty diesel engine” versus “light duty diesel engine”).<sup>118</sup> Within law, “duty” may refer to the first element of negligence, to the obligations of a fiduciary (e.g., a trustee or a corporate director/officer), or to a tax on a specific article or transaction (“Congress shall have power to lay and collect taxes, *duties*, imposts and excises”<sup>119</sup>).<sup>120</sup> The focus here will be on a third axis of semantic relatedness—relatedness between the legal and nonlegal meaning of a word or phrase.

The fact that words often have multiple meanings outside law and inside law poses a challenge for any effort to compare *the* legal meaning to *the* nonlegal meaning. Courts and other legal actors may disagree about the precise legal meaning of a term, as they do with duty

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117. See generally Alexander Budanitsky & Graeme Hirst, *Evaluating WordNet-Based Measures of Lexical Semantic Relatedness*, 32 COMPUTATIONAL LINGUISTICS 13 (2006) (addressing semantic relatedness in computational linguistics).

118. See MERRIAM-WEBSTER’S, *supra* note 20, at 388.

119. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

120. See *Duty*, BLACK’S LAW DICTIONARY (11th ed. 2019).

in negligence. Laypeople likewise may disagree about the colloquial meaning of the term (or, more likely, may not have well-defined views about the location of the edges). Unless we can pin down the precise location of each object in semantic space (and often we cannot), our claims about semantic relatedness will be approximations rather than exactitudes. But this is not a fatal flaw. We can usefully say that “Upstate New York is closer to the Midwest than to the Pacific Northwest” even though the definitions of each of those regions is contestable (does northern Westchester County count as “Upstate”?<sup>121</sup> is Pittsburgh part of the Midwest?<sup>122</sup> is western Montana part of the Pacific Northwest?<sup>123</sup>). We can likewise make substantive claims about semantic relatedness notwithstanding disagreements about the borders around each object’s meaning.

A greater challenge for the study of semantic relatedness lies in the operationalization of the relatedness concept. One way to operationalize semantic relatedness is to focus on overlapping applications and nonapplications of a word or phrase. We might ask, for example, whether a word or phrase in a statute—say, “church” in section 170 of the Internal Revenue Code<sup>124</sup>—applies and doesn’t apply to the same institutions as “church” in nonlegal language. English speakers generally don’t use the term “church” to refer to a synagogue or mosque, but synagogues and mosques are unquestionably “churches” under section 170.<sup>125</sup> Thus, some nonapplications of “church” in ordinary language are applications of the term in tax law. The larger the overlap of applications, the closer the semantic relationship between two objects.

The application-based approach conforms to a classical or “Aristotelian” view of the nature of categories, according to which “every category is associated with a set of membership criteria, or defining attributes, which are both necessary and sufficient.”<sup>126</sup> (“Aristotelian”

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121. See Michael Pollak, *What Area Is Considered Upstate New York?*, N.Y. TIMES, Feb. 16, 2014, at MB3.

122. According to the columnist George Will, “the Midwest probably begins on the western slope of the Alleghenies,” which would put Pittsburgh in. See *This Week’ Transcript: John McCain and Robert Gibbs*, ABC NEWS (Feb. 17, 2012, 11:59 AM), <https://abcnews.go.com/Politics/week-transcript-john-mccain-robert-gibbs/story?id=15719422> [<https://perma.cc/5XM9-43TT>].

123. See Dyer Oxley, *Poll: Should Montana Be Considered a Part of the Pacific Northwest?*, MY NW. (Sept. 30, 2019, 2:56 PM), <https://mynorthwest.com/1535615/poll-should-montana-be-considered-a-part-of-the-pacific-northwest> [<https://perma.cc/RU8Q-9ZLQ>] (reporting results of a Twitter poll in which thirty-two percent of respondents considered Montana to be part of the Pacific Northwest).

124. I.R.C. § 170(b)(1)(A)(i).

125. See, e.g., *Lippman v. Comm’r*, 24 T.C.M. (CCH) 323 (1965).

126. D.A. Cruse, *Prototype Theory and Lexical Semantics*, in *MEANINGS AND PROTOTYPES: STUDIES IN LINGUISTIC CATEGORIZATION* 382, 383 (S.L. Tsohatzidis ed., 1st ed. 2014).

belongs inside quotation marks because Aristotle’s own understanding of categories was more sophisticated.)<sup>127</sup> The application-based approach provides a starting point, but it does not capture all the ways in which polysemy might arise. Metaphor is a form of polysemy that is difficult to describe in terms of applications and nonapplications. For example, the “hotch potch” (or “hotch pot”) doctrine in probate law—which brings into an intestate’s estate an estimate of the value of advancements made to children so that the whole estate can be divided according to the intestacy statute<sup>128</sup>—does not share any applications with the eponymous Scottish stew.<sup>129</sup> The legal word and the nonlegal word are in some sense “related” insofar as the legal doctrine uses the stew as a metaphor, but the application-based approach fails to capture this relationship. The application-based approach also does not work well for metonymy, in which one object, concept, or attribute is used to refer to a related object or concept (“Crown” for queen, “White House” for presidency, or—as is common in U.S. administrative law, “Secretary” to refer to an entire department).

The challenge of operationalizing semantic relatedness brings to mind what Daniel Shaviro calls “the mapmaker’s dilemma.”<sup>130</sup> As Shaviro writes:

The Mapmaker’s Dilemma has two distinct elements. First, miniaturization inevitably means loss of local detail. Second, usable maps must generally be flat, but the Earth is spheroid. While this hardly matters when the scale is sufficiently small, for maps of the entire world it leads to significant distortion.<sup>131</sup>

This Article’s mapping exercise entails both miniaturization and flattening. The resulting map is too small to allow us to see all the points in the interstices between our paradigm cases. Moreover, the map’s flatness means that we cannot see all the dimensions of semantic relatedness—all the ways in which one usage of a word or phrase might be like or unlike another. But the solution to the mapmaker’s dilemma is not, of course, to jettison maps, nor is it to draw our maps to full scale.<sup>132</sup> We can use our map to navigate across the terrain of legal and

127. See John Corcoran, *Aristotle’s Prototype Rule-Based Underlying Logic*, 12 LOGICA UNIVERSALIS 9 (2018).

128. See *In re Monier Khalil Living Tr.*, 936 N.W.2d 694, 697 & n.1 (Mich. Ct. App. 2019).

129. See VICTORIA R. RUMBLE, *SOUP THROUGH THE AGES: A CULINARY HISTORY WITH PERIOD RECIPES* 54 (2009).

130. Daniel Shaviro, *The Mapmaker’s Dilemma in Evaluating High-End Inequality*, 71 U. MIAMI L. REV. 83, 90 (2016).

131. See *id.* at 91–92.

132. Shaviro illustrates the dangers of the full-scale approach with a passage from Lewis Carroll’s *Sylvie and Bruno Concluded* (a passage no doubt familiar to many readers, but perhaps not to all):

“What do you consider the *largest* map that would be really useful?”

nonlegal language while remaining attentive to the instances in which the map's lack of detail and dimensionality obscures important features of the landscape.

### *B. The Spectrum of Semantic Relatedness*

Semantic relatedness is a continuous quality. Monosemy, polysemy, and homonymy are regions of a spectrum separated by blurry boundaries. This Section introduces the three regions as well as a fourth category—legalism—which lies off the spectrum of semantic relatedness but potentially remains an element of the choice set for designers of legal institutions.<sup>133</sup>

#### 1. Monosemy

Monosemy—the property of having only one meaning—lies at one end of the spectrum of semantic relatedness. For present purposes, our focus is on instances in which a word or phrase has the same meaning in legal and nonlegal language. For example, the New York Vehicle and Traffic Law states that “upon The Governor Thomas E. Dewey Thruway . . . , the New York state thruway authority may establish a maximum speed limit of not more than sixty-five miles per hour. . . .”<sup>134</sup> “Mile” in the New York Vehicle and Traffic Law has the same meaning as “mile” in ordinary English. “Hour” means 60 minutes. In practice, one can probably drive significantly faster than 65 miles per hour on stretches of the thruway without being pulled over, but that is a function of lax enforcement rather than polysemous interpretation.

To be sure, even this seemingly straightforward example of monosemy admits the possibility of polysemy. Like many other quantifiers, “mile” is a word whose “semantic content is constant across

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“About six inches to the mile.”

“Only *six inches!*” exclaimed Mein Herr. “We very soon got to six *yards* to the mile. Then we tried a *hundred* yards to the mile. And then came the grandest idea of all! We actually made a map of the country, on the scale of a *mile to the mile!*”

“Have you used it much?” I enquired.

“It has never been spread out, yet,” said Mein Herr: “the farmers objected: they said it would cover the whole country, and shut out the sunlight! So we now use the country itself, as its own map, and I assure you it does nearly as well.”

*Id.* at 90–91 (quoting LEWIS CARROLL, *SYLVIE AND BRUNO CONCLUDED* 63 (Nabu Press 2010) (1893)).

133. I thank Marcel Kahan for suggesting this four-part categorization and Jonah Gelbach for helping me put words to the categories.

134. N.Y. VEH. & TRAF. LAW § 1180-a(2) (McKinney 2004).



languages and cultures,”<sup>135</sup> but “mile” could refer to an international mile (1609.344 meters) or to a U.S. survey mile (approximately 1609.347 meters)<sup>136</sup>—the New York statute does not specify.<sup>137</sup> Differences between international and U.S. survey miles will probably never matter to real-world traffic enforcement, but the fact that this paradigm case of monosemy includes a dash of polysemy serves to remind us that pure monosemes will be virtual unicorns.

## 2. Polysemy

Polysemy—the property of having multiple related meanings—is the region adjacent to monosemy on the spectrum of semantic relatedness. The linguistics literature draws a potentially useful distinction between linear and nonlinear polysemy. Linear polysemy arises when one word or phrase is a subset or superset of the other. Nonlinear polysemy arises when two words are related but neither subsumes or is subsumed by the other.<sup>138</sup>

Some polysemous relationships between legal and nonlegal terms involve linear polysemy. Consider the relationship between “tangible object” in 18 U.S.C. § 1519 and in ordinary language after *Yates v. United States*.<sup>139</sup> All applications of “tangible object” in 18 U.S.C. § 1519, as construed by *Yates*, also will be applications of “tangible object” in the colloquial sense (i.e., material things that can be touched). However, some applications of “tangible object” in the colloquial sense will be nonapplications of “tangible object” in 18 U.S.C. § 1519 (e.g., fish). Thus, the legal meaning of “tangible object” is a subset of the nonlegal meaning.<sup>140</sup> In other cases, the legal meaning of a term may be a superset of the nonlegal meaning.<sup>141</sup>

135. See Julian Nyarko & Sarath Sanga, *A Statistical Test for Legal Interpretation: Theory and Applications*, 38 J.L. ECON. & ORG. 539, 541 (2021).

136. *U.S. Survey Foot: Revised Unit Conversion Factor*, NAT’L INST. OF STANDARDS & TECH., <https://www.nist.gov/pml/us-surveyfoot/revised-unit-conversion-factors> (last updated Jan. 4, 2023) [<https://perma.cc/2A5Q-XAFX>].

137. Conceivably “mile” also could refer to nautical mile (1852 meters), though here, context pretty clearly indicates otherwise. *NIST Guide to the SI, Chapter 5: Units Outside the SI*, NAT’L INST. OF STANDARDS & TECH., <https://www.nist.gov/pml/special-publication-811/nist-guide-si-chapter-5-units-outside-si> (last updated Feb. 17, 2022) [<https://perma.cc/S9VT-ZJP8>].

138. See ALAN CRUSE, *MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS* 110–13 (2000).

139. 574 U.S. 528 (2015).

140. See *id.* at 544–45, 549 (“‘Tangible object’ is the last in a list of terms that begins ‘any record [or] document.’ The term is therefore appropriately read to refer, not to any tangible object, but specifically to the *subset* of tangible objects involving records and documents . . . .” (emphasis added)).

141. For example, a literal “taking” (i.e., seizure or capture) of private property for public use generally will be a “taking” under the Fifth Amendment (“nor shall private property be *taken* for

Still other polysemous relationships between legal and nonlegal usages are nonlinear: the legal meaning is neither a subset nor a superset of the nonlegal meaning. Nonlinear polysemy can arise when the legal and nonlegal terms exist in a Venn diagram-type relationship. For example, the compliance-error cases arguably fall within legal duty but not moral duty, while the policy duty-to-protect cases fall within moral duty but not legal duty. Nonlinear polysemy also can arise in cases of metaphor, where the relevant words or phrases are related even though the set of overlapping applications is null. What is distinctive about polysemy is the difficult-to-measure quality of *relatedness* between legal and nonlegal usages of a term. This relatedness is what gives polysemy its punch—what makes it a *functional* feature of legal systems—but also what gives rise to polysemy’s risks and costs.

### 3. Homonymy

At the far end of the spectrum of semantic relatedness lies homonymy—the existence of multiple *unrelated* meanings of the same object. Homonymy embraces both homophony (words or phrases with the same *pronunciation*) and homography (words or phrases with the same *spelling*). The relationship between “tort” (civil wrong) and “torte” (multilayered cake filled with cream, mousse, jam, or fruit) is an example of homophony; the relationship between “desert” (deserved reward or punishment) and “desert” (barren area) is an example of homography. Most cases of homonymy between legal and nonlegal usages entail both homophony and homography. Examples include “suit” (as in lawsuit) versus “suit” (as in clothing) and “count” (as in count of a complaint) versus “Count” (as in title of nobility for a loveable vampire Muppet). Here, the overlap of applications is an essentially empty set—though one could, conceivably, staple together pages of a complaint and wear them as a suit.

As linguist Alan Cruse has noted, “there is no sharp dividing line between relatedness and unrelatedness,” but “this does not render the distinction between polysemy and homonymy useless, because there are many clear cases.”<sup>142</sup> If a defense lawyer argues that her client owes no legal “duty” to the plaintiff because the defendant bears no moral responsibility to the plaintiff, the argument would be recognizable even

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public use, without just compensation”). See U.S. CONST. amend. V (emphasis added). At the same time, a law that prevents a landowner from building a home on a vacant lot may be a “taking” under the Fifth Amendment (or to use the textual participle, private property will have been “taken” for public use) even though nothing is literally seized. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Regulatory takings jurisprudence renders “taking” a polyseme, with the legal term sweeping in applications that the colloquial usage would likely leave out.

142. CRUSE, *supra* note 138, at 109.

if not dispositive. If a defense lawyer argues that a plaintiff may not maintain a “suit” because his jacket and pants are of a different fabric and color, the defense lawyer would simply be confused. Clearly, “duty” in tort law draws more heavily from “duty” in the sense of moral obligation or responsibility than “suit” across civil law draws from “suit” in fashion.

Dictionary writers often distinguish between polysemy and homonymy by using the same or different headwords or “lemmas.”<sup>143</sup> Related (polysemous) meanings of a word are listed as different “meaning items” under the same lemma, while unrelated (homonymous) meanings are listed under different lemmas. Deciding which meanings belong under the same lemma is, inevitably, somewhat arbitrary.<sup>144</sup> For present purposes, we can think of “homonymy” as capturing cases like “suit” in which there is minimal overlap between applications of the legal term and the nonlegal term, whether or not they would appear under the same lemma in a dictionary.<sup>145</sup>

#### 4. Legalogism

Finally, some legal terms lie entirely off the spectrum of semantic relatedness because they have no nonlegal correspondent. For example, section 408A of the Internal Revenue Code, enacted in 1997, establishes “Roth IRAs”<sup>146</sup>; before then, “Roth IRA” would have been a meaningless term. Other examples of legalogisms include “Archer MSAs,”<sup>147</sup> “S corporations,”<sup>148</sup> and—beyond the tax context—“Federal Pell Grants.”<sup>149</sup> Other legalogisms are imported from Latin (e.g., *res ipsa loquitur*, *res judicata*, and *stare decisis*) and Law French (e.g., *cy-près*, *laches*, *voir dire*). I refer to these as “legalogisms” rather than “neologisms” because some of these terms—like the Latin and Law French imports—are in no sense “neo.”

Legalogisms limit possibilities for polysemy because the legal meaning of the term is the only meaning. But sometimes, even in

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143. See, e.g., R.R.K. HARTMANN & GREGORY JAMES, *DICTIONARY OF LEXICOGRAPHY* 83 (1998).

144. See Brigitte Nerlich & David D. Clarke, *Polysemy and Flexibility: Introduction and Overview*, in *POLYSEMY: FLEXIBLE PATTERNS OF MEANING IN MIND AND LANGUAGE* 3, 4 (Brigitte Nerlich et al. eds., 2003).

145. “Suit” (lawsuit) and “suit” (clothing) both have French origins and therefore do wind up under the same lemma in many dictionaries. See, e.g., *suit*, n., *OXFORD ENGLISH DICTIONARY ONLINE*, <https://www.oed.com/view/Entry/193718> (last updated Dec. 2022) [<https://perma.cc/GQY8-BNHL>].

