Making Good Sense:
Pragmatism's Mastery of Meaning, Truth, and Workable Rule of Law[*]

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[*] By "sense" this article means not only "meaning conveyed or intended" but also "capacity for effective application of the powers of the mind as a basis for action or response." *See Sense,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014) "Workable" has the broad meaning discussed in Sections II, IV, and Appendix C, and "good" is further explored in the section on Eunomia, namesake of the Greek goddess of good order.)

I. <u>Introduction</u>

      A. <u>Rejecting Post-Truth Claims</u>

      We sometimes hear that we live in a post-truth era.[1] The press, for example, tell us that President Trump is "known for **trafficking in mistruths and even outright lies**;" that "The president often seeks to paint **a self-serving and self-affirming alternate reality** for himself and his supporters;" that, through May 31, 2018, "Trump had made **3,251 false or misleading claims in 497 days**--an **average of 6.5 such claims per day** of his presidency;" that Donald Trump, Jr. has, for example, **posted poorly-doctored images making "his father's Gallup presidential approval rating look [ten points] higher** than it actually is" while claiming "I guess **there is a magic wand to make things happen and @realdonaldtrump seems to have it**;" and that President Trump's attorney, Rudy Giuliani, even claims that **"Truth isn't truth"** and **"nowadays" facts are in the beholder's eyes**.[2]

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[1] Kurt Anderson, *How America Lost Its Mind*, THE ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/how-america-lost-its-mind/534231/.

[2] Ashley Parker, *President Trump Seems to Be Saying More and More Things That Aren't True*, THE WASHINGTON POST (June 19, 2017), https://www.washingtonpost.com/politics/president-trump-seems-to-be-saying-more-and-more-things-that-arent-true/2018/06/19/c1bb8af6-73d5-11e8-805c-4b67019fcfe4_story.html?utm_term=.ecc3b82c25d7 (on President Trump); Avi Selk, *Trump's Approval Hits 50 Percent--in a Doctored Poll Graphic Shared by His Son*, The Washington Post (August 10, 2018). https://www.washingtonpost.com/news/the-

One can also read of preceding (and perhaps "precedential") bluster like the following by an aide to former President George W. Bush:

> The aide said that guys like me [a reporter for the New York Times] were "in what we call the reality-based community," which he defined as people who "believe that solutions emerge from your judicious study of discernible reality." I nodded and murmured something about enlightenment principles and empiricism. He cut me off. "That's not the way the world really works anymore," he continued. **"We're an empire now, and when we act, we create our own reality.** And while you're studying that reality -- judiciously, as you will -- we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors . . . and you, all of you, will be left to just study what we do."[3]

To keep this Introduction reasonably brief, I set out more such quotations of the "powerful" or "influential" in Appendix A of this article.

Responsible lawyers must of course reject such "post-truth" mendacity and silliness. Responsible lawyers must, among other things, grasp and acknowledge applicable semantic, pre-semantic, and other restraints explored in Section IV and Appendix C of this article. As we shall see, such restraints unsurprisingly belie "magic wands," "alternate reality," and other such unworkable notions.

B. Rejecting Formalist Claims

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However, as also discussed in Section III of this article, in exploring such semantic, pre-semantic, and other restraints, responsible lawyers must take care not to ignore applicable semantic and other freedoms also discussed in this article.

As we shall see, such freedoms are inconsistent with formalist claims that the law is "a self-contained system of legal reasoning" involving deduction of "neutral" and apolitical results from "general principles and analogies among cases and doctrines" (including formalist claims that the law is like an "objective" game of baseball where judges merely call "balls and strikes.")[4] As discussed in more detail in Section III below, such formalism therefore also fails.

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fix/wp/2018/08/10/trumps-approval-hits-50-percent-in-a-doctored-poll-graphic-shared-by-his-son/?noredirect=on&utm_term=.16a1255eb064. The "doctored" graphic is especially brazen given its obvious manipulation (colors do not match, the "doctored" portion is out of line, and one can see another number lurking behind the "50%" "doctored" number. *See id.* Caroline Kenny, *Rudy Giuliani says 'truth isn't truth'*, CNN Politics (Aug. 19, 2018), https://www.cnn.com/2018/08/19/politics/rudy-giuliani-truth-isnt-truth/index.html, (emphases added throughout).

[3] Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, THE NEW YORK TIMES MAGAZINE (Oct. 17, 2004), https://www.nytimes.com/2004/10/17/magazine/faith-certainty-and-the-presidency-of-george-w-bush.html. (emphasis added).

[4] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 16-17 (1992) (defining formalism without the baseball reference). *See also* Jim Evans, *Sorry, Judges, We Umpires Do More Than Call Balls and Strikes*, THE WASHINGTON POST (Sept. 7, 2018), https://www.washingtonpost.com/outlook/sorry-judges-we-

C. Embracing Hermeneutic Pragmatism's Middle Way

In eschewing both "post-truth" and formalist errors, this article explores how responsible lawyers should take a middle path. That path focuses on *workable* rule of law that neither wrecks itself by ignoring restraint that it should have recognized nor chokes itself where it might have breathed.

In exploring such *workable* rule of law, this article's approach is therefore a pragmatic one. Its approach is also necessarily a "hermeneutic" one. One cannot workably grasp what one does not understand, and one cannot have understanding without workable notions of both meaning and interpretation. This article therefore explores what I shall call hermeneutic pragmatism. (I use the term "hermeneutic" here both as a synonym of "interpretive" and in honor of Gadamer's "philosophical hermeneutics" which recognizes that "For human beings, experiencing is preeminently participating in meaning."[5])

My overriding hope for such hermeneutic pragmatism is a high one. I hope that an overview of the freedoms and restraints inherent in such pragmatism will inspire readers to imagine and demand leaders who are honest about legal flexibility and restraint (including those in the executive, legislative, *and* judicial branches). I also hope such an overview will inspire readers to demand leaders who will insist on rule of law that "works" in all of the senses discussed in Section IV-C and Appendix C of this article.

Demands for such "workability" are urgent. "Post-truth" and formalist errors not only assail us singularly. Such errors compound themselves as well. A "post-truth" president or other public official can, for example, feel free by definition to assert *anything* including asserting (by word or deed or both) that "truth is not truth" while also asserting that good judges are merely umpires making truthful calls. Fortunately, hermeneutic pragmatism primes us to recognize and speak out against such contradictory nonsense.

II. Six Tenets of Hermeneutic Pragmatism

Six overlapping tenets of hermeneutic pragmatism collectively help us reject both "post-truth" and formalist errors. These overlapping tenets recognize the inextricable role of experience in meaning, the instrumental nature of concepts, truth as "the state of being the case," realism as being language bound, the force of the pre-semantic on law and fact, and various tensions between semantic freedoms (on the one hand) and semantic and pre-semantic restraints (on the other hand). Collectively, these six tenets guide us along hermeneutic pragmatism's middle path.

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umpires-do-more-than-call-balls-and-strikes/2018/09/07/bd6ba7a2-b227-11e8-a20b-5f4f84429666_story.html?utm_term=.6ed3461b9e07 (rejecting the notion that even baseball umpires merely call balls and strikes). *See also* Section III below on applicable semantic freedoms inconsistent with such formalist claims.

[5] *See Hermeneutical or Hermeneutic*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014) and JEAN GRONDIN, HANS-GEORG GADAMER A BIOGRAPHY 287 (Joel Weinsheimer tr., Yale 2003).

A. <u>The Inextricable Role of Experience in Meaning</u>[6]

1. <u>Sense and Reference</u>

Since our understanding of any given discourse depends upon the meanings of our terms, hermeneutic pragmatism straightforwardly begins by exploring the very nature of meaning itself. Recognizing straightaway that the same person, place, or thing can have multiple meanings (my brother is also my parents' son), hermeneutic pragmatism also straightforwardly recognizes that any workable theory of meaning must parse between sense (the cognitive or mental component of meaning) and reference (that to which the term refers as fact or fiction).[7] Meaning must have a sense component to account for the different meanings (such as brother or son) the same person, place, or thing may have. Meaning must also have a reference component to tie meaning to the specific portions of the objective or fictional world of experience and to tie together the different senses those specific portions may have.[8] To give a Constitutional example, parsing sense and reference allows a lawyer to refer to the same individual (the reference) as either the "Vice President" or the "President of the Senate" (with the difference of meaning thereby lying in the different senses of the terms).[9] Hermeneutic pragmatism thus embraces notions of meaning that workably recognize this mixed role of sense and reference.[10]

2. <u>Meaning and Experience</u>

Grasping that meaning involves both sense and reference, how do we effectively distinguish the meaning of one term (such as "Vice President") from the meaning of another term (such as "President of the Senate")? Hermeneutic pragmatism looks at the differences in how such terms play out in experience. More precisely, if one understands "experience" to include *both* external experience (i.e., objective or public experience) *and* internal experience (i.e., private[11] experience such as thoughts and memories), hermeneutic pragmatism embraces the following modified version of Charles Sanders Peirce's early pragmatic notion of meaning: the sense of a particular concept is the total actual and possibly-conceivable[12] ways in which that

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[6] This section draws from Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213 (2014) & Harold Anthony Lloyd, *Theory Without Practice Is Empty; Practice Without Theory Is Blind: The Inherent Inseparability of Doctrine and Skills*, *in* THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND 77-91 (Linda H. Edwards ed., 2017).

[7] *See* WINFRIED NÖTH, HANDBOOK OF SEMIOTICS 92-100 (Indiana Univ. Press, 1995) (1985).

[8] *See id.*

[9] *See id.*

[10] Such workability leads to the notion of instrumentality discussed in Section II-B below.

[11] By private experience, I mean experience private to the individual such as (without limitation) a thought or pleasant or painful sensation.

[12] Again, this can include private experience. "Possible" incorporates a normative as well as factual sense. For example, it is not possible in common speech for a *typical* horse to have eight legs. Section IV-B and IV-C below discuss linguistic pushback in more detail.

concept plays out in such experience.[13] The different senses of "Vice President" and "President of the Senate" thus depend upon the different ways such notions play out in such experience.

This approach to meaning fits how we use "meaning" in court, in the practice of law, and in law school. If one asks good lawyers, for example, what an actual or proposed contract means, such lawyers would "flesh it out," would describe how the contract would play out in practice. For example, if the actual or proposed contract contained an indemnity with a cap of one hundred dollars on the indemnitor's liability, the explanation would include a statement that in no scenario would the indemnitor be required to pay more than that amount. If a term were vague or ambiguous, the explanation would include tales of how various persons might read the term and how such tales might or likely would turn out. One would flesh out, for example, a statute in similar ways. Similarly, if one asks a good lawyer what her client's "emotional injury" means, such a lawyer would not only set out objective symptoms but would include the client's internal sufferings and other such experiences as well. Throughout this article, I shall therefore take the "meaning" of concepts in the way proposed above.[14]

In doing so, hermeneutic pragmatism, again, takes "experience" in the broad internal and external senses discussed above. It would therefore have difficulties with Felix Cohen's more narrow statement that in "modern jurisprudence" a word "that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it."[15] This is, of course, a much too constricted notion of meaning. Fictional moot court problems, for example, have meaning and play important roles in training lawyers even though they do not

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[13] Peirce's early formula reads: "Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE § 5.402 (Charles Hartshorne & Paul Weiss eds. (vols. 1-6) & Arthur Burks ed. (vol. 7-8), 1931-58) (c.1906). To the extent Peirce's formula focuses only on objective experience and therefore results in beliefs being synonymous if they cause the same habits, I would disagree. *See* JOHN P. MURPHY, PRAGMATISM FROM PEIRCE TO DAVIDSON 25-26 (1990). For example, I could have a habit of walking from my desk to the front door in just the same manner whether I believe that my neighbor or a stranger is at the door. *See also* WILLIAM JAMES, PRAGMATISM 18 (Thomas Crofts & Philip Smith eds., Dover 1995) (1907) (setting out James's interpretation of Peirce's notion of meaning).

[14] This is all also consistent with Gadamer's claim that "It is only in all its applications that the law becomes concrete," *see* HANS-GEORG GADAMER, TRUTH AND METHOD 322 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) [hereinafter GADAMER, TRUTH AND METHOD]. as well as Gadamer's further claim that "knowledge that cannot be applied to the concrete situation remains meaningless and even risks obscuring what the situation calls for." *Id.* at 311.

[15] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM L. REV. 809, 823 (1935) [hereinafter Cohen]. Hermeneutic pragmatism also rejects Cohen's "definition of legal concepts, rules, and institutions in terms of judicial decisions or other acts of state force." Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 8 (1937). Dissents, for example, have meaning even though the state will not enforce them. Additionally, lawyers and other legal scholars (along with the rest of a linguistic community) can debate and influence the meaning of legal concepts and can of course meaningfully maintain that judicial or other decisions have misinterpreted such concepts.

involve actual facts. Hypotheticals can also help legal analysis even though they do not involve actual facts. More broadly, fictional literature also has meaning even though such meaning is not factual. We are also always free to imagine much and such imagination has meaning. Hermeneutic pragmatism fully recognizes that all such examples have meaning although, again as discussed in Section IV and Appendix C below, there is much experiential and other restraint on what can be considered workably "real" despite any "post-truth" claims to the contrary.

B. Instrumentality and Workability

Given the desire for "workable" meaning discussed in Section II-A above, hermeneutic pragmatism thus also treats concepts as instruments which help us better organize and predict experience.[16] Thus, hermeneutic pragmatism agrees with the great American pragmatist William James that concepts must work "with the collectivity of experience's demands, *nothing being omitted*."[17] As we shall see in Section IV-C and Appendix C below, the italicized language encompasses moral as well as other experience. Given the demand for such complete workability across experience, hermeneutic pragmatism expressly rejects the dangerous "nihilism, relativism, irresponsibility, and the like"[18] characteristic of the subterfuge and silliness quoted in Section I-A above.

C. Truth as "The State of Being the Case"

Hermeneutic pragmatism, however, is careful not to equate "truth" itself with such Jamesian "workability." Instead, it requires definitions of truth to have such Jamesian "workability" (again as more fully fleshed out in Section IV-C and Appendix C below). For purposes of this article, I will therefore use the common definition of "truth" as "the state of being the case"[19] with the further understanding that our conceptual schemes and semantic lifeworlds discussed in Sections III and IV below define what is the case and that these definitions must be "workable in the senses discussed in Section IV-C and Appendix C below.[20]

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[16] *See* JAMES, *supra* note 13, at 21 (theories are "instruments" and "[one] must bring out of each word its practical cash-value, set it at work within the stream of [one's] experience.") However, as discussed in Section IV-B-5-a below, our words often have long pedigrees and can take on lives of their own. Rather than always using a word as "some arbitrary tool which can be thrown in a corner if it doesn't do the job;" one should instead recognize when such a word involves "a line of thought that comes from afar and reaches on beyond . . . ." *See* GADAMER, TRUTH AND METHOD, *supra* note 14 at 552.

[17] *See* JAMES, *supra* note 13, at 32 (Thomas Crofts & Philip Smith eds., Dover 1995) (1907) (emphasis added).

[18] *See* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 189 (2000) [hereinafter FELDMAN, AMERICAN LEGAL THOUGHT] (discussing such charges against postmodernsim).

[19] *Truth*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).

[20] *Compare* James's looser formulation in JAMES, *supra* note 13, at 31-32. ("Pragmatism's "only test of probable truth is what works best" in the full sense described above). For a concise review of various philosophical definitions of truth, *see Truth*, THE OXFORD COMPANION TO PHILOSOPHY (Ted Honderich ed., 2d ed. 2005).

Thus, for example, lawyers who are debating whether or not certain facts are "true" in a particular case will be constrained by prevailing views of how one determines what is the case--though such lawyers can challenge the workability of such views.

D. Realism as Language Bound

Because we cannot meaningfully speak of worlds or anything else without the use of language, hermeneutic pragmatism also straightforwardly recognizes that worlds in which we live are language bound and have meaning in the quasi-Peircean sense discussed in Section II-A above. As Hilary Putnam puts it: "To talk of 'facts' without specifying the language to be used is to talk of nothing; the word 'fact' no more has its use fixed by Reality Itself than does the word 'exist' or the word object'."[21] Thus, when we speak of what is "real," we must do so within a given conceptual scheme. We can therefore have the "real" but to have it in any meaningful sense we need language to define it. Thus, as Putnam also notes, "The world does not speak. Only we do."[22] In Sections III and IV below, I shall therefore discuss in further detail applicable freedoms and constraints involving concept creation as well as any attendant "realism" we might have within the conceptual schemes we create. As we shall see in Section IV below, significant restraints apply to such language-bound realities, restraints that prohibit, for example, presidential "magic wands."

E. The Force of the Pre-semantic on Law and Fact

Despite the language-bound nature of worlds in which we live, hermeneutic pragmatism also straightforwardly recognizes that we encounter forces currently beyond the meaningful words at our disposal, forces to which I shall simply refer without further interpretation as the "pre-semantic."[23] For example, as Jens Zimmermann notes, we can "have a toothache, or we

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[21] HILARY PUTNAM, THE MANY FACES OF REALISM 36 (1987) [hereinafter PUTNAM, MANY FACES].

