

The Queen of Chula Vista: Stories of Self-Represented Litigants and a Call for Using Cognitive Linguistics to Work with Them *

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Self-represented litigants who come to law libraries face a difficult challenge since they lack the acquired skill of using the rationalist logic of the courts. Mr. Dyer examines recent cognitive science and cognitive linguistics to seek a better theoretical grounding for working with self-represented litigants. He concludes with a call to action, especially for further research.

Table of Contents

Overview of Self-Represented Litigants	718
Handling Self-Represented Litigants at the Law Library	721
A Typical Scenario	722
Assessment and Direction	723
Stories of Self-Represented Litigants	724
Story of Stinky	724
Other Stories of Individual Patrons	725
The Queen of Chula Vista	725
The Spectrum of Self-Represented Litigants	726
The Cultural Analysis	727
Thinking Like a Lawyer: Discourse and Legal Consciousness	729
The Postmodern Search for Meaning	732
Bringing the Self-Represented Litigant Along	738
Enter the Librarian	739
Training by Example	741
Recent Developments in the Theory of Meaning	742
Connectionism and Recent Neural Science	743
The Cognitive Theory of Metaphor (Experientialism)	745

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Should the Law Librarian Employ Cognitive Linguistics?	751
A Call for Action	754
Afterword	756

“I need a book on the delusion of marriage.”—Unknown self-represented litigant¹

Overview of Self-Represented Litigants

¶1 The increase in the numbers of people who represent themselves in court is well documented.² There are several causes, and they lead to increases in a variety of different types of self-represented litigants who are coming to public law libraries and other law libraries that are willing to serve them.

¶2 The largest spike in self-represented litigants seeking help from law libraries comes from those who earn below the poverty line and, for one reason or another, are not served by the various legal services agencies meant to help them. Sometimes, the type of case is outside of the types of law practiced by the various agencies, or the litigant is simply unaware of or refuses to use an agency. Minor criminal infractions that would not impose prison time are not given public defense, for instance. Sometimes, the agencies simply suffer from lack of sufficient funds to take every case and have to perform “triage,” i.e., handle only the most egregious cases or those that are plainly winnable. A case where the law is unsettled will necessitate a greater amount of resources to litigate, thus meaning fewer cases overall can be handled when the agency has a tight budget. A utilitarian attitude (“greatest good for the greatest number”) is often commonplace in such environments, but it might be bureaucratically enhanced by the formation of rules about “acceptable” cases that eliminate the more problematic ones.

¶3 Another, smaller spike in self-represented litigants coming to law libraries occurs from the upper middle class when such litigants have a case that simply represents too few dollars to make it worthwhile to use a lawyer. For instance, many younger dual-income couples, especially those without children or substantial property, will choose to do their own divorce, essentially leaving each to go

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1. The quote is an actual reference question asked at the San Diego County (Calif.) Public Law Library, circa 1990, recorded by Reference Librarian Elaine Peabody. The self-represented litigant’s intent was to get a book on the “dissolution” of marriage, the California term for divorce. Or perhaps it was a Freudian slip.
 2. *E.g.*, JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A GUIDEBOOK FOR JUDGES AND COURT MANAGERS 8–9 (1998); JOHN GOERDT, DIVORCE COURTS: CASE MANAGEMENT, CASE CHARACTERISTICS, AND THE PACE OF LITIGATION IN 16 URBAN JURISDICTIONS 48 (1992); JUDICIAL COUNCIL OF CALIF., REVIEW OF STATEWIDE UNIFORM CHILD SUPPORT GUIDELINES 6–21 (1998). Although the anecdotal evidence and law review and case law citations to this phenomenon are numerous, I thank Richard Zorza for these more official citations. RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 11–12 & 15 nn. 1, 5 (2002).

his or her separate way without any long-term financial commitments. Members of the upper middle class are also more likely to pursue a tort claim or contract claim without a lawyer simply because they have more such instances and more at stake, albeit not enough to reach the “hire a lawyer” threshold.³

¶4 These are just the spikes. The only income level that does not self-litigate is the very rich, since they can always afford attorneys. However, even some of them have used public law libraries to look up the law themselves as a check on the adequacy of the legal services they are purchasing, i.e., to see if their own attorney’s opinion is correct.⁴

¶5 Most of the types of cases that self-represented litigants pursue are what would be expected from those who represent themselves, i.e., the most common litigation areas, such as family law, landlord-tenant, criminal law (but here the numbers are predominantly the non-incarceration offenses), immigration, small commercial claims, and tort claims. But self-represented litigants can run the gamut, as cases involving Robinson-Patman antitrust issues or stockholder derivative suits do come up as well. Among the most perplexing cases handled by self-represented litigants are estate matters, as the litigants are often not well versed in the law, yet their fact situations can be very complicated, including many conflicts of law matters.

¶6 The court systems themselves have begun to create some agencies under their own auspices to handle the large numbers of self-represented litigants in certain areas. In many states, the courts will have a lawyer or paralegal (or department of them) to aid people in pursuing small claims. In some states, the courts will do the same for family law matters. Such service usually is limited to creating useful

3. These observations are based on a 1996 survey conducted among potential self-represented litigants for the San Diego County Public Law Library by Dozier and Lausen Associates. The survey included more than a thousand phone respondents, who were, by necessity, limited to those who had telephones and who spoke English. Continued support for the income figures has come from annual surveys of law library users conducted by the Council of California County Law Librarians (CCCLL). However, those reports were less specific with regard to matching type of patron with type of income, and the statistical analysis was not as accurate. Closer individual analysis of some of the reports from the San Diego County Public Law Library for the CCCLL study was done over the years and showed some correlation, as noted here.

4. Based on anecdotal evidence from the San Diego County Public Law Library. Note also the statement by Richard Zorza:

The vast majority of litigants who proceed without lawyers apparently do so because of the cost. A 1995 survey by the Unified Family Court in King County (Seattle), Washington, found that 72 percent were without lawyers because of cost, and only 7 percent because of a mistrust of attorneys or because they were unhappy with previous legal assistance.

ZORZA, *supra* note 2, at 15 n.5 (citing UNIFIED FAMILY COURT OF KING COUNTY, PRO SE RESOURCE CENTER—TASK FORCE REPORT (1995)).

However, it should be noted that these percentages would not be the same as those self-represented litigants who use public law libraries. Anecdotally, it has been my experience that a greater percentage of self-represented litigants at the San Diego County Public Law Library expressed a mistrust or at least dismay with previous legal assistance. Of course, that also may simply be representative of the fact that those litigants were more vocal about their experiences than those who were there for reasons of cost.

forms and to helping individuals get the right forms and instructing them on how to fill them out. Since these law-trained court employees do not provide legal representation to the litigants, they try as much as possible to avoid helping a litigant choose between different legal strategies or filling similar lawyer roles. They do have to listen enough to the litigant's regurgitation of the facts of the case to be able to point the litigant to the correct forms and perhaps to fill out the simpler components of the forms (e.g., "Use your spouse's full name"). States vary in the amount of discretion given to such employees to help litigants, but all have limits that are far short of providing full lawyer service. The limits are not dissimilar to those often used at public law library reference desks so as to avoid the unauthorized practice of law.

¶7 Court systems that provide such services do not have unlimited funds, so typically the departments are quite small, given the population they serve. As a result, in addition to the limits created to avoid the unauthorized practice of law, other limits may be imposed so that the service provider does not have to spend too much time with any one litigant. For instance, in San Diego County, the Family Court Facilitator is limited in the amount of aid that can be provided on child custody issues and real property settlements. If the questions are outside the prescribed bounds, the facilitator has no real choice other than to recommend to litigants that they go to the San Diego County Public Law Library and work on the issues themselves.⁵ In Travis County, Texas, in which the city of Austin is located, the court placed the self-represented litigant court service under the rubric of the Travis County Law Library, with the consent of the county government. Referrals to the law library are well coordinated and obviously more efficient for the litigant.

¶8 The majority of self-represented litigants who are served by court services can usually proceed to court without having to go to the law library to complete their work. However, since the work in filing the forms is not reviewed by an expert, other than to see that all the required lines are completed, there exists the chance that litigants will miss obtaining some advantage that is rightly due them. For instance, unless the form explicitly asks for it, potential divorce petitioners may fail to include a request for consideration of a portion of the respondent's retirement benefits. Similarly, unless the form explicitly asks for it, tort claimants may fail to request attorney fees (in this case to cover their own cost of discovery and litigation). Beyond that, the opportunity to file a pleading that may lead to an extension of the law to cover a novel fact situation or to create a new tort liability

5. The San Diego County Superior Court also provides a required mediation service, after filing, for the litigants to work out disagreements in a divorce, prior to going to court. Of course, the initial characterization of the disagreement occurs through the pleadings, which in many such instances are created by the litigants themselves through their own work at the San Diego Public Law Library.

would certainly be very limited. Forms are based on prototypical cases, not on those on the “penumbra.”⁶

Handling Self-Represented Litigants at the Law Library

¶9 Since the approach that law librarians take to working with self-represented litigants is to help them meet their information needs, rather than to complete a prescribed process as efficiently as possible, the reference librarian at the typical public law library will initially treat each library user as an individual. Only after the reference transaction is partially completed will the librarian begin to make judgments on how best to proceed efficiently with aiding the user. The assessment will depend not only on the nature of the case, but also on the user’s capabilities as a researcher, as at least first detected. When possible and if it suits the user’s own needs self-assessment, the librarian will turn to such aids as books explicitly made for self-represented litigants or forms, checklists, and research guides created by the library staff. Most self-represented litigants are as pressed for time as anyone else, and they much appreciate such aids.

¶10 For users who are not fully prepared to handle their own case, the librarian will likely make a different suggestion. Traditionally, books about the court system are suggested to help familiarize the user with the courts, the procedure that must be followed, and, to some extent, the time commitment required. Some librarians will simply spend more time with such individuals, explaining in general terms the matters that they must then look up on their own and pointing to some commonly used sources, such as legal encyclopedias and continuing legal education materials.

6. The term “penumbra” has been used many times to refer to the extension of a right to include additional members in a class or to analogize to a right to create a wholly new right. Perhaps the most famous example is Justice Douglas’s use of the term in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), to recognize a “Constitutional right to privacy.” Burr Henly, “*Penumbra*”: *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L. Q. 81, 83 (1987). H.L.A. Hart’s famous defense of legal positivism includes use of the term “problems of the penumbra” as “problems which arise outside the hard core of standard instances or settled meaning.” H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) [hereinafter Hart, *Positivism*]. See also H.L.A. HART, *THE CONCEPT OF LAW* 119 (1961) [hereinafter HART, *CONCEPT OF LAW*]. Steven Winter discusses Hart’s use of the term “penumbra” as an early example of radiating categories from prototypes. STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 197–99, 204–05 (2001). See *infra* ¶¶ 94–101 for a discussion on prototypes and radial categories.

¶11 More recently, some librarians have begun to hold classes for self-represented litigants.⁷ Most such classes vary in length from one hour to three hours, but there are classes that last all day or for several hours over several days. The notion is that a considerably larger amount of detail can be imparted in an efficient manner if several users are being taught at the same time, and because the class has more than one person, the discussion can remain on general topics without getting into the specifics of an individual user's own case. Thus, unauthorized practice of law can be avoided while still telling the user such valuable things as the proper forms to be filed, the time elements of a case, the need to be inclusive in pleadings, etc., in addition to teaching the basics of legal bibliography and legal writing.⁸

¶12 In most public law libraries, the response of self-represented litigants to the aid offered by reference librarians is quite good. Not only do they evaluate the librarians' services as fulfilling their needs, it seems that the work actually does do that, in that such litigants tend to be much better prepared to go to court and achieve their ends. Part of that outcome is due to the fact that the "ends" to be achieved are often corrected by the self-represented litigants themselves as they learn just what remedies are actually available for them. Part of the satisfaction of both the litigants and the court systems comes from the fact that the litigants do not waste the courts' time, or at least less so than other litigants who are less prepared.

A Typical Scenario

¶13 Many self-represented litigants show up at the public law library after having exhausted other avenues in their approach toward their case. A typical complaint of self-represented litigants is of first going to the clerk of the court to start their

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7. See, e.g., Paula Seeger, *Teaching Legal Research to the Public: What We CAN DO to Serve the Public and Gain Supporters for Our Libraries*, AALL SPECTRUM, Feb. 2006, at 6. The following public law libraries had classes for the public listed on their Web sites as of February 26, 2006: Arizona State Law Library, Phoenix; Los Angeles County Law Library, Los Angeles, Calif.; Sacramento County Public Law Library, Sacramento, Calif.; San Diego County Public Law Library, San Diego, Calif.; Douglas County Law Library, Lawrence, Kan.; Washoe County Law Library, Reno, Nev.; King County Law Library, Seattle, Wash.; and Wisconsin State Law Library and the Dane County Legal Resource Center, Madison, Wis. The author knows of other law libraries that have classes for the public which were not listed at their sites. This is due in part to the fact that many law libraries' Web sites are part of a much larger governmental site that does not allow such listings. Also, many other law libraries noted that users can request tours of the library, and tours are often used by librarians as occasions to teach the rudiments of legal research, sometimes with previously prepared materials.
8. Many bar associations and other entities will hold classes for self-represented litigants, teaching greatly condensed courses in substantive law areas. These "people's law schools" are typically taught in two- or three-hour blocks, with several classes over a week or spread over a few weeks and with each class covering a different substantive area. Usually, each class will have a different teacher, a lawyer who is expert in the substantive area being discussed that day. Legal research is rarely taught, and procedure is usually limited to the basics of filing forms. These courses do provide good overviews and thus a good starting point for a self-represented litigant. One important benefit is exposure to the actual remedies available, which can lower or raise the litigant's expectations appropriately and thus psychologically aid his or her interactions with the justice system.

case but, not having the proper forms, “getting the runaround.” They are then sent to a legal service agency, which tells them they do not qualify for its services. They may have also been sent to one of the court-sponsored departments for handling self-represented litigation, only to find that the person there was only interested in having them file the usual papers for a case when he did not understand what was going on. They may have also tried the local lawyer referral agency, but found that, beyond a small initial assessment of the case, it would offer no more unless they wanted to pay (and this was not a viable option for them). Somewhere along the way, they were told to try the law library. This was often the way such litigants would explain their path to the law library. More likely, if the local public law library has good relations with the various departments and agencies, it was recommended by each of the agencies along the way, but the litigants, realizing that they would have to do their own work in a library and perhaps having some fear of libraries, did not want to go there.