146. See Taxpayer Relief Act of 1997, I.R.C. § 408A.

147. I.R.C. § 220.

148. I.R.C. § 1361(a)(1).

149. 20 U.S.C. § 1070a.

disputes over legalisms, litigants and judges will appeal to the “ordinary usage” of a term. Consider *Green v. Bock Laundry Machine Co.*, involving a since-amended provision in Rule 609 of the Federal Rules of Evidence allowing introduction of a prior felony conviction to impeach a witness only if “the probative value of admitting this evidence outweighs its prejudicial effect to the *defendant*.”<sup>150</sup> “Defendant” is a legalism—a survival of Law French that is now used almost exclusively in a legal sense.<sup>151</sup> In *Bock Laundry*, the defendant manufacturer sought to introduce evidence of the plaintiff’s prior felony conviction in a products liability action, arguing that Rule 609 did not present an obstacle because the only possible prejudicial effect was to the *plaintiff*. But accepting that interpretation “would deny a civil plaintiff the same right to impeach an adversary’s testimony that it grants to a civil defendant”<sup>152</sup>—a result that the Justices considered to be “bizarre.”<sup>153</sup>

The Court in *Bock Laundry* resolved the issue by holding that the protection from unfair prejudice in Rule 609 applied only to criminal defendants.<sup>154</sup> While the majority opinion focused largely on legislative history, Justice Scalia—concurring in the judgment—emphasized “the ordinary meaning of the word ‘defendant.’”<sup>155</sup> Scalia noted that the adjective “criminal” in front of defendant “sometimes is omitted in normal conversation (‘I believe strongly in defendants’ rights’).”<sup>156</sup> This cue from conversational English was one of the main pieces of evidence that Scalia marshalled in support of the narrower construction of Rule 609.

In the abstract, the idea that we might appeal to “normal conversation” in order to construe Law French might seem as “bizarre” as the literalist interpretation that the Court rejected in *Bock Laundry*. In context, Scalia’s appeal to “normal conversation” is not so strange (though few people other than lawyers and law students talk about their attitudes toward “defendants’ rights” in “normal conversation”). The relevant legalism—“defendant”—has become so familiar through widespread use, including through police procedurals on television

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150. 490 U.S. 504, 509 (1989) (emphasis added) (quoting prior version of FED. R. EVID. 609(a)).

151. See *defendant*, n. and adj., OXFORD ENGLISH DICTIONARY ONLINE, <https://www.oed.com/view/Entry/48789> (last updated Dec. 2022) [<https://perma.cc/5A8J-KSVY>].

152. *Bock Laundry*, 490 U.S. at 510.

153. *Id.* at 507; *id.* at 527 (Scalia, J., concurring in the judgment).

154. *Id.* at 524–26 (majority opinion). In dissent, Justices Blackmun, Brennan, and Marshall argued that the protection should be extended to civil plaintiffs and civil defendants as well as criminal defendants. See *id.* at 534–35 (Blackmun, J., dissenting).

155. *Id.* at 527 (Scalia, J., concurring in the judgment).

156. *Id.* at 529.

where “defendant” is used to mean “criminal defendant,” that it has lost its alien attributes and become part of ordinary English.

Few other legalisms will make this same linguistic journey, but the *Bock Laundry* anecdote serves to remind us that monosemy, polysemy, homonymy, and even legalism are not necessarily stable relationships or attributes. Most often, it is the legal meaning that evolves. But as we will see in the next Section, sometimes it is the ordinary meaning that changes, and the law that must decide whether to go along.

### C. Polysemic Pathways

The previous Section sought to situate polysemy in semantic space—as a relationship between words or phrases that is more distant than monosemy and less distant than homonymy. This Section shifts from space to time. How does polysemy emerge and evolve? While each manifestation of polysemy has its own origin story, we can again gain traction through mapmaking—and, specifically, by mapping out four paradigmatic polysemic pathways (though the list of four may not be exhaustive).

#### 1. Common Law Polysemy

One pathway to polysemy runs through the common law. “Duty” is an example of a polyseme that has traveled this route. Starting in the mid-nineteenth century, American treatise writers sought to derive general principles of tort law out of the wreckage of the writ system.<sup>157</sup> In his 1881 lecture on trespass and negligence in *The Common Law*, Oliver Wendell Holmes said: “We are to ask what are the elements, on the defendant’s side, which must all be present before liability is possible.”<sup>158</sup> By 1896, William Benjamin Hale had offered an answer to Holmes’s question: “duty to exercise care,” “violation of duty,” and “damages.”<sup>159</sup> That list would ultimately evolve into the familiar four elements of duty, breach, causation, and damages, with causation sometimes split into two further elements—cause in fact and proximate cause.<sup>160</sup>

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157. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 8–11 (Oxford Univ. Press expanded ed., 2003).

158. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 79 (Project Gutenberg ed., 2013) (1881).

159. WILLIAM B. HALE, *HANDBOOK ON THE LAW OF TORTS* 449 (1896).

160. See David G. Owen, *The Five Elements of Negligence*, 35 *HOFSTRA L. REV.* 1671, 1671–72 (2007) (explaining the evolution of the elements of negligence).

Two observations about common law polysemy bear emphasis. The first is that in common law domains, the relationship between labels and applications is dialogic. Courts had decided numerous negligence cases *before* treatise writers identified and described “duty” as an element. The label “duty” was chosen to fit the earlier cases, and then subsequent cases were influenced (and continue to be influenced) by the choice of label. In the statutory context, by contrast, the labels for elements typically precede judicial application. The labels influence the cases, but—absent amendment—the cases cannot influence the labels.

The second observation is that even common law polysemy can reflect a conscious *choice*. William Benjamin Hale recognized (and, indeed, underscored) that he was using “duty” in his treatise to mean something different from moral duty.<sup>161</sup> A century later, one of the discussion drafts for the *Restatement (Third) of Torts* proposed to shift to a three-element account of negligence: negligent conduct, legal causation, and physical harm.<sup>162</sup> (The nonexistence of a duty would have been an argument that the defendant could raise to escape liability for negligent conduct, rather than an element of the *prima facie* case.) Although the Third Restatement ultimately recognized duty as the first element of a *prima facie* claim of negligence,<sup>163</sup> the episode underscores the fact that even in the context of common-law doctrines with deep historical roots, the words themselves still may be in play. Individual and institutional actors have opportunities to add, subtract, and modify the labels that law applies to common-law concepts. The plasticity of the law’s labels helps to motivate the search in Part III for general principles that will guide the choice among monosemy, polysemy, homonymy, and legalogism—because it is, at least sometimes, a *choice*.

## 2. Interpretive Polysemy

A second polysemic pathway runs through the interpretation of statutory and constitutional text. A court or agency (or, occasionally, a legislature itself in applying its own rules) arrives at an interpretation of a word or phrase that diverges from the ordinary meaning. Some of

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161. See HALE, *supra* note 159, at 50 (“The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort.”).

162. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 3 (AM. L. INST., Discussion Draft Apr. 5, 1999); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 660 (2001) (explaining that the discussion draft proposed a three-element negligence case).

163. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 6 cmt. b (AM. L. INST. 2010) (“The first element, duty, is a question of law for the court to determine.”).

the examples above—such as the Supreme Court’s construal of “tangible object” in *Yates v. United States*—match this pattern. There are no doubt thousands of others.

In some respects, interpretive polysemy is a thoroughly modern phenomenon—a product not only of our “age of statutes”<sup>164</sup> but also of newfangled fashions in statutory interpretation. To understand this point, examine the contrast between Justice Brewer’s 1892 opinion in *Church of the Holy Trinity v. United States*,<sup>165</sup> an old chestnut of statutory interpretation syllabi, and Justice Ginsburg’s 2015 opinion in *Yates v. United States*,<sup>166</sup> which illustrates the modern method. The question in *Holy Trinity* was whether an Episcopal parish in Manhattan had violated the Alien Contract Labor Law of 1885 when it entered into a contract with E. Walpole Warren, an English clergyman, to serve as its rector.<sup>167</sup> The relevant part of the statute read:

[I]t shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, . . . under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States . . . .<sup>168</sup>

Writing for a unanimous Court, Justice Brewer conceded that “the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.”<sup>169</sup> But Justice Brewer went on to consider the title of the statute,<sup>170</sup> the circumstances surrounding its enactment,<sup>171</sup> a Senate committee report,<sup>172</sup> and finally, a strong intuition about legislative intent. “[T]his is a Christian nation,” Brewer (in)famously wrote. “[S]hall it be believed that a congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?”<sup>173</sup> Justice Brewer’s opinion concluded that “however broad the

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164. Cf. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31 (1982) (“[I]nterpretation of statutes involves an almost unavoidable judicial task. Words do not interpret themselves.”).

165. 143 U.S. 457 (1892).

166. 574 U.S. 528 (2015).

167. *Holy Trinity*, 143 U.S. at 457–58.

168. An Act to Prohibit the Importation and Migration of Foreigners and Aliens Under Contract or Agreement to Perform Labor in the United States, Its Territories, and the District of Columbia, chap. 164, § 1, 23 Stat. 332 (1885).

169. *Holy Trinity*, 143 U.S. at 458.

170. *See id.* at 462–63.

171. *See id.* at 463–64.

172. *See id.* at 464.

173. *Id.* at 471.

language of the statute may be,” the contract between the Church of the Holy Trinity and Walpole, “although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”<sup>174</sup>

*Holy Trinity* is a clear case of a court diverging from the ordinary meaning of a statute, but it does not fit easily onto our spectrum of semantic alignment. What word or phrase is Brewer interpreting polysemously? Is the Church of the Holy Trinity not a “corporation”? Is a legally binding arrangement between a church and its rector not a “contract or agreement”? Does Walpole’s ministerial work not qualify as “labor or service”? Brewer does not say.

Now consider Justice Ginsburg’s approach in *Yates*.<sup>175</sup> The question there was whether Yates, a commercial fisherman, could be convicted under 18 U.S.C. § 1519 for ordering a crew member to toss red grouper back into the Gulf of Mexico.<sup>176</sup> (Evidently, Yates was trying to hide the fact that he had harvested undersized fish in violation of federal regulations.) Like Justice Brewer in *Holy Trinity*, Justice Ginsburg conceded that the plain meaning of the statute covered the conduct in question.<sup>177</sup> She then went on to cite some of the same sources on which Brewer had relied: the title (technically, caption) of § 1519,<sup>178</sup> the circumstances surrounding the statute’s enactment,<sup>179</sup> a Senate committee report,<sup>180</sup> and finally, a strong intuition about legislative intent. “It is highly improbable,” Justice Ginsburg wrote, “that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial recordkeeping.”<sup>181</sup>

But the upshot of Ginsburg’s opinion reads very differently from *Holy Trinity*. The polysemy in *Yates* is explicit: “[W]e hold that a ‘tangible object’ within § 1519’s compass is one used to record or preserve information.”<sup>182</sup> Justice Ginsburg tells us exactly which words in the statute she is interpreting polysemously in order to achieve the Court’s result.

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174. *Id.* at 472.

175. *Yates v. United States*, 574 U.S. 528 (2015).

176. *Id.* at 531.

177. *See id.* at 532 (plurality opinion) (“A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction.”).

178. *See id.* at 539–40.

179. *See id.* at 540–41.

180. *See id.* at 542 n.5.

181. *Id.* at 546.

182. *Id.* at 549.



Justice Brewer in *Holy Trinity* and Justice Ginsburg in *Yates* are essentially acting out the Hart-Fuller debate, but in reverse order. In his 1957 Holmes Lecture at Harvard, H.L.A. Hart offered what would become “the most famous hypothetical in the common law world.”<sup>183</sup> As Hart put it: “A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles?”<sup>184</sup> Hart would go on to say that “in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.”<sup>185</sup>

Lon Fuller’s response in the *Harvard Law Review* the following year took issue with Hart’s description of interpretation. The “most obvious defect” of Hart’s theory, according to Fuller, “lies in its assumption that problems of interpretation typically turn on the meaning of individual words.”<sup>186</sup> According to Fuller, “[e]ven in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text.”<sup>187</sup> In Fuller’s view, courts do not ask whether a rector performs “labor or service” (or whether a fish is a “tangible object”). They ask whether an application of a statute fits within the statute’s purpose.

Fuller’s model—in which courts interpret statutes, not words—may have been a descriptively accurate account of statutory interpretation circa 1958, but statutory interpretation today, at least in the U.S. Supreme Court, increasingly resembles the interpretive exercise in Hart’s hypothetical. It is not surprising to hear the Justices say, for example, that a case “turns on the meaning of the word ‘costs,’ ”<sup>188</sup> or “turns on the meaning of the word ‘discharge,’ ”<sup>189</sup> or that “[t]he question before us is the meaning of the phrase ‘changing clothes’ as it appears in the Fair Labor Standards Act.”<sup>190</sup> Even when the Court consciously strays from ordinary meaning, as in *Yates*, it often does so on a word- or phrase-specific basis.

This trend toward word-by-word and phrase-by-phrase interpretation is not necessarily one to celebrate. (In my view, Fuller’s

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183. Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008).

184. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

185. *Id.*

186. Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662 (1958).

187. *Id.* at 663.

188. *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 879 (2019).

189. *S.D. Warren Co. v. Me. Bd. of Env’t Prot.*, 547 U.S. 370, 375 (2006).

190. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 222 (2014).

account of statutory interpretation is the more normatively attractive one—and as Frederick Schauer observes, even Hart may have agreed.)<sup>191</sup> For present purposes, though, the trend of courts assigning meanings to specific words or phrases (rather than to entire sections or statutes) serves to crystallize instances of interpretive polysemy. We can identify a divergence between the legal and nonlegal meaning of a specific word or phrase more clearly in a case like *Yates*, where the Court proceeds in Hartian word-by-word fashion, than in a case like *Holy Trinity*, where the Court hews to the Fullerian whole-statute model.

### 3. Legislative Polysemy

Not all statutory polysemy is interpretive polysemy: sometimes lawmakers themselves will assign nonstandard meanings to statutory terms. For example, “person” in the Federal Dictionary Act includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>192</sup> A “qualifying child” of a taxpayer in section 152 of the Internal Revenue Code can include the taxpayer’s brother, sister, nephew, niece, grandnephew, or grandniece<sup>193</sup>—and, if she or he is “permanently and totally” disabled, can be of any age.<sup>194</sup> A “qualifying relative” under section 152 need not be related at all.<sup>195</sup> An “animal” under the Animal Welfare Act excludes birds, rats, and mice if they are bred for use in research, “horses not used for research purposes,” all “farm animals,” and all cold-blooded animals.<sup>196</sup> And, for a real headscratcher, the South Carolina Sales and Use Tax Act defines “tangible personal property” to include “services and intangibles.”<sup>197</sup>

In some cases, legislative polysemy may serve the interests of word economy. Rather than repeating “corporations, companies, associations,” and so on hundreds of times, the Dictionary Act allows Congress to use “person” as shorthand. In other cases, legislative

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191. As Schauer observes, the point of Hart’s hypothetical was not that courts should interpret statutes on a word-by-word or phrase-by-phrase basis, but to illustrate—contra the legal realists—that many legal questions lie within a core of settled meaning (e.g., whether “no vehicles in the park” applies to trucks). See Schauer, *supra* note 183, at 1115–19. “No vehicles in the park” was, in this respect, “[a]n [u]nfortunate [e]xample” in the context of Hart’s argument, see *id.* at 1115, though an extraordinarily generative one in the long run.

192. 1 U.S.C. § 1. Like other definitions in the Dictionary Act, the definition of “person” applies across the U.S. Code “unless the context indicates otherwise.” *Id.*

193. I.R.C. § 152(c)(2)(B).

194. I.R.C. § 152(c)(3)(B).

195. See I.R.C. § 152(d)(2)(H).

196. 7 U.S.C. § 2132(g).

197. S.C. CODE ANN. § 12-36-60 (2022). I thank Michelle Layser for this example.

polysemy may result from the pursuit of a more sophisticated strategy: an attempt by lawmakers to change beliefs through legal language.

Consider again the introductory example of “take” in the Endangered Species Act. Under section 3 of the Act, the term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>198</sup> The Senate Commerce Committee report accompanying the Act emphasized that the drafters were defining “take” in “the broadest possible manner.”<sup>199</sup> One way to understand this definitional move is as an attempt to broaden the *reader’s* beliefs about harms to endangered species, such as significant habitat modification. By defining harms such as habitat modification as forms of “take,” the drafters are emphasizing that those harms are—in a fundamental way—*like* taking: in one case, the species is removed from its habitat; in the other, the habitat is removed from the species. We might not think about logging in the Pacific Northwest the same way we think about a literal taking of a red-cockaded woodpecker, but the definitional section of the Endangered Species Act suggests that perhaps we ought to.

To be clear, nothing about this example hinges upon the actual intent of the drafters of the Endangered Species Act. (The drafters might not have thought through their reasons for defining “take” polysemously.) The statute’s definition of “take” was fiercely contested in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, in which the Court held that the Secretary of the Interior permissibly interpreted “take” to include significant habitat modification.<sup>200</sup> The key point is that polysemous statutory definitions *may* perform work beyond word economy: defining *X* to include *Y*, where *X* would not typically include *Y* in ordinary language, may reflect an attempt to communicate a message that *Y* shares certain normatively relevant features with *X* such that *Y* ought to trigger the same response as *X*.