[22] RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 6 (1989) [hereinafter RORTY, CONTINGENCY]. As I read him, Gadamer makes a similar point: "Each science, as a science, has in advance projected a field of objects such that to know them is to govern them." GADAMER, TRUTH AND METHOD, *supra* note 14, at 449. In language that sounds very similar to Gadamer, Putnam also claims: "If one must use metaphorical language, then let the metaphor be this: the mind and the world jointly make up the mind and the world." HILARY PUTNAM, REALISM WITH A HUMAN FACE 262 (James Conant ed. 1990) [hereinafter PUTNAM, HUMAN FACE]. Continuing with my parsing between the pre-semantic and the linguistic, if the mind and the world are both properly taken as linguistic constructs, then this metaphor makes good sense to me.
[23] I acknowledge the complexities of reference and the various debates as to its nature. *See Referring*, THE OXFORD COMPANION TO PHILOSOPHY (Ted Honderich ed., 2d ed. 2005). ("Intuitively, for an expression to refer is for it to stand for or pick out something, but what this involves has long been debated. According to Frege the reference of an expression is determined by its sense, but lately Kaplan and Kripke have argued that some terms such as demonstratives, proper names, and natural-kind terms, refer directly.") I lack the space to explore reference in detail here and will trust that the reader can imagine along with me the possibility of referring to

[can] sense heat, before we can put these sensations into words and interpret them."[24] However, as Zimmermann also notes, we cannot have a "*meaningful* experience without understanding pain or temperature first within a cultural vocabulary by which we make sense of things."[25]   To avoid confusion going forward, hermeneutic pragmatism carefully distinguishes between the "pre-semantic" and the semantic. The latter includes such semantically-interpreted notions as the "world" or "experience." The latter therefore includes both sense and reference. The former, on the other hand, includes only reference[26] as, again, in Zimmerman's case of sensing heat before we have a concept of heat. I discuss in Section IV below the pushback of both semantic and pre-semantic restraints.

Such a distinction between the semantic and the pre-semantic can also hopefully explain away apparent contradictions in claims such as postmodern pragmatist Richard Rorty's claim that "The world is out there, but descriptions of the world are not."[27] ("World" has both sense and reference. Thus, does not Rorty broadly describe what he says he does not, i.e., the world?) We can eliminate such questions by translating Rorty's phrase into: "The pre-semantic is out there, but descriptions of the pre-semantic are not." (Since we are using "pre-semantic" as a term of pure reference, there should be no imputation of sense outside of language here.) This also similarly helps us polish Grondin's claim that "There is no 'pre-verbal' world, only world oriented to language, the world which is always to be put in words, though never entirely successfully"[28] into the more consistent (though perhaps less polished) "There is no 'pre-verbal' world, only the pre-semantic which is oriented to language, the pre-semantic which is always to be put in words." Taking such care with language also helps us truly appreciate Gadamer's eloquence: "Where the word breaks off, no thing may be"[29] and language is "the all-embracing form of the constitution of the world."[30] Again, as further noted in Sections IV-A, and IV-C below, hermeneutic pragmatism must wrestle with such pure reference of the pre-semantic.

Such a distinction between the semantic and the pre-semantic should remind judges, lawyers, and law students that much always remains "to be put in words" and that much that

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the yet to be interpreted. "Prudence prepares as best it can for the known as well as the unknown," for example, seems to me to refer to the uninterpreted as well as the interpreted.

[24] JENS ZIMMERMANN, HERMENEUTICS: A VERY SHORT INTRODUCTION 14 (2015). Peirce's definition of "feeling" may be helpful here: "an instance of that sort of element of consciousness which is all that it is positively, in itself, regardless of anything else." PEIRCE, § 1.306 COLLECTED PAPERS, *supra* note 13. As such, it "involves no analysis, comparison or any process whatsoever . . . ." *Id.*

[25] ZIMMERMAN, *supra* note 24, at 14.

[26] *See again supra* note 23 on reference. Again, I will trust that the reader can imagine along with me the possibility of referring to the yet to be interpreted. (Does this sentence on its face not do just that?)

[27] RORTY, CONTINGENCY, *supra* note 22, at 5. "World" has both sense and reference. Thus, does not Rorty broadly describe what he says he does not, i.e., the world?

[28] JEAN GRONDIN, INTRODUCTION TO PHILOSOPHICAL HERMENEUTICS xv (Joel Weinsheimer trans., 1994).

[29] GADAMER, TRUTH AND METHOD, *supra* note 14, at 483. "Thing" has sense as well as reference and thus requires language. The pre-semantic as pure reference lacks such sense.

[30] HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS 3 (David E. Linge, ed., trans., 1976) [hereinafter GADAMER, HERMENEUTICS].

should be addressed may often be missing in matters under consideration. Judges, lawyers, and law students should thus be ever vigilant as to the completeness or incompleteness for their current purposes of concepts and terms currently in play. I shall return to this point when discussing concept creation and deconstruction in Section III below.

F. Tensions between Semantic Freedoms and Semantic and Pre-semantic Restraints

Finally, since "foundations" are linguistic terms themselves, hermeneutic pragmatism honestly recognizes that our terms do not rest on any foundations transcending language. Since language defines foundations and we have much *potential* freedom in how we define our terms, lawyers and others thus have much *potential* freedom in how they might define and redefine foundations and thereby ground and reground their terms and concepts. However, as we shall see in Section IV below, lawyers and others also face much restraint on such *potential* freedom. As such, judges, lawyers, and law students should not overestimate such freedoms. As we shall see in Sections III and IV below, judges, lawyers, and law students should properly weigh applicable freedoms and restraints and not fall into errors of underestimation or overestimation. **Formalists, for example, can underestimate the freedoms of framing in legal reasoning discussed below[31] while "post-truth" people can speak of "magic wands" and otherwise overestimate such freedoms.** To better gage such freedoms and restraints, I shall next turn in more detail to the freedoms recognized by hermeneutic pragmatism. After that, I shall explore in more detail applicable tempering restraints.

III. Making Workable Sense: Law, Fact, and Overlapping Semantic Freedoms

A. Creating Meaning: Human Metaphors, Categories, and Concepts

Hermeneutic pragmatism, as we have seen, defines the sense of a concept as the total actual and possibly-conceivable[32] ways in which that concept plays out in experience (including both "objective" and internal experience).[33] Although judges, lawyers, and law students are always already surrounded by such meaning, although they "are always already encompassed by the language that is [their] own,"[34] they can also always try to re-describe[35] including trying to

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[31] *See generally* Harold Anthony Lloyd, *Good Legal Thought: What Wordsworth Can Teach Langdell About Forms, Frames, Choices, and Aims*, 41 VT. L. REV. 1, 1-22 (2016).

[32] Again, this can include private experience. Again, possible also includes a normative as well as factual sense: it is not possible in common speech for a *typical* horse to have eight legs.

[33] Again, Peirce's formula reads: "Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." PEIRCE, COLLECTED PAPERS § 5.402, *supra* note 13 . Again, to the extent Peirce's formula focuses only on objective experience and therefore results in beliefs being synonymous if they cause the same habits, I would disagree. *See again* MURPHY, *supra* note 13, at 25-26.

[34] GADAMER, HERMENEUTICS, *supra* note 30, at 62. Not inconsistent with this modified Peircean notion of meaning, Gadamer also notes that "we consider application to be just as integral a part of the hermeneutical process as our understanding and interpretation." *Id.* at 307. Gadamer also

change any concepts and categories in play. They can thus always attempt to use new metaphors, categories, and concepts to cause belief changes.[36] I shall therefore explore these tools as ways of drawing and "redrawing the boundaries between ourselves and [the pre-semantic]"[37]

      1. <u>Freedoms in Creating Metaphors, Categories and Concepts</u>[38]

      When judges, lawyers, and law students describe or re-describe, they often use metaphors, devices which on their face equate different things.[39] For example, if by "labyrinth" a lawyer drafting a contract means "a place constructed of or full of intricate passageways and blind alleys,"[40] then his claiming "this contract is a labyrinth" is a metaphor because it equates a particular contract with a physical place that it is not, i.e., a "a place constructed of or full of intricate passageways and blind alleys."[41] (Similes, by contrast, emphasize likeness without the bolder assertion of equivalence as in, for example, "that contract is like a labyrinth.")[42]

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notes that "knowledge that cannot be applied to the concrete situation remains meaningless and even risks obscuring what the situation calls for." *Id.* at 311. Gadamer also, in Michael J. Clark's words, laments the "rift" between "*techne* (skill or craft) and *phronesis* (practical-moral judgment)." Michael J. Clark, *Foucault, Gadamer, and the Law: Hermeneutics in Postmodern Legal Thought*, 26 U. TOL. L. REV. 111, 119 (1994).

[35] *See* RORTY, CONTINGENCY, *supra* note 22, at 73.

[36] *See id.* at 50 (addressing Davidson and new metaphors as causes rather than reasons for belief changes).

[37] *See* ALAN MALACHOWSKI, RICHARD RORTY 128 (2002).

[38] This section draws upon Harold Anthony Lloyd, *Law as Trope: Framing and Evaluating Conceptual Metaphors,* 37 Pace L. Rev. 89 (2016) [hereinafter Lloyd, *Law as Trope*].

[39] *See* RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 100 (2d ed. 1991) (A metaphor is an "assertion of identity rather than, as with [s]imile, likeness.")

[40] *Labyrinth*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/labyrinth (last visited July 15, 2018).

[41] This metaphor example can also show how metaphors can go "dormant." *See* CH. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 405-10 (John Wilkinson & Purcell Weaver trans., 1969). If by "labyrinth" the lawyer had instead meant "something extremely complex or tortuous in structure," there would be no such metaphorical reference to a "place" in space. *Labyrinth*, *supra* note 40. Thus, if the lawyer means this second sense of "labyrinth," his assertion would no longer involve a "live" metaphor. One can sometimes track this development of dormancy in the order of dictionary listings. For example, in listing defintions, Merriam-Webster's unabridged dictionary "tends to give the oldest sense first." *The Order of the Definitions May Not Mean What You Think*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/words-at-play/dictionary-facts-and-trivia/the-order-of-the-definitions-may-not-mean-what-you-think (last visited July 31, 2018).

[42] *See* LANHAM, *supra* note 39, at 100 (A metaphor is an "assertion of identity rather than, as with [s]imile, likeness.") For the difference between metaphor and metonymy (i.e., the use "of one entity to refer to another that is related to it" such as when a server refers to a customer as "the ham sandwich" because of what he ordered), *see* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 35-40 (2003) [hereinafter LAKOFF & JOHNSON, METAPHORS].

Building on the notion of metaphor (which, again, equates different things as with "Life is a cloud that no two people see the same"[43]), judges, lawyers, and law students create categories which are "sets of things" "treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other."[44] (In this article, I shall use "category" and "concept" interchangeably.) Membership in such categories turns upon "the criteria chosen to measure likeness or unlikeness."[45]   For example, one law firm might define a promotable associate as one who bills 1800 hours per year while another might set the criterion at 1900 billable hours per year. Other firms might not consider billable hours at all. The application of "promotable associate" to a given associate in a given firm will therefore turn on such criteria. (This example also underscores another point: there is no "natural" category here of the "promotable associate" since the term turns on the criteria that *we* choose. Since we could say the same about any other term we use, this also helps us to see that there are no natural categories apart from the linguistic systems we use-- categories, in other words, ultimately come from us and the languages we use.[46])

Why are categories important for judges, lawyers, and law students? First, as hermeneutic pragmatism recognizes, linguistic tools such as categories are needed to provide meaning in an otherwise semantic vacuum in which no worlds or other notions can exist. Again, in my revised Grondin, "There is no 'pre-verbal' world, only the pre-semantic which is oriented to language, the pre-semantic which is always to be put in words."[47] And in Gadamer's words, "Where the word breaks off, no thing may be"[48] and language is "the all-embracing form of the constitution of the world."[49]

Second, as hermeneutic pragmatism also recognizes, judges, lawyers, and law students (like all other thinkers) use categories to organize experience in ways that hopefully make such experience more predictable and thus easier and hopefully safer to manage.[50] By categorizing experiences together they do not have to debate every experience anew but can treat "similar" experiences in already-decided ways. For example, if a lawyer has decided that all of her associates are competent and are not likely to make a mistake when drafting a purchase and sale agreement, she can act accordingly without further analysis when in the future she needs one of them to draft a purchase and sale agreement.[51] Knowing that such categories ultimately come from us via our language and not from an external nature, greatly empowers us (in theory at least) to mold our categories in ways that better manage our experience. However, as we shall also see in Section IV and Appendix C below, this vast possible flexibility is subject to much restraint in practice.

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[43] *See* LANHAM, *supra* note 39, at 100 (A metaphor is an "assertion of identity rather than, as with [s]imile, likeness.")

[44] ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 20 (2002).

[45] *Id.* at 49.

[46] *See id.* at 50.

[47] *See* Section II-E above.

[48] GADAMER, TRUTH AND METHOD, *supra* note 14, at 483.

[49] GADAMER, HERMENEUTICS, *supra* note 30, at 3.

[50] *Id.* at 21-26. *See also* Section II-B above on the instrumentality of concepts and categories.

[51] *See* GADAMER, HERMENEUTICS, *supra* note 30, at 25-26.

2. <u>Freedoms in Retention, Framing and Adjustment of Categories</u>

Hermeneutic pragmatism recognizes much freedom (in theory at least) in retaining, framing, and adjusting categories.

As for retaining categories, as Quine puts it: "Any statement can be held true, come what may, if we make drastic enough adjustments elsewhere in the system."[52] For example, we can even *theoretically* attempt to thwart "recalcitrant experience by pleading hallucination or by amending certain statements of the kind called logical laws"[53] In other words, in theory at least, "there is much latitude of choice as to what statements to reëvaluate in the light of any single contrary experience."[54] However, as we shall see in Section IV and Appendix C below, plausibility and other restraints also apply to such "latitude of choice."

As for reframing and adjustment, such reframing and adjustment can even involve a complete reversal or reframing of a concept even where such change at first may seem experientially impossible or "uncontrollable." Peirce makes this point with the example of Schroeder's stairs:[55]
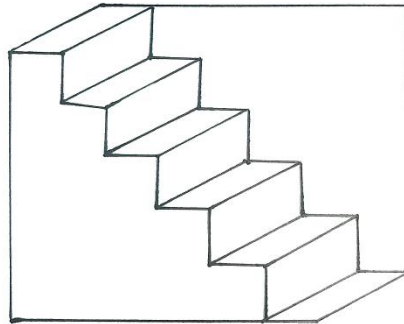
As Peirce notes, when looking at the diagram:

> [Y]ou seem to be looking at the stairs from above. You cannot conceive it otherwise. Continue to gaze at it, and after two or three minutes the back wall of the stairs will jump forward and you will now be looking at the under side of them from below, and again cannot see the figure otherwise. After a shorter interval, the upper wall, which is now near to you, will spring back, and you will again be looking from above. These changes will take place more and more rapidly . . . until at length, you will find you can at will make it look either way.[56]

To take a less abstract and more heartening example of such power of framing, Alan Malachowski reminds us that:

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[52] WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 43 (2d ed., rev. 1980).
[53] *Id.*
[54] *Id.* at 42-43.
[55] PEIRCE, COLLECTED PAPERS § 7.647, *supra* note 13.
[56] *Id.*

When someone like South Africa's Archbishop Desmond Tutu sincerely describes his cancer as 'a blessing,' as something that has greatly increased his appreciation of the value of life, and then other people in similar positions come to share his sentiments, perhaps the otherwise recalcitrant image of this kind of illness as being something that represents the sort of 'brute power' and 'naked pain' over which we have little causal control is thereby undermined.[57]

This freedom to reframe or even change or reject categories is of extreme importance. Not only can we thereby make our working categories more precise, we can also change or reject entirely categories that are otherwise factually, legally, or morally unworkable. Knowing, for example, that categories come from us and not from nature can allow us to abolish such evils as slavery even though slavery no doubt seemed an inherent part of nature to many at the time of its abolition.[58]

However, again, hermeneutic pragmatism demands that any such adjustments or rejections of frames or categories be workable in the senses discussed in Section IV-C and Appendix C. This includes working "sufficiently well enough for [the user] to function."[59] If the stairs in the above diagram, for example, do descend from above, even the craftiest lawyer will have a nasty surprise approaching them otherwise.

B. Freedoms in Playing Up and Playing Down[60]

Taking a deeper look at how concepts actually work, hermeneutic pragmatism also notes two primary functions of concepts: "highlighting certain properties" and "downplaying . . . , [or] hiding still others."[61] Pardoning the pun, concepts thus play up and play down as we just saw in a different way with Schroeder's stairs above. (We shall also further explore these functions of highlighting and hiding in Section III-C on deconstruction.)

For example, a villainous person wishing to damage the reputation of his neighbor's daughter might refer to the very same event by these very different statements:

My decrepit neighbor's daughter had a quiet and *very* involved conversation with a much younger man last night.

My hard-of-hearing neighbor's daughter talked quietly and at length on the phone last night with a man other than her husband.

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[57] MALACHOWSKI, *supra* note 37, at 128-29.

[58] *See* FELDMAN, AMERICAN LEGAL THOUGHT, *supra* note 18, at 87 ("Southern proponents of slavery tended to argue that natural law imposed a natural order on society, with slaves supposedly entrenched in their proper role (at the bottom)").

[59] GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH 21 (1999) [hereinafter LAKOFF & JOHNSON, PHILOSOPHY].

[60] This section draws upon Lloyd, *Law as Trope*, *supra* note 38.

