

## MISREADING LIKE A LAWYER: COGNITIVE BIAS IN STATUTORY INTERPRETATION

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### ABSTRACT

*Statutory interpretation dilemmas arise in all areas of law, where we often script them as scenes of conflict between a statute's literal text and its animating purpose. This article argues that, for an important class of disputes, this supposed discord between text and purpose is an illusion. In fact, lawyers are overlooking ambiguities of literal meaning that align well with statutory purpose. The form of ambiguity in question inheres not in individual words, but at the level of the sentence. What triggers a split in readings are verbs that linguists classify as "opaque," which are perfectly common in legal texts: intend, impersonate, endeavor, and regard are among them. In ordinary speech we resolve their dual readings unconsciously and without difficulty. In law, however, our failure to notice multiple readings of ambiguous language has left a trail of analytically misguided judicial determinations and doctrinal incoherence across a broad swath of law, from disability rights to white collar crime to identity fraud to genocide. Drawing on examples from these areas, this Article uses the tools of formal semantics to expose the ambiguity of opaque constructions and to make visible the family resemblance among the ways we misinterpret them. It then turns to the question of why lawyers misread and what we can do about it. The converging literatures of language development and the psychology of reasoning suggest an answer. When we analyze opaque sentences explicitly as statutory interpretation requires (as opposed to spontaneously in conversation), we may be particularly vulnerable to cognitive bias. Factors peculiar to law tend to amplify and propagate this bias instead of dampen and contain it, but they may also point the way toward more sophisticated and reliable legal reading.*

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## INTRODUCTION

During just three months in 1994, perpetrators from Rwanda's Hutu majority population deliberately and brutally massacred an estimated 800,000 minority Tutsis in a campaign of violence that was referred to worldwide as genocide.<sup>1</sup> Nevertheless, genocide prosecutions in the International Criminal Tribunal for Rwanda repeatedly stumbled over the question of whether the defendants acted "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," as

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<sup>1</sup> See, e.g., Rwanda: How the Genocide Happened, BBC NEWS (December 18, 2008, 9:53 AM), <http://news.bbc.co.uk/2/hi/1288230.stm> (referring to the Rwandan atrocities of 1994 as a genocide).

conviction under the Genocide Convention requires.<sup>2</sup> The legal issue was not whether the perpetrators intended to destroy the Tutsis – that much was clear. Rather, it was whether the Tutsis were in fact ancestrally or culturally distinct enough to be protected as an ethnic or racial group. Many jurists and commentators still maintain that whatever the Hutus' intent, if the Tutsis could not be neatly categorized as a race or ethnicity, the Genocide Convention could not apply.<sup>3</sup>

In the fall of 2001, the accounting firm Arthur Andersen directed a large scale destruction of documents regarding its client Enron. Expecting a federal subpoena of records as a wave of accounting scandals unfolded, the firm urged its employees to begin shredding papers in October, shortly before the SEC began an official investigation into Enron. The shredding ceased abruptly on November 9th, immediately on the heels of the SEC's subpoena.<sup>4</sup> In 2005, the Supreme Court reversed Arthur Andersen's conviction for "knowingly . . . corruptly persuad[ing] another . . . with intent to . . . induce any person to . . . withhold a record, document, or other object, from an official proceeding."<sup>5</sup> The conviction was defective in part because the jury instructions did not make clear that the defendant's actions had to be connected to a particular official proceeding that it had in mind, which in this case had not been initiated at the time of the shredding.<sup>6</sup> The ruling followed a line of obstruction of justice decisions dating back to the nineteenth century<sup>7</sup> in holding that, if in its frenzy of paper shredding the defendant firm was not specific about the particular official proceeding to be obstructed, the statute could not have been violated.

In 1869, an English court considered the case of *Whiteley v. Chappell*,<sup>8</sup> in which a man who had voted in the name of his deceased neighbor was prosecuted for having fraudulently impersonated a "person

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<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277. To meet the Genocide Convention's definition, acts must be committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." *Id.*

<sup>3</sup> See *infra* section II.C.

<sup>4</sup> *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698–702 (2005).

<sup>5</sup> *Id.* at 708; 18 U.S.C. §1512 (b)(2). The Arthur Andersen firm was not charged under a broader obstruction statute, 18 U.S.C. § 1503(a), the text of which could also have supported a conviction for "corruptly . . . endeavor[ing] to influence, obstruct, or impede[] the due administration of justice."

<sup>6</sup> *Arthur Andersen LLP*, 544 U.S. at 707–08.

<sup>7</sup> See *infra* section II(C) for a discussion of the progenitor of this line of cases, *Pettibone v. United States*, 148 U.S. 197, 205 (1893) (holding that defendant must know of a particular pending proceeding that his conduct would obstruct).

<sup>8</sup> (1868) L.R. 4 Q.B. 147.

entitled to vote.”<sup>9</sup> The court acquitted him, albeit reluctantly.<sup>10</sup> There had been voter fraud by impersonation, certainly. But the court fixated on the object of the impersonation and concluded that because a dead person could not vote, the defendant had not impersonated a “person entitled to vote.” The court attributed the mismatch between this result and the evident purpose of the statute to an oversight of the drafters: “The legislature has not used words wide enough to make the personation of a dead man an offence.”<sup>11</sup> Although commentators deride the decision as an example of the absurdities wrought by the “literal rule” of interpretation, there remain other examples of impersonation fraud that raise the same issues, and which jurists approach with no more sophistication than *Whiteley*.<sup>12</sup>

This Article argues that these disparate cases – in which arguably good examples of statutory violations seem to slip through a linguistic loophole – are all products of the same phenomenon, a particular form of misreading like a lawyer. They are not, as is often claimed, the result of careless drafting by legislators or flatfooted literalism by judges. Rather, they arise from the way virtually all legal actors – advocates, judges, scholars, and legislators – routinely botch the interpretation of a certain class of sentences. When these sentences are at issue, not only are lawyers unable to “make anything mean anything,”<sup>13</sup> but they at times appear unable even to make the text mean what it most naturally *should* mean. The troublesome types of sentences are what linguists have sometimes termed “opaque” constructions, whose predicates are opaque verbs.<sup>14</sup> Briefly, opaque verbs create a split in available readings by means of a particular structural ambiguity that inheres not just in English, but in natural language generally.<sup>15</sup> More on these sentences and how to recognize them will

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<sup>9</sup> *Whiteley v. Chappell* (1868) L.R. 4 Q.B. 147, 147.

<sup>10</sup> *Id.* at 148–49.

<sup>11</sup> *Id.* at 148.

<sup>12</sup> See *infra* section II(A).

<sup>13</sup> Comment, *Countdown: Convictions Unlikely for Bush Lawyers Who Authorized Torture*, YOUTUBE (May 5, 2009), <http://www.youtube.com/watch?v=YZa-OwostyY> (“A good lawyer can make anything mean anything.”).

<sup>14</sup> Opaque constructions include sentences as simple as “I want a sandwich,” “John drew a house,” and “Terry is waiting for someone.” For practice in seeing how these and similar sentences create ambiguity, see *infra* Part I(C).

<sup>15</sup> See BARBARA H. PARTEE, *MATHEMATICAL METHODS IN LINGUISTICS* 409–15 (1990) (discussing several classes of predicates that create opacity.) In discussing this class of sentences, I use the categorical nomenclature of opaque versus transparent contexts, found throughout the psycholinguistic literature, primarily because its terms have non-technical meanings that can be more helpful than alternatives (e.g., intensional versus extensional content) at hinting at their meaning.

follow.<sup>16</sup> For now, the important thing about them is their sheer ordinariness. They are neither rare nor particularly complicated as a matter of vocabulary or syntax. While in everyday language we negotiate these sentences with little mishap, in case after case, legal actors repeatedly trip over them.

Our mishandling of opaque constructions creates considerable and costly havoc in the areas of law it afflicts. Flawed judicial decisions snuff out meritorious claims and send doctrinal developments on an errant course.<sup>17</sup> Litigators, who can usually be trusted to argue for any possible (or impossible) interpretation that might serve their client, chronically fail to raise textual interpretations that are every bit as faithful to the letter of the law as to its purpose, thereby creating a false opposition between literal and purposive interpretation. Legislatures devote themselves to redrafting statutory language, only to produce texts that are likely to raise the same problems as the provisions they amended. Even we pointy-headed legal academics have missed opportunities to critique the way lawyers and judges reason about language. With occasional exceptions,<sup>18</sup> not only has legal commentary been oblivious to the family resemblance across a collection of

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<sup>16</sup> See *infra* notes 24 – 37 and accompanying text.

<sup>17</sup> See Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans With Disabilities Act*, 117 YALE L. J. 997, 1026-34 (2008) (citing examples of failed antidiscrimination claims due to overlooked ambiguity).

<sup>18</sup> Professor Michael Moore has pointed out the failure of a lawyerly “criterial theory of meaning” to interpret mental state predicates and other verbs that create the kind of ambiguity this Article discusses. Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 208-14 (1980) (arguing that mental predicates are a class of words that cannot be interpreted by searching for paradigm examples in the observable world). Lawrence Solan has recently analyzed opacity in contractual contexts. Professor Lawrence M. Solan, *Transparent and Opaque Consent in Contract Formation*, in COERCION AND CONSENT IN THE LEGAL PROCESS: LINGUISTIC AND DISCURSIVE PERSPECTIVES (Susan Ehrlich, et al., eds.), (forthcoming). Professor Gideon Yaffe works out an in-depth application of the *de dicto-de re* distinction to the law of criminal attempt in *Trying to Kill the Dead: De dicto and De re Intention in Attempted Crimes*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, (Andrei Marmor & Scott Soames, eds.) (2012). French legal scholar Ross Charnock has extensively discussed referential ambiguity in opaque contexts. Ross Charnock, *Meaning And Reference: A Linguistic Approach To General Terms And Definite Descriptions In Legal Interpretation* (Oct. 1, 2007), <https://sites.google.com/site/celluledelinguistique/Accueil-CRL/membres/ross-charnock>. See also Howard Pospesel, *Toward a Legal Deontic Logic*, 73 NOTRE DAME L. REV. 603, 617-21 (1998) (invoking *de dicto* and *de re* distinction in the modal contexts of “may” and “must”); Robert E. Rodes, Jr., *De re and De dicto*, 73 NOTRE DAME L. REV. 627, 627-30 (1998) (listing twelve short legal puzzles that can be explained by reference to *de dicto de re* ambiguity); Deborah Weiss, *Scope, Mistake, And Impossibility: The Philosophy Of Language And Problems Of Mens Rea*, 83 COLUM. L. REV. 1029 (1987) (exploring the implications of opacity for criminal *mens rea* modalities).

interpretive errors, but it has also misdiagnosed the errors as “literal” interpretations of poorly written code. We could hardly have gotten it more wrong: the problem is that we overlook sensible, literal readings that are right beneath our noses. This ought to call into question what we mean by legal expertise in interpretation in the first place.

Noticing and correcting these misreadings does not force us to take sides in any debate over theoretical approaches to statutory interpretation—textualism versus purposivism, originalism versus dynamic interpretation, plain versus open-textured meaning, positivist versus morality-effectuating theories of legal authority, or the resurgence of and resistance to canons of construction. Instead, instances of misreading should signal a need to step back and look well upstream from these fault lines. These debates address how to choose between contending meanings of statutory text in order to decide what the law is or ought to be. In doing so, they make a crucial but flawed assumption: they take it for granted that all reasonable literal readings of a given text will be readily apparent to lawyers, and therefore on the table, in any dispute over interpretation. Reading literally, we suppose, is the easy part of interpretation,<sup>19</sup> because linguistic content is processed upstream, pre-theoretically, as a matter of natural language competency rather than law. This is exactly the reason that a basic failure to apprehend literal readings should command the attention of legal theorists of all stripes: errors flow downstream.

One claim of this Article, then, is that many clashes among theories of statutory construction are simply irrelevant to a significant class of problems that legal actors regularly confront. Because these various approaches to interpretative disputes all take literal meaning as input, mistakes in reading literally will tend to confound interpretation, no matter whether one’s motto is more nearly the hard-boiled textualist’s “it’s right there in black and white” or the extreme purposivist’s “words can mean almost anything depending on the purpose and context.” The present analysis makes only one commitment concerning the relationship between law and language, and it is uncontroversial: text matters, at least enough that we should not disregard reasonable, literal readings of legally significant language.<sup>20</sup> If by such a modest standard the courts are

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<sup>19</sup> Following Lawrence Solum, interpretation in the sense used here means “recogniz[ing] or discover[ing] the linguistic meaning of an authoritative legal text,” as distinguished (helpfully, by Solum) from statutory construction. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100-01 (2010).

<sup>20</sup> See 2A STATUTES AND STATUTORY CONSTRUCTION 12–13 (Norman J. Singer and J.D. Shambie Singer, eds., 7th ed. 2007) (emphasizing the centrality of the clear and express language of a statute); see also *Caraco Pharmaceutical Laboratories v. Novo Nordisk*, 132 S. Ct. 1670, 1680 (2012) (“We begin ‘where all such inquiries must begin:

systematically overlooking available readings of statutory provisions, and if inattentive reading is masquerading as strict adherence to text, then we should all be concerned about the quality of legal interpretation.

There are four parts to this Article. Part I explains what opaque sentences are and how they create ambiguity, as informed by the field of theoretical linguistics. The method of this Part (The Fun Part) is experiential: it invites the reader to practice spotting ambiguity in opaque contexts by trying to see two distinct readings of simple sentences. Part II shows how courts have failed to consider alternative literal readings of statutes that contain opaque verbs across a broad range of substantive law, and the considerable consequences of these failures. These include the examples above—genocide, obstruction of justice, and fraud by impersonation—as well as a fourth, discrimination under the Americans with Disabilities Act (ADA), in which misreading persisted despite intense scrutiny by the Supreme Court, advocates, scholars, and Congress. Part III considers possible reasons why opaque sentences frustrate legal analysis. It draws on the psycholinguistic literature of language development as well as from research into fallacies of heuristic reasoning and cognitive bias. Together these bodies of research suggest that, while opaque constructions are complex and may be error-prone to some degree for everyone, some features of statutory interpretation may entrench, mask, and spread error. Finally, Part IV speculates on how we might prevent these errors, or at least intervene before they reach the point of fiasco.

#### I. TROUBLEMAKING VERBS: OPAQUE SENTENCES AND HOW TO SPOT THEM

Genocide. Obstruction of justice. Identity fraud. Disability discrimination. Statutes regulating these domains, and many other statutes that create interpretive stumbling blocks, share a particular grammatical characteristic: they contain a class of *opaque verbs*<sup>21</sup> that create *de dicto*

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with the language of the statute itself.”) (quoting *U.S. v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989)); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999) (“As in any case of statutory construction, our analysis begins with “the language of the statute.”) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)).

<sup>21</sup> “Opaque verbs” (or “opacity”) is a short hand for the verbs that occur in opaque constructions—it is not the verb that is opaque so much as the entire construction. I use the words “opaque sentence” interchangeably with “opaque construction” because, while the latter is more accurate (sentences can contain more than one opaque construction, and not all opaque constructions are full sentences), the former is more familiar to readers outside of linguistics. Moreover, focusing on sentences reminds us not to fixate on the meanings of individual words, which are not the root of confusion in the case of structural ambiguity.

versus *de re* ambiguity at the level of the sentence.<sup>22</sup> These terms are the subject of a rich literature and debate in linguistics and the philosophy of language, but it is a safe bet that only a tiny minority of lawyers will have heard of them. Opaque verbs typically have to do with states of mind, such as *intend* to destroy, *persuade* another with *intent* to withhold, *impersonate* or *pretend* to be, and *regard* as.<sup>23</sup> The ambiguities they create, however, do not arise from the meaning of individual words (lexical ambiguity), but from the semantic structure of the sentence as a whole (structural ambiguity). Because non-linguists are not accustomed to noticing distinctions of meaning that are not lexical, understanding what sets opaque constructions apart requires a walk-through these sentences' unruly behavior and some practice in identifying their doppelgänger readings.

#### A. *Transparent vs. Opaque Sentences*

Opaque sentences behave differently from ordinary (also called “transparent”) sentences in several ways. Here is a simple example of each type.

- |                  |                                |
|------------------|--------------------------------|
| (1) TRANSPARENT: | Chris <i>ate</i> a cupcake.    |
| (2) OPAQUE:      | Chris <i>wanted</i> a cupcake. |

Quite apart from the obvious difference in word meaning between “eat” and want,” linguists have noticed at least three patterns of difference between (1) and (2) at the level of the sentence, having to do with *existence*, *specificity*, and *substitution*.<sup>24</sup> These patterns represent logical moves that are valid with transparent sentences but not with opaque ones.<sup>25</sup> First, in order for Sentence 1 to be true (i.e., for Chris to have eaten a cupcake),

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<sup>22</sup> An equally common term for these verbs in linguistics is “intensional,” as contrasted with verbs whose meanings are dictated by their “extensions” or the things (states of affairs) that belong to the set defined by the word. The “intension” of a word is its conceptual properties, the contours of the category. A word of warning: “intension” is easy to confuse with “intention,” especially because “intend” is an intensional verb.

<sup>23</sup> The class of opacity verbs includes *inter alia* epistemic verbs (*know*, *believe*, *guess*.), verbs of desire (*want*, *hope*), perception verbs (*regard*, *smell*, *taste*), verbs of intention (*try*, *intend*, *promise*) and verbs of depiction (*draw*, *paint*). BARBARA H. PARTEE ET AL., *MATHEMATICAL METHODS IN LINGUISTICS* 409-10 (1990).

<sup>24</sup> For semantic accounts of the transparent/opaque distinction vis-a-vis asserting existence, see Eric Schwitzgebel, *De re Versus De dicto Belief Attributions*, *STAN. ENCYCLOPEDIA OF PHIL.* (Nov. 21, 2010), <http://plato.stanford.edu/entries/belief/#2.3>.

<sup>25</sup> Daniel C. Dennett and John Haugeland, *Intentionality*, in *THE OXFORD COMPANION TO THE MIND* (1987) (explaining that “intentional idioms” are a subset of Quine’s “referentially opaque” constructions).

there must have existed a cupcake. That may seem obvious, but compare this entailment of existence to Sentence 2's implications: Chris could surely have wanted a cupcake (and perhaps would have especially wanted one) if the world's last cupcake had been eaten long ago. Thus, while the objects of transparent verbs are asserted to exist, no such requirement of existence follows for the objects of opaque verbs.<sup>26</sup> A second difference is that the transparent Sentence 1 establishes reference to a specific cupcake, while opaque Sentence 2 does not. To see this, notice that it makes sense to say, "Chris wanted a cupcake, but no particular one," but not, "Chris ate a cupcake, but no particular one." Lastly, in transparent Sentence 1, we can substitute terms that are equivalent to "cupcake" without changing whether the sentence is true or not.<sup>27</sup> If Chris actually ate a cupcake, and if a cupcake is Whoopi Goldberg's favorite kind of dessert,<sup>28</sup> then the sentence "Chris ate Whoopi Goldberg's favorite kind of dessert" is likewise true, regardless of whether or not Chris is aware of Whoopi Goldberg's cupcake penchant. However, if Chris *wanted* a cupcake, it does not necessarily follow that "Chris wanted Whoopi Goldberg's favorite kind of dessert." Rather, the sentence mentioning Whoopi Goldberg could be interpreted to mean that Chris wanted whatever the actor's favorite dessert happens to be (as in seeing Whoopi Goldberg at a bakery and saying, "I want whatever her favorite is"); we might say this is false if Chris had never encountered or heard of Whoopi Goldberg, though Chris may still want a cupcake. Another example: at a time when Barack Obama is President, we can substitute "Barack Obama" for "the President" in a transparent context ("I am/met/talked to the President") without changing the truth of the sentence. Not so in an opaque context: many people may wish to be "the President" without necessarily wishing to be Barack Obama.

Linguists state these generalizations about opacity in abstract terms and without what most people would think of as earth-shattering implications. But when situated in the context of statutory analysis, lawyers' attempts to apply ordinary rules of inference to opaque sentences can have unfortunate and far-reaching real-world effects, as Part II will detail.

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<sup>26</sup> In the parlance of philosophy, the existential commitments entailed by transparent verbs are suspended for opaque verbs. See Graeme Forbes, *Intensional Transitive Verbs*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 5, 2010), <http://plato.stanford.edu/entries/intensional-trans-verbs/>.

<sup>27</sup> Schwitzgebel, *supra* note XX.

<sup>28</sup> Whoopi's Favorite Dessert: Cupcakes!, ABC: THE VIEW (Aug. 30, 2010), <http://theview.abc.go.com/blog/our-favorite-cupcakes>. ("There are few things in life that make me happier than the sweet, moist perfection that is a cupcake, baby.")

One more such rule that opaque sentences defy, which will be especially relevant to the interpretation of the Genocide Convention, concerns the inferences we can draw from disjunction. An example here will set up that more detailed discussion. First note the inferences that follow from an ordinary transparent construction whose object is a disjunctive list.

(3) TRANSPARENT: Kim ate a piece of cake, a piece of pie, or a cookie.

- (3a) Kim ate a piece of cake.
- (3b) Kim ate a piece of pie.
- (3c) Kim ate a cookie.

If Sentence 3 is true, it follows that at least one of the three sentences below it must be true. In formal terms, the distributive property holds for disjunction in transparent contexts: the meaning of “ate” distributes over each of the disjuncts. Conversely, if Kim instead ate something that is neither cake nor cookie nor pie---such as a baked good that Northeasterners call a “whoopie pie,”<sup>29</sup>---then Sentence 3 would be not be true because none of its components are. If asked to prove Sentence 3 true or false, it would thus make good sense to break up the disjuncts and test each simpler sentence one at a time. But this same logic does not necessarily hold for opaque sentences, as in this example:

(4) OPAQUE: Kim desperately wants a piece of cake, a piece of pie, or a cookie.

- (4a) Kim desperately wants a piece of cake.
- (4b) Kim desperately wants a piece of pie.
- (4c) Kim desperately wants a cookie.

Crucially, Sentence 4 can be true even if 4a, 4b, and 4c are all false, such as where Kim would be equally happy with any of them, and therefore cannot be said to desperately want any one of them. This may seem counterintuitive.<sup>30</sup> The key is that the sentence is ambiguous as to whether

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<sup>29</sup> “The whoopie pie, a baked good made of 2 cakes with a creamy frosting between them, is the official state treat [of Maine].” ME ST T. 1 § 225.