¶14 Once at the law library, self-represented litigants are often surprised by the reaction of reference librarians to their problem. They will actually listen for a while. Of course, the librarians are doing two things: assessing this new library user’s knowledge and research skill levels and ascertaining sufficient facts to direct the patron to the books, computers, classes, or other agency that he or she needs. To the user, however, the interest of a librarian seems to be that which one would get from a good lawyer, albeit interest for which the user does not have to pay.

¶15 What is it about this assessment and subsequent direction that makes the librarian so valuable to the self-represented litigant?⁹

Assessment and Direction

¶16 Most citizens have a developed sense of law and morality which comes from their cultural roots, their parents and education, their religion, and their own life experience. That knowledge base will give meaning to words that are different from the meaning that the legal community generally gives them and that judges ruling in specific situations would use. The job of a lawyer, being well versed in these proper meanings, is to represent the client and get the best deal possible by employing the proper discourse.¹⁰ In working with self-represented litigants, a law librarian’s job is to help them learn enough on their own to develop a sufficient sense of the proper discourse so that they can get closer to getting their own best deal. While a lawyer’s job for any individual client would take longer and be harder on the lawyer, the librarian’s job is psychologically more difficult for the

9. This scenario is not meant to imply that the other agencies through which the litigant passed were not also doing assessment and direction. They do the same. However, their assessment is not based on the same factors, i.e., the litigant’s fact situation and knowledge and abilities. They seek other factors to see if the litigant can be handled by the agency, such as income level, type of case (a limited fact analysis), or, for the court clerk, preparation prior to showing up.

10. See *infra* ¶¶ 42–49 for a discussion of “discourse.”

litigant. And the fact that the time is shorter makes it even more so, as indeed many lawyers often try to help their clients understand what they are doing for them, but at a slower pace.

¶17 The courts need to know that printed forms and computer kiosks will work only for those who already possess the knowledge and intelligence to make the shift in discourse easily. Ultimately, the least served will need human help.

Stories of Self-Represented Litigants

Story of Stinky

¶18 Here is a story from my days as director at the San Diego County Public Law Library.

¶19 Working in a public law library requires fortitude. Unlike the more pristine environments of the law school library and the law firm library, the public law library, like the public library, is open to all. Depending on the community, those that do not have a security guard often see very pathetic homeless transients, some of whom just want to get inside, away from the cold. Many are seriously mentally ill. Public law libraries often institute a rule requiring all users to be using the library for legal research, thus giving the staff a reason to throw the sleepers and loiterers out.¹¹

¶20 One duty law librarians take seriously is that of preserving the right of access to legal information, a right given to whomever walks in, including homeless transients. Many wiser, albeit still mentally ill, patrons, who might otherwise be asked to leave, avoid the rule by pretending to look up legal materials.

¶21 Some of these users actually are performing legal research. They have a goal in mind and are working toward that outcome. At times I would get discouraged because so much time was spent in dealing with those who fall through the cracks, the schizophrenic obsessives and others who had no case, but still wanted our attention.

¶22 Then about 1994, during some of our darkest financial times at the San Diego County Public Law Library, Stinky came along. Stinky was the nickname the reference staff gave to this homeless person who was so rank you could smell him before you saw him. He kept coming in every day for months. He was angry and obnoxious and very trying. Then one day he stopped coming. We didn't think about it, except to be relieved. A few weeks later, a clean-cut man in good clothes came into my assistant's office and asked to see me. My assistant Tracy told me she thought it was Stinky, but I said no way. Turns out it was. Stinky, now no lon-

11. Following the lead of public libraries, public law libraries usually have the local police enforce the rule against those who refuse to go peacefully. Most larger public law libraries spend considerable time dealing with issues of security and safety raised by the presence of mentally ill or otherwise bothersome "users." The ability of a public library to maintain some order in this regard has been upheld. *Kreimer v. Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992).

ger stinky, had come to thank me and the staff for putting up with him for so long. He had fought for and won, on his own, the return of his social security disability benefits and was no longer out on the streets. He had an apartment and his life back. He said, "You saved my life." I remembered Stinky through the rest of my career, not just for the lesson in toleration, but as an inspiration to continue to push for adequate funding and not to give up.

¶23 Stinky's story also caused me to listen more to the stories of other such users. Through them, I gained some insights that I will share with you.

Other Stories of Individual Patrons

¶24 The San Diego County Public Law Library receives approximately 100,000 visits per year from self-represented litigants. Many visit just once, and most stay for an average of some two to three hours, considerably longer than attorneys and other legal professionals who use the library and considerably longer than patrons at general public libraries. While constituting only about 40% of the total daily users systemwide, self-represented litigants ask more than 85% of the reference questions.¹²

¶25 I will now relate one more distinct story. The indistinct many far outnumber the distinct few. They are indistinct only in that their stories are so similar to everyone else's. They are distinct human beings, and the law librarians at the San Diego County Public Law Library always remember that.

The Queen of Chula Vista

¶26 One very interesting user referred to herself as the Queen of Chula Vista. Chula Vista is an incorporated city, a suburb of San Diego. This woman would maintain to the reference librarians that she was indeed the Queen of Chula Vista, and she meant the actual queen, not just someone chosen to ride at the head of a parade. She was, as you might surmise, mentally ill. While not a psychologist, I believe I would be safe in saying that she had schizophrenia with delusions of grandeur. She was reasonably well behaved, except that she did demand attention befitting a queen. Her questions at the reference desk made very little sense, since her version of reality was too far removed from the norm. She remained a patron for a couple of years, then we did not see her anymore. Unfortunately, since she was living on the streets, there is every chance that she may well have fallen into harder times, perhaps physical illness or injury or death. The library staff was not able to help her find an agency to aid her, as that was not her reason for being at the library.

12. Based on annual surveys conducted for the Council of California County Law Librarians. The percentage of self-represented litigants is greater at the three branch libraries (some 60 to 70%) than at the main library in downtown San Diego.

¶27 What she really wanted was to get her position as Queen of Chula Vista back: to return to her throne and rule her subjects. She spent considerable time studying the law, looking up books and cases, reading, taking notes, and writing. We believe that she actually filed some papers with the local superior court, but I cannot say for sure. Needless to say, she was unsuccessful in proceeding with her claim.

¶28 The thing that struck me most about her case was the fact that she was using the San Diego County Public Law Library at all. It would seem that, if she wanted her kingdom back, she needed to raise an army and overthrow the usurpers who had removed her from power. Of course, brought to its full logical conclusion, her fight would be with the whole United States government, since the sovereignty of the city of Chula Vista rested on the sovereignty of the state of California, which in turn rested on the sovereignty of the United States.

¶29 What was it that, in the midst of her delusion, required her to seek her redress within the court system and to look for her answers at the law library? I presume that she may have believed that she had a viable tort claim against the city of Chula Vista. Something within her needed some connectedness with the current order. How could she be so far out of bounds, yet still maintain that her case was somehow like those of the other users of the law library?

The Spectrum of Self-Represented Litigants

¶30 The story of the Queen of Chula Vista reveals the immense separation that a layperson can have not just from the discourse and vocabulary of law, but from the reality of what the justice system can do. On a scale representing the distance from the norm, there are a number of stories (and self-represented litigants) that would fall somewhere between that of the Queen of Chula Vista and that of Stinky. Public law librarians are often faced with schizophrenic obsessives who continue to pursue their lost case long after the system has given its final say on the matter. But there are also much saner people who pursue their cases endlessly.

¶31 A little closer to the norm are a significant number of people who are otherwise very reasonable and seemingly well in tune with the normative legal center, but who have one area (a peccadillo, if you will) where they become, in that sense, unreasonable. One example is the otherwise fine, upstanding citizen who beats his wife.¹³ The unrealistic comment, "She made me hit her," is so common that we don't even wince at hearing it, in spite of its complete lack of logic. Another is the otherwise nice neighbor who insists on his right to own dangerous dogs or other animals within a city or even an apartment building.

13. The number of policemen who have been found guilty of spousal abuse is too numerous even to make headlines any more. Lawyers found guilty of spousal abuse do not make headlines unless their final act is so criminal that the sentencing is really noteworthy. Judges found guilty of spousal abuse still make headlines, but only for a day.

¶32 Even closer to the norm are the many citizens who are simply mistaken about the law applicable to their situation. I remember one self-represented litigant who pounded his hand on the reference desk, demanding his constitutional rights. It turned out that he was involved in a child custody dispute. While undoubtedly a very important matter to him, it was not, as they say, a “federal case.”

¶33 Then closer yet would be the citizens who have some idea about the law relevant to their case, but are misinformed about the remedies they might be able to obtain. It is not atypical for a self-represented litigant to believe he is entitled to punitive damages in a commercial transaction dispute.

¶34 Another type of litigant who would have some variance from the norm is the culturally disadvantaged litigant. Obviously, most of those who are poor are less educated, so their understanding of the law, their discourse and vocabulary, would be farther from the norm. People who do not speak English would be similarly disadvantaged.

¶35 Think of this spectrum of self-represented litigants as a one-dimensional line representing the distance from the accepted norm that each individual self-represented litigant stands with regard to his own understanding,¹⁴ i.e., the percentage of difference between his understanding of legal reality and that accepted by the courts. In truth, the differences could be all over the place—on three dimensions, or however many dimensions one might wish to define, such as more liberal or conservative, willingness to accept evidence different from the norm, and so on. For our purposes, we are most concerned with the distance from the center spot, the accepted norm, so in our representation, no matter the direction of difference, we will collapse it into a one-dimensional line.¹⁵

¶36 So what do scholars have to say about this? Unfortunately, they do not say much about law library patrons specifically, but they do have much to contribute to our discussion of self-represented litigants.

The Cultural Analysis

¶37 Many scholars from various points of view have noted the difficulty that “ordinary people” have in understanding the law.

14. I use “understanding” here in the sense of “legal consciousness,” as defined by Sally Engle Merry. *See infra* ¶ 45.

15. I present this metaphor of ranking self-represented litigants by their understandings (legal consciousnesses) in a physical space for a purpose, as will become evident when I discuss the cognitive theory of metaphor. *See infra* ¶¶ 87–101. I wish to note though that my notion of this spectrum of self-represented litigants in a line in increasing distance from the norm came to me quite some time ago, well before reading the works of George Lakoff and Mark Johnson and of Steven Winter. Indeed, perhaps much of what this article is about is how librarians help self-represented litigants on their journey toward the center (the zero point). The obvious similarity to the metaphor of librarians as navigators on the information highway would probably strike Lakoff and Johnson as not accidental.

¶38 Law professor Lawrence M. Solan, a trained linguist, has noted that judges often use a variety of methods to interpret language in contracts, statutes, and constitutions so as to justify their decisions, proclaiming “precision” in order to sound convincing, rather than stating forthrightly their own difficulty and consternation at deciding what the words really mean.¹⁶ The decisions often leave even noted legal scholars shaking their heads. Solan uses as sources the legal realist jurisprudence of Benjamin Cardozo,¹⁷ the generative grammar and linguistics of Noam Chomsky,¹⁸ and the work of law professor David Mellinkoff, one of the early advocates of the Plain English Movement.¹⁹ Solan has been a spokesperson against the overuse and abuse of dictionary definitions by jurists as poor attempts to add precision (through “plain meaning”) to the law.²⁰

¶39 Another trained linguist, law professor Peter M. Tiersma, has similarly pointed out the difficulties of understanding the law, especially for the lay user.²¹ He points to the continued use and abuse, in spite of the Plain English Movement, of technical vocabulary; archaic, formal, and unusual words; impersonal constructions; overuse of nominalizations and passives; overuse of modal verbs; multiple negations; long and complex sentences; and just plain poor organization, especially in written materials.²² He has spoken of the great difficulty of creating adequate jury instructions.²³ Tiersma has noted the problem of *textualization*, a term he uses “to refer to the fact that the text is regarded not just as a record or evidence of the intent of a legal actor, but becomes the authoritative expression of that actor.”²⁴ The lay user is often befuddled by his own contract or pleadings.

