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CHANGING THE SUBJECT: COGNITIVE THEORY AND THE TEACHING OF LAW*

Jeremy Paul[†]

I. FORMALISM V. ANTI-FORMALISM: CUTTING DOWN THE TREES

For those of us teaching legal theory to American law students at the beginning of the twenty-first century, Steven Winter's book, *A Clearing in the Forest, Law, Life, and Mind*, has arrived just in time. It offers a path (to use one of Professor Winter's journey metaphors) out of our oldest and least fruitful debates. Consider the following thumbnail sketch of the central questions within contemporary academic discussion.

Does law satisfactorily constrain judicial decision-makers so that it makes sense to say that citizens in a contemporary democracy are both authors of the law that governs them and subject to the rule of law they have authored? Given the crucial nature of this question to the legitimacy of the legal system, it's no surprise that legal academics mostly answer "yes." The differences occur in providing the explanation.

On one side, we have the champions of what Michael Fischl and I have called "the rulebook account,"¹ but which typically goes by some variant of the name "formalism." The

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† Associate Dean for Academic Affairs and Professor of Law, University of Connecticut School of Law. Thanks to everyone at the Brooklyn Law School for inviting and hosting me, to Paul Berman, Anne Dailey, Laura Dickinson, Tanina Rostain, Tom Morawetz, and Susan Silbey for helpful comments, and especially to Steve Winter for blazing the trail.

¹ RICHARD MICHAEL FISCHL & JEREMY PAUL, *GETTING TO MAYBE* (1999).

basic idea here is familiar to every grammar school student. Law works precisely as the rules of a game.² We write the rules down in advance and when a dispute arises we consult the rules to tell us which side has the better argument. The crucial issue, and thus the point where debate truly begins, is over the breadth and scope of the rules. Everyone agrees that some disputes will arise which have not been adequately anticipated by the rule drafters. In such cases, the rulebook account won't fully explain how a judge can make a decision.

But formalists worry little about cases where "the rules run out" for two reasons. First, the rules will settle a vast majority of disputes and, as they see it, only those folks interested in stirring up trouble will keep harping on the relatively few gaps in the legal rules.³ Second, the system will contain sufficient institutional checks and balances so that judicial decision-makers forced to fill in the gaps will seldom do so in a way fundamentally threatening to the rule of law. Panels of judges will review initial decisions rendered by a solo judge. Judges will be chosen through a process, such as Senate confirmation, that includes a political check ensuring that judges won't be too far from the mainstream. Judges will be trained in a culture and chosen for a temperament that includes a preference for deciding cases in ways that hold the rules together even when particular disputes call for some amount of judicial interpretation. Thus, although the rulebook account requires all the usual qualifiers, it commands the allegiance of many sophisticated thinkers and has a strangle hold upon the common citizen's imagination.⁴

² For the relevance of games to Winter's overall argument, see his companion piece in this volume. See Steven L. Winter, *When Self-Governance is a Game*, 67 *Brook. L. Rev.* 1171 (2002).

³ Consider H.L.A. Hart's famous condemnation of American Legal Realists as being "pre-occupied with the penumbra." As Hart puts it, every legal rule has a core (we know a daredevil driving with his eyes closed is negligent or worse) and a penumbra (what about someone talking on a cell phone while driving). Only fools, Hart would tell us, would confuse the two situations and treat the latter issue as characteristic of all legal questions. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 606-15 (1958).

⁴ The most sophisticated presentation of contemporary formalism I know is Frederick Schauer's lucid and insightful *Playing by the Rules*. FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAWS AND LIFE* (1991). He recognizes all the problems with formalism mentioned above yet defends rule application and interpretation as superior to other

Opponents of formalism are more divided among themselves, but all begin with the same basic insight.⁵ Judicial decision-makers have substantial discretion in determining what the law is and how it applies to particular disputes. As Professor Winter describes in an even broader context,⁶ the formalist world view bumps up against two distinct difficulties.

First, the judge who makes a good faith attempt to determine what law applies to a particular dispute has an enormous array of material to survey. Every appellate decision is subject to multiple interpretations (*e.g.*, did the court protect a general right to privacy or a more specific right to use birth control?). Every statute is subject to multiple readings (should we read the language literally to bar discrimination in *places* of public accommodation or to bar discrimination by any business even if it has no specific location?). Worse still, every decision must be read in conjunction with every other decision, every statute in conjunction with every other statute, and all these ordinary legal documents must also be squared with constitutional provisions. Enormous judgment is required to determine how all these statements of law are meant to fit together.