[61] LAKOFF & JOHNSON, METAPHORS, *supra* note 42, at 163; *see also id.* at 152. The nature of conceptualization, of course, requires this. Since a concept differs from the thing conceptualized, there cannot be a perfect one to one match. *See, e.g.*, *id.* at 13.

My elderly neighbor's daughter talked with her son yesterday.[62]

Although possibly all truthful, these statements highlight and downplay various aspects of what happened and are thus incomplete and biased. The first two statements might help the villainous neighbor's calumny while the third likely would not. In any event, a good lawyer in voir dire, for example, who is considering the daughter as a potential juror in an alienation of affections case cannot uncritically accept any such biased and incomplete statements.[63] Instead, a good lawyer in voir dire will investigate what such statements highlight, downplay, and hide.

Hermeneutic pragmatism would also make judges, lawyers, and law students aware that glossing over the incomplete and biased nature of concepts can result in missed opportunities provided by "the alternative categories [they] did *not* use."[64] This can occur at multiple levels including levels of both structure and strategy. For example, hermeneutic pragmatism recognizes that a lawyer representing a client seeking "to lease" land does not serve her client well if she does not consider whether other possible means of controlling the land (such as a purchase) might better serve her client's interests. To engage in such further considerations, she must, of course, sufficiently inquire about the client's perceived and actual needs and interests. If, for example, she finds that the client wishes to control the land for several generations, she might better serve her client by suggesting a purchase.

As to possible strategic opportunities missed, if a lawyer always sees negotiation through the metaphor of combat, she forgets that negotiation can be (and often ought to be) cooperative.[65] Taking such a combative approach, she may thus unwittingly harm her client by negotiating a worse deal than she might otherwise have done. This, too, seems an especially important lesson in today's combative times.

All this said, taking care to appreciate the categories and metaphors in play is hardly always easy. As Amsterdam and Bruner note, we not only often "*experience the world as categorized* and simply take this experience for granted, as given,"[66] but at least ninety-five percent of thought may be "below the surface of conscious awareness."[67] All this thus means that grasping what our concepts and metaphors highlight and conceal is a constant and often difficult struggle, a struggle compounded by the need to recognize that freedoms here are at the same time subject to restraints as discussed in Section IV and Appendix C below.

C. Law and Deconstruction Insights

Given how concepts highlight and conceal, hermeneutic pragmatism also finds useful insights in Derrida's notion of deconstruction which also shows, among other things, how our concepts highlight some meanings while concealing others.

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[62] For another example, *see id.* at 163.

[63] Nor can a good lawyer as citizen do the same on broader social or political issues. Is welfare a "safety net" or a "handout" for example? *See* AMSTERDAM & BRUNER, *supra* note 44, at 51.

[64] *Id.* at 49.

[65] LAKOFF & JOHNSON, METAPHORS, *supra* note 46, at 10.

[66] AMSTERDAM & BRUNER, *supra* note 44, at 26.

[67] LAKOFF & JOHNSON, PHILOSOPHY IN THE FLESH, *supra* note 59, at 13.

Derrida believes that the meaning of words is determined relationally so that any concepts or terms always involve other concepts or terms.[68] To elucidate this, Derrida uses the French word for "to differ" ("différer") which can refer not only to the "different" but also the "deferred."[69] He thus coins the term "différance"[70] to capture such double meaning embracing "difference" (which he sees as "distinction, inequality, or discernability") and the "deferred" (which he sees as "the interposition of delay, the interval of a *spacing* and *temporalizing* that puts off until 'later' what is presently denied, [or] the possible that is presently impossible.")[71]

Given both the freedom to construct concepts and metaphors as well as their tendency both to highlight and conceal as discussed above, looking for both the differences and the deferred involved in such concepts and metaphors is obviously useful for anyone who would use language including lawyers, judges, and law students. Inquiring both into how chosen terms differ from other possibilities as well as inquiring into meanings deferred or suppressed helps the language user better understand both the good and the bad of particular turns of phrase.

For example, when reviewing draft or actual legislation, one should ask how the chosen terms in the draft or actual legislation differ from other possible choices, how the chosen terms interrelate with other terms, and therefore ask what is being "deferred" as well as what is being highlighted by the draft or actual legislation. Thus, if proposed legislation is offered to balance a budget, good lawmakers should also not only study the chosen terms of the legislation but also study what might not be expressly addressed yet impacted nonetheless. Would necessary infrastructure programs suffer? Would defense capabilities suffer? Would needed social programs suffer? Would any such damage here outweigh the "good" of such a balanced budget?

A judge writing her opinion should no less ask how the chosen terms differ from other chosen terms, how the chosen terms interrelate with themselves and the subject of the opinion, and how the opinion might affect the "deferred" or unexpressed.

Justice no doubt demands such deconstruction,[72] and hermeneutic pragmatism agrees with Balkin that deconstruction (at least in the sense suggested above) "is not a denial of the legitimacy of rules and principles; it is an affirmation of possibilities that have been overlooked or forgotten in the privileging of particular ideas."[73]

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[68] *See* DOUGLAS E. LITOWITZ, POSTMODERN PHILOSOPHY & LAW 88 (1997) (noting that Derrida is extending insights of Saussure and other structuralists who "held that social and psychological phenomena were best understood as a struggle or tension between component structures which derive their meaning in relation to other components" and thus also noting "The sound 'bat' and the concept 'dog' have no meaning in isolation, but they make sense when understood relationally, as parts within a structural system of sounds and concepts.").

[69] Jacques Derrida, *"Differance," in* FROM MODERNISM TO POSTMODERNISM: AN ANTHOLOGY 225 (Lawrence Cahoone ed., 2d ed. 2003) [hereinafter CAHOONE].

[70] Discussing the cleverness of this neologism exceeds the bounds of this article. I would note, however, that in French "différant" sounds the same as the standard word "différent" thus aurally ignoring and thus deferring difference that sight discerns. *See id.* note ii.

[71] *Id.* at 225.

[72] Derrida in fact claims that "Deconstruction is justice." Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority*," 11 CARDOZO L. REV. 920, 945 (1990).

[73] J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 763 (1987).

However, if one takes deconstruction to mean that texts' meanings are ultimately undecidable at any given point in time,[74] such a notion cannot work in the law. Judges must decide cases, and lawyers must give advice on the meaning of texts.[75] One must thus strive to balance fairly and thoroughly the analysis of différance with the need for finality that law might rightly demand in a given concrete case. In that light, my hermeneutic pragmatism would offer the following definition of deconstruction: **"the context appropriate search for différance."** As we engage in such a search, we must not only remember our conceptual and metaphorical flexibilities discussed above but also our restraints discussed in Section IV and Appendix C below.

D. Re-emphasizing Imagination

Given the freedoms we have in constructing categories and concepts and given the openness of thought required for deconstruction as I have pragmatically defined it, hermeneutic pragmatism agrees with Richard Rorty that increased imagination fuels "intellectual and moral progress."[76] As Rorty notes, imagination is "the ability to redescribe the familiar in unfamiliar terms," it is "the source both of new scientific pictures of the physical universe and the new conceptions of possible communities," and it is "power" that can "make the human future richer than the human past."[77] As Rorty also notes, imagination drives the "poetry of justice" needed to "break up 'bad coherence'" of prior bad precedent: thus, *Brown* effectively proclaimed that "like it or not, black children are children too."[78]

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[74] Given the endless interplay of Derrida's "difference" and his "deferred," which "puts off until 'later what is presently denied," *see* CAHOONE, *supra* note 69, at 225, one might claim that texts are undecidable. In this regard, Feldman contrasts Derrida and Gadamer: like Gadamer (whom I discuss in further detail in Section IV-B-3 below), Derrida stresses "that any text or event has many potential meanings, many possible truths; no single meaning remains fixed or stable in all contexts. . . . Yet, while Gadamer therefore considers the meaning of a text to be inexhaustible, Derrida considers it to be undecidable." FELDMAN, AMERICAN LEGAL THOUGHT, *supra* note 18, at 34. Feldman humorously notes that "if Gadamer and Derrida were looking at a glass of water, Gadamer would probably say that it is half full, while Derrida likely would say it is half empty." Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 187 n.101 (1996).

[75] *See* FELDMAN, AMERICAN LEGAL THOUGHT, *supra* note 18, at 194 ("Supreme Court justices must pronounce the law."); KENT GREENAWALT, LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS 73 (2010) ("One cannot rest content with 'deconstructing' a will to show that it lacks meaning or contains contradictory meanings; one needs to decide what the will does and does not do.").

[76] *See* RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 87 (1999) [hereinafter RORTY, PHILOSOPHY].

[77] *Id.* As Hookway similarly notes when discussing Peirce, "It was a mark of the great men of science that their guesses were particularly inspired; there are endless passages where [Peirce] describes the abductive skills of Kepler and other heroes." CHRISTOPHER HOOKWAY, PEIRCE 225 (1992).

[78] *See* RORTY, PHILOSOPHY, *supra* note 76, at 99; Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Brown's breaking up of the immoral "coherence" of segregating schools in accordance with the segregating of trains upheld by *Plessy*[79] is, of course, something to celebrate, and hermeneutic pragmatism's recognition that we can change our human concepts and categories gives us hope that we are not forever trapped in either immoral coherence or incoherence. This is not to say, however, that such change is always easy since, as discussed in Section IV and Appendix C below, there can be much pushback in multiple forms to change. Such pushback, however, should not deter us from celebrating the powers and delights of imagination that devises the workable or that otherwise causes no harm. In that spirit (and with the knowledge that our workable terms define "nature" rather than the reverse), hermeneutic pragmatism sings along with William Blake that "Nature has no Outline: but Imagination has. Nature has no Tune: but Imagination has!"[80] However, again, the pushback discussed in Section IV and Exhibit C cautions us that unworkable imagination must not masquerade as workable. However delightful much imagination may be, there are no presidential "magic wands."

E. Some Methods of Effecting Change

How do hermeneutic pragmatists attempt to initiate imaginative change? They can play off and work within the conceptual, systemic, semantic lifeworld, and experiential restraints I discuss in Section IV and Appendix C below. They can also use Rorty's redescriptive "method" which is:

> to redescribe lots and lots of things in new ways, until you have created a pattern of linguistic behavior which will tempt the rising generation to adopt it, thereby causing them to look for appropriate new forms of nonlinguistic behavior . . . . This sort of philosophy does not work piece by piece, analyzing concept after concept, or testing thesis after thesis. Rather, it works holistically and pragmatically. It says things like "try thinking of it this way" . . . [or] "try to ignore the apparently futile traditional questions by substituting the following new and possibly interesting questions." . . . [I]t does not argue for this suggestion on the basis of antecedent criteria common to the old and new language games. For just insofar as the new language really is new, there will be no such criteria.[81]

Of course, hermeneutic pragmatism sympathizes with Rorty here but with, again, the further caveat that, as explored in the remainder of this article, we must recognize the various forms of pushback against creative change. This caveat leads hermeneutic pragmatism to disagree with Rorty's claim that legal theory offers no defense against judges whose imaginations

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[79] Brown v. Board of Education, 347 U.S. 483 (1954); 349 U.S. 294 (1955); and Plessy v. Ferguson, 163 U.S. 537 (1896).

[80] WILLIAM BLAKE, "The Ghost of Abel," *in* THE COMPLETE POETRY & PROSE OF WILLIAM BLAKE 270 (David V. Erdman ed., rev. ed. 2008). My prose translation would of course change "Nature" to "the Pre-lingusitic." We should also join Blake in rejecting the Age of Reason's belief that imagination is "a degenerate malady of the intellect." S. FOSTER DAMON, A BLAKE DICTIONARY: THE IDEAS AND SYMBOLS OF WILLIAM BLAKE 195 (rev. ed. 1988).

[81] RORTY, CONTINGENCY, *supra* note 22, at 9.

result in "morally appalling" decisions.[82] Workable legal theory must also recognize the forms of pushback **(including moral pushback)** discussed in Section IV and Appendix C below.

IV. <u>Making Workable Sense: Law, Fact and Overlapping Semantic and Pre-semantic Restraints</u>

Having explored many of the freedoms asserted by hermeneutic pragmatism, we must now turn to the many restraints also recognized by hermeneutic pragmatism. I do not claim that the restraints surveyed are exhaustive. Additionally, if the devotion to restraint in what follows seems to outweigh the devotion to freedom, I plead a justified reaction to the excesses pointed out in Section I above and to the exigencies of these times of post-truth claims. Again, hermeneutic pragmatism (along with Blake) unabashedly celebrates the imagination though it recognizes the restraints discussed in this Section IV and in Appendix C.

A. <u>The Pre-semantic</u>

1. <u>Pure Reference and Pushback</u>

Hermeneutic pragmatism recognizes the pre-semantic as well as the semantic. Imagine, for example, a blind child who has not yet learned the concept of a cliff. If he walks over the edge of a cliff that he cannot see, he will, of course, suffer notwithstanding that he could neither see nor articulate the notion of a cliff. In such a case, the child has faced uncategorized or pre-semantic pushback. (Again, as in Section II-E hermeneutic pragmatism uses the term "pre-semantic" only to refer[83] without the additional notion of sense discussed in that section.) The pushback of the pre-semantic here no doubt exists.

This example of the unfortunate child should also let hermeneutic pragmatism refine Rorty's following reflections on Davidson. According to Rorty:

> Davidson's claim that a truth theory for a natural language is nothing more or less than an empirical explanation **of the causal relations** which hold between features of the **environment** and **the holding true of sentences**, seems to me all the guarantee we need that we are, always and everywhere, 'in touch with the **world**'. If we have such a guarantee, then we have all the insurance we need against 'relativism' and 'arbitrariness'. For Davidson tells us that we can never be more arbitrary than the **world** lets us be. . . . These **pressures** will be described in different ways at different times and for different purposes, but they are pressures none the less. [84]

If we refine Rorty's language above by substituting "pre-semantic" for both "environment" and "world," we can say that the child encountered a tragedy whose cause lay beyond his words, a tragedy which should therefore motivate him (should he survive) to change his language and behavior. This "pressure" (to use Rorty's word) of the pre-semantic should

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[82] RORTY, PHILOSOPHY, *supra* note 76, at 99.

[83] I acknowledge, again, the complexities of reference and the various debates as to its nature. *See supra* note 23 and accompanying text.

[84] RORTY, PHILOSOPHY, *supra* note 76, at 33 (emphases added).

demolish any prior arbitrary faith in the perpetual flat unbrokenness of ground and require new words and concepts for the child.

Applying all this to the unfortunate child above, he experiences what **we** would truthfully call blindly falling off of a cliff though **he** would lack such words and notions for the force **he** felt. We can point to real examples, too, where we have felt forces for which we lacked concepts or terms. Victims, for example, were suffering from HIV long before we had such a term.[85] Although they and their doctors lacked both a sense and a reference for HIV, they could feel[86] the pushback (or "pressure" to use Rorty's term) of the pre-semantic here. They tragically felt Gadamer's point: "that behind all the relativities of language and convention there is something in common which is no longer language, but which looks to an ever-possible verbalization . . . ."[87]

Of course, "post-truth" people, despite their bluster, also cannot blindly or with eyes wide open escape such pre-semantic pushback. If their claims do not work or withstand with the pre-semantic, they will feel its pushback, too.

2. The "Huck Finn Problem"[88]

As I have explored elsewhere,[89] feeling plays important roles in cognition beyond that just discussed with the unfortunate falling child. In addition to playing "a crucial role in expressing the urgency of emotional situations,"[90] feelings can often "pick up on something" that may not fit or fall under "a conventional rational category" available at the time.[91] Feeling, in other words, can often detect pushback or pressures (to use Rorty's term again) that language has either overlooked, simply gotten wrong, or has not otherwise sufficiently categorized.

A classic example from fiction of "picking up on something"[92] outside of the linguistic categories available to the person at the time is the so-called "Huck Finn Problem." Huck Finn refuses to return a slave even though Huck's linguistic (including moral) categories of the time all tell him that he is doing evil by helping the slave escape.[93] As Sabine Döring tells us, "It is his

[85] HIV may have passed to humans as early as around 1920. *See Origin of HIV & AIDS*, AVERT https://www.avert.org/professionals/history-hiv-aids/origin (last visited Aug 8, 2018).

[86] I have discussed feeling and contrasted it with emotion elsewhere. *See generally* Harold Anthony Lloyd, *Cognitive Emotion and the Law*, 41 LAW & PSYCHOL. REV. 53 (2016-2017) [hereinafter Lloyd, *Cognitive Emotion*]. Also, again, Peirce's definition of "feeling" may be helpful here: "an instance of that sort of element of consciousness which is all that it is positively, in itself, regardless of anything else." PEIRCE, COLLECTED PAPERS § 1.306, *supra* note 13. As such, again, it "involves no analysis, comparison or any process whatsoever . . . ." *Id.*

[87] GADAMER, TRUTH AND METHOD, *supra* note 14, at 551.

[88] This section draws from Lloyd, *Cognitive Emotion*, *supra* note 86, at 62-63.

[89] *See generally id.*

[90] AARON BEN-ZE'EV, THE SUBTLETY OF EMOTIONS 76 (2000).

[91] *See* Patricia Greenspan, *Reasons to Feel*, *in* WHAT IS AN EMOTION?: CLASSIC AND CONTEMPORARY READINGS 265, 267 (Cheshire Calhoun & Robert C. Solomon eds., 2d ed. 2003).