¶40 But it may well be that the root of the problem is deeper than the ambiguous terms found in law and the difficulty that lay users have with legal terminology and writing. Noted English positivist and legal philosopher H.L.A. Hart had used the terms “internal” and “external” perspective to represent the viewpoints of the members of the legal community (judges, lawyers, court clerks, etc.) and those who are outside it, respectively, and to suggest that those external to it simply could not understand the system and its logic.²⁵ A reviewer of postmodern phi-

16. LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 2, 118–38 (1993).

17. *Id.* at 12–15 (referring to BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* (1924)).

18. SOLAN, *supra* note 16, at 15–18 (quoting NOAM CHOMSKY, *REFLECTIONS ON LANGUAGE* 10–11, 36 (1975)).

19. *Id.* at 119–21. Mellinkoff was one of the first to challenge lawyers to use more ordinary English. *Id.* See DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963), and many subsequent writings.

20. See Lawrence M. Solan, *Finding Ordinary Meaning in the Dictionary*, in *LANGUAGE AND THE LAW: PROCEEDINGS OF A CONFERENCE* 255 (2003); Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in *VAGUENESS IN NORMATIVE TEXTS* 73 (V.K. Bhatia et al. eds., 2005).

21. PETER M. TIERSMA, *LEGAL LANGUAGE* 241 (1999).

22. *Id.* at 203–10.

23. *Id.* at 231–40. See also PETER M. TIERSMA, *COMMUNICATING WITH JURIES: HOW TO DRAFT MORE UNDERSTANDABLE JURY INSTRUCTIONS* (2006).

24. Peter M. Tiersma, *From Speech to Writing: Textualization and Its Consequences*, in *LANGUAGE AND THE LAW: PROCEEDINGS OF A CONFERENCE*, *supra* note 20, at 349, 350.

25. *E.g.*, HART, *CONCEPT OF LAW*, *supra* note 6, at 55, 86–87, 96.

losophers and their thoughts on law, Douglas E. Litowitz, uses the same two terms, explicitly borrowed from Hart.²⁶ Litowitz's point is that postmodern philosophers see the law from an external perspective, which helps to examine the justice system's hidden abuses, but that they fail to offer a positive jurisprudence because they fail to suggest the internal changes needed. The counterpoint argument that some postmodernists would make is that the justice system cannot be fixed from within. Let us see what some postmodernists are saying that is pertinent to our concern for self-represented litigants.

¶41 Within philosophy departments and law schools, a considerable amount of scholarship has been devoted to examining truth from a postmodern stance. I refer to the notion found in those places, as well as many other departments in academia and culture generally, that no single discourse, be it scientific, cultural, religious, or aesthetic, can be known to convey the same meaning to all people.²⁷ Furthermore, all discourses are laden with hidden meanings, tacitly and unconsciously accepted by those who know the discourse sufficiently to use it, and not understood at all by those who do not know the discourse.²⁸ Some postmodernists may go so far as to say that no two individuals will completely agree on meanings, as every person has a separate understanding (legal consciousness).²⁹

Thinking Like a Lawyer: Discourse and Legal Consciousness

¶42 Most law librarians are acquainted with the phrase "thinking like a lawyer." It is used to represent what is being taught in law school. The skills of logical analysis and application are presumably more important than teaching the current version of law because law will change over time, and the lawyer is best served by being able to find the law in law books and then applying it to the case at hand.

¶43 Some first-year law students (and some self-represented litigants) mistakenly think that "thinking like a lawyer" means only talking and writing in the overly technical manner that Professor Tiersma has warned us about.³⁰ Rather, the phrase refers to inculcating the jargon and logical analysis routinely used by the legal profession so well that one's use of these in a legal setting is automatic and is perceived as accurate and rigorous by both the user and others in the profession. The language and pattern that one uses when thinking like a lawyer is called a *discourse*.

26. DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* 20–34 (1997).

27. "Discourse" is a term widely used in postmodern scholarship. David Jolliffe, *Discourse*, in *ENCYCLOPEDIA OF POSTMODERNISM* 101–03 (Victor E. Taylor & Charles E. Winquist eds., 2003). My specific use of the term will be defined below. See *infra* ¶¶ 44–46.

28. H.L.A. Hart may well agree that those who do not know the discourse cannot understand the law, but he would contend that those who do know it are not subject to such "hidden meanings, tacitly and unconsciously accepted." He would state that, within the law, the meaning is there to be found. See HART, *CONCEPT OF LAW*, *supra* note 6, at 180–89.

29. See *infra* note 33 and accompanying text for Professor Sally Engle Merry's definition of "legal consciousness."

30. See *supra* ¶ 39.

¶44 Law professor John M. Conley and cultural anthropologist William M. O'Barr, in *Rules versus Relationships: The Ethnography of Legal Discourse*, wrote:

"Discourse" has entered the technical language of most humanistic and social scientific disciplines over the past decade. Neither the object nor the method of analysis is consistent. Discourse is widely used to refer to a stream of scholarly consideration, usually written, of the issues of concern to a particular field of inquiry. . . .

For those disciplines such as linguistics, anthropology, and sociology that study spoken as well as written language, discourse analysis also refers to the study of connected sequences of speech such as conversations and narratives.³¹

¶45 In *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*,³² cultural anthropologist Sally Engle Merry found that working-class Americans expect the legal system to provide them justice or revenge for their disputes over family problems, small property claims, and small commercial matters, and they are surprised to find that the system is geared toward mediation and settlement. She calls the different frames of meaning "discourses," borrowing from the French postmodern philosopher, Michel Foucault. She distinguishes discourse from the "consciousness" in the title of her book in this way:

Discourses are located in the world, rooted in institutional structures. Consciousness, on the other hand, describes an individual's understanding of his or her world. It is produced by a person's interpretation of the cultural messages provided by discourses, an active process in which the person uses cultural categories to construct an awareness of self.³³

¶46 Conley and O'Barr, using the term *discourse*, have wisely split it into two senses, "macrodiscourse," which is the abstract, Foucaultian sense, and "microdiscourse," which is the linguistic sense, referring to the discourse of variant social groups.³⁴ My use of "discourse" here has elements of both macrodiscourse and microdiscourse, in that legal discourse is both a hegemonic system and a discourse within a social group (i.e., the legal community) in the linguistic sense.

¶47 What follows is a long quote from Merry's *Getting Justice and Getting Even*, where she observes the attempts of working-class litigants to discuss their cases. Any reference librarian at a public law library can relate to her comments.

31. JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 2* (1990) [hereinafter CONLEY & O'BARR, *RULES V. RELATIONSHIPS*]. *But see* JAMES PAUL GEE, *AN INTRODUCTION TO DISCOURSE ANALYSIS: THEORY AND METHOD* (2d ed. 2006). This recent introductory text shows that discourse analysts have added considerable rigor to their definitions of categories of discourse in the fifteen years since Conley and O'Barr's book.

32. SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

33. *Id.* at 9.

34. JOHN M. CONLEY & WILLIAM M. O'BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER 6-7* (2d ed. 2005) [hereinafter CONLEY & O'BARR, *JUST WORDS*]. James Paul Gee uses the term "discourse," as in professional discourse, for macrodiscourse, and "social language" for microdiscourse. GEE, *supra* note 31, at 20-21.

Mediation sessions, clerk's hearings, and lower-court trials of family and neighborhood problems are instances of talk in which individuals present images of both themselves and events in ways designed to justify and convince. The conversation is a contest over interpretations of ambiguous events. The parties couch their descriptions in language intended to persuade, interpreting their own actions as fair, reasonable, or virtuous and those of the other side as unfair, small-minded, and irrational. Third parties also develop interpretations of both the event and the character of the people which they introduce into the discussion.

Conversations about events and actions take place within frames of meaning. The participants have already understood the incident within some frame of meaning. When they appear before a third party, they bring expectations about the third party's frame of meaning as well. There is obviously a good deal of uncertainty here, of flailing around for the right combination of concepts and explanations which the third party and the other side will accept. Experience is important: going to court hones a person's knowledge of persuasive ways of presenting problems and claims while alerting him or her to futile ones. Third parties frequently offer instruction about what they want to hear, how it should be phrased, and which labels are effective and which are not. They offer particular visions of how the law works and drop words which carry weight in the court. Parties couch their descriptions of events and character in ways designed to persuade these people. As problems move through the courts, parties quarrel over interpretations of situations, in part by arguing over the frames of meaning within which these interpretations are made. I call these frames of meaning *discourses*.

I argue that the lower courts contain three analytically distinguishable discourses, only one of which is that of law. One is based primarily on categories and remedies of the law, one on the categories and remedies of morality, and one on the categories and remedies of the helping professions. The same discourses exist outside the courts as well. . . . [W]hen people come to court, they bring their problems already framed in one or more of these discourses. Once they get into court, they find that mediators and court personnel try to reframe their problems in a different discourse.³⁵

¶48 Just as a litigant must learn some amount of legal discourse in order to understand the proceedings at court, a self-represented litigant must understand much more legal discourse and must learn it much earlier in the legal process. One would think that the reference librarian faces the same difficulty as the court personnel mentioned in Merry's observations, but actually the difficulty is greater. The job of court personnel is to get the litigant's documents into shape, to textualize the matter³⁶ so that the court can find and deal with the problem and apply the proper remedy (at least the one allowed by law). The job of the reference librarian is to enable self-represented litigants to research and address their own needs. Self-represented litigants must learn the meanings behind the legal discourse, learn how to apply legal discourse properly, and learn to accept the analysis of the situation that the discourse would give it. It is somewhat like learning a whole new culture.

35. MERRY, *supra* note 32, at 9–10 (footnotes omitted).

36. Remember Tiersma's comment on textualization. *See supra* text accompanying note 24.

¶49 In addition, the librarian must be able to communicate with self-represented litigants in their own terms, i.e., to understand each litigant's own cultural subgroup discourse (the second type of discourse) sufficiently to get through to the litigant. On top of that, the litigant's own legal consciousness may present shades of meaning that can confuse the situation. Stinky and the Queen of Chula Vista are obvious examples, but nearly everyone will have some elements of individual legal consciousness that will impede understanding to some degree.

The Postmodern Search for Meaning

¶50 The major issue of many postmodern thinkers is the epistemological one of whether an ultimate truth can be found. In art, the question is often put as to whether a person viewing a piece of art sees the same meaning that the creator intended and, if not, then which view is the "right" one. For literature and other humanities, the question is generally the same. The answers vary a lot.

¶51 Law professors have been a part of the postmodern movement as well.³⁷ The concern of most of them has been the extent to which the law includes in tacit ways the individual viewpoint of judges while they (the judges) profess to obtain their correct interpretations of the law solely from ideas within the law itself. In other words, judges as a general rule conduct their affairs as if they uncover the "ultimate truth" of the law from legal materials (cases, statutes, and, to a lesser extent, secondary sources such as articles, treatises, restatements, etc.), with no reference to materials from other disciplines,³⁸ but many postmodern legal thinkers believe that they don't really do that.³⁹ These postmodern legal thinkers believe

37. See generally GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* (1995). Professor Minda included within his taxonomy critical legal studies, feminist legal theory, law and literature, critical race theory, and, what seemed surprising at the time, law and economics. More recent work by law and economics scholars show a greater sympathy toward postmodern thought. Also, more recently, the culture and law movement has developed. Minda noted that, by 1995, the several postmodern legal movements had transited into their own legal discourses. *Id.* at 195–98.

38. While taking its roots back to the formalist theory of Christopher Columbus Langdell, who, as the first dean of the Harvard Law School, also invented the case method, the more modern representation has generally been labeled legal process theory, as espoused by Harvard Law School professors Hart and Sacks in their teaching materials, later published in casebook form as HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994) (derived, with corrections and a new introduction, from the authors' 1958 manuscript which, though unpublished, was widely distributed in a mimeographed "tentative ed."). See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Simultaneously, the English philosopher and legal positivist H.L.A. Hart called for the separation of law and morals. Hart, *Positivism*, *supra* note 6; HART, *CONCEPT OF LAW*, *supra* note 6, at 181–207.

