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ON WHOSE AUTHORITY?: LINGUISTS' CLAIM OF EXPERTISE TO INTERPRET STATUTES

MARC R. POIRIER*

I. INTRODUCTION

The 1995 Northwestern/Washington University Law & Linguistics Symposium and the events that led up to it¹ have a troubling side. Larry Solan's *The Language of Judges*² and the Symposium appear to be helpful exchanges of ideas. Solan's book in particular offers a thoughtful neo-Legal Realist critique of what judges say they are doing when they interpret the law. It shows how a linguist would explain things differently than a judge and gently makes suggestions for judges' self-improvement.

Another group, in their review of Solan's book, seeks to "go beyond" it.³ They make a stronger claim, that linguists are experts on ordinary language and therefore ought to be consulted before judges interpret statutes, at least when they claim to be reading statutes as ordinary

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1. These events include the publication of LAWRENCE G. SOLAN, *THE LANGUAGE OF JUDGES* (1993); the publication of Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 *YALE L.J.* 1561 (1994) (reviewing SOLAN, *supra*) [Yale article]; the submission of the Yale article in galley form to the United States Supreme Court and the parties in three pending cases, *id.* at 1562 n.2; the Supreme Court's citation of the Yale article in two majority decisions and a concurrence: *United States v. Granderson*, 114 S. Ct. 1259, 1267 n. 10 (1994); *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 114 S. Ct. 2251, 2255 (1994); *Staples v. United States*, 114 S. Ct. 1793, 1806 (Ginsburg, J., concurring) (1994); the submission of an amicus brief to the Supreme Court in *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), on behalf of the "Law and Linguistics Consortium", which consisted of Mr. Solan and the four authors of the Yale article; and a panel presentation by the authors of the Yale article, Professor Frederick Schauer and one or two others at the June, 1994 Law and Society Conference in Phoenix, Arizona. Also, I chaired a related panel, *Conflicting Accounts of Interpretation: Linguistics, Cognitive Theory, and the Legal Text*, at the June, 1995 Law and Society Conference in Toronto.

2. SOLAN, *supra* note 1.

3. Cunningham et al., *supra* note 1, at 1561.

language.⁴ Perhaps the most extraordinary claim was made by the amicus brief filed in the *X-Citement Video* case.⁵ I paraphrase this brief as follows:

We are a group of scientific experts authorized by our professional discipline. We do not take a position on the effect of the Court's decision on the parties before it. Nor do we take a position on child pornography, a broad issue in this case. However, we care deeply about adverbial syntax, and about what other courts have said and what this Court may say about syntax in the course of reaching and explaining its decision here. As experts, we seek to address the theory of interpreting statutory language that the Court will employ and articulate in this case. On arguments concerning what *knowingly* means here, insofar as they are about ordinary language and syntax, we can speak better than anyone else.⁶

The brief then presents an argument as to how *knowingly* must be read, assuming that the statute is an ordinary English sentence.

When the amicus brief is so paraphrased, it becomes clear that something is at issue. The filing of this brief and other events⁷ reflect the classic process of establishing a professional discourse.⁸ This essay sketches some of the ideas and issues involved in the claims of the Law and Linguistics Consortium and others. It focuses mostly on these linguists' claim of interpretive authority, but also on the particular theory of language that they offer. The question of their claim to objectivity also surfaces later in this

4. *Id.* at 1561, 1568. The amicus brief makes assertions of authority, both verbally and by being filed, that is, performatively. So does the Yale article, which was also submitted to the Court. However, the Yale article is more circumspect in its claims at some times than at others.

A major article, citing the Yale article, suggests that the Solicitor General's Office "hire some good linguists." William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 73 n.204 (1994) (citing Cunningham et al., *supra* note 1). See *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 896 (1995) (statement of Eskridge). See also *id.* at 939 (Geis: lawyers impute to language properties it does not have; Green: linguists have better information about ordinary language than judges).

5. Brief *Amicus Curiae* of the Law and Linguistics Consortium in Support of Respondents. *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) (No. 93-273).

6. *Id.*

7. See *supra* notes 1 and 4.

8. For the *locus classicus* for the proposition that a scientific discipline is constructed, see THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). Much of Michel Foucault's oeuvre is concerned with the construction of various professional disciplines and the policing of knowledges that they entail. See, e.g., MICHEL FOUCAULT, *Two Lectures*, in *POWER/KNOWLEDGE* 78-108 (Colin Gordon ed., 1980); see also Steven Goldberg, *The Central Dogmas of Law and Science*, 36 J. LEGAL ED. 371, 372-75 (1986) (discussing scientific communities). The work of constructing the subdiscipline of forensic linguistics goes on apace. *Vide* the appearance of a new JOURNAL OF FORENSIC LINGUISTICS and of this Symposium. Larry Solan spoke this summer to the district and appellate judges of the Sixth Circuit about what linguistics has to offer to statutory interpretation. Also noteworthy are the ongoing contributions of Georgia Green, Jeffrey Kaplan, Judith Levi, Roger Shuy and Peter Tiersma.

essay. On all counts, a single inquiry sums it up: On whose terms have these linguists been authorized?

II. DISCOVERY EXPERTISE AND INTERPRETER EXPERTISE

I propose a provisional distinction although it is one I shall ultimately have to discard as problematic because it conceals and delivers a theory of language.⁹ Consider, on the one hand, what I will call *discovery expertise*. Those familiar with the territory of skilled investigation can offer discoveries of facts or of analytic tools for general use. They are like detectives. But the story's ultimate meaning is to be pieced together by others.¹⁰ Consider, on the other hand, *interpreter expertise*. Those familiar with a language or a scientific discipline may be necessary to tell others how to use something or what it means. Thus, the establishment of *interpreter expertise* requires the interposition of a professional group which is shown to be indispensable to those outside the specialized community.¹¹ It is a claim of power and, if successful, permits an exercise of power. Thus, *discovery expertise* involves only analytic tools, while *interpreter expertise* also involves an explicit claim to a social position.

