Anglo-American.

From a scholarly point of view, Angela Ales Bello's book succeeds as an illuminating collection of historical and theoretical investigations of three great phenomenologists, and as such is to be recommended. But as a contribution to gender studies it is highly questionable.

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The Phenomenology of Modern Legal Discourse
WILLIAM E. CONKLIN

William Conklin's *The Phenomenology of Modern Legal Discourse* draws on literature, case study, and continental philosophy to take contemporary legal language to task. Conklin is critical of the ways in which modern legal discourse negates litigants, and proposes in his book that the very language of the courts is responsible for undermining the people it professes to represent. The book is written for lawyers and law students, laden with citations, cross-references, and historical contextualization. Given its breadth and cursory treatment of the philosophers it discusses, it provides an expansive, albeit superficial, introduction to the continental tradition. At the same time, it cautions would-be lawyers to the potential travesty of their own profession. First-year law students and seasoned lawyers alike would be advised to take Conklin's detailed and deftly outlined position into consideration, if only to understand the limitations of the juridical domain.

Like many writers of the phenomenological tradition, Conklin does not explicitly offer a normative assessment of that which he dissects. Rather, he picks apart the nuances of modern legal discourse to uncover what happens to the experiences of litigants when they are translated into language that is understandable to lawyers. He crafts a position that is part phenomenology, part critical theory, highlighting the semantic violence that the judicial branch inflicts upon the lifeworld. Though he does not condemn legal discourse outright, he issues a tacit warning for legal scholars and students about the potential imperialism of their field.

The book begins provocatively. The reader's attention is first drawn to Franz Kafka's *K* (from *Der Prozess*) as he meanders his way through the impenetrable channels of the convoluted German legal bureaucracy. *K* is the paradigmatic litigant, claims Conklin, insofar as he returns home one random day to discover that he has been issued a subpoena to appear in court. What follows for him is a tortuous route of self-discovery, in which neither *K* nor his legal advisors
can figure out exactly what K has done wrong, nor how to resolve the blizzard of red tape that ensues.

Conklin continues his explorations of modern legal discourse by posing what he takes to be their primary pitfall: that juridical language and legal discourse conceal suffering. His claim is that legal language, by masking and decontextualizing the real world experiences of litigants, dramatically debases human suffering and downplays the impact that such suffering has on their lives. His argument runs in fits and starts, but the point of his book is to chart the pathways through which the experiences of litigants become lost in legal discourse.

Conklin quickly differentiates “non-knowers” (those who have experienced some harm but are not expert enough in the nuances of the legal system to translate their experience into the appropriate terminology) from “knowers” (those expert in the nuances of the legal system but unfamiliar with the lived experiences of litigants). He lays out “paradigms of legal consciousness and legal language” by claiming that only knowers (judges, lawyers, paralegals and the like) are equipped with the linguistic apparatus to translate the language of non-knowers into juridically relevant discourse. This stark dichotomy runs through the text and provides the platform from which Conklin continues to criticize legal discourse and the court system.

He calls upon phenomenology to ask how and why the legal discourse of modern states conceals the experienced meanings of non-knowers. He suggests that non-knowers can neither know nor understand the language of authority without becoming experts in that language, and that the language of non-knowers is not incorporated into the language of juridical authority. For Conklin, this constitutes an incommensurability between the primary genre (a term he borrows from Bakhtin) of general interactive communication and the secondary genre of expert legal discourse.