39. The postmodern legal thinkers who would emphasize that belief will generally label themselves as either skeptics or as heirs to the legal realists. Other postmodern legal thinkers, as cataloged in MINDA, *supra* note 37, would not hold to such a belief. Some might well maintain that the language of the law, as defined by the courts, is itself an operative reality, and for some an oppressive tool. In that sense, they might likely maintain that an individual's "separate reality" is either a misunderstanding of the operative reality or an instance of the existential difference or alienation the system creates.

the judges have to include ideas that come from other sources, because each and every judge has his own personal meanings developed through his own culture, education, experience, and personal predilections.⁴⁰ Because judges rule according to their own understanding, the law would tend to favor what they know, or, to put it bluntly, judges would routinely follow the status quo because it is through that same status quo that they obtained their positions.⁴¹

¶52 For my purposes here, the jurisprudential and philosophical aspects of the prevailing theory commonly held among most judges are not of primary concern. Rather, the fact that the prevailing view exists is the concern, insofar as librarians must prepare self-represented litigants to meet it. Postmodern thought contributes to my efforts by identifying a substantial problem that self-represented litigants have when facing the system. Not only do self-represented litigants have difficulty simply because they have not studied the law and must develop legal research and writing skills, but they must also become immersed in the cultural and educational detail that is the backbone to the prevailing viewpoint, as represented by most judges. To appeal and win before a judge, the litigant must be able to present his case in a fashion that the judge will interpret as the correct format and include such evidence and law that the judge will find persuasive. In other words, self-represented litigants must appear as if they are using the proper discourse.⁴²

¶53 Discourse training for lawyers begins immediately in the first year of law school. The normal presentation pattern for most legal documents has been characterized as IRAC, which stands for “issues, rules, application, and conclusion.” All law students are instructed that this is the pattern to be used in law office memoranda and appellate briefs, but it also is used in elliptical ways for basic pleadings

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40. Included with these personal predilections would be not only the judges’ political preferences, but their individual choices generally, including what books to read and what television to watch. Indeed, the whole notion of a need to balance the Supreme Court, not just politically, but by religion, race, and sex, is predicated on the common sense belief that people from different backgrounds would rule differently, at least in subtle ways.
 41. For most of the postmodern legal movements, the notion is that the status quo unfairly favors modern business and property interests and disfavors minorities and the disenfranchised. The law and economics movement, however, would more properly be represented as suggesting that, since judges do use outside influences, they should consciously look to a good one, i.e., economic analysis. There are also, of course, judges who have heard these postmodern arguments and simply do not buy them. They may well explicitly see their own legal consciousness as good and proper and representative of what is and should be the prevailing norm.
 42. From one culture and law perspective, legal discourse is distinctive on multiple levels: a learned jargon, a particular style of analysis, and a disconnect between lawyers and society, all three learned in law school. CONLEY & O’BARR, *JUST WORDS*, *supra* note 34, at 133–35 (quoting ELIZABETH MERTZ, *LINGUISTIC CONSTRUCTIONS OF DIFFERENCES AND HISTORY IN THE U.S. LAW SCHOOL CLASSROOM* (American Bar Foundation Working Paper No. 9419, 1995)).

and motions, opinion letters, court presentations, and so forth.⁴³ Judges themselves will prepare their written opinions using the same format.⁴⁴

¶54 The IRAC formula is essentially a logical pattern. The *issues* are an initial determination as to what the case is about. The *rules* are created through a process of induction, taking relevant statutes and cases and extracting the rules from them. The *application* is the examination as to how the case at hand fits into the categories that the rules establish. The *conclusion* is the outcome as the rule is applied deductively. The whole enterprise makes sense if one is already versed in the law and the case is a “usual” one, i.e., one that has little in differentiating facts that might require a different rule.

¶55 The IRAC formula itself has been seen as too pat, even by traditional scholars. A formalist colleague of Professor Stephen Winter once complained that the over-simplified IRAC formula, as given to first-year law students, is misused, that the “A” should be for “analysis,” not “application.”⁴⁵ Indeed, after learning the IRAC formula, law students then spend the next three years digging deeper into the logical patterns necessary for the practice of law.

¶56 When I taught first-year law students legal research and writing twenty years ago, using the Marjorie Rombauer legal process method, I always delved deeper into the logical patterns, sometimes even thinking that I should add books on logic and rhetoric to the reading list. As I taught it, IRAC was merely the nice-looking gloss put over an immense amount of work and analysis. Indeed, the very choice of issues usually entailed substantial problems. One example was finding two separate lines of cases determined by outcome, as when a court’s ruling that a government agency was within its powers to act would be keynoted by the West Publishing Company as administrative law, but when the agency lost, it was a constitutional law case. The choice of issues also directly affects which facts are relevant and which are not. Another example was avoiding complex questions when writing up the issues portion of the IRAC.

43. IRAC is also occasionally employed by law librarians when teaching classes to self-represented litigants, most of whom do not have the skills for the work that brand-new first-year law students have, much less the analytical skills of practicing lawyers.

44. See, e.g., DOUGLAS LIND, *LOGIC AND LEGAL REASONING* (2001) (published by the National Judicial College for Professor Lind’s classes for judges); RUGGERO ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (3d ed. 2001). Judge Aldisert shows the use of traditional logic in appellate opinions as examples for lawyers. Aldisert was Lind’s predecessor and mentor. The standard text for philosophy students for many years has been IRVING M. COPI & CARL COHEN, *INTRODUCTION TO LOGIC* (12th ed. 2004). Aldisert depended heavily on Copi’s book (in an earlier edition) when he wrote *Logic for Lawyers*.

45. Telephone interview with Steven L. Winter, Walter S. Gibbs Professor of Constitutional Law, and Director, Center for Legal Studies, Wayne State Univ. Law Sch. (June 21, 2006). As an example of the larger amount of analysis that traditional scholars see to be needed, see STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1985). Burton stresses the use of analogy to create rules from cases. Analogy can be seen as a type of induction, one that uses few examples (i.e., prior cases), but that analyzes them closely to judge their pertinence. For a more recent examination of analogy that stresses the difficulty of the analysis, see LLOYD WEINREB, *LEGAL REASONING: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005).

¶57 Thus, although the IRAC pattern appears simple, it is in fact a cover-up for much more detailed analysis, presented in a form that the judge can read quickly and easily. One component of that collapse of analysis into a short, elliptical presentation is the removal of facts that the analysis proved to be irrelevant, but which are of great psychological importance to self-represented litigants.⁴⁶ As this is done without explanation, especially in pre-printed pleading forms, self-represented litigants begin to feel some loss of justice, of having their “day in court” curtailed to that extent.

¶58 As noted earlier, the IRAC formula seems to work well in “usual” cases, where the probable outcome is quite clear from the research. Of course, the notion that a case is “usual” is based on the presenter (litigant, lawyer, judge) and his own understanding. Lawyers who have practiced in an area of law for a long time will determine that a case is a “usual” one when it closely matches others that they have handled before. If the case is different, but one that should be within their scope of expertise, then the lawyers will decide that the case must be one of “first instance” or “first impression” (i.e., has no easy route to follow), and consequently will do more legal research to get to an answer. They may even characterize the case as one of “first instance” to bolster the claim that the judge should review materials that have been gathered from unusual sources, such as persuasive precedent from other states or law review articles.

¶59 New lawyers will, of course, not have the years of experience to fall back on, so for a while every case will be one of “first instance.” They will have to read cases in their own jurisdiction for the first time that they may well see again and again as they continue to practice the same kind of law. It is not uncommon for a law firm or a solo practitioner to refrain from charging for the full number of hours for preparing such a case because the new lawyer’s preparation time is so much above the norm. The cost is written off as necessary learning, knowing that it will come in handy later in similar cases.

¶60 From the perspective of self-represented litigants, their case is always one of “first instance.” The law of the case actually may be well settled, but the self-represented litigant will have to do a full-blown effort if it is to be done right. When the court creates forms for self-represented litigants, it includes aspects that incorporate the law as it would be applied to the prototypical case. Assuming the instant case is sufficiently similar to the prototypical case, then the form will do the job. That is, it will do the job if, in the eyes of the litigant, the job to be done is simply that of getting through the system (and getting whatever he or she can) without using a whole lot of the litigant’s own time and expense. If the outcome is less than what was desired, the litigant has given up the possibility of convincing the court that it should do more in order to preserve expediency. Of course, without a full-blown effort, no self-represented litigant will know whether the case is

46. CONLEY & O’BARR, *JUST WORDS*, *supra* note 34, at 133–34.

one that might have garnered a better result had it been thoroughly researched and well presented.⁴⁷

¶61 It is when the self-represented litigant determines either that the case is not susceptible to being handled by a quick form or that the form will not give the desired result (and the litigant will not settle for less) that the litigant will appear before the law librarian. Sometimes, the self-represented litigant, not used to employing the pattern of logic implicit within the forms, will also have problems with even the quick forms. He will express some confusion for items that would seem very basic to those who are well versed in persuasive argument modeled among the rationalist lines implicit in the IRAC formula.

¶62 The IRAC rationalist model itself, as an instantiation of the legal process theory or formalist theory, is susceptible to the type of criticism placed against the legal process theory as a whole.⁴⁸ In fact, many law review articles, in reviewing the arguments laid out in judicial opinions, routinely call into question the logic and rationale used by judges in their opinions. Most typically, to obtain the votes needed to achieve a majority opinion, the appellate judge will employ the IRAC formula, written as a long and well-cited text, which gives the appearance that all issues raised by the attorneys have been faced.⁴⁹ The logical deduction implied by the formula seems to give a rigor to the decision, but the deduction is only as good as the premises on which it is based. In trying to keep the premises minimized so

47. Of the “seven ongoing barriers to effectiveness for those who represent themselves,” Zorza lists the *analysis barrier* first:

Most self-help assistance programs report as the key problem that telling people the law was not enough. Litigants often need far more help than the program could give them in analyzing the implications of the law, in applying the law to the facts, and then in forging out of the law and the facts a coherent and persuasive legal argument. For example, it is one thing to tell a litigant that service of a court paper must follow certain rules. It is quite another for the litigant to be able to understand the legal meaning of what actually happened in a failed attempt at service.

ZORZA, *supra* note 2, at 17.

Four other barriers listed by Zorza also can cause self-help litigants to seek information from public law libraries: the Situation and Options Evaluation Barrier, the Preparation and Presentation Barrier, the Remedy Barrier, and the Enforcement Barrier. *Id.* at 17–18.

For a good general text listing the many cultural and economic barriers to self-represented litigants, as distinct from the analytical and linguistic ones noted here, see DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004).

48. Legal process theory is generally considered to be a type of legal positivism, which in turn is a type of positivism. See Leslie Green, *Legal Positivism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2003), <http://plato.stanford.edu/archives/spr2003/entries/legal-positivism>.

49. Much of the argument in chambers between the members of an appellate court is over the issues in the case. When judges have the time, they may bring additional issues to the case beyond those argued by the attorneys. No court, however, has the ability to route its opinion around for general public comment before deciding, so “Monday morning quarterbacks” (i.e., legal commentators) can generally find missing issues in any opinion.

SOLAN, *supra* note 16, is primarily about how judges obfuscate the difficulties and insecurities that they face when weighing differing arguments by writing in precise language, i.e., using the IRAC formula as if there were no conflicting premises. He and Cardozo believe that more candor would actually help understanding. *Id.* at 172.

as to home in on the logic, meanings are assumed and underlying issues may not be faced. So the formula itself bears a lot of the criticism.⁵⁰

¶63 The common notion that law school teaches law students to “think like a lawyer” is really a statement that law students must learn to use the IRAC formula for presenting their ideas, in whatever form of writing or classroom discussion the students must face, or otherwise they will not be persuasive.⁵¹ Given that the IRAC formula is pervasive throughout law school, it is little wonder that lawyers become versed in it. The formula, of course, is also the philosophical basis for much of rationalist philosophy, in most all its forms, and so is present in large ways in other

50. The first article to do this is thought to be Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968), which focuses on the defense of legal process theory found in Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). However, the leading critic has been Duncan Kennedy, who authored a series of articles, most notably *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518 (1986), and eventually a book, DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997). These materials deal with the very nature of the logic employed by judges. However, many, if not most, law review authors will question some form of the logical presentation whenever they question a judicial opinion, in addition to or in lieu of, the argument against the substance of the decision.

51. Some traditional legal scholars might argue that this statement is too simplistic, that law school certainly teaches more in-depth analysis than is shown in an IRAC-organized document. I do not dispute that fact. Rather, I am here stressing the notion that legal discourse has within it a component that requires that ambiguous or vague legal precedent must be represented in legal documents as not ambiguous or vague in order to have persuasive value when presented in court. Lawyers get used to applying this imposed rigor to their documents, and they learn to handle the appearance of rigor in the documents of opposing counsel and judges. Self-represented litigants sometimes mistakenly think the imposed rigor equates to their own moral certitude as to the rightness of their cause. Other self-represented litigants are doubly confused: first, by the fact that the law is vague or ambiguous, and, second, by the appearance that this is never the case for other litigants.

According to many postmodern legal movement thinkers, this educational socialization process sanctifies the rationalist model of the legal process theory and, to their minds, the discounted notion that the law is based on neutral principles that can be obtained from the study of legal materials exclusively, or, to be more specific, from the close examination of appellate opinions and their induction (or synthesis) into a legal rule. These postmodern thinkers believe that newly minted lawyers learn to “play the game,” if you will, and, in so doing, avoid having to take into account outside influences that might “cloud” their judgment with facts or philosophies that would call into question the legal rules thus found. So, the law becomes a non-changing, or less changing, discipline, conservative to the core, and unresponsive to the claims of oppressed minorities. See sources cited *supra* note 50 for materials in which such arguments are made.

disciplines as well.⁵² However, the average self-represented litigant is likely not to be so well versed in inductive and deductive logic. Indeed, the average self-represented litigant may well base most of his or her own principles on arguments of faith (“I believe in God and learned what that means in church”), friendship (“John told me he is a good dentist”), or presumed expertise (“I read it on the Internet”). The farther-removed-from-the-norm (or less-than-average, if you will) self-represented litigant may well have even cockier belief patterns. (Voices heard by schizophrenics create significant portions of their reality for them.)