One would do well to distinguish further two types of *interpreter expertise*. The stronger type claims to be a formal legal expertise in the evidentiary sense: X is qualified to testify. The second does not claim formal legal expertise, but nevertheless attains persuasive authority because of who the speaker is, in addition to what the speaker is saying. It is not always clear what kind of claim is being made for linguistic science as an

9. See *infra* notes 69-70 and accompanying text.

10. In adjudication, judges decide legal matters and the trier of fact decides factual matters. For treatments of the interpretation of facts and evidence as the piecing together of stories, see Philip N. Meyer, "Desperate for Love": *Cinematic Influences Upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994); Kim L. Scheppelle, *Facing Facts in Legal Interpretation: Questions of Law and Questions of Fact*, 30 REPRESENTATIONS 42 (1990); Kim L. Scheppelle, *Manners of Imagining the Real*, 19 L. & SOC. INQUIRY 995 (1994). Cf. Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1 (1991) (arguing that narrative is essential to cognitive processes); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994) (discussing a problematic tension between law's demand for truth and the demands of familiar narrative structures).

11. This process applies to claims of native language ability as well as of scientific authority. The claims of interpretive authority here are about linguistic science. See, e.g., Cunningham et al., *supra* note 2, at 1568; *Law and Linguistics Conference*, *supra* note 4, at 898-901 (general discussion of scientificity of linguistics); *Id.* at 914-16 (Levi: linguistics as science). Georgia Green also stresses the scientific status of linguistic analysis as the basis of its authority, and complains that "legal professionals are often unaware" of it. Georgia M. Green, *Linguistic Analysis of Conversation As Evidence Regarding the Interpretation of Speech Events*, in *LANGUAGE IN THE JUDICIAL PROCESS* 247, 261 (Judith N. Levi & Anne G. Walker eds., 1990).

adjunct to statutory interpretation.

Indeed, Professor Michael Risinger has urged me to abandon the *discovery/interpreter* distinction in favor of one that is plausibly more accurate in a central respect. Risinger would instead invoke the distinction in the law of evidence between adjudicative facts and legislative facts.

Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Culp Davis in his article *An Approach to Problems of Evidence in the Administrative Process*.¹²

The linguists are not offering their views on facts in a particular case. Rather, they are commenting on what might be classified as a kind of legislative fact, that is, the consequences of applying particular practices of interpretation. Thus, the linguists here are *not* proposing to act as formal expert witnesses at all.¹³ They seek to contribute to judges' general appreciation of the consequences of a certain approach to legislative factfinding.

In contrast to the evidentiary rule limiting judicial notice of adjudicative facts, there is no federal evidentiary restriction on arguments intended to influence judicial findings of legislative facts.¹⁴ Nor is there any procedural restriction on amicus participation, or any clear practice governing supposedly scientific arguments in their application to legislative factfinding. Risinger's view is thus that the filing of the amicus brief was proper, but that its arguments should not be given any special weight as the views of experts.¹⁵

I have clung to the *discovery/interpreter* terminology nevertheless. One way of challenging the linguists would indeed be, as Risinger suggests, to point out the incoherence of their claim of expertise in terms of the law of evidence. But if the linguists are ultimately accorded authority based on

12. FED. R. EVID. 201 Advisory Committee's Note (citing Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942)). The Advisory Committee's Note also explicitly relies on Kenneth C. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955) and Kenneth C. Davis, *A System of Judicial Notice based on Fairness and Convenience*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 69-95 (Roscoe Pound et al. eds., 1964).

13. As the term is used in FED. R. EVID. 702 & 703.

14. FED. R. EVID. 201 Advisory Committee's Note.

15. Risinger also argues that the *discovery* prong of my provisional distinction is misleading because it is, in fact, so rarely at issue. Most linguistic expert testimony is of the interpretive kind. Even in adjudicative contexts, the expert tells the finder of fact how it ought to interpret something or other.

some nebulous kind of deference by judges impressed by linguists' credentials, it will not help to dismantle the linguists' claim of expertise in the adjudicative fact arena alone. The *discovery/interpreter* distinction reflects the authorizing rhetoric invoked by the linguists themselves. It turns out to be useful to explore the rhetoric of science and objectivity that undergirds the *discovery* prong of the provisional distinction. And we must also ask whether this particular kind of linguistics is the most useful kind, a question that the *discovery* term keeps in view. In any event, Risinger and I end up at the same place. As I have already put the question, on whose terms have these linguists been authorized?

One type of *interpreter expertise* might rise to the strong level of formal expert testimony about reading statutes.¹⁶ In Risinger's view, of course, this would be improper. But whether in the context of argument about legislative or adjudicative facts, arguments of linguistic expertise are self-defeating insofar as they purport to simplify and clarify the legal process. There is an obvious problem: the battle of the experts, and whatever its analog might be in contests over legislative facts. Counter-experts will emerge for any position with the least bit of flexibility in it whenever the stakes are high enough. Moreover, the ultimate decision on contested questions will still be made by non-linguists. And nothing prevents judges from incorporating other factors surreptitiously in their purportedly language-related reasoning.¹⁷

There is a broader question about *interpreter expertise*. Is linguistic expertise what is called for? If so, whose? I offer an example. Once some of my clients were considering a proposed agreement with the U.S. Army Corps of Engineers (Corps). It concerned the mode of operation of

16. To the extent that formal expert testimony might ever be at issue, excluding some pseudo-experts might be thought to address this problem. So one road from the claim of *interpreter expertise* leads to consideration of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The Court described four relevant factors for admissibility of expert testimony: falsifiability, peer review and publication, error rate and general acceptance. *Id.* at 2796-97. These are to be applied flexibly. *Id.* at 2797. A courtroom more open to battles of the experts, including linguists, is one possible consequence of *Daubert*. On the other hand, some of the *Daubert* factors have been used to exclude certain kinds of "soft" expertise. Also, FED. R. EVID. 702 governs "scientific, technical, or other specialized knowledge," but *Daubert* addresses only the "scientific" portion of this rule. 113 S. Ct. at 2795 & n. 8. One might argue that social sciences are "technical or specialized" and that testimony about them does not trigger the *Daubert* test. All in all, it is too early to tell what effect *Daubert* will have on forensic linguists.