Second, even after a judge reaches an interpretation of existing materials to determine what the law is, all sorts of additional questions arise in determining how the law actually applies to the facts. A judge, for example, might carefully read three landlord/tenant cases together to conclude that the law of her jurisdiction prohibits a tenant from withholding rent without first notifying the landlord of a housing code violation. But the judge would still need to decide whether a note that reads "my water heats up slowly" is sufficient to suggest that the heater is broken as opposed to just performing a bit poorly.

Anti-formalists agree that these opportunities for judicial discretion are substantially greater in number and significantly more important than the formalists acknowledge. Accordingly, they see a need for additional theory to make sense of the familiar liberal faith in "the rule of law." Since the

forms of legal decision-making.

⁵ Such internal divisions, unsurprisingly, leave the anti-formalist camp far less effective than one would surmise based on the strength of their arguments.

⁶ STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 8 (2001).

rules themselves often don't provide determinate answers to legal questions, anti-formalists must determine how such answers can be provided. If the hard truth is that judges use the gaps, conflicts, and ambiguities as an opportunity to pursue a political agenda that is separate from their allocated task of applying the law, then the underlying theory of democracy will be called into question. So, the anti-formalists agree, the indeterminacy present in determining what the law is and how it applies to the facts poses a fundamental challenge to law that formalism itself cannot resolve.

At this point, anti-formalists dissolve into competing schools that vary across a spectrum depending on their faith in the ability of judicial discretion to be meaningfully constrained in the absence of constraint by formal rule. It's okay that formal law is riddled with indeterminacy, some anti-formalists tell us, because the judge can then look to economics or more broadly to "policy science" to fill in gaps with sound reasoning about what's best for society.⁷ It's okay that formal law is riddled with indeterminacy, other anti-formalists tell us, because interpretive strategies such as those used in literature or philosophy will allow judges to choose the result most consistent with existing legal principles.⁸ It's okay that formal law is riddled with indeterminacy, still other anti-formalists tell us, because there's a general societal consensus on the correct interpretation of the formal law and judges can secure their legitimacy by reaching for this consensus.⁹ It's to be expected, but not quite okay, we hear from some anti-formalists, that the law is rife with indeterminacy because judges then fill the gaps with political positions they have brought to the bench.¹⁰ From this view, law is just another form

⁷ This is one way to describe the work of the Legal Realists and those in today's Law and Economics movement. For a brief description of Legal Realism in these terms with accompanying citations to more extensive accounts, see Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 519-20 (1987). For new insight into the depth and power of law and economics unhinged from its prior ideological straightjacket, see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS AND WELFARE* (2002).

⁸ See, e.g., RONALD M. DWORKIN, *LAW'S EMPIRE* (1986).

⁹ The more sophisticated versions of this approach find consensus not on the questions that actually face courts but on the proper interpretive techniques or "disciplining rules" that courts must use to resolve such questions. See, e.g., Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

¹⁰ See, e.g., David Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A*

of politics and emphasizing the indeterminacy of rules helps point this out. Finally, it's a cruel joke, the extreme anti-formalists remind us, that the law is riddled with indeterminacy. Only a fool would fail to notice all the ways that not only rules but "reasons run out."¹¹ Our most sober jurists are playing a game if they expect us to believe their decisions are meaningfully constrained in the way we pretend such decisions must be for law to be legitimate.

And there you have it: a full term's course in contemporary jurisprudence over-simplified, but not all that inaccurately summarized, in a few paragraphs. Excluded, as usual, are more contemporary perspectives such as feminist jurisprudence and critical race theory, which question whether it makes sense to seek a universal perspective from which to view legal problems.¹² Indeed, it's precisely because of the challenges they raise that feminism and critical race theory are often taught as separate courses. Traditional theorists most typical reaction is that these new perspectives have much to offer but little that untangles the core debate between formalism and anti-formalism. As we shall see, Professor Winter's effort to displace the familiar questions of formalism helps validate the significance of feminism and critical race theory as central to the core of legal theory. Professor Winter makes this explicit in his chapter on narrative where he illustrates how traditionalists have unfairly criticized and marginalized the work of Patricia Williams.¹³ But to get there Professor Winter must first take us out of the seemingly interminable debate over formalism's vices and virtues.

