How To Do Things With Signs: Semiotics in Legal Theory, Practice, and Education

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 The title of this paper pays homage to J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (Harvard Univ. Press 1975). I would like to thank my research assistant Laura Jordan for her careful review and comments. Any shortcomings are of course my own.

I. Introduction

Discussing federal statutes, Justice Scalia tells us that "[t]he stark reality is that the only thing that one can say for sure was agreed to by both houses and the president (on signing the bill) is the text of the statute. The rest is legal fiction."[1]

How should we take this claim? If we take "text" to mean the printed text, that text without more is just a series of marks. Agreement on a series of marks without more has no meaning in itself. In struggling with Justice Scalia's remarks, we thus must ask whether on the face of these remarks he has committed the fallacy of conflating signifiers of meaning with meaning itself. Legislators do not agree simply on certain ink marks but on what they believe those ink marks signify.[2] Their duty is to legislate, not to produce mere marks of ink.

If we instead take "text" to embody something off the page, such as the "meaning" of the series of marks at issue, what is that meaning and how do we know that all the legislators "agreed" on that "meaning"? The series of marks itself cannot prove such unanimity, much less any specific meaning. Even if we take such off-the-page text as referring to words with standard or dictionary meanings, we know that words have multiple such meanings ("left," for example, can mean, among other things, a direction or the past tense of "leave"). A series of marks

[1] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 376 (2012).

[2] Justice Scalia no doubt understands that the meaning is not in the ink itself. He, for example, allows for the correction of scrivener's errors in certain cases, *id.* at 234-39, and acknowledges the role of context in determining meaning, *see id.* at 16, 20, 33, although he would restrict use of such critical context as legislative history. *id.* at 369-90.

referring to a series of words in itself thus does not tell us which standard meanings were in the heads of legislators when they read (if they did) drafts of the bill.[3]

In struggling with Justice Scalia's claim, we have necessarily delved into semiotics (i.e., the "general theory of signs"[4]) by noting that meaningful ink marks signify a meaning beyond themselves. The meaning is thus not in the ink but in what the ink signifies. As discussed below, a meaningful ink mark is a "signifier" of meaning (the "signified").

As this example shows, understanding how signifiers of signs function is critical to good judging and lawyering. We risk error if we look only at the signifiers which have no meaning in themselves apart from what they signify. Our task instead is to seek the signified, which, again, lies beyond the signifier.[5]

Additionally, a failure to understand how signs function can limit legal analysis and rhetoric by focusing on words to the detriment of other signs. As we shall see below, words are just one type of sign, and legal analysis and rhetoric are therefore greatly impoverished if we ignore other sign types. Consistent with such impoverishment, we often hear that words are the lawyer's tools. Rather than words alone, this article will claim that signs in their vast array (including but not limited to words) are the lawyer's fundamental tools.[6]

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[3] Thus, we would also want to question Justice Scalia's claim that "a majority [of legislators] has undeniably agreed on the final language that passes into law. That is all they have agreed upon . . . ." SCALIA & GARNER, *supra* note 1, at 393.

[4] CHARLES MORRIS, SIGNIFICATION AND SIGNIFICANCE: A STUDY OF THE RELATIONS OF SIGNS AND VALUES 1 (3d ed. 1968).

[5] I have challenged naïve textualism elsewhere and will therefore not explore that specific issue in detail in this article. *See generally* Harold A. Lloyd, *Law's "Way of Words": Pragmatics and Textualist Error*, 49 CREIGHTON L. REV. 221 (2016).

[6] Signs are, of course, all others' tools as well. As Charles Sanders Peirce notes, and as I hope this article will help demonstrate, "the universe . . . is perfused with signs, if it is not composed exclusively of signs." 5 & 6 CHARLES SANDERS PIERCE, COLLECTED PAPERS OF CHARLES SANDERS PIERCE 5.448 n.1 (Charles Hartshorne & Paul Weiss eds., 1963).

This article therefore broadly explores semiotics through a lawyer's lens, hopefully simplifying as much as possible much of the complex, divergent, and frankly sometimes baffling terminology used by those who explore semiotics. This article will first continue below with a general definition of signs and the related notion of intentionality. It will then address the structure and concomitants of signs, the nature of speech acts that are of interest to lawyers, the sign classifications used in legal analysis and rhetoric, the role of signs in careful legal thought and good legal rhetoric, the unfolding of the signified and the fixation of meaning debate, the semiotics of speaker vs. reader meaning, and some brief reflections on semiotics and the First Amendment. Finally, this article also provides an Appendix with further terms and concepts helpful to lawyers exploring semiotics.

I hope this article's broad overview of semiotics underscores the vital importance of semiotics in law and in legal education reform. I also hope this article inspires readers and legal education reformers to explore the vast worlds of semiotics that elude the page constraints of a general overview.

II. Definition and Function of Signs, Semiotics, and Related Terms

Given the many interrelated parts of semiotics, one must make a judgment call as to where to begin. My judgment call is to begin with the definition of a sign and to build from there.

A. Definition of Sign

A "sign" consists of a co-related signifier and signified, where the signifier is used to "represent" "something else,"[7] i.e., the signified.[8] Or as Eco puts it, "The sign is usually

[7] *See* 1 & 2 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 2.27-2.32 (Charles Hartshorne & Paul Weiss eds., 1960). In Peircean terms, a signifier can also be

considered as a correlation between a signifier and a signified (or between expression and content) and therefore as an action between pairs."[9] I explore in more detail in Section III. below the nature and interrelation of a signifier and a signified.

One should take care at the outset not to confuse "sign" as above defined with "signifier." Such confusion is all too easy in ordinary language. For example, we speak of a stop sign or a no parking sign. Strictly speaking, of course, as I have defined the terms, we should speak of a "signifier" in each such case if we mean to speak of the physical objects posted to refer to the obligation to stop where the signifier directs or avoid parking where the signifier directs. Unfortunately, in semiotic literature, the term "sign" can be used for "signifier,"[10] and the reader must therefore take care when reading such literature and substitute "signifier" for "sign" where appropriate.[11]

B. Signs and Intentionality

Since signs involve signifiers that point to something else, signs involve what philosophers call "intentionality." Intentionality recognizes that "[o]ur beliefs, thoughts, wishes,

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said to be "something which stands to somebody for something in some respect or capacity." *Id.* at 2.28.

[8] Not everyone agrees with the two-part structure of signs adopted here. For a brief table of various conceptions of the basic structure of signs. *See* WINFRIED NÖTH, HANDBOOK OF SEMIOTICS 88 (1995).

[9] UMBERTO ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE 1 (1986).

[10] For example, Clarke tells us that "[a] sign is any object of interpretation, the thing or event that has significance for some interpreter. It can stand for some object for this interpreter, signifying an action to be performed, arouse in the interpreter of feeling or emotion, or combine two or more of these functions." D.S. CLARKE, JR., SOURCES OF SEMIOTIC: READING WITH COMMENTARY FROM ANTIQUITY TO THE PRESENT 1 (1990). Peirce speaks more carefully in the following passage: "A sign, or *representamen* [i.e., signifier], is something which stands to somebody for something in some capacity." PEIRCE, *supra* note 7, at 2.28. However, elsewhere, he is not so careful. *See id.* at 2.230. Nöth notes that "in order that anything should be a Sign, it must 'represent,' as we say, something else, called its *Object* . . . ." NÖTH, *supra* note 8, at 80.

[11] *See also* NÖTH, *supra* note 8, at 79 (also discussing such confusion in the literature).

dreams, and desires are about things," and intentionality is thus "[t]he directedness or 'aboutness' of many, if not all, conscious states."[12] As John R. Searle therefore defines the term, "intentionality" is "that property of many mental states and events by which they are directed at or about or of objects and states of affairs in the world."[13] Intentionality also includes "the property of mental phenomena whereby the mind can contemplate non-existent objects and states of affairs."[14] Thus, "I will have your lease ready tomorrow" is intentional to the extent it signifies a lease (presently existing or not) that will be ready tomorrow.

In addition to intentional states such as "beliefs, fears, hopes, and desires" that are intentional in themselves (since they are mental states directed outward), intentionality can flow derivatively from mind as well and the intention by which an act is performed.[15] For example, a legal drafting computer program can include signifiers that signify because someone has constructed the program with such intention.[16] A computer program (such as a legal software program) can also have intentionality when someone reads it as signifying something.[17] The divergence of speaker and hearer meaning can be of great importance for lawyers, and I discuss and contrast speaker and reader meaning (as well as whose meaning should control) in Section VII below.

Whether we focus on speaker or hearer meaning in the case of text, for example, such meaning cannot of course be simply equated with the ink marks on a page. Without more, such

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[12] *See Intentionality*, OXFORD DICTIONARY OF PHILOSOPHY (3d ed. 2016).
[13] JOHN R. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 1 (1983).
[14] *Intentionality*, PENGUIN DICTIONARY OF PHILOSOPHY (2d ed. 2005).
[15] *See* SEARLE, *supra* note 13, at 27-29.
[16] *See also* Thomas A. Sebeok, *The Doctrine of Signs*, *in* FRONTIERS IN SEMIOTICS 35, 36 (John Deely, Brooke Williams & Felicia E. Kruse eds., 1986) ("Any source and any destination [of signs] is a living entity or the product of a living entity, such as a computer . . . .").
[17] Again, Peirce tells us that "[a] sign, or *representamen* [i.e., signifier], is something which stands to somebody for something in some capacity." PEIRCE, *supra* note 7, at 2.28.

marks are just that—ink upon a page. Such ink marks take on intentionality when we (as speaker or hearer) use and interpret such marks to represent or point beyond themselves. Thus, Charles Sanders Peirce tells us that "the Sign creates something in the Mind of the Interpreter,"[18] and "nothing is a sign unless it is interpreted as a sign."[19] Thus, Eco also tells us that a "sign is not only something which stands for something else; it is also something that can and must be interpreted."[20] I further address interpretation (including whose interpretation controls in certain situations) as the article progresses. I also contrast interpretation and construction in Section VII.B.1. below.

C. Definition of Semiotics

Having defined signs, we can now define "semiotics." Charles Morris provides a useful definition:

> Semiotic[s] has for its goal a general theory of signs in all their forms and manifestations, whether in animals or men, whether normal or pathological, whether linguistic or nonlinguistic, whether personal or social. Semiotic is thus an interdisciplinary enterprise.[21]

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[18] 7 & 8 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 8.179 (Arthur W. Burks ed., 1979).

[19] PEIRCE, *supra* note 7, at 2.306. We can thus use intentionality to parse between signifiers and non-signifiers. For example, an unobserved tree may have a patch of bark that cracks in the form of "**π**." That crack in the bark is not a signifier of mathematical pi (or any other pi) unless some mind uses or perceives that crack in the bark as signifying pi or as otherwise having such mathematical meaning. I have an express purpose in using "mind" here rather than "person" when referring to such intentionality. Although beyond the scope of this article, I am sympathetic with the field of zoosemiotics, which explores animals and semiotics. *See* Sebeok, *supra* note 16, at 76 (Zoosemiotics "focuses on messages given off and received by animals, including important components of human nonverbal communication, but excluding Nan's language and is secondary, language-derived semiotic systems, such as sign language or Morse code.").

[20] ECO, *supra* note 9, at 46.

[21] MORRIS, *supra* note 4, at 1.

Although Morris uses the term "semiotic," I follow Sebeok and use the term "semiotics," which Sebeok notes has "made irreversible inroads over" the term "semiotic" in American English.[22]

As a general and interdisciplinary theory of signs which covers how we signify and how we interpret experience, semiotics is thus a vast enterprise. As Sebeok tells us, "what semiotics is finally all about is the role of the mind in the creation of the world or of physical constructs out of a vast and diverse crush of sense impressions."[23] Good lawyers can hardly fail to have a good grasp of such an enterprise.

III. Structure and Concomitants of Signs in More Detail

With the above preliminaries addressed, we can now turn in more detail to the structure of signs. In what follows, I shall use Eco's description above of a sign as "a correlation between a signifier and a signified (or between expression and content) and therefore as an action between pairs." [24] As such, I shall distinguish and explore the signifier and the signified as correlated in the sign.

A. The Signifier

When lawyers think of signifiers, they often think of either written text (as with the Justice Scalia example above) or spoken words (as, for example, in a jury instruction). One of the goals of this article is to expand lawyers' views of the vast expanse of possible signifiers beyond text and spoken words. I will give a concrete example of the importance of such expansion in Section V. B below, where I briefly explore as an exemplar for lawyers Marc Antony's use of multiple types of signifiers. In performing such expiration, I hope lawyers will

[22] Thomas A. Sebeok, *'Semiotics' and Its Congeners, in* 1 LINGUISTIC AND LITERARY STUDIES 283, 288 (Mohammad Ali Jazayery, Edgar C. Polomé & Werner Winter eds., Mouton Publishers 1978).
[23] Sebeok, *supra* note 16, at 42.
[24] ECO, *supra* note 9, at 1.

take to heart Langer's assertion that "[l]anguage is by no means our only articulate product."[25] When analyzing signifiers, we must remember that they can include such a wide array as a "concrete object," "an abstract entity," "an idea or 'thought,'" a "perceptible object," a "physical event," or an "imaginable object.[26] I explore signifier types further in Section IV, where I explore the indexical, iconic, and symbolic signifier types that lawyers and others can encounter and use.

B. The Signified

Since the same person, place, thing, or event can have multiple meanings (my nephew is also my brother's son), the signified can involve both sense (the cognitive or mental component of meaning) and reference (that to which the term refers as fact such as the earth revolving around the sun or fiction such as Pegasus flying around the earth).[27] Meaning has a sense component to account for the different meanings (such as nephew or son) the same person, place, or thing may have. Meaning has 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.[28] Thus, for example, reference ties "my nephew" and "my brother's son" into the same person. Careful lawyers will grasp both suitable referential aspects of meaning in play as well as suitable sense.

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[25] Susanne K. Langer, *Discursive and Presentational Forms*, *in* SEMIOTICS: AN INTRODUCTORY ANTHOLOGY 87, 96 (Robert E. Innis ed., 1985).
[26] *See* NÖTH, *supra* note 8, at 80. *See also* PEIRCE, *supra* note 7, at 2.230 (failing to parse between "sign" and "signifier" in discussing the "perceptible" and the "imaginable").
[27] *See* NÖTH, *supra* note 8, at 92-100. The signified may involve only reference when, for example, it refers to the pre-semantic which has not yet been put to words or otherwise given sense. *See* Harold A. Lloyd, *Making Good Sense: Pragmatism's Mastery of Meaning, Truth, and Workable Rule of Law*, 9:2 WAKE FOREST J. L. & POL'Y 199, 208-09 (2019).
[28] *See* NÖTH, *supra* note 8, at 92-100.

1. Reference and the Referent

a. Definition of Referent

The referent is thus that to which a signifier refers as fact or fiction.[29] Again, for example, it is the single person referred to by both "my nephew" and "my brother's son."

Lawyers should remember that when we **meaningfully** refer with our signifiers, we are referring within the context of experience as we have interpreted it in our webs of signs (unless we would refer without more to the yet uninterpreted).[30] When referring within such interpreted experience, we are thus not referring to unknown or transcendentally-fixed things-in-themselves. Instead, we are referring to "things" within our semantic lifeworlds[31] woven out of our webs of signs. Since we weave our webs of signs, such webs of signs and the "things" within them are not transcendentally given and we can thus revise our referents to the extent pre-semantic and semantic restraints allow.[32]

Lawyers should remember this critical nature of reference because it permits progress. Since referents are not transcendentally given, and since reality is "internal" to our semantic lifeworlds,[33] we can always have hope of changing them where progress requires. Thus, for example, since the referent of marriage is not transcendentally fixed, we can point out its referent

[29] *Reference*, PENGUIN DICTIONARY OF PHILOSOPHY (2d ed. 2005).
[30] Lloyd, *supra* note 27, at 208-09.
[31] *See* Appendix for a brief outline of the term "lifeworld" and related terms.
[32] Lloyd, *supra* note 27, at 206-10, 222-44, 264-74 where I discuss in detail the freedoms and restraints on change.
[33] *See id*. *See also* HILARY PUTNAM, REALISM WITH A HUMAN FACE 114 (James Conant ed., 1992) (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 . . . . ").

with definite descriptions[34] that do not limit the referent to heterosexual unions (much like we can point out the referent of earth with definite descriptions that do not involve older descriptions such as the flat surface at the center of the universe).[35] As I have written elsewhere, re-describing commonly-accepted aspects of lifeworlds can face considerable pushback, but lawyers have a duty to resist such pushback where moral or other experience (or both) require.[36] The same duty applies to the "sense" component of meaning discussed in more detail below.

b. Reference Difficulties for Lawyers and Others

Forgetting that references are not transcendentally fixed is thus a first-order error of reference. Where references in our semantic lifeworld are wrong, forgetting that they are at most "mind-forged manacles"[37] that we might break is a tragedy of the highest order for lawyers and their clients.

A second-order error of reference stems from the act of referring itself. When a client would refer to something whose ownership she disputes with her sibling (such as a diamond money clip to which she points), problems can arise from the mechanics of reference itself.

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[34] By "definite descriptions," I mean a "description of a (putative) object as the single, unique, bearer of a property: 'the smallest positive number'; 'the first dog born at sea'; 'the richest person in the world.'" *Definite Description*, OXFORD DICTIONARY OF PHILOSOPHY (3d ed. 2016).
[35] Philosophers do not agree on how reference works. *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.") Lawyers do not have the luxury of debate here and must make reference work in their discussions with clients and others. Proper names where applicable "like 'Julius Caesar' or definite descriptions like 'the conqueror of Gaul'" seem to me sounder ways to start. *See Reference*, PENGUIN DICTIONARY OF PHILOSOPHY (2d ed. 2005).
[36] *See, e.g.*, Lloyd, *supra* note 27, at 264-74 (discussing "workability" to avoid pre-semantic and semantic pushback).
[37] *See* WILLIAM BLAKE, *London*, *in* SONGS OF INNOCENCE AND EXPERIENCE WITH OTHER POEMS 65, 65 (Basil Montagu Pickering 1866).