<sup>30</sup> If this is difficult to see, try substituting another opaque construction, “promised to eat,” for “desperately wanted.” In the “promise” context, it should be clear that a “promise to do A, B, or C” need not (and usually does not) amount to a promise to do any of those

Kim's desperate desire runs to the individual categories of the list or attaches only to them collectively.<sup>31</sup> If the latter, then it may also be true that the desire could be satisfied -- even typified -- by something that is not described in the named categories, but that embodies an amalgam of their characteristics (e.g., a whoopie pie).<sup>32</sup> The practical upshot is that we cannot reliably use the same reductive methods of proof when the logical structure of a sentence is opaque. While I have framed this generalization as a technical one about proof, it will correspond to substantive intuitions about the meaning of genocidal intent when we return to that context.

To summarize thus far, a large class of verbs manifests one or more anomalous behaviors—existence-neutrality, the availability of non-specific readings, and substitution-resistance<sup>33</sup>—and are thus considered opaque. To see these patterns across a wider range of vocabulary, we can try out the three tests in various contexts and notice how they distinguish a class of opaque verbs from ordinary transparent verbs, such as these:

TRANSPARENT: touch, send, wash, kick, read, get, marry, break,  
repair, borrow, sit on . . .

OPAQUE: desire, intend, request, seek, draw, believe,  
endeavor to buy, promise to sell, regard as . . .

Looking at the two lists, it is not so obvious what the members of each class have in common conceptually. Broadly and abstractly speaking, transparent constructions describe states of affairs in the “real” world. If you have information about the actual world alone, you can tell whether a transparent sentence is true or false (e.g., whether someone touched/washed/borrowed or sat on a horse) based on those facts, which is one way of saying you know what the sentence means.<sup>34</sup> Opaque constructions, on the other hand, describe states of affairs *mediated through other hypothetical states*, often mental states. As a result, their truth or falsity cannot be determined simply

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individual things. Rather, one's promise relates to the entire set.

<sup>32</sup> See *The History of the Whoopie Pie*, <http://macmaker.wordpress.com/2012/02/16/the-history-of-the-whoopie-pie/> (describing a whoopie pie as “[k]ind of like an Oreo, if the chocolate cookies in the Oreo were cakes 4-5 times the size of an Oreo cookie, and the icing were more whipped and airy like a pie filling instead of icing.”)

<sup>33</sup> See Intensional Transitive Verbs, *supra* note 30. See also Delogu et al., *Effects of intensionality on sentence and discourse processing: Evidence from eye-movements*, 62 J. OF LANG. & MEMORY 352, 352-53 (2010) (listing three properties of intensional verbs).

<sup>34</sup> Strictly speaking, it is not sentences themselves that are true or false, but the propositions expressed by them. See, CHERCHIA & MCCONNELL-GINET, *supra* note 16.

by sizing up the sorts of actual-world facts we rely on to decide if ordinary sentences are true or false. Rather, we have to consult the facts of the relevant “other” state (e.g., a world as believed, as desired, as intended, as pretended, as promised, as depicted in a drawing, etc.).<sup>35</sup> As some linguists have put it, opaque constructions are world-creating: they open up and introduce entire hypothetical worlds into our discourse.<sup>36</sup> In these scenarios, the facts can differ dramatically from those of the actual world, and opaque verbs make it easy and natural to talk about these possible counterfactual or hypothetical states. In fact, we can embed one opaque construction within another and thereby expand geometrically the complexity of our discourse, many degrees removed from the here and now.<sup>37</sup> In sum, opaque verbs do heroically profound work in expanding the range of ideas that we can communicate with a finite vocabulary. But they hold the potential to create confusion commensurate with their power. Mercifully, it is not necessary to have a thorough command of the semantic mechanisms of opacity in order to address the confusion in law that opaque verbs can cause. It is enough to train oneself to notice them, and the best way to do that is to practice seeing alternative readings in simple sentences.

*B. Two Ways to Read Opaque Sentences: De re and De dicto*

A property of opaque sentences that follows from the above observations, and that directly relates to statutory interpretation, is that they are ambiguous in ways that transparent sentences are not. Again, a pair of examples:

- (5) TRANSPARENT: I am writing on a piece of paper.  
 (6) OPAQUE: I am looking for a piece of paper.

We can paraphrase the logical structure of Sentence 5, if a bit awkwardly, as follows.

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<sup>35</sup> See PARTEE ET AL., *supra* note 28, at 410 (explaining that opaque verbs make it possible to express the complex possibilities of thought with a limited vocabulary).

<sup>36</sup> JAMES MCCAWLEY, *EVERYTHING THAT LINGUISTS HAVE ALWAYS WANTED TO KNOW ABOUT LOGIC (BUT WERE ASHAMED TO ASK)* 415-30 (2d ed. 1993).

<sup>37</sup> Being able to talk about things that are remote in space or time has been termed “displacement.” See Charles F. Hockett, *The Origins of Speech*, 203 *SCIENTIFIC AMERICAN* 88, 89 (1960). See also Kai von Fintel & Irene Heim, *Intensional Semantics 1–3*, MIT Lecture Notes (Spring 2011 ed.), available at <http://web.mit.edu/fintel/fintel-heim-intensional.pdf>, (discussing the capacity of language to convey meaning about “displaced” states other than the here-and-now).

(5a) There is a particular thing X, and X is a piece of paper, and I am writing on X.

Sentence 6, however, is ambiguous between two paraphrases or readings. The first one below is parallel to the transparent formulation (5a) above; the second reading shown in (6b), however, may describe a very different factual scenario.

- (6a) There is a particular thing X, and X is a piece of paper, and I am looking for X.  
 (6b) I am looking for some X or other, such that X is “a piece of paper.”

In traditional terms in linguistics and the philosophy of language, the reading in (6a) is called the *de re* or sometimes “transparent” interpretation.<sup>38</sup> *De re* translates from Latin as “about the thing,”<sup>39</sup> (i.e., the legally familiar term *res*), meaning that in this sentence we are talking about a particular thing, in this case an actual piece of paper that you could touch, photograph, and so on. This reading would be apt where the speaker has a particular piece of paper in mind, perhaps one on which she has written a phone number. The reading in (6b), on the other hand, is known as the *de dicto* (or sometimes “opaque”) interpretation, from Latin for “about what is said” (i.e., the legally familiar *dictum*).<sup>40</sup> Here the speaker is not looking for any particular object, but for whatever will match the description, “a piece of paper.” One would intend this interpretation when one is looking for something to write on.<sup>41</sup>

Ambiguity of this sort is not just a technical fact about language.

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<sup>38</sup> *De dicto* and *de re* are traditional terms first arising in the philosophy of language. See, e.g., CHIERCHIA & MCCONNELL-GINET, *supra* note XX at 43; L.T.F. GAMUT, LOGIC, LANGUAGE, AND MEANING 46-47 (1991). The modern philosopher most closely associated with theoretical developments concerning the class of phenomena that the distinction captures is W.V.O. Quine, whose thinking on *de dicto-de re* is summarized in MICHAEL MORRIS, AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE 113-33 (2007). Quine’s work in turn relates back to a distinction drawn by Gottlob Frege between “reference” and “sense.” Gottlob Frege, *Über Sinn und Bedeutung* [*On Sense and Reference*], in ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK [JOURNAL OF PHILOSOPHY AND PHILOSOPHICAL CRITICISM], 25-50 (1892).

<sup>39</sup> Mark Liberman, *Rarely Better than De re*, LANGUAGE LOG (Oct. 23, 2005), <http://itre.cis.upenn.edu/~myl/language-log/archives/002573.html>.

<sup>40</sup> *Id.*

<sup>41</sup> *But see* DANIEL C. DENNETT, THE INTENTIONAL STANCE 118, 174 – 202 (proposing that the *de dicto de re* distinction be “dismantled” as a theoretical construct).

The distinction bears directly on what matters in communication. When our intended meaning is oriented toward some *thing* (*de re*), then the words we use to refer to that thing (the cupcake, the piece of paper, etc.) can be nothing more than a convenient way to designate it—just as if we were pointing at it. In our piece of paper example, what I am seeking *de re* is the item with the phone number on it, which is only incidentally a piece of paper. When I am seeking “a piece of paper” *de dicto*, however, the very same words do not *refer* to any item at all.<sup>42</sup> Instead, they describe the category that I am talking about. Crucially, it is the category—and your relationship to it (e.g., wanting, seeking, intending)—that you mean to invoke when you want to be understood *de dicto*. This difference between talking about things on the one hand versus categories on the other can help determine which reading or readings are reasonable ones.

Experience tells us that we resolve *de dicto/de re* ambiguity in everyday natural language seamlessly and without having to think about it, based on the rich context of situated speech. Sentence (6) above may be ambiguous, but it would cause confusion only if the listener did not have enough contextual information to figure out which reading the speaker intended. If the speaker says, “I’m looking for a piece of paper” after complaining that she had lost someone’s phone number, context would push the listener to interpret the sentence *de re*. To be helpful, the listener might join in searching for the item and ask where the speaker saw it last. Change the context to the speaker holding a piece of chewed-on chewing gum that she hopes to wrap up and throw away, and the meaning is obviously *de dicto*. Here a helpful response would be to hand the speaker a tissue. Context is so useful—in fact, essential—in resolving ambiguity and responding appropriately, that in conversation we are unlikely even to notice the background ambiguity in the first place. In statutory interpretation, resolving ambiguity and responding appropriately involves developing rational criteria for proving that a statute has been violated, all dependent on our ability to size up context. Bypassing the intended meaning and responding to its counterpart (either by overlooking the ambiguity in the first place or by drawing the wrong inferences from context to choose among readings) is a recipe for legal mistakes that are as bizarre as—but of far greater consequence than—handing a Kleenex to someone who is searching for a phone number.

The ambiguity of opaque sentences should not be confused with vagueness, though lawyers often conflate the two terms. Ambiguity in the

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<sup>42</sup> For a brief explanation of the reference in a legal context, see Anderson, *Just Semantics*, 117 Yale L. J. 997, 1010–13 (2008) (contrasting the conceptual categories of “sense” and “reference” per Gottlob Frege’s nomenclature).

narrow sense refers to language that can have more than one distinct meaning, as where a dictionary has two different entries for a single word. Take the sentence, “The sentence was unconscionably long.” The word “sentence” is *lexically ambiguous*, because it could signify a linguistic unit on the one hand or a period of incarceration on the other. If you immediately noticed one of those meanings and took a moment to get the other one, that abrupt flip of a mental toggle is the sensation of noticing ambiguity: its calling card is discreteness.<sup>43</sup> Vagueness, by contrast, describes word meaning that is indeterminate at its conceptual edges. Fuzziness is its hallmark. While speakers may agree on what counts as a good example of “X” where X is a vague term, our intuitions may vary on whether to consider marginal cases as within or outside of the meaning of the word. In our “sentence” sentence above, the word “long” is vague because we would have difficulty drawing a line between “long” and “not long,” even if we agree that a sentence of 500 words (or 500 years) is clearly within its semantic bounds.<sup>44</sup> In contrast to lexical vagueness, the *de dicto/de re* distinction operates at the level of the sentence as a form of structural ambiguity: the meaning difference is located not in the definitions of individual words, but in the logical ways those words can combine to make larger units of meaning. It is important not to conflate these concepts when interpreting statutes. Disputes over vague terms tend to involve scenarios marginal to the core of the statute’s meaning and therefore tend to address “hard cases” where the text is semantically blurry. But structurally ambiguous sentences may have as many core interpretations as they have distinct semantic structures, so overlooking a *de dicto* or *de re* reading can amount to mistaking a good example of a statutory violation not just for a marginal one, but for a non-example—in other words, getting it exactly backwards.

### C. Detecting De Dicto and De re Readings

*De dicto/de re* ambiguity may seem like a subtle distinction, but practice at spotting the two available readings – one about a thing and the other about a category or description – can help cast their differences in

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<sup>43</sup> By the same token, anyone who says they “kind of, sort of” see the distinction of meaning almost certainly is not registering the ambiguity.

<sup>44</sup> For legal descriptions of the vagueness-ambiguity distinction, *see*, e.g., Lawrence Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97-98 (2010).

sharper relief. The following sentences can be read both ways. If both readings are not readily apparent, it may help to imagine two different scenarios that would correspond to the thing-based (*de re*) and the description-based (*de dicto*) readings. Suggested answers are upside down at the bottom of the page.<sup>45</sup>

- (7) Lenese wants to buy a house on Green Street.
- (8) My mother looks like a movie star.
- (9) I hope to accomplish one thing today.
- (10) The painting depicted two dogs.
- (11) Liv thought that Todd was her father.

The examples above show how misreading a sentence as *de re* when the intended reading is *de dicto* (and vice versa) can lead to confusion. For example, if Sentence 7 is said in a context where Lenese has made an offer to buy a particular house, then asking questions about that thing – the actual house – would make sense as a possible next move in the conversation. Tell me about the house. What color is it? What is its address? But on a *de dicto* reading, where Lenese simply likes Green Street in general, such responses to the statement would signal that the listener has misunderstood. After a moment of puzzlement, the speaker would likely correct the misunderstanding (“Oh, no, she doesn’t have a particular house in mind,”) and move on. Unfortunately, in law such off-base responses to statutory

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<sup>45</sup> [Note re: typesetting--- hoping you can rotate the following 180 degrees]

(7) *de re*: Lenese has her eye on a particular house, which happens to be on Green Street.

*de dicto*: Lenese likes Green Street and would like to move there.

(8) *de re*: My mother is a dead ringer for Lily Tomlin.

*de dicto*: My mother is glamorous.

(9) *de re*: I owe a thank-you note to a friend and hope to get that task done today.

*de dicto*: I have low standards for a productive day.

(10) *de re*: The cubist portrait of the royal corgi dogs, Holly and Willow, was a gift to Queen Elizabeth II.

*de dicto*: The painting by Keith Haring featured his signature stylized dog figures.

(11) *de re*: Liv said, “Hi Dad,” to a man facing away from her, but it turned out to be some guy named Todd.

*de dicto*: Liv Tyler grew up thinking that her biological father was Todd Rundgren, when in fact it was another seventies rocker, Steven Tyler. (See Susan Dominus, *Liv Tyler: Living for Today*, THE TELEGRAPH (June 8, 2008) (describing how actress Liv Tyler learned of her genetic relationship to the Aerosmith frontman).

language abound, and they are almost as difficult to correct as they are to identify in the first place.

The role of context in choosing among disambiguated readings marks an opportunity to head off a false contrast between textualism and purposivism concerning opacity phenomena. The two schools of thought part ways when the statute's literal text and its apparent purpose seem to tug in opposite directions.<sup>46</sup> The kind of ambiguity exemplified in the above examples, however, does not trigger this rift. The two readings for each are on equal footing as viable, literal interpretations. Once aware of them, the textualist and the purposivist alike would consult contextual clues---both within the larger text and beyond it--- to resolve the ambiguity. Though consulting surrounding factual context is often associated with purposivism, resolving ambiguity is equally implicated in textualist judging. When ambiguous sentences are under the microscope, modern textualists will point out that, "in textual interpretation, context is everything." In fact, compared to cases of lexical vagueness in which principled means of delimiting meaning can be elusive, the either/or structural ambiguities created by opacity ought to raise fewer concerns about courts taking impermissible liberties with the text. Regardless of judicial philosophy, courts that register only one of two literal readings will fall short of their own standards: textualists will fail to read rigorously; purposivists will either miss opportunities to consider context or will create an unfounded impression of discord between a statute's animating concern and its implementation through language. Whether courts wander down either path depends in part on the questions they ask in demanding proof that a statute applies.

As the next Part will show, courts tend to begin the interpretive process by posing thing-orientated (*de re*) questions. The process would look something like this if we were to make the questions explicit: "Tell us about the thing this dispute concerns (corresponding to some statutory term<sup>47</sup>), so that we can decide---perhaps by means of substituting equivalent expressions from statutory definitions---whether it really is an instance of the statutory term." When the text in question is an ordinary transparent sentence, this line of inquiry is not prone to error.<sup>48</sup> But when context calls

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<sup>46</sup> John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 79-85 (2006).

<sup>47</sup> The *res* can be concrete, as in "person entitled to vote," (*see* Part II(A) *infra*) or abstract, as in "major life activity" (*see* Part II(D) *infra*).

<sup>48</sup> This holds equally well for an opaque sentence whose *de re* reading is the only reasonable one. An example would be a standard liability insurance contract in which the insurer promises to defend the insured against "all claims *seeking* damages covered by this insurance."

for interpreting an opaque sentence *de dicto* (about categories, not things), these thing-based questions will not be satisfied on the facts, and thus something intended to be encompassed by the statute may be held not to be within its meaning. The analogy to our last Green Street hypothetical would be a listener responding to the speaker's puzzlement by proclaiming, "Since you cannot even identify the supposed 'house on Green Street' that you claim Lenese wants to buy, it cannot be true (or at least you cannot prove) that she 'wants to buy a house on Green Street.'" Instead of being quickly ironed out in conversation after a pause, such authoritative misreadings in law come to define the law itself. What's more, even if we are perceptive enough to notice the error, neither courts nor Congress may understand what went wrong well enough to correct it.

## II. EXAMPLES OF MISREADING

This Part has two objectives. The first is to explain some real-world problems of statutory interpretation as a failure of legal actors to appreciate and resolve the ambiguity that opaque verbs create. The second is to show that these problems share a certain family resemblance, not just linguistically, but also in terms of their legal fallout: complaints that good examples of statutory violations have fallen through textual cracks, diagnosis of the problem as faulty-drafting-meets-literal-reading, a general failure of commentators to notice that the text has multiple distinct readings, and various forms of legislative or jurisprudential backpedaling in the wake of problematic interpretation. The examples here all concern *de dicto* readings that were overlooked in favor of *de re* interpretation. This is not to say that *de dicto* reading is always or even usually preferred. Both modes of expression occur in legal as in natural language, and preferred readings vary entirely with the context. But the legal interpretation, I will argue, is biased in favor of *de re* reading, for reasons that Part III will explore.

### A. *Fraud by Impersonation*

The statute at issue in *Whiteley v. Chappell* made it an offense to fraudulently "personate any person entitled to vote."<sup>49</sup> The defendant had intentionally voted in the name of his neighbor, whose name was on the voter rolls but who also happened to be dead. The court acquitted, lamenting that it could not "bring the case within the words of the enactment."<sup>50</sup> After all, a dead person is not "a person entitled to vote."<sup>51</sup>

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<sup>49</sup> (1868) L.R. 4 Q.B. 147, 147.

<sup>50</sup> *Id.* at 148–49.

The tone of the decision is reluctant and resigned, for the court conceded that this species of voter fraud was likely within the scope of harms that the legislature meant to curb.<sup>52</sup> You can almost picture the jurists squinting as they scrutinized the text for some way to make it mean what it *ought* to mean. Coming up short, the court laid blame at the door of the drafters: “[T]he legislature has not used words wide enough to make the personation of a dead person an offence.”<sup>53</sup>

In linguistic terms, the *Whiteley* court’s error was to miss a literal, *de dicto* reading of the statute, one that would have accorded well with its purpose of prohibiting election fraud by impersonation. The verb “(im)personate” is opaque. Recalling the specificity test above, one can “impersonate” a doctor (a basketball player, a queen, etc.), but no particular one. We can paraphrase two different readings of the offense of “personat[ing] any person entitled to vote” this way:

*de re*:           pretending to be some particular individual, who is in fact entitled to vote

*de dicto*:       pretending to belong in the category, “entitled to vote”

The *de re* reading is satisfied only if “there is some X, such that X is a person entitled to vote, and the defendant [im]personated X.” In *Whiteley*, there was no such X, because X was dead and therefore not entitled to vote. This was exactly the court’s reasoning in finding that the statutory text did not apply. The *de dicto* reading, on the other hand, is satisfied where the defendant has pretended to belong in the category of eligible voters. That is just what the defendant did. The statute on its *de dicto* reading would therefore have easily supported the conviction that the court sought.

If the court had considered its own language more carefully, it might have noticed that there are two ways to read “the impersonation of a dead person,”<sup>54</sup> and that the same is true of pretending to be a person entitled to vote. Both descriptions match what the defendant did: he pretended to be a person entitled to vote; and in a very different respect, he pretended to be a dead person.<sup>55</sup> Each characterization is literally true---and on the very same

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<sup>51</sup> *Id.*

<sup>52</sup> Even defense counsel in *Whiteley* conceded that the defendant was “very possibly . . . within the spirit” of the statute. *Id.* at 148.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> (1868) L.R. 4 Q.B. 147, 149.

facts, false---depending solely on whether one reads them *de re* or *de dicto*. A chart can help organize the distinctions.

DID THE DEFENDANT IMPERSONATE . . .		
	a person entitled to vote?	a dead person?
<i>DE RE</i>	<b>No</b> because the man he pretended to be was not in fact entitled to vote (because he was dead, and the dead cannot vote).	<b>Yes</b> because the man he pretended to be was in fact dead.
<i>DE DICTO</i>	<b>Yes</b> because he pretended to belong in the category we call <i>an eligible voter</i> .	<b>No</b> because he did not pretend to belong in the category we call <i>a corpse</i> (or <i>vampire, zombie, mummy, etc.</i> ).

One reason to schematize the distinction with extreme and absurd examples is that, typically in speech and in law, the readings are either both true or both false at the same time. Impersonating a particular person (*de re*) in that person's capacity as a voter (*de dicto*) would satisfy both readings, for instance. Even where the distinction does not cash out in terms of disparate legal results, however, the two modes of meaning are relevant to how we think about legal categories, which is especially important when those categories are less clear cut than those in *Whiteley*.

