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REFLECTIONS ON THE INTERSECTION OF LAW AND LINGUISTICS

THIS IS NOT A SENTENCE

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For any observer-relative feature F, *seeming to be F* is logically prior to *being F*, because—appropriately understood—seeming to be F is a necessary condition of being F.[1]

Let be be finale of seem.[2]

The dream is an old one: reality shall replace appearance, the corruptible body will surrender to the transcendent mind, the chaotic confusion of the many will give way to the geometric clarity of the one, and we shall see not through a glass darkly, but face to face. In American legal thought, these Platonic urges are usually expressed through the respective attempts of the formalist to make law "scientific" or "objective," and hence, it is supposed, objectively knowable, and of the hermeneutician to make it an evolving object that changes yet remains the same, thereby rendering it both "legal" and potentially "progressive" or "just."

Both the formalist and the hermeneutic theoretical projects are enabled by the assumption that the meaning of a text is independent of the particular intentions of the text's author and of any particular reader's beliefs about those intentions. For the formalist, the subjective nature of the author's intention makes it deeply suspect; and in any case, on this view authorial intention is simply irrelevant. As Judge Frank Easterbrook has put it, "the process [of legal interpretation] is objective; the search is not for the contents of the authors' heads but for the rules of language they used."[3]

In hermeneutic theory, "dynamic" or "evolutive" interpretation is made possible by the assumption that a stabilized object of textual interpreta-

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1. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 13 (1995).

2. Wallace Stevens, *The Emperor of Ice Cream, in* THE COLLECTED POEMS OF WALLACE STEVENS 64 (1989).

3. *In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).

tion—"the text of the X"—maintains its essential identity, even as this object of interpretation takes on new meanings given to it as a consequence of the very interpretive acts that attempt to determine the object's meaning. For example, William Eskridge follows the work of Hans-Georg Gadamer in accepting Gadamer's assertion that "verbal meaning" functions as the key concept that enables a hermeneutic dialogue between the self-identical text and the changing interpretive situations in which the text finds itself situated.[4] On this view, the inherent semantic attributes of the marks or sounds that comprise the material manifestation of a text themselves create the interpretive possibility that those marks or sounds will be perceived (correctly) as containing whatever verbal meanings those marks or sounds are permitted to have, in whatever language the text happens to represent.[5]

What this symposium on the intersection between linguistic and legal theory illustrates well is that the distinction in legal theory between what is assumed to be a text's inherent formal meaning and its contingent historical meaning essentially replicates the distinction between "sentence meaning" and "utterance meaning" that is crucial to various linguistic theories. The distinction all these theoretical approaches insist on maintaining is that "between the meaning of a sentence and the meaning of an utterance of that sentence on some particular occasion."[6]

I think this distinction is illusory and that Georgia Green is correct when she argues that sentences cannot be interpreted out of context, because, as she puts it, "sentences don't occur out of context."[7] Now if this distinction is indeed illusory, then the theoretical project of determining the meaning of a text without reference to the author's intentions is doomed from the start. In fact, it *is* doomed, because it is oxymoronic. The various intellectual enterprises that depend on the existence of "sentence" or "verbal" meaning (also described as "literal," "conventional," "ordinary," or in traditional legal parlance, "plain" meaning) have been constructed on the basis of a fundamental mistake. The mistake is ontological. "Sentence meaning" simply does not exist in practice—only in theory. Unfortunately (unfortunately, that is, for theories of interpretation), linguistic meaning

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4. William Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

5. For a more extensive account of the relation between Gadamer's work and questions of legal interpretation, see Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993).

6. Michael S. Moore, *A Natural Law Theory Of Interpretation*, 58 S. CAL. L. REV. 277, 290 (1985).

7. *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 838 (1995).

never exists in theory, only in practice. Textual meaning always occurs in the context of, and indeed is generated by, the intentional semantic content of a particular utterance. Hence you can't have a true theory of linguistic practice any more than you can have a true theory of any other set of contingent facts.