17. A jury ought not to be deciding what a statute means, and Brandeis-brief like arguments would be presented to the judge alone. I suspect that one could come up with a scenario where some vaguely worded determination of ultimate fact gave the jury an opportunity to react to arguments about how to read a statute.

hydroelectric turbines at a Corps dam that had been constructed to accommodate such facilities in the future. The Clients had already become co-licensees, based on their understanding of the original license and of Corps documents dating back into the early 1960s.¹⁸ The language of the license and preliminary Corps documents presented problems.

There are several possible modes of operation of a hydroelectric project. One allows whatever water comes down the river to pass through the turbines immediately and continue downstream. Ponding water behind a dam can cause flooding and disrupt aquatic and riparian ecosystems.¹⁹ Yet ponding has its advantages. Ponding on a daily basis permits the water to be released at the most advantageous time, typically to generate electricity at peak demand times in afternoon and early evening.²⁰

The 1960 agreement stated that the project would operate on the basis of *run-of-river* operation. My clients planned to operate the project with daily ponding, causing a fluctuation in water level. Economic studies prepared in determining whether to undertake the project were based on a daily ponding model. Indeed, it made no sense economically to go forward with the project in 1985 if daily ponding was not allowed.²¹ The Corps, however, took the position that *run-of-river* meant *instantaneous outflow equals inflow*.

It looked as though we might be headed for the arcana of arguments over plain meaning and the parol evidence rule. But I did a computer search for *run-of-river* and *instantaneous flow* in the opinions of the Federal Power Commission (FPC), which has licensing authority over privately-owned hydroelectric projects.²² I documented a number of cases from the 1930s

18. See KAMO Electric Cooperative, Inc., 29 F.E.R.C. ¶ 62,197, at 63,285 - 86 (1984) (issuing license, describing preexisting Corps dam and describing project as "run-of-river"). See also KAMO Electric Cooperative, Inc., 34 F.E.R.C. ¶ 62,286 (partial transfer of license to Oklahoma Municipal Power Authority, effective January 1, 1986). Oklahoma Municipal Power Authority became the sole licensee in 1989. KAMO Electric Cooperative, Inc., 46 F.E.R.C. ¶ 62,286 (1989).

19. Oklahoma Municipal Power Authority, Project Nos. 3083-0252, -058, & -068, 72 F.E.R.C. ¶ 61,076, 1995 LEXIS FERC 1470, at *4-5 n.9 (July 26, 1995) (defining *daily pondage*).

20. There are other types of ponding. Weekly ponding permits the water to be stored and released during weekday afternoons and not on weekends. Seasonal ponding permits the storage of water flows in the winter and spring and greater releases during the summer and fall, when energy usage in warm climates is highest because of air conditioning.

21. Oklahoma Municipal Power Authority, 68 F.E.R.C. ¶ 61,058, at 61,199-200 (1994) (describing licensee's argument that the project's economics will become unfavorable if licensee is forced to provide additional water releases in order to raise dissolved oxygen level in stilling pool immediately below dam).

22. Pursuant to Part I of the Federal Power Act, 16 U.S.C. §§ 791 - 823b (1988 & Supp. V 1993). The Federal Power Commission is now the Federal Energy Regulatory Commission.

on where the FPC or another federal or state agency had used *instantaneous flow* to include daily fluctuation of water level, but not weekly or seasonal fluctuation.²³ From about 1965 on, however, *run-of-river* was used as a separate category from *daily ponding*.²⁴ Moreover, the first use of *instantaneous* in a published FPC opinion or order was in 1966, and

23. E.g., Duke Power Co. of North Carolina, 32 F.P.C. 119, 119 (1964) (refers to *run-of-river* operation with only peak releases from pondage, and consequent daily flow requirements); South Carolina Electric & Gas Co., 29 F.P.C. 631, 654-55 & n.10 (1962) (initial decision), *mod. & adopted*, 29 F.P.C. 624 (1963) (FPC annual reporting Form 12 defines *run-of-river* as permitting a few hours of storage; project is somewhere between *run-of-river* and *peaking*, but closer to *run-of-river*); City of Seattle, Wash., 26 F.P.C. 61, 100 (1961) (initial decision), *mod. & adopted* 26 F.P.C. 54 (1962) (stating that either version of the Boundary project "would have to be operated as a run-of-river plant with considerable peaking being permitted through the use of the available daily poundage [sic] at the site"); Virginia Electric Power Co., 10 F.P.C. 1, 7 (1951) (describing project as "largely a run-of-river development with pondage suitable only for [daily] peaking purposes"); Wisconsin Public Service Corp., 8 F.P.C. 691, 692 (1949) ("The project operates as a run-of-the-river plant except for the daily cycle of carrying more load over the peak hours and a reduced load during off-peak hours."). Some cases even included weekly fluctuations within the general category of *run-of-river*. E.g., Ice Harbor Project, 34 F.P.C. 714, 717-18 (1965) (project "essentially run-of-river," with daily and weekly drawdown); Arizona Power Authority, 42 F.P.C. 476, 482, 503 (1962) (initial decision), *dismissed* 42 F.P.C. 474 (1969) (describing project as "essentially a run-of-river plant," with *pondage* only for daily and weekly load variations).

24. One begins to find cases that refer to the project operation as *daily ponding* but that never refer to the project as *run-of-river*. E.g. Dan River Mills, Inc., 44 F.P.C. 1287, 1289 (1970) [hereinafter *Dan River Mills, Project No. 2625*] (describing operation as for *daily pondage*, with no mention of *run-of-river* in the order); Dan River Mills, Inc., 44 F.P.C. 1265, 1269 (1970) [hereinafter *Dan River Mills, Project No. 2626*] (same); Georgia Power Co., 37 F.P.C. 620, 622 (1967) (describing project as operating on a *daily regulating basis*; no mention in order of *run-of-river*); Lake Superior District Power Co., 34 F.P.C. 862, 862 (1965) (stating that project operation would involve *daily pond fluctuations*; no mention of *run-of-river* in the order). *But see* City of Vanceburg, Ky., 55 F.P.C. 1432, 1439, 1446 (1976) (describing project as *run-of-river*, but providing in Article 47 of the license for compliance with Corps limitations on fluctuations); City of Vanceburg, Ky., 55 F.P.C. 1460, 1469, 1487 (1976) (same); Dan River, Inc, 51 F.P.C. 1861, 1862 (1974) (describing the same projects addressed in the two Dan River Mills orders as *run-of-river* and hav[ing] only *small amounts of pondage*); Alabama Water Improvement Co. v. Alabama Power Co., 48 F.P.C. 270, 276 (1971), *remanded*, 48 F.P.C. 258 (1972) (initial decision describing Holt project as run-of-river but permitted to fluctuate by up to one foot daily). So the new distinction did not penetrate completely.