Another way to see the importance of the elusive distinction between the two readings is to consider them in a context that is usually interpreted *de dicto*, such as the offense of impersonating a police officer. It would be bizarre to interpret that phrase to apply only where the defendant had pretended to be some other individual who happens to be a police officer (impersonation *de re*) and not in a case where one had clad oneself in police garb and acted as a police officer would (impersonation *de*

*dicto*).<sup>56</sup> If it were otherwise, we would have to say that the offense does not reach the latter conduct, even though it is a prototypical form of police impersonation. Indeed, it is the *de dicto* reading that speaks to the peculiar harm of many impersonation offenses, especially those that involve some public role such as voting or law enforcement. That harm lies not so much in any injury to an individual who is impersonated, but in the ability of the impersonator to deceive others and undermine public trust. For all the *Whiteley* court's hand wringing, then, it turns out that the likely purpose of the voter fraud statute and its text were not remotely out of sync. Yet the judges could not see the literal *de dicto* interpretation that would have harmonized them, and evidently not for lack of trying.

More troubling than the faulty linguistics on display in the *Whiteley* decision itself is the case's staying power in legal education and commentary, not as a lesson on overlooked ambiguity, but to the contrary, as an example of extreme literalism.<sup>57</sup> In *The Legal Process*, Hart and Sacks discuss the case as an example of inflexible fidelity to the letter of the law: the English "literal approach."<sup>58</sup> According to another commentator, if the law is to be taken "at its word," then the impersonator must be acquitted.<sup>59</sup> And when materials on legal reasoning mention the case, they

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<sup>56</sup> See, e.g., Nick Wing, *Classmates: Mitt Romney Impersonated Police Officer In High School And College*, HUFFINGTON POST (June 7, 2012, 12:43 PM), [http://www.huffingtonpost.com/2012/06/07/classmates-mitt-romney-im\\_n\\_1575680.html](http://www.huffingtonpost.com/2012/06/07/classmates-mitt-romney-im_n_1575680.html).

<sup>57</sup> See, e.g., LAW COMM'N & SCOTTISH LAW COMM'N, THE INTERPRETATION OF STATUTES, 1974, Law Cmnd. 21 & Scottish Law Cmnd. 11, at 18 n.66, available at <http://www.scotlawcom.gov.uk/downloads/rep11.pdf> (citing *Whiteley* as example of an "extreme example of the application of the literal rule," HART & SACKS, *supra* note XX at 1149-58 (characterizing *Whiteley* as an application of the "literal rule" wherein the "literal or linguistically most probable meaning" of the statute is determinative); Ian McLeod, *Literal and Purposive Techniques of Legislative Interpretation: Some European Community and English Common Law Perspectives*, 29 BROOKLYN J. INT'L L. 1109, 1111 (2004) (citing *Whiteley* as an example of "simple literalism").

<sup>58</sup> The questions Hart and Sacks pose to readers suggest that they may have been more receptive to understanding the statute as ambiguous, but this point is overshadowed by the broad association of the case with literalism. Moreover, to the extent that the authors consider any ambiguity, they characterize it not in terms that correspond to the *de dicto de re* distinction, but to as lexical ambiguity of the term "personate." HART & SACKS, *supra* note XX at 1149-58. See also David Bennett, *Rules That Ought Not to Be Applied – the Ultimate Iconoclasm*, in BARNEWS: THE JOURNAL OF THE NSW BAR ASSOCIATION, WINTER 2010, 105 (2010) ("The case is frequently used by United States academics as an example of the undesirability of the English literalistic approach to construction as opposed to their own purposive approach,").

<sup>59</sup> Sue Chaplin, "Written in the Black Letter": *The Gothic And/In the Rule of Law*, 17 CARDOZO STUD. L. & LITERATURE 47, 49 (2005) ("To take the law at its word in this instance, then, is to allow the impersonator of the deceased to go free . . .").

tend to at once deride the court's literalism and acknowledge a dilemma, namely, a mismatch between the drafters' intent and linguistic meaning.<sup>60</sup> Thus framed as pitting text against purpose, the case serves as a foil for strict literalism's antidote, absurdity doctrine, which authorizes a departure from the literal interpretation of a statute when the result would be manifestly contrary to legislative purpose.<sup>61</sup> Subsequent amendments to English voter fraud law suggest that the British Parliament likewise chalked up the problem to the text as drafted: the modern version of the statute forbids voting in the name of another person "whether . . . living or dead,"<sup>62</sup> language that would have been superfluous to *de dicto* interpretation of the statute as originally written.

Given the persistent meta-misunderstanding of *Whiteley*, it is not so surprising that more recent interpretations of other impersonation offenses have gone similarly off the rails. The Supreme Court's decision in *Pierce v. United States*<sup>63</sup> is illustrative. The statute at issue made it an offense to "pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof," in order to obtain something of value.<sup>64</sup> The defendant, a newspaper editor in Alabama, was charged under the statute for having held himself out as working for the Tennessee Valley Authority (TVA) not long after it was formed during the New Deal era. In that guise he allegedly convinced the plaintiffs—various consumers who were eager to see the TVA benefit their communities—to contribute to the purchase of TVA advertising space in his newspaper.<sup>65</sup> The trial court found that the defendant had told at least some plaintiffs that he was employed by the Federal Government, that consumers believed him (plausibly because some may have believed that the TVA was part of the federal government), and that this aspect of his pretense induced them to purchase the advertising.<sup>66</sup> This would appear to be a very good example of the kind of impersonation prohibited by the statute, and so agreed the Sixth Circuit in upholding *Pierce*'s conviction at trial.<sup>67</sup>

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<sup>60</sup> See, e.g., MICHAEL ZANDER, *THE LAW MAKING PROCESS* 146 (6th ed. 1985) (describing the *Whiteley* opinion as a literal but irresponsible approach to interpretation).

<sup>61</sup> For a discussion of absurdity doctrine in general, see John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2393 (challenging absurdity doctrine as constitutionally untenable).

<sup>62</sup> Representation of the People Act, 1983, c. 2, § 60 (U.K.).

<sup>63</sup> 314 U.S. 306 (1941).

<sup>64</sup> *Id.* at 306.

<sup>65</sup> *Id.* at 308.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 307.

But no. The Supreme Court reversed the conviction based on the fact that the TVA is, in fact, a federally-owned corporation that is separate and distinct from the federal government.<sup>68</sup> This means TVA employees are not officers or employees of the government. According to the Court, the trial judge should have instructed the jury that “any . . . representation . . . that [the defendant] was connected with the TVA as an officer or employee . . . would not constitute the false impersonation of an officer or employee of the United States Government, TVA officers and employees not being officers and employees of the Federal Government.”<sup>69</sup> Echoing *Whiteley*, the Court stated, “While the act should be interpreted ‘so as to give full effect to its plain terms,’ we should not depart from its words and context.”<sup>70</sup> Only one dissenting justice opined that the literal terms of the statute supported the conviction.<sup>71</sup>

*Pierce* parallels *Whiteley* step for step in its reasoning about language. In both decisions, courts analyzed an opaque sentence as though it were transparent. Both analyses proceeded in two stages. First, they zeroed in on the object of the impersonation: the deceased erstwhile voter in *Whiteley*; the TVA employment in *Pierce*. Second, the court scrutinized this object as a factual matter to determine whether it matched the criteria for a statutory violation: was the impersonated man actually “a person entitled to vote”?; is an employee of the TVA actually “an employee of the federal government”? If not, then by this reasoning the facts could not be shoehorned into the statutory prohibition. Notice that this logic would have made perfect sense if the language of the operative clauses had been transparent as opposed to opaque. Had the defendants been on trial for “assaulting a person entitled to vote” or “bribing a federal employee,”<sup>72</sup> then on analogous facts this language would not have reached the defendants’

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<sup>68</sup> *Id.* at 310.

<sup>69</sup> *Id.* This instruction must be interpreted to mean that impersonating a TVA employee is inconsistent with (not merely insufficient to prove) the offense of impersonating a federal government employee. The jury instructions made it clear that “Pierce must have actually and intentionally represented himself or assumed to be an officer of the United States,” and that Pierce’s references to the TVA could be evidence of a violation only if made to deceive consumers into believing that Pierce was acting “as an officer or employee of the Federal Government.” *Id.* at 309.

<sup>70</sup> *Id.* at 311–12 (citations omitted).

<sup>71</sup> *Id.*, at 313 (Douglas J., dissenting).

<sup>72</sup> Indeed, the Court in *Pierce* cited a decision holding that government corporation employees are not “employees of the United States Government” as support for the premise that pretending to be with the TVA could not constitute impersonating a federal employee. See *Pierce*, 314 U.S. at 313 (citing *United States v. Strang*, 254 U.S. 491, 492–93 (1921)) (noting that *Strang* held that an employee of a government corporation was not necessarily an agent of the government).

conduct. But such reasoning led the courts astray in these opaque contexts, where their logic was only suited to one of the possible readings (*de re*). Had the courts focused instead on the *category* that the impersonation concerned, and the facts as the impersonator *pretended them to be*, they would have reached the opposite and more reasonable result. Importantly, neither court made any attempt to acknowledge alternative readings, which strongly suggests that they thought the text was unambiguous. Finally, the two statutes are parallel also in the way the law evolved to capture the conduct of future Whiteleys and Pierces. As with the addition of “whether living or dead” to the English voter fraud statute, it took an act of Congress to amend the federal impersonation statute to explicitly prohibit impersonation of an employee of a government-owned corporation such as the TVA.<sup>73</sup>

The Supreme Court’s *Pierce* decision has apparently never been criticized for its reasoning. The case is virtually absent from the literature on statutory interpretation. This may owe in part to it being rendered a dead letter from the outset by legislative amendment, which had already been passed by the time the case reached the Supreme Court.<sup>74</sup> Whatever the reason, the low profile of the *Pierce* decision means that what might be held up as a striking lesson in legal misreading instead continues to molder in a doctrinal dead end. By contrast, the next example is the subject of current and vigorous debate if not rigorous linguistic analysis.

### B. *Obstruction of Justice*

Federal criminal code provisions governing obstruction of justice have been assailed as an illogical, cacophonous “medley of crimes,”<sup>75</sup> particularly since a wave of financial scandals in the last decade focused public attention on white collar crime. Over one dozen statutes prohibit general interference with the due administration of justice as well as specific obstructive acts, from lying to Congress to threatening witnesses.<sup>76</sup>

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<sup>73</sup> In fact, Congress amended the impersonation statute in 1938, apparently between the events underlying the *Pierce* case and its adjudication by the Supreme Court in 1941. *Pierce*, 314 U.S. at 307 (citing Act of Feb. 28, 1938, ch. 37, 52 Stat. 82).

<sup>74</sup> *Id.*

<sup>75</sup> Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L. J. 1215, 1248–52 (2004) (discussing redundancy as well as holes in obstruction code).

<sup>76</sup> Obstruction statutes under Title Eighteen include 18 U.S.C. §1503 (influencing or injuring officer or juror, or more generally interfering with the due administration of justice), § 1505 (obstruction of proceedings before departments, agencies, and committees), § 1512 (witness, victim, or informant tampering), §1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy), and § 1520 (destruction

The result, according to some commentators, is chronic incoherence. Professor Chris Sanchirico describes obstruction provisions as “scattered like leaves over the landscape of evidentiary foul play, overlapping here, leaving patches of green there.”<sup>77</sup> Professor Julie O’Sullivan holds up this statutory crazy quilt to demonstrate that “[t]he so-called federal penal ‘code’ is a national disgrace.”<sup>78</sup> Blame falls routinely and heavily on Congress for racing to react to high-profile scandals with poorly thought-out prohibitions,<sup>79</sup> for enacting duplicative laws with widely disparate sentencing terms that leave enormous discretion to prosecutors,<sup>80</sup> and for using broad language that potentially sweeps within its scope conduct that many would consider licit.<sup>81</sup> This latter concern about overcriminalization, specifically implicating the mens rea thresholds in various provisions, has been a frequent refrain.<sup>82</sup> Such concerns undergirded the Supreme Court’s recently tightened interpretation of obstruction law, a shift that has received wide approval in legal commentary.<sup>83</sup> Against this backdrop, instances where courts may have read obstruction law *not* to reach arguably good examples of intentionally obstructive conduct have receded into the background of debate.<sup>84</sup> This section argues that the Supreme Court’s

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of corporate audit records).

<sup>77</sup> Sanchirico, *supra* note 75 at 1249. See also Pamela E. Hart, *Falling Through The Cracks: The Shortcomings Of Victim And Witness Protection Under § 1512 Of The Federal Victim And Witness Protection Act*, 43 VAL. U. L. REV. 771, 801–06 (2009) (discussing undercriminalization in witness tampering statute due to overly literal reading).

<sup>78</sup> See Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: A Case Study of Obstruction of Justice Statutes*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006) (holding up obstruction code as emblematic of Congressional failure to draft a coherent code).

<sup>79</sup> See *id.* at 654 (emphasizing the “political desire to react to a given scandal” as a reason for enacting new sections of the penal code).

<sup>80</sup> See *id.* at 654 - 55 (discussing how a redundant code empower prosecutors with “substantially greater bargaining power”).

<sup>81</sup> See generally *id.* See also *United States v. Aguilar*, 515 U.S. 593, 602 (1995) (noting that the broad language of section the omnibus clause on its face could criminalize too wide a range of conduct).

<sup>82</sup> See James K. Kirkpatrick, *The Supreme Court’s Bipolar Approach to the Interpretation of 18 U.S.C. § 1503*, 86 J. CRIM. L. & CRIMINOLOGY 1383, 1401 (1999); O’Sullivan, *supra* note 71, at 696–97 (stating that criminalization of what Congress did not intend to prohibit, including much of the ordinary conduct of lawyers, is a pressing problem in obstruction law). Prior to the Sarbanes-Oxley Act of 2002, however, complaints that obstruction code failed to punish culpable defendants were a focus of critique. Sanchirico, *supra* note 78, at 1249 (2004).

<sup>83</sup> 544 U.S. 696, 703 (2005) (noting that narrowly interpreting a criminal statute is “particularly appropriate . . . where the act underlying the conviction . . . is by itself innocuous”).

<sup>84</sup> O’Sullivan, *supra* note 71, at 706–08 (approving of the Supreme Court’s refusal to convict Arthur Andersen of obstruction without a strict jury instruction on *mens rea* and

celebrated decision in *United States v. Arthur Andersen LLP*<sup>85</sup> is such a case, and that it reflects a failure to reckon with the ambiguity in “endeavoring” and “intending” to influence the operation of our legal system.

The facts underlying Arthur Andersen’s prosecution bear repeating only to highlight how they slipped through a net of statutory language that intuitively ought to have captured the firm’s conduct. In the latter half of 2001, the energy firm Enron was spiraling toward bankruptcy when details of its misleading accounting practices became public. As Enron’s auditor, Arthur Andersen anticipated litigation.<sup>86</sup> By September 2001 it had appointed an Enron Crisis Response Team; by October 8th it had retained outside counsel to represent it in whatever legal action might arise from the scandal.<sup>87</sup> Just two days later, the firm began a concerted and urgent effort to “remind” employees to follow its otherwise dormant document retention policy, which called for destroying records unrelated to current work.<sup>88</sup> Despite the fact that the policy explicitly proscribed destroying documents “in cases of threatened litigation,”<sup>89</sup> Arthur Andersen managers told employees, “[I]f it’s destroyed in the course of the normal policy and litigation is filed the next day, that’s great.”<sup>90</sup> The shredding stopped on November 8<sup>th</sup>, the day after the SEC subpoenaed records, with a company email that read in part, “[N]o more shredding . . . . We have officially been served for our documents.”<sup>91</sup> In sum, evidence abounded that the firm’s clear purpose was to prevent its Enron auditing practices from coming to light in court.

At the time of the Enron debacle, two federal obstruction statutes applied to document destruction.<sup>92</sup> The more general provision is section 1503 of Title Eighteen, the “omnibus clause,” which is the most commonly invoked control on nonviolent white collar cover-up crime.<sup>93</sup> Section 1503

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decriing the broad language that frame statutory offenses).

<sup>85</sup> 544 U.S. 696, 698–702 (2005).

<sup>86</sup> *Arthur Andersen LLP*, 544 U.S. at 699.

<sup>87</sup> 544 U.S. at 698–99.

<sup>88</sup> *Id.* at 699–700.

<sup>89</sup> *Id.* at 700 n. 4.

<sup>90</sup> *Id.* at 700.

<sup>91</sup> *Id.* at 702 (alteration in original).

<sup>92</sup> As a direct Congressional reaction to Arthur Andersen’s acquittal, the Sarbanes-Oxley Act of 2002 added a third provision, section 1519, which prohibits destruction of documents with the intent to impede a Federal investigation, whether such a proceeding is pending or merely contemplated. 18 U.S.C. § 1519 (2010).

<sup>93</sup> JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* 328 (5<sup>th</sup> ed. 2010) (explaining the overlapping provisions of Title Eighteen and inconsistencies in their use by prosecutors).

makes it a federal offense to “corruptly . . . influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede the due administration of justice.”<sup>94</sup> A specific and even more unwieldy statute covers witness tampering. Section 1512(b) prohibits “knowingly . . . corruptly persuad[ing] another person] . . . with the intent to . . . induce any person to . . . destroy an object . . . with intent to impair the object’s . . . availability for use in an official proceeding.”<sup>95</sup>

Judging from Arthur Andersen’s express linking of the shredding to fears of prosecution, it would appear that the state of mind of the officers who directed the destruction would satisfy—and perhaps typify—the mens rea criteria of either 1503 or 1512(b).<sup>96</sup> Nevertheless, the firm was not charged under section 1503’s broad omnibus clause at all. As a result of a long history of misreading like a lawyer, that provision requires that a court proceeding be pending at the time of the obstructive acts—this is known as the “pending proceeding element” of section 1503<sup>97</sup>—and Arthur Andersen had calculated its document destruction to cease with the start of such a proceeding. As for criminal liability for witness tampering under 1512(b), the Supreme Court reversed the firm’s initial conviction, also on mens rea grounds. The jury instructions failed to specify that Arthur Andersen could only be convicted if there was a particular proceeding it had in mind when it issued the shredding directives.<sup>98</sup> As the defendant argued and the Court endorsed, “It is insufficient for the government to show that the defendant intended to affect some hypothetical future federal proceeding.”<sup>99</sup> In this way, the firm’s conviction fell between two statutory chairs, a puzzling result that the linguistics of opaque verbs can help illuminate.

A key term that frames the omnibus clause of Section 1503 is the opaque verb, “endeavor.” (Recalling the non-specificity test for opacity, note that one can endeavor to find a piece of paper, but no particular one.) The omnibus clause therefore has *de re* and *de dicto* readings. A rough paraphrase of the *de re* reading of “corruptly endeavor to influence the due administration of justice” would be this:

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<sup>94</sup> 18 U.S.C. § 1503 (2010).

<sup>95</sup> 18 U.S.C. § 1512(b) (2010).

<sup>96</sup> With respect to § 1512(b), this assumes that “corrupt” intent can be found in some “improper purpose,” as the trial court itself held and the Fifth Circuit affirmed. *United States v. Arthur Andersen, LLP*, 374 F.3d., 281, 286 (5<sup>th</sup> Cir. 2004).

<sup>97</sup> O’SULLIVAN, *supra* note 93, at 388.

<sup>98</sup> *Arthur Andersen LLP*, 544 U.S. at 707–08.

<sup>99</sup> 544 U.S. at 707 n. 10 (quoting petitioner’s argument to the trial court, Transcript of Record at 425, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (No. 04-368) to demonstrate that its argument to this effect was preserved on appeal).

*de re*: There is some X, which is in fact an instance of justice being administered, and the defendant corruptly endeavors to influence X.

The *de re* interpretation can in theory be satisfied on its terms even if the defendant does not know that what she is trying to influence is in fact “the administration of justice,” as long as whatever she corruptly endeavored to influence happened to meet that definition. The *de dicto* reading, on the other hand, insists on a connection between the defendant’s state of mind and “the administration of justice” as a category. Here is a paraphrase:

*de dicto*: The defendant corruptly endeavors to influence what we describe as “the administration of justice.”

This interpretation will be satisfied where the defendant is deliberately trying to prevent facts from coming to light in some hypothetical court proceeding or other that might arise, regardless of whether any such legal action is pending or ever results. As applied to Arthur Andersen, we might imagine asking the firm’s management why they were shredding documents and getting a candid answer: “Haven’t you been reading the newspaper? We’re destroying evidence to keep it out of court. We may not succeed in influencing a criminal trial, but we’re endeavoring to.” Even a narrow sense of the word “endeavor,” one that is determined only in terms of intended and not unintended results, would capture this state of mind as “endeavoring to interfere” with the administration of justice.<sup>100</sup> It would be difficult to imagine clearer instance of the mens rea captured by a *de dicto* interpretation of the omnibus clause, regardless of whether or not a proceeding was pending at the time of the shredding.

What if not the statutory language is the source of the requirement that a judicial proceeding be pending in order to trigger section 1503? No such criterion appears on the face of the statute, but it is nevertheless all but unquestioned in case law.<sup>101</sup> A century-long thread of largely overlooked structural ambiguity in the language of obstruction law leads to an answer,

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<sup>100</sup> For discussion of the semantics of “trying,” see, e.g., Gideon Yaffe, “Trying to Kill the Dead: *De re* and *De dicto* Intention in Attempted Crimes” in *Philosophical Foundations of Law & Language*, (Andrei Marmor and Scott Soames, eds.) (2011) [http://www.law.yale.edu/faculty/yaffe\\_publications.htm](http://www.law.yale.edu/faculty/yaffe_publications.htm). [pincite to p. 6 in online paper]

<sup>101</sup> Professor O’Sullivan has pointed out that the pending proceeding requirement is a judicially created element of the omnibus provision despite the fact that “there is nothing in the statute that requires proof of a pending judicial proceeding, let alone the defendant’s knowledge thereof.” O’SULLIVAN, *supra* note XX, at 398 (discussing the proliferation of judicially created elements in the omnibus provision).

if we follow it all the way back to 1893 and the progenitor of the current doctrine, *Pettibone v. United States*.<sup>102</sup> In that case, unionized miners were convicted at trial of obstruction for interfering with mining operations during a strike. The statute in question was the predecessor statute to the current omnibus clause, with identical operative language that prohibited “endeavor[ing] . . . to obstruct . . . the due administration of justice.”<sup>103</sup> As it happens, a federal court had issued a restraining order and injunction prohibiting interference with the mine, but there was no evidence that the defendants were aware of the order or even the suit.<sup>104</sup> The Supreme Court reversed their convictions, holding that, “without service of process, or knowledge or notice or information of the pendency of proceedings, a violation cannot be made out.”<sup>105</sup>

Thus far in its reasoning on the facts of *Pettibone*, the Court is on solid ground in finding that the mens rea element was lacking. The miners had not met the statute’s terms on either its *de re* or *de dicto* interpretation. Their ignorance of the court proceedings and orders undermined a finding that they acted corruptly in some way related to those actual (*de re*) proceedings or that they were endeavoring to influence them. Their states of mind had no connection to actual or hypothetical administration of justice as such, and therefore they could not be within the statute’s terms *de dicto*.