From the outset, lawyers should know that mere pointing alone never works as a clear act of reference. What is the scope of the reference indicated by the pointing? As Wittgenstein notes for example, when one wishes to name a person by pointing at the person, the viewer might take that definition as one of ". . . a color, of a race, or even of a point of the compass."[38]

In the hypothetical above, perhaps the client is only pointing to one of the diamonds in the money clip rather than to the money clip itself. Perhaps the sibling does not care about that diamond and would be satisfied with the rest of the money clip. The lawyer would be well-advised here to inquire in more depth as to the client's reference. Otherwise the parties may have an unnecessary lawsuit.

Reference can also be further complicated here by imprecision on the client's part. The client may actually point to the entire money clip though she only really wants the diamond. The client may even initially use the phrase "money clip" even though she only wants the diamond and has no desire to keep the rest of the money clip. Her lawyer must thus not only seek precision as to her expressed reference but also seek clarity as to her real reference. As I have discussed the need for careful reference in detail elsewhere,[39] I will not discuss the matter further here.

[38] LUDWIG WITTGENEIN, PHILOSOPHICAL INVESTIGATIONS 13-14 (G. E. M. Anscombe et al. trans., Macmillan Co. 3d ed. 1968).
[39] Harold A. Lloyd, *Plane Meaning and Thought: Real-World Semantics and Factions of Originalism*, 24 S. CAL. INTERDISC. L. J. 657, 680-83 (2015).

2. Sense

a. Overview

With the understanding that "experience" includes external experience (i.e., public or objective experience) *as well as* internal experience (i.e., private[40] experience such as thoughts, imagination, memories, and feelings[41]), in defining "sense" I shall use 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[42] ways in which that concept unfolds or can unfold in such experience.[43] Thus, for example, the different senses of "President of the Senate" and "Vice President" (both of which refer to the same person) depend upon the different ways such notions play out in such experience.[44]

I choose this approach to sense for at least two reasons. First, if sense does not come through either external experience (i.e., public or objective experience) or through internal

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

[41] This is thus broader than "synthesis, imagination, memory, evaluation and estimation" which Deely calls the "*internal sense* in philosophical tradition." JOHN DEELY, INTRODUCING SEMIOTIC: ITS HISTORY AND DOCTRINE 98 (1982).

[42] 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* dog to have ten legs.

[43] 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, *supra* note 6, at 5.402. 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, after hearing a knock, I could have a habit of walking across my office to the door in just the same way whether I believe that a student or another professor is at the door. *See also* WILLIAM JAMES, PRAGMATISM 18 (Thomas Crofts & Philip Smith eds., Dover Publ'ns, Inc. 1995) (1907) (setting out James's interpretation of Peirce's notion of meaning).

[44] Such experience can include connotation, or the "socio-cultural and personal associations," attached to the signifier or the signified. *See* ROBERT CHANDLER, SEMIOTICS: THE BASICS 246 (2nd ed. 2007).

experience (i.e., private experience such as thoughts, imagination, memories, and feelings), how could we possibly know it or relate it to the world of our external or internal experience? Second, and consistent with the first reason, this notion of sense fits how we understand sense in court, in the practice of law, in law school, and in life. If one asks good lawyers, for example, what an actual or proposed liability limitation in a contract means, such lawyers would "flesh it out" and would describe how the liability limitation would play out in practice. These reasons are compelling in themselves, and I will therefore not explore in this article difficulties with other current accounts of meaning and sense that I have discussed elsewhere (such as meaning as reference alone, meaning as merely ideas, behaviorism, and meaning as truth conditions.)[45]

Consistent with the experiential definition I have used of "sense," the signified may, however, be much less complex than how a proposed liability limitation in a contract might play

[45] Harold A. Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice and the Humanities*, 49 WAKE FOREST L. REV. 1213, 1250-1254 (2014). Additionally, C.K. Ogden & I.A. Richards outline no less than sixteen broad approaches to meaning (with some approaches having various subdivisions). In this outline, meaning can be: "I An Intrinsic property. II A unique unanalyzable Relation to other things. III The other words annexed to a word in the Dictionary. IV The Connotation of a word. V An Essence. VI An activity Projected into an object. VII (a) An event intended. (b) A Volition. VIII The Place of anything in a system. IX The practical Consequences of a thing in our future experience. [This comes closest to my definition, although I would include past experience and am careful to include both external and internal experience as above defined.] X The Theoretical consequences involved in or implied by a statement. XI Emotion aroused by anything. XII That which is Actually related to a sign by a chosen relation. XIII (a) The Mnemic effects of a stimulus. Associations required. (b) Some other occurrence to which the mnemic effects of any occurrence are Appropriate. (c) That which a sign is Interpreted as being of. (d) What anything Suggests. *In the case of symbols.* That to which the User of a Symbol actually refers. XIV That to which the user of a symbol Ought to be referring. XV That to which the user of a symbol Believes himself to be referring. XVI That to which the Interpreter of a symbol (a) Refers.(b) Believes himself to be referring. (c) Believes the User to be referring." C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING 186-87 (1923). If we are to know any such meaning, I would simply ask how such meaning, could be separated from "experience" as I have defined it. Such a return to experience as I have defined it, of course, returns us to my proposed definitions of meaning and sense.

out in experience. In some cases, the signified might simply be a feeling (or at least at first just a feeling). Peirce, for example, tells us that "the first proper significate effect of a sign is a feeling produced by it. There is almost always a feeling which we come to interpret as evidence that we comprehend the proper effect of the sign, although the foundation of truth in this is frequently very slight."[46]

Signs can also produce a feeling that something is not right. For example, the word "slave" might invoke to Huck Finn a certain extreme malaise that he cannot put into words in his current vocabulary. As I have argued elsewhere, such feeling can play an important role in our interactions with the world, as with Huck's decision to help liberate a slave even though his concepts and categories of the time told him that was wrong.[47] Lawyers, too, should of course listen to their feelings when, for example, a proposed text or course of action does not feel right.

The signified can be feelings of other kinds as well. For example, Peirce believes that "the performance of a piece of concerted music is a sign. It conveys, and is intended to convey, the composer's musical ideas; but these usually consist merely in a series of feelings."[48]

Thus, when I refer to "experience," I refer along with Deely to "the whole of our experience, from its most primitive origins in sensation to its most refined achievements of understanding" and thus to a "network or web of sign relations."[49] I also agree with Deely that "experience reveals itself as a constructed network built over time both through [our] biological

[46] PEIRCE, *supra* note 6, at 5.475.
[47] *See* Harold A. Lloyd, *Cognitive Emotion and the Law*, 41 L. & PSYCHOL. REV. 53, 62-63 (2016); Lloyd, *supra* note 27, at 225-26.
[48] PEIRCE, *supra* note 6, at 5.475.
[49] JOHN DEELY, BASICS OF SEMIOTICS 13 (2004).

heritage . . . and through the individual experiences whereby, atop the biological heritage, socialization and enculturation transpire."[50]

Finally, lawyers should remember that sense, like reference, is not transcendentally fixed.[51] We can and should adjust our sense as moral or other experience (or both) demands. For example, where moral and other experience (or both) require correction of the dehumanizing of homosexuals, lawyers should work against such dehumanization. No matter how old the pedigree of such dehumanization, such dehumanization is not transcendentally fixed[52] and can therefore be combatted and corrected no less than notions, again, that once held that the earth is flat and in the center of the universe. Once more, however, lawyers must be aware of the strong pushback that may occur when commonly-held meanings and categorizations are challenged in lifeworlds and strategize accordingly.[53]

b. Sense and "Dimensions of Signification"

With Morris, we can also usefully note a further expansive nature of sense, distinguishing between three "dimensions" of signification: the designative, appraisive, and prescriptive.[54] Morris thus tells us that the "designative" involves the "Sense organs" and relates to "Obtaining information," the "appraisive" involves "Object preferences" and relates to the "Selection of objects for preferential behavior," and the "prescriptive" involves "Behavior preferences" and relates to "Action on object by specific behavior."[55] As examples, he tells us that "usually 'black' is primarily descriptive,' good' is primarily appraisive, and 'ought' is primarily

[50] *Id.* at 14.
[51] *See* Lloyd, *supra* note 27, at 210-22.
[52] *Id.*
[53] *Id.* at 227-43.
[54] MORRIS, *supra* note 4, at 4.
[55] *Id.* at 8.

prescriptive."[56] Morris notes that context can change this result, and in some contexts, "black" can be "primarily appraisive or prescriptive," "good" can be primarily "designative or prescriptive," and "ought" can be "primarily designative or appraisive."[57] Morris also notes that any particular sign "may in varying degrees operate in all the dimensions of signification."[58] Again, therefore, sense may involve more than just communication of fact or fiction. Rather than simply listening to a client's words, a lawyer should, of course, *probe* the way the client describes and perceives the matter at hand, the way the client appraises the matter at hand, and the way the client would prefer to act. It is hard to see how a lawyer can discern a client's real interests in a matter without exploring Morris's three dimensions of signification. In this regard, one can consider again the diamond money clip dispute discussed in Section III. B. 1. b. above.

3. Reference, Sense, and RIRAC: Polishing One Legal Form of Thought

We can also use the sense and reference dimensions of meaning to polish a common legal form of thought: IRAC. In teaching law students to address all necessary steps in legal analysis, we teach them, among other things, the IRAC form, which stands for "Issue," "Rule," "Application," and "Conclusion."[59] Using IRAC as both a form *and* as a checklist, students and lawyers can both improve the logical flow of their analysis and check for omissions in their analysis. As to logical flow, resolving legal issues requires finding the rules that govern such issues, applying such rules, and reaching a conclusion. As to IRAC as a checklist, it reminds students and lawyers to identify and explore fully the issue or issues in play, to fully research and explore the rules in play, to fully and expressly apply those rules in play (a step that requires

[56] *Id.* at 4-5.
[57] *Id.* at 5.
[58] *Id.*
[59] COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 94 (3d ed. 2018).

constant reminder given the tendency to assume readers also know all the application steps that are in the student's or lawyer's head), and to provide the appropriate conclusion in a way that makes sense to the reader.

IRAC is thus quite useful as far as it goes. However, its focus on issues, rules, applications, and conclusions is a focus on the sense aspect of meaning. As we have seen that meaning involves both reference and sense, IRAC safely works only where there is no dispute or confusion as to reference. As we saw with the diamond money clip above, assuming no dispute or confusion as to reference can be quite dangerous. I therefore teach students that they should remember, in actual law practice at least, the more expansive checklist of RIRAC, with the first "R" standing for "reference." I, in fact, encourage them to think of RIRAC as one of the most basic forms (if not the most basic form) of checklists, as it is applicable across a wide variety of legal situations. For example, when a client arrives to discuss a dispute (such as a dispute involving the money clip above), the lawyer's first step should be to clarify the reference. If the lawyer, client, or opposing party is confused about the reference, then the issues, rules, applications, and conclusions debated and explored may be irrelevant to the real matter in dispute. As shown by the diamond money clip dispute above, finding such reference can be difficult, but it must be done. Lawyers must have a complete and accurate grasp of the signified, which includes reference as well as sense. Since I have also addressed RIRAC in detail elsewhere,[60] I will not explore it further here.

IV. Correlation of Signifier and Signified and Three Classifications of Signs

Having explored both the signifier and the signified, we can now explore their correlation. This, which should help demonstrate to lawyers the vast expanse of signs available

[60] Lloyd, *supra* note 39, at 669-70.

for their use. In what follows, I shall again use Eco's description above of a sign as "a correlation between a signifier and a signified (or between expression and content) and therefore as an action between pairs." [61] Peirce gives us three basic types of correlation (the indexical, the iconic, and the symbolic[62]) that are of special interest to lawyers, and I thus briefly explore below the signifier-signified co-relations in indices, icons, and symbols.[63] Since lawyers tend to focus on text and speech (which use symbolic forms of signifiers), I will begin with Peirce's perhaps less familiar types of signs involving indexical and iconic signifiers.

A. Indices

1. Correlation of "Real" Relation

Peirce tells us that "[a]n *Index* is a sign which refers to the Object that it denotes by virtue of being really affected by that Object,"[64] or "by virtue of being in a real relation to it."[65] Chandler usefully expands upon the indexical relation as "a mode in which the signifier is not arbitrary but is directly connected in some way (physically or causally) to the signified (regardless of intention)."[66]

Peirce gives a number of examples of indices including, the following: a sundial indicating the time, a "rap on the door," "a tremendous thunderbolt [indicating] that *something* considerable happened," "a low barometer with a moist air" indicating rain, a "weather cock"

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[61] ECO, *supra* note 9, at 1.
[62] PEIRCE, *supra* note 7, at 2.275; PEIRCE, *supra* note 18, at 8.335. *See also generally* PEIRCE, *supra* note 7, at 2.247-49, 2.275-307.
[63] I agree with Chandler that "although [this tripartite division of signs] is often referred to as a classification of distinct 'types of signs,' it is more usefully interpreted in terms of differing 'modes of relationship' between [signifiers] and what is signified." CHANDLER, *supra* note 44, at 36.
[64] PEIRCE, *supra* note 7, at 2.248.
[65] *See* PEIRCE, *supra* note 18, at 8.335. Peirce uses the term "dynamic object" here.
[66] CHANDLER, *supra* note 44, at 37.

indicating the direction of the wind, "the pole star" indicating north like a "pointing finger," a "plumb bob" indicating the "vertical direction," demonstrative pronouns like "this" and "that" indicating when successfully calling "upon the hearer to use his powers of observation [in order to] establish a real connection between his mind and the object," letters such as "A, B, C, D" used by geometricians to indicate parts of diagrams or used by lawyers and others to "fulfill the office of relative pronouns."[67] Thus, Peirce also tells us that pronouns are indices because "they indicate things in the directest possible way."[68] Thus, "a pronoun ought to be defined as *a word which may indicate anything to which the first and second persons have suitable real connections, by calling the attention of the second person to it*."[69] Similarly, indices can also be "more or less detailed directions for what the hearer is to do in order to place himself in direct experiential or other connection with the thing meant."[70] This could include such notices as "*there* is a rock, or shoal, or buoy, or lightship."[71] Peirce also both claims that proper names are indices[72] and that proper names "should probably be regarded as Indices."[73] Short explains Peirce's likely thinking here as follows: "we can say that each replica of the same proper name, e.g., 'Napoleon Bonaparte,' signifies whatever earlier replicas signified, going back to its

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[67] PEIRCE, *supra* note 7, at 2.285-87.
[68] *Id.* at 2.287 n.1.
[69] *Id.*
[70] *Id.* at 2.288.
[71] *Id.*
[72] *See* PEIRCE, *supra* note 18, at 8.335.
[73] 3 & 4 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 4.544 (Charles Hartshorne & Paul Weiss eds., 1980). As an example of the difficulties of parsing out Peirce's actual thought, he also tells us that "a proper name, personal demonstrative, or relative pronoun or the letter attached to a diagram, denotes what it does knowing to a real connection with its object but none of these is and Index, since it is not an individual."[73] PEIRCE, *supra* note 7, at 2.284. Again, my purpose here is to provide an overview of semiotics that I believe works and is useful to lawyers; I am not trying to provide an encyclopedic survey of conflicting views between various thinkers and within individual thinkers themselves.

original replicas, assigned, by an act of naming . . . ."[74] Finally, Peirce notes the role of indices in successful communication. The claim "Why, it is raining!" does not tell us where it is raining; we need either context (such as the speaker's "standing here looking out at a window as he speaks, which would serve as an Index"), or we need the proposition itself to indicate where it is raining.[75]

Noting that the link between signifier and signified "can be observed or inferred," as examples of indices, he lists:

> 'natural signs' (smoke, thunder, footprints, echoes, non-synthetic odours and flavours), medical symptoms (pain, a rash, pulse-rate), measuring instruments (weathercock, thermometer, clock, spirit-level, 'signals' (a knock on the door, a phone ringing), pointers (a pointing 'index' finger, a directional signpost), recordings (a photograph, a film, video or television shot, and audio-recorded voice), [and] personal 'trademarks' (handwriting, catchphrases).[76]

I could, of course, explore in virtually endless detail Peirce's other complex comments on indices (some of which I would challenge). However, my purpose here is to explore semiotics in a form useful to lawyers, and this enumeration of indices should suffice for the notion that indexical relations occur where "the signifier is not arbitrary but is directly connected in some way (physically or causally) to the signified (regardless of intention)." [77]

2. Evidence and Indices

Many lawyers will no doubt quickly think of evidence when they consider such a notion of the indexical sign. A bloody knife, for example, can be an indexical sign of a stabbing if the knife is directly connected to that stabbing in the way that indexical co-relations require. Rather

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[74] T. L. Short, *Life Among the Legisigns*, *in* FRONTIERS IN SEMIOTICS 105, 112 (John Deely, Brooke Williams & Felicia E. Kruse eds., 1986).
[75] *See* PEIRCE, *supra* note 73, at 4.544.
[76] CHANDLER, *supra* note 44, at 37.
[77] *Id.*

than a mere academic exercise, understanding the nature and proof of such indexical co-relations is thus of critical importance to lawyers. An indexical bloody knife also reminds the lawyer of the potential power of indexicals over words in such cases. A bloody knife directly connected with both a stabbing and the person alleged to have committed the stabbing can be much more rhetorically compelling than the victim's words, especially if the stabber disputes the victim's words. I will return to indices in Section V. B. below, when I explore the rhetorical indexical force of Caesar's body, bloody toga, and will in Marc Antony's funeral oration for Caesar, and in Section IX, when I explore certain indexical claims in the context of the First Amendment.

B. Icons

1. Correlation of Similarity

Peirce tells us that an icon represents "mainly by its similarity."[78] Chandler usefully clarifies the co-relation of signifier and signified here as "a mode in which the signifier is perceived as *resembling* or imitating the signified (recognizably looking, sounding, feeling, tasting or smelling like it) [or] being similar in possessing some of its qualities."[79]

For Peirce, icons include, without limitation, images, diagrams, pictures, and metaphors.[80] Peirce also notes that although photographs "are in certain respects exactly like the objects they represent," they obtain this likeness through the physical connections of photography. As such, photographs are indices.[81] (In my view, photographs are both indices and icons and demonstrate how signifiers and their signified can have multiple co-relations.)

[78] PEIRCE, *supra* note 7, at 2.276.
[79] CHANDLER, *supra* note 44, at 36.
[80] PEIRCE, *supra* note 7, at 2.277, 2.279.
[81] *Id.* at 2.281.