Consider a concrete example. Suppose I want to know how much the tiger at the zoo weighs. Someone tells me that he doesn't know what this tiger weighs, but that, "in general," tigers weigh 375 pounds. Of course, this may or may not prove to be helpful information. Maybe this tiger is exceptionally large or small. More to the point, such a generalization does not tell me very much about what interests me, which is just what *this* tiger weighs, not what tigers are generally understood to weigh. Now suppose my informant were to insist that in one sense he has *already* told me what I want to know, because all tigers have two weights: 375 pounds (their theoretical tiger weight) and N pounds (the particular and hence variable weight of any individual tiger). The strangeness of this statement is obvious enough when what one seeks to know is what the zoo's tiger weighs. What theories of textual interpretation overlook is that it is just as peculiar to answer someone's questions about the meaning of a particular text with the assertion that, although we don't know what this text means as an *utterance*, we can tell you what it means as a *sentence*. Texts cannot have meaning "in the abstract" any more than tigers can have abstract weights. The meaning of a text, like the weight of a tiger, is an empirical question, and no theoretical generalizations about what tigers weigh or what texts mean will give you the answer to either kind of question.

I recognize, of course, that it seems highly counterintuitive to assert that texts do not have conventional meanings. Note that the claim is not, absurdly, that when we attribute a conventional meaning to a text we are necessarily mistaken. Rather, the claim is that "sentence" or "conventional" or "plain" meaning isn't an *inherent attribute* of texts for the simple reason that texts don't have inherent formal attributes. The meaning of a text may indeed be identical with the conventional meaning that it supposedly manifests, but this will always be a contingent occurrence, the interpretation of which will require an empirical observation about the author's intention, not a tautological assertion about the formal qualities of language. Thus, Georgia Green is surely correct when she asserts that words *themselves* do not "have" meanings, and that all interpretation must be, in the technical

linguistic sense, pragmatic rather than semantic.[8]

Now in order to put the case against sentence meaning on the strongest possible grounds, I will examine the most powerful argument I know of for the claim that such meanings are inherent in the nature of language itself, rather than always being, as argued here, the contingent psychological by-products of actual linguistic practice. In a valuable essay that exposes many of the key mistakes that plague contemporary theories of legal interpretation, Larry Alexander asks the reader to imagine the following situation.[9] Suppose a person confronts text-like objects that have no authorial source of signification, and then attempts to interpret—to attribute particular semantic meanings—to those objects. If an acontextual interpretation is ever possible—if one could ever successfully interpret *sentences* rather than *utterances*—then, at a minimum, it would have to be possible in this prototypically acontextual situation. Of course, this activity will make sense as an *interpretive* practice only if we can accurately characterize certain acts of attribution as correct understandings of such an object's semantic meaning and others as misunderstandings of that meaning.[10] If, on the other hand, we cannot properly make such evaluative distinctions, then such acts of attribution cannot be considered interpretive acts.

Alexander provides the following account of how we might go about successfully interpreting such objects.[11] Imagine a cloud formation that looks like the word "go," or a monkey whose playful striking of a typewriter produces the letter sequence "w-h-a-l-e," or an accidental bumping of that typewriter that causes the "i" and "t" keys to strike the paper consecutively. In each of these cases, authorless phenomena have, on this account, produced actual words. We know that these marks are words because of a public convention to that effect; and although such public conventions are established initially by the semantic intentions of neologistic speakers, once these conventions *are* established "shapes and sounds and the words they produce have the meanings the public convention establishes independent of any author's or speaker's inten-

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8. *Id.* at 2.

9. Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions, in* LAW AND INTERPRETATION 357 (Andrei Marmor ed., 1995).

10. An interpretive practice involves an attempt to ascertain some fact about the world. For the understanding of any particular text, the relevant distinction is between the *attribution* and the *creation* of semantic meaning: only the former is an interpretive practice. See Campos, *supra* note 4, at 1082, as well as Paul Campos, *Three Mistakes About Interpretation,* 92 MICH. L. REV. 388 (1993).