#### 4. Evolutionary Polysemy

A fourth polysemic pathway involves the evolution of nonlegal language. The term “race” in the Civil Rights Act of 1866 offers an illustration. Section 1 of the Civil Rights Act of 1866 provided that citizens “of every race and color . . . shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal

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198. Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(14), 87 Stat. 884, 886 (codified as amended at 16 U.S.C. § 1532(19)).

199. S. REP. NO. 93-307, at 7 (1973).

200. 515 U.S. 687, 708 (1995).

property . . . as is enjoyed by white citizens.”<sup>201</sup> In the 1987 case *Shaare Tefila Congregation v. Cobb*, the Supreme Court confronted the question of whether the provision protects Jews from antisemitic attacks.<sup>202</sup> The plaintiffs in *Shaare Tefila*—a synagogue and several of its members—sued defendants who had desecrated the synagogue’s outside walls with spray-painted swastikas and other antisemitic messages.<sup>203</sup> The plaintiffs argued that these actions deprived them of the same right to hold property as is enjoyed by White citizens. The U.S. Court of Appeals for the Fourth Circuit rejected that claim: “Although we sympathize with [the plaintiffs’] position,” the court said, “we conclude that it cannot support a claim of racial discrimination” because “discrimination against Jews is not racial discrimination.”<sup>204</sup>

In reversing the Fourth Circuit, Justice White—writing for a unanimous Court—did not dispute the lower court’s conception of “race.” According to Justice White, “the question before us is not whether Jews are considered to be a separate race by today’s standards, but whether, at the time [the Civil Rights Act of 1866] was adopted, Jews constituted a group of people that Congress intended to protect.”<sup>205</sup> In a companion case holding that the 1866 Act also protected Arab Americans, Justice White cited references from members of Congress in 1866 to the Scandinavian, Chinese, Latin, Spanish, Jewish, Mexican, Mongolian, and German races.<sup>206</sup> “Plainly, all those who might be deemed Caucasian today were not thought to be of the same race” circa 1866, Justice White concluded.<sup>207</sup>

Justice White’s approach was not the only path available to the Court. The Justices could have said that “race” is a social construct, and that statutes prohibiting racial discrimination serve to protect individuals who—at any given moment—are construed by society to be members of an out-group based on their ancestry and appearance. On this view, the 1866 Act was intended to protect out-groups, but whether an individual is entitled to the Act’s protection depends on whether she is a member of a racial out-group today, *not* whether she was a member of an out-group in 1866. The legislative history cited by Justice White goes to show only that members of Congress considered Jews to be a separate race in 1866, not that members of Congress believed the statute would continue to protect Jews if—due to changing attitudes

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201. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982).

202. 481 U.S. 615 (1987).

203. *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 524–25 (4th Cir. 1986).

204. *Id.* at 527.

205. *Shaare Tefila*, 481 U.S. at 617.

206. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612 (1987).

207. *Id.* at 610.

toward “race” and toward Jewishness—society at some future point did *not* consider Jews to be members of a racial out-group. Perhaps the 1866 Congress meant for the statutory term “race” to free ride on the future trajectory of the idea of “race.”

The interpretation of old legal texts in light of intervening linguistic changes is a vast and deep question that lies beyond this Article’s already expansive scope. The key takeaway from the discussion of *Shaare Tefila* is that polysemy can arise not only through doctrinal evolution but also through linguistic evolution. How courts and other actors should respond to evolutionary polysemy depends partly upon polysemy’s benefits and costs—a topic to which we will turn momentarily.

#### *D. Distinguishing Polysemy*

By now, it is hopefully apparent that polysemy is a phenomenon in law that deserves focused study. But polysemy is also related to a number of other phenomena and debates—in particular, rules versus standards, textualism versus purposivism, and “legal fictions.” This Section seeks to distinguish polysemy from these related concepts while also highlighting connections.

##### 1. Rules vs. Standards

Over the last several decades, the trade-off between “rules” and “standards” has sparked a large literature in and beyond the law-and-economics field.<sup>208</sup> With a rule, the promulgator specifies *ex ante* what conduct is permitted or prohibited (e.g., “driving in excess of 65 miles per hour on a highway is prohibited”). *Ex post*, at the law enforcement stage, the only question is factual: Did the actor violate the rule? With a standard, the promulgator identifies *ex ante* a principle or policy to guide conduct (e.g., “driving at an excessive speed on a highway is prohibited”). *Ex post*, at the law enforcement stage, the inquiry is both factual and normative: Given the totality of the circumstances, did the actor’s conduct fail to conform to the principle or policy?

Decision costs are an important dimension of the rules-standards trade-off. Rules generally entail higher *ex ante* promulgation

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208. See, e.g., Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen M. Sullivan, *The Supreme Court—1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401 (2016).

costs, while standards entail higher ex post enforcement costs.<sup>209</sup> Another key dimension of the rules-standards trade-off is the choice between “certainty” and “calibration”: rules provide clearer guidance, but standards allow the law to respond more flexibly to the totality of the circumstances.<sup>210</sup> An additional facet of the rules-standards trade-off is the promulgator’s level of trust in the actors who will enforce the law ex post.<sup>211</sup> A lower level of trust may favor the constraining effect of rules; a higher level of trust may tilt the balance toward the discretion accompanying standards.

The possibility of polysemy has the potential to transform rules into standards. A prohibition on “driving in excess of 65 miles per hour on highways” loses its determinate quality if an adjudicator can decide on a case-by-case basis what counts as a “highway.” (The above-noted polysemy of “mile” is probably too subtle to matter in real-world cases.) But polysemy is also possible within the realm of pure “rules,” and monosemy is possible within the realm of “standards.” While the rules-standards trade-off will prove to be important to the analysis below, polysemy is not just another instantiation of the rules-standards debate.

For an example of a polysemous rule, consider again the Animal Welfare Act.<sup>212</sup> The rule that a cold-blooded animal is not an “animal” under the Animal Welfare Act lies on the rule end of the rule-standard spectrum. There are some edge cases—such as the naked mole-rat, a mammal with a fluctuating body temperature<sup>213</sup>—but even the most charismatic frog (say, Kermit) cannot qualify for coverage. For an example of a monosemous standard, consider “reasonable care” in negligence. Jurors generally are not instructed on a special legal meaning of “reasonable care”; they are left to draw upon their extralegal intuitions about reasonableness.<sup>214</sup> Disagreements about reasonableness in negligence law still arise, but they generally do not turn upon a distinction between the legal and nonlegal meaning of the term.

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209. Kaplow, *supra* note 208, at 579–84.

210. See Casey & Niblett, *supra* note 208, at 1402–03 n.3.

211. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1765 (1976).

212. 7 U.S.C. § 2132(g).

213. *Naked Mole-Rat*, SMITHSONIAN’S NAT’L ZOO & CONSERVATION BIOLOGY INST., <https://nationalzoo.si.edu/animals/naked-mole-rat> (last visited Feb. 6, 2023) [<https://perma.cc/7CAN-K9ZK>].

214. See, e.g., *Rossell v. Volkswagen of Am.*, 709 P.2d 517, 521–22 (Ariz. 1985); Patrick J. Kelly & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 595–97 (2002).

## 2. Textualism vs. Purposivism

The debate between textualism and purposivism has dominated the field of statutory interpretation for decades. Textualism certainly shares an affinity with monosemy, but the two are far from identical. For one thing, the choice between monosemy and polysemy can arise in common law (as with “duty” in tort law), where neither textualism nor statutory purposivism has much to say because there is no governing statute. For another, legislative polysemy sometimes causes textualism and monosemy to point in different directions.

*Bond v. United States*<sup>215</sup> highlights the tension between textualism and monosemy. Carol Anne Bond, a microbiologist living in a Philadelphia suburb, discovered that her husband had impregnated her best friend, Myrlinda Haynes.<sup>216</sup> Bond responded by spreading chemicals (including a solution used for photograph printing that she had purchased on Amazon) over Haynes’s car door, mailbox, and doorknob—apparently intending to cause Haynes to develop an uncomfortable rash but not to kill her.<sup>217</sup> Haynes suffered a minor burn that she treated by running it under water.<sup>218</sup>

In an instance of aggressive prosecutorial creativity, the local U.S. Attorney’s Office charged Bond under the Chemical Weapons Convention Implementation Act of 1998, which makes it a federal crime to use a “chemical weapon.”<sup>219</sup> The statute defines a “chemical weapon” as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>220</sup> The chemicals used by Bond would have been lethal in high doses, so under the definition, they appeared to be “chemical weapons.”

All sides agreed that describing Bond’s attack on her friend as the use of a “chemical weapon” would give rise to deep polysemy. “[A]s a matter of natural meaning,” Chief Justice Roberts wrote for the majority, “an educated user of English would not describe Bond’s crime as involving a ‘chemical weapon.’”<sup>221</sup> Roberts—invoking federalism concerns and the canon of constitutional avoidance—ultimately

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215. 572 U.S. 844 (2014).

216. *Id.* at 852.

217. *Id.*

218. *Id.*

219. 18 U.S.C. § 229.

220. 18 U.S.C. § 229F(1)(A), (8)(A) (defining a “chemical weapon” as “[a] toxic chemical and its precursors” and further defining “toxic chemical[s]” to encompass “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals”).

221. *Bond*, 572 U.S. at 860.

concluded that Bond's conduct fell outside the chemical weapons statute. Justice Scalia strenuously objected. According to Scalia, the "ordinary meaning" of "chemical weapon" was "irrelevant" because "the statute's own definition—however expansive—is utterly clear."<sup>222</sup> In a claim as bold as the prosecutor's charging decision, Scalia added that "no opinion . . . written by any court or put forward by any commentator since Aristotle . . . says, or even suggests, that 'dissonance' between ordinary meaning and the unambiguous words of a definition is to be resolved in favor of ordinary meaning."<sup>223</sup> When a clear statutory definition generates polysemy, according to Scalia, courts must follow the definition toward the polysemous outcome.

In the end, Justice Scalia came down on the same side of the case as Roberts (i.e., in favor of Bond) because in Scalia's view, while Bond's conduct clearly fell within the scope of the statute, the statute itself was unconstitutional.<sup>224</sup> Nonetheless, *Bond* underscores the point that commitments to textualism and monosemy can push in different directions.<sup>225</sup> The study of monosemy and polysemy may (and indeed, will<sup>226</sup>) yield implications for statutory interpretation debates, but monosemy and polysemy should not be mistaken as stand-ins for textualism and purposivism.

### 3. Legal Fictions

Polysemy is perhaps most closely related to the concept of "legal fictions." Lon Fuller famously described a legal fiction as "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."<sup>227</sup> Some instances of polysemy seem to meet Fuller's definition. For example, Fuller cites corporate personhood as an example of a legal fiction.<sup>228</sup> The use of the word "person" to describe corporations also is an example of polysemy. Both characterizations capture the fact that corporations are persons in some areas of the law but not outside the law.

In other cases of polysemy, the "legal fiction" description of polysemy seems strained. For example, the Justices in the majority in *Yates v. United States* did not imply (even fictitiously) that fish were

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222. *Id.* at 871 (Scalia, J., concurring).

223. *Id.*

224. *See id.* at 874–82.

225. To be sure, even the Roberts approach required a polysemous interpretation of the words of the statutory definition.

226. *See infra* notes 409–413 and accompanying text.

227. LON L. FULLER, LEGAL FICTIONS 9 (1967).

228. *See id.* at 12–14.



incapable of being touched; they simply adopted a definition of “tangible object” that is different from the term’s nonlegal meaning.<sup>229</sup> And some legal fictions involve no polysemy. For example, the Bill of Middlesex—a sixteenth century procedural device in which plaintiffs would allege that a fictional wrong occurred in Middlesex County in order to bring their claims within the jurisdiction of the King’s Bench—involved no apparent polysemy: the reference to Middlesex in the sixteenth-century complaints really referred to Middlesex, but no relevant wrong had occurred there.<sup>230</sup> Fuller’s analysis of legal fiction will nonetheless prove helpful when evaluating polysemy and its alternatives below.<sup>231</sup> The category of legal fictions, however, can neither subsume nor be subsumed by polysemy.

### III. EVALUATING POLYSEMY AND ITS ALTERNATIVES

The analysis so far has sought to *describe* the phenomenon of polysemy. This Part turns toward a normative evaluation of the phenomenon. What are the benefits of polysemy, and what are the costs? When—if ever—should designers of legal rules consciously *select* words or phrases that give rise to polysemy?

#### A. *The False Promise of Monosemy*

The case for monosemy seems straightforward at first. Law should speak in ordinary language so that laypeople can understand its contents with minimal effort. Communicative efficiency is an end in itself because unnecessary communication costs are a deadweight loss. Beyond that, communicative efficiency sustains rule-of-law values: as the Supreme Court has said, “the first essential of due process of law” is “that statutes must give people of common intelligence fair notice of what the law demands of them.”<sup>232</sup> “Fair notice” requires that law speak in the same language that the people do.

Monosemy also reduces decision costs for judges and other legal interpreters. When law is monosemous, a generalist judge who encounters a new statute need not learn a new vocabulary: she can rely on her knowledge of ordinary language to interpret the law’s commands. Moreover, laypeople can evaluate whether the judge is

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229. See *Yates v. United States*, 574 U.S. 528, 532 (2015).

230. See Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law: An Hypothesis*, in *BOUNDARIES OF THE LAW: GEOGRAPHY, GENDER AND JURISDICTION IN MEDIEVAL AND EARLY MODERN EUROPE* 149, 155–56 (Anthony Musson ed., 2005).

231. See FULLER, *supra* note 227.

232. *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (internal quotation marks omitted).

acting as a faithful agent of the legislature by assessing whether the results of cases match up with the language of legal rules.

Finally, monosemy enhances the law's expressive power. The law's statement that an actor owes a "duty" carries force beyond its deterrent effect because people understand "duty" as meaning moral obligation. A judgment that a defendant was "at fault" for a plaintiff's injury serves to condemn negligent conduct because "fault" connotes responsibility. Monosemy's effects on communicative efficiency, decision costs, and law's expressive power all make monosemy a useful linguistic strategy for designers of legal rules.

The principal problem with monosemy is that simple English sentences often cannot capture the nuance that society wants from its laws. (Nothing about the problem is English-specific—the same problem would arise in Spanish or Mandarin or Esperanto.) Society may want to follow a general rule that an actor is liable for negligence when she breaches a duty of care to another and causes damages—but might want to modify that rule (in different directions) in police failure-to-protect and compliance-error cases. In these cases, designers of legal rules have two options within the region of monosemy. First, they may stick with the simple rule notwithstanding the unsatisfactory results in specific cases. Second, they may shift to a more complex rule. To use an extreme example, the rule designers may adopt the Prosserian definition of duty whole-hog: An actor is liable for negligence if "the sum total of policy considerations" favor liability plus the elements of negligent conduct, causation, and damages are satisfied. Better yet, the rule designers might list all the policy considerations that enter into the "sum total."

The first option has the benefit of preserving communicative efficiency, minimizing decision costs, and retaining the expressive power of words like "duty." But it leads to outcomes in specific cases that society (by hypothesis) does not want. The second option avoids those unwanted outcomes but carries costs of its own. An unwieldy rule that accurately describes the law's contents in 100 pages does not necessarily fare better on the communicative-efficiency dimension than a polysemous rule that describes the law pretty well (but not perfectly) in a sentence. Also, articulating the 100-page rule *ex ante* would, as in the rules-standards trade-off, raise promulgation costs. And the rule's verbosity would sacrifice much of the expressive power that comes from using simple (if not entirely accurate) words like "duty."

Here, our rule designers reach another fork in the road. They may depart from monosemy, but where would they go next? Toward homonymy and/or legalism, or toward polysemy? Let's survey the

more distant reaches of the semantic-relatedness spectrum before considering monosemy's nearest neighbor.

### *B. The Allure of Homonymy and Legalogism*

Some commentators have searched for a solution to our dilemma in homonymy and legalogism. Reacting to the fact that “gift” carries different meanings in different chapters of the Internal Revenue Code, the great legal realist scholar-turned-Second Circuit Judge Jerome Frank once suggested that Congress might do better by “calling it a ‘gift’ in the gift tax law, a ‘gaft’ in the income tax law, and a ‘geft’ in the estate tax law.”<sup>233</sup> (“Gaft” and “geft,” having no apparent meaning outside of Frank’s hypothetical, would be legalogisms.) Contracts scholar Edwin Patterson, in an unfinished and unpublished treatise, proposed—“only half seriously”—that the words “offer” and “acceptance” be replaced with the Latin “spondesne” and “spondeo” so that English speakers wouldn’t be confused by the mismatch between the legal terms and their ordinary-English correspondents.<sup>234</sup> As noted above, legislative drafters sometimes make a similar move when they create new tax law categories.

Homonymy and legalogism allow the law to respond flexibly to hard cases without being bound by the ordinary meaning of terms. And while they reduce communicative efficiency relative to monosemy, they potentially carry fair-notice benefits relative to polysemy. When a layperson encounters a polysemous legal rule, she may be tempted to interpret it on her own—and may be misled. Homonyms and legalogisms implicitly come with a warning label for laypeople: “Don’t interpret this at home.” Arguably, a legal code composed of *only* monosemes, homonyms, and legalogisms would be *more* decipherable to laypeople than a legal code that includes polysemes. Laypeople would know when they can rely on their own interpretations and when they better call Saul.