Peirce points out that resemblance need not turn on appearance. It can also involve resemblance of objects in terms of "the relations of their parts."[82] Diagrams, for example, may set out certain parts of their objects without truly resembling them.[83]

Lawyers may, at first blush, consider icons less useful than indices, because the latter have “real” relations to what they signify. For example, a clear photograph of an alleged criminal stabbing a victim is certainly more persuasive of guilt than a clear drawing of the same act. This initial thought, however, underestimates the value of icons in practice. First, icons can focus only on relevant relations as in the case of diagrams.[84] As such, they permit us to study and discover new knowledge from depictions of such relations.[85] By excluding irrelevant aspects of matters diagrammed, they can perhaps expedite such discovery. By excluding such irrelevant aspects of matters diagrammed, diagrams can also perhaps expedite uncovering error or other difficulties in the matters diagrammed. Second, since icons are untethered from the "real" relations found in photography, for example, they allow rhetorical use not possible with indices such as photographs.[86] Cartoons, for example, can powerfully depict points of views by the manner in which they portray the persons, places, things, or other matters.

Lawyers should also remember that the iconic signification can be all the more powerful or memorable by focusing on unexpected points of resemblance. For example, Oscar Wilde

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[82] *Id.* at 2.282.
[83] *Id.*
[84] *Id.*
[85] *See id.* at 2.279.
[86] One can, of course, untether photographs by “touching them up” or by otherwise altering them. However, to the extent this breaks the "real" relation with the matters depicted, the photographs by definition no longer remain indexical.

famously refers to a person with a "shrill horrid voice" as "a peacock in everything but beauty."[87]

In addition to their imitative aspects, icons interrelate with the non-imitative in ways that lawyers should also understand if they are to effectively use and respond to iconic signifiers.

2. Functions of Background

As Schapiro points out, icons such as images or paintings generally appear against the background, a background which we often assume today to be rectangular and having a "clearly defined smooth surface on which one draws and writes."[88] Of course, such a background is not compelled, and lawyers seeking the most effective form of, for example, iconic exhibits should consider whether other background shapes and textures would be preferable in the lawyers' specific situation.[89] We can go even further and ask whether we want a clear distinction between background and image. In this regard, Schapiro reminds us that "prehistoric wall paintings and

[87] OSCAR WILDE, THE PICTURE OF DORIAN GRAY 10 (Michael Patrick Gillespie ed., W. W. Norton & Co. 2007) (1890). Jakobson gives us another striking example: "A missionary blamed his African flock for walking around undressed. 'And what about yourself?' they pointed to his visage, 'are you, too, somewhere naked?' 'Well, but that is my face.' 'Yet in us,' retorted the natives, 'everywhere it is face.'" Roman Jakobson, *Closing Statement: Linguistics and Poetics, in* SEMIOTICS: AN INTRODUCTORY ANTHOLOGY 145, 173 (Robert E. Innis ed., 1985).

[88] Meyer Schapiro, *On Some Problems in the Semiotics of the Visual Arts: Field and Vehicle in Image-Signs, in* SEMIOTICS: AN INTRODUCTORY ANTHOLOGY 206, 209 (Robert E. Innis ed., 1985).

[89] Thus, Schapiro tells us of those who "have painted on pebbles and on found fragments of natural and artificial objects, exploiting the irregularities of the ground in the physiognomy me of the object as part of the charm of the whole." *Id.* at 211. Schapiro also reminds us that ancient cave paintings were on "the rough wall of the cave" where "the irregularities of earth and rock show through the image," and the painter worked "on a field with no set boundaries and thought so little of the surface as a distinct ground that he often painted his animal figure over previously painted image without erasing the latter, as if it were invisible to the viewer." *Id.* at 209.

reliefs . . . had to compete with the noise-like accidents and irregularities of a ground which was no less articulated than the signed and could intrude upon it."[90]

3. Functions of Physical Frames

As Schapiro also points out, iconic images may or may not have physical frames.[91] Leaving the image unframed may make it appear "more completely and modestly the artist's work."[92] Depending on the choice of frame, the frame can help accent the iconic image, can serve as a "finding and focusing device," and can act "like a window frame through which is seen behind the glass" where the world of the iconic image lies.[93]

4. Functions of Size

Additionally, size plays a role in how we perceive the iconic image. Our reaction may change as a function of "the size of the field and the size of different components of the image relative to real objects which they signify and relative to each other."[94] For example, one might paint Alexander the Great as larger than his soldiers to reflect the notion of "Alexander as the Great."[95]

5. Functions of Place

Where we have a bounded visual field, iconic images can change in quality depending upon their location within various parts of the field, such as "upper and lower, left and right, central and peripheral, the corners and the rest of the space."[96] For example, a figure off-center

[90] Schapiro, *supra* note 88, at 209.
[91] *Id.* at 212-13.
[92] *Id.*
[93] *Id.* at 212.
[94] *Id.* at 219.
[95] *Id.* at 221.
[96] *Id.* at 214.

can appear "anomalous, displaced, even spiritually strained."[97] All of these non-imitative aspects of iconic images can thus play important roles in lawyers' use of, and response to, iconic signifiers.

6. Icons, Art, and Knowledge

In any case, the semiotic possibilities of the icon discussed above should persuade lawyers of the value and importance of icons. Hopefully this includes lawyers who previously may have dismissed icons' importance because of a more general belief that art is merely "some alien universe into which we are magically transported for a time."[98] Because icons signify, we lawyers, too, can say that art can be "knowledge," and in such a case, "experiencing an artwork means sharing in that knowledge."[99] I will return to icons in Section V below, when I discuss the power of mixing icons, indices, and symbols.

C. Symbols

1. Correlation of Convention or Stipulation

Taking inspiration again from Peirce, symbols are signs whose signifier and signified are correlated solely[100] by convention or by habit,[101] or otherwise "by the fact that [they are] used and understood as such."[102] Symbols would thus include "words, sentences, books, and other conventional signs."[103] Chandler again usefully expands upon Peirce by noting that the symbolic mode is "a mode in which the signifier does not resemble the signified but which is

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[97] *Id.*
[98] HANS-GEORG GADAMER, TRUTH & METHOD 83 (rev. ed. 2004).
[99] *Id.* at 84.
[100] *See* PEIRCE, *supra* note 7, at 2.299 ("The symbol is connected with its object by virtue of the idea of the symbol-using mind, without which no such connection would exist.").
[101] *See id.* at 2.292, 2.297.
[102] *See id.* at 2.307.
[103] *Id.* at 2.292.

fundamentally arbitrary or purely conventional so that this relationship must be agreed upon and learned."[104] Chandler would thus expand upon the above list of symbols to include, for example, "language in general (plus specific languages, alphabetical letters, punctuation marks, words, phrases and sentences), numbers, morse [sic] code, traffic lights, [and] national flags."[105]

2. Symbolic Signifiers: Freedom Yet Restraint

Any "concrete object," "abstract entity," "idea or 'thought,'" perceptible object," "physical event," or "imaginable object[106] might serve as a symbolic signifier either by convention or by stipulation.[107] If it is convenient, for example, for parties in a debate to use a white stone to refer to one proposition and a gray stone to refer to another, there is no semiotic reason why the parties cannot so stipulate. This potential flexibility thus presents lawyers with vast potential options

That said, however, such theoretical freedom can face much real world pushback. Unconventional signifier usage, for example, that violates linguistic community norms or that otherwise fails to move audiences in ways desired will on its face fall flat. Lawyers must remember that their surrounding linguistic communities require justification when signifier usage deviates from norms.[108]

Such potential flexibility of symbolic signifiers can also raise other potential legal issues. For example, since *any* "concrete object," "abstract entity," "idea or 'thought,'" perceptible

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[104] CHANDLER, *supra* note 44, at 36.
[105] *Id.*
[106] *See* NÖTH, *supra* note 8, at 80. *See also* PEIRCE, *supra* note 7, at 2.230 (failing to parse between "sign" and "signifier" in discussing the "perceptible" and the "imaginable").
[107] To the extent any such symbols indicate a speaker's meaning by being in a causal or other real connection with such meaning, we could also speak of such symbols of indices of such meaning. *See* Section IV. A. above on indices.
[108] *See* Lloyd, *supra* note 27, at 227-28.

object," "physical event," or "imaginable object[109] can potentially serve as a symbolic signifier, can *everything* potentially become protected speech or expression under the First Amendment to the extent one claims signifier usage in such a case? Obviously, there must be limits here (for example, no reasonable person would find the First Amendment protects tossing live grenades as signifiers of political dissatisfaction), and I briefly touch on semiotics and the First Amendment in Section IX.

D. Correlation and the Transubstantiation Fallacy

When exploring the correlation of signifier and signified, lawyers must take care themselves (as well as help their clients to take such care where appropriate) not to confuse a signifier with its signified. Such confusion, which one might call the "transubstantiation fallacy," can cause much unnecessary confusion and angst.

For example, the flag for many signifies one's country. However, the flag itself, of course, is not one's country. Thus, trampling the flag is not trampling one's country or otherwise physically harming one's country (though such action may signify extreme disrespect for one's country). When addressing such passionate subjects[110] as protests involving damage to national flags, rational discourse thus focuses on flags as signifiers rather than as nations transubstantiated. Similarly, burning a picture of a beloved person to send a message about that person is not equivalent to burning that person, and, again, rational discourse should focus on burning photos as signifiers rather than as persons transubstantiated. In a different manifestation of the transubstantiation fallacy, using icons as *signifiers* of divine or religious figures is not

[109] *See supra* note 106 and accompanying text.
[110] Transubstantiation beliefs seem especially likely to occur when dealing with signifieds of high regard. Thus, for example, we have the transubstantiation debate regarding Christian Communion. *See* Michael Newsom, *Pan-Protestantism and Proselytizing: Minority Religions in a Protestant Empire,* 15 WIDENER L. REV. 1, 12-50 (2009).

idolatry in the sense of equating such iconic signifiers with the divine or religious figures signified. Had Cromwell, for example, grasped the transubstantiation fallacy, perhaps much treasured British iconography would have escaped his destruction.[111] In any case, awareness of the transubstantiation fallacy should expose the confused "anti-idolatrous" iconoclast "who destroys religious images"[112] used as icons to signify what they resemble.

E. Beyond Correlation: Other Classification Possibilities

Having now finished an overview of sign classifications based upon three possible correlations of the signifier to the signified (the indexical, iconic, and symbolic), I briefly note (without exhaustive classification) that we can classify signs by their types of signifiers, by their types of signifieds, and by how these types of signifiers and signifieds interrelate.[113] Focusing just on the type of signifier or signified, we can note that a signifier can include a quality, an "actual existent thing or event," or a conventional signifier such as "the."[114] This is not a mere academic exercise but of potential important use to lawyers. A lawyer considering how to signify a person or event should consider which type of signifier in itself would be most effective.

For example, although a quality must be "embodied"[115] (we do not find red in itself but as the color of something seen or thought), we can consider which signifiers best signified the quality we wish to convey. A lawyer wishing to signify the horror of a tragedy might first assume a photograph conveys that horror. However, upon further reflection, perhaps a sound

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[111] ANTONIA FRASER, CROMWELL: THE LORD PROTECTOR 102-04 (1973).
[112] *See Iconoclast*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).
[113] *See, e.g.*, PEIRCE, *supra* note 7, at 2.264 (diagramming ten classes). Peirce expands upon these classifications in PIERCE, *supra* note 18, at 8.343-76.
[114] *See* PEIRCE, *supra* note 7, at 2.244, 2.245, 2.246.
[115] *See id.* at 2.244.

recording better captures the quality of horror. Perhaps even better still, a film with such sound combines both the visual and audial quality of horror lacking in a photograph alone.

As to the types of sense signified, they can include terms, propositions, and arguments.[116] Although as lawyers we are often first disposed to our deductive or inductive arguments or demonstrations, we should of course also ask whether other approaches might be more effective, such as using terms and propositions in narrative or dialogue instead of formal argument.[117]

V. Indices, Icons, Symbols, and Expansive Legal Rhetoric

A. Lawyers and the Semiotics of Rhetoric: More than Just Words

As the above discussion of the various types of signs, signifiers, and the signified should now make clear, legal rhetoric should hardly be confined to words alone, and a lawyer's toolbox containing only words is much impoverished. Although we refine and use our words, we should remember that words are only one type of symbol. Why not use other symbols as well in appropriate contexts to the extent we thereby enrich our meaning? We should also remember that signs are more than just symbols. Why not use Icons and Indices as well in appropriate contexts to the extent we thereby enrich our meaning? Why impoverish law in a semiotics of only words? In the next section, I turn to a bit of Shakespeare to underscore the importance of an expansive semiotics.

B. Lawyers and the Semiotics of Rhetoric: Antony's Funeral Oration

Once lawyers have a good grasp of how signs work and how signs may be classified by correlations of the signifier and the signified, lawyers can find much semiotic instruction in

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[116] *See id.* at 2.261, 2.262, 2.263.

[117] Peirce notes that that "our own thinking is carried on as a dialogue" which of course is "subject to almost every imperfection of language." PEIRCE, *supra* note 6, at 5.506.

Shakespeare's rendition of Antony's funeral oration Caesar.[118] They can see quite well how words alone ignore much of the semiotic arsenal available to them. Though Antony's entire speech bears reading again and again, space limitations require that I touch on select passages in the sequence in which they appear in Shakespeare. (Had I more space, I would also explore other classics of expansive semiotics such as (i) the illustrated writings of William Blake which demonstrate an unparalleled blending of the iconic and the non-verbal symbolic with the verbal symbolic and (ii) Barthes' exploration of the power of intermingling icons, symbols, colors, placement against the background field, and more in his examination of a Panzani advertisement.[119] I would suggest a careful review of Blake's illustrated works and Barthes' article for lawyers seeking to improve their rhetoric by grasping the power of mixing semiotics beyond words alone.)

Although we have only the words from the oration, as we will see, the words make plain that the oration turns on much more than mere words. For example, we can begin our selections with the following lines that powerfully rely on icons and indices as well as words:

> My heart is in the coffin there with Caesar,
> And I must pause till it come back to me.[120]

Here Antony indexically points to Caesar's body which is both an index of his murder (being physically connected to his murder) and an icon of Caesar (by virtue of resemblance). The

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[118] WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 2 (Penguin Books 2002). In addition to the selections examined here, I have examined more of Antony's speech elsewhere. *See* Harold A. Lloyd, *Let's Skill All the Lawyers: Shakespearean Lessons in Law and Rhetoric*, 6 ACTA IURIDICA OLOMUCENSIA 9, 49-55 (2011).

[119] *See* The William Blake Archive, *http://www.blakearchive.org/;* Roland Barthes, *Rhetoric of the Image*, *in* SEMIOTICS: AN INTRODUCTORY ANTHOLOGY 190, 192-205 (Robert E. Innis ed., 1985). I hope to do a separate article on William Blake's lessons for lawyers including Blake's semiotic insights.

[120] WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 2, lines 106-07 (Penguin Books 2002).

metaphor of Antony's heart briefly sharing Caesar's coffin paints a powerful picture, a powerful icon of grief.

As with use of Caesar's body as a signifier above, Antony continues demonstrating adeptness at using the same signifiers for multiple functions. He invokes Caesar's will as both an index and symbol of Caesar's love of the Roman people. It is an index to the extent it is directly related to and flowing from Caesar's affection. It is a symbol to the extent it stands for Caesar's love. Antony also mixes in other signifiers: the "sacred blood" as index of the crime and both index and symbol of the "sacred" man, and hair as both index and symbol of the man. Thus, Antony speaks in a suspense-building way by calling attention to the will and first feigning not to read it:

> But here's a parchment with the seal of Caesar;
> I found it in his closet. 'Tis his will.
> Let but the commons hear this testament—
> Which, pardon me, I do not mean to read—
> And they would go and kiss dead Caesar's wounds,
> And dip their napkins in his sacred blood,
> Yea, beg a hair of him for memory . . . .[121]

Antony also knows the power of centering icons in the field of vision (which power of centering is discussed in Section IV.B.5 above). To accomplish this with the corpse's iconic power of resemblance to the once living man, Antony thus continues:

> You will compel me then to read the will?
> Then make a ring about the corpse of Caesar,
> And let me show you him that made the will.
> Shall I descend? And will you give me leave?[122]

With the remnants of Caesar and his bloody clothes centered and in closer focus, Antony continues mixing his various signs as he examines the body and bloody clothes:

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[121] *Id.* at act 3, sc. 2, lines 128-37.
[122] *Id.* at act 3, sc. 2, lines 157-60. *See also* Section IV.B.5 above on icons and place.

> Look, in this place ran Cassius' dagger through.
> See what a rent the envious Casca made.
> Through this the well-belovèd Brutus stabbed;
> And as he plucked his cursèd steel away,
> Mark how the blood of Caesar followed it,
> As rushing out of doors, to be resolved
> If Brutus so unkindly knocked or no--
> For Brutus, as you know, was Caesar's angel.
> Judge, O you gods, how dearly Caesar loved him!
> This was the most unkindest cut of all.[123]

In addition to pointing out the indexical evidence of specific conspirators having participated in the crime, Antony here also uses the icon of metaphor when he speaks of blood that "followed" the stabs of Brutus to determine whether Brutus had in fact "so unkindly knocked."

Noting that Caesar fell "at the base of Pompey's statue,"[124] Antony continues:

> O, what a fall was there, my countrymen!
> Then I, and you, and all of us fell down,
> Whilst bloody treason flourished over us.
> O now you weep, and I perceive you feel
> The dint of pity. These are gracious drops.
> Kind souls—what--weep you when you but behold
> Our Caesar's vesture wounded? Look you here.
> Here is himself, marred, as you see, with traitors.[125]

Here with Caesar's fall, Antony uses an event as a signifier that he extends metaphorically (and thus iconically) to the resulting fall of Antony and the crowd ("all of us fell down"). And, of course, once again Antony points to Caesar's "marred" body as indicating murder.

Powerfully further showing that indices can be compounded as iconic metaphors, Antony continues:

> I tell you that which you yourselves do know,
> Show you sweet Caesar's wounds, poor poor dumb mouths,[126]

[123] *Id.* at act 3, sc. 2, lines 171-80.
[124] *Id.* at act 3, sc. 2, lines 185.
[125] *Id.* at act 3, sc. 2, lines 187-94.

> And bid them speak for me. But were I Brutus,
> And Brutus Antony, there were an Antony
> Would ruffle up your spirits, and put a tongue
> In every wound of Caesar that should move
> The stones of Rome to rise and mutiny.[127]

The wounds again serve here as indices of the murder but now they are also iconically "poor dumb mouths" waiting for their tongues to call out mutiny. This extraordinary metaphor shows that Antony (like good lawyers) fully appreciates the power of image over argument in appropriate circumstances.