Conklin demonstrates not only that the authority of legal discourse is incompatible with other, more experientially expressive, forms of interaction, but that legal discourse is self-substantiating. He exposes the entire legal system as little more than a back-patting Ponzi scheme where “professional knowers project their own institutional self-image into legal doctrines” (146). To support this claim, Conklin cites the writings of sitting judges who, in formulating their opinions, self-referentially invoke the authority of cases on which they themselves have ruled. Indeed, the explanation is condemning: if it is so that juridical truth is only as objective as the cumulative opinions of sitting judges, and if these judges are themselves the authors of the texts that they are interpreting, then judges act as sovereigns by decree, basing their opinions not on some externally validated legal spirit (as Conklin is wont to call it), but rather on their own fits and fancies. (This self-referentiality claim is itself curious, because the cases upon which judges have ruled stand as legal precedent, whether or not they themselves have ruled upon them. Precedent is therefore intersubjectively supported across a broad spectrum
However sympathetic the reader may be with Conklin’s general aim, one cannot easily ignore the way in which he unnecessarily denigrates realist pictures of language in general, and the secondary genres of experts in particular, as a means of criticizing legal language. He rails against objectivist, positivist, and representationalist pictures of language, preferring to speak of the socially constructed “heteroglossia” of dialogue, with the hope that dialogue will eschew the objectivizing tendencies of symbolic recapitulation. He would like to locate justice in the shared experiences of multiple interlocutors, as if the “intertextual” experiences of all speakers can somehow help smooth out differences that are lost when professional knowers squeeze non-knowers into specified, disembodied cubbyholes.

But this points to one of the clearest problems in the book: it begins and ends with a false dichotomy, as if there were a clear distinction between knowers and non-knowers, as though litigants can make no sense of their representatives, as though real world experiences are reconstructed entirely by, and not mediated through, the symbolic transformations of legal discourse. Where Conklin endeavors to substantiate this claim by citing court cases and literature, he assumes the dichotomy in order to suggest its existence; the conclusions he draws are virtually encapsulated in the terminology that he uses. When he suggests that participants in the secondary genre of juridical discourse “speak past” participants of the primary genre, he dramatically miscarries Bakhtin’s speech genre innovations. Claiming that knowers and non-knowers speak past one another in the way that Conklin does suggests that they can make absolutely no sense of the suffering of the other, which quickly degenerates into a position in which they can make no sense of the words the other uses. This sort of extreme relativism is a classic pitfall of the literature to which Conklin ambitiously defers, and one from which he cannot easily escape. With his assumptions about the way in which knowers relate to non-knowers, and the subsequent loss of what he calls “embodied meaning,” Conklin is set to embrace wholeheartedly a position that regards all meaning as socially and experientially contingent.

The point here is that he uses the dichotomy to suggest that since the two parties (knower and non-knower) cannot understand one another, there must be something lost along the way (suffering), and that this loss must not be adequately represented in legal discourse. But he has based his conclusion upon a dubious assumption about language use—that there exist wholly incommensurable ways of communicating such that two interlocutors cannot come to an understanding with one another about what has happened without experiencing each other in dialogue. Conklin searches for anthropological evidence that this does happen rather than investigating the theoretical plausibility of this position. It is, of course, the case that any discursive relation will always leave issues unsaid and suffering unattended. This seems simply to be the nature of coherent discourse, and does not
necessarily imply oppressive monologue. Working to achieve any legal end, whatever that end may be, entails making editorial decisions about what story will be told to the courts, and it will almost always involve translating experiences into narrative accounts that resonate with the codified law. If this is what bothers Conklin, then he has only restated that which any neophyte paralegal learns within her first month on the job. On the other hand, if what bothers Conklin is that the language of pain and suffering is not to be found in the banter of legal scholars, then he must explain what it should be doing there in the first place.