Bringing the Self-Represented Litigant Along

¶64 The notion exists among legal scholars that the layperson believes that “the Law” is set and determined, that there is a rule for every aspect of our lives, and that the justice system is to be respected precisely because it applies the law and thus brings the same results to everyone.⁵³ As a law librarian, it has been my experience that laypeople vary dramatically in what they believe about the justice system. There are probably as many laypeople who find the justice system to be blatantly political and rampant with abuse as there are those who find it to be highly respectable and accountable. Many library users have complained that the particular judge who ruled on their case was biased against them and misapplied the law. Some sophisticated users have complained that the law is needlessly

52. Albeit a completely different process, one could argue that the scientific method is an alternate form of IRAC, with its notion of hypothesis, repeated experimentation and testing, and, finally, creation of or alteration of a scientific law. The hypothetical scientific law (rule) being tested undergoes early challenges from the very first tests, which in effect form the first induction. Indeed, the hypothesis is often really formed only after some original, unusual phenomena has been observed, the anomalies to be addressed. Successive tests are simply further inductions. Then the deductive logic comes into play, suggesting the pattern of causality and the presumed observation in the critical test of the hypothesis. When the test results come out as expected, then the law is proven. One striking difference between a legal decision and a scientific experiment is that the experiment is devised precisely so that the hypothesis in question can be tested. That is, the experiment is devised so that the category of example being tested must be one that will work only if the law is true. Science chooses the fact pattern. In law, of course, the fact pattern just happens and the decision is to determine if the category for which the rule is to be followed contains the fact pattern. If an experiment fails, science has the luxury of declaring that a law is not proven. The field of law does not. Each case requires a decision, so there must be a law so that it can be decided.

The IRAC pattern is commonly used in other fields of study as well. Some, like proving the existence of God as a philosophical or theological exercise, can be made employing an IRAC formula. Some, like determining whether a particular book falls within a certain genre of novels, become a wholly human decision-making process where an IRAC formula can be deployed. Both these examples are subject to the criticism of circularity, which is the principle of the argument of the postmoderns with respect to legal process theory.

53. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175; Hart, *Positivism*, *supra* note 6; FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE* (1991). *But see* WINTER, *supra* note 6, at 296.

These arguments must be distinguished from that of Merry, whose perspective on the legal consciousness of working-class Americans comes from anthropological studies. Her point is that these litigants presume that they will receive justice or revenge for themselves, which is not necessarily the same as “justice for all.” MERRY, *supra* note 32, at 2, 179–80.

complex, done purposely to discourage self-represented litigants from suing large entities, such as corporations and governments.⁵⁴

¶65 Regardless of the variety of opinion though, practically every self-represented litigant has some respect for the fact that the justice system exists and must be dealt with.⁵⁵ Nearly all self-represented litigants are aware that their own sense of justice is not exactly the same as the normatively imposed sense of justice, as seen by the courts. Nearly all self-represented litigants using a public law library also know or learn that they will have to do a considerable amount of study to understand just what the justice system will require from them.⁵⁶ And nearly all self-represented litigants are fully aware that the justice system can and will occasionally screw up badly and give bad or unfair judgments, even under its own rules. So, extrapolating from the self-represented litigants I see, in my opinion, the average layperson, or at least those who come into public law libraries, is far more sophisticated and aware of the realities of the justice system than the legal scholars presume.

¶66 Rather, the ideal model of the justice system that legal scholars presume the layperson believes is more likely just what laypersons, faced with representing themselves in court, hope they will get but fear that they will not. I suspect that this is the case throughout the spectrum of self-represented litigants.⁵⁷

Enter the Librarian

¶67 The law librarian usually enters the process in a big way when self-represented litigants find that their work will not be simple. The quick form or self-help book will not be sufficient or is simply not understandable.

¶68 Librarians, however, usually do not try to teach such individuals the full-blown IRAC and all its implications. Normally, they will limit their role to that of getting the information to the litigants and then allowing them to figure it out on their own. In fact, librarians usually avoid discussing the presumed rigor that the

-
54. Professors Conley and O'Barr have placed litigants into two categories—those who are rule-oriented and those who are relationship-oriented—but they note that actual people exhibit both orientations and sometimes evolve from one (usually relationship-oriented) to the other (rule-oriented) as they move through the justice system. *See* CONLEY & O'BARR, *RULES V. RELATIONSHIPS*, *supra* note 31, at 59–67.
 55. A very few library users, such as the Freeman and some tax evaders, have shown a strong disregard for the institution of the law itself. Most of these eventually come to respect the fact that they must deal with the law, once they run afoul of it. But alas, they would be the exception that proves the rule.
 56. This awareness sometimes manifests quickly. At the main library of the San Diego County Public Law Library, much of the use of the coin changer is to feed parking meters. Once in a while, the librarians there are provided with a laugh when a self-represented litigant parks in the three-minute zone and comes in “to pick up a book” without having previously contacted the library.
 57. In fact, when faced with one’s own lawsuit, such reality hits home, as they say. I suspect that even the respected judge, who hires the best lawyer in town to represent him in his own case, has that same opinion of the justice system, as does the Queen of Chula Vista.

IRAC formula entails for law work. They try to “bring the problem down” to the presumed level of understanding of the litigant.

¶69 The common way to do this, whether answering a question at the reference desk or teaching a class, is to give an example. The librarian will show how information can be found in a book, via the index method or topic method, or found on a computer, through a well-constructed search that balances precision and recall.⁵⁸ The librarian will also show how a more general understanding of the law can be found in secondary sources, which can help the litigant understand the appellate opinion or even the operative statute.

¶70 Presenting the example in a class setting would involve a made-up legal problem for which the librarian has worked out the answer in advance. Presenting the example at the reference desk, however, would more likely involve starting on the litigant’s problem itself, for instance, by going to the stacks and showing how cases on the particular topic are found. There is a tendency among reference librarians either to show the topic route, leading to a large recall of cases that the litigant must wade through, or the index method, leading to a few relevant cases, but perhaps not as much as desired. In this way, the litigant is left to finish the problem. By not leading the litigant to the “final answer,” the librarian also has avoided giving an answer that could be construed as the unauthorized practice of law.⁵⁹

¶71 The self-help litigant learns from the example given by the librarian. Indeed, as any parent knows, much practical knowledge is gained from example, or example followed by some explanation put in simple terms. As I will explain,

58. *Precision* and *recall* are information science jargon terms. Precision is the ratio of the number of relevant documents retrieved over the number of documents retrieved. Recall is the ratio of the number of relevant documents retrieved over the number of relevant documents in the database. Some litigants, e.g., those who have heavily used such search engines as Google and Amazon.com, which employ sophisticated correlation techniques and feedback loops, can have trouble doing searches in standard Boolean logic, i.e., using precision and recall. This is essentially another discourse barrier.

59. Please note that I am here referring to the unauthorized practice of law and not the more general term of *legal advice*, which is so slippery that it has no real place in the discussion. Legal advice could be construed to be any helpful information at all, or it could be construed as only the final piece of assistance that the litigant relies on without further action on his or her own.

Some court and law libraries have developed guidelines so that their employees do not give legal advice, as they define it. The tendency is to increase the amount of information given, but there is a great variation among approved guidelines. Several states are addressing the issue. A complete footnote would require another article, but several courts have posted their rules on the Self Help Support Web site (www.selfhelpsupport.org) under “Library-Ethics.” This site requires registration as a professional who works with self-represented litigants and is not open to the public generally.

the real issue is not to train the self-help litigant to think like a lawyer, but to determine just how many examples with explanation to give to the self-help litigant.⁶⁰

Training by Example

¶72 When training by example, librarians typically will try to use words that they know the self-help litigants will understand quickly. To explain concepts that are new, they often will use metaphors or similes. For example: “This procedure manual is the roadmap for how your case will travel through court.” “The complaint pleading is like a job application or a credit card application. It gets the process started.”⁶¹

¶73 Some examples are so obvious to librarians, but initially so foreign to self-represented litigants, that the librarians will remark on the reaction of some litigants as they finally come to an understanding. For example, in a research class, the librarian will most likely present the state case digest as much like an index at the back of a book, except that the book is the set of state reporters and the digest is continually growing along with the number of reporters. This analogy will make sense to a litigant who has studied in college and had to write papers—they will experience an “Aha” moment. But it might mean nothing to those who have had no previous experience with book indexes. For them, the librarian may need to say, “Well, it’s like a phone book.” And for the younger crowd, the librarian may have to say, “Well, it’s like the search results from a Google search.”⁶²

60. The librarian’s major limitation in serving self-help litigants is time management. In most settings, the librarian will have to serve several library users at once or within a short period of time, so devoting a lengthy period of time to one litigant becomes unfair to the rest. Most librarians also have other chores to do—such as choosing books for purchase, organizing and updating reference files and databases, and perhaps even cataloging some books—while sitting at the reference desk. Many librarians also will accept reference questions via telephone, e-mail, or immediate contact methods variously called “virtual reference” or “live reference,” but basically all using sophisticated chat room software. The librarian will usually have some backlog of such questions that also need attention.

There also is the phenomenon known as the “captive librarian,” which occurs when a particularly needy library user sees that the librarian is all alone at the reference desk and “not doing anything.” The user then feels free to bombard the librarian with question after question or to ramble at length about the facts in the case, hoping to garner more aid or possibly just to have a sympathetic ear. This problem, and indeed time management in general, are outside the scope of this article.

61. The use of what is called a *classical metaphor* (A is to B as C is to D: “‘Plaintiff’ and ‘respondent’ are the names in civil court for the ‘prosecutor’ and the ‘defendant’ in a criminal proceeding”) can also help the litigant understand the relationship between the objects, but such instances are rare. The *straight metaphor* (i.e., the usual one) is, as we shall see, so common that its use is necessary to be able to advance the litigant’s conceptual thinking.

62. Of course, this particular explanation by example can go in many different directions. An effective reference transaction involves steering the conversation through verbal and nonverbal cues and backtracking when needed and trying again, always learning in the process. The skill of offering an understandable metaphor for a particular library user is the heart of good reference service.

It is not the purpose of this paper to list all the possible scenarios in a reference transaction. Indeed, it is a tenet of the argument made here that one could not possibly do that, for each reference transaction requires the librarian to reach an understanding of the library user’s own *idealized cognitive model* and to work within it. See *infra* ¶¶ 98–101. The idealized cognitive model for any particular user will be different from the next, and some, like the Queen of Chula Vista, may have a very strange one.

The idealized cognitive model should not be confused with legal consciousness, as Merry and I use it. A person’s idealized cognitive model would be a component contributing to a legal consciousness. It is also sometimes called a “frame,” but not with the same meaning when used by Merry because she is referring to a larger unit, a whole discourse.

¶74 Recent findings in cognitive science have bolstered the case that the learning by example done by small children is the beginning of a process that is the basic pattern of learning and developing concepts that we use throughout our lives. And the use of metaphors may well be the actual route through which the learning takes place.

Recent Developments in the Theory of Meaning

¶75 The cultural analysis provided earlier had a substantial amount to say about the issue of the disconnect between self-represented litigants and the justice system, but it offered little in the way of prescriptive advice. The last portion of the preceding section merely summarized the anecdotal, pragmatic attempts of law librarians to serve their clients without giving much theoretical direction.

¶76 Theoretically speaking, can the disconnect be cured? H.L.A. Hart did not think so. Reviewing postmodern philosophers with some generosity, Litowitz also found little in the way of aiding the justice system “from within.”⁶³ The purpose of the studies by the cultural anthropologists cited in this article, many of which represent a postmodern approach, was not to offer such cures. The purpose of most postmodern legal writers was not to bolster the system by suggesting such cures. Some current writers continue to espouse that the difference between legal language and common language is necessary.⁶⁴ And, as we have seen, some very influential writers continue to train American jurists in perpetuating the legal discourse without concern for the disconnect, as that is not their job.⁶⁵

¶77 At this time, I would like to introduce another theory that may well fill the job. Some recent developments in linguistics, based in large part on significant findings in cultural anthropology regarding perception, have been found to also be supported by recent developments in cognitive science and neuroscience. This theory, the cognitive theory of metaphor,⁶⁶ proposes a different pattern for under-

63. LITOWITZ, *supra* note 26, at 174 (borrowing the words for the crux of the conclusion to his book from HILARY PUTNAM, REASON, TRUTH, AND HISTORY 216 (1981)).

64. See, e.g., ALFRED PHILLIPS, LAWYERS' LANGUAGE: HOW AND WHY LEGAL LANGUAGE IS DIFFERENT (2003). Phillips, a Scottish jurist, reviews postmodern jurisprudence with considerable scepticism and uses Jürgen Habermas's linguistic analysis of law to justify the breach. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996). Habermas maintains that the separation of legal discourse from ordinary discourse is actually an advantage, allowing the law to remain freer of incursion from ordinary language and thus more precise. Phillips uses Habermas's theory to justify recent English and Scottish decisions, but he does not address the disconnect's effect on self-represented litigants.

65. See *supra* note 44. Another way to put this is that, so far, I have not seen answers from the traditional rationalist logic of legal process theory, from Chomsky's generative grammar, from the postmodern discourse theories, or from Habermas's discourse theory.

66. Within the field of cognitive linguistics, the cognitive theory of metaphor is only one of several parts. However, metaphor theory provides much of the underlying basis for the other parts. In particular, metaphor theory plays a huge role in creating abstract ideas, and thus legal concepts. A second part of cognitive linguistics is prototypicality and radial categorization, discussed *infra* ¶¶ 94–101. These are intimately linked to metaphor theory and are thought of as part of the theory by nonlinguists.

standing how people gain meaning from and through their language. I first became aware of the theory when studying the several more traditional writers who have noted the high use of analogy in legal thinking. It isn't a far stretch from using analogy to using metaphor, but the cognitive theory of metaphor makes metaphor much more alive and relevant than I had previously presumed.⁶⁷

¶78 But before getting to the cognitive theory of metaphor, I will review some findings in cognitive science and neural science that will help in understanding the cognitive theory of metaphor and bolster the claim that it needs to be studied with respect to its possible application in serving self-represented litigants.