Homonymy and legalogism certainly carry disadvantages. For example, when deciding whether a Roth IRA is an eligible shareholder of an S corporation,<sup>235</sup> judges cannot rely on their intuitions about the ordinary meaning of “Roth IRA” and “S corporation” because those terms have no ordinary meaning. But while homonyms and legalogisms

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233. *Comm’r v. Beck’s Est.*, 129 F.2d 243, 246 (2d Cir. 1942).

234. See Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 508 (2015) (citing EDWIN W. PATTERSON, TREATISE ON THE LAW OF CONTRACTS (unpublished and undated manuscript)).

235. See *Taproot Admin. Servs. v. Comm’r*, 133 T.C. 202 (2009), *aff’d*, 679 F.3d 1109 (9th Cir. 2012) (answer: no).

are less likely to guide judges, they are also less likely to mislead judges. We need not worry that a judge's extralegal intuitions about the meaning of "Roth IRA" and "S corporation" will cloud her decisionmaking because the judge presumably has no such intuitions.

Homonymy and legalogism are especially well-fitted for fields like estate and gift taxation that affect a small number of taxpayers who can afford to seek professional advice. In this regard, Judge Frank had it wrong—"gift" should be the word in income tax law, and "gaft" and "geft" in gift and estate tax law because the definition of "gift" in income tax law affects many more people<sup>236</sup> and more closely corresponds to the colloquial meaning.<sup>237</sup> Another factor favoring homonymy and legalogism in tax is the specialization of the judiciary: more than ninety-five percent of litigated federal tax cases end up in the U.S. Tax Court.<sup>238</sup> Homonymy and legalogism in fields with specialist courts do not require judges to learn a new language every time they shift from one field to another because judges generally remain focused on only one field.

When designers of legal rules opt for homonymy and legalogism, they face the additional question of which one to choose. An advantage of homonyms is that they tend to be easier to remember: stop and ask yourself whether you better remember my homonym for "duty" in Part I or Edwin Patterson's legalogism for "offer."<sup>239</sup> The disadvantage is that that the homonym might be misinterpreted as a monoseme or polyseme, either misleading laypeople (and undermining communicative efficiency) or misleading judges (and thus sending the decisionmaking process off track). And even when designers of legal rules do opt for homonymy or legalogism, there remains the possibility that the term will migrate into ordinary language—as the example of "defendant" in

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236. In fiscal year 2020, the Internal Revenue Service received more than 157 million individual income tax returns, versus approximately 158,000 gift tax returns and 15,000 estate tax returns. INTERNAL REVENUE SERV., DATA BOOK, 2021, at 4 tbl.2 (2021), <https://www.irs.gov/pub/irs-pdf/p55b.pdf> [<https://perma.cc/UYK6-TCQS>].

237. See *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (holding that a "gift" in income tax law "proceeds from a detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses" (internal citation and quotation marks omitted)).

238. Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1836 (2014).

239. The choice between homonymy and legalogism resembles the choice between an arbitrary and fanciful mark in trademark law. See Barton Beebe & Jeanne C. Fromer, *Are We Running out of Trademarks: An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 957 (2018). A legalogism, like a fanciful mark, may lead to high "distance costs." See Daniel Hemel & Lisa Larrimore Ouellette, *Trademark Law Pluralism*, 88 U. CHI. L. REV. 1025, 1027–28 (2021) (noting that "distance costs" arise "when firms use newfangled or non-English names that consumers struggle to recognize and recall"—e.g., the drug Valsartan for high blood pressure and the drug namzaric for memory loss).

*Bock Laundry* reminds us. Homonymy and legalism are sometimes desirable strategies, but they are not always stable ones.

### C. Productive Polysemy

A hypothetical system of legal rules that relied exclusively on monosemy, homonymy, and legalism would have much to recommend itself in theory. Laypeople would be able to tell when they either do not need the assistance of lawyers to interpret rules (monosemy) or when they definitely do (homonymy and legalism). Disputes over the interpretation of legal rules would still arise in the region of monosemy—for example, is a naked mole-rat a “warm-blooded” or “cold-blooded” animal under a statute that distinguishes between the two?<sup>240</sup>—but those disputes would not hinge upon any special legal meaning of the words of the rule. For legal rules that cannot be framed in purely monosemous terms, the rule itself would announce the need for a specialist. Our legal system would be a mix of ordinary English and the modern equivalent of Law French without the uncanny valley of words and phrases that *look* like ordinary English but don’t mean *quite* the same thing.

I am highly skeptical that this hypothetical system of legal rules is possible. As linguist Robyn Carston writes: “Monosemy is, at most, a short-lived initial phase when a word is newly coined.”<sup>241</sup> According to Carston, “every substantive word either *is* polysemous or very soon will be.”<sup>242</sup> But instead of fighting the hypothetical, let’s run with it for a moment. What would our idealized system of legal rules be *missing* if it banished polysemy like Plato banished the poets?

In at least four categories of cases, polysemy is potentially a feature of the law rather than a bug. The first is “approximate polysemy”; the second is “metaphoric polysemy”; the third is “redefinitional polysemy”; and the fourth involves instances of “selective transmission.” The list may not be exhaustive, but it is extensive—the set of desirable legal rules that fall into these four categories is large enough that if we lacked them, we would likely feel the loss.

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240. See *supra* note 212–213 and accompanying text.

241. Robyn Carston, *Polysemy: Pragmatics and Sense Conventions*, 36 MIND & LANGUAGE 108, 110 (2021).

242. *Id.*

## 1. Approximate Polysemy

“Approximate polysemy” captures cases in which a succinct legal rule articulated in ordinary English is “good enough” to communicate efficiently, minimize decision costs, and (potentially) leverage law’s expressive power, but monosemous adherence to the succinct rule would lead to unacceptable (or at least undesirable) results in a relatively small subset of cases. In Part I, we saw how this dynamic plays out with respect to “duty”: the ordinary English word does a generally satisfactory job of conveying the law’s contents to laypeople, provides a useful decisional heuristic for judges, and enhances law’s power to change beliefs and behavior through means other than deterrence, but the word doesn’t quite “fit” in a few instances (e.g., police duty-to-protect cases and compliance errors). All things considered, society is plausibly better-off with “duty” rather than “doodad” as the first element of negligence, though occasionally laypeople (including, potentially, the producers of an award-winning radio show) will fail to apprehend duty’s polysemy.

For another example not far afield from “duty,” consider “cause.” The causation concept plausibly serves several purposes in negligence law. It roughly calibrates the expected liability for an action to the social cost, even when adjudicators occasionally err in determining whether the defendant has exercised reasonable care.<sup>243</sup> It also may aid adjudicators in determining whether the defendant *has* exercised reasonable care: the fact that the defendant’s conduct did not cause injury may shed light on the quality of the conduct. Furthermore, causation plays a division-of-labor function in a system of private enforcement: if *A*’s negligent conduct injures *X* and *B*’s negligent conduct injures *Y*, the causation concept directs *X* to sue *A* and *Y* to sue *B* (which might not be the case if the rule was that any injured party could sue any actor who failed to exercise reasonable care). And causation aligns negligence law with strongly and widely held, if largely undertheorized, moral intuitions,<sup>244</sup> potentially enhancing law’s sociological legitimacy.

But a monosemous interpretation of “cause” in negligence would lead to troubling results in a small but nontrivial set of cases. These

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243. From an economic perspective, this aspect of the causation element might not be necessary if adjudicators determined negligent conduct without error. Given the possibility of adjudicative error, however, the limits on liability imposed by the causation element allow actors to proceed with high-benefit, low-risk activities even when an adjudicator would erroneously conclude that the actor’s conduct is negligent. See Steven Shavell, *Causation and Tort Liability* 4 (Harv. L. Sch., Ctr. for Law, Econ. & Bus., Discussion Paper No. 8/96, 1996).

244. For a classic effort to flesh out those intuitions, see Judith Jarvis Thomson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFFS. 101 (1984).

include cases in which the defendant's conduct was unquestionably the cause of the plaintiff's injury but not a "harm within the risk."<sup>245</sup> For example, in *Central of Georgia Railway Co. v. Price*, a conductor negligently failed to let a passenger disembark at her destination and then, when she wound up at the end of the line at night, secured a hotel room for her.<sup>246</sup> The passenger was injured in a hotel fire that evening and sued the conductor and the railroad. The conductor's negligence was no doubt a but-for cause of the passenger's injury—she wouldn't have been at the hotel if she had disembarked at her destination—but courts are understandably reluctant to make the railroad an absolute insurer for the passenger once the train passes her stop.<sup>247</sup>

Or, going in the other direction, a monosemous interpretation of "cause"—especially when combined with the preponderance-of-the-evidence standard of proof—might lead to *no* liability under circumstances in which most of us believe defendants ought to pay. A classic example is *Summers v. Tice*, in which two hunters negligently shot in the plaintiff's direction and the plaintiff could not identify either as more likely than not the "cause" of his injury—it was a 50/50 guess as to which one fired the bird shot that struck the plaintiff's right eye.<sup>248</sup> A more recent case presenting a similar dilemma is *Sindell v. Abbott Laboratories*, involving a woman whose mother had taken diethylstilbesterol ("DES"), a drug once administered to pregnant women to prevent miscarriage but that substantially raised the risk of adenocarcinoma in their daughters.<sup>249</sup> The plaintiff could not identify any single drug manufacturer as the cause of her injury, so she sued eleven DES manufacturers and asked the court to apportion liability on a market-share basis.<sup>250</sup> In *Summers* and *Sindell*, strong policy arguments based on deterrence and compensation interests favor liability, but this will require a creative interpretation of causation.

Cases like *Central of Georgia Railway*, *Summers*, and *Sindell* might motivate courts to discard the language of causation and replace it with something else (e.g., "schmausation"<sup>251</sup>), but it is easy to see why they do not. The word "cause" does a reasonably good job of conveying the contents of negligence law to ordinary people in the mine-run of

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245. See Mark F. Grady, *Causation and Foreseeability*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 114, 126 (Jennifer Arlen ed., 2013).

246. 32 S.E. 77 (Ga. 1898).

247. *Id.*

248. 199 P.2d 1 (Cal. 1947).

249. 607 P.2d 924, 925–26 (Cal. 1980).

250. *Id.* at 925, 937–38.

251. See Christopher Hitchcock, *The Metaphysical Bases of Liability: Commentary on Michael Moore's Causation and Responsibility*, 42 RUTGERS L.J. 377, 383 (2011).

cases. It provides judges (as well as juries) with a generally reliable decision heuristic. And it potentially enhances negligence law's narrative-construction power. In Tamara Relis's survey of wrongful death and medical malpractice plaintiffs, the third most common self-description of claimants' aims was a desire for "answers."<sup>252</sup> A plaintiff who has lost a family member or suffered a life-changing injury wants to know *why*.<sup>253</sup> A verdict framed in terms of cause—the jury finds that the defendant's negligent conduct was or wasn't the *cause* of the plaintiff's damages—potentially offers that answer. Postmodern fiction may function without a strong element of causation, but cause remains central to the narratives that most of us tell ourselves and each other. Deprived of the word "cause," tort law would likely lose some of its ability to supply answers that are satisfying (or even intelligible).

The use of polysemy also potentially facilitates cross-communication among lawyers. To be sure, lawyers who specialize in a subject are likely to grow accustomed to homonyms and legalogisms in their fields—personal injury and toxic torts lawyers would do fine with "schmausation" just as tax lawyers quickly assimilate terms like "Roth IRA" and "199-cap-A"<sup>254</sup> into their vocabularies. But as Henry Smith has observed, some areas of law are "modular" in the sense that their components can be—and often are—separated from each other and combined with components of other areas of law.<sup>255</sup> For example, antitrust law,<sup>256</sup> civil rights law,<sup>257</sup> and securities law<sup>258</sup> often draw from tort law's causation doctrine.<sup>259</sup> As a result, lawyers who don't interact with the tort system on a day-to-day basis still must engage with tort law concepts and precedents on occasion. Tort law's use of familiar labels for its modules potentially makes it easier for lawyers in other areas to access these concepts.

Can we generalize from duty and causation in negligence law to identify features that make approximate polysemy attractive in other areas? Potentially. One salient feature of "duty" and "cause" is that while their use in negligence law is polysemous, it is not *that*

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252. Relis, *supra* note 73, at 363 fig.4.

253. On the search for answers as a core function of tort law, see Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 72–73 (2010).

254. See I.R.C. § 199A.

255. See Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 1 (2011).

256. See, e.g., *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019).

257. See, e.g., *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).

258. See Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811 (2009).

259. The desirability of tort-law imperialism (i.e., the projection of tort-law concepts on other areas) is certainly up for debate. For a skeptical perspective, see Kenneth Vinson, *Proximate Cause Should Be Barred from Wandering Outside Negligence Law*, 13 FLA. ST. U. L. REV. 215 (1985).



polysemous. If one is trying to understand the requisites for negligence liability, “breach of a duty of reasonable care causing damages” is a decent starting point. The case for approximate polysemy depends on how satisfactory the polyseme is.

Thus, in stark contrast to duty and causation, the “actual malice” standard in public-official defamation cases probably does not meet the first criterion for productive approximate polysemy because the meaning of the legal term lies very far from what an ordinary English speaker might infer. As the Second Circuit recently noted in a defamation action brought by former Alaska governor and vice presidential candidate Sarah Palin against the *New York Times*, “actual malice does not mean maliciousness or ill will; it simply means the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>260</sup> The flip side of this is that “[e]vidence of hatred, spite, vengeance, or deliberate intention to harm” (i.e., actual malice) does not establish “actual malice”: “A defendant who was motivated to publish by the blackest spirit of hatred and spite will not be liable if he subjectively believed in the truth of the statement.”<sup>261</sup> Whereas polysemy plausibly economizes on communication costs in the cases of “duty” and “cause,” the polysemy of “actual malice” is simply confusing.

A second salient feature of “duty” and “cause” in negligence is their breadth. Notwithstanding the mid-century “assault upon the citadel,”<sup>262</sup> negligence remains the default rule governing interactions among strangers.<sup>263</sup> Approximate polysemy is an effective strategy for achieving wide (but not necessarily deep) comprehension of the law’s contents. For a tax law analogy, consider the definition of “qualifying child” in section 152 of the Internal Revenue Code.<sup>264</sup> “Child” is defined polysemously to include disabled adult siblings (though the modifier “qualifying” puts taxpayers on notice of potential polysemy).<sup>265</sup> Since tens of millions of taxpayers claim a deduction for qualifying children in years in which that deduction is in effect<sup>266</sup>—and many of them do so without the help of a professional—the designers of the legal rule have

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260. *Palin v. N.Y. Times Co.*, 940 F.3d 804, 816 (2d Cir. 2019) (internal quotation marks omitted).

261. *Varanese v. Gall*, 518 N.E.2d 1177, 1180 (Ohio 1988).

262. See William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099 (1960).

263. See Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 *N.Y.U. L. REV.* 1517, 1535, 1593 (2016).

264. I.R.C. § 152(c)(2)(B), (3)(B); *supra* note 194 and accompanying text.

265. I.R.C. § 152(c)(2)(B), (3)(B).

266. As a result of the 2017 tax law, the deduction is suspended for tax years 2018 through 2025. See I.R.C. § 151(d)(5).

a strong interest in conveying a basic understanding of the provision broadly. And a qualifying child will, in the usual case, be the taxpayer's child. By contrast, if only a small number of taxpayers were eligible for the deduction and those taxpayers generally would need the help of a professional to qualify, a legalism rather than a polyseme might perform a useful warning-label function.

A third salient feature of “duty” and “cause” is that society plausibly wants these words to pack expressive punch. As we saw in the discussion of *Tarasoff*, the use of the word “duty” potentially enhances tort law's ability to change beliefs; as we saw above with respect to “cause,” society plausibly wants tort law to perform a narrative-construction function. Yet as we will soon see, approximate polysemy is not the only type of productive polysemy that can potentially play this belief-changing role.

## 2. Metaphoric Polysemy

A second type of potentially productive polysemy involves the use of metaphor. A precise definition of “metaphor” is hard to pin down (“pin down” itself being a metaphor), but according to one view among linguists, a metaphor entails three elements—vehicle, tenor, and ground. The vehicle is the item used metaphorically; the tenor is the metaphorical meaning of the vehicle; and the ground is “the basis for the metaphorical extension” (i.e., “the common elements of meaning” that “license the metaphor”).<sup>267</sup> As Cruse illustrates: “[I]n *the foot of the mountain*, the word *foot* is the vehicle, the tenor is something like ‘lower portion,’” and “the ground” is “the spatial parallel between the canonical position of the foot relative to the rest of the (human) body, and the lower parts of a mountain relative to the rest of the mountain.”<sup>268</sup>

According to linguist George Lakoff and philosopher Mark Johnson, “the bulk of our everyday conventional language” is “structured and understood primarily in metaphorical terms.”<sup>269</sup> Metaphoric polysemy is similarly pervasive in legal language, where it serves at least three functions. These functions correspond roughly to the three uses of approximate polysemy that we saw above (addressed in a different order for expositional ease): communicative efficiency, expressive economy, and decision cost management.

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267. CRUSE, *supra* note 138, at 242.