Antony returns to the will to make multiple indexical points. The now-disclosed contents of the will indicate Caesar's goodness and love for the Roman people. "Caesar's seal" indicates the authenticity of the will. Thus, Antony continues:

> Here is the will, and under Caesar's seal.
> To every Roman citizen he gives--
> To every several man--seventy-five drachmas . . . .
> Moreover he hath left you all his walks,
> His private arbors, and new-planted orchards,
> On this side Tiber. He hath left them you,
> And to your heirs forever--common pleasures,
> To walk abroad and recreate yourselves.
> Here was a Caesar. When comes such another?[128]

When he realizes that his mixture of symbols, indices, and icons has proven powerfully effective, Antony remarks:

> Now let it work. Mischief, thou art afoot.
> Take thou what course thou wilt.[129]

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[126] Antony turns this powerful metaphor into allegory by repeated use in what follows. *See* RICHARD A. LANHAM, A HANDLIST OF RHETORICAL TERMS 4-6 (2d ed. 1991).
[127] SHAKESPEARE, *supra* note 120, act 3, sc. 2, lines 218-24.
[128] *Id.* at act 3, sc. 2, lines 234-36, 239-44.
[129] *Id.* at act 3, sc. 2, lines 252-53.

Hopefully the selective remarks above demonstrate why lawyers should ponder the entire speech and its semiotics. Hopefully the selective remarks above also demonstrate how lawyers who rely primarily on words rely on a much impoverished semiotics.

VI. Semiotics and Speech Acts of Interest to Lawyers

Having seen how Antony orchestrates a panoply of sense with different types of signs and different types of expression, we can now note in more detail how lawyers encounter multiple types of speech acts (i.e., acts performed with signs)[130] in their practice. Although I shall use the term "speech act" because of its wide usage, "semiotic act" would be more accurate and useful since words are only one type of signs, and I would encourage such change of terminology.

A. Assertives, Directives, Commissives, Expressives, Declaratives, Verdictives

Although I do not claim that these are the only or definitive categories of speech acts, Alan Cruse lists several categories which are useful for the purposes of this article.[131] ***"Assertives"*** are speech acts that "commit the speaker to the truth of the expressed proposition," such as speech acts which "state, suggest, post" or "claim" or "report."[132] Stating "X has been banned for ninety days," is thus an example of an assertive speech act. "***Directives"*** are speech

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[130] My semiotic definition is broader than definitions focusing only on words. *See, e.g.*, *Speech Acts*, OXFORD DICTIONARY OF PHILOSOPHY (3rd ed. 2016) (defining speech acts as "acts performed when words are uttered"). In discussing speech acts, J.L. Austin used the following distinctions: (1) Locutionary acts consist of "the *phonetic* act, of making noises, the *phatic* act of making a grammatical sentence, and the *rhetic* act of saying something meaningful." *Id.* (2) Illocutionary acts are "what is done *in* saying something, such as threatening or praying or promising." *Id.* (3) Perlocutionary acts are the "effects on hearers, such as frightening them." *Id.*

[131] ALAN CRUSE, MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS 374-75 (2d ed. 2004). For earlier and "classic" overviews of speech acts, see also generally J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (J. O. Urmson & Marina Sbisà eds., 2d ed. 1975); SEARLE, *supra* note 13, at 166.

[132] CRUSE, *supra* note 131, at 374.

acts having "the intention of eliciting some sort of action on the part of the hearer," such as giving an "order" or "command."[133] An order of a public official that commands the banning of X for ninety days would be an example of such a directive speech act by directing, for example, a group of persons not to use X. ***"Commissives"*** are speech acts that "commit the speaker to some future action" such as promising, offering, contracting, or threatening.[134] ***"Expressives"*** are speech acts which "make known the speaker's psychological attitude to a presupposed state of affairs," such as praising, blaming, thanking, and congratulating.[135] Blaming X for causing certain ills would be an example of such an expressive speech act. ***"Declaratives"*** are speech acts which "bring about a change in reality" which is "over and above the fact that they have been carried out."[136] For example, the declaratives "I hereby resign as President" or "I hereby open this exhibition" make actual changes in the social fabric of the world beyond just adding those uttered phrases to the set of phrases uttered in this world.[137] Such declaratives change who is President (in the former) and open up an exhibition (in the latter). Thus, in the case of resignation, the declarant "would no longer hold the post [the declarant] originally held, with all that entails."[138] Additionally, J.L. Austin speaks of a group of speech acts called ***"verdictives"*** that are such "judicial acts" such as convicting, acquitting, and fact finding.[139]

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[133] *Id.* at 374-75.
[134] *Id.* at 375.
[135] *Id.*
[136] *Id. See also* SEARLE, *supra* note 13, at 166 (recognizing "declarations, where we bring about changes in the world with our utterances").
[137] *See* CRUSE, *supra* note 131, at 375.
[138] *Id.*
[139] AUSTIN, *supra* note 131, at 153.

B. Other Possible Speech Act Distinctions

For purposes of this article, I draw from the speech act categories set forth above, although I acknowledge reasonable minds can differ as to how to draw performative categories (just as reasonable minds can differ about many other categories that we draw). One might argue, for example, that verdictives are in fact blends of assertives to the extent that they assert fault, directives to the extent that they direct a defendant to pay money, expressives to the extent that they blame a defendant, and declaratives to the extent that they change someone's legal status through sentencing. However, speaking of the "verdictive" is useful and timesaving for the brief jury exploration I do below in Section VII. Such categories are also otherwise useful in the discussion of sense and meaning more broadly signified by various types of signs.

VII. Interpretation and Construction of Speech Acts and Signs

Lawyers, of course, can deal with all such types of speech or semiotic acts. In doing so, they can face such questions as who should count as the speaker/writer, who should count as the hearer/reader, and whose meaning should control. I therefore next explore these fundamental semiotic issues.

A. Utterer/Speaker/Author vs. Hearer/Reader Meaning

Starting first with whose meaning should control, we must remember that to have meaning, we must have interpretation. Again, Charles Sanders Peirce tells us that "nothing is a sign unless it is interpreted as a sign,"[140] and Eco tells us that a "sign is not only something which stands for something else; it is also something that can and must be interpreted."[141]

[140] PEIRCE, *supra* note 7, at 2.306.
[141] ECO, *supra* note 9, at 46.

Of course, utterer/author/speaker and reader/hearer meaning can differ, and this leads us to the question of whose (if anyone's) meaning should prevail. As a fascinating example of such difference, Robert Benson tells us that the author's meaning for *The Wizard of Oz* is very different from the way most readers understand the work today.[142] According to Benson, rather than a fairy tale of good and evil involving a girl coming of age, the author meant the work to be a populist, political allegory.[143]

An abbreviated list of the author's meanings claimed by Benson include: Dorothy as representing the average person, the Yellow Brick Road as representing the gold standard, Dorothy's silver (as opposed to the film's red) slippers as representing free silver money, Oz as an abbreviation of "ounce" (used to measure gold and silver), the Wicked Witch of the East as representing "capitalists and bankers," the Tin Man as representing the factory worker, the Scarecrow as representing the farmer, the Munchkins as representing "the little people," the Cowardly Lion as representing William Jennings Bryan, and the Wizard as representing the President who governs the realm by his sleight of hand.[144] The typical modern reader, having little or no awareness of such allegory from another time, of course, will read the work quite differently.

The law is aware that author/speaker meaning can differ from reader/listener meaning. Thus, the Supreme Court has noted in *Spence v. Washington*, that "[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another man's jest

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[142] ROBERT BENSON, THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW 52-53 (2008).
[143] *Id.* at 52.
[144] *Id.*

and scorn."[145] That said, however, we still have the question of whose (if anyone's) meaning should prevail when meanings conflict.

B. Whose Meaning Controls: Some Initial Definitions and Distinctions

Focusing on determining whether author/speaker or reader/hearer meaning should control in several types of **nonfiction**[146] speech acts of particular interest to lawyers, I must next explore some critical distinctions that come into play in determining such operative meaning.

1. Interpretation vs. Construction

First, we should note the critical distinction between interpretation and construction (i.e., the linguistic or semiotic rather than the legal meaning). Interpretation determines "the linguistic understanding of the provisions at issue,"[147] whereas construction determines the "legal

[145] Spence v. Washington, 418 U.S. 405, 412 (1974) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943) (internal quotations omitted)).

[146] I acknowledge that the default toward speaker meaning discussed below cannot consistently work across the realm of fiction. Even if one focuses on author meaning in fiction, an author of a particular work of fiction can of course mean for readers to embrace reader meaning of the work. The author of a great poem, for example, can entice readers to become enmeshed in their own meanings that transcend and even contradict the author's. A non-fiction speaker, however, who claims that the child he holds in his arms is "his son" would not by that statement invite hearers to contradict his meaning. I will not otherwise address fictional meaning in this article. However, for those wishing to explore whether interpretation of fiction might shed on legal interpretation. Kent Greenawalt provides an interesting discussion which ultimately concludes that "the differences between literary and legal interpretation are so great that an understanding of the first will tell us almost nothing about how the debatable practical issues concerning legal interpretation should be treated." KENT GREENAWALT, REALMS OF LEGAL INTERPRETATION: CORE ELEMENTS AND CRITICAL VARIATIONS 132-37 (2018). That said, Prof. Greenawalt does note, as would I, that "novels and poems, as well as biographies and autobiographies, can teach us about human beings and our societies" and can thus have "practical significance" for the law. *Id.* at 135-36. I would go further and raise this claim to "great practical significance" for the law. *See also* Lloyd, *supra* note 45, at 132-36, for the importance of the humanities in law and legal education.

[147] Brian G. Slocum, *Introduction*, *in* THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 1, 5 (Brian G. Slocum ed., 2017) [hereinafter Slocum, *Introduction*].

meaning" of a text.[148] A text's "legal meaning" includes "the authoritative meaning given to it by a judge," whereas the "linguistic meaning" is "the meaning communicated by the language of the text in light of the appropriate context of the communication."[149] For example, one can imagine two parties carefully addressing all the terms of a lease agreement for a term of four years and video recording their careful reciting of all such terms. Interpretation would involve discerning the linguistic meaning of such provisions. Construction would involve determining the legal effect of such a video-recorded agreement. If, for example, the applicable jurisdiction required leases of more than three years to be in writing, then one must construe the lease as unenforceable even though the linguistic terms might be easily interpreted.

2. Actual vs. Hypothetical Speaker Meaning

Second, by "speaker," one will find in the literature not only references to actual speakers in question but also to such notions as "a normal speaker of English, using [words] in the circumstances in which they were used"[150] and "the reasonable maker of statements."[151] Since hypothetical speakers by definition do not exist, they cannot without more provide the actual mind required to interpret or generate speaker meaning.[152] To resolve this semiotic difficulty, we must derive the meaning from a real speaker who can convey the necessary intentionality.[153]

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[148] *See id.*; Brian G. Slocum, *The Contribution of Linguistics to Legal Interpretation*, *in* THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 14, 16 (Brian G. Slocum ed., 2017) [hereinafter Slocum, *Contribution of Linguistics*].
[149] Slocum, *Contribution of Linguistics*, *supra* note 148, at 16.
[150] Karen Petroski, *The Strange Fate of Holmes's Normal Speaker of English*, *in* THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 105, 107 (Brian G. Slocum ed., 2017) (quoting Holmes).
[151] *Id.* at 113 (referring to Justice Thomas).
[152] *See* Section VII. A. above.
[153] *See* SEARLE, *supra* note 13, at 27-29 (on derived intentionality).

For example, in reading a particular judicial opinion that finds that a "reasonable maker of statements" would "intend" X, we might derive the hypothetical speaker's intent from the judge who writes the opinion. We might say that she interprets the signifiers in ways that she believes such a hypothetical speaker would do. We might, on the other hand, attempt to derive the meaning from other actual speakers such as the majority of speakers of English and may even sample actual speakers to such an end. However, whomever we choose as the existing speaker or speakers to provide such derivative meaning, the point is to remember that such meaning is in fact derived, that such meaning does not come from non-existent hypothetical speakers who by definition cannot provide the actual intentionality required for meaning.

In matters of interpretation (as opposed to matters of construction), we should of course have doubts about using hypothetical speaker meaning in cases where we have reasonably-discernible actual speakers whose linguistic meaning can be reasonably determined. Where we can reasonably discern a speaker's actual meaning, morally and epistemically why would we give her another meaning as a matter of *interpretation*—why would we eembrace the untruth that she meant something that she did not mean? This concern will drive the two interpretation principles I propose in Section VII.C below.

3. Actual vs. Hypothetical Reader Meaning

Third, turning to readers, we can find distinctions in the literature between types of actual readers (such as between "ordinary readers" and "extremely well informed" readers.)[154] We can also see references to hypothetical readers of various characteristics, including those having the

[154] Kent Greenawalt, *Philosophy of Language, Linguistics, and Possible Lessons about Originalism*, *in* THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 46, 56-57 (Brian G. Slocum ed., 2017).

ability to "perceive relevant factors that are beyond the capacities of the vast majority of human readers."[155] Thus, Justice Scalia would use a "reasonable reader, an "objectivizing *construct*," who is aware of all the elements (such as the canons) bearing on the meaning of the text, and whose judgement regarding their effects is invariably sound. Never mind no such person exists."[156] Preferring reality, the two interpretation principles I propose in Section VII.C below will prefer meanings of bills embraced by actual legislators debating and voting on such bills where reasonable evidence exists as to such actual legislators' meanings. The interpretation principles I propose default to meanings of hypothetical legislators only where actual such meanings are not reasonably discernible.

4. Controlling Meaning vs. Controlling Signifiers

Finally, as we examine whose meaning controls, we should not confuse questions of the signified with questions of appropriate signifier use. As a matter of pure semiotics, we have seen that signifiers can include, for example, potentially any "concrete object," "abstract entity," "idea or 'thought,'" "perceptible object," "physical event," or "imaginable object.[157]

We must remember, however, that seeking an actual speaker's meaning conveyed by any such particular signifier is a separate inquiry from examining the legality of the use of such a signifier. For example, trademark law protects a "word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others,"[158] copyright law protects "an original work of authorship (such as literary, musical, artistic,

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[155] *Id.* at 57.
[156] *See* SCALIA & GARNER, *supra* note 1, at 393.
[157] *See* NÖTH, *supra* note 8, at 80. *See also* PEIRCE, *supra* note 7, at 2.230.
[158] *Trademark*, BLACK'S LAW DICTIONARY (7th ed. 1999) (also noting that "[i]n effect, the trademark is the commercial substitute for one's signature").

photographic, for film work) fixed in any tangible medium of expression,"[159] and criminal law would not permit killing a public official as a signifier of political protest.

Given such restrictions, a vendor's intent, for example, that a certain mark refer only to the vendor's products of course does not grant the vendor rights to use that mark if others have trademark protection for use of the mark. Although we may be able to determine, as a matter of interpretation, that such a vendor meant the mark only to refer to the vendor's products (the vendor's intended signified), trademark law can refuse him use of such a signifier and thereby provide remedies to the lawful holder of the mark. I further explore restrictions on signifier usage in Section IX below.

C. Whose Meaning Controls: Two Basic Principles

In light of the foregoing, I propose two principles of *interpretation* as the default starting position for non-fiction speech (or semiotic) acts. Under the "First Interpretation Principle" the actual speaker's meaning (as it unfolds over time) controls as a matter of *interpretation* where the actual speaker has communicated such speaker's meaning with reasonable discernibility.

Under the "Second Interpretation Principle" a hypothetical same-context speaker's meaning (as it unfolds over time) controls as a matter of *interpretation* where the actual speaker's meaning is not reasonably discernible due to lack of sufficient available evidence. By a "hypothetical, same-context speaker" here the Second Interpretation Principle means a hypothetical speaker who (who to the extent we can construe such a speaker) stands in the shoes of the actual speaker. This includes sharing the same duties, obligations, desires, and motives as the speaker and otherwise acting in the same contexts as the actual speaker. Such contexts include, without limitation, (i) cognitive contexts, (ii) physical and temporal contexts, (iii) social,

[159] *Copyright*, BLACK'S LAW DICTIONARY (7th ed. 1999).

cultural, and human contexts, (iv) discourse contexts, (v) textual or internal contexts, (vi) purpose contexts, and (vii) policy contexts.[160] Our ability to posit any such hypothetical same-context speaker will of course vary with the circumstances. Lesser knowledge about the speaker or applicable context or both will of course result in a less-refined hypothetical same-context speaker. That said, we must do our best.

When *interpreting* non-fiction speech (or semiotic) acts, we would thus turn to some form of hypothetical speaker meaning only where (i) no actual speaker exists or (ii) an actual speaker has not communicated his speaker's meaning with reasonable discernibility and we lack sufficient information to reasonably construct a hypothetical speaker who stands in the shoes of the actual speaker in the manner discussed above.

I propose these principles because we cannot without contradiction *interpret* reasonably discernible speaker meaning to be the meaning of another person or entity unless, of course, the speaker intends to incorporate others' meanings. (A person or group writing a document such as the Declaration of independence speaking of rights given by the Creator and otherwise incorporating certain philosophical traditions would be such an example. In such a case, it would be a mistake to ask what Jefferson, for example, *himself alone* meant by equality of men unless he meant to give the concept a meaning different from the Creator's or from the meanings of incorporated philosophical traditions.) Additionally, if we fundamentally respect the right of speakers to speak for themselves, we cannot, as a matter of *interpretation* respect such right yet substitute the meaning of another (whether actual or hypothetical) for such speakers' reasonably discernable meaning. Furthermore, without more, we cannot, as a matter of *interpretation*, morally hold speakers accountable for others' meaning where the speaker's meaning differs and

[160] *See* Lloyd, *supra* note 5, at 254-63.

is reasonably ascertainable. It is therefore difficult to disagree with Greenawalt's claim that "[a]ny plausible argument for disregard of intentions must rest on claimed specific obstacles, not ordinary understandings."[161]

In the above spirit, the First Interpretation Principle uses speaker meaning (as such meaning unfolds over time) where reasonably discernible. In that spirit as well, the Second Interpretation Principle uses the hypothetical, same-context speaker meaning discussed above (as such meaning unfolds over time). Since such a hypothetical speaker shares the same duties, obligations, desires, and motives as the speaker and otherwise acts in the same contexts as the actual speaker, It is thus hard to imagine another "speaker" whose meaning would more likely accord with the actual speaker meaning could we more clearly discern it.