Indeed, in the recent series of orders concerning the project my clients eventually constructed and now operate, the terminology remains somewhat inconsistent. The project is most often referred to as operating in a *daily ponding* mode. Oklahoma Municipal Power Authority, 72 F.E.R.C. ¶ 61,076, 1995 LEXIS FERC at *4; Oklahoma Municipal Power Authority, 68 F.E.R.C. ¶ 61,058, at 61,197 (describing project as "run-of-river with provisions for daily pondage"); Oklahoma Municipal Power Authority, 66 F.E.R.C. ¶ 62,033 at 64,130 n. 3 (1994); Oklahoma Municipal Power Authority, 51 F.E.R.C. ¶ 62,321 at 63,567(1990). But in one opinion the project is referred to as a *run-of-river* project. KAMO Electric Cooperative, Inc., 29 F.E.R.C. ¶ 62,197, at 63,286 (*run-of-river*; note that this order was issued prior to reaching agreement with the Corps and commencement of construction — the FERC may not have focused on the distinction). One of the *daily ponding* opinions also calls the project *run-of-river*. Oklahoma Municipal Power Authority, 68 F.E.R.C. at 61,197.

other government agencies, in their comments on hydro projects, began using *instantaneous* about the same time.²⁵ There was a linguistic shift. In 1960 or so my clients and the Corps would have meant to agree on what my clients now needed. I wrote up the history of the reading of *run-of-river*, *daily ponding* and *instantaneous flow* and sent it off to the clients.²⁶

I am not a linguist. My undergraduate major at Yale was in literature and literary theory. My basic training for the *run-of-river* memorandum was most likely a paper I wrote for a course on Dante's *Divina Commedia*, in which I examined every use of arrow or target imagery in the poem. Thus it is not necessarily what linguists have to offer that is most useful to a particular problem of legal interpretation.²⁷ Other disciplines of close textual reading and exegesis—among them, literature, history, religious studies, law, and some kinds of philosophy and psychotherapy—might turn out to be just what is called for, rather than a linguistics Ph.D.²⁸ Even if it is linguistics that is called for, whose version?

My clients and the Corps understood and applied the linguistic argument, once I developed it, without help from either a linguist or a judge. The Corps gave in and agreed to my client's terms. If *interpreter expertise* were at stake, someone would have had to tell them what the information I had

25. The first use of *instantaneous* in a published FPC hydro opinion is in Virginia Electric Power Co., 37 F.P.C. 353, 368 (1966), *rev. on other grounds*, 37 F.P.C. 340 (1967) (initial decision) (describing testimony of Department of the Interior witness). Other early orders include Niagara Mohawk Power Ohio River Power Co., 50 F.P.C. 2020, 2023 (1973) (Department of the Interior in 1969 sought *instantaneous* flows as a license condition); *Dan River Mills, Inc., Project No. 2625*, 44 F.P.C. at 1289 (1970) (Department of the Interior recommended a "minimum instantaneous flow" requirement; its letter was probably written in 1967 or so, as the license application was filed in October, 1966); *Dan River Mills, Inc., Project No. 2626*, 44 F.P.C. at 1287 (same); Bangor Hydro-Electric Co., 43 F.P.C. 132, 133 (1970) (referring to recommendation by the Department of the Interior, upon the recommendations of the Federal Water Pollution Control Administration and the Maine Air and Water Improvement Commission, of "minimum instantaneous seasonal flows"; license application filed in 1966, so comments probably from 1967 or 1968).

In some instances *instantaneous* was essentially equated with *run-of-river*. Niagara Mohawk Power Corp., 57 F.P.C. 817, 821-22 (1977) (New York Department of Environmental Conservation requested a flow requirement; FPC deemed an *instantaneous* flow requirement unnecessary because the project was operated as a *run-of-river* project).

26. Although I did not tell the client, I suspect that the refinement of customary categories from 1965 on was brought about by social factors, not random semantic drift: namely, the fledgling environmental movement. The key early victory of the environmental movement, *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), concerned the environmental and aesthetic effects of a proposed hydroelectric project.

27. *See, e.g.*, Green, *supra* note 11, at 249, 263 (discussing use of non-linguist experts).

28. I am not sure, therefore, why the proposal for a review of jury instructions by non-lawyers requires linguists, rather than those with other professional formations or just good skills with complicated language and ideas. *But see Law and Linguistics Conference, supra* note 4, at 967.

developed meant. But once it was presented, they were perfectly capable of evaluating it. As Georgia Green says, "The average person can easily follow a well-organized discussion of the principles for [linguistic] analysis but does not come to a trial equipped with the framework or vocabulary for consciously identifying the relevant."²⁹ In short, the more plausible claims of usefulness of linguistic science purport to be *discovery expertise*. If so, the person articulating the explanation should be able to remain anonymous. Authority would rest on the apparent usefulness of the argument tools themselves.