268. *Id.*

269. George Lakoff & Mark Johnson, *Conceptual Metaphor in Everyday Language*, 77 J. PHIL. 453, 453 (1980).

First, some legal metaphors potentially make complicated concepts easier to communicate and easier to remember. Consider the standard in *Abbott Laboratories v. Gardner*: Courts, when deciding whether an issue is “appropriate for judicial resolution,” must “evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”<sup>270</sup> The Supreme Court describes this as the “ripeness” doctrine.<sup>271</sup> “Ripeness” is a metaphor—the issue in the case is not literally ready for harvesting and eating—but the vehicle (ripeness) works reasonably well as linguistic shorthand and as a mnemonic device for remembering the doctrine.

Second, some legal metaphors are expressive: they convey a particular attitude toward their tenor. For example, Congress engaged in expressive metaphor when it passed section 67 of the Deficit Reduction Act of 1984, which imposed tax penalties on “golden parachute payments.”<sup>272</sup> A golden parachute payment is defined as a payment to an executive of a corporation that is contingent upon a change in ownership or control of the corporation and that equals or exceeds three times the executive’s annual compensation.<sup>273</sup> The legislative history reflects two reasons why Congress was concerned about “golden parachutes”: first, that corporations might write golden parachute provisions into executives’ contracts in order to discourage takeovers; and second, that executives might propose takeovers that aren’t in the shareholders’ best interests because the executives know they will be “handsomely rewarded” if a takeover occurs.<sup>274</sup> Either way, Congress thought that golden parachute payments should be “strongly discouraged.”<sup>275</sup> The evocative image of a corporate executive escaping from a plummeting firm in a golden parachute aligns with Congress’s apparent desire to deter golden parachute payments through a mix of tax disincentives and rhetorical scorn.

Finally, and most interestingly, some metaphors in the law serve a decision cost management function. This use of metaphor arises when promulgators face high decision costs in specifying a standard’s scope and seize upon a prototype case as a metaphoric vehicle. The metaphor serves both to shift decision costs forward in time and to provide some guidance for future adjudicators. Those future adjudicators apply the legal standard by reasoning analogically from the prototype. Some of the resulting applications, though they may be analogous to the

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270. 387 U.S. 136, 148–49 (1967).

271. *Id.* at 148.

272. Pub. L. No. 98-369, § 67, 98 Stat. 585-86 (codified as amended at I.R.C. §§ 280G, 4999).

273. I.R.C. § 280G(b)(2)-(3).

274. H.R. REP. NO. 98-4170, at 199–200 (1984).

275. *Id.*

prototype, do not fall literally within its terms. The outcomes thus appear polysemous—and potentially quite peculiar—to anyone who reads the law and then compares the text to its applications.

Examples of this strategy are familiar to every American lawyer. For instance, “Congress shall make no law respecting an establishment of religion . . .” Or: “Congress shall make no law . . . abridging the freedom of speech.”<sup>276</sup> If we encountered these provisions with knowledge of the English language (whether circa 1791 or 2022) but without familiarity with American constitutional law, we almost certainly would *not* say that a creche display on the staircase of a county courthouse is a “law respecting an establishment of religion.”<sup>277</sup> (It isn’t even a law.) Nor would we say that wearing a black armband is “speech.”<sup>278</sup> (Indeed, John and Mary Beth Tinker remained silent through their protest.<sup>279</sup>) “Establishment of religion” and “speech” present prototype cases rather than literal descriptions of what activities are proscribed or protected.

Or, for an example a little further down the Bill of Rights, consider the first clause of the Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”<sup>280</sup> In *Katz v. United States*, the Court held that the government’s wiretapping of an enclosed telephone booth was a search “within the meaning of the Fourth Amendment.”<sup>281</sup> Justice Harlan—whose concurrence in *Katz* would prove more influential than the majority opinion—arrived at his conclusion by analogizing to the paradigmatic “search” of a person’s home. According to Harlan, “a man’s home is, for most purposes, a place where he expects privacy.”<sup>282</sup> Thus the touchstone for a search, in Harlan’s view, is whether the government has intruded upon a person’s “reasonable expectation of privacy.”<sup>283</sup> Harlan’s logic follows a similar pattern as the speech cases: starting from the prototype (the metaphoric vehicle) and identifying normatively relevant features (i.e., the *grounds*

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276. U.S. CONST. amend. I.

277. *See* *Cnty. Of Allegheny v. ACLU*, 492 U.S. 573 (1989), *abrogated by* *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

278. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

279. *See id.* at 508.

280. U.S. CONST. amend. IV. We might include the Fifth Amendment Takings Clause and the Sixth Amendment Confrontation Clause on this list as well.

281. 389 U.S. 347, 353 (1967).

282. *Id.* at 360 (Harlan, J., concurring); *see* BARRY E. FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 219 (2017).

283. *Katz*, 389 U.S. at 360.

of the metaphor) rather than hewing to a monosemous interpretation of the relevant constitutional term.<sup>284</sup>

The use of metaphoric polysemy for prototype purposes does not map easily onto the rules-standards spectrum. Recall that rules “leav[e] only factual issues for the adjudicator.”<sup>285</sup> That seems like a curious description of case law interpreting the First or Fourth Amendments. Recall that standards identify a “background principle or policy” and then instruct adjudicators to apply that principle or policy.<sup>286</sup> Cases construing these constitutional provisions seek to tease out background principles and policies—“excessive government entanglement,”<sup>287</sup> “viewpoint neutrality,”<sup>288</sup> “reasonable expectations of privacy”<sup>289</sup>—but the provisions themselves do not announce these principles and policies. Yet these legal commands are not only familiar—they are some of the *most* familiar provisions in American law. (The “most famous hypothetical in the common law world”—Hart’s “no vehicles in the park”—is another example of this prototype phenomenon.<sup>290</sup>) Moreover, they have a close analogue in common-law jurisprudence. Common-law judges resolve a particular case and invite future courts to reason analogically from the resolution of that case. A prototype can serve a similar function: it operates like a precedent, though often a precedent reduced to a single word or short phrase.

Imagine, for example, that promulgators have a strong intuition that particular types of activities should be protected or prohibited. Say they know they want to proscribe establishments of religion like the Anglican establishment in Virginia,<sup>291</sup> efforts to restrict verbal expression critical of the state like the criminal prosecution of John Peter Zenger,<sup>292</sup> and “general searches” like the searches for smuggled

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284. At least according to Justice Black in dissent, a wiretap is not a search “under the normally accepted meanings of the words” because “[a] conversation . . . is not tangible.” *Id.* at 365 (Black, J., dissenting). Justice Black did not anticipate that a half-century later, we would routinely use the term “search” to refer to search-engine queries of nontangible items.

285. Kaplow, *supra* note 208, at 560.

286. Sullivan, *supra* note 208, at 58.

287. *See* *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

288. *See* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

289. *See* *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

290. *See supra* notes 183–191 and accompanying text.

291. On the colonial establishments, see generally Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

292. On the colonial experience with criminal libel, see PHILLIP I. BLUMBERG, *REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW* 55–57 (2010).

goods under the Townshend Acts.<sup>293</sup> (I offer this as an illustrative example rather than a historical claim about the origins of the Bill of Rights.) Promulgators, however, do not yet have a fully formed theory as to when, where, why, and how state involvement in religion is objectionable, individual expression is valuable, or government intrusions ought to be checked by a warrant requirement. They lack sufficient information to promulgate a “rule” in the rules-standards sense, but they also lack sufficient information to promulgate a “standard” in the rules-standards sense. All they have is a strong intuition about a particular case—a prototype—plus an understanding that this intuition extends more broadly than the prototype.

The use of a prototype as metaphoric vehicle offers a potential solution that economizes on ex ante decision costs—even more so than a standard does. The promulgators can explicitly protect or proscribe the prototype and then leave it to subsequent adjudicators to apply the prototype as metaphoric vehicle—to identify the normatively relevant features that supply grounds for comparison between vehicle and tenor. Thus, a later court confronted with the question of whether the Establishment Clause prohibits a creche display on a courthouse staircase can reason by analogy from colonial religious establishments. A court confronted with the question of whether the Free Speech Clause protects the wearing of black armbands can reason by analogy from restrictions on verbal expression. And a court confronted with the question of whether a wiretap of a public telephone requires a warrant can reason from physical searches of a person’s body or property. Ultimately, subsequent adjudicators may identify the normatively salient features of the prototype—the grounds of the metaphor—and convert the metaphor into a more conventional standard (as with the “reasonable expectation of privacy” test for a search). But they also may continue to reason directly from the prototype (as with modern free speech jurisprudence).

This delegation of normative decisionmaking to subsequent adjudicators increases ex post enforcement costs relative to a rule, though it is not immediately obvious that this strategy fares worse in terms of ex post enforcement costs than a standard. Within cognitive linguistics, prototype theory posits that humans process words and concepts—not by applying “a list of necessary and sufficient conditions that a thing or event must satisfy to count as a member of the category denoted by the word” but by comparing a potential member to the

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293. On colonial history and the motivations for the Fourth Amendment, see FRIEDMAN, *supra* note 282, at 133.

word's prototype case.<sup>294</sup> Advocates of this theory argue that prototype-based reasoning is a more “natural” mode of human cognition than principle-based reasoning.<sup>295</sup> In other words, it may be easier for later adjudicators to decide whether a government intrusion is “search-y” than to decide whether the government intrusion constitutes a violation of a “reasonable expectation of privacy.”

This use of prototypes veers far to the calibration side of the certainty-versus-calibration spectrum, which potentially raises worries about fair notice. That may be one reason why we often see prototypes in cases where analogies to the prototype operate as constraints on government actors rather than on private parties. Federal, state, and local government officials do not face criminal or even civil liability for violating newly recognized constitutional rights,<sup>296</sup> so concerns about fair notice are at a low-water mark. Arguably, in the free speech context, doctrinal ambiguity deprives private individuals of ex ante knowledge as to when they can safely disregard speech restrictions, but that objection is less powerful when a monosemous interpretation of the Free Speech Clause would definitely leave them out in the cold.

One might ask whether metaphorical polysemy—in the prototype case or any of the others—really needs to be metaphorical. After all, metaphors can be replaced with similes. The Internal Revenue Code could proscribe “golden parachute-like payments”; the Constitution could say that “Congress shall not do anything that’s *like* establishing a religion or abridging the freedom of speech”; and so on. One answer might be that simile would rob law of some of its majesty—that for legal actors and institutions to retain their status in society, they must maintain the fiction of determinacy. An alternative (and less artful) explanation may be that simile is simply less powerful than metaphor. A determination that “wearing a black armband *is* speech” plausibly sends a stronger message—to private individuals, government officials, and subsequent courts—that this form of symbolic expression deserves protection than would a determination that

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294. Linda Coleman & Paul Kay, *Prototype Semantics: The English Word Lie*, 57 LANGUAGE 26, 43 (1981).

295. For an early exposition of prototype theory, see Eleanor H. Rosch, *Natural Categories*, 4 COGNITIVE PSYCH. 328 (1973). For a summary of cognitive science research on the ease of processing prototypes, see Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 764–65 (2009).

296. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (“The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

“wearing a black armband is *like* speech,”<sup>297</sup> just as “Juliet is *like* the sun” would not convey the same regard for Juliet.<sup>298</sup> As Fuller writes in his study of legal fictions: “Eliminate metaphor from the law and you have reduced its power to convince and convert.”<sup>299</sup>

In sum, metaphoric polysemy is potentially productive when it serves mnemonic, expressive, or decision-guiding functions. Yet, as we will see in Part III.D, metaphoric polysemy is also quite risky. Metaphoric polysemy—particularly of the prototype variety—requires confidence that subsequent adjudicators will be able to pick up on the normatively relevant features of the prototype (i.e., the ground of the metaphor). As with a standard, this often requires a leap of faith.

### 3. Redefinitional Polysemy

A third type of potentially productive polysemy—redefinitional polysemy—specifically seeks to leverage law’s expressive power. Redefinitional polysemy can be additive or subtractive. Additive polysemy seeks to include a new item in a set—i.e., to define *X* to include *Y*, when *X* would not conventionally include *Y*, in order to emphasize the ways in which *X* and *Y* are similar. Defining “take” in the Endangered Species Act to include significant habitat modification is arguably an example of this additive strategy.<sup>300</sup>

The subtractive version of redefinitional polysemy reared its head in the recent case of *Biden v. Missouri*, in which the Supreme Court voted 5-4 to uphold a Health and Human Services Department rule requiring facilities that receive Medicare and Medicaid funds to order their employees to receive a COVID-19 vaccine.<sup>301</sup> One key statutory authority upon which HHS relied was the definition of “hospital” in the Medicare Act. That provision defines “hospital” to be an institution “primarily engaged” in the provision of diagnostic services, therapeutic services, “care of injured, disabled, or sick persons,” or rehabilitation services,<sup>302</sup> but then it goes on to add a

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297. In fact, Justice Fortas’s opinion for the Court concluded that the wearing of armbands in *Tinker* was “closely akin to ‘pure speech,’” see *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969), not that it *was* speech. The Court’s use of simile rather than metaphor—even at the high-water mark for protection of symbolic expression—may reflect the privileging of text over image discussed below. Cf. Amy Adler, *The First Amendment and the Second Commandment*, 57 N.Y. L. SCH. L. REV. 41 (2013) (discussing how the First Amendment has historically protected text to a higher degree than images).

298. Cf. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act II, sc. II, l. 3 (Samaira Book Publishers 2017) (1597).

299. FULLER, *supra* note 227, at 24.

300. See *Babbitt v. Sweet Home Chapter of Cmty. For a Great Or.*, 515 U.S. 687, 708 (1995).

301. 142 S. Ct. 647, 650 (2022) (per curiam).

302. 42 U.S.C. § 1395x(e)(1).



number of elements that one would not normally think of as *defining* “hospital.” To be a “hospital” within the meaning of a Medicare Act, an institution must—among other requirements—maintain clinical records on all patients,<sup>303</sup> have bylaws in effect for its staff of physicians,<sup>304</sup> and “meet[] such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.”<sup>305</sup> This last definitional element provided a statutory hook for the HHS Secretary to require hospital staff to be vaccinated.<sup>306</sup>

To a reader unfamiliar with the structure of statutory definitions, this provision of the Medicare Act is profoundly strange. A hospital that does not require its staff to be vaccinated against COVID-19 (and thus does not “meet such other requirements as the Secretary finds necessary”) is, under the Medicare Act, not a “hospital.” Why would Congress write the Medicare Act this way rather than simply requiring hospitals to comply with HHS regulations? And why did the Biden administration, which could have cited several statutory provisions potentially supporting its position, foreground the definition of “hospital” in its briefing?<sup>307</sup>

One way to understand the polysemous definition of “hospital” in the Medicare Act is as a transformation of “hospital” into something like a “thick concept.”<sup>308</sup> A “thick concept,” as defined by philosopher Bernard Williams, is a concept with both a descriptive and an evaluative component.<sup>309</sup> While Williams was focused on thick *ethical* concepts, we combine description and evaluation in other contexts too. Consider the scene from *Crocodile Dundee* in which the title character, on a trip to New York City, is accosted by a mugger with a switchblade. “That’s not a knife,” Dundee scoffs, pulling out a machete. “THAT’s a knife,” Dundee says as the muggers flee.<sup>310</sup> One might understand Congress, in the Medicare Act, as scoffing similarly at health care facilities that fail to meet basic HHS requirements. “That’s not a ‘hospital.’ THAT’S a ‘hospital,’” the Medicare Act tells us.

To be clear, nothing rides on whether members of Congress consciously drafted the definition of “hospital” in the Medicare Act to

303. *Id.* § 1395x(e)(2).

304. *Id.* § 1395x(e)(3).

305. *Id.* § 1395x(e)(9).

306. *Biden*, 142 S. Ct. at 650.

307. Application for a Stay of the Injunction, *supra* note 31, at 2; Reply in Support of Applications for Stays at 5, *Biden*, 142 S. Ct. 647 (2022) (Nos. 21A240, 21A241), 2022 WL 2270198.

308. I thank Rick Pildes for this suggestion.

309. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 140 (1985).

310. *CROCODILE DUNDEE* (Rimfire Films 1986). I credit Christopher Beauchamp for this example.

operate like “knife” in *Crocodile Dundee*. The claim is, rather, that one potentially productive function of polysemous statutory definitions is to combine description and evaluation, with the implication that items that do not meet the statutory definition fall short in a normatively relevant way. The result is a mismatch between the ordinary and legal meanings of a term, but the mismatch is part and parcel of the rhetorical strategy. Redefinitional polysemy thus gives legal-rule designers another way to shape beliefs and—potentially—behavior.<sup>311</sup>

#### 4. Selective Transmission

A fourth type of productive polysemy involves what Meir Dan-Cohen has described as “selective transmission”: communicating one message to one audience and a different message to another.<sup>312</sup> Dan-Cohen envisioned that selective transmission would occur when the criminal law sought to communicate a conduct-guiding rule to the general public and a decision-guiding rule to law enforcement officials and judges. But as Dan-Cohen observes, selective transmission is not limited to the criminal context.<sup>313</sup> It is possible whenever there exists some degree of “acoustic separation” between audiences—when different audiences hear different messages. Acoustic separation is challenging to maintain in a monolingual setting because laypeople generally have access to the same materials as law enforcement officials and judges (e.g., statutes, regulations, and court opinions). But it is potentially more viable when relevant audiences are divided by linguistic and even international borders.