Both such principles will also assume (as with the example of the Declaration of Independence example above) that intentionally incorporated terms or principles of others will have such others' meanings unless actual or hypothetical speaker meaning intended to change such meaning. Thus, again, a person or group writing a document such as the Declaration of independence speaking of rights given by the Creator and otherwise incorporating certain philosophical and other traditions would incorporate those other meanings as they unfold in experience through time unless such those drafting a document such as the Declaration of Independence meant another meaning. Thus, again, it would be a mistake to ask what Jefferson, for example, *himself alone* meant by equality of men in the Declaration unless he meant to put his own differing meaning on the concept. We can call this the "incorporation caveat," and for the sake of space I will consider the incorporation caveat an unstated caveat running through the remainder of this article.

[161] GREENAWALT, *supra* note 146, at 49.

D. Whose Meaning Controls: Some Applications of Interest to Lawyers

In light of the discussions above, I shall now apply and test the First Interpretation Principle and the Second Interpretation Principle using several types of non-fiction speech acts of interest to lawyers. Where useful, I shall also contrast construction with interpretation.

1. Signs, Assertives, and Tort Law

I begin with a simple hypothetical to lay the groundwork for more complex discussions that follow. Let us imagine that we have a reasonably discernible speaker who, for example, asserts that "John Smith is a thief." The First Interpretation Principle requires us to seek the actual speaker's meaning (as it unfolds over time) if the actual speaker has communicated such speaker's meaning with reasonable discernibility. Unless there is reasonably discernible evidence that the speaker meant to speak ironically and not literally, we should thus as a matter of interpretation an assertion that Smith is a thief. If, however, the reasonably discernible evidence suggests such irony, we should interpret such speech ironically.

However, as a matter of construction, we might reach a quite different result. If our speaker's "irony" takes on a literal meaning in the general public that harms Smith in a way that we feel defamation law should discourage, we might as a matter of such law **construe the legal effect** of the words literally. For lack of space, I take no position here on the propriety of so doing. I raise the point merely to make the logical distinction between interpretation and construction of individual assertive speech acts so that we might build upon the distinction in the discussion that follows.

2. Signs, Commissives, and Criminal Law

In *Elonis v. United States*,[162] the defendant posted online a semiotic array of items which on their face could be seen as threatening. For example, mixing the indexical, iconic, and symbolic, the defendant posted a photograph (index) of a co-worker and himself where he held a toy knife (icon) to the neck of the co-worker and included the caption "I wish" (symbol).[163] After he was subsequently fired, the defendant posted such language as "Y'all think it's too dark and foggy to secure your facility from a man as mad as me?"[164]

The defendant also posted about his wife. Such posts included: "Did you know it's illegal for me to say I want to kill my wife?"[165] After his wife obtained a "three-year protection-from-abuse order" against the defendant, the defendant posted the following online:

> Fold up your [protection-from-abuse order] and put it in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order that was improperly granted in the first place
> Me thinks the Judge needs an education on true threat jurisprudence
> And prison time'll add zeros to my settlement . . .
> And if worse comes to worse
> I've got enough explosives to take care of the State Police and the Sheriff's Department.[166]

The defendant also posted such other words as:

> That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a Kindergarten class

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[162] *See generally* Elonis v. United States, 135 S. Ct. 2001 (2015). *See also* Lawrence M. Solan, *Linguistic Knowledge and Legal Interpretation: What Goes Right, What Goes Wrong*, *in* THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 66,71-72 (Brian G. Slocum ed., 2017).
[163] Elonis, 135 S.Ct. at 2005.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 2006.

The only question is . . . which one?[167]

As a result of these and other posts, the defendant was charged and convicted under 18 U.S.C. §875(c) which criminalizes the transmission in interstate commerce of "any communication containing any threat . . . to injure the person of another."[168]

How should the interpretive principles suggested above apply here? Since the identity of the speaker was known and since discovery should have been available in the criminal proceedings, the linguistic meaning of the defendant's words should be determined by the First Interpretation Principle. Though his wife and former co-workers were "afraid and viewed [the defendant's] posts as serious threats,"[169] the speaker's intent governs linguistic meaning here for the reasons discussed above. (This, again, is a separate question from (i) construction of their legal meaning and (ii) their wisdom or appropriateness as a moral or social matter.) Thus, as a matter of *interpretation*, we must examine evidence of actual speaker meaning (including but not limited to the words as evidence) to determine such linguistic meaning.

On their face, the signifiers' speaker meaning could easily be interpreted as threats by use of, among other things, a toy knife to the throat and by use of such words as "kill" and "bullet." On their face, the signifiers' speaker meaning could also be interpreted, for example, as expressing contempt for the defendant's co-workers and wife. On the other hand, other words posted by the defendant (such as "Art is about pushing limits"[170]) and words uttered by the defendant in court (such as claims that his posts modeled well-known rap lyrics[171]) might suggest

[167] *Id.* at 2006.
[168] *Id.* at 2004.
[169] *Id.* at 2007.
[170] *Id.* at 2006.
[171] *Id.* at 2007.

artistic intent--though many if not most of us might find such artistic intent a difficult sell.[172] As to linguistic meaning, we might therefore well interpret these signs as threatening commissives.

All that said, however, one must remember that 18 U.S.C. §875(c) also requires *construction* of the legal meaning of the posts and any relevant speaker intent. The district court convicted the defendant of threats under the statute, holding that conviction "required only that [the defendant] 'intentionally made the communication, not that he intended to make a threat."[173] The court of appeals upheld the conviction, holding that the statute only required "the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat."[174] The Supreme Court reversed and remanded, focusing on the jury instruction "that the Government need prove only that a reasonable person would regard [the defendant's] communications as threats."[175] Rejecting this approach as effectively substituting a negligence standard for the criminal intent typically required by criminal statutes, the Supreme Court found such criminal intent would be "satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."[176]

The tests for **legal meanings** recognized in the various stages of this case thus differ greatly. At odds with the First Interpretation Principle, the district court required no intended

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[172] The speaker could also, of course, intend the same words to express contempt, threats, and forms of the aesthetic.
[173] *Id.* at 2007.
[174] *Id.*
[175] *Id.* at 2012.
[176] *Id.*at 2011-2012 (holding that "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state" and noting Cochran v. United States, 157 U.S.286, 294, 15 S.Ct. 628 (1895) which held that a defendant could encounter ''liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind.") The Court thus reversed and remanded the case.). Elonis, 135 S.Ct. at 2013.

threat[177] while somewhat more in line with the First Interpretation Principle the Supreme Court required speaker "purpose" or "knowledge, holding, again, that the criminal mental state required by the statute is met if the defendant communicates "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."[178]

Given the high stakes of a criminal conviction here, the Supreme Court's focus on the speaker's intent or mental state (rather than the auditor's) makes sense to me. Also, given the high stakes of such a criminal conviction, it also makes sense to me that we should in general have less flexibility in *construing* meaning that a criminal defendant might not have meant. Thus, *construction* should insist on proof beyond a reasonable doubt (rather than by a preponderance of the evidence) when establishing a *speaker's* criminal intent to convey a threat, and we can therefore have cases like *Elonis* where we might well believe that there was a linguistic threat while nonetheless finding no such threat as a matter of criminal *construction*.[179]

3. Signs, Commissives, and Private Law

Having thus first explored a public law example of potential commissives, we can now turn to private law examples of commissives. In exploring whose meaning should control in

[177] *Id*. at 2007. Again, the district court held that conviction "required only that [the defendant] 'intentionally made the communication, not that he intended to make a threat." *Id.*

[178] *Id.*at 2012. I say "somewhat more in line" because the "knowledge" prong of this test may deviate from the First Interpretation Principle to the extent such prong recognizes unintended commissives. For example, one might genuinely write verse with no intent to threaten anyone while knowing that some will nonetheless feel frightened. *See* Solan, *supra* note 162, at 71-72 (noting fright as "a side effect".) That said, of course, we might have policy or other reasons for finding a threat as a matter of *construction* just as we might *construe* ironic speech as defamatory as suggested in Section VII.D.1 above.

[179] As Solan thus notes: "the Supreme Court made it clear that proving that Elonis intended his wife to draw inferences that would cause her to be intimidated was necessary to establishing that a crime has been committed. Until then, the literal meaning of these verses would be taken at face value." *Id.* at 72.

cases of private law commissives, I first briefly examine the interpretation and construction of wills and then turn to the the interpretation and construction of contracts.

a. Signs and Wills

I treat wills as commissives because they commit the testator's estate to do certain things. In the case of a single testator, it is hard to disagree with Greenawalt that "the intentions of the writer who has died are obviously key, since the will is designed to carry out her intentions."[180] From the standpoint of interpretation, it is therefore hard to see how the right default meaning is not the meaning of the author of the will. In this regard, Prof. Greenawalt gives us the example of the testator who named in his will a person he did not know, "Robert J. Krause," rather than "Robert W. Krause," a "close friend and employee."[181] Because this apparently involved mistaken reliance on a telephone book, the court followed the author's more likely intent.[182] In light of the First Interpretation Principle, the court's action seems quite correct as a matter of interpretation. Again, since the purpose of a will is to dispose of a testator's property as the testator intends,[183] it runs afoul of such purpose to substitute for the actual author's meaning the meaning of some hypothetical ideal author or the meaning of readers whether actual or hypothetical.

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[180] GREENAWALT, *supra* note 146, at 11. Greenawalt observes that matters may be more complex "if a married or unmarried couple has reached an agreement about what the will of each would provide. In that event, one might see a will as more like a contract." *Id.* For sake of space, I will keep my will discussion to that of a single testator who has made no such agreement, and I will discuss contracts in a separate section below.

[181] *Id.* at 15.

[182] *Id.* Such a result can be seen as either a "correction" of the will or applying the proper meaning of the signifier "Robert J. Krause." Although either frame reaches the correct result, from a semiotic standpoint it would seem more precise to me to say that the court sought the correct meaning of the signifier "Robert J. Krause."

[183] *See again id.* at 11.

As for construction of the legal meaning of the will, one can strongly argue that construction should not reach a different result. Robert J. Krause was presumably not relying on receiving the property at issue so no reliance concerns should generate a different legal meaning. Additionally, as Greenawalt points out, reliance arguments in the case of wills can often seem of little weight since a testator can generally change his will at will, and "most potential recipients do not actually see the wills of their benefactors."[184]

Other potential reasons for construing the meaning in favor of Robert J. Krause rather than the more likely intended Robert W. Krause (such as will drafters' and courts' need for "clear and consistent interpretations of similar language," the difficulty of "discerning after someone's death what was really intended," and guarding against the possibility that evidence of the different meanings of terms such as "Robert J. Krause" could be manipulated.[185]) do not apply here. Names vary so there is no "similar language" to construe consistently. Furthermore, it should not be difficult to determine that the testator employed and was close friends with Robert W. Krause rather than Robert J. Krause. Given all this, there is little reason to worry about improper manipulation of meaning when recognizing that "Robert J. Krause" really meant the testator's employee and close friend, Robert W. Krause. Construction should thus converge with interpretation in finding such a meaning.

b. Signs and Contracts: Williston, Corbin, and More

One can imagine that both a seller and a buyer intend "apples" to mean only golden delicious apples. If that seller agrees to sell such "apples" to that buyer upon written lawful terms which both parties intend in the same way, the parties linguistic meaning of "apples" no doubt

[184] *Id.* at 15.
[185] *See* Greenawalt, *supra* note 154, at 50.

covers only golden delicious apples. Applying a different meaning of some hypothetical speaker of English or of some other reader (actual or hypothetical) would change what the parties meant and would thus fail as a matter of *interpretation*.

This seems quite straightforward, and Steven J. Burton thus tells us that "American courts universally say that the primary goal of contract interpretation is to ascertain the parties' intentions at the time they made their contract."[186] To the extent the parties' intentions are reasonably discernible, the First Interpretation Principle, of course, squarely accords with this "primary goal" and with interpreting "apples" in the contract above to mean golden delicious apples.

As for *construction*, it is also difficult to justify (without more) a different meaning for "apples" here. In *construing* contracts, courts may, of course, recognize other goals than enforcing speaker meaning. Such goals include fostering "the security of transactions" (including clarity for the parties and their assignees "about their rights, duties, and powers"), fostering "the peaceful settlement of disputes non-arbitrarily, in accordance with the Rule of Law" (which includes predictable contract interpretation that is "coherent with the law of contracts generally"), and "formulating legal rules that are administrable by the courts and by the parties."[187]

Here, however, the seller and buyer are the only parties affected by the contract, and their meaning of "apples" is reasonably discernible. Construing the contract in accordance with their meaning thus secures their deal, should foster peaceful and non-arbitrary dispute settlement by

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[186] STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 1 (2009).
[187] *See* BURTON, *supra* note 185, at 2, 7-8. *See also* GREENAWALT, *supra* note 146, at 6, 111 (noting concerns such as judges being asked to perform functions they cannot reasonably perform, respecting needs of a "just and healthy society," and "general fairness and efficiency.")

treating the parties as they intended, and should prove quite administrable by turning on reasonably discernible meaning and by requiring that the parties act just as they intended.

Having addressed both interpretation and construction of the “apples” contract above, we can now turn to three schools of thought addressing the reading and enforcement of contracts:

First, "literalism" "holds that the literal meaning of the contract's governing word or phrase, as found in a dictionary, determines the parties' rights, duties and powers."[188]

Second, "objectivism" "looks for the parties' intentions as expressed (manifested) in the contract document as a whole and its objective context, but not the parties' mental intentions;" in other words, it looks for “manifested intention, as a reasonable person familiar with the objective circumstances would understand the manifestations,” and thus “infers *reasonable* meaning(s) from the parties’ manifestations of intention in light of the circumstances, whether or not the meaning(s) reflect what the parties had in mind as the meaning of the terms they used.”[189] Thus, for example, Samuel Williston looks to "the natural meaning of the writing to parties of the kind who contracted and at the time and place where the contract was made, and [under] such circumstances as surrounded its making."[190]

Third, "subjectivism" "looks for the mental intentions or knowledge of the parties when they manifested their intentions, taking into account all relevant evidence," although it does not recognize intentions which are not expressed.[191] Thus, the Restatement (Second) of Contracts

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[188] *Id.*
[189] *Id.* at 2, 6, 51.
[190] As quoted in *id.* at 29.
[191] *Id.* at 2, 28. *See also* GREENAWALT, *supra* note 146, at 23-24 (discussing the Restatement (First) of Contracts’ “complex objective approach” turning on the meaning that would be given by "a reasonably intelligent person" who is "familiar with all operative usages and knowing all the circumstances other than oral statements by the parties about what they intended the words to mean" and the Restatement (Second) of Contracts’ “more subjective approach.”) *See also*

provides: “Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."[192]

As phrased, the literalism option can be quickly dispatched for both interpretation and construction. Since words typically have multiple definitions and can thus have multiple “literal” senses, literalism cannot work as a matter of interpretation. Even if parties to a contract have used terms in a dictionary sense, the dictionary (with its multiple definitions of terms) cannot itself tell us which sense the parties used. Additionally, literalism would lead us astray where parties have not used terms in a standard or “dictionary” sense. Literalism fairs no better with construction. Given such multiple “literal” definitions of terms, construction also requires more than just a dictionary. Even if a judge is to construe contracts in accordance with the dictionary meanings of terms, a judge must have some method of determining which of these “literal” dictionary meanings apply.

Objectivism also fails for both interpretation and construction. Since it would divorce itself from the parties' "mental intentions," and, in Williston’s words, it would look for "the natural meaning of the writing to parties of the kind who contracted at the time and place where the contract was made, and [under] such circumstances as surrounded its making”[193] rather than what the parties actually meant, such "objectivism" cannot work as a general rule of *interpretation*. If the parties’ meaning is reasonably ascertainable, *interpretation* should give

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RESTATEMENT (FIRST) OF CONTRACTS § 230 (AM. LAW INST. 1932); RESTATEMENT (SECOND) OF CONTRACTS § 201 (AM. LAW INST. 1981). Additionally, the RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. a (AM. LAW INST. 1981) notes that “the relevant intention of a party is that manifested by him rather than any different undisclosed intention.” The First Restatement reflects Williston’s objectivism while the Second Restatement reflects Arthur Corbin’s greater subjectivism. *See* KENT GREENAWALT, LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS 265-67.

[192] RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (AM. LAW INST. 1981).

[193] As quoted in BURTON, *supra* note 185, at 29.

them that meaning for the reasons set forth in Section VII.C above. Objectivism also fails as a general rule of *construction*. Again, if the seller and buyer are the only parties affected by the "apples" contract and their meaning of "apples" is reasonably discernible, why should they not have their contract for golden delicious apples? Again, construing the contract in accordance with their meaning secures *their* deal, should foster peaceful and non-arbitrary dispute settlement by treating the parties as they intended, and should prove quite administrable by turning on reasonably discernible meaning and by requiring that the parties act just as they intended.

Of the three approaches above, this therefore leaves us with "subjectivism," the approach which, again, "looks for the mental intentions or knowledge of the parties when they manifested their intentions, taking into account all relevant evidence."[194] As an approach to *interpretation*, this approach on its face accords with the emphasis that the First Interpretation Principle and Second Interpretation Principle place upon speaker meaning. As a matter of construction, this approach would also give the seller and buyer in the "apples" contract above their contract for golden delicious (and only golden delicious) apples. In doing so, this approach would also construe the contract in accordance with the parties' meaning thus secures *their* deal, would likely foster peaceful and non-arbitrary dispute settlement by treating the parties as they intended, and should prove highly administrable by turning on reasonably discernible meaning and by requiring that the parties act just as they intended. Common construction policies are thus advanced by such an approach.

Thus, the Restatement (Second) of Contracts correctly interprets and construes the following similar example:

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[194] *Id.* at 2.

> A and B are engaged in buying and selling shares of stock from each other, and agree orally to conceal the nature of their dealings by using the word "sell" to mean "buy" and using the word “buy" to mean "sell." A sends a written offer to B to "sell" certain shares, and B accepts. The parties are bound in accordance with the oral agreement.[195]

This example squarely accords with the First Interpretation Principle to the extent the parties’ odd use of terms is reasonably ascertainable. As for construction, recognizing the parties’ meaning secures *their* deal, should foster peaceful and non-arbitrary dispute settlement by treating the parties as they intended, and, again, should prove quite administrable by turning on reasonably discernible meaning and by requiring that the parties act just as they intended.