III. SOME DIFFICULTIES WITH DISCOVERY EXPERTISE: COMMUNITY, AUTHORITY AND IDENTITY

During the law and linguistics panel discussion at the 1994 Law and Society Conference,³⁰ Professor Jeffrey Kaplan tried a linguistic experiment. He sought to reproduce the ordinary language argument about *knowingly* from the *X-Citement Video* amicus brief. He depicted a "sentence" with *knowingly* in front of a series of parallel clauses (a) ..., (b) ..., with an -if- clause at the end. Asking those members of the audience with legal training to suspend their specialized language knowledge, he argued that it was inevitable, as a matter of ordinary English, that *knowingly* would not modify the succeeding *if* clause. Only about half the audience of forty or so agreed. Kaplan was puzzled.³¹

I was in that audience and did not raise my hand. My problem was that, as someone with years of legal training and practical experience, I simply could not look at *knowingly* in what was obviously a statutory context and read it as ordinary English. For a lawyer with any experience, *knowingly* in a statute does not operate as standard English does. As a lawyer, I knew that the appearance of *knowingly* in a context I was unfamiliar with should send me scurrying to cases and treatises. I needed to know how it had been treated in that particular area. Issues of intent and responsibility, implicated semantically in various statutes and situations, are too central and too convoluted for there to be a consistent syntactic usage in heterogenous

29. Green, *supra* note 11, at 273. Accord Cunningham et al., *supra* note 1, at 1569; *Law and Linguistics Conference*, *supra* note 4, at 869-70 (Levi).

30. See *supra* note 1.

31. And he still is. *Law and Linguistics Conference*, *supra* note 4, at 812-13 (Kaplan). I am relying on a year-old memory and failed to take notes, so I may have confused the details of Kaplan's experiment. What is clear is that the audience failed to behave as Kaplan thought they should as native speakers of English.

situations over any period of time.³² Ordinary language and adverbial syntax are the wrong places to start.³³

Professor Kaplan apparently assumed that when a legal text purports to be in or about ordinary language, it is. The statement that a particular instance of statutory language is *ordinary* or that there is a *plain meaning* is in fact itself part of a specialized practice of legal interpretation that has a history and functions of its own.³⁴ When judges say *plain meaning*, they may not mean *plain meaning* in a sense that linguists would recognize as ordinary language.³⁵ If not, the linguists' explanation to judges about the *plain meaning* practices of judges is naive.³⁶ Moreover, as the *knowingly* discussion shows, legal usage is not uniform. Legal language practice involves a group of related frames, rather than a single frame. Finally, a qualification that purports to restrict the linguists' assertions to ordinary language does not resolve the situation. There is always the possibility that the judge or other authorized legal interpreter will use the linguists' *ordinary language* analysis inappropriately anyway.³⁷

32. Indeed, Chief Justice Rehnquist's majority opinion in *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994), makes this practice explicit. He rejects "[the] most natural grammatical reading" of the statute because of "anomalies that result from this construction" and some presumptions of criminal and constitutional interpretation. *Id.* at 467. Symposium participants differed over whether this phenomenon is best described as a legal linguistic subcommunity, or as a community that shares non-linguistic interpretive practices. See, e.g., *Law and Linguistics Conference*, *supra* note 4, at 884-89 (Moore: some techniques of construing statutes involve textual meaning, some involve interpretation); *id.* at 969-70 (Greenawalt: is the problem a different language theory for lawyers or trumping of language by other legal concerns?).

33. *Accord id.* at 901-02, 903, 916-18 (Greenawalt). I have run the *knowingly* issue by several law students. They respond by referring to Section 2.02 of the Model Penal Code. MODEL PENAL CODE § 2.02 (1962). Our first year curriculum drums it into them that there are special rules for construing state of mind words in criminal statutes, and that they should beware. For the confusion of *knowingly* constructions in environmental statutes, see *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993), *mod. & reh. denied*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995). Bankruptcy, UCC and tax practices may have yet other *knowingly* traditions.

34. See, e.g., Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995) (providing a number of possible non-textual explanations for the Supreme Court's shift towards finding *plain meaning* most of the time when applying the interpretive framework of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

35. Although the Yale article does discuss different usages of *plain meaning*, it does not ultimately seem to make much difference. Cunningham et al., *supra* note 2, at 1563-66.

36. It does share with many variants of textualism a wistful aspiration to the objective text as constraint.

37. If *discovery expertise* alone were at issue, for example, the Supreme Court would simply have used the proffered linguistic analysis without attribution, as it did much other argument from various briefs. Instead, it cited to the Yale article explicitly, treating the article's authority as *interpreter expertise* (who said it) rather than *discovery expertise* (what was said). Two can play at this game. The

The problem of whose linguistic community is operative could also be described as an aporia—a difficulty arising from an awareness of incompatible views, an impasse providing no way out. Linguists, once they have dropped claims to *interpreter expertise*, are studying and talking about ordinary language. So when they offer their explanations for use within the community, are they talking in ordinary language—in which case why and how did they get to talk so much in the first place? Or are they talking in authorized expert language, even if not as formal testifying experts—in which case, what is the conversation with non-specialists really about and, insofar as the concern about power in professionalized discourse reemerges, who authorized it?³⁸

The linguists explore (and exploit) a preexisting aporia in language jurisprudence. Are statutes in ordinary language or not?³⁹ If so, then many interpretations ought to be equally valid. Yet a judge interprets differently, in an authoritative way. Even so, the judge may claim merely to be reading the text.⁴⁰

This apparent contradiction is fundamental to the operation of our legal system. Political and institutional concerns depend on statutory language being both ordinary and specialized *at the same time*. Let us consider this aporia from the point of view of the generation and reproduction of power or knowledge, a Foucauldian perspective. The ordinary language speaker is governed by legal texts. On the one hand, these texts are supposed to be accessible and to mean something. This supposition of accessibility is essential to the notion of responsibility, both as to the individual's

first footnote in the *X-Citement Video* amicus brief pointed out that the Yale article, with a similar methodology and authors, had already been cited twice by the Court. On the potential for misappropriation of the author's authority, see MICHEL FOUCAULT, *What is an Author?*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE* 113-38 (Donald Bouchard ed., 1977).

38. Paul Campos, *Against Constitutional Theory*, 4 *YALE J.L. & HUMAN.* 279 (1992) (distinguishing "intentional misreading" and "reauthoring" from textual interpretation, at least as to "sacred texts" such as the Constitution). See also Michael J. Perry, *The Authority of Text, Tradition and Reason. A Theory of Constitutional "Interpretation"*, 58 *S. CAL. L. REV.* 551, 557-71 (1985) (comparing reading a Constitutional text and a sacred text). Neither Campos nor Perry discusses who will perform these alternative authorized interpretations. See Paul Brest, *Who Decides?*, 58 *S. CAL. L. REV.* 661 (1985).