The 1979 Normalization Communiqué between the United States and the People’s Republic of China offers a vivid illustration. China sought U.S. acquiescence to the “One-China” policy—the claim that China and Taiwan are part of the same sovereign state.<sup>314</sup> In the 1972 Shanghai Communiqué negotiated by U.S. National Security Advisor Henry Kissinger and Chinese Premier Zhou Enlai, the United States had “acknowledge[d]” the One China position (the Mandarin text

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311. Additive redefinitional polysemy might be characterized as a type of metaphor, but subtractive redefinitional polysemy is the opposite of metaphor. In metaphor, a word or phrase is applied to an object or action to which it isn’t literally applicable. *Metaphor*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/117328> (last visited Feb. 2, 2023) [<https://perma.cc/JS3S-G93N>]. In subtractive redefinitional polysemy, by contrast, a word or phrase is *not* applied to an object or action to which it *is* literally applicable.

312. Dan-Cohen, *supra* note 32, at 635.

313. *See id.* at 635 n.21.

314. *See* Bei Hum & Anthony Pym, *Constructive Ambiguity and Risk Management in Bilingual Foreign-Affairs Texts: The Case of “One China,”* 6 ASIA PAC. TRANSLATION & INTERCULTURAL STUD. 3, 4–6 (2019) (discussing “the diplomatic origins of ‘One China’”).

used a similar if not weaker word, “ren shi dao”),<sup>315</sup> but Chinese negotiators in 1979 sought a more significant concession. The parties bridged the gap between their two positions through “constructive ambiguity” (a term generally attributed to Kissinger, though he was out of office by the time of the 1979 communiqué, which was negotiated on the U.S. side by President Carter’s National Security Advisor Zbigniew Brzezinski).<sup>316</sup> The key sentence in the 1979 communiqué reads, in the official English version: “The Government of the United States of America *acknowledges* the Chinese position that there is but one China and Taiwan is part of China.”<sup>317</sup> But in the Mandarin text, the word used in place of “acknowledges” is “cheng ren,” which also can connote acceptance or recognition.<sup>318</sup> “Cheng ren” thus conveys a more significant concession on the United States’ part in Mandarin than in English.<sup>319</sup>

As Bei Hum and Anthony Pym note, the use of the polysemous “cheng ren” “cannot be seen as an out-and-out mistranslation: the semantic extension overlaps sufficiently with ‘acknowledge’ for equivalence to be claimed.”<sup>320</sup> That partial overlap allowed U.S. and Chinese negotiators to thread a diplomatic needle.<sup>321</sup> By translating “acknowledges” into Mandarin as “cheng ren,” China and the United States could send different messages to different domestic audiences, all while papering over the lack of consensus between the two powers. At least arguably, this was for the best: the Normalization Communiqué helped to de-escalate a global conflict and facilitated the Chinese economic growth spurt that ultimately lifted an estimated 800 million people out of poverty.<sup>322</sup> The “cheng ren” case can thus be classified as an example of productive polysemy. As we shall see in the

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315. *See id.* at 6 (illustrating the similarities between the two meanings of the words used in both English and Mandarin).

316. *Id.*

317. SHIRLEY A. KAN, CONG. RSCH. SERV., RL30341, CHINA/TAIWAN: EVOLUTION OF THE “ONE CHINA” POLICY—KEY STATEMENTS FROM WASHINGTON, BEIJING, AND TAIPEI 39 (2014) (emphasis added).

318. *See* Hum & Pym, *supra* note 314, at 7; AVERY GOLDSTEIN, RISING TO THE CHALLENGE: CHINA’S GRAND STRATEGY AND INTERNATIONAL SECURITY 5 n.5 (2005) (explaining that the Mandarin text used the term “chengren” which has the connotation of acceptance); ALAN D. ROMBERG, REIN IN AT THE BRINK OF THE PRECIPICE: AMERICAN POLICY TOWARD TAIWAN AND U.S.-PRC RELATIONS 99–100 (2003) (providing a historical account of how this change was made).

319. ROMBERG, *supra* note 318, at 100–01.

320. Hum & Pym, *supra* note 314, at 7.

321. *See id.*

322. *See* WAYNE M. MORRISON, CONG. RSCH. SERV., RL 33534, CHINA’S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 1 (2019) (explaining China’s emergence as a global economic power in the past four decades).

next Section, though, the “cheng ren” episode also illustrates the challenges of selective transmission in the real world.

#### *D. The Risks and Costs of Polysemy*

Each of the polysemic strategies outlined above—approximate polysemy, metaphoric polysemy, redefinitional polysemy, and selective transmission—can prove useful in certain contexts. But they also can run amok. They either can backfire or can be manipulated by legal actors for socially counterproductive purposes.

##### 1. Approximate Polysemy

A virtue of approximate polysemy—that it facilitates quick and efficient communication—also can be a vice. Consider again the “qualifying child” example above.<sup>323</sup> The polysemous use of “child” allows many tax filers to breeze through the question of whether they can claim a child tax credit: either they have a child and claim the credit, or they are childless and skip to the next item. But sometimes we may want the law to facilitate “thinking slow” rather than “thinking fast.”<sup>324</sup> The IRS estimates that in tax years 2009 through 2011, nineteen percent of children claimed as “qualifying children” for the child tax credit didn’t actually qualify.<sup>325</sup> It is hard to know how many of these cases represent genuine errors as opposed to intentional overclaims, but the Internal Revenue Code’s definition of “qualifying child” is concededly complicated.<sup>326</sup> For example, a taxpayer’s biological child might not be her “qualifying child” if the taxpayer and her child did not have the same principal place of abode for more than half the year.<sup>327</sup> The use of a legalism rather than a polyseme (e.g., “qualifying schmid” rather than “qualifying child”) might prompt taxpayers to slow down, check the criteria for qualifying schmid status, and avoid overclaims.<sup>328</sup> The use of a legalism also might spur some taxpayers

323. See *supra* notes 193–194 and accompanying text.

324. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (explaining the juxtaposition between fast and slow modes of thought).

325. U.S. DEP’T OF THE TREASURY, AGENCY FINANCIAL REPORT: FISCAL YEAR 2018, at 148 (2018), [https://home.treasury.gov/system/files/236/AFR\\_Full%20111518\\_clean\\_508\\_FINAL.pdf](https://home.treasury.gov/system/files/236/AFR_Full%20111518_clean_508_FINAL.pdf) [<https://perma.cc/TDM4-FSRU>].

326. See Jacob Goldin & Ariel Jurow Kleinman, *Whose Child Is This? Improving Child-Claiming Rules in Safety Net Programs*, 131 YALE L.J. 1719 (2022) (illustrating the complexity of current child-claiming rules in the U.S. tax system).

327. See I.R.C. § 152(c)(1)(B).

328. Most likely, the term used in the IRS’s Form 1040 instructions matters more than the term used in the Internal Revenue Code, though the instructions generally follow the statutory terminology. See *Instructions for Form 1040 and Form 1040-SR—Tax Year 2021*, INTERNAL

who *do* have qualifying children (e.g., an adult sister who shares a home with her teenage brother and whose parents are absent) to check the statutory criteria and find that they *can* claim a qualifying child.

The use of the term “consent” in contract law provides another case where a legalism might be preferable to the current polyseme.<sup>329</sup> As Meirav Furth-Matzkin and Roseanna Sommers have demonstrated through a series of survey experiments, conceptions of “consent” differ markedly between laypeople and lawyers.<sup>330</sup> For example, in one of the survey experiments conducted by Furth-Matzkin and Sommers, the researchers presented laypeople and law school graduates with a scenario in which an automobile salesperson promised a customer that he could pay for a new car over five years without incurring any fees. But the fine-print text of the sales contract—which the customer did not read—provided for a \$2.99 fee every time the customer made a payment.<sup>331</sup> As a matter of blackletter contract law, fraudulent misrepresentation vitiates consent and renders a contract voidable.<sup>332</sup> Nonetheless, roughly half of laypeople in the survey experiment concluded that the customer had “consented to pay the . . . fees,”<sup>333</sup> while the vast majority of law school graduates (almost four-fifths) said that the customer had *not* consented.<sup>334</sup>

Furth-Matzkin and Sommers’s finding suggests that the word “consent” means different things to different audiences—consent procured by fraud still may count as “consent” to many laypeople even when, as a matter of contract law, it does not.<sup>335</sup> Approximate polysemy thus gives rise to the risk that laypeople on juries will rely on “folk” notions of consent rather than applying the legal definition of the term.<sup>336</sup> Replacing “consent” in contract law with a legalism (“schmonsent?”) might jolt jurors away from their preconceived notions

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REVENUE SERV. 1, 18 (Dec. 21, 2021), <https://www.irs.gov/pub/irs-pdf/i1040gi.pdf> [<https://perma.cc/GR2C-2LC4>].

329. See, e.g., CAL. CIV. CODE § 1550 (West 2022) (stating that the parties’ “consent” is “essential to the existence of a contract”); *id.* § 1565 (stating that “consent of the parties to a contract must be . . . [f]ree”); *id.* § 1567 (stating that “apparent consent is not real or free when obtained through . . . [f]raud”).

330. Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503 (2020).

331. *Id.* at 520.

332. See, e.g., *Harkrider v. Posey*, 24 P.3d 821, 827 (Okla. 2000); *Julius Castle Rest., Inc. v. Payne*, 216 Cal. App. 4th 1423, 1440 (2013); *accord* RESTATEMENT (SECOND) OF CONTS. § 164 (1981) (contract is voidable by a party who justifiably relies on the other party’s fraudulent misrepresentation).

333. Furth-Matzkin & Sommers, *supra* note 330, at 521 & n.73.

334. *Id.* at 522 n.76.

335. See, e.g., *Harkrider*, 24 P.3d at 827; *Julius Castle Rest.*, 216 Cal. App. 4th at 1440.

336. Cf. Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2302–04 (2020) (noting similar risk in criminal context).

of “consent,” prompting them to apply the law’s criteria rather than their own.

Approximate polysemy also may misfire when the wedge between a term’s ordinary meaning and its legal meaning undermines the perceived legitimacy of legal institutions. The police duty-to-protect example in Part I.B is one illustration of this phenomenon. For another, consider the Third Circuit’s recent decision in *Ellis v. Westinghouse Electric Co.*, a case involving section 503(b)(1)(A) of the Bankruptcy Code.<sup>337</sup> That provision accords priority treatment in bankruptcy to administrative expenses, defined as “actual” and “necessary” costs of preserving the bankruptcy estate.<sup>338</sup> Those words—“actual” and “necessary”—have long been understood as polysemes. Under the Supreme Court’s 1968 ruling in *Reading Co. v. Brown*, the “decisive” factor under the statute is not actuality or necessity but “fairness to all persons having claims against an insolvent.”<sup>339</sup> More than a half-century after the *Reading* decision, though, the words “actual” and “necessary” linger in the Code.

The plaintiff in the *Ellis* case had worked for Westinghouse since 2010 and continued to work at the company after its 2017 bankruptcy filing and until May 2018, when he was told that he would be terminated as part of a restructuring of his department.<sup>340</sup> *Ellis*, who was 67 years old at the time of his termination, sued Westinghouse for age discrimination.<sup>341</sup> One of the questions certified to the Third Circuit on interlocutory appeal was whether *Ellis*’s claim qualified as an administrative expense under section 503(b)(1)(A).<sup>342</sup>

As Troy McKenzie observes in a thoughtful essay on the *Ellis* case, the notion that *Ellis*’s claim might fall within the statutory definition may strike non-bankruptcy lawyers as deeply disconcerting.<sup>343</sup> After all, as McKenzie notes, “preserving the estate does not entail any ‘necessity’ to commit age discrimination in violation of federal law.”<sup>344</sup> How, then, could a court possibly allow *Ellis*’s claim as an administrative expense under section 503(b)(1)(A)? The Third Circuit wrestled with this question, and though it ultimately ruled in *Ellis*’s favor, it took pains to add that “we do not mean to imply that

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337. 11 F.4th 221 (3d Cir. 2021) (Ambro, J.).

338. 11 U.S.C. § 503(b)(1)(A).

339. 391 U.S. 471, 477 (1968).

340. *Ellis*, 11 F.4th at 228.

341. *Id.*

342. *Id.* at 229.

343. Troy A. McKenzie, *The Loose Ends of the Debtor’s Estate: Ellis v. Westinghouse Electric Co. and the Bar Date for Administrative Expenses*, 41 BANKR. L. LETTER 1, 7 (2021).

344. *See id.*

employment discrimination is merely a cost of doing business.”<sup>345</sup> Of course, the only reason why the Third Circuit even faced the concern that ruling in favor of an employment-discrimination plaintiff would be interpreted as condoning employment discrimination is the peculiar polysemy of “actual and necessary.”

In sum, the costs of approximate polysemy mirror the benefits. Approximate polysemy can increase communicative efficiency, reduce decision costs, and leverage law’s expressive power. But sometimes, approximate polysemy causes the law to communicate *too* quickly, leads decisionmakers to rely *too* much on their extralegal understanding of a term, and expresses a message other than the one that designers of legal rules intend to send. The implication is not that law should avoid approximate polysemy altogether but that designers of legal rules should pay careful attention to approximate polysemy’s double-edged nature.

## 2. Metaphoric Polysemy

Metaphoric polysemy, like approximate polysemy, gives rise to risks and costs that are closely related to its benefits. One is the risk that the metaphor will become too powerful, taking on a life of its own. Ripeness doctrine arguably has suffered this fate. For example, in *Reno v. Catholic Social Services, Inc.*, the Court considered a challenge to an Immigration and Naturalization Service regulation that rendered the plaintiffs ineligible for legalization under the 1986 Immigration Reform and Control Act’s one-year amnesty program.<sup>346</sup> The Court held that the plaintiffs’ claims would not “ripen” until they formally filed for amnesty and had their applications rejected.<sup>347</sup> At least from one perspective, cases like *Catholic Social Services* treat equitable claims like avocados—courts must time their interventions for the perfect moment between unripeness and overripeness. The Court in *Catholic Social Services* effectively required plaintiffs to submit a “futile” application

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345. *Ellis*, 11 F.4th at 231. The court went on to offer its own reflection on the dissonance between the statutory language and the case outcome:

The employment discrimination claim arose out of *Ellis*’s employment, which without dispute benefitted the Westinghouse estate. Treating such claims as administrative expenses furthers the policy goal of § 503(b)(1)(A)—providing incentives for employees to continue working for a bankrupt company. Without the assurance that any valid employment discrimination claim would be paid in full, workers may leave based on fear that their rights will not be fully protected.

*Id.* (internal citation omitted).

346. 509 U.S. 43, 46 (1993).

347. *Id.* at 59.

because its focus on the ripeness metaphor had distracted it from the functional considerations for which “ripeness” serves as shorthand.<sup>348</sup>

The risk of the too-powerful metaphor is even more acute when polysemy is used to supply a prototype that will guide future decisionmaking. That prototype strategy relies on later decisionmakers to identify the normatively relevant aspects of the prototype—the grounds for the metaphor—but this reliance may prove to be misplaced. Consider again the example of “speech” in the First Amendment. Scholars have long debated the reasons why “speech” might merit constitutional protection. Thomas Emerson famously listed four such reasons: because it (1) allows for individual self-fulfillment, (2) facilitates the pursuit of truth, (3) enables individuals to participate in social decisionmaking, and (4) maintains a balance between stability and change.<sup>349</sup> Yet, as Amy Adler observes, some of the Supreme Court’s First Amendment cases suggest that the Justices have picked up on a different element of the “speech” prototype—the fact that “speech” represents *verbal* expression—and accorded greater constitutional protection to verbal expression than to images.<sup>350</sup> Arguably, the Justices have seized upon a salient but normatively irrelevant feature of the prototype—the fact that speech is verbal expression—and thus failed to provide sufficient protection to nonverbal expression. They have been misled by metaphor.

### 3. Redefinitional Polysemy

Redefinitional polysemy might seem like the safest of the polysemic strategies because it is so tightly controlled. Whereas approximate polysemy and metaphoric polysemy do not usually come with labels (e.g., “Warning: Don’t take this too literally”), redefinitional polysemy announces itself. For example, section 1861 of the Medicare Act (defining “hospital” to exclude institutions that don’t meet HHS’s health and safety standards)<sup>351</sup> wears its polysemy on its sleeve. If everyone understands redefinitional polysemy as such, what could go wrong?

One response is that *not* everyone will necessarily recognize redefinitional polysemy for what it is. For example, a layperson—or even a lawyer—who encounters the relevant word or phrase outside a

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348. *Cf. id.* at 77–82 (Stevens, J., dissenting) (criticizing the majority’s ripeness analysis along these lines).

349. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878–79 (1963).

350. See Adler, *supra* note 297, at 42, 45–47.

351. 42 U.S.C. § 1395x(e)(9).



statute's definitional section might not be aware of the redefinition lurking elsewhere. That concern might be mitigated in the Internet age when online versions of statutes include hyperlinks for elsewhere-defined terms. (The version of the U.S. Code managed by the Legal Information Institute at Cornell Law School already seeks to do exactly that.)<sup>352</sup> But it is not always obvious when a statutory term is a defined term. For example, the central question in *King v. Burwell* was whether the phrase "Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act" was effectively defined elsewhere in the statute to include exchanges established by the federal government when the state had failed to do so itself.<sup>353</sup> As *King v. Burwell* illustrates, determining whether a particular term is a defined term often will depend upon "the broader structure" of the statute—including the statute's purpose.<sup>354</sup> Even a well-trained algorithm is unlikely to catch all the cases in which a term is effectively defined by other statutory provisions.