PROGRESSIVE CRITIQUE 17 (David Kairys ed., 1982); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (fin de siècle)* (1997) (arguing that judges are powerfully influenced by their own ideological positions along the liberal/conservative spectrum and that judges are often in denial about this).

¹¹ No one does extreme anti-formalism better than Pierre Schlag. For his brilliant demonstration of how and why reasons run out, see PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998).

¹² See generally Anne Comer Dailey, *Feminism's Return to Liberalism*, 102 *YALE L.J.* 1265 (1993) (reviewing *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (describing how both dominance and relational feminism question a universalist perspective and raising provocative questions about how the challenge to universalism can be turned upon feminism itself); *CRITICAL RACE THEORY xv* (Richard Delgado ed., 1995) (describing the theme of collected essays as replacing universalism with a "call to context").

¹³ WINTER, *supra* note 6, at 131-38.

Given the overwhelming appeal of formalism, no one believes its champions will ever give up striving for continually refined models in which rule-following is core and all else periphery. Given the numerous embarrassments to formalism, no one believes its opponents will tire of pointing out the absurdity of expecting legal language to provide binding constraint. Legal theory teachers are thus reduced to the task of familiarizing our students with all sides of the debate and leaving them to develop their own philosophy. In doing so, we abandon them in an environment in which each of the available choices appears so obviously flawed as to be unworthy of allegiance for any but the most dogmatic thinkers. No wonder so many conclude that theory must have little to do with law practice and that jurisprudential debates are beyond understanding or interest.

Professor Winter is out to change all this. His argument begins with noticing the premises shared by formalists and anti-formalists alike. As Winter explains, both sides agree that the literal application of rules would represent the simple most elegant way in which law could meaningfully constrain human behavior. Formalists cling to the idea that law actually works this way. Anti-formalists often lament that rules fail to constrain judicial discretion and thus offer a series of supplementary techniques designed to shore up the rule-based account. Winter is perhaps a little too quick to ignore all the ways that anti-formalists actually prefer the techniques they offer. Law and economics devotees, for example, are not necessarily formalists at heart. But, Winter's insight is nonetheless crucial. The rule-based account of law that seems so commonsensical to formalist and anti-formalist alike deserves serious scrutiny to determine whether it stands up to our best understandings of how people process information and to what we know about law in actual practice. Winter argues convincingly that in this light the debate between formalism and anti-formalism loses most of its bite.¹⁴

It is possible to provide a flavor for Winter's approach without exploring issues with the depth that he does. Take any of the hundreds of puzzles within legal doctrine that have long bedeviled legal theorists (Winter discusses several). For our

¹⁴ WINTER, *supra* note 6, at xvi-xvii, 6-12, 187-89.

purposes, we can consider, as Winter does to great effect in Chapter 10, the constitutional guarantee against laws abridging freedom of speech or of the press.¹⁵ With a formalist account, we would begin and mostly end with the constitutional language as a source of guidance on how to resolve certain situations. What are we to do, however, with problems such as laws banning flag burning or nude dancing? Such statutes clearly seem to implicate First Amendment concerns. Yet who could miss the problem that these laws appear to prohibit conduct rather than speech? With a literal reading the Constitution might appear inapplicable to these obvious efforts by government to restrict communication. Actual case law, however, is well up to the challenge of moving beyond literalism to a more purposive constitutional interpretation. Here then the anti-formalists pounce. The Court's willingness to expand constitutional guarantees means that something well beyond formalism is going on. Since all conduct can be described as communicative (perhaps I mean to send a message when I bust your chops), there is no coherent way to draw linguistic lines between constitutionally-protected speech/communication and constitutionally-unprotected conduct. It is just one short step then to the broader conclusion that what is driving the cases is a judicial, dare we say political, discretion divorced or disconnected from doctrinal analysis.