11. Alexander, *supra* note 9, at 403.

tion."[12] This "dictionary meaning" (mean$_d$) of what appear to be words is thus always available to the interpreter as an independent source of semantic signification—a source that enables us to undertake correct and incorrect interpretations of authorless, text-like objects (of quintessential "sentences" or "sentence fragments") that are not and cannot be interpretations of any author's intentions.

It follows from this that "a cloud formation that is shaped like the letters 'g' and 'o' means$_d$ [has as one of its inherent attributes the dictionary meaning of the English word] 'go.'"[13] In the same way, "the monkey's typing of whale means$_d$ a large aquatic mammal." We properly attribute dictionary meanings to such authorless objects when the objects in fact instantiate those meanings. Although it makes no sense to argue about what *the* meaning of a set of random marks really is when those marks form a word with different meanings in different languages (a false cognate), or a word that has multiple dictionary meanings in the same language (a homonym), or a word that has both a formal dictionary meaning and other, less formal meanings when used by various speakers (*e.g.*, idioms, malapropisms, codes), the uncontroversial fact that we can usefully employ dictionary meanings when teaching languages to children indicates that dictionary (*i.e.*, sentence) meaning is always *a* meaning of any text-like object—at least of any such object that instantiates a public convention. Hence the practice of authorless attribution is properly characterized as an interpretive practice because we can either correctly identify or fail to identify the dictionary meanings that such authorless objects actually manifest.

This theoretical distinction between the dictionary meaning and the author's meaning of a text allows us to ask, as a practical matter, *which* (correct) interpretation of a text should be controlling in different interpretive situations.[14] As Alexander puts it, "what is important is that we be clear about what our practical enterprise is."[15] We must then decide whether the author's intended meaning or the text's dictionary meaning

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12. *Id.*

13. *Id.*

14. Note that normative arguments concerning the interpretation of texts require the possibility of interpretations that exclude each other, and yet are still in some non-trivial sense correct interpretations. That is, normative interpretive theory depends on the belief that interpretive practice sometimes allows or requires the interpreter to choose between (at least) two mutually exclusive yet simultaneously "valid" interpretations. By contrast, the argument put forth in this essay leads to the conclusion that nothing of interpretive interest turns on the claim "the text should mean X."

15. Alexander, *supra* note 9, at 404.

should be what guides the interpretation of any particular text.

Alexander's account of how different sources of semantic meaning create the possibility of different interpretive theories has great intuitive plausibility. Yet it depends upon the central assertion: Dictionary meaning can be attributed [correctly] to objects with no authorial intent. Note, however, that any act of authorless attribution requires an attributing agent: an agent who declares that a particular object manifests a codified, formal meaning, the content of which remains independent of anyone's intentions or beliefs—even (or perhaps especially) those of the attributing agent who, after all, believes he is *discovering* rather than *creating* the object's semantic significance.

But can texts or text-like objects actually derive their semantic content from some codified meta-context of objective meaning? The belief that they can has been attacked with great effectiveness by deconstructive critics. As Jonathan Culler puts it:

> Any attempt to codify context can always be grafted onto the context it sought to describe, yielding a new context which escapes the previous formulation. Attempts to describe limits always make possible [more precisely, such attempts reveal the latent possibility of] a displacement of those limits.[16]

Culler illustrates this assertion by pointing out how Wittgenstein's claim that it is impossible to say "bububu" and mean "I shall go for a walk in the rain" is actually a performative demonstration of the very thing the philosopher wants to deny.[17]

Deconstructionists commonly argue that the ultimate futility of formal attempts to limit the possible linguistic manipulations of potentially significant sounds or marks has dire consequences for the epistemology of interpretation, and perhaps even for the ontology of semantic meaning. Such assertions are, in my view, *non sequiturs*: products of a residual Cartesianism that requires some realm of incorrigible knowledge in order to properly ground our inquiries. Yet the observation that we can always be mistaken about the meaning of a particular text is usually no more significant or interesting than the fact that we can always be mistaken about any state of affairs—*i.e.*, most of the time, this observation has little or no practical significance.