39. *Law and Linguistics Conference*, *supra* note 4, at 891-92 (Cunningham: legal interpreters *interpret* in a legal sense but are viewed by the rest of the populace as *interpreting* in an ordinary language sense).

40. See, e.g., *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 200-201 (Scalia, J., concurring) (basing position on retroactive force of decision on position that courts do not create law but declare what the law already is); *Law and Linguistics Conference*, *supra* note 4, at 879-81 (Schauer: legal opinions are deliberately written in the language of discovery and inevitability, of what is already in the text).

awareness of her/his duties and as to the presupposition that individual rational decisionmakers decide whether or not to break the law. On the other hand, we cannot tolerate the multiple and conflicting interpretations that would be generated if we took literally the ideal of accessibility of the legal text on equal terms to every individual. Discipline and enforced coherence in reading legal texts are required. So the ordinary person is excluded from positions that can declare interpretations based on the legal authoritative text, and a specialized interpretive discipline is created.⁴¹ Within their own ranks, authorized interpreters—judges, and the linguists and law professors who aspire to that position⁴²—maintain consistency, predictability, and so on, through the discipline of their specialized linguistic practice.⁴³ At the same time, they invoke the accessibility of the text as ordinary language to legitimate their exercise of power within the larger community.⁴⁴

41. On the force of authority inherent in legal interpretation, see Noam Chomsky & Michel Foucault, *Human Nature: Justice Versus Power*, in REFLEXIVE WATER: THE BASIC CONCERNS OF MANKIND 133, 170-72 (Fons Elders ed., 1974) (moderated debate between Noam Chomsky and Michel Foucault); Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 920 (Mary Quaintance trans., 1990). Actually, this statement overgeneralizes. At some times and places, for some people, informal community interpretation trumps official law. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Nevertheless, it is emphatically not the province and duty of ordinary persons to say what the law is. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (Marshall, J.) ("It is emphatically the province and duty of the judicial department to say what the law is."); Goldberg, *supra* note 8, at 373 (discussing how specialized training and technical vocabulary make the views of the scientific community inaccessible to most laypeople).

42. The aspiration of some linguists is clear from this whole series of events discussed in Part I *supra*. For a discussion on the aspiration of traditional legal scholars, see Pierre Schlag, *Anti-Intellectualism*, 16 CARDOZO L. REV. 1111 (1995); Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2056 (1993).

43. Legal interpretation is disciplinary in nature whether it is viewed as a specialized discourse or as a trumping of language by other considerations. *Law and Linguistics Conference*, *supra* note 4, at 969-70 (Greenawalt). See Randy Frances Kandel, *Foreword—Whither the Legal Whale: Interdisciplinarity and the Socialization of Professional Identity*, 27 LOYOLA L.A. L. REV. 9, 14 (1993) (discussing legal education as socialization, including training in "plain language statutory interpretation").

44. So it is not, after all, puzzling that people continue to ascribe *ordinary language interpretation* to what they would also admit is really *specialized interpretation*. *Law and Linguistics Conference*, *supra* note 4, at 893-94 (Eskridge: it is puzzling). People depend on the ritualistic recitation of *ordinary language interpretation* to legitimate the inevitable judicial exercise of interpretative authority, even when they do not believe *ordinary language interpretation* is what is going on. Judith Levi has noted this phenomenon in contractual language that is not understood but is nevertheless binding because it is theoretically available. *Law and Linguistics Conference*, *supra* note 4, at 932-33 (Levi). She correctly recognizes the ritualistic aspect of the invocation of *ordinary meaning* in this limited context.

It thus seems misguided that linguists should consult only ordinary English language ability rather than also looking to what the specialized community does. A footnote in the Yale article demonstrates this oversight. In examining *enterprise*, the authors note that judges viewed a hypothetical Quebec terrorist organization as an *enterprise*, whereas others did not.⁴⁵ The authors speculate that judges were accustomed to the concept of *criminal enterprise*.⁴⁶ This analysis does not do justice to the data. Judges' linguistic practices—and more generally speaking, legal linguistic practices—are framed by various experiences, professional disciplines and goals. They *cannot* be treated as ordinary English with any hope of accuracy.⁴⁷

The linguists' offer of explanations in a scientific, universal, objective mode obscures other helpful observations about language and law. To explore this argument requires a digression on prototype theory. Many of the law and linguistics group did not seem to appreciate the implications of this theory.⁴⁸ Solan is an exception, and his contribution to this Symposium is welcome.⁴⁹ I should also note that Charles Fillmore, whose theory of frame semantics is one of the foundations of prototype theory, was at the Conference and is among the symposiasts.⁵⁰

Prototype theory holds, in relevant part, that human beings do not operate cognitively with categories that have clear boundaries. Categorizations depend on central cases or models that have *a number of* characteristics. But not every instance is prototypical. We are often presented with cases that have some, but not all, of the prototypical elements. These cases will produce puzzling results. Some people will perceive these instances as clearly within the category. Others will strongly perceive that they are not. Some will have a troubling sense of confusion. Others may be able to see

45. Cunningham et al., *supra* note 2, at 1605 n.180.

46. *Id.*

47. The counterargument is that because of the rule of lenity, criminal statutes have to be read in ordinary English. But judges applying the statutes don't always do this, which is what the data on *enterprise* show. So the linguists' argument is no longer descriptive, but normative. But if it is normative, it loses the claim of science, and perhaps the claim of authority.

48. To be sure, Cunningham and his colleagues spend a good deal of time talking about prototype theory in their investigation of *enterprise*. But when it comes time to interpret the data, they seem to be looking for categories with hard edges and to have overlooked the possibility that data indicating perception of a strong dichotomy does not exclude the possibility of a prototype effect. Cunningham et al., *supra* note 2, at 1610-11.

49. Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 WASH. U. L.Q. 1061 (1995).