Where the Court stumbled was in stating its inferences from the statute about the requisites of obstruction, generally and in dicta, without considering how obstruction *de dicto* might occur. As though articulating the obvious, the Court stated that “obstruction can only arise when justice is being administered. Unless that fact exists, the statutory offense cannot be committed . . . .”<sup>106</sup> From there it was a short step to determining that “without . . . knowledge or notice [of that fact] the evil intent is lacking.”<sup>107</sup> The latter move makes sense as an explanation for acquittal of these defendants, whose interference with a court order was inadvertent. But where interference with some court proceeding or other is the very goal of the conduct, it is no distortion to call the actor’s state of mind corrupt, and consciously so. This point is obscured if one leaps from the presence of “administration of justice” in the statute to requiring the *existence* of a

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<sup>102</sup> 148 U.S. 197, 205 (1893) (determining that obstruction required the existence and knowledge or notice of a pending proceeding that the defendant was endeavoring to obstruct.)

<sup>103</sup> *Id.* at 197.

<sup>104</sup> *Id.* at 203–04.

<sup>105</sup> *Id.* at 207.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

pending judicial proceeding in a violation as the Court did. That leap is safe when it comes to transparent verbs, but opaque verbs refuse to follow the ordinary rule of existential entailment.<sup>108</sup> Analogizing to our voter fraud case, *Pettibone* parallels the *Whiteley* court's reasoning: both decisions reflect a not-necessarily conscious assumption that an actual instance of a statutory term ("person entitled to vote" or "administration of justice") was a precondition of liability. In both cases, these courts might have considered liability based on a *de dicto* reading without a textual stretch.

Despite the faulty logic of the *Pettibone* reasoning, and perhaps because the miners were properly acquitted, courts have since been in virtual lockstep in assuming that the omnibus clause requires a pending proceeding by its terms.<sup>109</sup> The Fifth Circuit's confident assertion is typical: "There are three core elements that the government must establish to prove a violation of the omnibus clause of section 1503: (1) there must be a pending judicial proceeding; (2) the defendant must have knowledge or notice of the pending proceeding; and (3) the defendant must have acted corruptly with the specific intent to obstruct or impede the proceeding in its due administration of justice."<sup>110</sup> Only one court has explicitly questioned the pending proceeding requirement, briefly and in dicta.<sup>111</sup>

Moreover, although the specific witness tampering provision at issue in *Arthur Andersen* (section 1512) expressly stated that an official proceeding need not be pending at the time of the offense,<sup>112</sup> the Court assumed nonetheless that liability must be tied to a particular proceeding to support a charge of "persuading another . . . with intent to . . . impair [documents'] . . . availability for use in a judicial proceeding."<sup>113</sup> Without

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<sup>108</sup> See *infra* Part I.

<sup>109</sup> The Supreme Court endorsed this view in *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (citing *Pettibone* for the proposition that a pending proceeding and knowledge of that proceeding is required before there can be "the evil intent to obstruct"). See also *United States v. Triumph Capital Group*, 544 F.3d 149, 166 (2d Cir. 2008) (citing *Pettibone* for the requirement that "the judicial proceeding actually exist"); *United States v. Macari*, 453 F.3d 926, 936 (7th Cir. 2006) (requiring that the government show "that there was a pending judicial proceeding"); *United States v. Weber*, 320 F.3d 1047, 1050 (9th Cir. 2003) (stating that "a defendant can only be convicted under the omnibus clause if there is a pending proceeding"); *United States v. Fleming*, 215 F.3d 930, 934 (9th Cir. 2000) (stating the omnibus clause "has been authoritatively construed to require a pending federal judicial proceeding").

<sup>110</sup> *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989).

<sup>111</sup> *United States v. Novak*, 217 F.3d 566, 571 n.11 (8th Cir. 2000) (assuming *arguendo* that the statute requires a pending proceeding but questioning whether the text requires it).

<sup>112</sup> 18 U.S.C. § 1512(f)(1) (2010).

<sup>113</sup> *Arthur Andersen LLP*, 544 U.S. 696, 707-08 (2005) ("A 'knowingly corrupt

such particularity of intent, the Court reasoned, the firm could not be a “knowingly corrupt persuader.” But on a *de dicto* reading, of course it could, just as one can surely “knowingly corruptly” destroy documents with the single-minded intent to “to keep a judge from seeing them” without having a particular jurist in mind.

For a somewhat starker example of *de dicto* document destruction, imagine an accounting firm that contracts with a cleaning service to provide office waste disposal services, including paper-shredding. See No’Krime Kleenup, has a written but unenforced within-the-hour customer response policy, which it rarely follows. Its brochure urges clients:

*For shredding of documents with intent to impair their use in a judicial proceeding, or for other justice-obstructing requests, please be sure to mention our Customer Response Policy.\**

If SeeNo’Krime directs employees to shred documents pursuant to an “otherwise legitimate”<sup>114</sup> timeliness policy, has it unlawfully obstructed (or endeavored to obstruct) justice? Its intent to obstruct seems clear, if perhaps *weaker* than that of Arthur Andersen, whose management directly feared prosecution. On the reasoning of the *Arthur Andersen* decision, however, the fact that SeeNo’Krime will never have a particular proceeding in mind would appear to insulate it from liability.

To avert misunderstanding, the claim here is not that the Arthur Andersen firm clearly should have been convicted, but rather that it clearly met the intent element on a legitimate literal reading of the statute. There may after all be extratextual reasons for acquittal where the facts satisfy the statute’s *de dicto* but not *de re* reading. The rule of lenity might still have impeded conviction, although we should expect the rule of lenity to be less availing against a *de dicto* reading of a statute, which requires a tight match between the state of mind and the statutory terms. Alternatively, an explicit determination that the statute takes aim only at *de re* violations of obstruction law could have exonerated the firm. Regardless of which way it might have ultimately come out on this issue, the Court bypassed reasoned inquiry when it implicitly rejected a *de dicto* basis for conviction out of hand and without discussion. In doing so, the Court (more than Congress)

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persuader’ cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.”)

\* *Kindly note that our Commitment to Obstruct Justice applies only where we have no particular proceeding in mind.*

<sup>114</sup> *Arthur Andersen LLP*, 544 U.S. AT 568.

abdicated its role in clarifying the contours of a statute broadly aimed at protecting the sanctity and integrity of our justice system.<sup>115</sup>

For its part, Congress swiftly responded to the Enron scandal by enacting yet another obstruction provision to capture subsequent white collar crime scandals and cover-ups. The Sarbanes-Oxley Act of 2002 brought us the supposedly new offense referred to in the literature as “anticipatory obstruction of justice.”<sup>116</sup> As with Britain’s posthumous-voter-impersonation provision, much of what this new category accomplished could have been achieved by reading the statute *de dicto*.<sup>117</sup> And if anticipation of a particular or identifiable proceeding continues to be required, then SeeNo’Krim’s business model could continue to flourish.

This is not to say that *de dicto* readings of text are uniformly ignored in obstruction law or elsewhere. A counter example is *United States v. Aguilar*, which involved a federal judge had been convicted under federal search and seizure law for the giving notice [to a criminal defendant] of the possible interception” of his communication by federal wiretap. If only the *de re* reading were relevant, the prosecution would have had to prove that there was a “possible interception” in fact that the defendant had disclosed. The Supreme Court affirmed Judge Aguilar’s conviction, rejecting the argument that there could be no violation where no “possible interception” existed in fact. In other words, it interpreted “giving notice of a possible interception” *de dicto*. In the *Arthur Andersen* case itself, the government’s argument was based on a *de dicto* interpretation. It argued that the text of the witness tampering statute did not require an intention to obstruct “some particular proceeding.”<sup>118</sup> And in a similar vein, the well-known case of *Morissette v. United States* overturned a conviction for “knowingly convert[ing] government property” that the defendant believed was abandoned property.<sup>119</sup> The conviction could have stood on a *de re* reading (the object was in fact government property, and he knew he was taking it) but it failed to meet the statute’s terms *de dicto* (he did not know he was taking “government property”).

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<sup>115</sup> *United States v. Cueto*, 151 F.3d 620, 628 (1998) (7<sup>th</sup> Cir. 1998) (discussing the legislative purpose behind the omnibus clause).

<sup>116</sup> 18 U.S.C. § 1519 (2010). Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C.S 1519, 89 CORNELL L. REV. 1519, 1555 (2004).

<sup>117</sup> The Sarbanes Oxley Act did clarify that document shredding (as opposed with persuading another to do so as witness tampering) was prohibited, which would not be reached by *de dicto* interpretation. 18 U.S.C. § 1519 (2010).

<sup>118</sup> See Brief for the United States, *Arthur Andersen LLP*, 2005 WL 738080, at \*45 (2005).

<sup>119</sup> *Morissette v. United States*, 342 U.S. 246, 276 (1952).

To conclude, obstruction of justice doctrine veered into an interpretive thicket early on, when the Supreme Court held that its central statutory provision could not be triggered without reference to some pending proceeding.<sup>120</sup> As a consequence, enormous legal energy has been poured into questions about the object of alleged obstruction: is the matter really an “official proceeding”?<sup>121</sup> when exactly does a proceeding begin and cease to be “pending”?<sup>122</sup> must the obstructive conduct begin during the pendency of the proceeding and not before it?<sup>123</sup> and so on. These questions divert attention from a more searching exploration of criminal intent: what state of mind was driving the defendant’s conduct in the case at hand?; is that a culpable state within the meaning of the statute?; does the statute give adequate notice that acting with such an intent is unlawful? These are questions that the courts are uniquely positioned to answer. They also implicate a doctrinal question that linguistic categories can help to frame, namely whether *de dicto* readings of obstruction statutes ought to be available as a basis of prosecution. Such readings are certainly available interpretations as a matter of language. By foreclosing them without considering their viability, the courts have declined to participate in refining obstruction doctrine within the ambiguous statutory language, other than by ad hoc pronouncements of judicially-created elements.<sup>124</sup> It is therefore no wonder that all we have to show for over a century of obstruction law is the present tableau of incoherence.<sup>125</sup> If courts are unable to see a range of plausible literal readings in what Congress legislates, clamoring for Congress to rationalize the code will get no traction on the complex problems of obstruction of justice.

### C. Genocide

Though genocide has occurred throughout history, “the crime of

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<sup>120</sup> See *supra* note XX and accompanying text. Of course, the argument here is that the supposed holding was only dicta, but it has been virtually universally characterized as holding in case law.

<sup>121</sup> See *U.S. v. Mann*, 685 F.3d 714 (8th Cir. 2012) (holding that an official proceeding

<sup>122</sup> See *U.S. v. Layne*, 192 F.3d 556 (6<sup>th</sup> Cir. 1999) (A judicial proceeding is a “pending proceeding” until disposition is made of any direct appeal taken by the party claiming error that would result in a new trial.)

<sup>123</sup> See *Mann*, 685 F.3d 714, 719.

<sup>124</sup> See O’Sullivan, *supra* note XX at 398 (discussing the proliferation of judicially created elements in the omnibus provision).

<sup>125</sup> Professor Chris Sanchirico in 2004 referred to federal spoilation code as “apparently the Peter Pan of evidentiary procedure” for being “deemed ‘immature’ for almost seventy-five years.” Sanchirico, *Evidence Tampering*, 53 DUKE L. J. 1215, 1248 (2004).

crimes” first became cognizable in 1948 through the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).<sup>126</sup> With its roots in the work of Polish jurist Raphael Lemkin, who coined the term to capture the gravity of the Holocaust,<sup>127</sup> the Convention’s genocide definition has perplexed international tribunals and stirred debate in human rights commentary.<sup>128</sup> Trials now being conducted by the International Criminal Tribunal for Rwanda (“ICTR”) are a case in point.<sup>129</sup> The 1994 campaign of violence by the majority Hutu against the minority Tutsi population of Rwanda caused an estimated 800,000 deaths and was condemned worldwide as genocide.<sup>130</sup> In the social science literature on the causes and characteristics of genocide, there is little disagreement that the Rwandan mass killings constituted a genocidal campaign that targeted an entire people for destruction based on group identity, where group-directedness is the sine qua non of genocidal intent.<sup>131</sup> One prominent genocide scholar cites Rwanda as an uncommonly clear case of genocide, due to the perpetrators’ explicit intent – as shown by their incitement violence on state-sponsored radio programming, for example -- to exterminate the Tutsi “vermin.”<sup>132</sup> Yet when it comes to interpreting the definition of genocide as a crime under international law,

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<sup>126</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>127</sup> RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944) (calling for an international criminal law response to the holocaust perpetrated against the Jewish people in Europe during World War II); *See also* Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 *Am. J. Int’l. L.* 145, 146 (1947) (describing genocide as grounded in hatred of a group or desire to “exterminate” the group.)

<sup>128</sup> *See* RICHARD ASHBY WILSON, *WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS* (2012) (providing a detailed account of the ICTR’s inconsistent approach to interpreting the genocide definition); WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2000) (recounting the history of genocide law and its interpretation); Diane Marie Amman, *Group Mentality, Expressivism, and Genocide*, 2 *INT’L. CRIM. L. REV.* 93, 95 (2002) (proposing an expressivist approach to the Genocide Convention to resolve tensions in interpretation).

<sup>129</sup> As of this writing, the ICTR has completed adjudication of forty-eight cases, with nine cases now pending and five awaiting trial. Status of Cases, International Criminal Tribunal for Rwanda. <http://www.ictor.org/default.htm> (last visited September 3, 2012).

<sup>130</sup> *Rwanda: How the Genocide Happened*, BBC NEWS (December 18, 2008, 9:53 AM), <http://news.bbc.co.uk/2/hi/1288230.stm>.

<sup>131</sup> Examples of politically motivated mass murder include Mao’s Cultural Revolution in China and For a discussion that distinguishes genocide from *See* Barbara Harff, *No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder Since 1955*, 97 *AM. POL. SCI. REV.* 57, 57 (2003) (“Perpetrators rarely signal their intentions as clearly as Hutu extremists did in Rwanda in the early 1990s when they characterized Tutsis as vermin and proposed to eradicate them.”)

<sup>132</sup> *Id.*

the ICTR has struggled to find that even those responsible for large-scale massacres possessed the requisite *mens rea* as the Convention defines it.<sup>133</sup>

### 1. Interpreting Genocide in the Rwanda Tribunal

In order for violence to be criminalized under the Genocide Convention, the defendant must be shown to have acted “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>134</sup> The stumbling block for the ICTR has been that, by its accepted definitions of these four dimensions of group difference, it is unclear which of them, if any, describe the distinctiveness of the Tutsi people.<sup>135</sup> Historically, the categories Tutsi and Hutu originated in a precolonial socioeconomic hierarchy among Rwanda’s main identity groups, and these categories were later racialized and reified by Belgian colonizers beginning in the 1930s.<sup>136</sup> But to the extent anyone could speak of race as an objective fact, Rwandan Tutsis are not racially distinct from the Hutu majority.<sup>137</sup> Nor do they have different national identities.<sup>138</sup> They do not practice a different religion from Hutus; and the two groups’ shared language and culture blur any distinction by ethnicity, according to the ICTR.<sup>139</sup> Moreover, while Rwandan citizens in 1994 carried state issued identity cards classifying them as ethnically Hutu or Tutsi, the boundaries between the categories are porous enough to permit movement between the categories.<sup>140</sup> Thus, while it was obvious that perpetrators had possessed the intent to destroy the Tutsis as a group, ICTR proceedings were dominated by debate on the threshold question, “Is this group in fact a

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<sup>133</sup> See *Prosecutor v. Akayesu*, Case ICTR-96-4-T, Judgment, (September 2, 1998) (Kama, Aspegren, Pillay, JJ.) (struggling to determine Tutsis and Hutus as distinct ethnicities).

<sup>134</sup> “Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

<sup>135</sup> See WILSON, *supra* n. XX at 236.

<sup>136</sup> *Id.* at 238-40.

<sup>137</sup> *Prosecutor v. Akayesu*, Case ICTR-96-4-T, Judgment, (September 2, 1998) (Kama, Aspegren, Pillay, JJ.) (citing the basis of the distinction between Tutsis and Hutus).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

racial, ethnic, religious or national group?” In its early deliberations, the ICTR was clearly vexed by the question of whether perpetrators of mass murder could be convicted of genocide if in fact the Tutsis do not meet the criteria of being a race, ethnicity, religious group, or nationality.<sup>141</sup> The conventional answer, based on what many assert to be a literal reading of the Convention’s text, was “no.”<sup>142</sup>

The ICTR waffled on how to resolve this dilemma in its early judgments. In the prosecution of Jean-Paul Akayesu, a mayor who had overseen mass murder in his commune, the tribunal compared “objective” facts about the Tutsis in history and Rwandan society to the categories found in the genocide definition.<sup>143</sup> In a what one commentator calls a seriatim approach to applying the statute, the panel tested the fit of each term to the Tutsi category one at a time, focusing on race and ethnicity as more likely matches.<sup>144</sup> It found that the Tutsis did not meet either classification, though their distinctiveness encompassed aspects of both race and ethnicity. The ICTR panel then revisited the meaning of the intent provision itself. Based in part on the United Nations Genocide Committee’s *travaux préparatoires* as a form of legislative history, it concluded that the terms “racial, ethnical, religious or national group” should be understood to mean more broadly “a stable and permanent group.”<sup>145</sup> The Tutsis met those criteria, and Akayesu’s conviction followed. But so did criticism and debate. Prominent international human rights scholar William Schabas has criticized the stable-and-permanent-group test a brazen deviation from the text, which he believes requires a distinct ethnic identity of a target group in order for genocide to have occurred.<sup>146</sup> Another commentator described the *Akayesu* opinion as “an unjustifiably liberal interpretation both of the terms of the Convention, and the intention of the drafters.”<sup>147</sup> Others faulted the ICTR for grounding its judgment in objective standards of group identity rather than in the social

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<sup>141</sup> WILSON, *supra* n. 108 at 238-45.

<sup>142</sup> *Id.* at 238.

<sup>143</sup> *Akayesu*, Case ICTR-96-4-T, Judgment, (September 2, 1998) (Kama, Aspegren, Pillay, JJ.)

<sup>144</sup> Diane Marie Amman, *Group Mentality, Expressivism, and Genocide*, 2 INT’L. CRIM. L. REV. 93, 95 (2002).

<sup>145</sup> WILSON, *supra* note. XX at 246.

<sup>146</sup> WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 110 (2000). (“It is necessary, therefore, to determine some objective existence of the four groups,” (referring to the race, religion, ethnicity and nationality).

<sup>147</sup> Nina H.B. Joergensen, *The Definition of Genocide: Joining the Dots in the Light of Recent Practice*, 1 INT’L. CRIM. L. REV. 285, 288 (2001).

construction of identity categories and the subjective intent of the perpetrators.<sup>148</sup>

In subsequent prosecutions, these tensions played out in the ICTR's decisions, which collectively espoused a mishmash of objective and subjective criteria, victim and perpetrator perspectives, textual and extratextual factors, and varying definitions of ethnicity. In the 1998 prosecution of C. Kayishema, for example, the ICTR revisited the question of ethnicity and, by criteria broadened to include "a group identified as such by others, including perpetrators of the crimes," found the Tutsis to be an ethnic group.<sup>149</sup> Importantly, the *Kayishema* panel did not find that the Hutus' subjective regard of Tutsis as an ethnic group was what made their intent anti-ethnic. Rather, they held that the attitudes of Hutus toward the Tutsis *made* the Tutsis an ethnic group *in fact*.<sup>150</sup> In other words, the *Kayishema* panel was following *Akayesu* in focusing on what the Tutsis "really" were; i.e., reading the genocide definition *de re*. While the pronouncement in *Kayishema* would appear to have settled the question of Tutsi ethnicity and whether those who attacked them *qua* Tutsis possessed genocidal intent, the tribunal in 1998 decided that issues of the intent element of genocide should be analyzed on a case-by-case basis – an approach starkly at odds with the sweepingly programmatic nature of the Rwandan atrocities.<sup>151</sup> It is no wonder that the ICTR's jurisprudence on genocidal intent has been characterized as "ultimately confused."<sup>152</sup>

## 2. *De re* and *De Dicto* Readings of Genocide

To the extent that the ICTR's confusion stemmed from difficulty reconciling an intuitively clear example of genocide with the meaning of a text, the Tribunal might have more successfully harmonized these forces if it had recognized that the genocide definition was structurally ambiguous. The verb "intend" is opaque, and its variant "with intent to" is likewise susceptible of *de dicto* and *de re* readings.<sup>153</sup>

<sup>148</sup> See WILSON, *supra* note XX.

<sup>149</sup> Prosecutor v. Kayashima, Case No. ICTR-95-1, Judgment (May 21, 1999).

<sup>150</sup> *Id.* The further opined that perpetrators' subjective views of a targeted group as a distinct ethnicity must be "objectively reasonable," for which the tribunal has attracted sharp criticism. See WILSON, *supra* n. 108 at 181. ("This has to be one of the more perplexing statements in international legal reasoning....")

<sup>151</sup> Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence (Dec. 6, 1999).

<sup>152</sup> WILSON, *supra* note XX.

<sup>153</sup> Recalling the test for non-specific readings as diagnostic of opacity, one can "intend to eat a cupcake, but no particular one." *Supra* note XX and accompanying text.

i. Genocidal Intent *De re*

On a *de re* reading the “intent to destroy a racial, ethnical, religious or national group” is satisfied only if the Tutsis are in fact one of these sorts of groups. We can paraphrase the *de re* reading this way:

*de re*: There exists some X that is in fact a national, ethnic, racial or religious group, and the perpetrator intended to destroy X.