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16. JONATHAN CULLER, ON DECONSTRUCTION 124 (1982).
17. *Id.*

What *does* follow from what Derrida[18] and others have called the ineluctable "iterability" of language? What follows is that the "dictionary" or "sentence" meaning of a putative word must be like any other meaning—a meaning that may or may not have been conferred, by some meaning-conferring agent, to a putative word on a particular occasion of utterance. I say "putative" because to attribute semantic significance to any encountered mark or sound—to treat it as a *signifier*—is itself always an act of interpretation or misinterpretation. Misinterpretation can always occur because all such acts of attribution remain open to the possibility of two kinds of mistake. First, we may misattribute what meaning the meaning-conferring agent in fact conferred to a signifier when the agent generated that particular signifier. Second, a more radical kind of mistake can occur if we encounter what appears to be an object that represents an act of semantic signification that in fact is not an object that represents an act of semantic signification. In this latter case, any attempt to determine the proper semantic interpretation of the object is an attempt to determine the fact of the matter when indeed there is no fact of the matter. Thus a cloud formation that is shaped like the letters "g" and "o" does not constitute a representation of a word. We can choose to treat the formation *as if* it constituted the representation of a word, but this will remain a counterfactual attribution of semantic meaning to an object that has none.

This fundamental difference between the representation of a word and a natural phenomenon that appears to be the representation of a word reminds us that the physical manifestation of any semantic representation—the mark or sound—is always an artifactual remnant of some agent's intentional mental state. It is the difference between finding a stone that is *shaped like* a knife, and a stone that *has been used as* a knife. Only one of these stones is an artifact, which is to say only one of the stones has been an object of conscious intentionality,[19] and this distinction will remain crucial to any account of what each stone's shape signifies.

What I want to insist upon is why, when one attempts to interpret what appear to be linguistic signs, "public conventions" (*i.e.*, dictionary meaning, verbal meaning, sentence meaning, etc.) do not and cannot possibly *establish* the meanings of those particular marks. Public conventions are not signifying agents. Public conventions are employed by signifying agents. If an agent employs a particular convention when producing a signifier,

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18. Jacques Derrida, *Signature Event Context*, 1 Glyph 180, 182 (1977).

19. "With consciousness comes intentionality, the capacity of the organism to represent objects and states of affairs in the world to itself." SEARLE, *supra* note 1, at 7.

then the signifier has the meaning given to it by signifying agents when they employ that particular convention. Only then will the convention itself have positive significance for the accurate interpretation of that signifier.

The key point of the argument is that *someone* must always generate semantic meaning, because a representation is always the product of some representer's intention to represent. Linguistic conventions do not exist apart from their contingent instantiation upon particular occasions of utterance, and dictionary or sentence meanings can be nothing more than theoretical generalizations drawn from such particular occasions. Such generalizations remain just that, which is to say that, like all generalizations, they will sometimes prove useful and sometimes mislead. Semantic meaning cannot be generated by linguistic conventions, because linguistic conventions are tools employed by signifying agents, rather than agents themselves. Words do not mean; people do.

At bottom, the distinction between semantic meanings and the material objects that encode those meanings is related to the inexact yet fundamental ontological distinction between facts that are intrinsic to nature and facts about human subjectivity.[20] If a cloud formation looks like the word "go," the formation's mass, extension, humidity, and so forth would remain what they were whether there were any subjects in the world to observe those qualities or not. By contrast, the fact that the formation appears to represent a word is an observer-relative fact. Without observers, there would be no such facts. A world without observing subjects might *in theory* be full of objects that such subjects would mistake for words or knives. But objects that *are in practice* words or knives, or indeed that *are mistaken for* words or knives, require subjects who undertake the creation, interpretation, and misinterpretation of such intrinsically subjective phenomena. Thus, to say that a monkey's random striking of w-h-a-l-e on a keyboard "means" a large aquatic mammal is to make a counterfactual observation about the world. It is to say, "this is an object that if it had been employed as a signifier probably would have been employed to signify a large aquatic mammal." To say that "it" nevertheless does mean a large aquatic mammal is to make a mistaken claim about the existence of a signifier when in fact no such signifier exists.