One short step, Professor Winter might agree. But a wrong one. As Winter argues, the fact that legal language cannot constrain outcomes in the way formalists hope does not prove that language cannot constrain outcomes in the way that matters most.¹⁶ We are not surprised, he might stress, when a court immediately and without reflection denies a First Amendment claim raised by a kidnapper who argues he only "borrowed" the child to "make a statement."¹⁷ Nor should a court pause long over protecting a citizen's rights to act out a mime in a public park even though no speech is involved. What stabilizes these clear results is current social understandings

¹⁵ *Id.* at 273-86.

¹⁶ *Id.* at 153, 191.

¹⁷ *See id.* at 283 (making a similar point using Oklahoma City bombing example).

about the way our world works. Although such understandings are constantly in flux, at any given moment certain efforts to draw the line between speech and conduct will appear plausible and others less so. Thus, despite our collective inability to create rigid categories of protected speech and unprotected action, judges can continue to render decisions that as Winter might describe it “make sense” to us. Accordingly, we can make quite accurate predictions about the kinds of decisions courts will make without being able to explain those decisions in absolute or formalist terms.

How are such predictions possible? This crucial question moves us to the heart of why Winter’s book is such a marvelous contribution, indeed a crucial re-direction of tired jurisprudential debate. As we shall see, what Winter does is no less sweeping than propose a different way of explaining human thought. He turns to developments in linguistics and cognitive theory to argue that it’s quite possible for us to understand a word, a category, or a legal rule as constraining meaning or outcomes without determining them. If carried to conclusion, such a view would be like the Rosetta stone of legal theory. That’s because almost all observers of the contemporary legal scene agree that formalism is riddled with problems, yet no one has a convincing explanation for why the public continues to be relatively unconcerned (at least prior to *Bush v. Gore*¹⁸) that we have rogue judges dispensing nothing but political justice.

As I teased him at our Brooklyn Law School conference, *A Clearing in the Forest* is written in the narrative structure that Winter untangles in Chapter 5. Thus, Winter’s verbal encounter with those in other disciplines leaves him with a new weapon. He then proceeds on his journey through legal theory by using his new weapon to reject both halves of the legal academy’s Hobson’s choice. Winter joins the anti-formalists in concluding that existing legal materials provide plenty of room for multiple interpretations, meaningful disagreement, and social progress. But he is with the formalists in finding that the legal materials are sufficiently constraining so that the law performs the tasks we most

¹⁸ 531 U.S. 98 (2000).

rightly expect from it: clarifying, guiding, and modifying human conduct.¹⁹

Winter performs this seemingly magical feat with the introduction of several concepts. First, he broadens our understanding of the process of categorization. One way to think about categories is along the lines that Winter calls the rationalist model.²⁰ For rationalists, placing an item in a category involves determining whether it has the necessary and sufficient attributes to warrant being so labeled. A square, for example, is a four-sided figure with each of the sides having the same length and each angle having ninety degrees. This form of categorization holds the following promise for a formalist approach to law. The law might set forth certain consequences that will occur when a set of facts properly falls within a legal category. For example, a signed document indicating mutual assent to terms involving a bargained-for exchange might constitute a "contract." A judge's job, thinking back to the rulebook account, will be to determine whether the set of facts before her have the necessary attributes. If so, a contract is present and certain legal consequences will flow.

As we all know, however, this type of formalism suffers from the familiar problem that it is very difficult to squeeze recalcitrant facts into formal categories. Might a deal be a contract even if it's not in writing? The formalist response is to write more rules, clarify, and not worry too much about the hard cases. The anti-formalist response is to draw attention to formalism's failure to deliver and crow about the necessary injection of "policy" (celebratory) or "politics" (condemnatory) into judging.

Here is Winter's view: Categories are more complex than simply the specification of necessary and sufficient attributes. He shows instead how categories are viewed better through the lens of cognitive theory. From the rationalist standpoint, a robin and a penguin are equally birds. They both have the required attributes. But ask people at random to name a bird and many more will name a robin than a penguin. Winter explains that such "prototype effects" play a major role

¹⁹ WINTER, *supra* note 6, at 158-60, 329-30.

²⁰ *Id.* at 8-12.

in explaining human categorization.²¹ We very often proceed from a central case outward rather than attempting to determine category fit through a list of attributes. Winter nicely provides the example of the category “mother,” which he notes may one day have had a central case of the married, stay-at-home mom who gave birth to and then nurtured her and her husband’s biological children.²² This central case, of course, is entirely socially contingent. But think of the issues raised then by the phrases “birth mother,” “adoptive mother,” “genetic mother,” “foster mother,” and “stepmother.” Such radial categories are much more common within language than the earlier example of the square. Each has certain connections to the core idea of “mother” but each also has differences.