Redefinitional polysemy poses a further challenge for statutory interpretation beyond the potential lack-of-awareness problem. Interpreters of the statute (including judges, other government officials, and private parties trying to conform their behavior to law) must determine whether and how the *definiendum* (the defined term) affects the *definiens* (the definition itself).<sup>355</sup> For example, a key question in *Sweet Home* was whether the ordinary meaning of "take" continues to bear any relevance once the statute has defined "take" to include "harm." Justice Stevens, writing for the majority, focused on the ordinary meaning of "harm" (the *definiens*), saying nothing about the ordinary meaning of "take" (the *definiendum*).<sup>356</sup> Justice Scalia, in dissent, blasted the majority for that move: "The tempting fallacy—which the Court commits with abandon—is to assume that once defined, 'take' loses any significance, and it is only the definition that matters."<sup>357</sup> Scalia continued: "It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense."<sup>358</sup>

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352. *About the LII*, LEGAL INFO. INST., [https://www.law.cornell.edu/lii/about/about\\_lii](https://www.law.cornell.edu/lii/about/about_lii) (last visited Jan. 21, 2023) [<https://perma.cc/MQ5Q-EVR4>].

353. 576 U.S. 473, 483, 486–92 (2015) (emphasis omitted).

354. *See id.* at 492–93.

355. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 187 (1st ed. 2012).

356. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995).

357. *Id.* at 718 (Scalia, J., dissenting) (emphasis and internal citations omitted).

358. *Id.* at 719.

Justice Scalia's stance in *Sweet Home* may seem to be in tension with his position in *Bond*: "When a statute includes an explicit definition, we must follow that definition, *even if it varies from that term's ordinary meaning*," Scalia wrote in the latter case.<sup>359</sup> Scalia sought to reconcile his opinions in the two cases on the ground that the *definiens* in *Sweet Home* ("harm") was ambiguous, thus justifying resort to the *definiendum* ("take"), whereas the *definiens* in *Bond* was "utterly clear," thus rendering the *definiendum* "irrelevant."<sup>360</sup> Whether or not that attempt at reconciliation is persuasive, Scalia's discussion of the *definiendum-definiens* relationship highlights the challenge facing practitioners of redefinitional polysemy. On the one hand, the ordinary meaning of the *definiendum* may drag down the effort at redefinition if a court finds the *definiens* to be ambiguous. On the other hand, the redefinitional effort depends on readers *not* forgetting about the ordinary meaning of the *definiendum*. Defining "take" to include "harm"—or defining "hospital" to exclude hospitals that don't vaccinate their staff against COVID-19—has the potential to influence beliefs and behavior precisely because the defined terms are "take" and "hospital" rather than "schmake" and "schmospital."

Is statutory text therefore too brittle to sustain redefinitional polysemy? The jury, to use a common legal metaphor, is still out. Redefinitional polysemy is a subtle strategy, and statutory text is a poor medium for subtlety. Yet statutory text is also a privileged medium: a statute—unlike a speech, op-ed, or tweet—carries the additional persuasive force of democratic legitimation. Lawmakers who have access to that medium still may find it tempting to use powerful rhetorical devices—such as additive and subtractive redefinition—in order to influence beliefs and behavior. But they run the risk that the ordinary understanding of the *definiendum*—the understanding that they seek to change—will not only survive the redefinitional effort but shape the statute's scope.

#### 4. Selective Transmission

When drafters of a legal text use a single word or phrase to communicate different messages to different targets, they run the risk of "leakage"—a breakdown in the acoustic separation between audiences.<sup>361</sup> Richard Singer has argued that leakage will generally

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359. *Bond v. United States*, 572 U.S. 844, 871 (2014) (Scalia, J., concurring in the judgment) (emphasis added) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)).

360. *Id.* at 871.

361. Richard Singer, *On Classism and Dissonance in the Criminal Law: A Reply to Professor Meir Dan-Cohen*, 77 J. CRIM. L. & CRIMINOLOGY 69, 84–85 (1986).

prevent drafters from transmitting a conduct-guiding rule to the general public and a different decision-guiding rule to law enforcement officials—the use of selective transmission that Meir Dan-Cohen initially envisioned. As Singer notes, laypeople have access to judicial opinions and serve on juries.<sup>362</sup> Moreover, judges and other law enforcement officials don't live in seclusion: they regularly converse with—and maybe even share homes and families with—laypeople. Inevitably, targets of the two distinct messages will compare notes. Apart from questions about the moral legitimacy of selective transmission, Singer argues that the strategy—as a practical matter—“simply will not work.”<sup>363</sup>

The 1979 Normalization Communiqué, discussed above,<sup>364</sup> at first appears to be a potential exception to this rule because the two audiences—primarily Mandarin-speaking citizens of China and primarily English-speaking citizens of the United States—were separated by an ocean as well as a language. But, of course, some English speakers in the United States also understood Mandarin, and they nearly foiled the effort at selective transmission. At a Senate Foreign Relations Committee hearing in February 1979, just one month after the signing of the Normalization Communiqué, Senator Jacob Javits of New York, the Republican ranking member of the committee, said to Carter administration Deputy Secretary of State Warren Christopher:

I notice that the Chinese translation, according to our staff, of the communique . . . uses a Chinese word which means “recognition” in respect of the PRC's view of Taiwan, the one-China view, whereas our translation—and I have it before me—uses the words, “The Government of the United States of America acknowledges the Chinese position that there is but one China and that Taiwan is part of China” . . . . Now, is it going to be made clear to the Chinese that our position remains consistent?<sup>365</sup>

Christopher responded that “we regard the English text as being the binding text.”<sup>366</sup> He added: “We regard the word ‘acknowledge’ as being the word that is determinative for us. We regard the Chinese word as being subject to that as one of the meanings of it. I simply give you assurance on that point.”<sup>367</sup> Perhaps surprisingly, Javits found the explanation satisfactory. “Very good. Thank you,” he replied.<sup>368</sup> (Javits,

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362. *Id.* at 85.

363. *Id.* at 93.

364. See *supra* notes 317–319 and accompanying text.

365. *Taiwan: Hearings on S. 245 Before the S. Comm. on Foreign Rels.*, 96th Cong. 29 (Feb. 5, 1979), reprinted in LEGISLATIVE HISTORY OF THE TAIWAN RELATIONS ACT P.L. 96-8 (Arnold & Porter, 1979).

366. *Id.*

367. *Id.*

368. *Id.*

though a Republican, was generally considered a liberal,<sup>369</sup> and he was sympathetic to the Carter administration's policy on China and Taiwan.<sup>370</sup> He may have chosen not to press the point further once he understood the administration's strategy.) The episode goes to show the difficulty of maintaining acoustic separation—even across languages—though it also suggests that the selective transmission strategy may succeed even when the acoustic barrier breaks.

A different—and potentially more pernicious—use of polysemy for purposes of selective transmission sometimes occurs in the private law context. The drafter of a contract may use a word or phrase that she thinks will mean one thing to an unsophisticated counterparty and something else to a court. Used that way, polysemy becomes a trick with no redeeming social value.

The use of the word “damages” in commercial general liability policies is arguably an example of this phenomenon. Those policies often provide that the insurer will indemnify the insured for “all sums which the insured shall become legally obligated to pay as damages because of property damage.”<sup>371</sup> Mr. and Mrs. Marois, owners of a small grocery store and gas station in the village of South China, Maine, purchased an insurance policy with that precise language from Patrons Oxford Insurance Co.<sup>372</sup> The State Department of Environmental Protection ordered the Maroises to clean up a leak from underground tanks on their property.<sup>373</sup> The insurer argued that cleanup costs—even cleanup costs that a state agency had ordered the Maroises to undertake—did not count as “damages.” The Maine Supreme Court agreed with the insurer: according to the court, the Maroises’ state-ordered cleanup costs “may effectively alleviate or prevent property damage to others,”<sup>374</sup> but that fact did not bring the costs within the legal definition of “damages.” The Maroises may have thought that their insurance policy would cover them against the cost of complying with a state agency’s order to remediate property damage, but instead, they found themselves on the hook.

Insurers who issue policies with the clause from the *Marois* case may be taking advantage of the polysemy of “damages.” The word

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369. See James F. Clarity, *Jacob Javits Dies in Florida at 81: 4-Term Senator from New York*, N.Y. TIMES (Mar. 8, 1986), <https://www.nytimes.com/1986/03/08/obituaries/jacob-javits-dies-in-florida-at-81-4-term-senator-from-new-york.html?smid=url-share> [<https://perma.cc/Q9JM-AP8G>].

370. See Jacob K. Javits, *Congress and Foreign Relations: The Taiwan Relations Act*, 60 FOREIGN AFFS. 54, 58 (1981).

371. See, e.g., *Indus. Enters. v. Penn Am. Ins. Co.*, 637 F.3d 481, 483 (4th Cir. 2011) (ellipsis omitted).

372. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 17–18 (Me. 1990).

373. *Id.* at 16–17.

374. *Id.* at 18.

“damages” can refer generically to losses or injuries,<sup>375</sup> or it can refer specifically to “compensation in money imposed by law for loss or injury.”<sup>376</sup> A layperson who does not understand this double meaning may pay more for an insurance policy than she would have paid if she had realized that government-ordered remediation of property damage wouldn’t count as “damages” under the policy. Here, polysemy results in a windfall to insurers while leaving policyholders vulnerable to significant economic loss.

Some courts address cases like *Marois* through the doctrine of *contra proferentem*—ambiguities in a contract are construed against the drafter.<sup>377</sup> The doctrine of *contra proferentem* serves to protect unsophisticated parties against polysemy. Other courts have found that the word “damages” is not sufficiently ambiguous to trigger application of *contra proferentem*. As the Eighth Circuit has held:

[F]rom the viewpoint of the lay insured, the term “damages” could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses. In the insurance context, however, the term “damages” is not ambiguous, and the plain meaning of the term “damages” as used in the insurance context refers to legal damages and does not include equitable monetary relief.<sup>378</sup>

The Fourth Circuit has reached a similar conclusion: Claims for reimbursement of court-ordered cleanup costs are not “‘damages’ in the legal sense.”<sup>379</sup>

So long as the acoustic separation between laypeople and judges remains intact—so long as purchasers of insurance policies fail to understand the legal limits on the meaning of “damages” and fail to negotiate for broader coverage—holdings like those of the Fourth and Eighth Circuits allow sophisticated parties to use selective transmission for redistributive (and often regressive) ends. As the next Part shows, polysemy also may be redistributive—and regressive—in a much broader set of cases. But while the redistributive effects of polysemy in the “damages” example are relatively clear-cut, the

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375. *Damage*, OXFORD ENG. DICTIONARY ONLINE, <https://www.oed.com/view/Entry/47005> (last visited Jan. 17, 2023) [<https://perma.cc/TK3M-RWBN>].

376. *Damage*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/damages> (last visited Jan. 15, 2023) [<https://perma.cc/NRE3-PQSB>].

377. *See, e.g.*, *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1182–83, 1187–90 (3d Cir. 1991), *abrogated on other grounds by Tutein v. Insite Towers, LLC*, 572 F. App’x 107, 113 (3d Cir. 2014); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1206–07 (2d Cir. 1989); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 784 P.2d 507, 510–11 (Wash. 1990).

378. *Cont’l Ins. Cos. v. Ne. Pharm. & Chem. Co.*, 842 F.2d 977, 985 (8th Cir. 1988) (applying Missouri law).

379. *Md. Cas. Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987) (applying Maryland law); *accord Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (applying South Carolina law).

redistribution we will see in Part IV is much more subtle—and much more pervasive.

#### IV. THE POLITICAL ECONOMY OF POLYSEMY

The previous Part suggested that polysemy may generate net benefits for society in many circumstances, though not in all. A well-intentioned designer of legal rules—motivated by the public interest rather than individual or institutional self-interest—would sometimes choose polysemy even if she had full access to all options on (and off) the spectrum of semantic relatedness. Yet structural biases also favor the production—and probably overproduction—of polysemy. Moreover, the structural bias in favor of polysemy serves to empower specific institutions (namely, courts) and interest groups (namely, lawyers). These redistributive effects render lawyers and law professors—as well as law students—conflicted parties in the analysis of semantic relatedness.

##### *A. The Structural Bias for Polysemy*

The polysemic pathways charted in Part II.B point toward potential structural biases favoring polysemy. Consider first the common-law polysemy route. If the state high court has held that the four elements of negligence are duty, breach, causation, and damages, judges on a state trial court or state intermediate appellate court will be hard-pressed to alter those elements explicitly. Referring to the duty element as “doodad” or causation as “schmausation” might not be reversible error in itself, but a lower court judge would be flagging her opinion for further review if she sua sponte adopted homonymy or legalism. Accordingly, lower court judges in common-law cases may overutilize polysemy relative to its alternatives when faced with fact patterns in which a monosemous interpretation of existing doctrine would yield undesirable outcomes. In some of those cases, homonymy or legalism may be preferable choices from society’s perspective, but the lower court judge is stuck with polysemy.

At the level of the state supreme court, judges and justices face a wider menu of options. If a state supreme court wants to drop an element from a common law cause of action,<sup>380</sup> rename a judicially

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380. See, e.g., *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 654 (Tex. 1987) (“[W]e hold that proof of physical injury resulting from mental anguish is no longer an element of the common law action for negligent infliction of mental anguish.”).

created doctrine,<sup>381</sup> or create a whole new cause of action,<sup>382</sup> it generally can. The chief judge of the state supreme court might draw some quizzical looks from colleagues at the next meeting of the Conference of Chief Justices if her state has replaced the duty element of negligence with “doodad” or causation with “schmausation,” but state high courts often have substantial leeway to define and redefine common-law concepts. For this reason, we might be less concerned about the structural bias favoring polysemy when state supreme courts—rather than lower courts—are interpreting and innovating on common law.

Yet the federalist structure of U.S. courts reintroduces concerns about the overproduction of polysemy, even in common-law domains, and even when state supreme courts are the decisionmakers. Exposures to individual instances of polysemy have the potential to undermine lay confidence in monosemous interpretations, not only of other areas of law but also of other sovereigns’ laws. For example, an individual who encounters polysemy in New York tort law may come to question her own interpretation of New Jersey tort law and federal admiralty law. Unless laypeople draw a stark distinction among federal and state laws, polysemy in one state may have spillover effects on communicative efficiency elsewhere.

In the public finance literature, the term “horizontal fiscal externality” is used to describe instances in which a change in taxation or expenditures in one state or province within a federation affects the budget constraint of another state or province, while the term “vertical fiscal externality” is used to refer to instances in which a change in taxation or expenditures at one level of government affects the budget constraint of higher or lower levels of government.<sup>383</sup> Analogously, we can think of polysemy as generating horizontal and vertical *interpretive* externalities. When the New York Court of Appeals is choosing whether to interpret New York law in a way that would generate polysemy, New York judges may fail to internalize the costs for the communicative efficiency of New Jersey law (a horizontal interpretive externality) or federal law (a vertical interpretive externality). The result is a further reinforcement of the structural bias favoring polysemy—this time at all levels of a state’s court system.

The structural biases favoring polysemy are even more powerful in constitutional and statutory interpretation cases. Now, lower court

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381. See, e.g., *Commonwealth v. King*, 834 N.E.2d 1175, 1181 (Mass. 2005) (renaming the “fresh complaint doctrine” as the “first complaint doctrine”).

382. See, e.g., *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 318 (Mass. 1976) (recognizing tort of intentional infliction of emotional distress in Massachusetts).

383. See Bev Dahlby, *Fiscal Externalities and the Design of Intergovernmental Grants*, 3 INT’L TAX & PUB. FIN. 397, 398 (1996).

judges and high court judges both face binding constraints when choosing among monosemy, polysemy, homonymy, and legalogism. For example, the U.S. Supreme Court might decide that the best way to deal with the problem in *Yates* is to revise 18 U.S.C. § 1519, but the U.S. Supreme Court does not have the power to rewrite a statute. Rather, it has the power to adopt a polysemous interpretation of “tangible object” in 18 U.S.C. § 1519. If monosemy, polysemy, homonymy, and legalogism are all theoretically attractive options under certain circumstances but courts have limited access to homonymy and legalogism in statutory cases, then—again—we might expect overutilization of polysemy when judges feel that monosemy fails.

The possibility of interpretive polysemy is thus judge-empowering, but judge-empowering in a still-constrained way. Judges—at least in the United States—do not have free rein across the spectrum of semantic relatedness in statutory cases: they can interpret existing text monosemously or polysemously, but they cannot alter the statutory text. “At least in the United States” is a key qualifier because the rule against judicial amendment of statutes is not universal: both the Canadian Supreme Court<sup>384</sup> and the Constitutional Court of South Africa<sup>385</sup> have asserted the power to “read in” text to salvage a statute from unconstitutionality. The “reading in” power has the potential to mitigate—though not eliminate—the structural bias favoring polysemy.