The absence of authorial meaning necessarily means the absence of sentence meaning because sentence meaning, when present, is always a

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20. This distinction between observer-relative facts and facts that are intrinsic to nature is elaborated in JOHN R. SEARLE, THE REDISCOVERY OF THE MIND 211-12 (1992).

manifestation of authorial meaning. Marks and sounds are made semantical-
ly meaningful by particular acts of semantic attribution. Language—indeed
semantic meaning of any kind—cannot exist apart from such particular acts.
Accidentally typing "i-t" is not such an act, and those marks when made
by the random action of the typewriter are no more a representation of a
word than "xq" would be a representation of a word if someone accidental-
ly typed that. While it is true that the accidental typing of "it" can be
treated *as if* it were the representation of a word, so can the accidental
typing of "xq." Neither object is a word; however, both objects would be
words if their production was the result of an intention to generate semantic
meaning. And of course, both objects could be mistaken for words.

   Hence, if we were to ask children what words were being formed by a
cloud formation, we would be employing a heuristic fiction: NO such
words exist. Alexander's discussion of such hypothetical phenomena rightly
emphasizes the futility of arguments about "the" meaning of accidental
marks whenever those marks could be taken to signify more than one thing
and could therefore seemingly provide occasions for interpretive dispute.[21]
Yet because there may always be a difference between a conventional
meaning of a signifier and another conventional meaning of that signifier,
or, to put it another way, between a (more or less) conventional usage and
a (more or less) idiosyncratic usage, it always remains possible to have an
interpretive dispute about what this or that signifier happens to mean. It
follows that no occasion for interpretation can ever be immune to the
possibility of interpretive dispute, because the potential always exists for a
lack of congruence between what speakers mean and what listeners
understand speakers to mean. This, after all, is why we can even talk of
such pluralistic phenomena as utterance meaning, sentence meaning,
malapropisms, ambiguity, and so forth. Therefore, it is always pointless to
make any claim about—that is, to interpret—the meaning of *linguistically
acontextual* marks because it is pointless to assume (except as a heuristic,
strategic, or playful fiction) that such marks could ever be words.
Moreover, it follows logically that to attempt to carry out valid acontextual
interpretations of *intrinsically contextual* phenomena—to treat utterances as
sentences—is to attempt to do the impossible.

   In brief, if we are dealing with a speech act we can never preclude the
possibility of a dispute about the speech act's semantic content. If we are
not dealing with a speech act, then we cannot say anything about the

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21. Alexander, *supra* note 9, at 404.

event's semantic content other than to note that the event has no semantic content. At most, such cases present us with an illusion of semantic content. The cloud formation, the monkey's "whale," the accidental typing of "it," and the linguistic theorist's "sentences considered in the abstract"[22] are all the linguistic equivalents of Rorschach blots, into which we project the mistaken belief that we are seeing words, just as an archeologist might mistake a stone that *looks like* a knife for a stone that *someone had employed as* a knife.

Alexander is also right when he says that "what counts is that we be clear about what our practical enterprise is."[23] This is not merely because "legal interpretation is a practical endeavor," but also because *any* interpretation of linguistic phenomena cannot be controlled by general accounts or theories of linguistic interpretation.[24] The interpretive enterprise of figuring out what a text means is always a practical rather than a theoretical endeavor, because it is always an inquiry into a particular historical fact: the meaning of a particular set of signifiers produced on a particular occasion by the meaning-conferring agent who produced them.