The key point is that it’s unsurprising that the categories used in legal rules don’t often precisely fit the facts. Indeed, we should expect that judges will encounter situations where there’s doubt about the applicability of legal categories because that’s how language works. Moreover, language works that way, Winter continues, because it reflects the basic cognitive apparatus with which humans encounter the world. We use categories because they are useful to us, and since the world is constantly changing, we must be able to adapt those categories to fit new situations.

Winter’s points about categorization would alone be sufficient to have launched legal theory in a promising new direction. We have long asked: If the legal materials themselves cannot formally dictate outcomes in many legal disputes, what kind of thought process do judges employ to determine those outcomes? It’s not much of an answer to say judges rely on hunches.²³ Nor can we learn much from a theory that says judges make the materials the best they can be.²⁴ Just what way is that? Winter proposes that recent developments in cognitive theory tell us a great deal about the kinds of arguments which judges will and will not find plausible.²⁵ Accordingly, Winter goes well beyond his discussion of categorization to introduce us to a new vocabulary for

²¹ *Id.* at 76-86.

²² *Id.* at 26, 100-01, 189-90.

²³ *Id.* at 157-58 (citing Hutchinson).

²⁴ WINTER, *supra* note 6, at 129 (citing Dworkin).

²⁵ *Id.* at 248-53.

understanding human thought and thus a new set of tools for predicting which arguments are likely to resonate with judges.

Readers of this law review will have to read Winter's book for themselves to gain a full grasp of this vocabulary. After all, if it could be summarized in a paragraph, why would Winter have needed to write the whole book? But the core idea is that human thought patterns stem from our situation as embodied beings encountering a treacherous world. It's not surprising then that we move from concrete experiences such as the power of standing erect to abstract metaphors such as the idea of standing in court.²⁶ Equally important is our experience as social beings in which we assimilate information in terms of idealized cognitive models to make sense of our world. Accordingly, arguments that seem perfectly rational when viewed from the perspective of someone unfamiliar with our culture may be rejected promptly by judges steeped in American lore.

I constantly tell my students that the National Basketball Association ("NBA") should require at least two women to play on the court at all times. Choosing only men is clearly discriminatory and violates Title VII. The NBA rebuttal that the men are better players begs the question: In what sense are they better? If what's meant is that they perform better on the court, this is illogical. Since the game is competitive, as long as the other team also has two women, no team will suffer competitively. If by contrast what's meant by better is that the fans prefer to see all men, and thus will pay more for the games, this also is not definitive. Courts long ago rejected the "customer preference" defense when airlines argued that their business clients preferred young, attractive flight attendants.²⁷ I have yet to hear an argument that persuades me to give up my Don Quixote quest for co-ed basketball. But Winter's work urges me to focus instead on how I know my task is futile, at least in the short run. It's not because my argument is illogical. Instead, it's because society—and judges—in our culture reflexively experience

²⁶ For Winter's magisterial and still unequalled treatment of the relationship between law and metaphor, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *STAN. L. REV.* 1391 (1988).

²⁷ *Wilson v. S.W. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

sporting events as gender segregated and find this perfectly natural. In the long run, I might change hearts and minds. But only then will the law follow.

When arguing that we can better predict judicial outcomes if we understand embodied thinking and socially contingent, idealized cognitive models Winter's book will produce two common misreadings. Let's dispense with them here. Winter is not calling for a return to modified formalism. He believes that judges will find themselves constrained by the categories and rules established in legal materials. A judge cannot credibly hold an executive liable for sexual harassment if he smiles more often when his secretary wears attractive clothes. But Winter never argues that the word harassment, which one might find in a statute or precedent, isn't big enough to accommodate such an interpretation. In other words, it's not the legal materials alone that provide the constraint. It's what we have been taught collectively about our society and the kinds of things that might legitimately be found actionable.