A change of facts could, of course, change this result as a matter of both interpretation and construction. For example, as a matter of interpretation, if A and B both die and their heirs are left to settle the contract, A’s and B’s speaker meaning may no longer be reasonably discernible.[196] If such speaker meaning is no longer reasonably discernible, in the view advanced by this article, the "Second Interpretation Principle" would turn if reasonably possible to a hypothetical same-context speaker's meaning in the case of party A and in the case of party B. Again, our ability to posit any such hypothetical same-context speaker will of course vary with the circumstances, and lesser knowledge about the speaker or applicable context or both will of course result in a less-refined hypothetical same-context speaker. That said, we must do our best when we attempt interpretation.

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[195] RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b, illus. 4 (AM. LAW INST. 1981). *See also* BURTON, *supra* note 185, at 28.

[196] Again, the RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (AM. LAW INST. 1981) provides: “Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.” However, again, the RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. a (AM. LAW INST. 1981) also notes that “the relevant intention of a party is that manifested by him rather than any different undisclosed intention.” In this changed hypothetical, to use the RESTATEMENT (SECOND) terminology, the original “manifested” intent may no longer be discernible.

That said, construction here can also result in a legal meaning of contract terms that differs from their linguistic meaning. Again, in enforcing contracts, courts may recognize other goals than respecting speaker meaning, such as fostering "the security of transactions" (including clarity for the parties and their assignees "about their rights, duties, and powers"), fostering "the peaceful settlement of disputes non-arbitrarily, in accordance with the Rule of Law" (which includes predictable contract interpretation that is "coherent with the law of contracts generally"), and "formulating legal rules that are administrable by the courts and by the parties."[197]

Under these changed facts where the death of A and B leaves their original speaker meaning no longer reasonably discernible, these construction goals may well require construing "buy" to mean "buy" and "sell" to mean "sell." Fostering peaceful resolutions of disputes may itself suffice for such construction where there is no reasonably discernible evidence that such terms were used in their opposite senses.

A different change of facts could also raise construction concerns such as promoting "security of transactions." If, for example, the contract is assigned while A and B are still living, and the assignee does not know that A and B had orally agreed to alter the meanings of "buy" and "sell," promoting "security of transactions" strongly weighs in favor of construing "buy" to mean "buy" and "sell" to mean "sell" to protect the "innocent" assignee. Since the assignor (A or

[197] BURTON, *supra* note 185, at 2, 7-8. *See also* GREENAWALT, *supra* note 146, at 6, 111 (noting concerns such as judges being asked to perform functions they cannot reasonably perform, respecting needs of a "just and healthy society," and "general fairness and efficiency.")

B) would be in a superior position of knowledge, the assignor in such a case should be forthright in informing the assignee of any special meaning of terms.[198]

4. Signs and Directives

In exploring whose meaning should govern in the case of directives, I next briefly explore the question of legislation and speaker meaning. For the further reasons discussed below, the First Interpretation Principle and the Second Interpretation Principle should again control interpretation where reasonably possible. For reasons of space, I limit my discussions here to interpretation and do not explore construction.

a. Signs and Legislative Intent

To apply the First Interpretation Principle and the Second Interpretation Principle in legislation, we must be able to identify the relevant speaker intent. This is, of course, more complex than identifying the intent of a single testator or the intent of the two individual parties to the "apples" contract above. Given the multiple parties involved in legislation (such as the legislators and the executive who signs such legislation, not to mention staff and others who may be involved in drafting legislation), identifying the relevant speaker intent may seem daunting and even impossible. Additionally, since a legislature is not itself a thinking being, we might of course ask whether it can ever make logical sense to speak of legislative intent.

b. Signs and Legislatures as Speech Actors

In tackling these issues, we should remember that we create our concepts and that we judge them by their workability.[199] We should thus recognize with Gerald MacCallum, Jr. that

[198] Thus, where parties have differing meanings as to terms, the Restatement (Second) of Contracts in §201(2) sensibly addresses such differing meanings in terms of which party is at fault, and §201(3) recognizes no mutual assent where meanings differ and neither party knew the other's meaning or should have known such meaning. *See also* BURTON, *supra* note 185, at 62 & n. 109.

the question here is not just "*Are* legislatures capable of intent?" We should also be asking whether the notion of legislative intent is *useful*.[200] If such a concept is useful, we should fashion a concept of legislative intent in a way that works most effectively.

Such a concept is no doubt useful. It continues (and helps us grapple with) a long judicial tradition of seeking "legislative intent," a tradition that respects the "principle of legislative supremacy" by recognizing the supremacy of laws enacted by the legislature.[201]

Additionally, understanding "legislative intent" as part of a legislative speech act is consistent with Constitutional references to Congress as an actor. For example, Article I speaks of "legislative Powers" that are "vested in" Congress, and speaks of each house of Congress being the "Judge of the Elections, Returns and Qualifications of its own Members."[202] How can we speak of Congress as such a rational Constitutional actor if we cannot also find a way to speak of its having intent to act in certain ways?

i. Signs and Legislatures' Speech Acts

How, then, can we go about speaking of legislative intent in a workable way? We must identify a workable speaker or speech actor that can have such legislative intent. Rather than losing oneself in the swirl of individual and collective legislator minds, I would define the legislature itself (not some combination of legislators) as the speaker or speech actor. Consistent with that approach, I would then maintain that a legislature's legislative (and thus directive)

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[199] Lloyd, *supra* note 27, at 264-74 (discussing workability).
[200] *See* GERALD C. MACCALLUM, JR., LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY 34–35 (Marcus G. Singer & Rex Martin eds., 1993).
[201] M. B. W. Sinclair, *Legislative Intent: Fact or Fabrication?*, 41 N.Y.L. SCH. L. REV. 1329, 1331 (1997).
[202] U.S. CONST. art. I, §§ 1, 5.

speech act occurs when a sufficient majority of legislators have voted in the manner provided by law to adopt a "legislative proposal offered for debate."[203]

In other words, a legislature *itself* "speaks" legislatively upon the adoption in the manner provided by law of "legislative proposal[s] offered for debate."[204] I would thus agree with Richard Ekins' that instead of a "sum of intentions held by each member of the majority," "what is held in common amongst legislators" is a common "proposal" they deliberate and vote upon.[205] I would thus also hold that the meaning of such legislation is the meaning of the proposals offered for debate and adopted.[206]

ii. Signs and Interpreting Legislatures' Speech Acts[207]

Of course, if the meaning of a legislative directive speech act is the meaning of the proposals offered for debate and adopted,[208] we must ask whose take on such meaning controls. Again, as Peirce reminds us, "nothing is a sign unless it is interpreted as a sign."[209] We must

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[203] *See Bill*, BLACK'S LAW DICTIONARY (7th ed. 1999); WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS 33-35 (7th ed. 1989) (summarizing and diagramming how "a bill becomes a law"); RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 230-31 (2012).
[204] *Id.*
[205] EKINS, *supra* note 203, at 231.
[206] *Id.* Though any such legislative proposal will have been adopted at a specific point in time, that is not to say that better and fuller understandings of such legislative speaker meaning cannot thereafter develop over time. *See* Section VIII below.
[207] For reasons of space, I consider only interpretation of legislative speech acts. In addition to the linguistic meaning of a statute, construction of the statute can (as in the case of other speech acts) provide a different legal meaning than the linguistic one. For example, in accordance with the lenity canon, a court might construe a statute more narrowly than its linguistic meaning. *See* POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 191-193 (Carolina Academic Press 2006). Thus, a court might construe a criminal statute in favor of "modern reader understanding" in light of the "general principle that people should receive 'fair warning' of what behavior is criminal." *See* GREENAWALT, *supra* note 146, at 63.
[208] *See supra* note 203 and accompanying text. Though any such legislative proposal will have been adopted at a specific point in time, that is not to say that better and fuller understandings of such legislative speaker meaning cannot thereafter develop over time.
[209] PEIRCE, *supra* note 7, at 2.306.

thus ask whose interpretation governs in the case of such debated and adopted legislative proposals?

Legislators are the elected officials who debate and vote on bills, and we must therefore seek as best we can their meaning of proposals offered for debate and adopted. Using meanings assigned by other speakers or hearers would effectively usurp the legislators' role. As Michael Sinclair puts it when speaking of legislatures, "Legislators are elected . . . . [and] To allow [a] 'hearer's' meaning to triumph . . . would be anti-democratic and would allow the triumph of non-elective law making over the normal, elective law-making."[210]

In an ideal situation, legislators objectively speak with a common voice about the meaning of the proposal, and such common voice is reasonably and objectively discernible from the legislative history or otherwise. Of course, the reality of the legislative process is no doubt rarely if ever so ideal.[211] What are we to do when an actual common voice is not reasonably and objectively discernible?

In such a case, the Second Interpretation Principle requires that we attempt as best we can to construct a common voice of hypothetical legislators who have the same duties, obligations, desires, motives, and other contexts as the legislators involved in the particular legislative process. It is hard to see how we can do better if, again, we are to do our best to avoid "the triumph of non-elective law making."[212] Consistent with the Second Interpretation Principle, this gives us the initial meaning of the legislation, which meaning is unleashed into experience and thus develops through time as discussed in Section VIII below.

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[210] *See* Sinclair, *supra* note 201, at 1388.
[211] As Prof. Slocum notes, "due to the enormous volume of legislation and other reasons, most legislators do not read most of the text of the statutes on which they vote." Slocum, *Contribution of Linguistics*, *supra* note 148, at 33.
[212] *See* Sinclair, *supra* note 201, at 1388.

Discerning such meaning can, of course, be difficult and subject to reasonable dispute. As I have written before, the pragmatics of finding speaker meaning is often complex, and reasonable minds can often disagree as to the results of such a process.[213] Not only is this the case with ordinary judges of speaker meaning, it is also the case with judges having the characteristics the "ideal" judge Eunomia.[214] Law, however, requires answers in particular cases, and we must do our best to find and provide such answers in a way that, again, avoids "the triumph of non-elective law making."[215]

For example, one can imagine a statute that simply reads "monarchs can only be killed in the month of June," and one can also imagine that the statute does not define "monarch," that all the legislators involved are dead, and that no legislative history for the statute survives. On the face of things, we cannot have rule of law if readers or judges can simply pick whatever meaning of "monarch" they personally find most appropriate—especially if they pick a meaning that allows regicides in the month of June.

Instead, we must look at the statute through the eyes of our hypothetical *legislators* having the same duties, obligations, desires, motives, and other contexts as the legislators involved in the particular legislative process. If, for example, these legislators swore to uphold the laws of the land and if these laws forbade murder, "monarch" cannot mean "king" or "queen." This would all the more be the case if such legislators operated in a system with a king or queen as head of state,

Again looking through the eyes of our hypothetical *legislators* having the same duties, obligations, desires, motives, and sharing the other contexts as the legislators involved in the

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[213] *See generally* Lloyd, *supra* note 5; *see also* Lloyd, *supra* note 27, at 244-50.
[214] *See* Lloyd, *supra* note 27, at 244-50.
[215] *See* Sinclair, *supra* note 201, at 1388.

particular legislative process, we must thus look for a meaning other than "king" or "queen." If, for example, the statute was passed at a time when newspapers and other non-legislative historical records note the near unanimous consent among the public that insects should be protected from extinctions and that limiting the hunting of monarch butterflies to the month of June was imperative to that insect's survival, interpreting "monarch" as the monarch butterfly could make good sense. Since the original legislators were part of that near-unanimous public, interpreting "monarch" as the butterfly would thus link "monarch" killing to the month of June in a reasonable fashion that accords with the views and obligations of our same-context hypothetical legislators.

As further discussed in Section VIII below, when deciding upon such a meaning, we must always remember, however, that the sense of monarch or of any other term involves the total actual and possibly-conceivable ways in which such sense unfolds or can unfold in experience. Since no finite mind can conceive of all the possible ways a term might unfold through time, no legislator's *understanding* of a term at given points in time can grasp all the possible ways that term's sense can play out in ever-unfolding experience. We must therefore take care to distinguish between meaning and understanding (original or otherwise). Thus, I discuss the unfolding of sense though time in more detail in Section VIII.B below and the unfolding of reference through time in more detail in Section VIII.A below.

c. Scalia's Less-Tethered Hypothetical Directive Meaning

To put the Second Interpretation Principle's hypothetical legislators in further context, Justice Scalia and his followers also rely upon hypothetical constructs, though they rely on much looser constructs than the Second Interpretation Principle's hypothetical same-context legislators. Claiming that we are "governed by what the laws *say*, and not by what the people who drafted

the laws intended,"[216] Justice Scalia would, again, use his "reasonable reader, an 'objectivizing *construct*,' who is aware of all the elements (such as the canons) bearing on the meaning of the text, and whose judgement regarding their effects is invariably sound. Never mind no such person exists."[217]

Of course, those concerned with improper judicial activism should worry about judges using such a hypothetical reader construct. Again, for the reasons discussed above in VII.D.4.b.ii, rule of law cannot prioritize reader over legislative speaker meaning in statutory interpretation.[218] Additionally, if we do not include the Second Interpretation Principle within "all the elements (such as the canons) bearing on the meaning of the text," we increase judicial interpretive discretion. We do that by ignoring restraints and suggestions of meaning provided by the duties, obligations, desires, motives, and other contexts restraining and informing the hypothetical legislators under the Second Interpretation Principle.[219]

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[216] *See* SCALIA & GARNER, *supra* note 1, at 378.
[217] *Id.* at 393.
[218] *See again* Sinclair, *supra* note 201, at 1388.
[219] To continue with "monarch" statutes, one can imagine, for example, a statute that simply reads "monarchs are banned." Imagine also that the only reference to what "monarchs" means is in the legislative history, and resort to legislative history is banned. *See* Scalia & Garner, *supra* note 1, at 388 ("use of legislative history is not just wrong; it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation in deciding the case presented.") A "reasonable reader" here might therefore read that term as referring to either butterflies or kings. However, a hypothetical legislator who shares the same duties, obligations, desires, motives, and other context as the bulk of legislators involved in the particular legislative process must interpret "monarchs" as butterflies if the legislative history shows that this was the meaning debated. Such an approach no doubt leaves much less room for "judicial activism" here--at least where reliance on legislative history is banned.

5. Signs and Verdictives

In exploring whose meaning should control in verdictives (which again consist of such speech acts as convicting, acquitting, and fact finding)[220] and as another example of speaker meaning that avoids attempted fusion of disparate individual intents, I briefly now explore the example of a jury that finds a defendant negligent in a slip and fall case and awards the plaintiff damages in the amount of $100,000.00.

Although not an enduring entity like a legislature, the jury's group speech acts require a certain number of votes of members of the body. For example, the Federal Rules of Civil Procedure provide that "[u]nless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least six members."[221]

For purposes of the example here, we can posit a jury of six persons in a civil case where a majority rather than a unanimous verdict is required. After several days of deliberation, the jury in the jury room by a vote of five to one finds a defendant drugstore negligent in a slip and fall case and awards the plaintiff damages in the amount of $100,000. One of the jurors did not think the drugstore was negligent. Although five of the jurors did find the drugstore negligent, none of them individually initially thought $100,000 was the proper damage amount. They each had different amounts in mind but finally compromised on $100,000 as a fair amount.

On these facts, the jury's verdictive speech act is the determination that the defendant was negligent and that the grant to the plaintiff should be a damage award of $100,000. This verdictive speech act is not some sum of the individual intents or acts of six separate jurors (or of the subset of five who voted in favor of the verdict). Instead, it is the verdictive speech act of the

[220] AUSTIN, *supra* note 131, at 153.
[221] FED. R. CIV. P. 48(b).

jury as a separate entity, which speech act occurs because the requisite majority of jurors voted to find liability and to award damages in the compromise amount of $100,000, an amount differing from the amount individual jurors would have awarded without the need of compromise.

However, as with legislators in the legislative example above, that is not to say that individual jurors' statements, intents, and purposes are irrelevant to the interpretation and construction of the group verdict. The jury can be polled to confirm each juror's vote.[222] If, for example, a tired foreman erroneously left a zero off the jury's verdict form and filled out the verdict form with the sum "$10,000" rather than "$100,000," we would hope for a poll to verify the award amount.[223] In such a case, the jurors' intent for "$10,000" to mean one hundred thousand dollars should of course be controlling. Additionally, turning from interpretation to construction, if, for example, the dissenting juror has evidence that the five voted against the drugstore because they were bribed, the dissenting juror should of course be heard in considering whether the verdict should be construed as unlawful.[224] In all such cases, however, the *jury's* verdictive speech act is a separate speech act apart from the intents and purposes of the individual jurors.

When reading the jury's verdict form, there should therefore be little question that the First Interpretation Rule should control here. We can reasonably discern both the jurors' identity and their intent as to the verdict the majority approved. Reader meaning, on the other hand, might find an erroneous "plain meaning" of $10,000 unless the reader was aware of the actual

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[222] FED. R. CIV. P. 48(c).
[223] *See also* FED. R. CIV. P. 49(b)(3) (addressing "Answers Inconsistent with the Verdict" and 49(b)(4) addressing "Answers Inconsistent with Each Other and the Verdict").
[224] *See, e.g.*, FED. R. EVID. 606(b)(2)(B) (permitting jurors to testify regarding whether "an outside influence was improperly brought to bear on any juror").

jurors' meaning and factored that meaning into interpretation. But would this not return us to the jury's speaker meaning as understood by the jurors? Use of a hypothetical jury's meaning (which could differ from the actual jury's meaning) would on its face be inappropriate here since we can reasonably discern both the jurors' identity and their intent as to the verdict the majority approved. Both the First Interpretation Principle and the Second Interpretation Principle thus soundly direct us to the actual verdictive act as understood by the actual jurors.

VIII. Meaning and Time: Signs, Originalism, and the Fixation of Meaning Debate

Having addressed multiple aspects of the semiotics of meaning, we can now briefly turn to the semiotics of meaning and time. Even though meaning is not transcendentally fixed,[225] there remains the question of whether meaning somehow becomes fixed *within* our webs of signs at the time such meaning is first signified. For example, Justice Scalia's version of the "fixed-meaning canon" holds "that words must be given the meaning they had when the text was adopted."[226] To answer this question, we must distinguish between the reference and the sense component of meaning and provide an answer for each. To answer this question, we must also be careful to distinguish between understanding and sense with sense, again, being the broader total actual and possibly-conceivable ways in which notions unfold or can unfold in ever-changing experience. Given our lack of omniscience, our understanding of a term at any given point in time will always thus be narrower than the term's sense.