[92] *Id.*

[93] Sabine A. Döring, *Why Be Emotional?*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF EMOTION 283, 285 (Peter Goldie, ed., 2013).

sympathy for Jim [the slave] which causes Huck to act . . . though he does not endorse his emotion but castigates himself for his weakness."[94]

As Döring also tells us, in our "default" mode we usually "take the representational content of our perceptions at face value" even though these perceptions are not always correct.[95] Much like the Müller-Lyer illusion pictured below (where the lines refuse to appear of equal length even though they are), Huck's feelings conflict with his linguistically-affected perceptions and understandings of a "straightforward" notion that theft of property (a term then including human property) is wrong.[96]
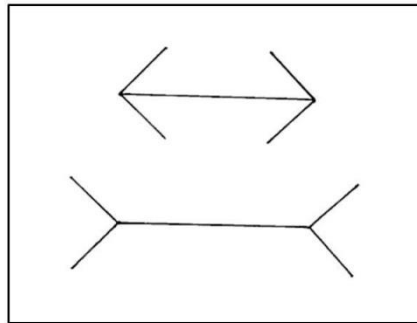
Huck's feelings, however, have alerted him to the "illusion" of error in helping Jim escape. No matter how impossible it might have been to *see* the error in condemning such behavior, Huck's feelings have properly broken the chains of conceptual frameworks that have not morally worked and that have otherwise colored his experience. As discussed in Section IV-C and Appendix C below on "workability," I (consistent with Huck's case) believe **that the pre-semantic pushes back in ways that require refinement of moral as well as other concepts**.

Such power of pre-semantic pushback or pressure reminds us of the limitation of words and should caution "post-truth people" who might believe that freedoms in how we form and frame our categories allow us to revel in "nihilism, relativism, irresponsibility, and the like" without fear of consequence. It should also caution judges, lawyers, and law students that perhaps something is not quite "right" or workable about their current concepts in play.

B. Semantic Lifeworlds and the Meaningful

1. General Overview and Restraints

Assuming that experience is shaped by language,[97] hermeneutic pragmatism agrees with Putnam that the term "lifeworld" or "Lebenswelt" includes "the world as we actually experience

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[94] *Id.*

[95] *Id.* at 293.

[96] *See id.* Such perception in Huck's case is no doubt affected by the commonly-accepted legal and moral notions of the time.

[97] I am assuming with Rorty that: "The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own-- unaided by the describing activities of human beings-- cannot." RORTY, CONTINGENCY, *supra* note 22, at 5. As clarified in this Section IV-B, this is consistent with Gadamer's claims that language is "the all-

it" and I shall so use the term (usually as "semantic lifeworld") in this article.[98] Consistent with my earlier distinction in Section II-E above between the "pre-semantic" and the world as set forth in language, I shall therefore use "semantic lifeworld(s)" as a semantic rather than a "pre-semantic" notion. (That said, and though I also focus in this Section IV on the meaningful--i.e., notions having both sense and reference as discussed in Section II-D above--flexible semantic lifeworlds must include reference to the pre-semantic that is yet to be given reference or sense or both.) As we shall see, any such semantic lifeworld(s) also contain significant restraints that belie any notion of hermeneutic pragmatism expounding "nihilism, relativism, irresponsibility, and the like."

In defining "semantic lifeworld(s)," hermeneutic pragmatism recognizes that such a "semantic lifeworld" or "semantic lifeworlds" include not only non-technical matters of experience but the technical as well.[99] It therefore recognizes that semantic lifeworlds include interpretive groups that are "nested" within others so that the American legal community, for example, "is surrounded by the political community, social community, and ultimately the entire interpretive community of American and perhaps international culture."[100] Such semantic lifeworlds are thus complex webs where change generally requires justification acceptable to the appropriate members.[101] For example, a competent lawyer member of such complex webs will be wary of claims that a quitclaim deed warrants good title.[102]

To explore common semantic lifeworlds and their accompanying restraints in further detail, I shall next examine semantic lifeworld restraints of common sense, Gadamer and his

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embracing form of the constitution of the world" and on language "depends the fact that man has a *world* at all." GADAMER, TRUTH AND METHOD, *supra* note 14, at 440. "World" is a linguistic concept with both sense and reference as these notions are distinguished in Section II-A above.

[98] I lack the space to give a detailed account of the history of this term. Briefly, I would reach back to Husserl, and Smith provides good summary definitions in Husserl's context: "Lebenswelt" is "the life-world, the world of everyday life, the surrounding world as experienced in everyday life" and "life-world" is "the surrounding world as experienced in everyday life, including 'spiritual' or cultural, that is, social, activities." DAVID WOODRUFF SMITH, HUSSERL 437 (2007).

[99] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 99 (beside other linguistic beliefs lie "agreements that are peculiar to the members of a particular discipline, whether it be of scientific or technical, juridical or theological nature. Such agreements constitute the body of a science or technique.")

[100] ROBERT BENSON, THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW 74 (2008). In this regard, Benson also describes Stanley Fish and his notion "that we all live in 'interpretive communities' which are made up of a 'political, social and institutional . . . mix' of constraints on acceptable interpretations." *Id. See also* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 513 ("All language is the language of a community, be this a community bound by biological ties, or by the practice of a common discipline or technique. The terms used, their meaning, their definition, can only be understood in the context of the habits, ways of thought, methods, external circumstances, and traditions known to the users of the terms.")

[101] *See id.*, at 513 ("A deviation from usage requires justification . . . .").

[102] "A deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid." *Quitclaim Deed*, BLACK'S LAW DICTIONARY (10th ed. 2014).

"linguistic constitutions of the world," restraints of "internal realism" restraints of individual concepts, and restraints of applicable implementives. All such restraints merit careful attention in these times of post-truth claims.

2. "Common Sense" and Semantic Lifeworlds

We all know that common sense can be wrong--even embarrassingly wrong. For example, the philosopher G. E. Moore once claimed, "I know there is a window in this room." Unfortunately for Moore, the curtains in the University of Michigan lecture hall where he was speaking had no windows behind them.[103]

Despite that embarrassing example, hermeneutic pragmatism also recognizes that common sense can be correct as well and can in any event put up formidable resistance across semantic lifeworlds. Perelman and Olbrechts-Tyteca capture what we generally mean by such common sense: "a series of beliefs which are accepted within a particular society and which the members of that society suppose to be shared by every reasonable being."[104] One must bring considerable persuasion to counter such "common sense" since one is opposing beliefs presumed to be "shared by every reasonable being."[105]

Given the force of common sense just noted and "conceptions of reason which equate reason with common sense,"[106] challenging common sense can thus be deemed "absurd." Of course, where one takes a position that will be considered "absurd," one should be prepared for a strong reaction. The "post-truthful" risk such potential reactions no less than the rest of us. Judges, lawyers, and law students should also, of course, be aware of such force.

These strong reactions can be multifold. Thomas Reid warns of one sharp "weapon" against those who challenge common sense: ridicule, which he notes "cuts with as keen an edge as argument."[107] Current rhetoric would agree with such claims of keenness: "The ridiculous is what deserves to be greeted by laughter, that laughter which has been designated as 'exclusive laughter' (rire d'exclusion) . . . .)[108] **I would translate *"rire d'exclusion"* more ominously-- and accurately I think--as *laughter of expulsion*. Such laughter should cut deeply.**

Additionally, the "post-truthful" should expect other potentially severe reactions when they publicly mock or challenge such cherished "common sense" notions as truth and honesty. By attacking the cherished, they risk severe public emotional reactions such as **public contempt** (whose prototypical desire in such a case is to ostracize someone seen as unworthy), **public disgust** (whose prototypical desire in such a case is to remove someone seen as contaminating), **public anger** (whose prototypical desire in such a case is to punish someone seen as culpably causing wrongful harm), and **public hatred** (whose prototypical desire in such a case is unfortunately to cause pain or harm to someone seen as deserving such pain or harm as a result

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[103] *See* PUTNAM, MANY FACES, *supra* note 21, at 53.

[104] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 99.

[105] *Id.*

[106] *See id.* at 86.

[107] *See* Thomas Reid, *Of First Principles in General*, *in* THOMAS REID, INQUIRY AND ESSAYS 259 (Ronald E. Beanblossom & Keith Lehrer eds., 1983).

[108] PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 205.

of evils done).[109] In questioning the "unquestioned and unquestionable," one can thus risk such fates, among others, as "prison or a mental institution."[110] Again, semantic lifeworlds push back here in potentially dire ways against the "post-truthful" as well as the rest of us.

This is not to say, of course, that one should always give way in the face of such pushback. Where common sense is wrong it should be called out. Those who thought that the world was round and not flat, for example, or that the earth courses around the sun rather than the reverse absolutely should have fought those battles. However, in doing so, they would have been strategically foolish not to plan for potentially-fierce and cutting pushback.

3. Gadamer and "Linguistic Constitutions of the World"

Hermeneutic pragmatism can also learn from Gadamer's claim that language is "a limitless medium that carries *everything* within it" and his resulting talk of a "linguistic constitution of the world" that is "effected by history," and that provides "an initial schematization for all our possibilities of knowing."[111] Although I would more clearly state that there can be various such competing "constitutions" at various levels in any complex society (which may or may not include among them any dominant "linguistic constitutions of the world"), the metaphor is a useful one for judges, lawyers, and law students who would persuade. One must know one's audience, and to do that one would, of course, want to know the various "linguistic constitutions of the world" at play.

Though I have celebrated imagination above,[112] imagination must therefore know that each member of its audience "always [has] a world already interpreted, already organized in its basic relations"[113] and that "we are always already encompassed by the language that is our own."[114] Imagination must also understand that prejudices or "fore-understandings" in such "linguistic constitutions" often go unnoticed by the mind and can only be addressed if we bring it "before" us and reflect upon it to determine what in the "pre-understanding may be justified from and what unjustifiable."[115] Furthermore, "basic prejudices" in such "linguistic constitutions of the world" can put up considerable resistance to protect "themselves by claiming self-evident certainty." [116] Gadamer warns us that "one who calls the self-evident into doubt will find the

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[109] *See* Lloyd, *Cognitive Emotion*, *supra* note 86, at 99-106 (setting out rubrics of basic emotions).

[110] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 57.

[111] GADAMER, HERMENEUTICS, *supra* note 30, at 13. Gadamer refers to Johannes Lohmann regarding the phrase "linguistic constitution of the world." *Id.*

[112] Gadamer celebrates the imagination as well: "It serves the ability to expose real, productive questions, something in which, generally speaking, only he who masters all the methods of his science succeeds." *Id.* at 12.

[113] *See id.* at 15.

[114] *Id.* at 64.

[115] *See id.* at 38; *see also* GADAMER, TRUTH AND METHOD, *supra* note 14, at 559 ("a hermeneutic fore-understanding is always in play and . . . therefore requires reflexive enlightenment"); PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 105 ("In most cases . . . A speaker has no firmer support for his presumptions than psychical and social inertia which are the equivalents in consciousness and society of the inertia of physics.").

[116] GADAMER, HERMENEUTICS, *supra* note 30, at 92.

resistance of all practical evidence marshaled against him."[117] Gadamer also warns us that the "self-evident" can be extensive: "Long before we understand ourselves through the process of self-examination, we understand ourselves in a self-evident way in the family, society, and state in which we live."[118]

Imagination seeking change must therefore have sufficient persuasive means[119] to counter this complex mixture of "linguistic constitutions," traditions, and prejudices. Thus, Wilson Huhn, for example, gives an excellent overview of some basic ways to challenge aspects of legal semantic lifeworlds in play by examining and attacking, among other arguments, arguments based on precedent, tradition, and policy.[120]

Additionally, the person who takes any position must examine her own "linguistic constitutions," "preunderstandings," and "prejudices." She must do this not only to withstand potential objections others may raise, but also to ensure that she herself really understands what she would accomplish. (Perhaps, for example, her own prejudice blinds her to ways her desires actually counter her own self-interest.) This subtlety might well seem lost on the "post-truth" speech quoted in Section I above and in Appendix A as well as on Trump supporters whose economic or other interests he may not support or may even undermine (such as those of the low income voter with pre-existing health conditions who might be unable to obtain healthcare coverage if Trump successfully dismantles current health coverage options but who somehow suffer under delusions that actually-available coverage is worse than it is.)

4. "Internal Realism" and Semantic Lifeworlds

a. Putnam and "Internal Realism"

Consistent with the notion of "linguistic constitutions of worlds," Putnam insightfully explores what he calls "internal realism" which also provides further pushback in category and concept creation and usage. As Putnam notes:

> We can and should insist that some facts are there to be discovered and not legislated by us. But this is something to be said when one has adopted a way of speaking, a language, a 'conceptual scheme'. To talk of 'facts' without specifying the language to be used is to talk of nothing; the word 'fact' no more has its use fixed by Reality Itself than does the word 'exist' or the word object'.[121]

Thus, according to Putnam, "There are 'external facts', and we can *say what they are*. What we *cannot* say-- because it makes no sense-- is what the facts are *independent of all conceptual choices*."[122] Put another way,

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[117] *Id.* at 93.

[118] GADAMER, TRUTH AND METHOD, *supra* note 14, at 278.

[119] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 106 ("Change . . . has to be justified.").

[120] *See* WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 85-200 (3d ed. 2014).

[121] PUTNAM, MANY FACES, *supra* note 21, at 36.

[122] *Id.* at 33.

The world does not speak. Only we do. The world can, once we have programmed ourselves with the language, cause us to hold beliefs. But it cannot propose language for us to speak. Only other human beings can do that.[123]

Consistent with this, Putnam claims that

Internal realism [i.e., the sort of realism described by Putnam above after we have adopted a 'way of speaking'" or a 'conceptual scheme'] says that we don't know what we are talking about when we talk about 'things in themselves.'[124]

Instead, the internal realist

is willing to think of reference as internal to 'texts' (or theories), *provided* we recognize that there are better and worse 'texts.' 'Better' and 'worse' may themselves depend on our historical situation and our purposes; there is no notion of a God's-Eye View of Truth here . . . .[125]

(I shall explore this notion of "better" and "worse" in Section IV-C and Appendix C on workability below, which Section IV-C and Appendix C will also explore the pushback of the pre-semantic as well as the semantic.)

Putnam's "internal realism" can therefore also embrace a form of common sense by claiming that **within** "conceptual schemes" or semantic lifeworlds:

There *are* tables and chairs and ice cubes. There are also electrons and space-time regions and prime numbers and people who are a menace to world peace and moments of beauty and transcendence and many other things.[126]

Through focusing on things posited in the "conceptual scheme" or semantic lifeworld, Putnam's internal realism can therefore take "our familiar commonsense scheme, as well as our scientific and artistic and other schemes, at face value, without helping itself to the notion of the thing 'in itself.'"[127] Such internal realism can, in other words, linguistically concentrate on objects existing in and described by the "conceptual schemes" or semantic lifeworlds rather than

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[123] RORTY, CONTINGENCY, *supra* note 22, at 6. As I read him, Gadamer makes a similar point: "Each science, as a science, has in advance projected a field of objects such that to know them is to govern them." GADAMER, TRUTH AND METHOD, *supra* note 14, at 449. In language that sounds very similar to Gadamer, Putnam also claims: "If one must use metaphorical language, then let the metaphor be this: the mind and the world jointly make up the mind and the world." PUTNAM, HUMAN FACE], *supra* note 12, at 262. Continuing with my parsing between the pre-semantic and the linguistic, if the mind and the world are both properly taken as linguistic constructs, then this metaphor makes good sense to me.

[124] PUTNAM, MANY FACES, *supra* note 21, at 36.

[125] PUTNAM, HUMAN FACE, *supra* note 12, at 114.

[126] *See* PUTNAM, MANY FACES, *supra* note 21, at 25.

[127] *See id.* at 17.

on some unfathomable thing-in-itself lying beyond the realm of experience.[128] Thus, what we **meaningfully talk about** is within a conceptual scheme or semantic lifeworld, as discussed in Sections II-C and II-D above and in this Section IV. Thus, "what is and is not physically possible" within a conceptual scheme or semantic lifeworld would not be an "external distinction imposed by philosophers" but "a distinction internal to the physical theory itself."[129] Such a conceptual scheme therefore also pushes back albeit internally.

As a part of such internal pushback, Putnam sensibly notes that our conceptual schemes set out the requirements for truth and verification[130] and that science and other inquiry must therefore meet such requirements. In evaluating such internal realism's requirements for truth and verification, the typical person puts powerful stock in her five senses as framed by language. Such senses verify to her that tables, ice cubes, and chairs exist. Thus, a "post-truth" person cannot persuasively obliterate existing tables, ice cubes, and chairs by simply denying their existence. Nor can he do the reverse and generate (by magic wand or otherwise) an inaugural or other crowd or fantasy that did not exist.[131]

b. Hart and Law's "Internal Points of View"

Similarly addressing internal realism in the law, H.L.A. Hart notes that people may regard the law either externally or internally:

> . . . [I]t is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We make all these respectively the 'external and the 'internal points of view'. [132]

Those who take the internal point of view "manifest their acceptance of them as governing rules" and will use such phrases as "'It is the law that . . .', which we may find on the lips not only of judges, but of ordinary men living under a legal system, when they identify a

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[128] *See id.* at 43. (the "'makers-true' . . . of our beliefs lie *within* and not *outside* our conceptual system"). However, again, as discussed in Section II-E above and Sections IV-A and IV-C below, the pushback of the pre-semantic plays a role in evaluating the workability of any such "makers-true" adopted by, and internalized in, any conceptual scheme or semantic lifeworld.