50. See GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 68-71 (1987) (discussion of Fillmore).

it both ways.⁵¹ Also, our attempts as native speakers to define the most important elements of the prototype may turn out not to be an accurate reflection of our perceptions.⁵²

Prototype theory provides a straightforward explanation for a problem Cunningham raised. How can Justices Scalia and Ginsburg, both sincerely reporting their readings of a statute as English speakers, agree that the text is plain, but differ as to what that plain meaning is?⁵³ Answer: They have each generated a different subset of categories and preference intensities from the general prototype and are applying them to a non-prototypical example. To each, their perception seems right.

Prototype theory, however, puts Green's solution to the "Hydra" problem in jeopardy, and with it a certain type of claim of linguistic authority. Green says, essentially, "Well, for texts with many authors, we simply can't ask what *the* author intended. But fortunately, we linguists can still ask what *the* addressee would understand."⁵⁴ Prototype theory suggests this approach is flawed. Describing responses to nonprototypical categories requires one to consider a response across a group—not the response of an individual. Also, linguists as informants will not reproduce experientially the scattering of responses to non-prototypical categories. Only empirical work can do this.⁵⁵ Finally, who *is* this ideal addressee? To create a fictive addressee as the object of idealized linguistic study and then claim universality for its results is surely an imperial move.⁵⁶ Linguistics as a

51. See Solan, *supra* note 49; Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989) (discussing and applying cognitive theory to legal language, especially LAKOFF, *supra* note 50; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (discussing and applying cognitive theory to legal language, especially GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980)).

52. Winter, *Transcendental Nonsense*, *supra* note 51, at 1151-56 (discussing Linda Coleman & Paul Kay, *Prototype Semantics: The English Word Lie*, 57 LANGUAGE 26 (1981) (criteria used to identify a *lie* differ from criteria used to define a *lie*)).

53. *Law and Linguistics Conference*, *supra* note 4, at 852-53 (Cunningham).

54. *Id.* at 870-71 (Green) (paraphrased). But Green was never on very firm ground. For a discussion on social practices involving the authority of authors, see generally FOUCAULT, *supra* note 28.

55. As Michel Foucault argues:

What if understanding were a complex, multiple, non-individual formation, not "subjected to the subject".... One should then put forward this entire dimension ... and consequently replace individuals and their "knowledge" in the development of a knowledge which at a given moment functions according to certain rules which one can register and describe.

Foucault, *supra* note 32, at 149.

56. PATRICIA J. WILLIAMS, *The Pain of Word Bondage, in THE ALCHEMY OF RACE AND RIGHTS* 146-65 (1991) (discussing situation-specific differences in the operation of law as applied to blacks and whites, men and women).

discipline is pointless unless there is some kind of relationship between the object of study and a real linguistic community. This connection could be achieved either by empirical field work or by an explicit claim of normativity as opposed to objective science.⁵⁷

Perhaps, as Solan suggests,⁵⁸ another problem with prototype theory is that, whatever its merits, it just does not fit the model that judicial decisionmaking often requires. Neither a judge nor an attorney consulting a linguist would be happy with an explanation of prototype-radial categories, or fuzzy set theory, or any other approach that did not answer certain questions with a 'yes' or 'no.' Solan ultimately suggests a refinement of the judicial system's use of such categories. Meanwhile, I question the ability of linguistic science of the *discovery expertise* type to maintain its integrity when met with the empowered practical demands of legal practice. Linguists will from time to time be faced with the following choice. (1) They can explain that the categories are not clear and definite as a matter of ordinary language practice. In such case, their expertise does not fit the template of the practical legal question, and is therefore useless, and runs the risk of being discarded or not consulted in the first place. (2) Or they can disavow, as incorrect within their purportedly objective scientific domain, approaches that do not fit the paradigm of clear categorical boundaries that many legal matters demand. The legal process may thus impose a categorical theory of language on supposedly disinterested linguistic science.

For several of the above reasons, the treatment of dictionaries in the Yale article is flawed.⁵⁹ It criticizes dictionaries for being out of date and not comprehensive enough. The proposed solution is that a real live linguist will provide a more accurate account of *the* meanings that is more current and situation-specific.⁶⁰ An equally important argument, and one not made, is that we need to examine the failings of dictionaries in terms of our expectations about the ultimate possibilities of objective, self-contained definitions. We risk overlooking the process of the situation-specific plasticity of language. Often there will be another kind of interpretive contextual problem altogether—one without clear rules, or one that requires a different experience and expertise.⁶¹ At this point, why is linguistic

57. I am indebted to Pierre Schlag for this thought.

58. Solan, *supra* note 49.

59. Cunningham et al., *supra* note 1, at 1563, 1566.

60. *Id.*

61. See Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1449-52 (1994) (arguing that dictionaries cannot provide the context necessary to do all the work of

expertise needed, as opposed to some other kind? And why this particular kind of linguistics? There seems to be a professional stake in purporting to improve on the dictionary rather than to question it.

Indeed, a subtle insistence on objective meaning underlies much of the Symposium. Sometimes it is counterproductive. The participants talked at length about the *no vehicles in the park* hypothetical,⁶² but omitted Steven Winter's contribution.⁶³ Winter argues that context and purpose are fundamental to understanding language.⁶⁴ In this particular case, appreciating the culturally determined meaning of *park* is essential to frame the issue. Historically, the general understanding of *park* varied over time along what turns out to be a crucial dimension for interpreting a prohibition of *vehicles*. Bicycles in the park would have been anathema in the mid-19th century.⁶⁵ Is the issue whether bicycles are *vehicles*? Or is the issue what a *park* is for? In this case, *park* provides a semantic frame, and discussion of a *vehicle* in the abstract is misleading and unhelpful.

Winter's general approach, a version of cognitive theory, is useful, particularly because it provides a cogent theory explaining why people in good faith differ about what terms mean. He shows that culturally incommensurable and rigid views about land use and religion undergird the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*.⁶⁶ Similarly, my clients' trouble with the Corps of Engineers⁶⁷ was directly related to an unexamined linguistic shift. It was, moreover, prompted by and ultimately understandable in terms of a culturally contingent need to refine the category *run-of-river* to account for an increased societal concern over the effect on the environment of hydroelectric projects. Thus the wares of specific historically and culturally contextual studies can be useful to practitioners as well as legal scholars. A linguistic discussion of how legal texts work should not suppress or

interpreting statutes). See generally STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 120-126 (1989) (claiming no set of rules can give an account of its own application; a pre-existing context and purpose are required).