A. Time and Reference of Signs

With respect to the reference component of meaning *within* our webs of signs, we can in many cases, at least, consider fixation the *default* (but only the *default*) position, even though

[225] *See* Section III.B above.
[226] *See* SCALIA & GARNER, *supra* note 1, at 428.

such reference is not transcendentally fixed. If, for example, we say that a lawyer gave a speech on March 14, 2019, we would ordinarily say reference to the speech itself remains fixed *within* our discourse even though we may from time to time reach different conclusions as to what was meant by that speech. That is, we might debate the meaning of the speech over time but we would ordinarily say that we are referring *within* our discourse to the same speech.

However, though fixation is thus the initial default with reference, we can nonetheless say that reference can and should change in certain situations within our discourse. For example, if we learn that X rather than Y was the first person to write a treatise on the interpretation of contracts, we will thus change the reference of the phrase "the first person to write a treatise on contracts" from Y to X. Since reference is not transcendentally fixed,[227] we can make such correction. Thus, reference can be refined or changed by refining definite descriptions as discussed above in Section III.B.1.a.

B. Time, Sense, and Understanding of Signs

For at least the four reasons discussed below, fixation of sense claims are at best tautological and at worst erroneous. First, since sense is the total actual and possibly-conceivable ways in which notions unfold or can unfold in experience, [228] "freezing" or fixing

[227] *See again* Section III.B.1.a above. Although reference is not transcendentally fixed, it does provide stability in the rule of law. Taking again our butterfly statute that provides "monarchs are banned," the sense of "monarch" cannot shift through time to mean "royal head of state" without a corresponding change in the reference. Such unlinking a statute from one referent and linking it to a radically different referent no doubt requires appropriate state action if we are to have rule of law. Again, this is not to say that the sense or understanding or bothof monarch cannot unfold over time: we can discover new colors of the monarch, we can come to see the monarch as no longer endangered, we can come to see the monarch in new symbolic ways, etc. *See* Section VIII.B below. This is also not to say that reference cannot be refined (as opposed to changed) by refining definite descriptions as discussed above in Section III.B.1.a. The discussion above of the referent of marriage provides such an example. *See id.*

[228] *See* Section III.B.2.a above.

such sense at best simply "fixes" such sense as such *possible* as well as actual unfoldings in ever-unfolding and ever-changing experience. Such a tautology thus hardly rules out possibilities of sense yet ungrasped by any current understanding as experience always continues to unfold.[229]

Second, since meaning plays out in ever-changing experience, such experience itself brings its own changes to the unfolding of meaning. We now, for example, must debate whether "marriage" in an older statute includes same-sex marriage given the social and legal changes in the concept of marriage. Marriage now means something very different today[230] than it meant when only members of the opposite sex could marry, when women were belittled by coverture,[231] or when many heterosexual blacks were barred from the institution entirely as slaves.[232] Thus, we also now see such definitions of marriage as "A legal union between two persons that confers certain privileges and entails certain obligations of each person to the other, *formerly restricted in the United States to a union between a woman and a man*" (emphasis added).[233] This definition notes how the meaning of marriage has unfolded through time by highlighting removal of a once necessary element: a union of those of the opposite sex.[234] Consistent with this unfolding of the concept of marriage through time, Peirce eloquently and presciently tells us that:

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[229] As explored in Section VII above, we could non-tautologically speak of *af*fixation of meaning such as whose meaning should we affix to certain signs.
[230] *See* Obergefell v. Hodges**,** 135 S.Ct. 2584 (2015).
[231] *See generally* Amber Bailey, Comment, *Redefining Marriage: How the Institution of Marriage Has Changed to Make Room for Same-Sex Couples,* 27 WIS. J. L. GENDER & SOC'Y 305 (2012).
[232] *See generally* Darlene C. Goring, *The History of Slave Marriage in the United States,* 39 J. MARSHALL L. REV. 299 (2006).
[233] *Marriage,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016).
[234] *Id.*

> A symbol [such as a word], once in being, spreads among the peoples. In use and in experience, its meaning grows. Such words as *force, law, wealth, marriage*, bear for us very different meanings from those they bore to our barbarous ancestors.[235]

Third, precedent presents an obvious legal example of such experiential change. A court's determination of statutory meaning is legally binding so long as the precedent lasts or until the legislature amends the statute to provide other meaning.[236] Precedent broadly presents problems for any alleged fixation of meaning unless perhaps one considers the possibility of "relying on precedents" as part of the original meaning.[237] But if "relying on precedents" is part of the original meaning, this would reaffirm that the meaning is not fixed but can change as precedent requires.[238]

Fourth, such fixation claims are wrong to the extent they ignore the fact that speakers can actually intend for their concepts to unfold over time. A group of legislators, for example, could intend that a statutory concept of "marriage" for which they vote should evolve with less-discriminatory lay understandings of marriage over time. In any case, where the purpose of a statute is to govern future behavior, would it not be reasonable to imagine those involved in passage of the statute assumed (unless perhaps they tried to include a fixation clause along the

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[235] PEIRCE, *supra* note 7, at 2.302. As Blake also powerfully notes: "Reason, or the ratio of all we have already known, is not the same that it shall be when we know more." *See* WILLIAM BLAKE, *There is No Natural Religion, in* POEMS AND PROPHECIES 4 (Alfred A. Knopf 1991).

[236] *See e.g.* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeal*, 73 GEO. WASH. L. REV 317 (2005). Although beyond the scope of this paper, Barrett notes various arguments as to the proper force of such stare decisis. For example, she notes that "One line of thought interprets Congress's silence following the Supreme Court's interpretation of a statute as approval of that interpretation. If Congress had disagreed with the Supreme Court's interpretation, the argument goes, Congress would have amended the statute to reflect its disagreement." *Id.* At 317.

[237] *See* Greenawalt, *supra* note 154, at 55-56.

[238] *See id.* I lack the space to explore originalism and precedent in further detail here. I hope to do so in a further future article.

lines discussed below in this Section VIII.B) that meanings of the statute would unfold in sensible ways in such future experience?

One can also, of course, give countless lay examples of such intended unfolding of sense. If I write letter to a friend telling him that he is always welcome at "my house," it would not make sense in such an endless invitation for the meaning of "my house" to be frozen as of the time of writing. I am not inviting my friend to a house frozen in time beyond reach but to a house that exists in time and thus changes in physical and other ways including social ways. As social standards (such as desirability and price), for example, unfold over time, understandings of "my house" will unfold accordingly in those regards as well.

In light of these four points, we should return briefly to Justice Scalia's version of the "fixed-meaning canon" which, again, provides "that words must be given the meaning they had when the text was adopted."[239] Could we perhaps make more sense of Justice Scalia's canon by modifying it to apply only to statutes which expressly include a "freezing" or fixation clause such as: "terms used in this statute shall have the meanings in effect as of the date of passage of this statute"? Even ignoring how we should handle the specific phrase "meaning in effect" (whose meaning? does "meaning" here mean understanding rather than sense?), it is hard to see how such a modification would work. First, we have the problem with precedent discussed above. Second, we cannot understand such "frozen" meanings apart from how they actually and possibly play out in ever-unfolding and ever-changing experience. But to say this, of course, is to say such meanings are not fixed except perhaps, again, in some tautological sense such as the

[239] *See* SCALIA & GARNER, *supra* note 1, at 428. Justice Scalia does, for example, temper this canon with such provisos as his "principle of interrelating canons ("No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions") and his recognition that "general terms may embrace later technological innovations." *Id.* at 59, 16.

meaning adopted by the legislature with the "fixation" clause is the meaning adopted by the legislature with the "fixation" clause.

C. Time and Application of Signs

Those who would "freeze" or fix meaning[240] might try to respond that applications or extensions of concepts change rather than the concepts themselves. For example, such persons might maintain that the original concept of marriage above has not changed but that instead we now have new "extensions" or "applications" of the term "marriage." Such persons might claim that marriage is a general concept that does not purport to name every person, place, thing, or event to which the concepts possibly extend.[241] They might claim that such general concepts give us the "criteria" or other guidance we need to determine what specific things or events are included within the concepts; for example, the concept of "green" gives us the "criteria" or other guidance we need to pick out actual green things in the world.[242] Those who would "freeze" or fix meaning might thus attempt to parse between concepts (which do not change) and applications of those concepts, where applications may include applications not contemplated at the time of a statute's passage.

The unfolding of the concept of marriage through time, however, on its face does not permit such an approach. Where a union of members of the opposite sex was an original element of the concept of marriage,[243] current application of the concept of marriage to same-sex parties

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[240] *See, e.g.*, SCALIA & GARNER, *supra* note 1, at 435 ("A legal text should be interpreted through the historical ascertainment of meaning that it would have conveyed to a fully informed observer at the time when the text first took effect."). Of course, would not a fully informed observer at any time know that concepts can unfold over time in unforeseen directions?

[241] As Michael Sinclair notes, "A legislature cannot normally enact extensions; they would be simply too particular." Sinclair, *supra* note 201, at 1370.

[242] *See, e.g., id.* at 1350.

[243] *Marriage,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016).

would be impossible without a change in the very concept of marriage that eliminates the opposite-sex requirement. Additionally, again, the meaning of the "criteria" given by concepts for application of such concepts cannot be fully fixed since we cannot understand "frozen" meanings outside of the very time and unfolding of experience required to understand them at any point in time.

In saying this, however, I do not deny that we apply concepts. Judicial opinions, for example, of course apply concepts when such opinions apply rules to the case at hand. However, such application is necessarily performed in the context of then-unfolding experience, which experience bears the marks of prior experience to date. Additionally, I fully acknowledge the importance of application since sense itself unfolds through experience, and application involves such unfolding of sense. One cannot therefore have a reasonable understanding of concepts apart from reasonably grasping such unfolding of meaning through application. Thus, Gadamer can correctly say that "[a]pplication does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. It is the very understanding of the universal—the text—itself."[244] For the fullest sense of "understanding," I would therefore agree with Gadamer that "understanding always involves applying the meaning understood."[245] If sense unfolds through experience, how could we say otherwise?[246] This point is magnified by the fact

[244] GADAMER, *supra* note 98, at 336. I would also agree that "[i]t is only in all its applications that the law becomes concrete. Thus the legal historian cannot be content to take the original application of the law as determining its original meaning." *Id.* at 322.
[245] *Id.* at 328. I thus also agree with Gadamer that "application is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but co-determines it as a whole from the beginning." *Id.* at 321.
[246] *Cf.* PEIRCE, *supra* note 7, at 1.219 ("What I mean by the idea's conferring exist upon the individual members of the class is that it confers upon them the power of working out results in this world, that it confers upon them, that is to say, organic existence, or, in one word, life.")

that sense is determined by context,[247] and that the sense of context, like other sense, also unfolds through experience.[248] However, in addition to the unfolding of meaning through time by the applications of concepts through time, I would be clear that concepts themselves (as with the case of marriage above) can evolve through time in ways that change application itself.

D. Time and Signifier Drift

In addition to such evolving meaning of the signified through time, signifiers through signifier drift can also refer to different or additional signifieds over time. For example, the Middle English verbal signifier for a road was "rode"[249] though the signifier "rode" now signifies the past tense of "ride." Such signifier change through time is often used as a primary argument by originalists: we must, the argument goes, be originalists to avoid confusion in light of such signifier drift.[250]

This argument, however, does not address the fact that the *signified* (such as the meaning of the word "marriage") can unfold over time. Instead, this argument focuses on the different case of *signifier* drift.

If the signifier "X" signified the concept A when used in a statute but now signifies the concept B, we must of course recognize that the original statute signifies the concept A rather

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[247] *See* SCALIA & GARNER, *supra* note 1, at xxvii ("Nothing but conventions and contexts cause a symbol or sound to convey a particular idea.").

[248] As I am not dealing with pragmatics in detail in this article, I will not also explore problems finding "fixed" sense that result from any differences in experience and understanding of an author and a reader. *See, e.g.*, PEIRCE, *supra* note 6, at 5.506 (discussing the imprecision flowing from the fact that "no man's interpretation of words is based on exactly the same experiences as any other man's"); GADAMER, *supra* note 98, at 272 ("The recognition that all understanding inevitably involves some prejudice gives the hermeneutical problem its real thrust.").

[249] *See Road*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).

[250] *See* SCALIA & GARNER, *supra* note 1, at 78, 82 (discussing what Queen Anne may once have meant by "awful, artificial, and amusing").

than the concept B. However, this does not mean that we should ignore the ways the concepts A and B themselves unfold over time.

Confusing signifier drift with the unfolding of concepts through time thus conflates the signifier with the signified (and we might add that fallacy to the list of logical fallacies lawyers should avoid). That we must now, for example, understand the Middle English "rode" as road[251] when applying a Middle English "rode" statute hardly implies that the *concept* of a road cannot unfold through time. Nor does understanding Shakespeare's use of "Marry" in an original archaic sense of expressing "indignant surprise"[252] where appropriate mean either (i) that the concept of marrying or marriage cannot unfold over time or (ii) that judges and lawmakers cannot recognize that sense unfolds over time in the way discussed above.[253] Signifier drift categorically differs from the unfolding of the sense of concepts, and a careful semiotics avoids conflating the two.[254]

IX. Some Brief Closing Thoughts on First Amendment Semiotics

Grappling with the signifier, the signified, whose meaning should control in various situations, and correlations between the signifier and a signified can also help refine free-speech analysis. Although deep explorations of semiotics and free speech are beyond the scope of this introductory article on semiotics and the law, I can outline a few remarks on the subject. These remarks presume reasons commonly given for protecting speech: protecting democracy and our

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[251] *See Road*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014).
[252] *See* 1 ALEXANDER SCHMIDT, SHAKESPEARE LEXICON AND QUOTATION DICTIONARY 696 (Dover 1971).
[253] *See* Section III.B.2 above.
[254] *See again id.* (discussing what Queen Anne may once have meant by "awful, artificial, and amusing").

right to self-governance,[255] permitting "the search for knowledge and 'truth' in the marketplace of ideas,"[256] protecting "individual autonomy, self-expression, or self-fulfillment,"[257] and fostering tolerance.[258]

A. Freedom of Speech and Signifier Types

Good first amendment jurisprudence recognizes that words are not the only signifiers of expression. The American flag, for example, is no doubt a symbol of America, and burning that flag can therefore symbolize, for example, disapproval of America or American policy. If so intended, flag burning can thus be symbolic expression despite Chief Justice Rehnquist's general claim that "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others . . . ."[259] Of course, burning a flag can also be non-symbolic where there is no expressive intent. Burning a flag, for example, can be a proper means of flag disposal and need express nothing in such a case beyond perhaps the desire to dispose of a flag properly.[260] Or, on the other hand, by virtue of proper disposal, such flag burning might be seen as great respect for the flag itself or the country it represents.

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[255] *See generally* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).
[256] *Id.* at 502 (setting forth the rationale while contending that "a completely unregulated market of ideas will lead to discovery of truth is highly contestable").
[257] *Id.* at 502-04; Brian C. Murchison, Speech and the Self-Realization Value, 33 HARV. C.R.-C.L. L. REV. 443, 498–503 (1998) (". . . First Amendment analysis [should] attend more self-consciously to the speaker's development through expression.").
258 Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 984-85 (1990).
259 Texas v. Johnson, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting).
[260] 4 U.S.C. § 8(k) (2006). *See also* Johnson, 491 U.S. at 411 (stating that federal law holds burning to be the preferred means of disposing of a flag that is no longer fit for display).

B. Freedom of Speech and Harmful Signifiers

However, it does not follow from the fact that anything can serve as a signifier that all things are fair game for signifiers and free expression **as a matter of law**. Again, trademark law protects a "word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others,"[261] copyright law protects "an original work of authorship (such as literary, musical, artistic, photographic, for film work) fixed in any tangible medium of expression,"[262] and criminal law would not permit killing a public official as a signifier of political protest.[263] In each of these cases, freedom of speech analysis must balance the harm of violence to rights or to person against any harm of limiting expression. Exploring such a balance in detail is beyond the scope of this article. However, I can address below the potential fungibility of signifiers as one available balancing tool in certain cases.

C. Freedom of Speech and Fungible Signifiers

If a non-harmful signifier can signify just as well as a harmful one, a good grasp of semiotics supports balancing interests and requiring use of the non-harmful signifier rather than

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[261] *Trademark*, BLACK'S LAW DICTIONARY (7th ed. 1999) (also noting that "[i]n effect, the trademark is the commercial substitute for one's signature").

[262] *Copyright*, BLACK'S LAW DICTIONARY (7th ed. 1999). One might by copyright analogy justify, as a matter of construction, prohibitions against protestors disrupting for political expression a funeral designed by others to convey a message of sorrow and good remembrance. I have explored other rationales for such restrictions elsewhere. *See generally* Lloyd, *supra* note 263,

[263] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence."); United States v. Stevens, 599 U.S. 460, 493 (2010) (Alito, J., dissenting) ("The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes."); United States v. Mullet, 868 F. Supp. 2d 618, 623 (N.D. Ohio 2012) ("The First Amendment has never been construed to protect acts of violence against another individual, regardless of the motivation or belief of the perpetrator."). I have also written elsewhere on restrictions on using living beings as signifiers. *See* Harold A. Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 FIRST AMEND. L. REV. 237, 244-45, 282-83 (2013).

the harmful signifier. Using the non-harmful signifier, the speaker speaks just as clearly, and harm to others is avoided. For example, if burning a copy of a draft card conveys the same sense of protest to unwitting viewers conveyed by burning an actual draft card, where is the free-speech need to damage an official document such as a draft card?[264]

Continuing to balance harms, we can also imagine a cookie baker who offers his famous and easily-identifiable cookies for retail sale, who claims that his cookies are *his* works of art celebrating heterosexuality and condemning homosexuality, who has made his views on sexual orientation well known, and who therefore refuses to sell his cookies to gay customers.[265] In other words, he thus claims his cookies are signifiers for expressive (if not also assertive) speech acts.[266] Given that anything can be a signifier, this sort of example is of great importance if we worry that freedom of speech may be used as cover for discrimination or other pernicious purposes.

