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Introduction

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SYMPOSIUM: COGNITIVE LEGAL STUDIES: CATEGORIZATION AND IMAGINATION IN THE MIND OF LAW

A Conference in Celebration of the Publication of
Steven L. Winter's Book,
A Clearing in the Forest: Law, Life, and Mind

INTRODUCTION[*]

Lawrence M. Solan[†]

This volume contains the proceedings of a Symposium that took place at Brooklyn Law School on October 26-27, 2001, entitled "Cognitive Legal Studies: Categorization and Imagination in the Mind of the Law." The Symposium—the fourth published program of Brooklyn Law School's Center for the Study of Law, Language and Cognition[1]—focuses on the ideas that Steven Winter develops in his important new book,

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[1] The earlier publications have been: P.N. Johnson-Laird, *Causation, Mental Models, and the Law*, 65 BROOK. L. REV. 67 (1999); *Roundtable: The Cognitive Bases of Gender Bias*, 65 BROOK. L. REV. 1037 (1999) (containing an article with that title by Virginia Valian, and contributions by Mariane LaFrance, Marc R. Poirier and Elizabeth M. Schneider); *The Jury in the Twenty-First Century: An Interdisciplinary Conference*, 66 BROOK. L. REV. 971 (2001).

A Clearing in the Forest: Life, Law, and Mind.[2] Winter's straightforward premise is that the legal system can only establish principles through the people who act on its behalf, and that conventional legal argumentation makes incorrect assumptions about how people—including, naturally, those in the legal system—reason.

Relying on advances in cognitive science during the past quarter century, Winter argues that reasoning is not linear and hierarchical the way some legal writers and much legal doctrine present it. Rather, it is imaginative, and relies heavily on metaphorical structure and cognitive models developed from experience. That is, we reason more from the bottom up than from the top down. As critics since the beginning of the twentieth century have observed, rule-like accounts of the law work only by sweeping a great deal of indeterminacy under the rug. However, critical movements that revel in the law's seeming incoherence miss the fact that significant regularities come to light once one begins to reconceptualize the law in terms of the kind of thinking in which people really engage in everyday life. Winter uses advances in cognitive science to do just that.

This challenge to conventional legal thinking has enormous ramifications for traditional legal domains including statutory interpretation, constitutional analysis, and the nature of common law reasoning. With depth and insight, Winter explores each of these topics and others. It is the breadth of this approach to legal reasoning that led to this Symposium being named "Cognitive Legal Studies."[3] In fact, anyone looking casually at the table of contents would likely regard this volume as a collection of interesting, but seemingly unrelated articles on various topics in legal theory. Contributions range widely in subject matter, including the 2000 presidential election, constitutional theory, race, legal education, law and literature, criminal law, and the process used by judges in reasoning about controversial cases. At a different level, however, the collection becomes entirely

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[2] STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001).

[3] The title was the idea of Gary Minda, Professor of Law, Brooklyn Law School.

coherent: All of the essays in this volume are about how phenomena seemingly at odds with conventional legal understandings become coherent in light of certain contextual threads, often metaphorical, that run through them. Thus, the collection itself is a metaphor for its content.

Winter's work is heavily influenced by the writings of George Lakoff[4] and Mark Johnson. In the issue's first essay, "Law Incarnate," Professor Johnson describes how Winter's book fits into the broader project of cognitive science in which Lakoff, Johnson, and many others have been engaged.[5] For those who have read neither Winter's book nor the underlying cognitive literature, it is an excellent introduction. Johnson argues that the categories we use in everyday life are embodied and motivated by our experience. It is only in terms of this motivation that one can understand them at all. He then uses these and other insights to anchor Winter's contributions to the study of law and mind.

Frank I. Michelman gets right to the heart of the matter in "Relative Constraint and Public Reason: What is 'The Work We Expect of Law?'" Michelman picks up on Winter's notion of moderate indeterminacy in law, and asks what it says about the ability of legal institutions to do what we might expect of them. Of course, the question immediately forces us to ask just what it is that we might expect law to do. This, in turn, evokes normative issues of self-governance, which are the principal focus of Michelman's essay. Drawing on work from political theory, jurisprudence, and Winter's approach to cognition and law, Michelman asks whether cognitive science might have something to say about "public reason," which is an essential aspect of ensuring basic liberties. In so doing, he questions the need for special "legal" institutions in light of the deeply entrenched, socially motivated mental models that drive positive law.