The depth of the confusion that surrounds these issues is illustrated by some of the remarkable claims that legal philosophers routinely make when discussing questions of textual interpretation. For example, consider this claim put forth by Professor Dennis Patterson:

> Intentions do not establish meanings. If you utter the sentence "I would like minestrone soup" but intended to order chicken noodle soup, the meaning of your request is clear. Furthermore, your intention is completely irrelevant to the meaning of what you said.[25]

This example presents us with a speaker who is producing certain sounds that signify the speaker's attempt to communicate a request for what the interpreter calls "chicken noodle soup." By stipulation, the interpreter of this utterance knows two things about it: The speaker is making sounds that represent his intention to communicate a request for what the interpreter calls "chicken noodle soup," and the speaker is making sounds that the interpreter assumes a certain heuristic fiction called "the ordinary speaker

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22. JUDITH N. LEVI, A SHORT HISTORY OF LINGUISTIC TERMS 1.
23. Alexander, *supra* note 9, at 404.
24. *See* Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982).
25. Dennis Patterson, *The Poverty of Interpretive Universalism: Toward A Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 14 n. 72 (1993).

of English"[26] would use to communicate a request for what English speakers usually call "minestrone soup." So what, exactly, is "clear" about the meaning of this utterance? As an interpretive matter, everything that counts: which is to say, the semantic intention of the speaker, the listener's successful interpretation of this intention, and the listener's understanding that such an intention would usually be expressed by a different set of sounds. Note that in practice—and language does not exist except in practice—language consists of speakers' meanings and listeners' understandings or misunderstandings of those meanings. The meaning of a particular text—and all texts are particular texts—is clear if the listener has understood the speaker's meaning. The "formal" (*i.e.*, universal, theoretically specifiable) meaning of a text is a heuristic fiction that may or may not help us understand any particular text's actual meaning.

I want to conclude by noting that we should, perhaps, find something troubling in Dennis Patterson's example, and indeed about the whole idea of attempting to develop comprehensive theories of legal or linguistic meaning. What concerns me is the implicit juridical impulse that seems to fuel these intellectual projects. It is as if Patterson's analytical declaration that X means Y, or Jeffrey Kaplan's assertion that when "the enactor of a statute performs an illocutionary act of legislating, that enactor is bound by what he does"[27] should be followed by that judicial classic utterance, *It is so ordered*. There is something intellectually questionable about the theorist's authoritarian drive to regulate and simplify the complex and inevitably somewhat chaotic particularism of legal and linguistic practice through the deployment of some imperial theoretical construct, whether it be "sentence meaning," "truth-conditional semantics," "the rule of law as a law of rules," or making legal language "the best it can be."

All such concepts work within their respective discourses to objectify, to impoverish, and ultimately to obscure the inescapably subjective nature of semantic meaning: those acts of signification that are the focus of the interpretive assertions *I used* these marks to mean X, Y and Z, *you understood them* to mean X, Y and W, and *they would have used them* to mean X, Y and T. These two facts and the accompanying counterfactual

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26. For an incisive critique of universalist claims about "ordinary meaning," see Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625 (1979), *reprinted in* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 269 (1980).

27. *Law and Linguistics Conference, supra* note 7, at 865.

(the possible content of which will be as unlimited as the potential identities and intentions of "they") represent what we might call the intrinsically subjective matrix of linguistic events. That matrix reveals that the meaning of a text is always identical with some particular agent's intended meaning. The assertion "these marks mean X" must mean either "these marks mean X to me," or "these marks meant X to N," or "these marks would have meant X to N under the following (counterfactual) circumstances."

Marks or sounds are semantically meaningful only if they have been made so by the representational intentions of some meaning-conferring agent; and the interpretation of such signs is always an attempt to discover what that agent meant. Whenever it is treated as the methodological or hermeneutic key to interpretation, the formal stipulation of sentence or verbal meanings instantiates the same theoretical mistake. For unless we identify their meaning with the semantic intentions of some meaning-conferring agent, marks that we wish to interpret as words can represent no more than a random collection of semantically meaningless objects, signifying nothing.