Signifier fungibility can provide an answer here as well. The cookie baker can choose other signifiers that at least equally convey his celebration of heterosexuality and his condemnation of homosexuality, signifiers that in fact might convey such celebration and condemnation more precisely. For example, putting his thoughts and rationales to words can perhaps express them more clearly than would such unconventional signifiers such as cookies. If

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[264] Discussing this iconic option would have bolstered the Court's decision upholding a draft card mutilation statute in United States v. O'Brien, 391 U.S. 367 (1968). Though modern color photocopying technology would be easy to make an exact duplicate for burning, prior to such technology, a folded piece of paper or one in an envelope, for example, could perhaps have passed as the real card before an audience.

[265] Due to space limitations, I discuss this simpler case of the cookie baker who refuses to sell to gay customers. I hope to do a future article on the semiotics of Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (involving a wedding cake baker who refused to sell a wedding cake to a gay couple).

[266] *See* Section VI. above.

so, requiring other fungible signifiers would thus not require discrimination against gay customers while still permitting the baker's free (and perhaps more precise) expression.

If other fungible signifiers exist for his message (including words which may be more precise means of expression), how would prohibiting discriminatory cookie sales (i) infringe on the baker's right to speak on matters of public concern, (ii) interfere with the battle of truth in the marketplace of ideas, (iii) endanger his right to "self-expression," or (iv) improperly (after balancing the harm of discrimination against the fungibility of signifiers) "circumscribe[e] his autonomy and self-fulfillment" as a matter of expression?[267]

Of course, where signifiers are not so reasonably fungible, such lack of reasonable fungibility can support the use of such signifiers where, for example, harm to others does not outweigh use of such signifiers. An excellent example of such lack of fungibility would be signifiers uniquely conveying emotional meaning, such as Mr. Cohen's "Fuck the Draft" jacket worn in the corridors of the Los Angeles County Courthouse in 1968.[268]

D. Freedom of Speech and Correlation of the Signifier and the Signified

Notwithstanding the reasoning above, however, could the cookie baker above reasonably argue that some sort of objectionable compelled expression occurs if he must sell his cookies to gay people?

1. Symbolic Concerns

If the cookie baker uses his cookies to celebrate heterosexuality and condemn homosexuality, does compelling him to sell his cookies for use at a gay celebration compel him

[267] *See* Section IX. above on reasons offered for free speech protection.
[268] *See generally* Cohen v. California, 403 U.S. 15 (1971). In that case, Mr. Cohen used that phrase to express publically ". . . the depth of his feelings against the Vietnam War and the draft . . . ." *Id.* at 16.

to express a contrary message? If his cookies are used at such a celebration, do they not now convey celebration rather than condemnation?

Semiotics helps us see how no compelled expression exists here for at least two reasons. First, under the First Interpretation Principle, the cookie baker's meaning is unimpaired. The baker's cookies are famous, easily recognizable, and his views are well known. Second, signifiers can be put to non-expressive use without impairing the speaker's meaning. For example, I can use a treatise as a doorstop without impairing or changing the speaker's meaning. Similarly, a gay celebration can put out cookies solely for purposes of refreshment without impairing or changing the speaker's meaning. As such, again, one cannot reasonably claim that sales of cookies to gay people endangers the baker's right to speak on matters of public concern, interferes with the battle of truth in the marketplace of ideas, endangers the baker's right to "self-expression," or "circumscribes" his "autonomy, self-expression, and self-fulfillment" as a matter of *expression*.[269]

2. Additional Indexical Concerns

Apart from the meaning the baker attaches to his cookies, if his cookies are used at a gay celebration and everyone at the celebration is aware that the cookies came from his bakery, does this physical connection with the celebration in itself not indicate either celebration of homosexuality or at the very least the baker's involvement with, and thus approval of, a sexual orientation he condemns? In asking such a question, we are in fact asking at least two indexical questions.

[269] *See* the first paragraph above in this Section IX setting out reasons offered for free speech protection.

First, we are asking whether the baker's mere physical connection through the sale itself indicates views disavowed by the baker. This is not a difficult question. On the purely transactional level, a retailer simply sells his goods, and the acceptance of the price and tender of the goods therefore simply indicate such a sale. There seems little more to be said on this point of pure logic.

However, we must also ask whether sale of the cookies could also indicate mental attitudes of the baker. For example, an individual's donation to a political party may reasonably indicate support of that party (although it can indicate other things such as desire to gain favor). Though mental states can thus be indicated, it is hard to find indexical expression here of mental states supporting the gay party or anything gay at all. Again, the baker is in a retail business and thus presumably sells cookies to many whose views he rejects. It is thus hard to see how the default state of mind indicated here is anything more than simply a retail one. Should one have any doubt, the baker's views on homosexuality are well-known and should thus clarify any such doubts.

Thus, one cannot reasonably claim that any indexical meaning of sales of cookies to gay people endangers the baker's right to speak on matters of public concern, interferes with the battle of truth in the marketplace of ideas, endangers the baker's right to "self-expression," or "circumscribes" his "autonomy, self-expression, and self-fulfillment."[270]

Due to space limitations, I must end my brief First Amendment comments here. I hope, however, to see others probe such semiotics including courts as they wrestle with the extent and limits of freedom of speech.

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[270] *See again* the first paragraph above in this Section IX setting out reasons offered for free speech protection

X. Conclusion: Semiotics and the Middle Path

Having now examined the utility and insights of semiotics for those involved in legal theory, practice, and education, I end by first pointing out two opposing paths that one might wrongly take after an exploration of semiotics. I then end by noting a sensible semiotics that threads between such opposing erroneous paths.

Since signifiers can effectively include any concrete, abstract, tangible, or intangible thing (such as any "concrete object," "abstract entity," "idea or 'thought,'" "perceptible object," "physical event," or "imaginable object,)[271] and since meaning is not transcendentally given,[272] one must carefully gauge one's reaction to that vastness of potential signifiers and their potential signifieds.

Taking such care, one must not abandon all restraint and believe that one can assert, direct, commit, declare, or express[273] anything as signified with anything as signifier. As I have written before, both semantic and pre-semantic experience would push back against such unlimited license.[274] For example, if one steals a trademark, directs actions with words that no one can understand, or claims to a police officer that "stop" means "go," one may well experience failure or loss.

On the other hand, one must not cower in the face of that vastness of potential signifiers and signifieds by seeking comfort in wrong beliefs[275] in formalism (i.e., in beliefs that the law is "a self-contained system of legal reasoning" involving deduction of "neutral" and apolitical

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[271] *See* NÖTH, *supra* note 8, at 80. *See also* PEIRCE, *supra* note 7, at 2.230.
[272] *See* Section III. B. 1. a. above.
[273] *See* Section VI. above on the various types of speech (semiotic) acts.
[274] Lloyd, *supra* note 27, at 222-50.
[275] *See id.* at 210-22 (describing various freedoms we have in, for example, framing, creating meaning, and adjusting categories).

results from "general principles and analogies among cases and doctrines."[276]) Again, since referents and sense are not transcendentally given, and since reality is "internal" to our semantic lifeworlds,[277] we can always have hope of seeking change where progress requires. Additionally, since sense itself unfolds in experience over time, one cannot speak of the law in any meaningful way as a "self-contained" system severed from such unfolding of sense in experience over time.

Unlike the approaches above, a sensible semiotics must by definition actually work.[278] It must take a middle path between (i) formalism lost in a "self-contained" system impossibly severed from the unfolding of sense in experience and (ii) any semiotics of unlimited license. Semiotics shows us that such a middle path must also be a "hermeneutic" path, i.e., a path involving interpretation. One cannot workably address what one does not understand. To understand, one must have workable notions of both meaning and interpretation which allow one to "present [something] in understandable terms" and "to explain or tell the meaning of [that something]."[279] I have therefore called this middle path "hermeneutic pragmatism" to reflect both the required pragmatism and the required understanding of meaning and interpretation.[280] In this middle path, in this sensible semiotics, in this hermeneutic pragmatism lies law's soundest way to achieving sensible and ever-unfolding justice and rule of law.

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[276] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 16-17 (1992) (defining formalism).
[277] *See again* Lloyd, *supra* note 27, at 210-22, 232-34; PUTNAM, *supra* note 33, at 114 (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 . . . .).
[278] I have addressed workability in detail elsewhere. *See* Lloyd, *supra* note 27, at 264-74.
[279] *See Interpret,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014)
[280] *See* Lloyd, *supra* note 27, at 201-02.

Appendix

Some Further Useful Terms and Concepts

I. Three Subdivisions of Semiotics

Charles Morris classically provides a useful definition of three subdivisions of semiotics: pragmatics, semantics, and syntactics.

Pragmatics "is that portion of semiotic which deals with the origin, uses, and effects of signs within the behavior in which they occur."[281] Understanding pragmatics as the study of how individuals in actual practice use words and other signs, I have written in detail about the subject elsewhere and will therefore not explore in detail in this article many of the matters I have previously addressed.[282] Pragmatics is, of course, an extremely important subdivision of semiotics for lawyers. Much of what we do involves how a particular person or entity used language, such as struggling with what *they* meant by a word or words which they used.

Semantics "deals with the signification of signs in all modes of signifying," and syntactics "deals with combinations of signs without regard for their specific significations or their relation to the behavior in which they occur."[283] This article explores semantics to the extent it explores the signified but does not explore syntactics.[284]

II. Semiosis vs. Semiology and Tokens vs. Types

To help readers as they explore semiotics further, I note here three distinctions readers will likely encounter.

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[281] MORRIS, SIGNS, LANGUAGE AND BEHAVIOR 219 (1946).
[282] *See generally* Lloyd, *supra* note 5.
[283] *Id.*
[284] Nöth describes the three branches as follows using “sign vehicle” for “signifier”: syntactics "studies the relation between a given sign vehicle and other sign vehicles," semantics "studies the relations between sign vehicles and their designata," and pragmatics "studies the relation between sign vehicles and their interpreters." NÖTH, *supra* note 8, at 50.

First is the distinction between "semiotics" and "semiosis." "Semiosis" is "the *process* of meaning-making"; this includes meaning making involved in the interaction of the signified and signifier.[285] The term also refers to "signification as a process" or "the activity of signs"[286] and "the process of sign interpretation."[287] It can also mean "any sign action or sign process" or "activity of a sign."[288]

Second is the distinction readers may see between "semiotics" (referring to work within the tradition of Charles Sanders Peirce, which tradition this article follows) and "semiology" (referring to work within the tradition of Ferdinand de Saussure).[289] Saussure's views[290] are generally beyond the scope of this paper, which again follows the tradition of Peirce.

Third is the distinction between tokens and types. As Nöth puts it, "A sign in its singular occurrence is a token, whereas the sign as a general law or rule underlying its use is a type." [291] Taking the word "fast" as an example: "As a word of the English language it is a type. Every written or spoken instance of that is a token."[292] Thus, if a paragraph uses the word "contract" four times, there will be four tokens of the English language word.

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[285] *See* CHANDLER, *supra* note 44, at 259 (referring in Peircean fashion to the signifier as "representamen" and the signified as "the object and the interpretant").
[286] *Semiosis*, ENCYCLOPEDIA OF SEMIOTICS (Paul Bouissac ed., 1998).
[287] Short, *supra* note 74, at 105.
[288] VINCENT M. COLAPIETRO, GLOSSARY OF SEMIOTICS 178 (Paragon House 1993) (bolding omitted).
[289] *See* CHANDLER, *supra* note 44, at 259.
[290] Saussure took a synchronic approach to semiotics thus studying "a phenomenon (such as a code) as if it were frozen at one moment in time." *Id.* at 262. Consistent with this, he distinguished between (i) "langue" as an "abstract system of rules and conventions of a signifying system [that] is independent of, and preexist, individual users" and (ii) "parole" which "refers to concrete instances of [language's] use." *Id.* at 252. As I see semiotics and language as live (even though they carry potentially-challengeable traditions and ready-made concepts and schemas), I therefore see Saussure's approach as quite wrong.
[291] NÖTH, *supra* note 8, at 81.
[292] *See id.*

III. Signs and Lifeworlds

Lawyers exploring semiotics in any depth will encounter the terms Lebenswelt (or lifeworld), Umwelt, and Innenwelt. Although the first of these three terms is likely familiar to many lawyers, I will briefly address all three terms. Assuming that language shapes experience,[293] I favor Putnam's definition of the "lifeworld" or "Lebenswelt" as "the world as we actually experience it."[294] As I would define the term, such a lifeworld includes both the technical as well as the non-technical.[295] It includes interpretive groups that are "nested" within others; thus, 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."[296] Lifeworlds are therefore complex webs of meaning where

[293] I agree 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." RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 5 (1989). Similarly, Gadamer claims that language is "the all-embracing form of the constitution of the world" and on language "depends the fact that man has a *world* at all." GADAMER, *supra* note 98, at 440.

[294] *See* PUTNAM, *supra* note 33, at 118. Lacking the space to give an extensive history of the use of this term, I would briefly point back to Husserl. Smith gives useful 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).

[295] *See* CHAÏM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 99 (John Wilkinson & Purcell Weaver trans., 1969) (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").

[296] BENSON, *supra* note 142, at 74. Thus, Benson also describes Stanley Fish's 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 295, 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

change generally requires justifications acceptable to the appropriate members of the nested communities.[297] For example, competent lawyer members of such complex webs will push back on claims, for example, that "due process" is a meaningless term.

"Umwelt" is "[t]he environment selectively reconstituted and organized according to the specific needs and interests of the individual organism . . . ."[298] Put another way, "Umwelt" is the "environment insofar as an organism is equipped to perceive it" and is thus "not simply what is objectively there, but only what is perceptually and operationally available to the organism."[299] As to the relation of Umwelt to Lebenswelt, Deely notes "the specifically human Umwelt" is called by some the Lebenswelt.[300]

According to Deely, the Umwelt "depends upon and corresponds to" an Innenwelt.[301] An Innenwelt is a "cognitive map, developed within each individual" that "enables the individual to find its way in the environment and insert itself into a network of communication, interest, and livelihood shareable especially with the several other individuals of its own kind."[302]

IV. Charity and Related Notions

Consistent with rational interaction, both the First Interpretation Principle and the Second Interpretation Principle assume that speakers acting in good faith wish to speak

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habits, ways of thought, methods, external circumstances, and traditions known to the users of the terms.").

[297] *See* PERELMAN & OLBRECHTS-TYTECA, *supra* note 295, at 513 ("A deviation from usage requires justification . . . .").

[298] DEELY, *supra* note 49, at 59-60.

[299] COLAPIETRO, *supra* note 288, at 201 (Paragon House 1993).

[300] DEELY, *supra* note 49, at 60.

[301] *Id.*

[302] *Id.*

relevantly in the speech situation at hand.[303] That is, they assume that speakers acting in good faith by definition wish to speak in a way that "can be interpreted as contributing to the conversational [or other]l goals" of the speaker or hearer.[304] Consistent with this, the First Interpretation Principle and the Second Interpretation Principle assume that, if a speaker wishes to be relevant, she by definition would not generally intend to speak wrongly, irrationally, or incoherently, even if her words or other signs could be interpreted as wrong, irrational, or incoherent.[305] This therefore leads us to a principle of balance or charity that generally infers a rational and coherent meaning where possible unless we have reasons to believe otherwise.[306]

V. The Pre-Socratics to Peirce: Semeion, Symbolum, Signum, and Icon

Semiotics has an ancient pedigree. Tracing its lines in simplest of terms, one can note the ancient Greek fascination with the indexical. Pre-Socratics such as Parmenides and Heraclitus understood the Greek term "semeion" or sign in the sense of evidence or "tekmerion" which explains why Hippocrates, for example, focused on symptoms as signs of diseases.[307] In addition to this indexical understanding of "semeion" (whose "paradigm was medical symptoms such as

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[303] *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 27 (1989). I expand Grice here with my bracketed language.
[304] CRUSE, *supra* note 131, at 419 (quoting G. N. LEECH, PRINCIPLES OF PRAGMATICS (1983)).
[305] *See* DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION 27 (1984). *See* RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (AM. LAW INST. 1981) ("An interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.").
[306] As Kent Greenawalt nicely tells us: "What I would hope from an interpreter [who has found statements that seem contradictory or at odds with the remainder of a piece] is that if she could figure out which statement did fit my overall position best and which reflected a lapse in how I have expressed myself, she would say, 'Greenawalt probably means X (or would think X) though one of his sentences points in a different direction.'" GREENAWALT, *supra* note 190, at 82.
[307] *See* CLARKE, *supra* note 10, at 2-3, 11-13.

spots),"[308] one also encounters "symbolos" used for sentences and words.[309] Both the index and the symbol securely fell under the umbrella of "sign" once St. Augustine famously used "signum" to include "both the evidential signs of the Greeks and words as linguistic signs used in communication."[310] Further filling out sign types, St. Bonaventura and others explored iconic signs.[311] Peirce designed his subsequent "classification of signs into icons, indices, and symbols . . . to incorporate the principal types of signs discussed in the tradition he inherited."[312] Thus, **lawyers who use and appreciate semiotics today stand on the shoulders of giants from the pre-Socratics to Peirce and beyond**. Unfortunately, I lack of space to explore historical semiotics in more detail here but hope this brief summary will entice readers to explore more such history on their own.[313]

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[308] COLAPIETROA, *supra* note 288, at 177-178

[309] CLARKE, *supra* note 10, at 3; COLAPIETROA, *supra* note 288, at 177-178 (noting that "this distinction between sign and symbol was in ancient Greek usage not always clearly or consistently drawn"). It is beyond the scope of this word to explore whether, for example, passages of Aristotle may have used "symbola" and "semeia" interchangeably. *See id.* at 15.

[310] CLARKE, *supra* note 10, at 3, 23.

[311] *Id.* at 4-5, 34-35, 41-43.

[312] *Id.* at 5.

[313] Those who are especially ambitious may wish to start with JOHN DEELY, FOUR AGES OF UNDERSTANDING: THE FIRST POSTMODERN SURVEY OF PHILOSOPHY FROM ANCIENT TIMES TO THE TURN OF THE TWENTY-FIRST CENTURY (Univ. of Toronto Press 2001). This tome explores "preliminaries to the notion of sign; the development of the notion itself; forgetfulness of the notion; and recovery and advance of the notion" in the long history of Western philosophy. *Id.* at xxx.