In applying this reading to the facts, a court would compare the characteristics of the Tutsi group to definitions of nationality, race, ethnicity and religion, one by one like a computer would, checking for a match. If the group does not fit any one of the four categories listed, then no genocide can have occurred. This is just the sort of mechanistic reasoning that the ICTR emulated, apparently believing the text constrained them to do so. Despite differences among the reasoning in *Akayesu*, *Kayeshima* and other decisions, all ICTR panels seemed to have uncritically accepted this logic across the board and therefore had to strain to fit the Rwandan facts into the statutory framework.

ii. Genocidal Intent *De dicto* – Three Variations

A *de dicto* reading moves away from scrutiny of what sort of group the Tutsis “really” are and forces us to grapple with the nature of the perpetrators’ intent directly. Or more accurately, *de dicto readings* orient us this way, for there is more than one way to read the genocide definition *de dicto*, owing to the disjunctive list that falls within the scope of “intent to destroy.” I propose thinking about these possibilities in successive stages of remove from the particularist *de re* reading. After dispensing with one implausible *de dicto* reading,<sup>154</sup> these stages progress along what I’ll call low, middle, and high road interpretive paths, according to the degree to which they illuminate what it means to call some state of mind genocidal. So, beyond the goal of reconciling the Genocide Convention’s text with Rwandan events as a prototypical example of the crime, drawing out its different meanings can harmonize legal analysis with a more searching

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<sup>154</sup> The implausible *de dicto* reading is one in which the perpetrators’ intent is directed against “some national, ethnic, racial or religious group or other” without any particular target in mind.

inquiry of what sets genocide apart. I argue that the essence of a genocide is not its group-based targeting of what just happens to be a racial, ethnic, religious or national group (*de re*), but its targeting of a group as *a people*, where we know what is meant by “a people” by reference to the four named dimensions of difference. The payoff at the end of the high road is a view of genocide that sees its legal, linguistic, social and psychological strands braided together, a perspective that was regrettably absent from the ICTR’s definitional fumbling

The low road *de dicto* interpretation paraphrases the text this way:

*de dicto 1*: Perpetrator intends to destroy some group as “an ethnic group” (or as “a national group,” or as “a racial group,” or as “a religious group”)

This reading has much in common with the reasoning of the *Kayishema* judgment.<sup>155</sup> The subtle difference is between whether the perpetrators’ view makes the Tutsis an ethnic group in fact (the *de re* reading in *Kayishema*), from which genocidal intent follows, or whether it makes the intent genocidal directly as a function of the Hutus’ anti-ethnic intent. It captures facts in which the Hutu perpetrators were aiming to destroy the Tutsis as a group, which it considered to be an ethnic group (the most likely fit among the four supercategories), even if the Tutsis do not objectively meet the criteria for “ethnic group” or any of the other three listed dimensions of difference. This interpretation would have been a textually expedient way out of the ICTR’s interpretive dilemma. Some commentators, by their approval of the *Kayishema* reasoning, would endorse this take on the definition precisely because it locates the intent element squarely in the mind of the perpetrators.<sup>156</sup> And by moving the focus off of the features of Tutsi distinctiveness in fact, this view does seem to come a step closer to the zeroing in on the intent behind genocide than does *de re* interpretation. But others have cautioned that it risks reifying the rigid, exogenous categories that supported a campaign of mass violence in the first place.<sup>157</sup> Moreover, taking as given the ICTR’s finding that the Tutsis are not linguistically or culturally an ethnic group in fact,<sup>158</sup> calling Rwandan atrocities genocide in this way would impute something like

<sup>155</sup> See text accompanying *supra* note 143.

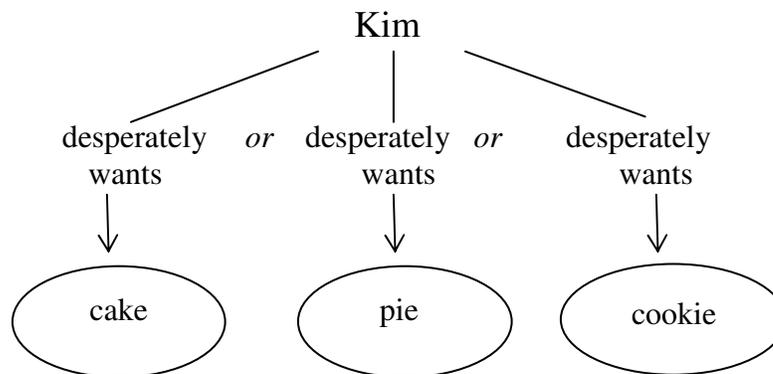
<sup>156</sup> See, e.g. See NIGEL ELTRINGHAM, ACCOUNTING FOR HORROR (2004) (describing the wholly ideational nature of genocidal intent.)

<sup>157</sup> See WILSON, *supra* note XX at 180-81.

<sup>158</sup> *Akayesu*, Case ICTR-96-4-T, Judgment \_\_\_ [paras. 170, 513] (September 2, 1998) (Kama,Aspegren, Pillay, JJ.)

“mistake” to its perpetrators---either as to the features of Tutsi group characteristics or as to the meaning of “ethnicity.” If we take seriously the notion that the killings would not have been genocidal but for the perpetrators’ mistaken view that the Tutsis are an ethnic group, we cannot turn around and say of Rwanda, as United Nations Ambassador Samantha Power has said, “The case for a label of genocide was the most straightforward since the Holocaust.” So in spite of the superficial appeal of the low road interpretation, we would do well to move on to less fragmentary understandings of genocide.

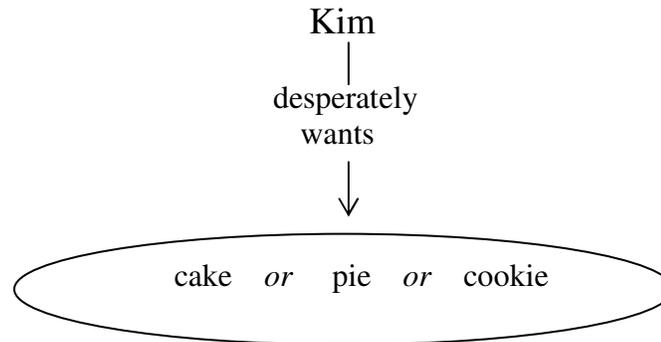
The argument for a middle road *de dicto* reading reprises our earlier discussion of disjunction in opaque contexts.<sup>159</sup> Recall the sentence, “Kim desperately wants a piece of cake, a piece of pie, or a cookie,” compared to its counterpart with the transparent verb “ate.” Unlike the transparent sentence, the opaque sentence is ambiguous, not just between *de re* and *de dicto*, but also between setting up a *distributive* versus a *collective* relationship between the list and the opaque verb.<sup>160</sup> The distributive *de dicto* reading is built like the transparent reading (in the genocide context, the low road reading). On this understanding of the Kim sentence, we are talking about three different desires---three different mental states, any one of which would make the sentence true---and claiming at least one of them describes Kim. For example, if you were a restaurant server who was confused about Kim’s urgent dessert order, we could depict your thinking this way, as in “Table Seven desperately wants X, Y, or Z, but I can’t remember which one”:



<sup>159</sup> See text accompanying *supra* notes 29—31.

<sup>160</sup> There is no collective transparent reading. What is transparently true for the list is true for one or more of its disjuncts.

By contrast, the collective reading (the middle road) describes one state of mind that relates to a whole list. Such a mental state maps out very differently:



On this reading, Kim desperately wants something or other that is represented in the list, but without predilections among them, so that we could not say of any of the items that Kim “desperately wants” that type. Indeed, it does not make sense to ask “which one” category fits the facts, when the entire list collectively defines one intent-state.

In the context of genocide, the paraphrase of the middle road reading looks like this:

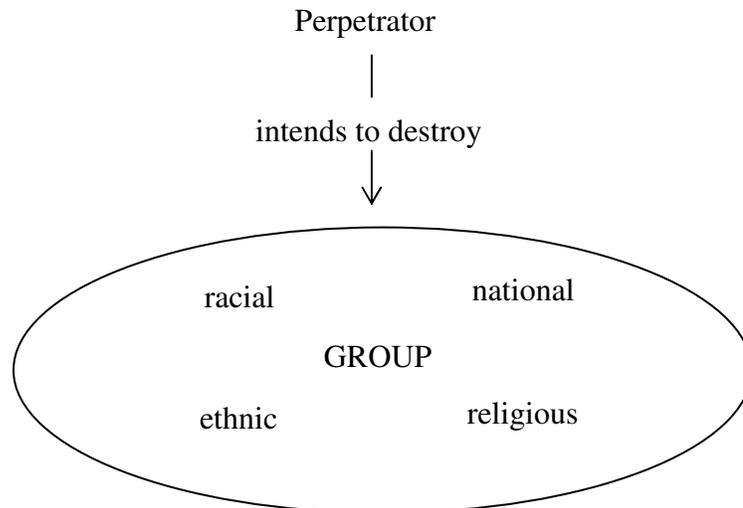
*de dicto* 2: Perpetrator’ intends to destroy some group as “a national, ethnic, racial or religious group.”

In other words, the intent here is group-based and “anti-national/ethnic/racial/religious.” This reading views genocidal intent as unitary, rather than as a collection of four different flavors of intent cobbled together. It would be satisfied where, if asked whether the Tutsis are a group by any of the labels on the list, the perpetrators would simply answer Yes, without necessarily having a belief about any one category as most apt. This view captures something important about reasoning about genocide that inquiries into specific intent miss, namely the mismatch between a particularistic legal standard and the *indifference* of perpetrators when it comes to the actual qualities of their targets. It seems unlikely that the genocide’s architects had ruminated over, much less cared about, what “kind” of group the Tutsis are. Yet predicating genocidal intent on the Hutus’ acceptance of one of the four labels---even in the aggregate---to describe their target, still seems artificial. Indeed, what we know about how Hutus categorized the Tutsis suggests that they had little thought of their targets as any class of human being whatsoever. The term frequently used

to refer to the Tutsis violence-inciting radio broadcasts was *inyenzi*, meaning “cockroaches.”<sup>161</sup> The fiction of the perpetrators categorizing their victims at the genocide definition’s level of abstraction is a drawback that invites a still more nuanced reading of the intent element.

The high road reading is harder to see, but it is worth unpacking because it may be the interpretation most faithful to the conceptual sweep of genocidal intent. Returning to our concrete Kim example, I argued earlier that the sentence “Kim desperately wanted a piece of cake, a piece of pie, or a cookie” can be typified by reference to something that does not fit any of those individual categories but that represents an amalgam of those categories’ properties. A whoopie pie, for instance, could be a prime example of something that would satisfy exactly the desire expressed by the sentence. It might even be a superior example to an item in the listed class, because its features reflect the list as a whole, and therefore the desire that relates to the list collectively.<sup>162</sup>

In a grammatically parallel fashion, although in the most serious context imaginable, the perpetrators’ intent in Rwanda can be an exemplar of genocidal intent defined in terms of four categories, even if the Tutsis do not as a group fit into any single one of the separate categories from any perspective. The intent requirement could be drawn this way:



<sup>161</sup> *Id.* [paras. 148, 149]

<sup>162</sup> This assumes that mixing and matching features of the categories is acceptable, as it would be in the case of the genocide categories but not, say, in the context of wanting “coffee, tea, or milk.”

This formulation is more difficult to align with the syntax and even the vocabulary of the Genocide Convention, but here is an attempt at a paraphrase:

*de dicto* 3: The perpetrator intended to destroy some group as *a people*, to wit, a national, ethnic, racial or religious group.

This reading does not require that the Hutus consider the Tutsis to be distinctive along the named lines. It requires that the intent to destroy them be directed at Tutsis *qua* a people, where the four categories act as corner-posts to frame this sense of what a people is. The Tutsi group is defined by an amalgam of the properties that make up the four listed group-types. It is reasonable to infer that the intent to harm them falls comfortably within this frame.

Some may object that this “reading” rewrites the text, either by substituting the *Akayesu* tribunal’s “stable and permanent group” generalization, or by reading in an implied catch-all phrase (“ . . . or some other similar group), either of which could will broaden the definition to cover all manner of violence (against women, sexual minorities, political groups) that the Convention drafters meant to exclude. My claim is that the high road reading does not supplement the text; rather, it fills gaps between categories to reflect that the intent need not replicate those gaps. The perimeter of the intent space is mapped by the text. It does not include “other” types of groups at all---the Tutsis’ distinctiveness was not captured by any “type” of difference, but it *was* captured in the interstices of the listed supercategories. Unless there is good reason to believe that the intent standard did not mean to cover groups which are typologically stranded in this way, then it is reasonable to fill these cracks by inference.

The high road *de dicto* interpretation finds support in the origins of genocide law. Raphael Lemkin’s own writings frequently mention “peoples,” “populations,” and “entire human groups” as the targets of genocide.<sup>163</sup> In coining the term, Lemkin referred to the definition of the Greek root “genos” as “race or tribe.”<sup>164</sup> This etymology has been widely repeated in historical accounts of genocide law, and some have argued that it illustrates the privileged status of “racial” in the genocide definition, as though the other categories were conceptual add-ons.<sup>165</sup> To the extent the

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<sup>163</sup> See Dianne RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944).

<sup>164</sup> RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79 (1944).

<sup>165</sup> See See David Luban, *Calling Genocide by Its Rightful Name: Lemkin’s Word*,

origin of the term is relevant to interpretation, the gloss of the Greek root as “race” tends to distort its basic meaning, which is more generally defined as “kind” or “type.”<sup>166</sup> If genocide quintessentially targets a *kind* (as in, “We don’t like your kind,”), then the categories of nationality, race, ethnicity and religion correspond to *kinds of kinds* of people. Destructive intentions toward some group *qua* a people is perhaps as basic a definition of a genocidal mentality as possible. Yet such a formulation would obviously be unworkably broad as a text for criminalizing genocide, as would the addition of catch-all phrase, “. . . or some other kind (or kind of kind) of people.” It therefore makes sense that the Convention was drafted – and should be interpreted -- with the four named categories representing corner-posts that define the *intent* to destroy a people as such, not the distinctiveness of the targeted *people*.

To summarize, the Convention’s text supports the intuitive observation that genocidal intent does not hinge on whether or not the targeted group happens to be so-called protected group, as though the Convention were the equivalent of an international Endangered Species Act.<sup>167</sup> Nor is genocidal intent a superset composed of four distinct subtypes of intent---nationalist, racist, anti-ethnic and anti-religious---as though these four have been grouped together in one phrase for efficiency’s sake. Rather, there is distinctive mentality that the international community has seen fit to call by one name: genocidal. Though four categories define and give shape to that intent, no single one of those dimensions of difference need correspond to the facts of mass atrocities in order for that intent to be present, in order for genocide to have occurred. There is nothing about the text of the genocide definition that forecloses such a conclusion. If ever there was a body of law that should resist reductive analysis and demand this sort of *in toto* interpretation, it is “the crime of crimes.” International criminal tribunals can effectuate this understanding of genocide by recognizing the possibilities in its *de dicto* readings.

#### D. Disability Rights

Overlooked ambiguity lurks in civil as well as criminal statutes, as

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*Darfur, and the UN Report*, 7 CHI. J. INT’L. L. 1, 9 (2007) (arguing that Lemkin’s definition of genocide should be revised to include the intent to “exterminate” a group).

<sup>166</sup> D.N. STAVRAPOLOS, OXFORD GREEK-ENGLISH LEARNER’S DICTIONARY (MODERN) 233 (8<sup>th</sup> ed. 2010). See also PINKER, THE LANGUAGE INSTINCT, *supra* note XX at 45 (1997) (tracing grammatical gender to its root meaning of “kind”).

<sup>167</sup> Interestingly, at least one proponent of revising the Genocide Convention has likened its protections to those applied to endangered species. See David Luban, *supra* n. 137 at ”).

the jurisprudence of the recently-amended Americans with Disabilities Act demonstrates. According to the orthodox account of ADA history, the Act featured a naively-drafted definition of disability, which, when scrutinized by the courts, failed to capture many instances of unequal treatment that ADA drafters themselves had expected to be actionable.<sup>168</sup> A linguistically based account turns this standard story of so-called literalism on its head. What hamstrung the ADA was not close and rigorous reading, but a failure to notice the same kind of ambiguity that is present in the impersonation, obstruction, and genocide statutes. Elsewhere I have offered a detailed account of how the ADA's broad remedial purposes could have been reconciled with its text without resorting to legislative amendment. A brief summary of that argument follows, and it sets the stage for reflecting on how such a flawed analysis came to lodge itself in disability rights law, at least until (and perhaps beyond) the passage of the ADA Amendments Act of 2008.<sup>169</sup>

Like the texts in impersonation, obstruction, and genocide law, the ADA's central antidiscrimination provision was formulated in terms of an opaque verb, in this case, *regard*. In order to claim the ADA's protection from discrimination (often in employment), claimants had to prove as a threshold matter that they had—or were *regarded as* having—a disability.<sup>170</sup> (While it may seem odd at first glance to equate “having a disability” with being regarded as having a disability, it makes sense in the domain of antidiscrimination: being treated as more limited than you are because of some physical or mental condition, and being denied opportunities as a result, is at once discriminatory and disabling.) In the definition, disability is further broken down in terms of “an impairment” that limits “a major life activity.”<sup>171</sup> Thus, claimants who sought to establish regarded-as disability had to prove that they were “regarded as

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<sup>168</sup> Conditions found not to be disabling within the meaning of the ADA included cancer, diabetes, and kidney disease. Perhaps the high water mark of restrictive ADA interpretation was the Fourth Circuit's decision in *Littleton v. WalMart*, 231 Fed.Appx. 874 (11<sup>th</sup> Cir. 2007) (holding that plaintiff's “mental retardation” was not a disability within the ADA). An important article for anyone charting the ADA's development is Chai R. Feldblum's *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB. L. 91, 147 (2000).

<sup>169</sup> For a detailed argument that contests the blame-the-drafters story of the ADA, see Anderson, *Just Semantics*, supra note \_\_, at 1022–42.

<sup>170</sup> *Id.* at 995. Strictly speaking, having a disability includes being regarded as having a disability, according to the statute. 42 U.S.C. § 12112(a) (2010). It is common, though, to distinguish the three prongs of the definition by referring to “actual,” “regarded as” and “record of” disability.

<sup>171</sup> 42 U.S.C. § 12112(a) (2010).

having an impairment that substantially limits a major life activity.” Plaintiffs could not meet this threshold requirement, the courts reasoned, without proving “which impairment” and “which major life activity” the employer had in mind.<sup>172</sup> Very often this was impossible simply because the employer had no such *thing*—a specific major life activity—in mind. The closer the employer’s motivations hewed to disability bias, the harder it was for claimants to prove they had been regarded as disabled.

Following several examples of ambiguous opaque constructions, two distinct readings of “regarded as limited in a major life activity” may jump off the page. In case not, here are paraphrases that distinguish the *de dicto* and *de re* interpretations of the definition’s major-life-activity requirement:

*DE RE:* There is some X, and X is a major life activity, and the employer regards the claimant as being substantially limited in X.

*DE DICTO:* The employer regards the claimant as being substantially limited in some “major life activity” or other.

By assuming that there must exist some particular major life activity that the regarader had in mind in order for the statute to apply, the courts were tacitly endorsing a *de re* reading, apparently without considering alternatives.<sup>173</sup> The *de dicto* reading would have corresponded to facts where the employer simply regarded the claimant as matching the description “disabled” (i.e., impaired and substantially limited), in some unspecified way or another, and took adverse action as a result. Examples could include hearing rumors of disability in general associated with an employee or applicant, or inferring that an applicant is disabled because his résumé lists Disability Studies as his college major.<sup>174</sup> Such facts would seem to epitomize disability discrimination precisely because they generalize so broadly from limited information about a particular individual. Yet by the courts’ *de re* reasoning, even a hypothetical smoking gun case of discrimination – an employer who tells a worker by email that he is being fired “because I’ve heard you have some disability or other” –

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<sup>172</sup> Anderson, *supra* n.137, at 1001.

<sup>173</sup> *Id.* at 1040–42 (maintaining that the courts were oblivious to ambiguity as evidenced by the fact that they never gave reasons for preferring one reading over another, or for couching their approach in “plain meaning” terms).

<sup>174</sup> For a discussion of these and other “proxy” examples of disability discrimination, see Anderson, *supra* note 17, at 1061–63.

would not be actionable, because the claimant could not prove “which major life activity” the employer had in mind.<sup>175</sup> In spite of this sort of odd result, the courts overlooked a *de dicto* reading that would have effectuated the ADA’s antidiscrimination purpose, for nearly two decades.<sup>176</sup>

Even more puzzlingly, disability rights advocates did not notice an entirely natural way to read the ADA that would have readily served their clients’ interests. Instead, they acquiesced to the courts’ so-called literal interpretation, conforming their arguments to it, sometimes absurdly, even as it took down one meritorious claim after another.<sup>177</sup> Commentators likewise blamed the statutory language and joined in the call to amend it.<sup>178</sup> This view carried the day with the recent enactment of the ADA Amendments Act of 2008 (ADAAA). If poor drafting of the ADA was the misdiagnosis, then the ADAAA may amount to elective surgery for a condition the patient did not have.<sup>179</sup> Although the revised statute removes the nettlesome “major life activity requirement” from the test for “regarded-as-disabled,” it did not address the underlying misunderstanding of the statute that flows from particularistic, *de re* assumptions.<sup>180</sup> It is too early

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<sup>175</sup> *Id.* at 1000–1001 (discussing a smoking gun scenario). See also Elizabeth F. Emens, *Disabling Attitudes: U.S. Disability Law and the ADA Amendments*, 60 AM. J. COMP. L. 205, 212 (2012) (noting the absurdity of expecting that employers will have thought about “major life activities”).

<sup>176</sup> Anderson, *supra* note XX at 1023-36 (discussing how courts missed *de dicto* readings).

<sup>177</sup> There is certainly room for debate as to whether an appropriately capacious reading of the ADA would have supported the interpretations sought by disability rights advocates. But the courts never reached that question because structural ambiguity was apparently never raised before the courts. See Anderson, *supra* note XX at 1033–34 (noting that advocates have failed to argue for a *de dicto* reading of the statute)..

<sup>178</sup> *Id.*

<sup>179</sup> This characterization of the ADAAA speaks primarily to changes to the regarded-as prong, although there were other aspects of the amendment.