[129] *See* PUTNAM, HUMAN FACE, *supra* note 12, at 71. Gadamer also gets at this inner reality when he discusses games and playing within the context of their rules. Gadamer observes that "Play fulfills its purpose only if the player loses himself in play," and that "Someone who doesn't take the game seriously is a spoilsport." GADAMER, TRUTH AND METHOD, *supra* note 14, at 103. Put another way, a "spoilsport" does not experience "the game as a reality that surpasses him," that "draws him into its dominion and fills him with its spirit." *See id.* at 109.

[130] *See id.* at 43.

[131] Julie Hirschfeld Davis & Matthew Rosenberg, *With False Claims, Trump Attacks Media on Turnout and Intelligence Rift,* THE NEW YORK TIMES, Jan. 21, 2017, https://www.nytimes.com/2017/01/21/us/politics/trump-white-house-briefing-inauguration-crowd-size.html

[132] H.L.A. HART, THE CONCEPT OF LAW 89 (2d ed. 1994).

given rule of the system.'"[133] Those who take the external point of view, however, will instead manifest their non-acceptance by such phrases as "'In England they recognize as law . . . whatever the Queen and Parliament enacts. . . .'"[134]

Of course, severe potential pushback awaits "post-truth" people who flaunt a legal system internalized by the "bulk of society."[135] Such potential pushback is endless and therefore well beyond specific discussion in this article. I shall therefore just highlight a few aspects which "post-truth" people flaunt at their peril.

First, to the extent "post-truth people" are lawyers (I, of course, shudder at such a possibility), such people should be aware of Rule 8.4 of the Rules of Professional Conduct. Rule 8.4 of the ABA Model Rules of Professional Conduct expressly provides: "It is professional misconduct for a lawyer to [among other things] engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[136]

Comment 7 to Rule 8.4 further provides that "Lawyers holding public office assume legal responsibilities going beyond those of other citizens."[137] "Post-truth" lawyers (again I shudder at the possibility of such lawyers) serving as public officials thus face heightened pushback. And whether or not they are lawyers, "post-truth" public officials in their "post-truth" mindset are apparently blind to the very real internal restraints of the law running from systematic checks such as applicable grounds for removal or impeachment to criminal prosecution. Those in elected, appointed, or hired positions of public power, of course, also face the ballot box, impeachment, and termination for cause as the case may be.

As long as legal rules and principles[138] are internalized by the "bulk of society,"[139] risks imposed by such restraints are formidably real. They provide further and potentially severe pushback on any "post-truth" view that we live in an era of "nihilism, relativism, irresponsibility, and the like."[140]

5. Specific Concepts and Semantic Lifeworlds

a. Specific Concepts Themselves

Further exploring applicable restraints on the "post-truthful," perhaps some of the most obvious restraints we encounter are in the specific concepts that we use. For example, in a conveyance of Blackacre to another, I might in a deed warrant and represent the property to be rectangular and containing 20,000 square feet. Having done that, subsequently denying that the property has four corners and subsequently claiming that the property actually contains only 15,000 square feet, for example, will create pushback because the concept of a rectangle and the expressly stated number of square feet push back.

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[133] *Id.* at 102.

[134] *Id.*

[135] *See id.* at 114, 116

[136] MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2016).

[137] *Id.* at cmt. 7.

[138] *See again* HART, *supra* note 132, at 259-268.

[139] *See again id.* at 114, 116.

[140] FELDMAN, *supra* note 18, at 189.

That is not to say that I cannot attempt to tackle such restraint by reframing or otherwise modifying my concepts as discussed in Section III above, but I must nonetheless recognize the pushback of such restraint. For example, I might claim that the "corners" of the "rectangle" comprising Blackacre are misshaped in such and such a way that results in Blackacre having more than four "angles." I might, for example, also try to claim that the original measurement of 20,000 square feet was a surveyor's mistake. I might do all of these things but in doing them I have changed what I originally said and would thus effectively be conceding a breach of warranty and a misrepresentation as to Blackacre. Though we create concepts like Blackacre, such concepts can thus take on a life of their own that we can no longer fully control.

As Gadamer would no doubt remind us here, taking up a word can be more than taking up "some arbitrary tool which can be thrown in a corner if it doesn't do the job," but instead can involve "a line of thought that comes from afar and reaches on beyond . . . ."[141] Such reaching "beyond" also leads us to the pushback of conceptual presuppositions and entailments discussed below.

b. Specific Concepts and Presuppositions[142]

Additional conceptual pushback occurs in the form of conceptual or semantic presuppositions.[143] For example, if a "post-truth" person responds to a traffic citation by saying "my driving during the day with a malfunctioning taillight was hardly dangerous," that answer must presuppose "a malfunctioning taillight" or he would not be speaking consistently. A "post-truth" person could of course realize the tactical error he had made and try to deny that he meant to admit the malfunctioning taillight. Unfortunately for him, he would likely find that that horse had too far left the barn.

Such "semantic presuppositions" and related stasis theory (noted below in this section) can prove much trickier than the previous example might suggest. For example, in a paternity proceeding an alleged father has denied paternity. In a hearing, counsel for the mother claims that the man "has treated his son horribly." The alleged father responds: "That is not true! I have done him no harm!" Does negating just the proposition as to horrible treatment concede paternity? One must, of course, tread carefully here, and this applies to the "post-truthful" no less than to the rest of us.

Such presuppositional pushback ties into rhetorical stasis (or issue) theory which recognizes a progressive and straightforward presuppositional issue line: (1) *Sitne*? ("Does it exist?") (2) *Quid sit*? ("What is it?") and *Quale sit*? ("What [quality] of thing is it?")[144] For

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[141] *See* GADAMER, TRUTH AND METHOD, *supra* note 14, at 552.

[142] Harold Anthony Lloyd, *Law's "Way of Words": Pragmatics and Textualist Error*, 49 CREIGHTON L. REV. 221 (2016) [hereinafter Lloyd, *Way of Words*]. I have not addressed here pragmatic presuppositions which can be found at *id.* at 285.

[143] In common speech, to "presuppose" is either "to believe or suppose in advance," or "to require or involve necessarily as an antecedent condition." *Presuppose*, AMERICAN HERITAGE COLLEGE DICTIONARY 1084 (3d ed. 1993). I focus here on the latter sense which can be defined more formally to involve "a proposition whose truth is necessary for either the truth or falsity of another statement. Thus if *p* presupposes *q*, *q* must be true for p to be either true or false." *See Presupposition*, THE OXFORD DICTIONARY OF PHILOSOPHY (3d ed. 2016).

[144] *See* LANHAM, *supra* note 39, at 93.

example, to ask what something is (such as a tree growing in a park) on its face concedes the tree's existence. To ask whether that species of oak is sturdy, on its face concedes that the tree is an oak and that it exists. Given such a stasis line, even a "post-truth" person must carefully understand what she is conceding when she responds, for example, that she was right to cut down that very oak tree in the park because she did not believe it was sturdy. By making a "*Quale sit*" assertion, she has effectively conceded the "*Sitne*?" and the "*Quid sit?*" questions, i.e., whether she did something and whether it was cutting down that oak in the park.[145] This stasis line applies to the "post-truthful" no less than to the rest of us.

c. Specific Concepts and Entailments[146]

Further pushing back on the "post-truthful," propositions also entail[147] other propositions. For example, "My dog, Lucky, is a boxer mix" unavoidably entails that "Lucky is an animal."[148] It also entails that Lucky is of the genus Canis, the family Canidae, the Order Carnivora, the Class Mammilia, the Phylum Chordata, and the Kingdom Animalia,[149] even if the speaker (including even the "post-truth" speaker) has never heard all those terms and cannot have meant to use or mean them. The "post-truth" speaker no less than any other speaker is unavoidably caught up in such an extended web of expanding meaning by the very use of language itself. A "post-truth" person who claims that Lucky is a dog but not of the genus Canis should at the very least expect ridicule from ordinary audiences with access to a dictionary or the internet.

6. Implementives and Semantic lifeworlds[150]

Qui vult finem vult media.[151]

A further category of additional meaning (and attendant pushback) flowing from a speaker's use of concepts includes what I have called (for want of a better term) "implementives."[152] Implementives recognize (where appropriate) the maxim "Qui vult finem

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[145] *Id.*

[146] This Section draws from Lloyd, *Way of Words*, *supra* note 142, at 286-287.

[147] I accept Cruse's definition of "entailment": "To say that Proposition P entails Proposition Q means that the truth of Q follows logically and inescapably from the truth of P, and the falsity of P follows likewise from the falsity of Q."[147] ALAN CRUSE, MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS 28 (2011).)

[148] *Id.*

[149] *Canis lupus familiaris*, 1 MAMMAL SPECIES OF THE WORLD: A TAXONOMIC AND GEOGRAPHIC REFERENCE 2142 (Don Wilson & DeeAnn Reeder eds., 3rd ed. 2005).

[150] This section and Appendix B draw from Lloyd, *Way of Words*, *supra* note 142, at 225, 278-81 and Harold Anthony Lloyd, *Let's Skill All the Lawyers: Shakespearean Lessons in Law and Rhetoric*, 6 ACTA IURIDICA OLOMUCENSIA 9 (2011) [hereinafter Lloyd, *Let's Skill All the Lawyers*].

[151] JAMES T. BRETZKE, CONSECRATED PHRASES: A LATIN THEOLOGICAL DICTIONARY: LATIN EXPRESSIONS COMMONLY FOUND IN THEOLOGICAL WRITINGS 199 (3d ed. 2013). I would translate this as "One who wishes the end wishes the means."

[152] Lloyd, *Way of Words*, *supra* note 142.

vult medi"[153] which I would translate as "one who wishes the end wishes the means." As we shall see, the "post-truthful" face no less applicable implementive pushback than the rest of us.

a. Micro-Implementives

Consistent with application of the above means-end maxim in appropriate cases, "micro-implementives" cover the means of carrying out, applying, or enforcing specific directions, rules, agreements, or any other specific matters where desired ends suggest using reasonable means. To recognize a meaningful right in an enforceable contract, for example, is to grant some way to implement that right even where the applicable contract may not specifically address implementation.[154]

To take another example, hiring a lawyer to consummate a lease can convey "implied" authority beyond that expressly granted since, of course, the client presumably wills by the engagement the reasonable means to effectuate such a lease.[155] Because of the considerable development of, and literature on, the law of remedies and agency, for example, I shall not address legal micro-implementives further than to note that such remedies and implied agency expand meaning and provide attendant pushback.[156]

b. "Macro-Implementives"

i. Argumentation: Habermas

In addition to the micro-implementive examples given above involving the means of carrying out, applying, or enforcing *specific* directions, rules, agreements, or any other *specific* matters, "to will the end is to will the reasonable means" can also apply to implementing disciplines or general types of activities themselves. As these sorts of implementives can more broadly implement the very existence of such disciplines or activities, I shall refer to them as

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[153] BRETZKE, *supra* note 181.

[154] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 344 et seq. (AM. LAW INST. 1981) (broadly addressing remedies); U.C.C. §§ 2-703, 2-711 (AM. LAW INSTITUTE & UNIF. LAW COMM'N 1977) (addressing sellers' and buyers' remedies in general in contracts for the sale of goods).

[155] *See* RESTATEMENT (THIRD) OF AGENCY § 2.02 (AM. LAW INST. 2006) ("An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to the achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.")

[156] *See, e.g.*, DAN R. DOBBS & CAPRICE ROBERTS, LAW OF REMEDIES (3rd ed. 2017); RESTATEMENT (THIRD) OF AGENCY (AM. LAW INST. 2006). For a potential parallel in the area of medicine, *see* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 127 ("if someone is declared to be suffering from a particular disease, this involves, at least partially, an advance judgment of the treatment that will be applied to him.")

"macro-implementives."[157] Applicable macro-implementives also push back against the "post-truthful" no less than against the rest of us.

For example, Habermas sees arguments as "processes of reaching understanding that are ordered in such a way that proponents and opponents . . . can test validity claims that have become problematic."[158] He believes that accomplishing this requires "pragmatic presuppositions of a special form of interaction, namely everything necessary for a search for truth organized in the form of a competition."[159] Such "pragmatic presuppositions" would thus include: (1) "Every speaker may assert only what he really believes," and (2) "A person who disputes a proposition or norm not under discussion must provide a reason for wanting to do so."[160] Given human limits of knowledge and power, these "pragmatic presuppositions" seem on their face among the reasonably-necessary means to the broader end of having such argumentation.[161]

However, hermeneutic pragmatism would use the term "implementive" here rather than "pragmatic presupposition." "Implementive" more directly suggests required means to an end. Additionally, "implementive" avoids confusion with the notion of formal presupposition discussed above.[162] Furthermore, "implementive" avoids confusion with "pragmatic presuppositions" in discourse such as, for example, where speakers in a group know that the term "victim" in their discourse means one of their whiny neighbors rather than a real victim.[163] In any event, and however termed, such macro-implementives push back against those who would lie.

ii. Law: Fuller and Beyond

As a powerful pushback against the "post-truthful," one can also step back and more generally explore macro-implementives for the very rule of law itself, that is, for "[t]he

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[157] A distinction between the two sorts of implementives seems required for further reasons. Micro-implementives can be seen as perhaps more analogous to implication (as in the case of implied agency) whereas macro-implementives can be seen as perhaps more analogous to preconditions or presuppositions (as seen with Habermas's "pragmatic presuppositions" discussed in this Section IV-B-6-b-i.)

[158] JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 87 (Christian Lenhardt & Shierry Weber Nicholsen trans., 2015).

[159] *Id.*

[160] *Id.* at 88.

[161] Habermas also suggests, for example, "presuppositions" for "participants in argumentation" where "argumentative speech" seeks "a rationally motivated agreement." Such "presuppositions" include: (1) "Every subject with the competence to speak and act is allowed to take part in a discourse"; (2) "Everyone is allowed to question any assertion whatever"; and (3) "No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in [the two prior rules]." *Id.* at 88-89. Given limitations of human knowledge and power, implementives along the foregoing lines also seem straightforward if one is seeking "a rationally motivated agreement." *See id.*

[162] Again, such presupposition involves "a proposition whose truth is necessary for either the truth or falsity of another statement. Thus if *p* presupposes *q*, *q* must be true for p to be either true or false." *See Presupposition*, THE OXFORD DICTIONARY OF PHILOSOPHY (3d ed. 2016).

[163] *See* Lloyd, *Way of Words*, *supra* note 142.

supremacy of regular as opposed to arbitrary power."[164]   Where we have such rule of law in any effective sense, we must of course have the means to implement such rule of law not only in the "micro" sense of, for example, having injunctive remedies to enforce restraining orders in specific cases or providing a seller with meaningful remedies in the event of a buyer's breach. We must also recognize reasonable, general means necessary for implementing the rule of law itself in light of the limitations of human knowledge and power. In light of their implementive function for rule of law itself, I shall also call these reasonable implementive means "macro-implementives."

Although Lon Fuller unfortunately uses phrases such as "the inner morality of the law,"[165] he has famously partially explored what I would like to clarify as macro-implementives, a clarification for the "post-truthful" as well as for the rest of us. Fuller recognizes that a legal system's rules "normally serve the primary purpose of setting the citizen's relations with other citizens. . . ."[166] To that end, Fuller recognizes that legal rules cannot work if they are (1) ad hoc, (2) not publicized, (3) retroactively applied in abusive fashion, (4) not understandable, (5) contradictory, (6) otherwise beyond a party's power to perform, (7) changed with disorienting frequency, or (8) administered in a way that differs from their announcement.[167]

Each one of these eight points recognizes on its face that human beings as non-omniscient, non-omnipotent, or both, cannot be expected to follow rules which do not have these characteristics. How can a person of limited knowledge and power embrace and follow, for example, unknown, impossible, incomprehensible, or incomprehensibly-administered rules? At least where we would have rule of law, macro-implementives thus push back on the post-truthful as well as the rest of us. For example, if we want people to drive no faster than fifty miles per hour on a certain road, we have to give coherent and consistent notice. We cannot achieve that speed limit by giving no notice or by speaking of different limits from moment to moment. For those interested in exploring each of these implementives in more detail (as well as three more that I propose), I further explore in Appendix B eleven macro-implementives related to the rule of law as well as alternative forms of pushback where we would have "rules" but not rule of law.

C. Pre-semantic and Semantic lifeworld Workability Restraints[168]

In light of the multiple forms of pushback discussed above, if we are to claim that our legal or other concepts and categories have a force beyond mere utterance, we must show that such concepts and categories both **effectively *stand* within our applicable linguistic semantic lifeworlds *and* effectively *withstand* the pre-semantic.** These are the forms of "*stand*" we

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[164] *Rule of Law*, BLACK'S LAW DICTIONARY (10th ed. 2014). Consistent with this definition, Hart notes that the general purpose of the law is to provide "guides to human conduct and standards of criticism for such conduct." HART, *supra* note 132, at 249. Similarly, Fuller recognizes that a legal system's rules "normally serve the primary purpose of setting the citizen's relations with other citizens. . . ." LON L. FULLER, THE MORALITY OF LAW 207-08 (Yale Univ. Press rev. ed. 1979).

[165] *See, e.g,. id.* at 4, 42-43.

[166] *Id.* at 207–08.

[167] *See id.* at 39.