Consider the case of *R. v. Sharpe*,<sup>386</sup> involving the prosecution of a British Columbia man on child pornography charges.<sup>387</sup> The defendant, Sharpe, argued that Canada’s broadly worded child pornography statute violated his “freedom of thought, belief, opinion, and expression” under the Canadian Charter of Rights and Freedoms, and the trial and appellate courts in British Columbia agreed.<sup>388</sup> The Supreme Court of Canada conceded that the child pornography law was overbroad in some of its applications—for example, the law on its face made it a crime for teens under the age of eighteen to take sexually explicit photographs of themselves—but it nonetheless reversed the lower court judgment.<sup>389</sup> Instead, the court “read in” two new

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384. See *Miron v. Trudel*, [1995] 2 S.C.R. 418 (Can.); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.).

385. See Robert Leckey, *Remedial Practice Beyond Constitutional Text*, 64 AM. J. COMPAR. L. 1, 2 (2016).

386. *R. v. Sharpe*, [2001] 1 S.C.R. 45 (Can.).

387. For background on the *Sharpe* case, see Ann Curry, *Child Pornography Legislation in Canada: Its History and Current Developments*, 29 CANADIAN J. INFO. & LIBR. SCI. 141 (2005).

388. *R. v. Sharpe*, [2001] 1 S.C.R. 45, para. 25 (Can.).

389. *Id.* at para. 41.



exceptions: one for “any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use,” and another for “any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.”<sup>390</sup> Significantly, the Supreme Court of Canada did not frame the two new exceptions to the child pornography law in *Sharpe* as interpretive gloss on statutory text. It expressly added to the statutory text.

To be sure, “reading in” is a rare remedy even in the countries where courts have asserted the power—thus, the structural bias in favor of polysemy probably persists in the Canadian system too. The key point for present purposes is that as long as “reading in” remains outside the judicial toolkit, we can expect courts to invoke polysemy even when an unconstrained designer of legal rules would simply amend the legal rule rather than adding interpretive gloss. In this respect, the possibility of interpretive polysemy expands the power of the judiciary, but only within the confines of a system that restricts the power of the judiciary in constitutional and statutory interpretation cases.

Finally, it bears emphasis that courts are not the only institutional actors who deploy polysemy as a strategy: legislatures do too. The phenomenon of legislative polysemy reminds us that polysemy is not purely a response to constraints binding on the judiciary. The structural biases favoring polysemy likely lead to its overproduction, but it would be a mistake to attribute all instances of polysemy in the law to those structural factors.

### *B. Lawyers' Interest in Polysemy*

Not only does polysemy shape the distribution of power across legal actors and institutions but it also potentially elevates the wealth and status of lawyers in general. In this respect, lawyers, legal scholars, and law students evaluating polysemy face a conflict-of-interest problem. Our self-interest in polysemy does not negate all the conclusions that we might draw about the phenomenon, but it certainly deserves recognition and reflection.

The most obvious way in which polysemy accrues to the benefit of lawyers is by raising the demand for our services. This benefit extends even to law professors who do not directly sell legal services—insofar as polysemy raises the demand for our students' services, it also raises the demand for us. The demand-side consequence of polysemy is

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390. *Id.* at para. 115.

not simply that it makes individual laws harder to interpret—as emphasized above, the availability of polysemous terms such as “duty” may make it *easier* to convey the contents of negligence law to laypeople. Rather, polysemy transforms legal texts into Forrest Gump’s box of chocolates: laypeople don’t know which one—monosemy or polysemy—they are going to get.<sup>391</sup> As a result, even when laypeople encounter monosemous text, they are likely to need to hire a guide.

But if all polysemy did was to raise entry barriers to legal interpretation, it would be a less interesting phenomenon. It would increase lawyers’ wealth but not necessarily their status. Laypeople would have to consult lawyers for technical advice, but our advice would not necessarily sound in the register of morality.

Frederick Schauer offers a generative comparison to a sentence from a 1961 shop manual for the MGA sports car: “Before rebushing the lower trunnion banjos, you must remove the bonnet fascia and undo the A-arm nut with a #3 spanner.”<sup>392</sup> Schauer suggests that law may be like the jargon of the MGA instructions: “[A] technical language largely incomprehensible to those outside the relevant technical community.”<sup>393</sup>

Yet polysemous law differs from MGA car talk in two key respects. The first, as highlighted above, is in polysemy’s subtlety. “Trunnion banjos,” “bonnet fascia,” and “A-arm nut” are the automotive equivalent of homonymy and legalism; the words themselves alert readers to the need for expert assistance. If I want to get my 1961 MGA roadster repaired, I know I will need to go to someone who understands that technical language. By contrast, law’s use of polysemy—rather than homonymy and legalism—means that even the user manual that appears to be written in plain English potentially requires expert translation.

The second—and more important—difference is that polysemy raises the stakes of legal interpretation beyond where they would be if law were a purely technical language. No one outside the technical world of antique sports car repair ascribes any particular meaning to the words in the MGA shop manual. Nothing rides—other than my hypothetical roadster—on the scope of the term “Trunnion banjos.” By contrast, words like “duty,” “cause,” “actual,” and “necessary” do possess meaning beyond law. It is the nonlegal meaning of those terms that gives law its expressive power—and also generates dissonance in cases like *Hartzler v. City of San Jose*, *Lozito v. City of New York*, and *Ellis v.*

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391. See FORREST GUMP (Paramount Pictures 1994).

392. Schauer, *supra* note 234, at 501 (citation omitted).

393. *Id.*

*Westinghouse Electric Co.* Not only do laypeople need to hire lawyers to answer legal questions (in the same way that I need to hire a skilled repairperson to fix my MGA roadster), but the lawyers' answers carry greater significance as a result of law's polysemy.

The fierce battles over the legal meaning of the word "person" illustrate the point especially dramatically. Just four months after Justice Blackmun's opinion in *Roe v. Wade* declared that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn,"<sup>394</sup> Senator James Buckley, a New York Republican, introduced the first in a series of proposed constitutional amendments aimed directly at *Roe*'s personhood holding. Under Buckley's amendment, the word "person" in the Fifth and Fourteenth Amendments would be defined to include "all human beings, including their unborn offspring at every stage of their biological development."<sup>395</sup> Representative James Burke, a Massachusetts Democrat, soon introduced identical personhood language in the House,<sup>396</sup> and other members of the House and Senate continued to press personhood amendments for the next several years.<sup>397</sup> For those lawmakers, it was important not only to ban abortion nationwide—a separate section of the proposed amendment would have accomplished that—but to countermand Blackmun's suggestion that a fetus is not a "person."<sup>398</sup>

Would the reception of *Roe* have been any different if the relevant constitutional term were something other than "person"? Linda Greenhouse and Reva Siegel caution us against overemphasizing *Roe*'s role in the genesis of the pro-life movement,<sup>399</sup> perhaps the precise wording of the Fourteenth Amendment and of Blackmun's opinion mattered less than many lawyers tend to believe. Still, it is hard to imagine congressmembers or senators introducing constitutional amendments to clarify that a fetus is a "legal subject"—or a "schmerson"—under the Fourteenth Amendment. The polysemy of "person" may not have caused the pro-life movement's reaction to *Roe*, but at least it colored the response.<sup>400</sup>

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394. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

395. S.J. Res. 119, 93d Cong. (1973).

396. H.R.J. Res. 769, 93d Cong. (1973).

397. See James Bopp Jr., *An Examination of Proposals for a Human Life Amendment*, 15 CAP. U. L. REV. 417, 467 (1986).

398. See *id.*

399. See Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L. J. 2028 (2011).

400. Fetal personhood did not play a significant role in the Supreme Court's 2022 opinion overruling *Roe*. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). In the weeks since the *Dobbs* decision, several states have considered laws to define a fetus as a "person" for purposes ranging from state income tax law to high occupancy vehicle lanes (e.g., allowing a

The polysemy of “person” has had an even clearer impact in the wake of *Citizens United*.<sup>401</sup> Justice Kennedy’s opinion for the Court did not actually hold that corporations are “persons” within the meaning of the Fifth and Fourteenth Amendments; it simply cited<sup>402</sup> Justice Powell’s opinion for the Court in *First National Bank v. Bellotti*, which had stated—in a footnote—that “[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment.”<sup>403</sup> Yet the Court’s suggestion, even via cross-reference, that corporations are “persons” quickly became a cause célèbre among Democrats. “I don’t care how many times you try to explain it, corporations aren’t people. People are people,” said President Obama.<sup>404</sup> Democratic lawmakers responded with several proposed amendments to exclude corporations from the constitutional definition of “person,” including—most recently—an amendment introduced by Senator Jon Tester in 2021 that would declare that “[a]s used in this Constitution, the terms ‘people,’ ‘person,’ and ‘citizen’ shall not include a corporation.”<sup>405</sup>

President Obama, as a former constitutional law professor, surely understands that “person” in the Constitution is a polyseme—and Senator Tester presumably does too.<sup>406</sup> But the politicians and activists who rail against corporate personhood (like the abortion opponents who decried fetal nonpersonhood after *Roe*) also understand that “person” is more than a term of art. As the philosopher Logi Gunnarsson observes in the context of debates over great-ape personhood, the term “person” is often used both descriptively and normatively—often at the same time.<sup>407</sup> When they hear the Supreme Court say that corporations are persons and fetuses aren’t, many people—even trained lawyers like Obama—can’t help but hear a

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pregnant motorist to drive in a lane reserved for cars with two “persons”). See Lydia Wheeler, *Fetal Rights’ Laws Impact Extends from Abortion to HOV Lanes*, BLOOMBERG L. (July 27, 2022, 3:45 AM), <https://news.bloomberglaw.com/us-law-week/fetal-rights-laws-impact-extends-from-abortion-to-hov-lanes> [<https://perma.cc/QME6-HQ75>].

401. *Citizens United v. FEC*, 558 U.S. 310 (2010).

402. *Id.* at 342 (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)).

403. *Bellotti*, 435 U.S. at 780 n.15 (1978) (citing *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886)).

404. Richard McGregor, *Obama Launches Re-election Campaign*, FIN. TIMES (May 5, 2012), <https://www.ft.com/content/3e052040-96dd-11e1-847c-00144feabdc0> [<https://perma.cc/M9FU-MH76>].

405. S.J. Res. 11, 117th Cong. (2021).

406. Even within the Fourteenth Amendment, “person” has multiple meanings. Corporations clearly aren’t persons under Section 2 of the Fourteenth Amendment, which requires the apportionment of representatives according to the “whole number of persons in each State.” U.S. CONST. amend. XIV, § 2.

407. Logi Gunnarsson, *The Great Apes and the Severely Disabled: Moral Status and Thick Evaluative Concepts*, 11 ETHICAL THEORY & MORAL PRAC. 305, 318 (2008).

statement about who is and isn't entitled to special solicitude in social decisionmaking. And this fact makes the technical language of law quite different from the technical language of antique sports car repair. "Trunnion banjo" is not a thick evaluative concept. "Person" is.

By using terms with deep nonlegal resonance—albeit often in law-specific ways—legal language serves to elevate the status of judges. It gives courts the appearance of being the ultimate deciders of questions such as who is a "person," what is a "duty," and what counts as a "cause." Yet it is not only judges who stand to benefit from polysemy—lawyers do too. Only individuals with law degrees and bar memberships are allowed to litigate the scope of these terms. And law's precarious position within the academy receives a boost as well. Individuals without Ph.D.s who speak in the technical language of "Trunnion banjos," "bonnet fascia," and "A-arm nuts" are not welcomed into the university alongside ethicists and metaphysicians. Individuals without Ph.D.s who speak in the technical language of "person," "duty," and "cause" are.

Of course, lawyers also differ from antique sports car mechanics in that the mechanics reconstruct roadsters while lawyers reconstruct economic, social, and political orders. Even if we spoke in terms like "Trunnion banjo" and "bonnet fascia," laypeople would care about legal debates because those debates have real-world consequences that do not depend on (though may be amplified by) the rhetoric employed. Thus, it would be an exaggeration to say that the legal profession's status *depends* on polysemy, just as it would be a stretch to say that the legal profession's vested interest in polysemy *explains* the structural biases identified in the previous Section. My argument is one of degree: Polysemy ups the ante of legal debates, but it does not constitute the whole pot. Likewise, institutional arrangements encourage the production of polysemy, but they are certainly not the sole cause. Law's polysemy is a multifactorial phenomenon. It just so happens that lawyers benefit disproportionately from the phenomenon, even though—as emphasized above—broader society sometimes benefits too.

## CONCLUSION

Polysemy is an inevitable outcome of the evolution of human language, as well as an overdetermined byproduct of American legal institutions. It also can be "productive"—in the sense that it can function as a tool that aids lawmakers in advancing social objectives. Polysemy's productivity comes with risks and costs—as well as side benefits to judges, lawyers, and law professors. The hope is that a focused study of polysemy will help us to design better laws, to interpret

our existing laws more sensibly, and to reflect more critically on our own relationship to law's language.

On the design front: Identifying and evaluating various types of productive polysemy can point us toward circumstances in which polysemy may or may not be net beneficial. One key takeaway is that the desirability of “approximate polysemy”—the use of legal terms like “duty” and “consent” that roughly track but do not perfectly match their colloquial correspondents—depends in large part on whether we want the law to promote “thinking fast” or “thinking slow.”<sup>408</sup> That question is highly dependent on context, and this Article does not answer it across the board. Rather, the analysis here should prompt designers of legal rules to *think* about how long and hard they want their audiences to *think*. Where fast thinking is desirable, approximate polysemy may be too. Where designers of legal rules want audiences to slow down and let go of extralegal intuitions, an alternative such as legalogism may be preferable.

Beyond approximate polysemy, the analysis here highlights the ways in which designers of legal rules can deploy metaphor effectively. Metaphoric polysemy can serve a mnemonic or expressive function; it also can provide a prototype. The prototype model gives lawmakers a menu option that lies off the rules-standards spectrum. But this is not an entirely new menu item: indeed, the prototype model describes some of the most familiar provisions in American law.

Deliberate redefinition and selective transmission occur less frequently in the law than do approximation and metaphor, and it is no mystery why. For redefinitional polysemy to succeed, it must convey two messages at once (e.g., a hospital that fails to vaccinate its staff against COVID-19 is a hospital and is not a “hospital”; a switchblade is a knife and is not a “knife”). That sort of subtlety is not usually law's strength. Selective transmission, for its part, typically depends upon acoustic separation, and acoustic barriers are ever harder to maintain in an increasingly interconnected age. Redefinitional polysemy and selective transmission are devices that designers of legal rules may choose to use in some cases, but they are unlikely ever to be the standard tools of the trade.

As for matters of interpretation: The analysis here shows that law speaks in approximations, in metaphors, and sometimes in redefinitions—and all this may present a challenge to ordinary meaning textualism. Giving each word or phrase in a statute its ordinary meaning might be a bit like giving each word or phrase in a Shakespearean sonnet its ordinary meaning—it would miss much of the

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408. See *supra* note 324 and accompanying text.

point. Viewed from another perspective, the analysis here adds force to some of the functionalist arguments favoring textualism.<sup>409</sup> Textualists are people who take interpretive externalities seriously—who seek to align legal and nonlegal language so that laypeople no longer need to pay hundreds or thousands of dollars for legal advice every time they need to understand a statutory term. It is interesting that textualism—notwithstanding its potentially egalitarian economic implications—has been embraced by the right and not by the left.

Beyond the broad-brushstrokes debate between textualism and purposivism, the analysis here points to specific ways in which judges and other interpreters can enrich their analysis of statutory language. Judge Richard Posner famously argued that “the task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction.”<sup>410</sup> According to Posner: “The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”<sup>411</sup> An evaluation of polysemy is one potential element of imaginative reconstruction: Insofar as an interpretation gives rise to polysemy, is it a type of polysemy that rational lawmakers would have wanted under these circumstances? For example, in *Sweet Home*, one can imagine reasons why lawmakers—seeking to broaden Americans’ views about the importance of protecting endangered species’ habitats—might have chosen a capacious and nonliteral definition of “take.”<sup>412</sup> In *Bond*, it is harder to see what lawmakers might have been driving at with their expansive definition of “chemical weapon.”<sup>413</sup> Understanding the potential uses of redefinitional polysemy—and other types of polysemy—may help judges decide whether a particular interpretation would result in a productive or counterproductive relationship between a statute’s words and its (construed) content.

Finally, and most immediately, the study of polysemy and its alternatives can make us wiser critics of the law—and of ourselves. Monosemy, polysemy, homonymy, and legalogism offer us a vocabulary through which to understand law’s vocabulary—a language with which to articulate claims about the ways in which law translates language

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409. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 17–18 (Amy Gutmann ed., 1997) (emphasizing fair-notice and bias-reduction benefits of textualism); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1317 (2010) (emphasizing minority-protection benefits of textualism).

410. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

411. *Id.*

412. See *supra* note 199 and accompanying text.

413. See *supra* note 220 and accompanying text.

into power. Even though some amount of polysemy is unavoidable, the spectrum of semantic relatedness reveals a range of real alternatives. Thinking about the different ways in which various laws might have been phrased helps us identify the effects of law's linguistic choices, including the redistributive effects. Not only does it give us crisper counterfactuals, but it allows us to see more clearly in the mirror.