<sup>180</sup> The amended definition of disability is unchanged apart from a qualifying paragraph that appears to remove the “major life activity” requirement from the regarded-as prong. This addition is not exactly semantically coherent because it states a contradiction: it refers to “an impairment that substantially limits . . . a major life activity,” subject to the caveat that the impairment need not limit a major life activity.

(1) DISABILITY.—The term ‘disability’ means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

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(3) A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has

to tell how the amended ADA will be interpreted in the courts, but the changes leave open the possibility that this faulty reasoning will be brought to bear next on the criterion of “impairment,” which remains unchanged by the ADAAA. As a result, plaintiffs who cannot show “which particular impairment the regarader had in mind” should be prepared for the same sorts of interpretive errors that eviscerated the original ADA.

Before turning in Part III to the puzzle of why we overlook certain literal readings, it is worth considering the claim that the ADA’s impotence was not a matter of how the courts read the statute, but rather of the political preference of some courts for reading the ADA narrowly. Setting aside the question of how hostility to a popular statute could be virtually unanimous across two decades and all fora of judicial decisionmaking, there is a simple reason why a political explanation is incomplete at best: the plaintiffs’ bar was just as benighted about the text as the bench. Disability rights advocates, who were surely motivated to make textual arguments for broad ADA coverage, were univocal in their call for redrafting the statute, even though the argument for *de dicto* interpretation had never been tested in court.<sup>181</sup>

Relatedly, the persistence of misreading could be framed in terms of path dependence: once the statute had been misread and a precedent established, it was impossible to backtrack. True, prior choices often constrain subsequent choices even when the original choice was a product of random facts or circumstances that have since changed, and this does add to the inertia of in an irrational decisionmaking pattern. But the intransigence of misreading in disability, impersonation, obstruction, and genocide cases seems to have a different flavor. The systematic neglect of *de dicto* readings does not stem from one original instance of misreading by happenstance, but to enduring patterns of reasoning about an entire class of sentences. Against this backdrop, politics and path dependence do little explanatory work. Instead, as argued below, the cognitive and disciplinary factors that contribute to misreading opaque constructions would be at least as likely to influence the fiftieth judge scrutinizing the text as the first judge.

To sum up, the four examples of misreading discussed here leave us with a set of rhetorical questions. If giving a dead person’s name at the

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been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S.C. 12101 (2010).

<sup>181</sup> Anderson, *Just Semantics*, *supra* note 17 at 1033.

voting polls or selling advertising while falsely claiming to be working for the federal government is not fraudulent impersonation, what on earth is? When the Arthur Andersen firm was shredding documents, what was it intending to do if not influence the administration of justice? Could there be a clearer example of disability discrimination than an employer who says, “I refuse hire you because I’ve heard you have some disability or other, and I don’t know or care what it might be”? What shall we call what happened in Rwanda if not a genocide driven by a prototypical case of genocidal intent? In this latter context, the ICTR’s focus on whether the Tutsis were a “protected group” was as linguistically surreal as it was exasperating for human rights lawyers. Richard Wilson has captured the strangeness of this jurisprudence succinctly: “Why was an issue that was so straightforward for Hutu Power activists as they embarked upon their killing spree so difficult for international lawyers?”<sup>182</sup> The next Part converts these rhetorical questions into an answer-seeking one: Why do lawyers misread?

### III. WHY DO LAWYERS MISREAD?

This Part explores problems with opaque constructions in law as a mystery of metacognition colliding with legal praxis. It draws on empirical and theoretical literature on opaque sentences in particular and on reasoning more generally. Together this research suggests that, in spite of our competence in handling opacity unconsciously in everyday speech, our explicit analyses of these constructions may be especially vulnerable to cognitive bias. I argue further that certain features of the legal context tend to amplify rather than dampen the distortion. If this is right, then our misreading of opaque sentences is tantamount to giving cognitive bias the force of law.

#### A. *Clues from Psychology*

Legal interpretation of opaque sentences implicates at least two branches of cognitive psychology: psycholinguistics (the study of how we acquire and process language) and the science of how we reason more generally. In considering these crosscutting literatures, I hope not only to unearth substantive clues to the phenomenon of legal misreading, but also to map out a paradox at the core of overlooked ambiguity. As with many phenomena that are in plain view yet escape our awareness, once we notice

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<sup>182</sup> WILSON, *supra* note XX at 221.

the overlooked literal readings of statutes, it seems surprising that we could have missed them in the first place. On the other hand, those vexing thing-oriented questions that courts have posed---what is the alleged ‘major life activity’ (or person entitled to vote, or ethnic group, etc.), and is it really a major life activity, etc., within the meaning of the statute?---seem analytically correct somehow. For lawyers who are accustomed to tailoring their arguments to these criteria, the claim that “there doesn’t have to be an X” for the statute to apply, where X is a phrase staring back at us from the statutory text, can be a hard sell. One disability rights advocate expressed skepticism (toward the argument that no particular major-life-activity need be alleged in order to satisfy the ADA’s text) this way: “That may be fine for a law review article, but we have a federal judge to convince.” When we analyze opaque constructions step by step, it seems, our intuitions about how language works clash with our lawyerly intuitions about how to methodically prove a claim. Any psychologically-based account of legal misreading should make sense not only of the underlying error patterns, but also of the way we oscillate between trusting linguistic and legal expertise.

#### 1. Evidence from Psycholinguistics: Acquiring Opacity

With appropriate caveats on generalizing from language development to statutory interpretation,<sup>183</sup> the errors that children make in dealing with opacity can be a source of insight for lawyers because they closely parallel our legal misreading of opaque contexts. Whereas opacity has yet to be acknowledged as a category in law, opaque constructions have inspired a vast and vibrant body empirical study in psychology. Here we should qualify the claim that in everyday conversation “we” would never make the sorts of interpretive errors that courts have made in our examples. That is true in the main, but it is not strictly true. Some of us do make a similar kind of mistake, demonstrating a blind spot for ambiguity and detecting *de re* readings only. Besides courts, two other much-studied populations who have trouble handling opacity are children under the age of four to six<sup>184</sup>

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<sup>183</sup> Statutory interpretation is a uniquely situated use of language that has not been studied from a psycholinguistic perspective. The parallels drawn in this section are suggestive rather than direct. Taking this a step further, Dennis Patterson has argued that the activity of legal reading is *sui generis* and therefore linguistics is irrelevant to it. *Against a Theory of Meaning*, 73 WASH. U. L. REV. 1153, 1153 (1997) (describing linguistics as “a red herring on the trail to discovering the meaning of legal texts”).

<sup>184</sup> See, e.g., THOMAS ROEPER, *THE PRISM OF GRAMMAR* 255-66 (2006) (explaining empirical evidence for four-year-olds’ confusion in attributing mental states to others in linguistically ambiguous contexts, and their preference for interpretations that are evident from the observable world).

and older children with diagnoses on the autism spectrum.<sup>185</sup> Largely from studies of these groups,<sup>186</sup> the research arrives at two broad conclusions: simply put, opaque sentences are difficult; and *de re* readings are available earlier in development and with more ease than *de dicto* readings.

Young children are realists---maybe even *de re*-alists---in a more etymologically faithful sense than we usually use that word.<sup>187</sup> They have been described as “remarkably bad at reasoning about mental states” and they seem to have trouble contemplating situations other than the world as they perceive it.<sup>188</sup> Research on children’s theory of mind – the ability to attribute mental states to others – shows how children confuse actual facts with non-actual states in very simple contexts.<sup>189</sup> The dominant

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<sup>185</sup> See SIMON BARON-COHEN, *MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND* (1997). Simon Baron-Cohen et al., *Does The Autistic Child Have A Theory Of Mind?* 21 *COGNITION* 37 (1985); Peter Mitchell and Josephine E. Issacs, *Understanding of Verbal Representation in Children with Autism: The Case of Referential Opacity*, 12 *BRITISH JOURNAL OF DEVELOPMENTAL PSYCHOLOGY* 439-453 (1995) (comparing the development of competency in normally developing children with children diagnosed on the ASD spectrum); A. Senju et al., *Mindblind Eyes: An Absence Of Spontaneous Theory Of Mind In Asperger Syndrome*. 325 *SCIENCE*, 883 (1997). Studies on theory of mind and autism emphasize that autistic children perform less well on mentalizing tasks than children with Downs syndrome (i.e., who have a general cognitive deficit). Baron-Cohen, *Does The Autistic Child Have A Theory Of Mind?* 21 *COGNITION* 37 (1985); Peter Mitchell and Josephine E. Issacs, *Understanding of Verbal Representation in Children with Autism: The Case of Referential Opacity*, 12 *BRITISH JOURNAL OF DEVELOPMENTAL PSYCHOLOGY* 439-453 (1995) (arguing that theory-of-mind is not a matter of general cognition but is a “module” of cognition).

<sup>186</sup> One explanation for the fact that we know little about how adults process opacity (See Francesca Delogu, et al., *Effects of Intensionality on Sentence and Discourse Processing: Evidence from eye-Movements*, 62 *J. OF LANG. & MEMORY* 352, 353 (2010) -- is that modern linguistics has emphasized the puzzle of how typically-developing children manage to acquire the complex grammar of their first language so quickly. Adult linguistic competency is the child’s target as well as the knowledge that linguistic theory seeks to explain, so that *incompetence* in adults is largely an oxymoron.

<sup>187</sup> The resemblance between “reality” and “*de re*” is instructive; they share a common root in the latin word for “thing.”

<sup>188</sup> Susan A. J. Birch and Paul Bloom, *The Curse of Knowledge in Reasoning About False Beliefs*, 18 *SCIENCE* 382, 382. There is, however, a growing literature that suggests that early forms of theory of mind competence are present in infants. See Kristine H. Onishi and Renee Baillargeon, *Do 15-Month-Old Infants Understand False Beliefs?*, 308 *SCI.* 214 (2005).

<sup>189</sup> For a general review of the theory of mind literature, see REBECCA SAXE AND SIMON BARON-COHEN, *THEORY OF MIND* (2007). See also Jill de Villiers, *Language And Theory Of Mind: What Are The Developmental Relationships?* in SIMON BARON-COHEN ET AL. (EDS.), *UNDERSTANDING OTHER MINDS* 83 (2000). Although there is broad agreement that children pass through a sequence of developmental stages of mentalizing ability, some theorists are more apt to characterize children’s false-belief errors as linguistic (often

experimental method in theory-of-mind research has been the false-belief task.<sup>190</sup> In the classic experiment, a character places an object in location A (e.g., Maxi puts some chocolate in the green cupboard), and the child then watches as someone else moves the object to location B unbeknownst to the character (Maxi's mother moves the chocolate to the blue cupboard while Maxi is outside).<sup>191</sup> The child is then asked, "Where does Maxi think the chocolate is?"<sup>192</sup> Typically-developing three-year-olds will incorrectly choose the blue cupboard (location B): that is, they answer in terms of their knowledge of real-world facts instead of the facts as believed by the character. This mistake has been characterized as a realist error,<sup>193</sup> reality bias,<sup>194</sup> the curse of knowledge,<sup>195</sup> mentalizing failure,<sup>196</sup> or in the case of a similar result associated with autism, mindblindness.<sup>197</sup> By around age four, which is quite late in terms of language acquisition,<sup>198</sup> children's correct answers suggest an emerging understanding that we all have (and talk about) mental states whose facts may or may not line up with reality: in Maxi's belief-world the chocolate *is* in the green cupboard, never mind that it is *really* in the blue cupboard. Success on this basic theory of mind task is

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pragmatic) rather than conceptual. See Jerome Russell, "Can we say . . . ?": *Children's Understanding of Intensionality*, 25 COGNITION 289, 299 (1987) (arguing that children are mistaking *de re* for *de dicto* belief on the moved-object test.)

<sup>190</sup> See SAXE AND BARON-COHEN, *supra* note 189.

<sup>191</sup> H. Wimmer and J. Perner, *Beliefs About Beliefs: Representation And Constraining Function Of Wrong Beliefs In Young Children's Understanding Of Deception*, 13 COGNITION 103, 103-10 (1983).

<sup>192</sup> *Id.* at 103.

<sup>193</sup> Marian Counihan, *What Do Four-Year-Olds Have In Common With Frege? A Theoretical And Practical Investigation Of The False-Belief Task*, 9 (2002) (available at <http://staff.science.uva.nl/~michiell/docs/counihanthesis.pdf>) (confirming that children younger than four make clear realist errors); Susan A. J. Birch and Paul Bloom, *The Curse of Knowledge in Reasoning About False Beliefs*, 18 SCIENCE 382, 386 (2007) (contending that young children's difficulty with false belief tests reflects a conceptual deficit).

<sup>194</sup> See Paul Mitchell et al., *Contamination In Reasoning About False Belief: An Instance Of Realist Bias In Adults But Not Children*, 59 COGNITION 1, 10 (1996); Sarah Hulme et al., *Six-year-olds' Difficulties Handling Intensional Contexts*, 87 COGNITION 73, 74 (2003) (finding that children who pass false belief tests nevertheless have difficulty with referential opacity).

<sup>195</sup> Birch and Bloom, *supra* note 188.

<sup>196</sup> See Hulme et al., *supra* note 185 at 75.

<sup>197</sup> Simon Baron-Cohen et al., *Does the Autistic Child Have a "Theory of Mind"?*, COGNITION 21 (comparing autistic and typically-developing children's performance on false-belief tasks).

<sup>198</sup> Eve V. Clark, FIRST LANGUAGE ACQUISITION 386 (2003) (stating that on most accounts children acquire all major syntactic structures by age four). STEVEN PINKER, THE LANGUAGE INSTINCT (2d ed. 2002) (stating that children have mastered most important features of their language by age four).

a prerequisite to navigating the ambiguity of opaque constructions.<sup>199</sup>

Even in a simple moved-object experiment, young children's errors look remarkably like legal misreading. To register an ambiguous statute's *de dicto* reading, one must consider some non-actual state of affairs (the world as believed, as intended, as pretended, as endeavored, as regarded) regardless of what is true about the actual world. The mistake courts make is to anchor the interpretive process in real-world facts and to disregard the relevant hypothetical state. This resembles the way the three-year-old mistakenly derives "where Maxi *thinks* the chocolate is" from where it *really is*.<sup>200</sup> Likewise in the impersonation example, the *Whiteley* court assumed that "impersonating a person entitled to vote" must take its meaning from some (*de re*) person entitled to vote in actuality. Had the court applied the statute to the world-as-pretended by the impersonator, however, it would have had no trouble finding a *de dicto* voter alive and well (looking exactly like the defendant but bearing the name of the deceased erstwhile voter). When it ignored this hypothetical state, which is arguably the essence of impersonation, the court committed what might indeed be called a realist error.<sup>201</sup>

Ambiguous sentences like the ones in our legal examples require a still more sophisticated kind of thinking that children do not develop until around age six, well after they pass false belief tests.<sup>202</sup> Five-year-olds understand that a world-as-believed can look different from the actual world (false-belief competency). But when a task involves distinguishing two valid ways of *representing* reality, they cannot seem to reliably keep these "dual identities" separate.<sup>203</sup> For a concrete example, imagine that Ann

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<sup>199</sup> See Apperley, *supra* note 189.

<sup>200</sup> The precise nature of the link between the expression and the actual world for a child is debated. See Apperley, *supra* note 189. One alternative interpretation is that children answer according to their own beliefs (egocentric bias), as opposed to the objective world (reality/realist bias). *Id.*

<sup>201</sup> In a strange twist, that error then became *reified* as law by virtue of it being made by the highest arbiter of legal interpretation.

<sup>202</sup> Deepthi Kamawar and David Olson, *Thinking About Representations: The Case of Opaque Contexts*, 108 J. EXP. CHILD PSYCHOL. 734, 737 (2011) (stating that children find opacity tests harder than false belief tasks).

<sup>203</sup> The classic test features a character who matches two representations. In the stimulus story, a man with curly red hair steals George's watch while George sleeps. George then awakens and has no idea who the thief might be. The children were asked, "Can we say George is thinking, 'I must find the thief who stole my watch'?" (correct answer Yes); "Can we say George is thinking, 'I must find the man with curly red hair who stole my watch'?" (correct answer No). Children up to age six freely and incorrectly swap "the thief" with "the man with curly red hair" and answered Yes to the second question. Jerome Russell, "Can we say . . . ?": *Children's Understanding of Intensionality*, 25

knows that a ball is in a drawer. The ball happens to be a gift for Tom, but Ann does not know this. As represented in Ann's mind, the drawer contains a ball but not a gift. But a five-year-old, unlike an adult, will say that "Ann believes that there is *a gift* in the drawer," as though whatever is true for "a ball" must also be true about "a gift" in this context. In other words, the child makes a substitution error. In the actual world both "a ball" and "a gift" are in the drawer. But this is not the case in Ann's belief-world, so we cannot swap those terms when speaking of Ann's beliefs.<sup>204</sup> The Supreme Court's error in *U.S. v. Pierce* was similar, but in negated form: the TVA is *not* a federal agency, therefore (by substituting an equivalent term) pretending to be a TVA employee is *not* impersonating a federal agency employee.<sup>205</sup> In the world of the defendant's pretense, of course, he was both "a federal employee" and "a TVA employee."

Even adults are not immune from difficulty in processing opaque sentences. Studies of processing time show that opaque sentences take extra time to read and resolve, especially when the *de dicto* meaning is intended.<sup>206</sup> The more information one has about actual-world facts, the more interference is observed with our ability to correctly resolve ambiguity (e.g., when interpreting the ambiguous instructions of someone who knows fewer facts).<sup>207</sup> And in an experiment where adults correctly interpreted an ambiguous utterance *de dicto*,<sup>208</sup> their gaze was nevertheless briefly drawn to an object in the scene that would represent the belief *de re*, suggesting a form of realist bias.<sup>209</sup>

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COGNITION 289, 299 (1987).

<sup>204</sup> See Ian A. Apperly & E. J. Robinson, *When Can Children Handle Referential Opacity? Evidence For A Systematic Variation In 5- And 6-Year-Old Children's Reasoning About Belief And Belief Reports*, 85 JOURNAL OF EXPERIMENTAL CHILD PSYCHOLOGY 297, 306–07 (2005).

<sup>205</sup> See *supra* note XX and accompanying text.

<sup>206</sup> See Paul Mitchell, *Contamination In Reasoning About False Belief: An Instance Of Realist Bias In Adults But Not Children*, 59 COGNITION 1 (1996) (hypothesizing different accounts of reality bias in children and adults); Martin Hackl et al., *Processing Opacity*, 13 Proceedings of Sinn und Bedeutung (2009) (available at [www.ilg.uni-stuttgart.de/SuB13/hackl-et-al.pdf](http://www.ilg.uni-stuttgart.de/SuB13/hackl-et-al.pdf)) (finding longer processing times for opaque constructions); Boaz Keysar, *Limits on Theory of Mind Use in Adults*, 89 COGNITION 25 (2003) (stating that adults' use of crucial elements of theory of mind is not reliable).

<sup>207</sup> *Id.* at 92.

<sup>208</sup> For example, the subject is told to "hand me the big one," where the subject knows that the speaker cannot see the largest of three items. The subject will select the correct object corresponding to the speaker's belief-state, but only after looking briefly at the largest one. Ian Apperly and E.J. Robinson, *Children's Difficulties with Partial Representations in Ambiguous Messages and Referentially Opaque Contexts*, 16 COGNITIVE DEVELOPMENT 595 (2001).

<sup>209</sup> See, e.g., Deepthi Kamawar and Richard Olson, *Children's Understanding of*

As for explaining the difficulties observed in older children and sometime in adults, a common culprit among diverse accounts is the challenge of complex second-order thinking. Also termed *metarepresentation*, this is the ability to treat a thought (a first-order mental representation of an object in the world) as an object itself, to mentally manipulate it as though playing with a model, to compare it to other such models, and so on. This is especially difficult for ambiguous language, which requires us to hold steadily in mind different possible situations--one actual and the others as-believed, as-intended, as-desired, as-pretended, etc.--without comingling them. Taxed by the cognitive demand of juggling these mental models, even adults may find the simplicity of *de-re*-only interpretation irresistible, if only for an instant.

To summarize thus far, opaque sentences require hard work to fully (as opposed to one-sidedly) interpret. Still, the typical six-year-old is conversationally fluent in them. In the high-stakes world of legal reasoning, it is surprising that all the king's horses and all the king's men, often billing by the hour, fall short of extracting the full range of reasonable interpretations of a statute. Recent studies make partial progress toward solving this mystery by positing two different systems for handling opacity. One system, acquired by age four, is efficient enough to be deployed on the fly but too rigidly tethered to actual-world facts to handle metarepresentational tasks.<sup>210</sup> A second system, developed by roughly age six, has the flexibility and sophistication needed to juggle the possible "worlds" that opaque constructions construct. This fits the developmental stages observed in the literature, but it does not yet explain why lawyers miss *de dicto* readings when thinking carefully about them, or conversely, why anyone can reach *de dicto* readings quickly and automatically. Fortunately, this is where psycholinguistics converges with the literature of cognition and reasoning, in which "dual process" cognition is being richly theorized and refined. For traction on the puzzle of misreading, the next section turns to the study of cognitive bias at the intersection of dual modes of reasoning.

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*Referentially Opaque Contexts: The Role of Metarepresentational and Metalinguistic Ability*, 10 J. COGNITION & DEVEL. 285, 302–03 (2009)(concluding that metarepresentational ability correlates positively with success on opacity tasks).

<sup>210</sup> See Jason Low and Joseph Watts, *Attributing False Beliefs About Object Identity Reveals a Signature Blind Spot in Human's Efficient Mind-Reading System*, 20 PSYCH. SCI. 1, 6 (2013); Ian Apperley and Butterfill, *Do Humans Have Two Systems To Track Beliefs And Belief-Like States?* 116 PSYCHOLOGICAL REVIEW 953 (2009).