[168] This section and Appendix C draw from Lloyd, *Law as Trope*, *supra* note 38, at 102-07.

seek, not illusory Cartesian notions of "standing" or "building" on "indubitable" foundations existing apart from the categories *we* create.[169]

Hermeneutic pragmatism thus forges categories meant to "work" with both the linguistic *and* with the pre-semantic. Determining such pre-semantic and semantic lifeworld "workability" involves examining and weighing in specific cases a number of **factors** (in some cases overlapping). These factors include assessing such categories in terms of their accuracy of prediction, their coherence with semantic lifeworld facts and values, and their coherence with any applicable precedent. These factors also include weighing the effects of any pushback of the pre-semantic as in the case of the Huck Finn example discussed above. I have set out the foregoing and other workability factors in more detail in Appendix C. The post-truthful spurn such critical workability analysis at their peril.

V. Hermeneutic Pragmatism's "Eunomia" Rather Than "Hercules" as
   Judge[170]

   A. Eunomia's Qualifications and Practice

In the context of the law, how should we go about "workably" weaving together hermeneutic pragmatism's insights of freedom and restraint that we have now discussed? Having seen that semantic lifeworlds are linguistic constructs, we should look to those who are best suited to grasp and apply the senses and references of the semantic lifeworlds in play. The linguistic nature of semantic lifeworlds in play thus requires persons with an excellent grasp of linguistics and philosophy of language. Additionally, given the freedoms and restraints that we have discussed as well as the need for judgments that cohere with "the collectivity of experience's demands, *nothing being omitted*," [171] hermeneutic pragmatism requires persons who grasp the force of all applicable forms of pushback discussed above including the moral.

Seeking such persons, hermeneutic pragmatism would therefore turn to reasonable[172] and moral judges not only excellently versed[173] in legal theory and legal practice,[174] but also in

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[169] *See René Descartes*, THE OXFORD DICTIONARY OF PHILOSOPHY 128, 129 (3d ed. 2016) ("Descartes's theory of knowledge starts with the quest for certainty, for an indubitable starting-point or foundation on the basis alone of which progress is possible."). However, again, "foundation" is a language-bound term, and, as Rorty reminds us, "human languages are human creations." *See* RORTY, CONTINGENCY, *supra* note 22, at 5. Certain foundations beyond our various languages (and our abilities to debate terms) are thus impossible. Aware of this, hermeneutic pragmatism seeks workable notions subject to the various freedoms and constraints discussed in this article. Recognizing constraints, hermeneutic pragmatism thus rejects unfettered "nihilism, relativism, irresponsibility, and the like" while at the same time recognizing that foundations (like other notions) are language bound.

[170] This Section also draws from Harold Anthony Lloyd, *Speaker Meaning and the Interpretation and Construction of Executive Orders*, 8 WAKE FOREST J.L. & POL'Y 319, 358-60 (2018) [hereinafter Lloyd, *Speaker Meaning*].

[171] *See* JAMES, *supra* note 13, at 32 (emphasis added).

[172] I use "reasonable" here in the sense of "possessing sound judgment" as well as not being "extreme or excessive" in ways that unworkably ignore the force of applicable forms of

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linguistics, philosophy of language, and the pragmatic theory of meaning discussed in this article. Since language involves the use of signs,[175] such reasonable and moral judges should also be excellently versed in semiotics[176] (including pragmatics[177]). Furthermore, since workability requires broad coherence across semantic lifeworlds, such judges should also be excellently versed in the humanities[178] and be otherwise excellently capable of grasping the matters of semantic lifeworlds in play.

For at least two reasons, hermeneutic pragmatism would not choose non-judicial role models for interpreting text or other aspects of legal semantic lifeworlds.[179] Not only do judges review matters of law *and* fact,[180] judges must also comply with the rules of judicial and professional conduct[181] and would thus be bound by appropriate impartiality between the parties and by other standards not binding upon non-lawyer readers.

For ease of reference, I would call a judge with the above qualifications "Eunomia" (whether she judges alone or in a panel of other Eunomias). I name such a model **human** judge

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pushback discussed above. *See Reasonable*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014). I have added the "pushback" qualifier.

[173] I have carefully chosen this adjective because it turns on study, experience, knowledge, and skill. *See Versed*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2007).

[174] Understanding the art and craft of law cannot be separated from understanding the theory of law. *See generally* Harold Anthony Lloyd, *Raising the Bar, Razing Langdell*, 51 WAKE FOREST L. REV. 231 (2016).

[175] "A sign is a meaningful unit which is interpreted as 'standing for' something other than itself." DANIEL CHANDLER, SEMIOTICS: THE BASICS 260 (2d ed. 2007). *See, e.g.*, Harold Anthony Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 First Amendment L. Rev. 237, 253–56 (2013); Lloyd, *Way of* Words, *supra* note 142, at 221, 225.

[176] By "semiotics" I mean "the study of signs" which "involves both the theory and analysis of signs, codes and signifying processes." CHANDLER, *supra* note 175, at 259.

[177] *See Pragmatics*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016) ("The study of language as it is used in a social context, including its effect on the interlocutors" and "[t]he branch of semiotics that deals with the relationship between signs, especially words and other elements of language and their users.").

[178] I have made the case before for crucial role of humanities in legal education. *See* Lloyd, *Exercising Common Sense*, *supra* note 6, at 1232-36.

[179] Justice Scalia, for example, would invoke the aid of a "reasonable reader" defined as one "who is aware of all the elements (such as the canons) bearing on the meaning of the text, and whose judgment regarding their effects is invariably sound. Never mind that no such person exists." ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 393 (2012). Of course, this generates at least two questions: What would count as "aware"? How can we workably apply a model that Justice Scalia expressly admitted does not exist?

[180] *See* Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standards of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion').").

[181] *See generally, e.g.*, MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983); MODEL CODE OF JUD'L CONDUCT (AM. BAR ASS'N 1990).

"Eunomia" because her namesake Eunomia is the goddess of "Good Order," sister of Dike (goddess of Justice) and Eirene (goddess of Peace), and daughter of Themis (goddess of "Divine Law").[182] What better name for a judge of workable order of "the collectivity of experience's demands, *nothing being omitted*"?[183]

Rather than impossible fictions such as Dworkin's "superhuman judge" Hercules,[184] hermeneutic pragmatism thus chooses a **human** model because hermeneutic pragmatism must have workability (including plausibility). The "superhuman" is beyond us and is therefore unworkable (and implausible). Instead, hermeneutic pragmatism more workably requires the human qualities of reasonableness, honesty, appropriate impartiality, an excellent education in the fields noted above, and excellent abilities of grasping matters in play.[185] It therefore "classically" corrects Dworkin's "Hercules" with its own more suitable "Eunomia."

That said, "Eunomia" or "Good Order"[186] does not mean "Always One Workable Order" or "Never a Workable Dissent." Just as Eunomias might ultimately see a particular painting of Schroeder's stairs in Section III-A-2 above running in opposite directions, such Eunomias might of course honestly, impartially, reasonably, skillfully, and otherwise thoroughly weigh applicable workability factors including applicable factors and elements of particular cases or controversies and reach different but equally-workable conclusions. For example, one can imagine a statute which reads "All drivers going in the same direction must drive on the same side of the road." Without more, on the very face of the statute, one Eunomia might workably rule that drivers must drive on the right side of the road while another might workably rule that drivers must drive on the left.

Workability does not prohibit this difference. Rather, workability requires a legal system that honestly recognizes and workably anticipates such potential difference. A workable legal system in such a case could, of course, use a panel of three judges or some other method that would break or prohibit the tie (including seating only one Eunomia as judge).

B. Eunomia and the Foreign Corporation[187]

How might a single Eunomia go about deciding a particular case more complex than the road case above? Take, for example, a case involving Acme Corporation as defendant where Eunomia must apply the following state statute which no courts have previously interpreted:

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[182] *See Horae*, THE OXFORD CLASSICAL DICTIONARY (Simon Hornblower & Antony Spawforth eds., 3rd ed. 1996); *Themis*, *id*.

[183] *See again* JAMES, *supra* note 13, at 32 (emphasis added).

[184] *See Dworkin*, THE PENGUIN DICTIONARY OF PHILOSOPHY (2d ed. 2005). Dworkin in fact gives Hercules "superhuman intellectual power and patience." RONALD DWORKIN, LAW'S EMPIRE 239 (Harvard 1986).

[185] "Excellent" means "very good of its kind" and is therefore quite humanly attainable. *See Excellent*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).

[186] *See supra* note 182. *See also Eunomos,* ABRIDGED LIDDELL AND SCOTT'S GREEK-ENGLISH LEXICON 285 (Simon Wallenberg Press 2007) (1909) ("under good laws, well-ordered, orderly"); Nomos *id.* at 467 ("usage, custom, convention: a positive enactment, law, ordinance"). (I have transcribed the Greek letters to Latin ones.)

[187] This section is inspired by Cohen's question "Where Is a Corporation?" *See* Cohen, *supra* note 15, at 809-812.

"Courts of this state have personal jurisdiction only over persons or entities having a presence within this state." Acme Corporation underwrites and sells insurance, is incorporated in another state, has its corporate headquarters in yet another state, has ten employees who work from home in Eunomia's state, such ten employees sell insurance for Acme in Eunomia's state, and Acme Corporation has been sued for breach of such an insurance contract sold in Eunomia's state. Eunomia must determine whether the courts of her state have personal jurisdiction over Acme Corporation under the above statute.

In interpreting and applying the statute, Eunomia first looks at the statute and then looks for any judicial interpretation of the statute. Discovering the lack of precedent in her state, she returns to the statute and focuses upon "persons or entities" and "having a presence within this state." She focuses on these phrases because she understands that the statute will not apply if corporations are not "persons or entities" and if they lack a "presence within the state."

Focusing on such terms, she also recognizes that such phrases and their underlying concepts push back as we have discussed above and that any reasonable decision she makes must therefore recognize such pushback. However, she also recognizes that such terms as "entity" and "presence" have broad scope and will not simply dictate an answer here in any formalist fashion. She also recognizes that these terms are used within the context of broader legal and other semantic lifeworlds (including a statutory scheme that must have some reasonable purpose if it is not to be irrational law). She therefore knows that she must give these terms a meaning that works within the context of such legal and other semantic lifeworlds.

That the corporation is an "entity" gives her little initial difficulty. In common language use, that term includes "an organization (as a business or governmental unit) that has an identity separate from those of its members."[188] The term "presence," however, is not so simple. She determines that "presence" typically means "the fact or condition of being present."[189] She next determines that the two most-likely applicable ordinary language senses of "present" are "now existing or in progress" or "being in view or at hand."[190] Neither definition alone resolves the matter because they neither tell her how nor where a corporation should be considered either "existing or in progress" or "being in view or at hand." In fact, the "easy" definition of "entity" potentially injects a problem here because it parses between an organization and its members. Taking this literally, would not the ten employees (or "members") be irrelevant to her jurisdictional considerations since they are by definition parsed from the organization itself?

Eunomia does not let herself become trapped by this last question. (Nor does she let herself become trapped by metaphysical questions of whether a corporation can literally exist in any of the fifty states in the way a physical object such as a tree can exist.[191]) Instead, she

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[188] *Entity,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).

[189] *Presence*, *Id.*

[190] *Present*, *Id.*

[191] *See* Cohen, *supra* note 15, at 810 ("Clearly the question of *where a corporation is*, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation. Nor is it a question that demands for its solution any analysis of political considerations or social ideals. It is, in fact, a question identical in metaphysical status with the question of which scholastic theologians are supposed to have argued at length, 'How many angels can stand on the point of a needle?'") Eunomia, of course, understands that "present" and "presence" can have multiple meanings as discussed above that

understands that her solution must work broadly in light of the legal and other semantic lifeworlds in play (including a statutory scheme that must have some reasonable purpose if it is not to be irrational law).

In seeking such broad workability, she explores ways in which the corporation might make itself "at hand" within her state. (She does not focus on "being in view" since she believes that one must be "in view" in some sense if one is "at hand"--one must be findable to be at hand.) Could "being at hand" include having ten in-state employees who sell Acme's insurance from their homes? In answering this question, Eunomia recognizes, again, that she is operating within the contexts of broad legal and other semantic lifeworlds (including a statutory scheme that must have some reasonable purpose if it is not to be irrational law). As such, she asks herself what works best here within "the collectivity of experience's demands, *nothing being omitted.*"[192] Such a question raises sub-questions such as how much "at hand" do ten in-state employees make the corporation, how difficult and unjust would it be to require plaintiffs to bring their action in another state, and how difficult and unjust would it be to require the corporation to defend an action in a state where it has ten employees?[193] Excellently exploring and answering such questions should lead Eunomia to an answer that results in the requisite good order. That is, of course, the best that we can expect of her.

Since Eunomia's detailed explorations here could fill a law review article in itself, I shall go no further into the weeds of her inquiries, frames, and decisions. Instead, I shall end with the point that she proceeds in a fashion that recognizes both framing flexibility and real restraints on what she can workably do. I shall also end by noting that one cannot rule out the possibility of another Eunomia excellently reaching an equally-workable but different result. That, too, would be the best we could expect of her in a world possibly permitting equally-workable alternative solutions. Of course, "equally-workable" is the key here--such a different Eunomia could not acceptably provide (whether under cover of "magic wands," putative formalism, or otherwise) any different answer unless it is equally workable.

VI. <u>Conclusion</u>

Having now explored the freedoms and restraints of hermeneutic pragmatism, how might lawyers or others use such hermeneutic pragmatism to engage "post-truth" or formalist errors? In his RELIGION AND THE DECLINE OF MAGIC, historian Keith Thomas touches on the daunting challenge here:

> It is a feature of many systems of thought, and not only primitive ones, that they possess a self-confirming character. Once their initial premises are accepted, no subsequent discovery will shake the believer's faith, for he can explain it away in terms of the existing system. Neither will his convictions be weakened by the failure of some accepted

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can avoid such "needle" debates. She also understands, as discussed in Section III-A above, that we can also speak metaphorically.

[192] *See again* JAMES, *supra* note 13, at 32 (emphasis added).

[193] *See* Cohen, *supra* note 15, at 810.

ritual to accomplish its desired end, for this too can be accounted for. Such systems of belief possess a resilience which makes them virtually immune to external argument.[194]

Where legal minds face such "systems of belief [that] possess a resilience which makes them virtually immune to external argument," they can attempt to use Rorty's redescription approach discussed above in hopes that believers in the other system will be intrigued and thereby converted by the appeal of the redescription if not by the argument of the redescription. Again, Rorty's method is to:

> redescribe lots and lots of things in new ways, until you have created a pattern of linguistic behavior which will tempt the rising generation to adopt it, thereby causing them to look for appropriate new forms of nonlinguistic behavior . . . . This sort of philosophy does not work piece by piece, analyzing concept after concept, or testing thesis after thesis. Rather, it works holistically and pragmatically. It says things like "try thinking of it this way" . . . [or] "try to ignore the apparently futile traditional questions by substituting the following new and possibly interesting questions" . . . . It does not argue for this suggestion on the basis of antecedent criteria, and to the old and new language games. For just insofar as the new language really is new, there will be no such criteria.[195]

Additionally, legal minds can try to invoke the pushback and pressures of the pre-semantic, of the semantic lifeworlds in play (including their concepts, implementives, and other forces), and can hopefully otherwise enlighten the otherwise recalcitrant believers on the external and internal "workability" of belief systems in play.

Should this not work, legal minds can try to remind erroneous "post-truth" or formalist champions of the **ridicule** they might expect (**including the ridicule that excludes**).[196] Legal minds can also especially remind the "post-truthful" of potentially worse. To the extent the "post-truthful" publicly mock or challenge such cherished notions as truth and honesty, they risk severe public emotional reactions such as **public contempt** (whose prototypical desire, again, is to ostracize someone seen as unworthy), **public disgust** (whose prototypical desire, again, is to remove someone seen as contaminating**), public anger** (whose prototypical desire, again, is to

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[194] KEITH THOMAS, RELIGION AND THE DECLINE OF MAGIC 767 (1971). One can compare Thomas's language with the definition of a "fanatic" as "a person who adheres to a disputed thesis for which no unquestionable proof can be furnished, but who nevertheless refuses to consider the possibility of submitting it for free discussion and, consequently, rejects the preliminary conditions which would make it possible to engage in argumentation on this topic." PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 62. One can also compare "an entrenched position in social discourse . . . where nobody is in the least bit inclined to dispute it because, for example, it serves a useful purpose or 'nobody has given us any interesting alternatives which would lead us to question it.'" MALACHOWSKI, *supra* note 37, at 53 (citing RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 175 (1979) discussing Quine and Wilfrid Sellars). Rorty's redescription method discussed below might seem more likely to work with this last sort of inertia.
[195] RORTY, CONTINGENCY, *supra* note 22, at 9.
[196] PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 205.

punish someone seen as culpably causing wrongful harm), and **public hatred** (whose prototypical desire, again, is to cause pain or harm to someone seen as deserving such pain or harm as a result of evils done).[197] If "post-truth" people can be reached in no other way, perhaps these last messages can resonate with them.[198]

Should all these specific persuasive efforts fail, "post-truth" and formalist folk must nonetheless navigate both the pre-semantic and the semantic lifeworlds that buffet them. They turn blind eyes to such forces at their peril.