Connectionism and Recent Neural Science

¶79 *Connectionism* is

a movement in cognitive science which hopes to explain human intellectual abilities using artificial neural networks (also known as “neural networks” or “neural nets”). Neural networks are simplified models of the brain composed of large numbers of units (the analogs of neurons) together with weights that measure the strength of connections between the units. These weights model the effects of the synapses that link one neuron to another. Experiments of this kind have demonstrated an ability to learn such skills as face recognition, reading, and the detection of simple grammatical structure.⁶⁸

The success of the artificial intelligence created by this type of computer model is not just amazing, but more promising than any other model for robotics and the various artificial intelligence fields.⁶⁹

¶80 There is a problem though. The model also shows the tremendous difference between computers and human minds. The average human mind has a hundred billion neurons in the cerebral cortex, and each neuron can have several dendrites leading to and from the axons of other neurons, so the potential relationships between the neurons is some magnitudes beyond the mere hundred billion.⁷⁰

67. There are several legal writers who are employing the cognitive theory of metaphor, but I have not yet found any who are using it to address the issue of self-represented litigants and their disconnect with legal analysis.

68. James Garson, *Connectionism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Nov. 5, 2002), <http://plato.stanford.edu/archives/win2002/entries/connectionism>. This article is a good explanation of the movement and its implications in nearly lay terms. It also has a very substantial reading list. For a more current and much more in-depth presentation from a connectionist viewpoint, I highly recommend JEROME A. FELDMAN, *FROM MOLECULE TO METAPHOR: A NEURAL THEORY OF LANGUAGE* (2006). It is written like a textbook, meant to be read from cover to cover, with later explanations dependent on earlier chapters. One could quite literally say that “ideas build in complexity” as the book goes along.

69. Feldman has provided the amazing story of a computer that understands newspaper stories. FELDMAN, *supra* note 68, at 245–55 (citing Srinivas Narayanan, *Talking the Talk Is like Walking the Walk: A Computational Model of Verbal Aspect*, in *PROCEEDINGS OF THE NINETEENTH ANNUAL MEETING OF THE COGNITIVE SCIENCE SOCIETY* (1997)).

70. NANCY C. ANDREASON, *THE CREATING BRAIN: THE NEUROSCIENCE OF GENIUS* 57 (2005). There are also nodes of neurons within the inner portions of the cerebrum, and the cortex of the tiny cerebellum, the seat of long-term memory, has approximately one trillion neurons. Note that these estimates are about 3.3 times higher than the estimates made as recently as 2000. So there is much to learn. For instance, only recently has it become known that connections between axons and dendrites can go both ways.

The ends of the individual dendrites in a human mind have differing amounts of protein loads that create different “weights,” i.e., create a greater or lesser strength of connection to the corresponding axon. These weights can change over time as the brain “learns.”⁷¹ The ability to duplicate such size and complexity through man-made machines is not now available. Connectionists suggest it may take several decades.⁷² Skeptics claim it is impossible.⁷³

¶81 How does the brain learn? According to recent neurological studies, and backed by the models created by the connectionist cognitive scientists, the brain comes to understand sense patterns through the creation of “neural nets,” which are used to contain the memories of various senses. These neural nets are a series of linked neurons that *flash*⁷⁴ when a particular sense has some sort of momentous event. If the event is noteworthy enough, the dendrites linking the neurons will change physically so that they contain more of the proteins that transfer as the electrical charge passes through the neurons. Thus, the paths taken by the electrical charge will be repeated when a similar event is sensed. For an infant, the events that would trigger such a reaction would be the typical pain or pleasure events that heighten the senses. Most basic sense learning occurs at the physically lower portions of the brain, the subcortical portion known as the *reptilian brain* because of its similarity to animal brain at a basic level. The next time that the senses are affected in the same way, the same circuitry fires again. Eventually, recognition of a familiar face—Mama, for instance—would become a commonplace memory.

¶82 The main feature to recognize is that the brain actually uses the same neural net to record a second event of approximately the same thing. In effect, this is like saying that the brain uses a vector pattern to remember things, rather than a pixel pattern; that is, it uses something more akin to a picture represented by a mathematical formula (that changing screen saver you have on your computer) than by a bit map (that photograph you decided to use instead as your screen saver). And it uses the same neural net repeatedly when faced with the same sensory experience.

¶83 If the sensory experience is slightly altered (the liquid in the infant’s cup is slightly cooler than has been the custom), the neural net will alter slightly. Some of the neurons will not flash, and others not in the original net will flash, and some of the weights will alter.

71. R. Douglas Fields, *Making Memories Stick*, SCI. AM., Feb. 2005, at 74, 74–81; R. Douglas Fields, *Erasing Memories*, SCI. AM. MIND, 2005, no. 4, at 28, 31.

72. The several decades notion simply refers to the rate at which computers increase in storage size and processing speed. Storage is the bigger issue. There are further limitations because any artificial intelligence that would match human intelligence would need a body for gathering independent input, and duplicating the sense mechanisms of the human body adds even more complexity. Feldman suggests that the eventual robot would only simulate the senses, and, at best, communicating with such a robot would be like communicating with an alien species. FELDMAN, *supra* note 68, at 339–41.

73. Peter Kassan, *AI Gone Awry: The Futile Quest for Artificial Intelligence*, SKEPTIC, 2006, no. 2, at 30, 31–33.

74. *Flash* refers to the electrical activation of neurons that are observable by implanted electrodes or by functional magnetic resonance imaging (fMRI).

¶84 When the infant starts to feel emotions, the next level of the brain kicks in. This middle brain, or *paleomammalian brain*, will remember emotions in the same way as the reptilian brain, with neural nets. Only this time, the emotions will have been triggered by electrical charges from the reptilian brain, as the baby's senses trigger the emotion in response to the event. The baby sees the familiar face, Mama, and smiles. The infant feels love for its mother. Neural nets are built up to represent the various emotions that infants, adults, and, indeed, all mammals feel. The smile itself is actually something more.

¶85 The cerebral cortex, or as it is sometimes known, the neocortex, is the *neomammalian brain*. It controls reason and language and has significant control over our directed motor functions as well. The cortex is significantly larger in human beings than in any other animal. The more intelligent animals have larger cortexes. Essentially, the first two portions of the brain are the same size in pigs and dogs as in humans, but the cerebral cortex is the difference.⁷⁵

¶86 That smile came from the infant's motor stimulus command from its cortex. Eventually, the infant will say "Mama" as it learns to mimic the command to say "Mama" from the relatives who train it. The neural net that learns to say the word is built in part from the recognition of Mama's face in the lower levels of the brain and the emotive state that that recognition brings about.⁷⁶ When the infant says "Mama," the lower neural nets are included in the flashing. Later on, when the child learns that there are other mothers, portions of the neural net that develops the word "mama" will flash when thinking about mothers in general. The knowledge of the concept "mothers" has a base in the sensory experience of the child's own mother. Mama becomes the exemplar for the concept "mothers."

The Cognitive Theory of Metaphor (Experientialism)

¶87 While cognitive scientists and neural scientists have been developing the scientific basis for memory and learning, a separate theory was developing that meshes rather well with the scientific findings. George Lakoff, a linguistics professor at the University of California at Berkeley, and Mark Johnson, a philosophy professor

75. See PAUL D. MACLEAN, *THE TRIUNE BRAIN IN EVOLUTION: ROLE IN PALEOCEREBRAL FUNCTIONS* 8–9, 15–18 (1990); TEMPLE GRANDIN & CATHERINE JOHNSON, *ANIMALS IN TRANSLATION: USING THE MYSTERIES OF AUTISM TO DECODE ANIMAL BEHAVIOR* 52–54 (2005). Note that the conscious awareness of emotions is found in the cortex, even though the emotions themselves are generated in the middle brain. However, without the feelings generated from below, our consciousness of our emotions and, indeed, our sense of self would be empty. CHRISTOF KOCH, *THE QUEST FOR CONSCIOUSNESS: A NEUROBIOLOGICAL APPROACH* 93 (2004) (quoting ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS* (1999)).

76. I recall how my older sister told me that she was ten years old before she found out that "nice" and "egg" were two words, as in "eat the nice egg." Evidently, my parents continuously repeated the adjective "nice" with "egg" when serving my sister breakfast to entice her to eat her eggs. I would like to think that the anecdote showed the futility of using a set phrase to train a child if the child did not have an independent understanding of its meaning, but I suspect that my sister knew the difference quite early and was just being witty. My parents did not repeat the experiment with me (ten years younger than my sister). I had no problem with eating eggs.

now at the University of Oregon, developed the cognitive theory of metaphor. The main tenet of the theory is that, in developing and explaining abstract concepts, humans use metaphors that include more concrete concepts,⁷⁷ i.e., things that we observe through our physical senses. The connection to connectionism and neural nets is the language. When a word is used in a metaphorical sense, much of the same neural net that fires for the regular sense of the word also fires for this sense. Whether and when the whole neural net (including the lower brain functions) fires for the word in a metaphorical sense is still a matter to be explored.⁷⁸

¶88 Lakoff and Johnson refer to their theory as *experientialism*. While their work is considered standard reading among cognitive scientists and linguists,⁷⁹ it is

77. Cognitive scientists and linguists apply the term “concrete” to those concepts that most of us don’t even think of as concepts at all, such as the concept of a chair. Sometimes, the more concrete concept is also a bit abstract, but less so than the abstract concept being explained by the metaphor. For example, the metaphor *life is a journey* uses the simpler source concept of a *journey* to explain some aspects of the target concept *life*.

78. The neural nets that fire for the word in its basic meaning may well include firings of sensory memories. For instance, the thought of “mother” might include some component of her facial likeness, which in turn would include some basic sensory experience. (I do not refer here to an image of one’s own mother, but rather to more generalized components. “Mother” may evoke a conscious memory of a woman with gray hair; one understands almost immediately that “woman” can be universalized, but “gray hair” is only an expectation that might influence a subject’s response time in psychological testing.) These primary experiences are known as *qualia*, a term of art used among philosophers and borrowed by neuroscientists to represent the conscious recognition of a basic sense experience, such as seeing the color red. Whether such basic sense memories, and thus the neural nets that contain them, would fire for a metaphorical use of the word “mother,” as in “the mother of all battles,” is yet to be discovered. However, the lower brain levels have been found to fire when the word “mother” is used in a prototypical sense (e.g., a “mother’s love” and when speaking of the mothers of others). Unfortunately, fMRIs are insufficiently refined to see how much of the neural net that fires is the same, and the methods of observing individual neurons are wholly inadequate. About a hundred individual neurons can be observed simultaneously, out of a hundred billion.

Much has been done, but covering the whole range of consciousness will certainly take a very long time, if it is even possible. Nobel laureate Gerald M. Edelman is the leading contributor, among many others, and he recently published a book meant for general audiences, GERALD M. EDELMAN, *WIDER THAN THE SKY: THE PHENOMENAL GIFT OF CONSCIOUSNESS* (2005). For a mid-size discussion of these matters in a book hopefully available at your local law library, see chapter two of WINTER, *supra* note 6. Winter uses GERALD M. EDELMAN, *BRIGHT AIR, BRILLIANT FIRE: ON THE MATTER OF THE MIND* (1992) at length, and he gives a good overview as of 2001. Also recommended is CHRISTOF KOCH, *THE QUEST FOR CONSCIOUSNESS: A NEUROBIOLOGICAL APPROACH* (2004), which specifically studies visual qualia.

79. The primary books are GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (Univ. of Chicago Press, 2003) (1980) [hereinafter LAKOFF & JOHNSON, *METAPHORS*]; GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS* (1987) [hereinafter LAKOFF, *WOMEN, FIRE*]; MARK JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* (1987); GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* (1989) [hereinafter LAKOFF & TURNER, *MORE THAN*]; and GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* (1999) [hereinafter LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*]. Lakoff and Johnson acknowledge that their theory owes much to the pioneering work of cognitive psychologist Eleanor Rosch, who developed the theory of prototypes and basic-level categories. LAKOFF, *WOMEN, FIRE*, *supra*, at xii.

not as well known among law professors, information science professors, cognitive psychologists, and other philosophy professors.⁸⁰

¶89 Experientialism holds that the normal way of thinking abstract thoughts and ideas does not occur according to the traditional logical patterns of deduction, induction, and so on, as understood by philosophers, scientists, and judges since Aristotle. Rather, in our everyday lives and in our highest reasoning, we employ metaphors to the basic sense ideas that we learn prior to learning language and then describe through language.

¶90 Thus, we use very common expressions to represent rather abstract ideas. For example, we have orientation metaphors:⁸¹

Health and life are up, sickness and death are down.

He's at the *peak* of health. Lazarus *rose* from the dead. He's in *top* shape. He *fell* ill. He came *down* with the flu.

Having control or force is up; being subject to control or force is down.

I have control *over* her. I am *on top of* the situation. . . . He's in the *upper* echelon. . . . He is *under* my control. He is my social *inferior*.

Good is up; bad is down.

Things are looking *up*. We hit a *peak* last year, but it's been *downhill* ever since.