## 2. Explanations from Theories of Cognitive Bias

Cognitive science has been transformed over the past several decades by dual process theories of cognition and the role of heuristics and biases in reasoning.<sup>211</sup> This view of human thought has recently been popularized in *Thinking, Fast and Slow* by Nobel laureate Daniel Kahneman, who with Amos Tversky pioneered the field and whose work is widely cited in interdisciplinary law and psychology. According to this family of theories, our thinking is negotiated between two types of cognitive mechanisms.<sup>212</sup> System 1 or “fast” thinking is cognitively easy, intuitive, associative (making connections by similarity as opposed to computational reasoning) and automatic.<sup>213</sup> By contrast, “slow” System 2 operations are effortful, analytical, algorithmic, and conscious. The two systems take on anthropomorphic personalities in the literature, with an impulsive, credulous, overconfident System 1 competing with its frowning, Spock-like and skeptical counterpart.<sup>214</sup>

Dual modes of thought help account for our competence at highly diverse mental tasks, from instantly reading facial expressions to working through a tedious mathematical proof. At times, though, their respective weaknesses dovetail in ways that undermine rational thought. System 1’s efficiency comes at the cost of reliability. Although System 2’s job description includes monitoring System 1 outputs for error, it tends not to deploy unless consciously pressed into service.<sup>215</sup> In other words, System 2 is lazy. (I will echo the heuristics and biases literature with frequent reference to this feature of System 2, which should not be confused with

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<sup>211</sup> See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 7–10 (2011) (recounting the author’s foundational research collaboration with Amos Tversky). See also DANIEL KAHNEMAN AND SHANE FREDERICK, *Representativeness Revisited* 49 (1984).

<sup>212</sup> Some theorists caution against oversimplifying the duality as being about exactly two processes. See, e.g., Keith E. Stanovich, *Distinguishing the Reflective, Algorithmic, and Autonomous Minds: Is It Time For A Tri-Process Theory?* in JEFFREY EVANS & K. FRANKISH (eds.), *TWO MINDS: DUAL PROCESSES AND BEYOND* 55. (2009); Keith E. Stanovich and Maggie L. Toplak, *Defining Features Versus Incidental Correlates Of Type 1 And Type 2 Processing*, 11 *Mind & Society* 3 (2012). See also Dan Kahan, *Two Common (& Recent) Mistakes About Dual Process Reasoning & Cognitive Bias*, THE CULTURAL COGNITION PROJECT AT YALE LAW SCHOOL, (Feb. 3. 2012) (dispelling misconceptions about the reliability of the two systems).

<sup>213</sup> KAHNEMAN, *supra* note 211, at 105.

<sup>214</sup> CASS SUNSTEIN AND RICHARD THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 22 (likening reflective analytical cognition to Mr. Spock of *Star Trek*).

<sup>215</sup> KAHNEMAN, *supra* note 211 at 99 (explaining that “lazy System 2” often endorses System 1 outputs).

carelessness as an attribute of the person doing the thinking. Moreover, the flipside of deferring to “fast” thinking is efficiency.) When it fails to override automatic thinking with conscious reasoning, unwittingly biased decisionmaking may ensue.<sup>216</sup>

To explain the mechanism cognitive bias, dual process theory emphasizes System 1 heuristics—mental shortcuts that yield immediate answers with minimal effort or computation. Heuristic problem-solving strategies are serviceably accurate, but at times they can derail rational thought, as they are hypothesized to do in example after compelling example of reasoning gone awry. For instance, one study found that, on average, people were willing to pay more for \$100,000 of life insurance coverage for death by terrorism than for the same coverage for death by any cause, including terrorism.<sup>217</sup> This illustrates the “availability heuristic” in action, by which we answer questions of probability based on the ease of thinking of an example of the harm instead of by computing possible outcomes and likelihoods.<sup>218</sup>

Heuristics insinuate their way into decisionmaking because, when faced with a relatively hard question (how much is life insurance worth for various covered causes?) we can “substitute an easier question” (how easy is it to think of an example of terrorism?)<sup>219</sup> when it appears to be a shortcut to the same place. The substitution of a heuristic question happens so seamlessly that we do not even notice the difficulty of the original question.<sup>220</sup> According to dual process accounts, we can explain many cognitive errors by determining which System 1 heuristic is activated, and then asking why System 2 failed to override the erroneous result.<sup>221</sup> Even for computations that are simple in absolute terms, the relative ease of a heuristic approach may trample more careful reasoning. Another famous example of System 2’s failure to catch an error in System 1’s efficient but unreliable heuristics is the bat-and-ball problem: A bat and a ball together cost \$1.10, and the bat costs one dollar more than the ball; how much does the ball cost?<sup>222</sup> The answer reached with greatest ease (ten cents) is incorrect, yet this was the response of over half of college students who

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<sup>216</sup> *Id.* at 202.

<sup>217</sup> *Id.*

<sup>218</sup> See Jonathan S. B. T. Evans, *supra* note XX at 206 (concluding that what unifies dual process theories is the representational nature of System 2 and the fact of its competition with System 1).

<sup>219</sup> This is also known as *attribute substitution*. *Id.* at 129-31.

<sup>220</sup> KAHNEMAN, THINKING, FAST AND SLOW, *supra* n. \_\_, at 99.

<sup>221</sup> DANIEL KAHNEMAN AND SHANE FREDERICK, *Representativeness Revisited* (1997).

<sup>222</sup> Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCH. 697, 699 (citing Shane Frederick’s research).

were tested.<sup>223</sup> On a dual process account, System 1 latches on to the round numbers suggested in the problem, which generates an easy if incorrect answer that makes it past System 2's lethargic gatekeeping. As Kahneman has summarized, "People are not accustomed to thinking hard and are often content to trust a plausible judgment that quickly comes to mind."<sup>224</sup>

Some patterns of dual process reasoning immediately seem an apt fit for statutory misreading examples. First, as the psycholinguistic literature confirms, opaque sentences are just plain difficult, particularly when it comes to holding *de dicto* readings in mind.<sup>225</sup> Instead of merely checking the sentence against the facts of the actual world as we do with transparent sentences, we must think hypothetically about the facts in other possible states (a world as desired, believed, intended, pretended, regarded, etc.), sometimes in multiply embedded layers. For example, it is far more difficult to articulate criteria for "endeavoring to do something that would amount to 'obstructing justice' in some hypothetical state of affairs" than to ask concretely, "Was a proceeding pending at the time the defendant destroyed evidence?" System 1 is ill-equipped to work through these alternatives; in fact, it "neglects . . . and suppresses ambiguity."<sup>226</sup> System 2 may have the ability, but it eschews the effort. In this scenario we would expect that System 1 will first heuristically compare the statute's terms to the actual world, and System 2 will be too lazy to notice other ways that the statute could be true. Misreading opaque statutes as *de re* instead of *de dicto* could thus be an instance of "answering the easier question."

Dual process theory also fits lawyers' skepticism of the claim that we are missing the *de dicto* reading in the first place. Heuristics are intuitively appealing; they seem right to us. We may experience them as so insistent on their correctness as to be nearly animate. Evolutionary biologist Steven Jay Gould once described this System 1 quirk in the context of Kahneman's best-known example, the Linda Problem.<sup>227</sup> The problem presents a description of "Linda," listing traits that readers might associate with feminist values (e.g., outspokenness, philosophy major, antidiscrimination interest, and so on).<sup>228</sup> A majority of experimental subjects incorrectly predict that Linda is more likely to be a "feminist bank teller" than "a bank teller," even though every feminist bank teller is also a

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<sup>223</sup> *Id.* The ball costs a nickel; the bat costs \$1.05. If this requires citation, we are in trouble.

<sup>224</sup> *Id.*

<sup>225</sup> See Part III.A *supra*.

<sup>226</sup> *Transcript for Daniel Kahneman Uncut*, TO THE BEST OF OUR KNOWLEDGE, <http://tbook.org/book/transcript/transcript-daniel-kahneman-uncut>.

<sup>227</sup> KAHNEMAN, THINKING, FAST AND SLOW, *supra note* \_\_\_, at 158–59.

<sup>228</sup> *Id.* at 156.

bank teller, and therefore there are more possibilities for Linda to be a bank teller unmodified.<sup>229</sup> Gould reported that even after the correct answer became apparent to him, “a little homunculus in my head continue[d] to jump up and down, shouting at me—‘but she can’t just be a bank teller; read the description.’”<sup>230</sup> This character may be the same one who shouts, “But we *must* find *some* actual ‘person entitled to vote’ (or major life activity, official proceeding, ethnic group, etc.); that’s what the statute *says*.” This inner psychodrama nicely captures the conflict between “of course, why didn’t I see that before” and “but that *can’t* be right,” which seem to do battle in lawyers’ reactions to an exposition of linguistic opacity, particularly when pointing out the perils of *de re* interpretation goes against the grain of accepted patterns of legal reasoning.

There is at first glance a glaring mismatch, however, between dual process stories of cognitive bias and the way lawyers misread opaque sentences. In the bat-and-ball and Linda problems, “fast thinking” is the source of error, which our inattentive “slow thinking” passively endorses without ever getting into the act of reasoning. But in our statutory examples, System 2 is not sleepy or unmotivated; rather, it is keenly on the lookout for ambiguity, which at least some courts and advocates clearly would like to find. Moreover, System 2 *does* deploy an algorithm (“what is the alleged X, and is it really an X in terms of the statute?”) in order to apply a statute, but the algorithm itself seems to be the problem. It is as though we have a bug in our mental reasoning program, not a problem of over-reliance on kneejerk intuition.

This paradox calls for a refined model of erroneous reasoning, one that the work of prominent dual process scholar Keith Stanovich provides. Stanovich and others have pointed out that equating System 2 with reliability oversimplifies the mechanics of reasoning, and that there is an important difference between being able in the abstract to reason analytically and being able to apply these skills appropriately and reflectively in situated problem solving.<sup>231</sup> He proposes that System 2 has a

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<sup>229</sup> *Id.* at 157–58. The error in reasoning is termed the “conjunction fallacy,” whereby we neglect to observe that being in a set defined as “A and B” (bank teller + feminist) is analytically less probable than A alone, regardless of how well the meaning of B resonates with the description of the thing we are classifying. This example has been criticized on a number of grounds, including the possibility that asking if Linda is a bank teller may imply that she is a bank teller for the purpose of assessing the relative likelihood of her being a feminist also. Ronald R. MacDonald and Kenneth J. Gilhooly, *More About Linda or Conjunctions in Context*, 2 EUR. J. COG. SCI. 57, 58 (1990).

<sup>230</sup> *Id.* at 159.

<sup>231</sup> See Keith E. Stanovich, *The Fundamental Computational Biases Of Human Cognition: Heuristics That (Sometimes) Impair Decision Making And Problem Solving*, in

reflective component as well as an analytical one.<sup>232</sup> The reflective mind is in charge of directing the analytic mind to *decouple* mental representations from real-world facts so that we can begin to reason hypothetically about possibility, belief, pretense, intent, and other non-actual states.<sup>233</sup> Decoupling is a close fit with the requirements of metarepresentational reasoning, which some language acquisition researchers have speculated is the cause of opacity problems for older children and adults.<sup>234</sup> Opaque constructions require us to model alternative ways the world could be, and to manipulate those models without confusing them with actual-world facts. It may be that we can manage this quickly in conversation because we have learned to automaticity the conversational rules of inference that help us extract coherent meaning from situated uses of language.<sup>235</sup> Where the task is to *generate* alternate ways that a sentence could be true in the full range of hypothetical contexts, and where analytical thinking operates without doing the necessary decoupling from reality, we are likely to default to the heuristics of System 1 and employ System 2 only to justify their output.<sup>236</sup> The result will be a “shallow”<sup>237</sup> application of System 2 that masks a System 1 undercurrent.

The crucial role of decoupling shows how, when it is absent or unsustained, our reasoning can be expressly algorithmic (as opposed to unconscious and intuitive) yet “inflexibly locked into [a mode of thinking] that takes as its starting point the world that is given to the subject” and “never constructs another model of the situation.”<sup>238</sup> This description particularly resembles the impersonation cases, where the courts never considered the facts of a world-as-pretended, in which there was (on the facts of that world) “a person entitled to vote.” Although courts and others have blamed legislative drafters for case outcomes, we might do better to question the passive acceptance of a single model of the world that

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J. E. DAVIDSON & R. J. STERNBERG (Eds.), *THE PSYCHOLOGY OF PROBLEM SOLVING* 291 (2003); Keith E. Stanovich, *Distinguishing the reflective, algorithmic, and autonomous minds: Is it time for a tri-process theory?* In J.S.B.T. Evans & K. Frankish (Eds.), *IN TWO MINDS: DUAL PROCESSES AND BEYOND* 55, 70 (2009).

<sup>232</sup> Stanovich, *supra* note XX at 63.

<sup>233</sup> Keith E. Stanovich, *Rationality and the Reflective Mind* 50-51 2011. More precisely, because we are dealing with facts as mediated by the mind, it is really our *knowledge* or *belief* about the actual world that must be decoupled from subsequent manipulations of our model.

<sup>234</sup> See *supra* note XX and accompanying text. See also Apperley, *supra* note XX, at 598.

<sup>235</sup> Stanovich, *supra* note XX at 68

<sup>236</sup> *Id.* at 71.

<sup>237</sup> *Id.*

<sup>238</sup> Apperly, *supra* note XX at 598.

characterizes legal misreading.<sup>239</sup>

Even when the reflective mind does initiate a call for decoupling, the effort of sustaining it may cause the reasoner to keep slipping back to an actual-world frame of reference.<sup>240</sup> This brings to mind the contexts of genocide, disability rights, and obstruction cases. When interpreting statutes in those contexts, courts repeatedly referenced the centrality of mental states that the legal context made highly salient (through *regard* and *intend*), but they continually reverted to actual-world facts in order to assess whether certain terms were represented in those mental states (e.g, is X actually a major life activity? was there in fact a pending proceeding? did the perspective of the Hutus render the Tutsis an ethnic group in fact?).

Lastly, some forms of cognitive bias may stem not from a failed interaction between Systems 1 and 2, but to problems with the knowledge that System 2 explicitly brings to bear on problem solving, which in cognitive science has sometimes been termed, in keeping with that literature's computer metaphors, "mindware."<sup>241</sup> This knowledge consists of the rules, procedures, and strategies that can be retrieved by System 2 and used for interpretation. Mindware problems occur where one lacks the knowledge needed to solve a problem ("missing mindware") or where the knowledge one deploys is flawed (provocatively labeled "contaminated mindware").<sup>242</sup> The next section speculates that legal reasoning is a form of "mindware," and that both problems may be at work in law.

To sum up, findings from diverse branches of psychology suggest that legal misreading arises out of (and may be overdetermined by) various kinds of thinking errors. This is a promising way to explain the misreading phenomena for individuals. To explore how virtually an entire professional community can misread so uniformly (in a field defined by adversary process) and acquiescently (in a profession with a reputation for pugilism), we should look to the ways that the legal context may camouflage, endorse, and replicate error. Perhaps legal training and legal institutions make a general cognitive bias more difficult to resist in our particular work.

### *B. The Role of Law in Propagating Error*

If cognitive bias is the "misreading" part of my thesis, this section makes the case that there is something particularly "like a lawyer" in our mistakes. It is one thing if most adults would make the kind of error seen in

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<sup>239</sup> Stanovich, *supra* note XX at 63.

<sup>240</sup> *Id.* at 68.

<sup>241</sup> Stanovich, *supra* note XX at 68.

<sup>242</sup> *Id.*

our misreading examples due to a confluence of biasing tendencies, in explicit interpretation if not in natural language. But it is quite another to believe as lawyers that when we read text this way *we are doing a good job* of interpreting language in an orderly and disciplined manner. I argue here that educational, structural, and cultural factors conspire to endorse misreading in law, bringing it from the realm of individual minds to the level of the profession. Inspired by dual process categories of “missing” and “contaminated” knowledge as a way of organizing these factors, this section frames legal misreading in terms of (1) what we lack in tools to reason effectively about opacity, and (2) what we possess of reasoning strategies that we erroneously apply to opaque provisions in statutes.

### 1. Tools lawyers lack

One way to identify lawyers’ relevant knowledge deficits is by comparing ourselves to linguists and philosophers, who have been noticing and theorizing opacity since the Middle Ages. Specialists in semantics have two sorts of tools that lawyers lack. Conceptually, they have a notion of *structural semantic ambiguity* for distinctions of meaning that are neither lexical nor syntactic, of which *de dicto/de re* is one.<sup>243</sup> For lawyers, ambiguity comes in only lexical and syntactic varieties.<sup>244</sup> From “no vehicles in the park” to “what is chicken?” we are fixated on word-level meaning. Our way of detecting and resolving it is straightforward: pinpoint the confusing word and turn to dictionaries or their equivalent<sup>245</sup> to determine what the word means in context. At the level of surface grammatical relations is syntactic ambiguity, which we discuss in terms of “what modifies what,” and which we make visible with brackets and arrows to show different relationships among syntactic constituents.<sup>246</sup> But this sparse typology leaves no room for differences of meaning wrought by opacity, because those distinctions do not spring either from the lexicon or from syntax. When a distinction cannot be found in the only two places we know to look for ambiguity, it is tempting for lawyers to conclude that it does not exist.

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<sup>243</sup> See, e.g., Harry Bunt, *Applicability of Underspecification Techniques*, in HARRY BUNT AND REINHARD MUSKENS (EDS.), *COMPUTING MEANING* 59 (2008) (providing a taxonomy of meaning differences).

<sup>244</sup> See e.g. Allan E. Farnsworth et al., *CONTRACTS: CASES AND MATERIALS* (8<sup>th</sup> ed. 2013) (stating the “two varieties” of ambiguity and giving examples).

<sup>245</sup> Trade usage in contract law is an example of a dictionary substitute that defines what a word or phrase means within the dialect of a commercial community.

<sup>246</sup> See Anderson, *supra* note XX at 1009 (contrasting lexical and syntactic ambiguity with the structural ambiguity of the *de dicto-de re* distinction).

In addition to having a conceptual category and name opacity, semanticists have a technology—formal models of grammar—with which to depict multiple readings of a single ambiguous sentence. These expressions of the logic of sentences make ambiguity visible and thereby reinforce the conceptual distinctions that they expose. They can also reveal commonalities across phenomena (e.g., that opaque predicates bear a family resemblance, that *de re* readings begin with “there is some X . . .”).<sup>247</sup> By contrast, any awareness of opacity in law is likely to be misconstrued as a lexical phenomenon and therefore compartmentalized, relevant only to other encounters with that same word (impersonate, regard, endeavor, etc.). With neither concepts nor tools for making structural ambiguity salient, it will be difficult for lawyers to register it, much less learn what we need to know about opaque sentences.<sup>248</sup>

Although we sometimes do make distinctions that correspond to *de dicto* and *de re*, we lack coherent terms for doing so. Compare the meanings of specific and general intent in criminal law with their counterparts in the context of testamentary intention: specific and general legacies. The concept of specific intent is ill-defined and largely outmoded, but it roughly corresponds to interpretation *de dicto*, with general intent mapping onto *de re*. For example, one who has the specific intent to “assault a police officer” must know that the victim is in the category police officer, and hence intend to assault someone in matching that *de dicto* description. General intent requires only an intention to do the act coupled with a blameworthy state of mind, which could be completed where one impersonates another person (perhaps by identity fraud), and that person just happens to be a police officer *de re*.<sup>249</sup> In the law of wills however, a “specific legacy” (e.g., to bequeath someone a particular car) matches *de re* interpretation, while a “general legacy” (to bequeath “my car,” whatever car I happen to have at the relevant time) is *de dicto*.<sup>250</sup> Even the term “literal” is confusing when applied to opacity. Literal meaning concerns the sense of a word—roughly translated as dictionary meaning—and whether that sense is more basic to the word or expands into figurative language. If either *de dicto* or *de re* can be said to hew more closely to literal meaning, it would be *de dicto*, because it concerns the linguistic description itself and its conceptual significance, rather than an object in the world that it more or less arbitrarily points to. Thus, “literal” in these cases is not just inaccurate;

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<sup>247</sup> See *supra* note XX and accompanying text.

<sup>248</sup> *Id.* Anderson, *supra* note XX at 1008–10.

<sup>249</sup> See *People v. Gleisner*, 115 Mich. App. 196 (Mich. App. 1982).

<sup>250</sup> See PETER M. TIERSMA, *LEGAL LANGUAGE* 123 (1999).  
TIERSMA, *supra* note XX at 123.

it is backwards.

## 2. Tools lawyers use that don't work

The mechanical reasoning that lawyers and judges apply to opaque sentences (in fact, all sentences) amplify and spread irrational interpretation. This interpretive strategy---which might be called a form of mindware in dual process accounts<sup>251</sup>---is the algorithm of asking, for any relevant noun phrase *X* in the statute, “What is the alleged *X*, and is it really an *X* in fact (i.e., by the statutory definition)?” This stepwise analysis is appropriate for transparent sentences, but it cannot capture *de dicto* meaning. Stanovich has theorized that “contaminated mindware” consists of rules or procedures that are disrational but that nonetheless spread for four reasons that he identifies. First, the strategy must be “appealing or promise some benefit.”<sup>252</sup> In law, the what-is-the-*X* protocol is enormously appealing despite its flaws because it *seems* rigorously faithful to text. Moreover, even its undesirable results insulate judges from a more fundamental criticism: motivated reasoning. For example, no one could accuse the *Whiteley* court of interpreting language in a goal-directed or non-neutral way.<sup>253</sup> Second, the faulty strategy may “free ride” on strategies that are effective in other contexts, which is exactly the case for what-is-the-*X* as applied to ordinary transparent sentences. Third, the algorithm often contains its own “self-replication strategies” whereby it spreads from user to user, as in a chain letter urging you to forward it to ten others. Perhaps no better self-replicating mechanism exists than the operation of precedent and the practice of citing authority, supported by what has been called a “culture of conformity.”<sup>254</sup>

The fourth attribute of flawed thinking that aids its spread, according to Stanovich, is an “evaluation-disabling strategy”<sup>255</sup> whereby objections are undermined *ex ante*. Law goes this one better: instead of merely making it hard to assess “what is the *X*” for accuracy, the law makes it *the*

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<sup>251</sup> KEITH E. STANOVICH, WHAT INTELLIGENCE TESTS MISS 152 (2009).

<sup>252</sup> *Id.*

<sup>253</sup> See, e.g., Anna Ronkainen, *Dual Process Cognition and Legal Reasoning*, Available at SSRN: <http://ssrn.com/abstract=1879429> (Sept. 30, 2011); Barbara Spellman and Frederick Shauer, *Legal Reasoning*, Virginia Public Law and Legal Theory Research Paper No. 2012-09, 2-4 (2012).

<sup>254</sup> Susan Sturm and Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 530 (explaining how the adversarial nature of law school can foster conformity together with competition).