And what more can legal minds with eyes wide open do? They can seize the freedoms discussed above and unleash their imaginations to do the *workably* good and even the *workably* wonderful.[199] They can hold accountable those who would do the unworkable including evil (which never works in the broad sense discussed above). They can serve as (and seek out) Eunomias and other role models who would also do the *workably* good or even the *workably* wonderful. They can also demand a renewal of ceremonial rhetoric that frequently celebrates and instructs us in the better things that we do, that "strengthens the disposition toward action by increasing adherence to the values it lauds."[200]

As to the last point, judges, lawyers, and law students should thoroughly lament the current "lack of understanding" of ceremonial rhetoric.[201] They should remember how Simon Weil once reflected on what more of such rhetoric by French people in London might have done to impassion resistance among the occupied French during the Second World War. They should remember how Weil's possible means of rousing those back in France included

> expression, either officially or under official sanction, of some of the thoughts which, before ever being publicly expressed, were already in the hearts of the people, or in the hearts of certain active elements in the nation . . . . If one hears this thought expressed publicly by some other person, and especially by someone whose words are listened to

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[197] *See* Lloyd, *Cognitive Emotion*, *supra* note 86, at 99-106 (setting out rubrics of basic emotions).

[198] Additionally, to the extent a "post-truth" person challenges "common sense" without good reason or publicly mocks or challenges cherished notions such as truth and honesty, they, of course, diminish any "capital incorporated in [their] person" that could have otherwise served them as ethos. *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 299.

[199] In doing so, those without the blindfolds can also invoke the infinite possibilities of argument that the restraints discussed above generate. In this sense, there is a synergy between freedom and restraint that frees up vast realms of potential argument. The explorations of common sense, for example, provide much fodder for credibility presentations to a judge or jury. The explorations of conceptual restraint (including their presuppositions and entailments) similarly free up vast possibilities of argument as do the various micro-implementives and macro-implementives that might be in play in a given situation. And, of course, "workability" provides potentially-endless possibilities for discussion in given situations. Thus, there is much potential for imagination in such restraints, and lawyers should view such restraints as empowering as well as limiting.

[200] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 50.

[201] *Id.*

with respect, its force is increased a hundred-fold and can sometimes bring about an inner transformation.[202]

One struggles to find more moving words than these on the powers of rhetoric's third branch[203] and its utility in rousing the best in us.[204]

Judges, lawyers, and law students (along with Eunomia) should thus celebrate hermeneutic pragmatism's demands for the *workably* good both for the pleasure *and* the instruction that such celebration brings. Hermeneutic pragmatism's celebration of the imagination and its honest recognition that categories come from us (while at the same time categories also give us "us") spurs on more conceptual refinement and progress.

That said, hermeneutic pragmatism's recognition of the many restraints discussed above should both temper the "post-truthful" (including their claims of "magic wands") as well as the slippery-slope fears of "formalists" who would otherwise be open to imagine and strive for the workably better.

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[202] As quoted in *id.* at 53.

[203] *See* LANHAM, *supra* note 39, at 164-65 (distinguishing between deliberative rhetoric which is concerned with persuasion as to future action, judicial rhetoric which is concerned with a legal matter from the past, and ceremonial rhetoric which includes praise or commemoration).

[204] Hermeneutic pragmatism does not deny that evil can attempt to pervert ceremonial rhetoric to its ends as well. All the more, however, does this argue for more use of ceremonial rhetoric for the good.

Appendix A

Further "Post-Truth" Claims of the "Powerful" or "Influential"

Kellyanne Conway (counselor to President Trump)

1) Discussing with Chuck Todd the size of the crowd at Trump's inauguration: "Don't be so overly dramatic about it, Chuck. What-- You're saying it's a falsehood. And they're giving Sean Spicer, our press secretary, gave alternative facts to that. But the point remains--"[205]

2) Discussing with Norah O'Donnell the reference to "alternative facts": "Well, it was alternative information and additional facts . . . . And that got conflated. But, you know, respectfully, Norah, I see mistakes on TV every single day and people just brush them off. Everybody thinks it's just so funny that the wrong—the wrong movie was, you know, heralded as the winner of the Oscars."[206]

3) Olivia Nuzzi's account of her interview with Conway: "Of course, to hear Conway tell it, nothing that nefarious is going on at all. She shrugs when asked about the inaccurate things she's said. The Bowling Green Massacre? She meant to say 'Bowling Green masterminds,' she told me, referring to the would-be terrorists who were apprehended before they staged an attack. And alternative facts? 'Two plus two is four. Three plus one is four. Partly cloudy, partly sunny. Glass half full, glass half empty. Those are alternative facts,' she said, further defining the infamous phrase as 'additional facts and alternative information.'[207]

Scottie Nell Hughes (political commentator)

Discussing "facts" with Diane Rehm on 11/30/16: "And so one thing that has been interesting this entire campaign season to watch is that people that say facts are facts, they're not really facts. Everybody has a way, it's kind of like looking at ratings or looking at a glass of half-full water. Everybody has a way of interpreting them to be the truth or not true. There's no such thing, unfortunately, anymore of facts. And so Mr. Trump's tweet amongst a certain crowd, a large -- a large part of the population, are truth. When he says that millions of people illegally voted, he has some -- in his -- amongst him and his supporters, and people

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[205] Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Era of Alternative Facts*, THE WASHINGTON POST (Jan. 22, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/?utm_term=.22c4534891f5.

[206] Richard Huff, *CBS Press Release*, CBS NEWS (Mar. 3, 2017), https://cbspressexpress.com/cbs-news/releases/view?id=47236.

[207] Olivia Nuzzi, *Kellyanne Conway Is a Star*, NEW YORK MAGAZINE (Mar. 18, 2017), http://nymag.com/daily/intelligencer/2017/03/kellyanne-conway-trumps-first-lady.html.

believe they have facts to back that up. Those that do not like Mr. Trump, they say that those are lies, and there's no facts to back it up." [208]

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[208] *The Diane Rehm Show: How Journalists Are Rethinking Their Role Under a Trump Presidency*, NPR (Nov. 30, 2016) (transcript available at https://dianerehm.org/shows/2016-11-30/how-journalists-are-rethinking-their-role-under-a-trump-presidency).

Appendix B

More on Macro-Implementives and the Rule of Law

Although Lon Fuller unfortunately uses phrases such as "the inner morality of the law,"[209] he has famously partially explored what I would like to clarify for the "post-truthful" and others as macro-implementives. Again, Fuller recognizes that a legal system's rules "normally serve the primary purpose of setting the citizen's relations with other citizens. . . ."[210] To that end, Fuller recognizes that rules (whatever specific subject matter they may address) cannot work if they are (1) ad hoc, (2) not publicized, (3) retroactively applied in abusive fashion, (4) not understandable, (5) contradictory, (6) otherwise beyond a party's power to perform, (7) changed with disorienting frequency, or (8) administered in a way that differs from their announcement.[211]

Turning to Fuller's first point, to the extent rules can be ad hoc, we are not omniscient and therefore cannot obey rules before they are made. A macro-implementive against the ad hoc thus pushes back. Fuller's first point here is also arguably definitional: what is ad hoc is arguably not a rule. To the extent this point is also definitional, it would have the definitional or conceptual pushback in the sense discussed in Section IV-B-5-a above. The remaining seven of Fuller's eight points all expressly turn on ways that rules can fail given our human limitations. That is, they all involve a rule-related implementive principle that when a speaker (such as a sovereign or other rule maker) promulgates a rule that he wishes others to follow, such a wish on its face suggests recognizing as well the means to achieve that rule so long as such means are not inconsistent with other higher rules the speaker wishes to be followed.

Turning to Fuller's second point, we are not, again, omniscient and therefore cannot recognize and obey a rule which we cannot know. Macro-implementives therefore demand publication of rules to be followed. Such demand is not a "morality" of the law, at least not in any ordinary sense of the term.[212] It is instead a facilitating rule required to make the rule maker's specific rule feasible in light of human limitations and is therefore (whether initially expressly recognized by the rule maker or not) a necessary adjunct of any sincere and realistic desire that a specific rule be followed. This macro-implementive thus also pushes back.

Turning to Fuller's third point, our lack of omniscience similarly demands caution with respect to retroactive rules since we would lack notice of retroactivity at the time we act.[213] We could also frame this in terms of lack of omnipotence: we lack the power to travel back in time to act in accordance with a retroactive rule. In either case, again, the demand for caution here is not a "morality" of the law, at least not in any ordinary sense of the term. It is instead, again, a facilitating rule required to make the rule maker's specific rule feasible in light of human

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[209] FULLER, *supra* note 164, at 42.

[210] *Id.* at 207–08.

[211] *See id.* at 39.

[212] It is not, for example, "a doctrine or system of moral conduct." *See Morality*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/morality (last visited July 30, 2018).

[213] I use the word "caution" here since retroactive rules can sometimes be desirable. If, for example, notaries in a particular past year made an unusual number of similar clerical errors in notarizing deeds, a remedial statute righting such deeds could well make sense.

limitations and is therefore (whether initially expressly recognized by the rule maker or not) a necessary adjunct of any sincere and realistic desire that a specific rule be followed. This macro-implementive thus also pushes back.

Turning to Fuller's fourth point, we again are not omniscient and therefore cannot obey rules that we cannot understand. If the rule maker truly desires that we follow his rules, such desire must thus embrace the facilitating rule that his specific rules be understandable. This macro-implementive thus also pushes back.

Turning to Fuller's fifth and sixth points, we are not, again, omnipotent. If the rule maker truly desires that we follow his rules, such desire must thus embrace the facilitating rules that his specific rules not be contradictory and not be otherwise impossible to perform. These macro-implementives thus also push back.

Turning to Fuller's seventh point, we are not, again, omniscient, and therefore cannot follow rules changed with disorienting frequency. If the rule maker truly desires that we follow his rules, such desire must thus embrace the facilitating rule that his specific rules have sufficient stability to be understandable. This macro-implementive thus also pushes back.

Turning to Fuller's eighth point, we are not, again, omniscient and cannot therefore know rules except as they are promulgated to us. We therefore rely on them as promulgated. If the rule maker truly desires that we follow his rules, such desire must thus embrace the facilitating rule that his rules not be administered in a way that differs from their promulgation. This macro-implementive thus also pushes back. (This macro-implementive, however, can be both easy and difficult in practice. As an easy case, we should not of course be charged with speeding when we are driving below a posted numerical speed limit. Less specific terms, however, embrace more administrative flexibility. For example, if the posted speed limit is instead "a reasonable speed under the circumstances," our reliance on such promulgation expressly turns on more flexible terminology that demands more circumspection on our part. Although we might plead a defense lack of omniscience in such a case as well, such a plea would not seem compelling--in my view at least--since an ordinarily-competent driver should be capable of assessing what is "a reasonable speed under the circumstances" and can further protect herself by driving under that speed.[214])

We can also go further than Fuller here. Turning to a ninth and critical implementive, legal rules cannot serve as guides for conduct without facilitating certain allowances of speech.[215] These facilitating allowances flow from the role of language itself in our semantic lifeworlds and from our lack of omniscience and the resulting necessity of speech with respect to rules in multiple ways. First, there must be speech to convey, implement, and enforce rules. Language sets out the rules which do not implement or enforce themselves. Human communication must facilitate that process including necessary allegations and testimony before and at hearings alleging breach of the rules. Second speech is required to follow rules. At the very least, we must be able to ask what rules mean, to obtain feedback as to how well we are following such rules, and to defend ourselves in the event of an alleged breach. So long as such legal rules remain in place, such implementive allowances of speech must therefore be recognized. This macro-implementive thus also pushes back.

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[214] As I have discussed vagueness, ambiguity, and indeterminacy elsewhere, I will not discuss these issues further here. *See* Lloyd, *Way of Words*, *supra* note 142, at 266-72.

[215] I speak of "allowance" of speech here to distinguish it from "freedom" of speech guaranteed by the First Amendment.

This implementive universe of such allowed expression can be much larger than one might first imagine since statements involving the law can encompass much. Since the civil or criminal law or both can apply in some fashion to almost anything (if not everything) that we do, including such broad categories of our actions as "lawful behavior," it is hard to see why at least some degree of implementive speech allowance is not required to explore and defend such broad categories of life as "lawful behavior." Of course, since behavior is either "lawful" or "unlawful," it is hard to see what escapes at least some degree of implementive speech allowance.[216] (It is unfortunately beyond the space limits of this article to begin tracing in more detail the outer limits of such broad implementive allowance of expression separate and apart from the First Amendment.[217])

Turning to a tenth and further critical implementive, since governance by legal rules requires allowance of speech to the extent noted above, commensurate equal protection requirements must concomitantly follow such implementive allowance of speech. It is hard to see, for example, how discounting the speech of one race and elevating the import of the speech of another race would be consistent with the implementive allowance of speech required for effective governance by legal rules. This macro-implementive thus also pushes back. (Again, it is unfortunately beyond the space limits of this article to begin tracing the scope of such implementive equal protection requirements separate and apart from those of the Equal Protection Clause.).

Finally, turning to an eleventh and further critical implementive, meaningful equal protection and freedom of speech cannot of course exist without necessary concomitant procedural due process. Where one must be able to speak and be heard by one's government, one must have sufficient concomitant procedural due process to speak and be heard. One must have the same to enforce equal protection. Thus, governance by legal rules also implementively requires sufficient due process to facilitate such implementively-allowed speech and equal protection. Procedural due process is also implementively required by the very nature of governance by rules. Without such procedural due process, rules implode as internalized guides for individual conduct because the consequences of compliance (and even what constitutes compliance itself) become uncertain. Without such procedural due process, one becomes a Desdemona[218] potentially subject to condemnation no matter what one does. This is not legally rule-governed activity under any meaningful sense of the term. This macro-implementive thus

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[216] As Borges puts it, "[I]n the human languages there is no proposition that does not imply the entire universe; to say *the tiger* is to say the tigers that begot it, the deer and turtles devoured by it, the grass on which the deer fed, the earth that was mother to the grass, the heaven that gave birth to the earth." JORGE LUIS BORGES, *The God's Script*, *in* LABYRINTHS 171 (L.A. Murillo trans., 2007). The law, of course, is a part of this universe.

[217] One might argue that I would prove too much here. For example, espionage is a legally rule-governed activity. Does that mean that CIA agents, for example, are therefore allowed to speak publicly about whatever they do and whatever they find? Of course not--such allowance would contradict the very rules of their profession. However, the implementive concerns we have noted above would require allowance to speak to the extent consistent with such rules of confidentiality and such implementives.

[218] Desdemona is murdered by her husband, Othello, who erroneously believes she has been unfaithful to him. *See* WILLIAM SHAKESPEARE, THE TRAGEDY OF OTHELLO THE MOOR OF VENICE.

also pushes back. (Unfortunately, again, it is beyond the space limits of this article to begin tracing the scope of such implementive due process requirements separate and apart from those of the Due Process Clause.)

Of course, the above discussion presumes rule of law, and we can have a different situation entirely in the case of, for example, a sadistic dictator who delights in the promulgation of arbitrary and capricious "rules." In that case, however, one can still see that semantic lifeworlds would nonetheless push back in multiple ways. To the extent the dictator's "rules" confuse rather than guide, they are not legal rules in the ordinary sense of "guides to human conduct and standards of criticism for such conduct."[219] The dictator would face the conceptual pushback discussed in Section IV-B-5-a above. Additionally, the powerful force of common sense would push back in at least two ways. First, rules which cannot be followed are in common parlance absurd[220]—a black mark as we have seen in the eyes of that powerful semantic lifeworld force called "common sense." Second, such a lawless dictator must face the powerful common sense notion that "no man ought to be blamed for what it was not in his power to hinder."[221]

Furthermore, as discussed in Section IV-C above and Appendix C below, morality is a workability factor, and the lawless dictator would "govern" in light of the pushback of a post-Nuremburg world.[222] No hermeneutic pragmatist can therefore support a lawless dictator, and hermeneutic pragmatism is therefore hardly "politically ambivalent" in this regard.[223] Hermeneutic pragmatism would instead remind the dictator of the possible consequences of his behavior running from the ridicule that excludes to Nuremburg.[224]

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[219] HART, *supra* note 132, at 249.

[220] Similar to Hart, a common dictionary definition of "rule" is "a prescribed guide for conduct or action." *Rule*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/rule (last visited July 30, 2018). What cannot be followed cannot by definition be a guide, i.e., "something that provides a person with guiding information." *Guide*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/guiding.

[221] REID, *supra* note 107, at 287.

[222] *See* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946 (1947). For information regarding more recent crimes against humanity, see the International Crimes Database (ICD) of the Asser Institute, available online at http://www.internationalcrimesdatabase.org.

[223] *See* FELDMAN, *supra* note 18, at 181 (on apparent political ambivalence of postmodernism).

[224] *See supra* note 222.

Appendix C

Pre-semantic and Semantic Lifeworld Workability Restraints

1. Predictability

We want our concepts to help us navigate experience by, among other things, predicting how experience will unfold. To see this, we can take again the example of the unfortunate blind child discussed in Section IV-A-1 above who also lacked the concept of a "cliff" and therefore had an unexpected fall. For something to work it of course must not lead to such inaccurate expectations or predictions of how the future will unfold (including how the pre-semantic will push back). Predictability is thus a straightforward factor of workability though (as the following sections show) it does not exhaust what we mean by "workable."[225]

2. Organization and Coherence

In addition to the foregoing aspects of "workability," "workable" concepts must, of course, work with *every* relevant aspect of the semantic lifeworlds we inhabit as well as with the pre-semantic. William James, again, succinctly describes such workability as a workable coherence that "fits every part of life best and combines with the collectivity of experience's demands, *nothing being omitted*."[226]

a. Coherence of "Facts" and "Values"

i. Requiring Broad Coherence

James's reference to "nothing being omitted" is of critical import. If our concepts are to work, we can no more omit, for example, moral pushback than the pushback of a heavy door we are trying to open. If we have no workable concepts for such moral pushback (including the pushback for justice and the respect for human dignity which I believe has roots in both the pre-semantic and the pragmatic[227]), we can find ourselves in uncomfortable positions like Huck Finn's discussed in Section IV-A-2 above (or worse).