Jeremy Paul's essay, "Changing the Subject: Cognitive Theory and the Teaching of Law," brings the cognitive perspective to legal education. Paul is the co-author of a book

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[4] Especially central to Winter's work is GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS (1987). Although he was not able to contribute to this volume, Professor Lakoff attended and spoke at the symposium.

[5] *See* GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT (1999).

that encourages a more conceptual approach to legal education.[6] The first part of the essay explores his agreements and disagreements with Winter's approach. The second part explores ways in which cognitive theory can form the basis for reformation in the law school curriculum. Many problems that lawyers face recur regardless of the doctrinal area in which the problem arises. While law schools purport to train students to "think like lawyers," they spend precious little time saying anything enlightening about how lawyers think. Advances in cognitive theory like those developed by Winter in his book can help law teachers take more seriously the stated educational goals. The curriculum already has cross-doctrinal courses, such as Legislation and Statutory Interpretation (which, incidentally, I teach), and could do much more. Recurring conceptual problems, like the rules versus standards issue, or the problem of what Paul calls "two-fers" (dealing with situations in which the law sets forth two alternative criteria, and the individual meets neither in full, but both in large part) can form the basis of much more legal teaching. Paul's essay contains a number of creative ideas along these lines, with concrete examples.

In "The Subject and Object of Law," Lawrence Joseph also concerns himself with normative issues. Joseph looks to poetry as the expressive form in which authors try hardest to transcend their linguistic heritage. They are, of course, unable to do so (poets are human too, you know), but the effort shows a deep commitment to grappling with the most important human experience. Joseph argues that actors in the legal system should certainly be obliged to make serious efforts to come to grips with legally central concepts such as "morally just," but rarely even try. He looks to recent work of Robin West[7] to set out the problem, and to the promise of experientially-based legal reasoning as a starting point for seeking an answer.

Jonathan Simon, in "Governing Through Crime Metaphors," talks about the metaphorical structure of talk about criminal law. Politicians and judges alike consistently

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[6] RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE (1999).

[7] Robin West, *Taking Moral Argument Seriously*, 74 CHI.-KENT L. REV. 499 (1999).

describe the population as a set of victims of violent criminals, justifying an ever-escalating set of laws and harsh punishments. Simon looks at the "war on crime" metaphor, developed as part of President Johnson's statement issued with his signing the Omnibus Crime Control and Safe Streets Act of 1968.[8] Interestingly, the war metaphor, itself socially contingent, evoked images of World War II, in which the population was mobilized and willing to make sacrifices for the sake of preserving important values of society. The metaphor, for example, would have been less apt if the Viet Nam War were the only American war in memory at the time the bill was enacted. Simon discusses other metaphors used to describe crime, and ends his essay with the suggestion that a progressive political and legal agenda might begin with serious consideration of its metaphorical foundations. He illustrates this point with a "war on cancer" as a means of motivating aggressive environmental policy.

D. Marvin Jones' essay, "We Must be Hunters of Meaning': Race, Metaphor, and the Models of Steven Winter,". explores race as an experientially-based, socially-constructed concept. Drawing from arguments in his forthcoming book,[9] Jones shows how the concept of race is built from societal decisions intended to create a caste-based social structure. He does this through the use of narrative, a cognitive structure about which Winter writes at length in his book. Jones principally uses two stories to build his point: that of an escaped slave, Henry Bibb, and that of the film, *Guess Who's Coming to Dinner*. His essay uses these narratives to argue that not only is the notion of race socially constructed, but that it is constructed out of contested cognitive models that help to explain its cognitive complexity.