<sup>255</sup> STANOVICH, *supra* note 251, 154.

*law itself.* For example, when the Supreme Court in *Pettibone* declared that there must exist some pending proceeding in order for there to have been “an endeavor to obstruct” such a proceeding, it kicked off a process of converting an interpretive mistake into a legal fact. Indeed, the notion that there is any mistake at all in legal misreading could be challenged definitionally; “error” makes sense only if law is normatively accountable to the workings of natural language, as it is to the rules of arithmetic. It would truly turn the tables on the bat-and-ball problem if the problem-solver were to declare that \$1.00 *is*, as a matter of law, one dollar more than ten cents, perhaps conceding that formal arguments to the contrary are interesting and clever, but not dispositive. Surreal as it sounds, this is not so very far from misreading like a lawyer.

### C. A Synthesized Account of Misreading

At last a more complete story of misreading falls into place. Whatever the precise mechanism of bias, a confluence of factors militate in favor of seeing only *de re* readings. Opaque sentences are difficult and therefore resist full elaboration when we can substitute an easier heuristic approach that fits most (transparent) sentences. Like an inner three-year-old, our System 1 mentality favors a thing-oriented interpretation. System 2, if deployed, does so unreflectively. Instead of going through the possible configurations of facts that the statutory text might represent, System 2 uses an easier, shallow “what is the X” analysis that accords with System 1.

The result gives legal readers the best of both worlds in what we might call *rigoristic*, as opposed to rigorous, textual analysis.<sup>256</sup> It will appear strict in its fidelity to the express words---if not the sentences---of the statute, without the hard mental work that genuine interpretive rigor would require. A legal audience will lack the tools to notice (and to say, and to show) that something important has been neglected, either while it is happening or once it has propagated by precedent and citation. Rare objections will be discounted as undisciplined, ends-oriented, “soft” appeals to the purpose or “spirit” of the statute. We will dispatch them to a handy scapegoat: the legislature. Legislative action may not solve the problem, but it will divert interest away from how misreading could have happened in the first place. In this way, misreading comes to look like the perfect caper where the culprit is never apprehended. It would be genius if it were conscious.

Misreading will be difficult to reconstruct from the record, because

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<sup>256</sup> Credit to Susan Schmeiser for this just-right term.

the record will preserve only seemingly unrelated disputes over the meanings of particular words and phrases: *person entitled to vote*, *government agency*, *official proceeding*, *impairment*, *major life activity*, *ethnic group*. It will be carved up into pieces and those pieces scattered arbitrarily (alphabetically) throughout the dictionary, where they will discreetly and discretely fossilize. Bones tell a story only if they belong to a skeleton; the problem is that the opaque construction is not an animal that has ever existed in the lawyer's zoo. This Article has argued that lawyers should believe in and observe this creature of language before we can begin to think about taming it. The next Part discusses more and less promising prospects for capturing opacity in law.

#### IV. WHAT CAN WE DO ABOUT MISREADING?

Whatever their mechanism, the fact that interpretive biases occur and spread without our conscious awareness makes them very difficult to correct. Optimists will point out that lawyers are already possessed of an underutilized secret weapon: our natural language competency in handling opacity. The bad news is that this knowledge is tacit, which makes it hard to deploy consciously. The natural setting for exercising our competence is in situated conversation, and "it is easier to think about situations than sentences."<sup>257</sup>

If correcting misreadings is a matter of overcoming a combination of knee-jerk intuition on the one hand, and misapplied analytical skills on the other, then the outlook from cognitive science appears bleak. Daniel Kahneman himself is generally not optimistic about the potential for personal control of biases.<sup>258</sup> Groups do not fare much better than individuals in his view, given their general unwillingness to introspect, and introspection itself is not an activity emphasized in law.<sup>259</sup> For these reasons and others related directly to opacity in particular, comfortably traditional legal interventions---making rules and setting defaults---will probably fail. Instead, this Part suggests we capitalize on what lawyers and legal institutions are good at---structuring our options, deploying thing-oriented reasoning, and exacting conformity from diverse ranks---and finding ways to countervail what is difficult about opacity, perhaps with the help of technology.

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<sup>257</sup> ROEPER, *supra* note XX at 120.

<sup>258</sup> KAHNEMAN, *supra* note —, at 417.

<sup>259</sup> Vikram Khanna, *Psychology's Ambassador to Economics*, SLOW MOVEMENT, [http://chutzpah.typepad.com/slow\\_movement/2008/07/bt-psychologys-ambassador-to-economics.html](http://chutzpah.typepad.com/slow_movement/2008/07/bt-psychologys-ambassador-to-economics.html), (July 12, 2008).

### A. *Organizing a Paradigm of Readings*

Opaque contexts are a creature of the formal structure of language, but to get traction against the confusion they cause, we will need to have a functional sense of *de dicto* and *de re* meanings. Can we draw out any generalizations about when to read a sentence one way or the other, which we could then turn into guidance for those dealing with legal texts? This is no easy task, as the wide variety of opaque verbs themselves suggest, to say nothing of the fact that it is the nature of these constructions to introduce layers of hypothetical states into legal discourse. Moreover, the choices for how to convert text to a legal rule are more complicated than simply “choose one or the other reading,” in part because a single provision may contain multiple opaque predicates. With these caveats, this Section makes a very preliminary attempt to organize the alternatives for interpreting opaque sentences in a given text.

By now we have some clues as to the characteristics of *de re* and *de dicto* readings respectively. *De re* interpretation is largely about referring, or pointing to some object in the discourse. Briefly put, it’s the thing that counts. The category we use to refer to that thing is simply an intelligible way of identifying the *res*, which “just so happens” to be in that category. When the importance of a term is to identify a referent, *de re* interpretation is relevant. To illustrate with a hypothetical variation on a familiar contract case, if a cotton buyer elicits from a seller a “promise to deliver cotton on ‘a ship called the Peerless,’” the ship’s name might be nothing more than a way to zero in on a particular shipment.<sup>260</sup> To test whether this is so, try substituting another referent for the term that is used, and see if it fundamentally changes the meaning. In the hypothetical Peerless case, we might substitute “the three-masted vessel docked at Pier 4.” If that description functions just as well in context, then the *res* matters, not the description. For *de dicto* readings, the category takes center stage. The substantive context of the terms will be germane to some objective or purpose. Consider the hypothetical Peerless case in this light. Imagine that a fortune teller had prophesied to the promisee that she would become fabulously wealthy as long as her next cotton shipment came on “a ship called the Peerless.” In this case the description is relevant to an objective. If there happen to be two Peerlesses, then a shipment on either vessel would satisfy a *de dicto* interpretation of the promise. Characteristic of *de dicto* readings is a relative indifference to “which one it is.” In short, the test for

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<sup>260</sup> *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Exchequer 1864).

the relevance of a *de dicto* reading is “do we care about the category”?

In crafting a rule that invokes *de dicto* or *de re* readings, we should consider that a sentence with alternative readings might authorize a rule that invokes both of them. If so, then it seems we have four possibilities for legal rules, according to whether *de re* or *de dicto* is necessary or sufficient to the operation of the statute. This gives us four possible combinations with shorthand labels.

- DE RE ONLY*: *de re* is necessary and sufficient  
*DE DICTO ONLY*: *de dicto* is necessary and sufficient  
 EITHER *DD* OR *DR*: *de re* is sufficient and *de dicto* is sufficient  
 BOTH *DD* AND *DR*: *de re* is necessary and *de dicto* is necessary

Although it is difficult to anticipate the range of policy reasons for preferring one of these four alternatives, the following examples illustrate possible legal scenarios corresponding to each of them.

*DE RE ONLY* – A contractual context that makes sense only on *de re* interpretation is a liability insurer’s promise to defend the insured against “suits seeking covered damages.”<sup>261</sup> “Covered damages” is simply the “thing” being sought in the suit. Its role here is simply to identify what kind of thing (a damages claim seeking damages that the policy happens to cover) makes a suit trigger the insurer’s duty to defend. The category itself is irrelevant; we could change it to list all the covered damages (for negligence, for malpractice, etc.) without affecting the term’s meaning. Conversely, it would be absurd for an insurer’s duty to be triggered by a suit that lists “covered damages” *de dicto*, because the relationship between the seeker’s state of mind and the category are irrelevant to the insurer’s duty to its insured.

*DE DICTO ONLY* – Impersonation of law enforcement officers should be read *de dicto only*. In such cases, “law enforcement officer” is not just a way to identify a person to protect from impersonation. If that were so, we would expect to protect that person from impersonation whether or not on duty, and regardless of the capacity he is performing. Rather, what we care about is the holding of oneself out falsely as matching the description, “a law enforcement officer,” and the resulting injury to public trust in law enforcement. Here, it is only the category that matters.

*DE RE OR DE DICTO* -- On an interpretation where either reading would be enough to trigger an ambiguous provision, we would expect

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<sup>261</sup> *Health Net, Inc. v. RLI Ins. Co.*, 141 Cal. Rptr. 3d 649, 653 (2012), as modified on denial of reh’g (June 12, 2012).

serious and related concerns about both the thing and the category. The ADA criterion of “being regarded as having an impairment” in order to claim the antidiscrimination protection meets this standard. On the *de re* reading, the impairment (e.g. epilepsy) as a “thing” matters even if the employer does not regard epilepsy as “an impairment” *de dicto*, both because the worker herself could experience workplace disadvantage based on being regarded as epileptic, and because enforcement of antidiscrimination protections in regarded-as cases may achieve statutory aims by diminishing discrimination against non-parties who have epilepsy. The category of “impairment” matters because regard of a person as impaired tends to be constitutive of employment barriers and of disability itself. Moreover, the bar for establishing oneself as entitled to protection from disability discrimination is low for this remedial statute, and therefore this least stringent of the four tests makes sense.

*DE RE AND DE DICTO* – Requiring both readings sets a high bar for the operation of a statutory term. In *Flores-Figueroa v. United States*, the Supreme Court interpreted an “aggravated identity theft” statute forbidding “knowingly transfer[ing] . . . a means of identification of another person.” The opaque verb here is “know.” The Court ruled that the identifying data must in fact belong to another individual (*de re*, i.e., not just a fictitious person) and that the defendant must actually know this (*de dicto*). Here, the “thing” is the person whose identification has been misappropriated. While identity theft bears some similarity to impersonation offenses, it differs in that harm is less an injury to public trust and more an individual harm to the one impersonated. To the extent the statute is meant to protect that individual’s rights, its purpose is not served directly if the identification belongs to no one.

### *B. Traditional Approaches: Drafting and Defaults?*

For the same reasons we have often blamed drafters for confusion surrounding opacity, we may be inclined to delegate to drafters the task of preventing misreading. Likewise a default rule – a new canon of construction – seems at first glance a good way to guide courts when ambiguities nonetheless slip into statutes.

Can drafters disambiguate as they are often urged to do? By many accounts, ambiguity is an avoidable sign of poor drafting.<sup>262</sup> For the sort of

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<sup>262</sup> See, e.g., Farnsworth, *Cases and Materials on Contracts* XX (7<sup>th</sup> ed. 2007); *FAO Papers Online*; Kenneth L. Rosenbaum, *Legislative Drafting Guide: A Practitioner’s View* 15 (2007) (available at [http://www.fao.org/fileadmin/user\\_upload/legal/docs/lpo64.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/lpo64.pdf).) (last visited Sept. 20, 2012).

ambiguity created in these examples, however, drafting care is unlikely to be helpful. We use opaque constructions frequently and necessarily in natural speech. In statutes they turn up without any mark of distinctiveness in just the sort of contexts we regulate (e.g., *intend*, *believe*, *know*, *seek*, *attempt*, *promise*, *discriminate against*, *foresee*, etc.). And as in natural language, where speakers do not notice ambiguity unless it causes confusion, legislators would find it extremely difficult and inefficient to police it *ex ante* based on a simplistic exhortation to “say what you mean.” Even if drafters had a list of troublemaking verbs to alert them to potential ambiguity, they would be hard pressed to see on their own what are often subtle distinctions of meaning, let alone to draft around the problem effectively.<sup>263</sup> Even when one grasps the difference between *de dicto* and *de re* readings, it can sometimes be difficult to tease them apart, particularly when using substantially the same vocabulary that gives rise to ambiguity in the first place. To convey the difference between *de dicto* and *de re* readings, linguists resort either to highly formal articulations of the sentence’s logical structure, or to detail-rich but contrived scenarios that distinguish the two meanings. Neither of these is a good fit with our present practices of encoding law in text.

If it is not feasible to intervene on the front end in statutory drafting, then it may be tempting to select either a *de re* or *de dicto* interpretation as the default. A new Canon of Opaque Constructions might state, “Ambiguous opaque sentences as are to be interpreted *de dicto* [or alternatively, *de re*] unless that interpretation is clearly unreasonable.” This would be a mistake. First, it will do no good to have a rule standing by in the wings when the circumstances that trigger the rule remain invisible to the judge who could apply it. For all their practice, courts are like most language users in that they are largely unaware of *patterns* of language – concerning specificity, entailment of existence, and resistance to substitution -- that we were able to see in Part I with a few cupcake sentences. If courts are not sensitive to the fact that some verbs create ambiguity in contexts where most verbs do not, then a rule that helps choose among literal readings will be useless. Even imagining that courts could spot ambiguity and grasp the difference firmly enough to implement a default rule, it would be difficult to say which of the two (or more, in the case of multiply-embedded opaque constructions) the default should be. The fact that statutes are enacted to apply to a range of circumstances might suggest that we should read ambiguous statutes *de dicto* unless a contrary

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<sup>263</sup> The revised language of the ADA’s “regarded as” prong is an example. See Part II(D) *infra*.

meaning is clearly intended.<sup>264</sup> However, lawyers will likely remain biased in favor of *de re* readings, and in combination with a *de dicto* canon this would be a recipe for even greater incoherence.

### C. Innovative Interventions: Technology and a New Heuristic

If there is hope for reducing the confusion of opacity at any point--- from legal training to legislative drafting to judicial reasoning--- traditional means will not be adequate, and looking outside the discipline will be especially important. Help may come in the form of technology, borrowings from cognitive science, or models for reducing bias in other contexts. As to the last, lawyers might take a cue from the medical field, in which error is acutely costly and professionals have been actively chronicling and combatting it.<sup>265</sup>

At the point of drafting, computational aids offer a promising direction for handling the two tasks that humans struggle with: spotting structural ambiguity, and imagining the complex range of hypothetical situations that an opaque statutory provision could describe. These tasks demand sensitivity to structure and computational power, competencies in which machines excel. Hopes for using computers in this role may sound starry-eyed or threatening, depending on your point of view. But it is not far-fetched to suppose that computers at a minimum could serve as ambiguity-detection sentries to assist drafters. In the fashion of computerized spelling or grammar checkers, they could be programmed to trigger the user's attention to an ambiguous phrase, and perhaps to prompt the user to consider alternative readings. Already some expert systems developed for law show promise in recognizing and identifying opacity, and much more assiduously than a lazy System 2 gatekeeper.<sup>266</sup> The more difficult task of prompting the use with possible literal readings is no more sophisticated than some current computing applications in machine translation<sup>267</sup> and other expert systems.<sup>268</sup> The key is that, consistent with a

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<sup>264</sup> For example, Robert Hockett describes the (extensional) equivalent of *de re* meaning as arbitrary and the *de dicto* as more "law like." Robert Hockett, *Reflective Intentions: Two Foundational Decision Points in Law and Mathematics*, 29 *CARDOZO L. REV.* 1967, 1990 (2008).

<sup>265</sup> JEROME GROOPMAN, *HOW DOCTORS THINK 2* (2008).

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<sup>267</sup> Emily M. Bender and D. Terrence Langendoen, *Computational Linguistics in Support of Linguistic Theory*, 1 *LINGUISTIC ISSUES IN LANGUAGE TECHNOLOGY* (2010).

<sup>268</sup> One example of a successful approach to pattern-spotting with moderate precision and recall (that is, a system that will catch many problems, but that will still miss some as well as flag non-problems) is the "integrated development environment" software that most

theme of recent work in artificial intelligence, ambiguity detection and resolution does not require a computer to reason like a human, but only to spot patterns.<sup>269</sup> In short, computers could supplement System 2 with beefed-up analytical power a better work ethic. It is an open question how helpful such a system could be in catching possible sources of confusion without flagging too many ambiguities that are not likely to lead to confusion. Another question is how comprehensive their semantics could be in presenting the panoply of differentiated readings to us, from those described easily but less helpfully in formal logic, to more difficult but detailed (and perhaps even diagrammatic) renderings of possible readings. But these questions are worth exploring, in part because doing so will boost the awareness of structural ambiguity on the part of drafters, which is a worthwhile end in itself.

Technology might also aid in training lawyers to recognize opacity, if not spontaneously then once it has been raised. Despite being in the metalinguistics business, lawyers neither have nor for most purposes need any explicit training in linguistics at all. But if lawyers are to address a shortage of expertise in handling opaque constructions, they may have to do so in the same way that linguists learn to recognize opacity: by practice. Currently the only package of tools for learning to spot opacity is a full-fledged course in semantics or a related field. But that need not be so. As the experiential method of Part I shows, a smattering of examples that make distinctions of meaning visible could be enough to promote familiarity with the phenomenon. With appropriate materials, law schools today could expose all students to training in this and other metalinguistic competencies. The added dimensions of video and aural media could boost the effect of training beyond what print media alone can offer. Students could experience through an interactive training program a missing ingredient---one that abounds in ordinary conversation but is difficult to synthesize in abstraction---that is needed to develop expertise in interpreting opaque constructions: instant notice of our mistakes. Finally, the lackluster success of debiasing interventions in other domains may undersell what is possible in law,<sup>270</sup> which is tightly and hierarchically organized to urge and

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programmers use to catch common programming errors and suggest how to solve them. See, e.g., GROOPMAN, *supra* note XX at 197.

<sup>269</sup> Professor Christopher Manning, personal communication (Nov. 12, 2013) (stating that a theme of artificial intelligence has been to recognize opportunities for pattern recognition that stop short of human-like reasoning).

<sup>270</sup> See, e.g., Reidar Bratvold, *Correcting Common Errors in Probabilistic Evaluations: Efficacy of Debiasing*, Paper SPE 102188 presented at the SPE Annual Technical Conference and Exhibit, 2006.

even enforce the proliferation of new knowledge.

Finally, at the endpoint of judicial scrutiny, it will be difficult to stamp out the habit of overreliance on algorithmic *de re* reasoning. But we can take advantage of our knowledge that it is easier to see something that manifests as a *res*, and follow the lead of psychologists to call our what-is-the-X mechanism of legal misreading what it is: a heuristic approach to reasoning about language. That is, we would make a *thing* of it, and give it a name, perhaps the “reification heuristic.” Or, to spur wider uptake of this concept, it could be called the more evocative “Schoolhouse Rock heuristic” so as to call to mind the central confusion of sense with reference: “a noun is a person, place or thing.”<sup>271</sup> This may help us remember that a noun often functions not by pointing but by constituting a description for a mental category.

*De re* and *de dicto*. Things and words. Reversing the course of legal misreading calls for a more conscious, rational understanding of their differences in language. To begin, we may have to reify some categories that do not yet exist in the legal mind, to make them solid enough to be looked *at* instead of looked through.

## CONCLUSION

“(1) Read the statute; (2) read the statute; (3) read the statute!”<sup>272</sup> We all get the joke. Here, by Judge Friendly’s account, Justice Frankfurter has set us up to expect that his three steps of statutory interpretation will lay out an expert’s algorithm for finding our way from text to law. The punch line is that the three steps are all the same thing, and maybe the fact that the one thing is reading -- something far from a trade secret, something we already know how to do -- delivers part of the punch, too. In the debate over methods of statutory construction, this familiar line might be called into service by the textualist, for whom it signals that the plain meaning of text is the beginning, middle, and end of interpretation. On the other end of the hermeneutic spectrum, proponents of purposivist or intentionalist theories might note that the command to read and reread is itself an admission that meaning may be less plain than it seems at first glance. But how do Justice Frankfurter’s words resonate far upstream from the disputed

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<sup>271</sup> But we can take advantage of our knowledge that it is easier to see something that manifests as a *res*, and follow the lead of psychologists to)

<sup>272</sup> HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (citing Justice Felix Frankfurter’s “threefold imperative” for statutory interpretation).

terrain of interpretive methodologies, where everyone agrees that text is important, and that courts should not entirely neglect obvious, reasonable, literal readings of legally significant language? Against this backdrop, the exhortation to read, read, read sounds less like words of wisdom and more like a recipe for mechanically reinscribing error.

Yet by reputation, a lawyer has nearly a sorcerer's powers when it comes to conjuring meaning from written language. One moment, words in a lawyer's hands are plastic, stretching to reach a meaning that might have seemed impossible in natural language, to the astonishment and exasperation of onlookers. The next moment, Presto, words are rigid and precise, with meanings narrow enough to squeeze through a tax loophole or other technicality. Whether we use our skills to make textual meaning appear expansive or vanishingly thin, the common denominator of a lawyerly approach to language seems to be *mastery*. How surprising, then, if our expertise in reading were to fail us in any systematic way. How much more unsettling if no one noticed, least of all the magicians themselves.

Lawyers' self conception as masters of rigorous reading may in fact be inhibiting our ability to detect meaning that is before us in black and white. Misreading can occur in areas from voter fraud to genocide, as the examples in this Article show. Its costs are enormous in terms of misplaced legal advocacy, unnecessary and ineffectual revision of statutes, absurd and unjust outcomes in individual cases, and lost opportunities to refine our collective understanding of important legal categories: what might it mean to have genocidal intent? to assume the identity of another? to regard someone as disabled? to intend to obstruct justice?

More distressing still is the fact that we confuse the true nature of the problem – inattention to subtle but important patterns in natural language -- with its opposite: close and rigorous reading. This ought to lay a foundation for a searching disciplinary critique of legal reasoning about language. It ought also to motivate a search for interventions whose surface is barely scratched here. To the extent that our blind spots are a product of cognitive bias, legal institutions should engage the interdisciplinary field of cognitive science for guidance. But because some aspects of legal institutions and culture may exacerbate cognitive distortion, lawyers also have an obligation to turn attention inward and come to a more circumspect understanding of legal expertise, its limits, and its possibilities for transformation.