Such broad coherence must thus involve coherence across objective experience (such as my current body temperature and other objective "facts"), subjective experience (such as my current private thoughts and speculations about my current body temperature), aesthetic and religious experience, personal and community values and standards, morality (including, again, justice and respect for human dignity), law, and other rules and principles having force in our semantic lifeworlds.

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[225] *See* HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 9-10 (Blackwell 1995) (on the "different *types* of 'expediency'").

[226] *See* JAMES, *supra* note 13, at 32 (emphasis added).

[227] *See* Harold Lloyd, *Beyond Rawls' Fiction: The Veil of Ignorance Is Real*, HUFFINGTON POST: THE BLOG (Mar. 2, 2016, 10:09 AM, updated Dec. 6, 2017), https://www.huffingtonpost.com/harold-lloyd/beyond-rawls-fiction-the_b_9365888.html.

ii. Maintaining Broad Coherence

As with simplicity, addressing such coherence may prove more difficult than might first appear: something may cohere well in one aspect of a semantic lifeworld and yet fail in another. When that happens, overall coherence fails. For example, I might objectively solve a need for money by simply stealing it. However, that would run afoul of both my personal values and general moral values and standards. Stealing would thus not be a workable solution because it would not cohere with my personal values or with moral values and standards of the semantic lifeworld.

Similarly, in matters of law, a concept or notion may fail to cohere with the whole. A state, for example, might need land for a dam and might conceive that simply seizing the land without compensation would be the simplest and thus best solution. It would involve only one step while taking and paying would involve two steps. If the state further lacked sufficient funds to buy the land, it might think this solution even more "workable" since it would give them a dam they would not otherwise be able to have. However, no such "simplest" solution would work because it would not fit with the limitations on the powers of states to take private property without just compensation.[228] Additionally, it would not fit with moral rules: it is generally not right to take property without paying for it. Laws that ignore the moral thus call out for revision to the extent they do not morally "work" no less than laws of physics call out for revision to the extent they do not physically "work." Hermeneutic pragmatism is thus hardly morally indifferent.

b. Coherence of Precedent

Consistent with the foregoing discussion of "workability," respecting precedent can promote predictability (permitting those contemplating future action to rely on past decisions, practices, and views), economy (not wasting effort solving problems already solved), and coherence (treating similar cases alike).[229]

Such respect for precedent (though *not* unbending deference to erroneous precedent) thus plays a critical role in legal and other analysis.[230] For example, imagine a parent who is satisfied with his decision to start his first child's allowance when that child reached the age of ten. If the parent has no reason to think the "rule of ten" did not work, why would it not be a waste of effort to reconsider the rule when the second child reaches that age? Furthermore, how would it be fair to treat the next child differently unless the parent had good reason to do so (such as financial setbacks or the second child's behavior)? Any change could also generate confusion for the next

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[228] *See* U.S. CONST. amend. V.

[229] *See* DAVID M. WALKER, THE OXFORD COMPANION TO LAW 1174 (Oxford 1980) ("The main justifications for [stare decisis] are that it enables a judge to utilize the wisdom of his predecessors, that it makes for uniformity of application of law to similar cases, and that it makes the law predictable."). Stressing the importance of precedent here, I should note Dworkin's foil of "legal pragmatism" which he defines as permitting judges to "make whatever decisions seem best to them for the community's future, not counting any form of consistency with the past as valuable for its own sake." DWORKIN, *supra* note 184, at 95. As should be apparent by now, hermeneutic pragmatism rejects this view in multiple ways.

[230] *See* HUHN, *supra* note 120, at 41-50 (discussing the importance of precedent and tradition).

child who, because of past example, might well have thought his allowance would also begin at age ten. Why do that without good reason?

All that said, there can no doubt be good reason for change. Reasons for respecting a given precedent can fail when, for example, there has been error, unfairness, or when other reasons arise that require new thought. Refusing to rethink precedent in such situations can of course generate unfair results by perpetuating error or injustice or by reaching wrong results in changed circumstances. Refusing to rethink precedent in such situations can also thwart judicial or mental economy by requiring periodic reconsideration or patches as discussed above where the precedent simply does not work well in practice and can also thwart predictability by the doubt that hangs over questionable prior decisions or rules. When any of this happens, the very reasons of coherence, economy, fairness, and predictability that generally support precedent require us in such specific situations to reconsider specific precedent.[231]

c. Plausibility of Coherence

To the extent concepts do not seem plausible, common sense can resist them thereby potentially making their use less simple than alternative concepts not invoking such resistance. Thus, concepts are more workable to the extent they are plausible.[232] Nonetheless, if the concept which is otherwise most workable seems initially implausible, we should advance such a concept with the view that its greater workability should render it not only plausible but acceptable over time. Thomas Kuhn, for example, gives us a highly-useful extended exploration of how plausible scientific paradigms have been replaced over time.[233]

d. Metaphorical Privilege

Finally, in the face of such coherence and plausibility demands, we must tie back in the use of metaphor we have discussed earlier. We have already seen the acceptability of useful metaphorical contradiction. As discussed in Section III-A above, a metaphor equates "A" and "not-A,"[234] and is thus by its very essence a contradiction.

To give a concrete example of such acceptable contradiction, quantum mechanics holds that light can be both a particle and a wave.[235] Light, however, is not a particle (at least not in the sense of particles of dirt or dust or other common uses of the term) and it is not a wave (at least not in the sense of waves at the beach or at a lake or in other such common senses of the term). All the more is the light now shining from my lamp not a contradictory combination of these two different things (a particle and a wave). My lamp neither seems to be pelting me with particles nor splashing me with waves much less "pelting-splashing" me with some contradictory

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[231] Following precedent can also promote simplicity and coherence in the senses discussed below, and any reconsideration of precedent should also involve these considerations.

[232] *See* HOOKWAY, *supra* note 77, at 226.

[233] *See again generally* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996) (discussing radical paradigm shifts in science).

[234] *See again* LANHAM, *supra* note 39, at100 (a metaphor is an "assertion of identity rather than, as with [s]imile, likeness.")

[235] Franco Selleri, *Preface to* WAVE-PARTICLE DUALITY (Franco Selleri ed. 1992); *see also generally* B.H. BRANSDEN & C.J. JOACHAIN, QUANTUM MECHANICS, 760 (2d ed. 2000).

combination of such two different things. Yet, workable science can require that I use such a contradiction when exploring certain properties of light.[236]

This contradictory example of light as both a particle and a wave helps us grasp a metaphorical "privilege" required by the very complexity of life itself. Because the following metaphors have different meanings that more accurately capture particular moments, we need to be able to say such contradictory things as "I'm slowly trudging my way through the day" and "The day is slowly passing me by." These statements are contradictory because the first casts time as stationary while the second casts time as moving.[237] We need to recognize with Lakoff and Johnson that:

> To operate only in terms of a consistent set of metaphors is to hide many aspects of reality. Successful functioning in our daily lives seems to require a constant shifting of metaphors. The use of many metaphors that are inconsistent with one another seems necessary for us if we are to comprehend the details of our daily existence.[238]

The demand for coherence is therefore not a prohibition of the inconsistencies of useful metaphors where such metaphors' usefulness outweighs the usefulness of logical coherence. Coherence serves workability and not the reverse. We can also capture this point with a flexible notion of coherence itself: such flexible coherence demands the best overall fit. If the best overall fit requires metaphorical contradiction, coherence in that broader sense demands it.[239]

3. Simplicity

a. Structural Simplicity

When examining such predictability, we are of course better served to the extent we can test our notions before we rely upon them, before we head toward the cliff so to speak.[240] In this sense, more easily testable concepts thus work better than others. Such reflections on ease of testing also involve further factors of workability: appropriate simplicity and economy.

As Peirce puts it, one should seek when constructing possible theories and concepts "Economy of money, time, thought, and energy."[241] As avoiding waste (whether of time or effort or otherwise) is a virtue on its face, one should of course prefer the simplest of otherwise-equally effective concepts or categories.[242] Additionally, at least at first blush, the simpler should by definition be generally easier to use. Furthermore, added complexity can increase the possibility

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[236] *See again id.*

[237] *See* LAKOFF & JOHNSON, METAPHORS, *supra* note 42, at 41-45.

[238] *Id.* at 221.

[239] Lakoff and Johnson parse between the incoherent and the inconsistent. They would characterize the two inconsistent time metaphors above as subcases of the same metaphor of "From our point of view time goes past us from front to back." *See id.* at 44. In their view, the two metaphors can thus cohere even though they are inconsistent. *See id.*

[240] *See* PEIRCE, COLLECTED PAPERS §§ 5.197, 7.220 , *supra* note 13; HOOKWAY, *supra* note 77, at 226.

[241] PEIRCE, COLLECTED PAPERS § 5.600, *supra* note 13.

[242] *See generally* RONDO KEELE, OCKHAM EXPLAINED: FROM RAZOR TO REBELLION (2010).

of error.[243] Adding more moving parts to a machine, for example, adds more ways for the machine to break. Where a machine with one moving part works just as well as a machine with two moving parts, why would one choose the more complex device which not only is therefore likely more difficult to maintain but offers two moving parts rather than one part subject to breakage? Analysis of workability must therefore always involve simplicity analysis. The "post-truth" person who buys a needlessly-complex widget maker, for example, could thus have done better. The lawyer who drafts a needlessly-complex document could also have done better.

b. Scope Simplicity

Simplicity and economy also apply at the level of scope. If a single theory A can account for a range of matters that otherwise require adopting multiple theories B and C, one should as a matter of simplicity (if all other things are equal) adopt theory A rather than theories B and C. As Peirce puts it, "wide generalization will save repetitious work," and we thus find "good economy, other things being equal, to make our hypotheses as broad as possible."[244] Of course, such hypotheses must be judged by all applicable restraints including all applicable forms of workability (which include the moral), and broadness of scope here does not therefore justify "post-truth" people who harbor broad delusions. Scope simplicity should also apply, for example, to documents that lawyers draft. If one document can *as effectively* address a transaction as three separate documents, one must of course ask why the lawyer would not wish to use a single document.

c. "Natural" Simplicity

All that said, however, Peirce also helps us see that "the logically simpler" hypothesis is not always the more "natural" hypothesis that accords with instinct.[245] Peirce suggests that we should in such a case follow the more "natural" hypothesis on the assumption that we "have a natural bent in accordance with nature's."[246] If we have such a "bent," then presumably the more "natural" hypothesis might more likely work. Even if we suspect we may not have such a "bent," by seeming less foreign to the semantic lifeworlds we inhabit, the "more natural hypothesis" may be more likely to cohere with other aspects of those semantic lifeworlds in ways that work better overall. Furthermore, what better accords with "instinct" may better sense pre-semantic pushback and avoid the Huck Finn problem discussed in Section IV-A-2 above. (I believe that pre-semantic pushback results in both moral and factual concepts and frameworks that help withstand such pushback.)

d. Aesthetic, Religious, and Rhetorical Simplicity

Three other areas where the logically-simpler approach may not be simpler overall can involve aesthetics, religion, and rhetoric.

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[243] *Id.*

[244] PEIRCE, COLLECTED PAPERS §7.221, *supra* note 13.

[245] *See id.* § 6.477 (italics omitted).

[246] *See id.*

i. Aesthetics

In the case of aesthetics, the "logically-simpler" approach may not always be the truly simpler approach. For example, one can imagine choosing between proposed plans for a much needed bridge to encourage traffic into town. One plan is a simple, ugly, brutalist bridge and the other is ornate and striking. Because of its inherent draw, the more "logically complex" but more striking bridge may indeed be the "simpler" choice in the long run. The ugly bridge may actually turn away (or at least not entice) travelers and may also require endless expenditures such as supplemental advertising, signage, and other measures to draw traffic. The lawyer advising the town in such a case would better serve her client if she brings to bear such a more aesthetically-sophisticated notion of simplicity. Like adding the more aesthetic bridge, a judge, lawyer, or law student may find, for example, that adding *more* art or music to life can be one of the simplest ways to a fuller and more productive life.

ii. Religion

In the case of religion, the "logically-simpler" approach may also not always be the truly simpler approach. Adding a deity, for example, to the cosmos is more "logically complex." However, such addition does not change what we objectively experience (and thus does not interfere with day-to-day science). Yet, it may, for example, provide a given judge, lawyer, or law student a more vivid inner life that in turn generates more and better legal or scholarly work than would otherwise result.[247] Once again, the "logically simpler" might well not be the simpler life solution overall since it would result in both an emptier inner and outer life. Instead, the added deity might be one of the simplest ways for such a judge, lawyer, or law student to have a fuller inner and outer life.

iii. Rhetoric

In the case of rhetoric, context appropriate "accumulation of arguments" can no doubt strengthen a case, and such accumulation should be measured in at least two ways: by "relations between arguments" (i.e., by how such accumulation strengthens or weakens the arguments) and by "diversity of audiences" (i.e., by how such accumulation affects the audience in play).[248]

Consistent with this, Peirce tells us that reasoning "should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected."[249] If "sufficient" is taken to mean the optimum number of threads,[250] this brilliant metaphor captures argumentative rather than "logical"

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[247] *See generally* WILLIAM JAMES, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY (Frederick Burkhardt and Fredson Bowers eds., Harvard Univ. Press 1979) (1897).

[248] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 474, 477.

[249] PEIRCE, COLLECTED PAPERS § 5.265, *supra* note 13.

[250] Too many threads can weaken argument no less than too few. For example, an extra argument might only serve to make an audience consider a negative it would not otherwise have considered. PERELMAN & OLBRECHTS-TYTECA, *supra* note 41, at 481. Additionally, advancing a large number of arguments can create "the impression that one lacks confidence in any one of them." *Id.* at 483.

simplicity. The former involves use of a sufficient number of threads which are no thicker than necessary and which are woven together in a way that best holds if every thread but one fails. Of course, good judges, lawyers and law students weave such cables rather than forging chains.

e. Patching and Rigging

Unfortunately, what is "simpler" is not always as clear as in the one-part vs. two-part machine example above. For example, when our one moving part machine breaks, should we patch the break or replace the entire machine? A machine with a patch has an additional part lacking in an unpatched machine and is thus more complex in that sense. However, the patch may have minimal cost and extend the life of the machine to the length of a replacement.

Measuring simplicity here simply in terms of the number of patches would be myopic. We should also consider the additional cost and effort required for a new machine (including removal of the old, introduction and placement of the new, and possible new training) which are complexities actually avoided by the patch. However, what if that "simple" patch is required every week or every day or every hour? At what point does it become simpler just to replace the machine? The scientific revolutions from Aristotle to Copernicus to Newton to Einstein give us non-legal examples of how long it has seemed sensible to patch and rig failing scientific models.[251]

In matters of law, we also have similar struggles over whether and how long to patch or rig our legal concepts and rules. For example, if prohibiting same-sex marriage proves more and more a problem of equal protection, is it sufficient to patch or rig the problem by recognizing "equivalent" civil unions and continuing to prohibit same-sex unions?   From a simplicity standpoint, this is not a difficult question. Here we either open up a working vehicle (marriage) to others or require them to ride in a "separate but equal" new vehicle which we must now acquire and maintain. To ask which approach is simpler really answers itself. The mere fact of adding and maintaining a new vehicle alongside another already working one is on its face more complex. The one-vehicle solution on these facts is simpler and the Supreme Court has sensibly ended the patching and rigging here.[252]

4. Pre-semantic Pushback

In addition to "working" with aspects of semantic lifeworlds just discussed, "workable" concepts must be able to withstand the pre-semantic as well. This applies not only to pushback we would label as "physical" such as the cliff that faced the unfortunate child discussed above. It would apply to "non-physical" pushback as well. For example, as we have discussed, Huck Finn encountered such non-physical pushback when he struggled over helping a slave escape. Workable concepts must therefore recognize all pushback of the pre-semantic, including what we would typically put into "moral," "aesthetic," and "religious" or "spiritual" as well as "physical" words.

In light of all such pre-semantic pushback, the "post-truth" person who believes that she can say or do anything and suffer no long-term consequences is seriously deluded. As shown by

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[251] *See generally* KUHN, *supra* note 233 (discussing patching and replacing various scientific models over time).

[252] *See* Obergefell v. Hodges, 576 U.S. ___ (2015).

the blind child above who stepped off a cliff or those convicted at Nuremberg for crimes against humanity, workable semantic lifeworlds must respect pre-semantic pushback translatable both into the physical (as with the blind child) and the moral (as with the Nuremberg defendants).[253] In addition to committing evil, the Nuremberg defendants who committed crimes against humanity under color of local law were fools to ignore the moral pushback that such local laws ignored as well. Judges, lawyers, and law students should, of course, also be aware the limits of terms and concepts currently in play and the possibilities of the pre-semantic yet to be put into words.

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[253] *See* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946 (1947). For information regarding more recent crimes against humanity, *see* the International Crimes Database (ICD) of the Asser Institute, available online at http://www.internationalcrimesdatabase.org.