In "Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology," Dan Simon reports on empirical work that he has conducted with colleagues about the ways in which judges come to conclusions in highly contested cases. Simon is a law professor and psychologist, who has been applying work in cognitive and social psychology to

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[8] Pub. L. No. 90-351, § 502, 82 Stat. 197 (1968).
[9] D. MARVIN JONES, RACE, SEX, AND SUSPICION (forthcoming 2002).

legal settings.[10] How is it that five justices in the majority can adduce some thirty or fifty arguments in favor of their position, and the dissenting four can do the same with respect to theirs, without appearing to acknowledge, except for some nasty quips, that there is another side to the story? That is, if, as Winter argues, the law of the excluded middle is the source of enormous misconception, why do judges keep returning to it in their arguments? To answer this question, Simon relies on psychological literature that uses neural networks to demonstrate the high value that people place on coherence. He relates these findings to the themes of the Symposium, and more broadly to issues in legal theory.

One theme running through both Winter's book and the essays in this volume is the importance of context in legal reasoning. It is conventional legal wisdom that the words in a legal document, for example a statute, must derive some of their meaning from the context in which they are used. But Winter uses context far more broadly and far more creatively. Legal arguments are not only expressed in words that can only be construed with respect to context, but the words that legal writers use necessarily reflect the ways in which they frame the world. His analysis of the famous debate between Hart and Fuller over the hypothetical "no vehicles in the park" ordinance illustrates this point well.[11] The last two essays in this volume—the first by Peter Gabel, the second by Winter, make this point as they illuminate aspects of the 2000 presidential election.

Peter Gabel's essay, "What It Really Means to Say 'Law Is Politics': Political History and Legal Argument in *Bush v. Gore*," sees the 2000 election as resulting from the limited set of images and schemas used in the political arena today. According to Gabel, the 2000 election demonstrates the final triumph of the Reagan Revolution. The post-electoral period provided for Gore the opportunity to rally behind the successes of the civil rights movement in procuring for everyone the right to vote. But instead of evoking images of Martin Luther King Jr. calling for universal suffrage, and instead of arguing that the refusal to count all the votes in Florida diminished the

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[10] *See* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998).

[11] WINTER, *supra* note 2, at 200-06.

value of the votes of the millions of working people nationwide who had voted for him, Gore decided to look presidential and rally behind arguments about the rights of states to regulate their voting scheme without interference from the federal government. These, of course, are the arguments that have historically been used to oppose the civil rights movement. Gabel argues that the rhetoric of the Reagan years—family, the evil empire, and federalism—had become Gore's rhetoric as well, and had prevented Gore from making the arguments that his supporters would have wanted to hear.

In the volume's last full essay, "When Self-Governance Is a Game," Steve Winter puts his approach to legal reasoning to work. Focusing on the 2000 election, Winter probes the significance of the "game" metaphor that pervaded discourse between election day and the Supreme Court's decision. The issue is not the fact of the matter—Bush supporters said right from the beginning that Gore was a sore sport for trying to change the rules of the game after it was becoming clear that he would lose if the game were played as designed. The real question is why the game metaphor caught hold, and was so effective a way of presenting the dispute. The stakes were high. The use of the "game" metaphor essentially pre-empted an alternative conceptualization of the election as a matter of particpatory democracy. Winter explains the dominance of the game analysis by exploring the evolution of the concept of "games" in contemporary culture. To summarize one point that he makes, when we adopt our everyday experience of watching professional sports to watching a presidential election, we become passive observers of a contest in which the pros duke it out according to a set of rules that is both fixed and arbitrary. This surely explains a lot.

The Symposium issue ends with Gary Minda's Afterword, "Steve Winter's *A Clearing in the Forest.*" In it, Minda describes some of the major ideas in Winter's book, and uses them to pull together many of the ideas in the Symposium. Minda's piece succinctly announces the promise of Cognitive Legal Studies as a means for reforming both legal theory and legal education.

No doubt readers will find the essays in this volume provocative, and perhaps controversial. In fact, there is not complete consensus among the authors on significant issues.

But the breadth of subject matter and richness of analysis must inevitably lead one to respect the endeavor and recognize its explanatory power. At the end of the day, the issue is really a simple one: Won't we learn more about how law functions if we take more seriously the ways in which its players understand their world?