¶91 These orientation metaphors are obvious when one considers that a sick person lies down, while a healthy one is up and active. This fact has been known by humans since the beginning of language, and it has carried over in our development of ideas.

80. *The Stanford Encyclopedia of Philosophy* does not have an entry for “experientialism,” even though it does have one for “connectionism.” The *Internet Encyclopedia of Philosophy* has an entry for “embodied cognition,” which includes references to the work of Lakoff and Johnson. Monica Cowart, *Embodied Cognition*, in INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2006), <http://www.iep.utm.edu/e/embodcog.htm>. A leading proponent among law professors is Steven L. Winter, who has been employing the cognitive theory of metaphor in various writings since the mid-1980s. His 2001 book, *A Clearing in the Forest: Law, Life, and Mind*, WINTER, *supra* note 6, received strong praise among his own colleagues, as evidenced by the symposium devoted to it, Symposium, *Cognitive Legal Studies: Categorization and Imagination in the Mind of Law*, 67 BROOK. L. REV. 941 (2002), but not so much acknowledgment otherwise. A few other authors have picked up the call. *E.g.*, Linda Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASSN. LEGAL WRITING DIRECTORS 169 (2004). *But see, e.g.*, WEINREB, *supra* note 45, at 167–68 (making substantial case for primacy of analogical reasoning in law, but not mentioning Lakoff, Johnson, or Winter until the last pages of book's appendix). Even more telling, the text by Professor Lind which is used at the National Judicial College to train judges on writing logical opinions makes no mention of the cognitive theory of metaphor or experientialism. *See* LIND, *supra* note 43.

Cognitive psychology is still “dominated by the old idea that concepts are all literal and disembodied,” i.e., not experientialist. LAKOFF & JOHNSON, *METAPHORS*, *supra* note 79, at 269. Lakoff and Johnson see much value in their work for both cognitive and clinical psychology, but the recognition has not happened yet.

81. Examples taken from LAKOFF & JOHNSON, *METAPHORS*, *supra* note 79, at 15–16.

¶92 There are also cultural coherence metaphors. For example, “more is better” is coherent with *more is up* and *good is up*, but “less is better” is not. Underlying this metaphorical frame is the root idea that having more things is somehow better. Undoubtedly, this could be traced to the necessity to gather food and necessities, but not all cultures have this same priority.⁸² Lakoff and Johnson also note our primary use of personification (“*Inflation is eating up* our profits.”),⁸³ metonymy (“*The White House* isn’t saying anything.”),⁸⁴ and ontological metaphors (“*Inflation is lowering* our standard of living.”).⁸⁵

¶93 The point is that our abstract ideas have real understandability because we can see relationships based on their analogy to things and events we observe through our ordinary sense experience.⁸⁶ Harking back to the discussion on connectionism and neural nets, we can see that the use of metaphors would enable our brain to employ previously established neural nets to make sense of abstract ideas. So, the statement “Inflation is eating up our profits” would cause listeners to include some of the neural net they would use when thinking of eating. (You can almost picture a personified “inflation” as a small (or large) beast eating your food.)⁸⁷

¶94 The next component of experientialism is the recognition of our use of prototypes. From our experience of first learning of our own mother, each of us has a prototype for the use of the word “mother” in other contexts. Obviously, the most common use would be to understand what someone is saying when he refers to his own mother, instead of the listener’s, by referring mentally to the mother the

82. LAKOFF & JOHNSON, METAPHORS, *supra* note 79, at 22–24.

83. *Id.* at 33.

84. *Id.* at 38. Metonymy is the use of a significant part to stand for the whole. The part must be significant enough to make the allusion recognizable. The term “White House” stands for the presidential administration of the United States. It is not a personification, as no one assumes that the actual White House could talk, but rather that someone at the White House, such as the press secretary, could talk. Another example of a metonymy is referring to a baseball pitcher as “a good arm,” as distinguished from saying “he has a good arm.”

85. *Id.* at 26.

86. LAKOFF & TURNER, MORE THAN, *supra* note 79, at 63–65.

87. LAKOFF & JOHNSON, METAPHORS, *supra* note 79, was originally published in 1980. In the afterword written for the 2003 edition, the authors note that the Neural Theory of Language Project at the International Computer Science Institute in Berkeley, Calif., has caused them to make some revisions. “The division of metaphors into three types—orientational, ontological, and structural—was artificial. All metaphors are structural (in that they map structures to structures); all are ontological (in that they create target domain entities); and many are orientational (in that they map orientational image-schema).” *Id.* at 264. The findings that caused this revision were the discoveries of direct correlations in actual neural nets between source and target domains. Much of this was due to the discovery of the use of metaphor mapping of primary sensory data at the unconscious level, as described above in the section on Connectionism and Recent Neural Science, and the subsequent introduction of such sources into the work at the Neural Language Project. Metonymy, on the other hand, does seem to represent a different type, in that neurally there is coactivation of two different frame structures, rather than two different domains, and the two simple frames may form one complex frame. *Id.* at 265–67.

listener knows best. This reference is done literally “in a flash,” by which I mean that a portion of the neural net that would fire for one’s prototypical use of the term “mother” will fire for this new use.

¶95 The category “mothers” is informed from our embodied sense of our own mother. In our brain, we are able to create new neural paths that enable the concept to be more inclusive of other entities as “mothers.”⁸⁸ Later, when the concept is firmly in place, metaphors can be based on the term. The term “the mother of all battles” is a very far stretch from the prototypical use of the term “mother.” Some of the neural net is used again, and some of the original meaning is used again. The abstract concept, something along the lines of “this battle will be of overwhelming significance in our lives, as each of our mothers are,” is an extension of the category of mothers to the point where, if asked to give a use of the term “mother,” it would not be the first to come to mind. Lakoff and Johnson refer to such use as a radial category. The subsequent uses of the term “mother” extend radially out from the center, the prototype.⁸⁹

¶96 As Lakoff and Johnson explain: “Our most important abstract concepts, from love to causation to morality, are conceptualized via multiple complex metaphors. Such metaphors are an essential part of these concepts, and without them the concepts are skeletal and bereft of nearly all conceptual and inferential structure.”⁹⁰

¶97 Lakoff and Johnson do not mean that all thought is metaphorical. The “skeleton,” if you will, is noted thus:

[T]here is a vast system of nonmetaphorical concepts, for example, the base-level concepts and the spatial-relations concepts. All basic sensorimotor concepts are literal. . . . Concepts of subjective experience and judgment, when not structured metaphorically, are literal; for example, “These colors are similar” is literal, while “These colors are close” uses the metaphor Similarity is Proximity.⁹¹

88. As humans mature, they change their prototypical meanings, so that “mother” would eventually come to be understood as a term referring to a generalized “mother,” rather than one’s own mother. LAKOFF, *WOMEN, FIRE*, *supra* note 79, at 74–76. A greater variation from one’s prototype can create a slowness in recognition (fractions of a second).

These are my own thoughts. In a sense a person’s “worldliness” might well be measurable in how abstracted the prototype is. For instance, one may sometimes feel a discomfort if the person speaking is speaking of his mother in a way different from how one would speak of his own mother because of the variation from the prototype the listener would have in mind. That is, someone complaining about a domineering mother might create a momentary lack of recognition in someone whose mother was not domineering. On the other hand, the recognition would be reinforced if the mother referred to was in some respects similar to one’s own mother. An ability to listen before speaking too quickly due to the immediate reaction one has from this use of prototype is the trick of a good listener and a skill of a good reference librarian.

89. LAKOFF, *WOMEN, FIRE*, *supra* note 79, at 74–76, 91 (chapter 6 is called “Radial Categories”). Lakoff’s example of “mother” at that point refers to the variants, such as “birth mother,” “foster mother,” and “surrogate mother.” WINTER, *supra* note 6, *passim* (using “mother” example throughout book).

90. LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 79, at 73.

91. *Id.* at 58.

Discussing further these important abstract concepts, they continue:

Each complex metaphor is in turn built out of primary metaphors, and each primary metaphor is embodied in three ways: (1) It is embodied through bodily experience in the world, which pairs sensorimotor experience with subjective experience. (2) The source-domain logic arises from the inferential structure of the sensorimotor system. And (3) it is instantiated neurally in the synaptic weights associated with neural connections.

In addition, our system of primary and complex metaphors is part of the cognitive unconscious, and most of the time we have no direct access to it or control over its use.⁹²

¶98 Lakoff maintained in early works that “we organize our knowledge by means of structures called *idealized cognitive models*, or ICMs, and that category structures and prototypes effects are by-products of that organization.”⁹³ As an example, the term “bachelor” implies an ICM based on the concept of marriage and marriage-eligible men.

The noun *bachelor* can be defined as an unmarried adult man, but the noun clearly exists as a motivated device for categorizing people only in the context of a human society in which certain expectations about marriage and marriageable age obtain. Male participants in long-term unmarried couplings would not ordinarily be described as bachelors; a boy abandoned in the jungle and grown to maturity away from human contact would not be called a bachelor; John Paul II is not properly thought of as a bachelor.⁹⁴

¶99 For purposes of our discussion, the most notable thing about idealized cognitive models is that, at the level of abstract concepts, they contain not only basic metaphors, but complex ones based on culture, experience, and education. The discussion of a legal rule and the radiating category that important words would have in that discussion will hinge on the ICM of the two people discussing the matter.

¶100 For example, if a library user were to ask what “service of process” meant, the reference librarian would automatically know several things: the user is not familiar with basic court procedure; it is probable that the user is also not familiar with the terms “service” and “process” as used in this context; the user must have come across the phrase somehow, such as from reading a library book or having been served; and, fortunately, the user seems otherwise fluent in English. The two terms, of course, are not used in their ordinary sense here, but as jargon terms,

92. *Id.* at 73.

93. LAKOFF, *WOMEN, FIRE*, *supra* note 79, at 68. *See also* WINTER, *supra* note 6, *passim* (Winter uses *idealized cognitive model*, or ICM, throughout his book). Currently, cognitive linguists are more inclined to use either the terms “frames” or “domains,” often interchangeably, or “mental spaces.” These can refer to larger groupings of meanings that may or may not have prototypical cores. “Idealized cognitive model” as a term is now relegated to the specific role of discussion of a frame that has a readily known prototype, and often one that does not exactly match reality, as with “bachelor.” *See* WILLIAM CROFT & D. ALAN CRUSE, *COGNITIVE LINGUISTICS* 7–39 (2004).

94. LAKOFF, *WOMEN, FIRE*, *supra* note 79, at 70 (quoting Charles Fillmore, *Towards a Descriptive Framework for Spatial Deixis*, in *SPEECH, PLACE, AND ACTION: STUDIES OF DEIXIS AND RELATED TOPICS* 31, 34 (R.J. Jarvella & Wolfgang Klein eds., 1982)). The same quote is found in WINTER, *supra* note 6, at 86. Both use Fillmore’s example as a starting point in their descriptions of ICMs. The “boy” in the quote is Tarzan, by the way.

meaning to “have someone who has an official capacity formally hand copies of court pleadings over to the opposing party and acknowledge their receipt.” The cognitive model employed in the phrase “service of process” presumes a model of court procedure and required tasks that litigants must perform. In continuing with the reference transaction, the reference librarian further learns what jurisdiction is pertinent, what type of case the user is pursuing, and what and where the litigant is in the process. All these bits of information form the ICM that is readily understandable for the librarian, but must be learned new by this user.⁹⁵

¶101 So, in describing the service of process to this user, the librarian will employ metaphors to other experiences that the librarian will presume the user has already had. It will soon become apparent to the librarian just how far removed the user is from the cultural understanding possessed by the librarian and to what extent the librarian will have to work harder to employ more base-level metaphors or more familiar metaphors in order to explain the matter to the patron.⁹⁶

Should the Law Librarian Employ Cognitive Linguistics?

¶102 So where does this discussion of cognitive neuroscience and the cognitive theory of metaphor leave us? George Lakoff and Mark Johnson have called for a complete rethinking of much of the basic tenets of philosophy, most notably in their book, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought*.⁹⁷ Steven L. Winter has similarly called for a rethinking of the logic and language used in law, based on the cognitive theory of metaphor, in the final chapter of *A Clearing in the Forest: Law, Life, and Mind*: “Here I press the point to its radical conclusion: The social processes that make law meaningful and those by which we make law are, necessarily, one and the same.”⁹⁸ He goes on to say:

95. In some foreign countries, process is served automatically by court employees or through the mail system. Immigrants from such countries would not know that it is their responsibility to see that process is served. Unfortunately, many native-born Americans also do not know this, and getting proper service of process is a major barrier for self-represented litigants.

96. One might presume that the word “service” in service of process would be easy to explain. For instance: “To serve the papers, you have to have someone hand the papers physically over to the respondent or defendant, just like a waitress serves the meal to the customer on behalf of the cook.” This explanation might not work, though, for a homeless person. Service at the soup kitchen would be a better analogy.

The word “process” would be harder to explain. One could offer a sort of reverse metonymy (describing a part by its whole, in this case). I would contend that the word “process” is here not just the use of the noun “process,” but a nominalization from a radial use of the verb “process.” So the phrase has two nominalizations. Of course, the phrase is now a common term in legal discourse. The nominalization of verbs is one of those barriers to meaning that Tiersma rightly dislikes. See *supra* ¶ 39.