62. E.g., *Law and Linguistics Conference*, *supra* note 4, at 837-75.

63. Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 *TEX. L. REV.* 1881 (1991).

64. *Id.* at 1881-1905.

65. *Id.* at 1895-99.

66. 485 U.S. 439 (1988). Winter, *supra* note 63, at 1905-19 (indicating the Court's assumption that religion is personal and separable from uses of land and geographical features).

67. See *supra* notes 9-20 and accompanying text.

devalue such investigations.⁶⁸

As it happens, the problem with the *discovery* metaphor in the *discovery/interpreter* distinction is just the same masking of context by purported objectivity. I suggested above that *discovery* is about tools.⁶⁹ But tools are not objects. They are objects with potential uses.⁷⁰ They are tools *only* because of a context or frame within which we recognize them. Therefore, an offer of objective linguistic tools can only take place within a context that contains an implicit theory of language. The analysis that purports to be independent and objective is misleading. The offer of analytic tools tends to obscure the assertion of interpretive force that makes them tools to begin with.

IV. CONCLUSION

A major point of this Symposium is that judges and legal philosophers, who have to talk about language, might as well have a good theory. Professional linguists ought to be able to help. I agree with this. But as soon as one seeks to speak authoritatively, there are other stakes here, namely professional expertise and identity. The incentives to take particular positions on who is authorized to interpret and in what way often remain unexamined. The sense of self in roles is at stake.

Where those roles depend on a theory of language as relatively autonomous, the incentive to claim professional expertise is also mutually reinforcing with a general desire to establish and hold onto a separate self.⁷¹ Objective theories of language do reinforce the notion as well as the practice of a separate, pre-existing subject, independent and uncondi-

68. There were no scholars who work in critical theory at the Symposium. *Law and Linguistics Conference*, *supra* note 4, at 880 (Schauer); *id.* at 881-82 (Eskridge). One form of suppression is to ignore and thereby silence contrary discourse altogether. See, e.g., Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Foucault, *supra* note 6; WILLIAMS, *supra* note 56.

69. See *supra* notes 9-11 and accompanying text.

70. See, e.g., RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 11-13 (1989) (discussing the idea of vocabularies as tools in the work of Ludwig Wittgenstein and Donald Davidson).

71. Steven L. Winter, *Foreword: On Building Houses*, 69 TEX. L. REV. 1595, 1605 n.49 (1991). In any argument about interpretation, part of what is at stake is the ontological, epistemological, economic and social position of the subject. One argues for one's independent existence as well as the authority to interpret. See Pierre Schlag, "Le Hors de Texte, C'est Moi": *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1637-47 (1990) (discussing how legal discourse establishes the self as an independent subject).

tioned in essential respects: the Enlightenment Man [sic].⁷² This approach to the subject has been and ought to be called into question, even when we are “only” talking about law and language.⁷³ Presuppositions of self-sustaining identity run deep in the Western tradition,⁷⁴ but they are not necessarily so.⁷⁵ As we search for better linguistic tools, we need to acknowledge a temptation. For reasons at once idealistic and profoundly self-centered, law and linguistics tends to persuade by offering to describe an obscure object of desire.⁷⁶ Because of this tendency, its methods may serve to obfuscate the exercise of power and violence in legal interpretation and in the constitution of the social and individual self, which the law is also about.⁷⁷

72. I include a “[sic]” here because most of the 17th- and 18th-century thinkers who brought about the Enlightenment would naturally have referred to the rational subject of their theories as “Enlightenment Man,” without any notion of the 20th-century feminist view that “man” as opposed to “human” or “person” may be exclusionary and sexist.

73. See, e.g., AFTER IDENTITY: A READER IN LAW AND CULTURE (Dan Danielson & Karen Engel eds., 1994); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); Winter, *supra* note 59.

74. See, e.g., CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

75. Not necessary epistemologically or psychologically, and not necessary to a compassionate and well-functioning society. E.g., CHARLOTTE JOKO BECK, EVERYDAY ZEN: LOVE AND WORK (1989) (describing lay Zen practice, often in American psychological idiom); MARK EPSTEIN, THOUGHTS WITHOUT A THINKER: PSYCHOTHERAPY FROM A BUDDHIST PERSPECTIVE (1995) (comparing the Buddhist psychology of self and selflessness, and certain modern modes of psychotherapy); Schlag, *supra* note 71, at 1671; CHÖGYAM TRUNGPA, SHAMBHALA: THE SACRED PATH OF THE WARRIOR (1984) (detailing an ethical system for harmonious society related to but not dependent on Tibetan Buddhist teachings and practices); Winter, *supra* note 71.

76. I address here not only Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993), but Jacques Lacan’s psychoanalytic theory, JACQUES LACAN, ÉCRITS I (1966), insofar as I understand it, and Luis Buñuel’s wonderful film, THAT OBSCURE OBJECT OF DESIRE (Greenwich/Galaxy/Incine 1977). See also JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 27-29, 43-50 (1990) (discussing Lacan’s theory of the origin of the (inevitably masculine) subject).

77. E.g., AFTER IDENTITY, *supra* note 73; Brest, *supra* note 41; Cover, *Foreword*, *supra* note 41; Delgado, *supra* note 68; Eskridge, *supra* note 68; Foucault, *supra* note 8; Scheppele, *Manners of Imagining the Real*, *supra* note 10; WILLIAMS, *supra* note 56. Not coincidentally, these sources on the force of law typically discuss language or storytelling in the context of categories of class, race, gender or sexual identity. Yet ending on this note is not pessimistic or nihilistic. See, e.g., Alan Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L. REV. 507 (1990); Winter, *supra* note 63. We can still ask whether and how deconstruction presents opportunities, at least some of the time, to construct provisional new visions. See, e.g., Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).