This raises a related problem. In spite of the important criticisms that Conklin offers of the legal system, he never makes clear how legal discourse is meant to cope with suffering. It would be one thing if he were attacking the pillars of counseling, a discipline intent on remedying suffering. Perhaps Conklin then might have a condemning case—counseling would propose to remedy suffering and instead conceal it. But this is simply not so with the judiciary. Every lawyer in the world begins his prefatory hire-me speech with something akin to the following: “I’m really sorry that X has happened, but here are your options.” Lawyers make few if any gestures toward consolation. Instead they focus on settling conflicts, mishaps, and legal grievances between particularized agents by appealing to the generalized and codified law (hence the need for translation into a secondary genre). At higher levels of the judiciary, of course, they abstract from particularized citizens to pit generalization against generalization, legislation against constitutional foundation. But it is with the very lowest levels that Conklin primarily occupies himself, and here lawyers attempt to help non-knowers achieve an end, whether that end be reparations or justice. They do so by alerting non-knowers to potential recourse, not by suggesting that they will help them overcome their suffering. While it is true that much of the legal system is established to redress suffering and harms inflicted upon individuals, Conklin does not explain why justice cannot be done if an imperfect account of suffering is brought by lawyers before the courts. Unfortunately, he also does not address the more basic question of whether the strategies and purposive rationality of legal bartering can fairly be considered communicative discourse at all. Even many discourse theorists recognize that communicative discourse need only be called into effect when there is a genuine crisis of understanding. Otherwise, linguistically seated strategic action is a means of accomplishing tasks; it is legitimate so long as it does not betray the interests of the communicative participants.

For all of its critical merit, the book is not without methodological flaws. Conklin treats such a multitude of philosophers that he cannot possibly cover any one of them fairly. He cites them as if they were scientists, each working independently on the collective project of coming to conclusive positions about the descriptive state of the world. His breadth of treatment prevents him from recognizing the conflicts endemic to the often disparate positions he cites. A short list of just the heavy-hitters will reveal his theoretical breadth and smorgasbord
thinness: Derrida, Gadamer, Bakhtin, Foucault, Saussure, Merleau-Ponty, Barthes, Husserl, Heidegger, Levinas, Nancy, Weber, Zizek, Deleuze, Butler, Baudrillard, Lukacs, Hegel, Habermas, Spinoza, Kant, Descartes, Hart, Peirce, Schrödinger, Heisenberg ... the list goes on. He uses their concepts as tools for building his project, but does little to demonstrate the important ways in which each theorist differs from the other. We are left with pithy recapitulations of their positions.

This raises a third problem with Conklin’s position. He spends so much time examining legal discourse from the standpoint of contemporary phenomenology, attempting to contextualize it within the entire history of philosophy, and thereby establishing his expertise in such matters, that he is guilty of stepping into an exclusive secondary genre himself. While his project may not conceal suffering, he nevertheless brings his own expert discourse to the table. The language he uses is so specialized as to require years of training in his particular brand of phenomenological, postmodern criticism. This would not be so bad except that his own assumptions about the incommensurability of speech genres prove too difficult for his entire project to bear.

Conklin’s is a laudable project, but one fraught with the possibility of sinking into extreme relativism. By taking on his task phenomenologically (as opposed to critically), attempting to plot the mechanisms that differentiate legalese from normalese, and thereby to cast doubt on juridical knowledge and expertise as a whole, Conklin gets lost in his own critique. He spends many pages referring to philosophers his primary audience is unlikely to have read or properly understood. He then leans heavily on a picture of meaning that depends on unique individual experiences—irreducible to linguistic codification, untranslatable over shared narratives. His position on language is condemning of all but a very specific form of shared dialogue, which undermines the point that he seems more intent on making. At times it becomes clear that he is less interested in the actual inner workings of legal discourse than in criticizing the ways in which non-knowers are left out of the picture. His book, it seems, is intent on making the point that legal discourse can be, and often is, oppressive. With this, one must simply nod in agreement.

So where Conklin begins, he also concludes. That is, he demonstrates what he takes to be primary to the secondary genre of legal discourse—that it conceals suffering—and then, by appealing to text, literature, and anecdote, shows how individuals can enter a lawyer’s office with serious personal concerns and exit with a portfolio of legal hieroglyphics. Like Kafka’s K, litigants may not understand how they arrived where they did. His book is thorough and his targets are certainly worthy of criticism. Conklin’s chosen path for this criticism, however, over-relativizes discourse. It is worthwhile reading for anyone seeking a better understanding of the pitfalls of legal translation, and perhaps even the devastating ways in which legal language can be used to maintain a grasp on power, but readers seeking a comprehensive and thorough interpretation of legal scholarship would
do better to consult the original texts themselves.

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