97. LAKOFF & JOHNSON, *PHILOSOPHY IN THE FLESH*, *supra* note 79.

98. WINTER, *supra* note 6, at 332.

To understand the underlying cognitive structure of the concept “Law” is, in an important sense, to understand what law “really is.” As Peter Gabel explains, “when we realize that we routinely speak these ideas and images to each other . . . , we can begin to form an understanding of how the law is actually constitutive of our social experience.” To understand this conceptual structure is, thus, to understand something fundamentally important about law’s *social* meaning: How we think about and understand law affects how we behave towards it; and this is true whether—and whenever—we defer to it, challenge it, or actively seek to change it.⁹⁹

¶103 Winter goes further:

In our idealized cognitive model, it is the Law personified that lays down the rules or paths we are to follow and that enforces these constraints by force. One consequence of this model is that legal positivism—at least in its crude, command-model form—seems merely constitutive of common sense. In technical terms, legal positivism is a prototype effect arising from our cognitive model of law, which explains the stubborn persistence of the positivist understanding of law notwithstanding the blistering critiques to which it has been subject.¹⁰⁰

¶104 Since IRAC, the hidden legal analysis using inductive and deductive logic, and the underlying positivist theory of law are the ruling modes of discourse (today if not tomorrow), then law librarians should use the cognitive theory of metaphor to help them help self-represented litigants learn the IRAC pattern and the underlying analysis as part of their research efforts. However, the very use of the cognitive theory of metaphor will, perforce, lead librarians to speak and use metaphors more in tune with the theory and thus, to some extent, begin to aid Winter in his project. Winter would respond that to pretend to aid self-represented litigants solely through the use of more formal logic, as set out by the IRAC formula, is simply to use a different set of metaphors (a more restricted set, a subset, if you will) that would continue to substantiate the prevailing positivist position. The cognitive theory of metaphor enables us to broaden the ways in which we can reach our patrons and gives us the tools by which to understand what we are doing in doing so.

¶105 To ease this ethical dilemma of whether to teach in ways that would reinforce the status quo or to teach in ways that may aid change, I would respectfully remind law librarians just where they sit within the bureaucracy of the justice system. The large majority of self-represented litigants will not even use the law library. They will fill out forms based on the traditional IRAC formula which ask the question in ways that will restrict the discussion to the prototype situation and

99. *Id.* at 339 (quoting Peter Gabel, *The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1564 (1984)).

100. *Id.* at 340 (footnote omitted). In this paragraph, Winter uses the term “legal positivism” and “positivism,” in, as he notes, its crude sense. Winter is referring to how the law is perceived as it is practiced by trial judges and practicing lawyers. In my succeeding paragraph, I use the term “positivist” in the sense that Winter uses it.

typical resolution of their cases. In most such instances, at least at this point in time, justice, such as it is, will have been served. Then another significant segment will be served by those court-run agencies that help self-represented litigants fill out forms, and many of them will similarly be served adequately. A few litigants will be sent by the attorneys or paralegals at the agency over to the law library or to a legal service agency because they see that the litigant's case is somehow different (i.e., does not fit the prototype) and needs more work. The few who do come to the law library are either sent there because their case is not prototypical or they have resolved on their own to do the work themselves, whether or not they have a prototypical case. Most self-represented litigants who have prototypical cases would probably just prefer to use the forms or the court-run agencies and get the justice that is given in such cases. Remember that time and efficiency are not just the concern of the court, but also of the litigants themselves. They may not get "total justice," but will at least get the justice that they can afford and get it done, so they are not "in deeper." The large majority of self-represented litigants are handled quite well by the court's efficient services, as they can "get it," at least for the purposes of completing their legal work, if not for the purposes of having them more appreciative of the justice system and feeling as if they were dealt with fairly "on their own terms."

¶106 So, the ones who are left—the self-represented litigants who have the case that "falls through the cracks," those who want to know and understand the process more thoroughly than they can by using pre-set processes, or those who simply "have an ax to grind" (i.e., want to change the law)—are the ones who come to the law library. As such, these litigants serve the justice system by being instruments of change, usually in a small way but, perhaps, in the aggregate, as important as the attorneys who fight the large cases that result in overturned doctrine.¹⁰¹ Also, the self-represented litigants who simply cannot "get it," i.e., cannot fathom the intricacies of the IRAC formula intellectually or cannot understand the underlying idealized cognitive model sufficiently, may need to come to the law library. These are very good candidates for classes that are taught with helpful metaphors.

¶107 Thus the law librarian's first job is to establish communication with self-represented litigants, and the cognitive theory of metaphor and its supporting science appears to me to be the best way of coming to grips with that endeavor and being able to study it in a professional manner. The law librarian's second job is to provide self-represented litigants with the "tools" they need to go forth "to do the job." It appears to me that the cognitive theory of metaphor can give librarians the wherewithal to show self-represented litigants what they need to know. At least, it offers a promise that the traditional IRAC formula can obfuscate.

101. Stinky, in his small way, changed the status quo, not only for himself, but perhaps by making the defendant Social Security Administration (or at least their agents in San Diego) a bit more discerning in their responsibility to determine who should receive SSI benefits.

A Call for Action

¶108 For working public law librarians, I would suggest that they continue doing what they are doing, i.e., answering reference questions and giving classes.¹⁰² To improve the results, they might read Lakoff and Johnson, as well as the many books available on teaching strategies.¹⁰³

¶109 For the profession of law librarianship, I would call for an addition to the American Association of Law Libraries' Research Agenda to include studies in cognitive science and cognitive linguistics and their potential use in the law library.¹⁰⁴ We should also encourage schools of information to focus some of their research agenda in this direction. It seems to me that the public law library offers a very good laboratory, a good place to conduct studies that could lead to a dissertation. For the profession of law, our national organizations that have been busy

102. A very significant number of law libraries give classes to self-represented litigants, or allow them to attend classes intended for all users, including members of the bar. *See supra* note 7. In 2002–04, reference librarians at the San Diego County Public Law Library were able to use two Library Services and Technology Act grants from the California State Library to produce new classes for self-represented litigants and to “train the trainers” by showing other California county law librarians what they did. Several state law libraries have conducted similar training classes for the county law librarians in their states. Perhaps it is time to develop a clearinghouse for all these efforts, or to expand the clearinghouse maintained by the Legal Information Services to the Public Special Interest Section of the American Association of Law Libraries (AALL) to include these efforts.

In fall 2007, as this article is going to press, the Self Represented Litigation Network's Law Librarian Working Group will be sending out a survey to law libraries to create a directory of programs for serving self-represented litigants, similar to the directory the Network created of court-based programs, A DIRECTORY OF COURT-BASED SELF-HELP PROGRAMS (2006), <http://www.ncsconline.org/WC/Publications/ProSe/contents.htm>. One question on the law library survey will be on classes held for self-represented litigants. The Self Represented Litigation Network, managed under the National Center for State Courts and financed by the State Justice Institute and several state court systems and foundations, was formally created in March 2006, although it had been in the process of forming and doing work for several years. In July 2007, the AALL Executive Board voted to have AALL become a participating organization in the Network.

103. A recent workshop on “Cultivating Cultural Competency in Volunteers” at the Equal Justice Conference in Denver in 2007, had a short, but very interesting example of a checklist for legal aid advisers to use when working with litigants from a traditional Native American culture. The authors compared and contrasted several of the values and behavioral patterns common to many traditional Native American societies with those persuasive in the dominant Anglo American society of the United States. In effect, this is a list of frames of reference (or idealized cognitive models) that differ between the legal aid workers and the people they are aiding. It is a good model that might be employed at public law library reference desks for many of the groups we face. *See* Charles Horejski & Joe Pablo, Cultural Awareness: Practical Suggestions for Non-Indians Interacting with Indian Tribes, available at http://www.nlada.org/Training/Train_Civil/Equal_Justice/2007_Materials/047_2007_Delaney_handout5 (last visited Aug. 13, 2007).

104. In 2006–07, the AALL Research Committee awarded me and a few other law librarians a small grant to develop a bibliography and essay on cognitive science and linguistics for law librarians. I am grateful for the support given under the present AALL Research Agenda. Grants of the type described *infra* note 105, however, would cost much more, probably beyond the funding currently available to the Research Committee. But training programs that would enable law librarians to conduct some empirical research themselves might be within the current budget.

at work on the problem of serving self-represented litigants should add cognitive science and cognitive linguistics to their research agenda.¹⁰⁵

¶110 Lest one think that, in joining with Lakoff, Johnson, and Winter and calling for such research, I am assuming their political stance, which tends to be liberal, let me point out that the metaphor of a “marketplace of ideas,” which is alluded to strongly in the research agendas of these national organizations, would seem to say that such examination can only contribute.¹⁰⁶ Winter has noted that the “marketplace of ideas” is one of those metaphors that promotes capitalism and its business orientation, while it does open us up to new ideas.¹⁰⁷ All idealized cognitive models both constrict discussion in some ways and simultaneously open discussion in other ways. Frankly, if the use of the cognitive theory of metaphor is found after time not to be very efficient, then I have no doubt that its use will be dropped. But the discoveries of recent science make that scenario unlikely.¹⁰⁸ I believe that any national organization, regardless of political mindset or purposeful neutrality, could join this effort.

¶111 Lastly, for myself and for any others who wish to join in the effort, I plan to continue to look at legal reasoning, legal rhetoric, and legal research, now with the advantage of this new way of observing what is really going on. This is the

105. The Self-Represented Litigation Network conducts research across the several professions and types of agencies that help self-represented litigants. I would like to see studies similar to those done by John Conley, William O’Barr, and Sally Engle Merry. CONLEY & O’BARR, *RULES V. RELATIONSHIPS*, *supra* note 32; CONLEY & O’BARR, *JUST WORDS*, *supra* note 34; MERRY, *supra* note 32. However, the approach should include cognitive linguistics and possibly other relevant linguistic investigations. One possibility is that suggested by ALICE DEIGNAN, *METAPHOR AND CORPUS LINGUISTICS* (2005). *Corpus*, as used by Deignan, refers to large chunks of text which are examined to see the variety of ways that a specific word is used. Another possibility is combining cognitive linguistics with discourse analysis itself. *See generally* DISCOURSE AND COGNITION: BRIDGING THE GAP (Jean-Pierre Koenig ed., 1998); DAVID LEE, *COGNITIVE LINGUISTICS: AN INTRODUCTION* 170–97 (2001). I would encourage those organizations funding research to examine the words of both self-represented litigants and the people who serve them, as a starting point to delving into the problems of the disconnect in meaning that self-represented litigants face when meeting the justice system.

Under the Network’s 2007 research agenda, through funding from the State Justice Institute, noted court consultant John Greacen is heading a team that is videotaping divorce proceedings and then interviewing the self-represented litigants and the judges after the decision to see if the information the judges were trying to convey is actually reaching the litigants. This is a small scale, preliminary study to see if such studies can provide useful research results. Cognitive linguistics are not a part of the study, but nonverbal cues are being studied, and some attention to word choice is made as well. The author is a member of the Network’s Research Working Group and was on the internal review panel for the initial grant application, but is not a member of this research team.

106. *See, e.g.*, JEANNE CHARN & RICHARD ZORZA, *CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS* (2005). This report for the Bellow-Sacks Access to Civil Legal Services Project, a joint project of Harvard Law School’s Program on the Legal Profession, Clinical Education Program, and the Hale and Dorr Legal Services Center of Harvard Law School, calls for, among other things, an examination of “best practices” throughout the nation. The Self-Represented Litigation Network has several working groups devoted to sharing best practices.

107. *See* WINTER, *supra* note 6, at 271–73.

108. All the five barriers to self-represented litigants noted by Zorza that are due to the self-represented litigants’ own weakness of understanding, *see supra* note 47, could be aided by law librarians using the cognitive theory of metaphor.

first of what I intend to be a series of articles. Stinky inspires me, but the Queen of Chula Vista intrigues me. We all have a primal and social connection to law. It is a part of each of us, and as we practice it (in the broadest sense), we become a part of it. The Queen of Chula Vista may have a very unusual idealized cognitive model of the law, but that she, like the rest of us, has one, I have no doubt.

Afterword

¶112 When he read an earlier draft of this article, Steven Winter offered two global comments, in addition to many helpful insights. He first noted that

In contrasting the deductive reasoning of lawyers and how they actually think, you (Dyer, the author) take the lesser way out. There is more to say, as lawyers also think in the cognitive metaphor theory and just talk deductively. People would find that they would see that law is itself ensnared in what it thinks and what it does.¹⁰⁹

¶113 Subsequent to that conversation, I added the section on legal discourse, as suggested by James Donovan. So I have now said a little bit more. I am also inspired by many judges, lawyers, and court employees whom I have met while dealing with issues facing self-represented litigants. They are willing to look at research, to sponsor it, and to accept its results. The legal community may well be more willing to look at cognitive metaphor theory than the law school community has been. Perhaps we will see where that leads.

¶114 Winter also noted that “[w]ith regard to law librarians using the cognitive theory of metaphor, there are two ways to go. You (Dyer, the author) went for the larger one. You could have simply recommended the smaller one: just to be a better law librarian.”¹¹⁰

¶115 Professor Winter is right. I purposely chose the larger way. I did so because I recognize that public law librarians are an integral part of the justice system, and judges know this. They would expect no less of us, as we would expect no less of ourselves.

109. Telephone interview with Professor Steven Winter, *supra* note 45 (paraphrase, as conversation was not recorded).

110. *Id.*