Neither is Winter arguing that all is right with the world because courts will interpret ambiguous legal materials in line with a general societal consensus. His is not a Panglossian view, and he is fully aware that many issues in our culture are deeply contested. Rather, his point is that a thorough study of methods of conceptualization will tell us a great deal about whether certain arguments might resonate with judges who most typically come from the dominant parts of the culture. As Winter would describe it, there is plenty of room for innovation and imagination within the law. But arguments that ask judges to invent doctrines out of whole cloth are not consistent with the practice of law as he has seen it. Indeed, the resistance of judges to think outside the idealized cognitive models Winter describes leaves Winter quite sober about how gaps in the law will be filled. For one thing, gaps will often go unrecognized, since judges will fail even to comprehend the quite logical arguments challenging their point of view.²⁸ And, when judges do see a gap, the consensus they search for will as often be conventional wisdom

²⁸ Winter provides a nice example of this when discussing the Supreme Court majority's inability to grasp Justice White's argument in dissent in *Immigration & Naturalization Servs. v. Chadha*, 462 U.S. 919 (1983). WINTER, *supra* note 6, at 245-53.

as an actual consensus. Compare, for example, the reaction of the nation's journalists to the Monica Lewinsky scandal (a president who lies must go) with the more measured reaction of the voting public.²⁹

So, to return to the theme with which we began, Winter's emphasis on a broadened concept of human rationality, on a flexible, adaptive view toward categories, offers us a fresh take on the formalism/anti-formalism debate. With Winter's view, law can have its cake and eat it, too. It can be constrained and flexible, adaptive yet not reductively political, imaginative without being whimsical. To repeat, this does not leave Winter endorsing anything like our current legal system or any particular outcomes. But it does leave him a more credible defender of the rule of law than any other writer I know.

II. EXPANDING THE COGNITIVE FRONTIER

As a fan of Winter's work, I want to use the rest of this Essay to explore the ways in which I think *A Clearing in the Forest* poses questions that should engage legal theory for a good long time to come. Above all, Winter is to be congratulated for bringing renewed focus to the question of how judges are actually persuaded, rather than leaving us languishing in the failures of formalism. To avoid the role of unabashed cheerleader, however, let me first describe two ways in which I believe Winter might yet improve on the account of law provided here.

Let's talk first about the enemy Winter claims to be vanquishing. He asserts that lawyers, judges, philosophers, etc., have fallen victim to a reductionist view of rationality.³⁰ Over and over again Winter shows how sophisticated thinkers

²⁹ Noted columnist Frank Rich summarized it this way, "From the moment Mr. Clinton first wagged his finger about 'that woman' a majority of the public judged him a lying philanderer—even as they came to the parallel conclusion that his scandalous behavior shouldn't force him from office. Though the Washington establishment would eventually be driven bananas by the compartmentalization of those two opposed ideas, Americans beyond the Beltway, possessed of first-rate intelligence, shrugged it off. And the country functioned just fine." Frank Rich, N.Y. TIMES, Feb. 13, 1999, at A19.

³⁰ For a description of the reductionist view, see WINTER, *supra* note 6, at 8-9.

make errors by trying to solve complex category problems with formal technical lines. For example, Chapter 11 does a wonderful job of critiquing a Supreme Court decision on perjury by pointing out how the Court was in the throes of a literalist (as opposed to a socially-grounded) view of the notion of a lie.³¹ Indeed, much of the book's very hard work is its painstaking care in explaining so many important aspects of law (rules, analogies, doctrinal shifts) in terms of a struggle between the rationalist model and the newer, more sophisticated, cognitive approach. (Winter means it when he invokes the "rational argument is war" metaphor.)³²

From my vantage point, however, this structure is a remnant of precisely the kind of thinking Winter is trying to transcend. Are we not running the risk of embracing a p and not-p structure (like the kind we saw in the definition of a square) when we so sharply contrast the rationalist model with a more cognitive approach? And there's a second mystery. Where exactly does this primitive rationalist model come from? Winter details the model as though it was built mostly by sophisticated lawyers, philosophers, and legal thinkers bumbling about trying to make sense of their jobs. Too often for my taste he contrasts their mistaken views with the deeper truth of "common sense."³³ But, of course, the rest of the book describes most sophisticated models of thought as built from the ground up.

It's worth asking then whether the rationalist model that Winter wants to replace in fact serves important social functions. A great deal of cognitive space, for example, is saved when we pretend our categories are open and shut. And, the human ability to manipulate categories that Winter so brilliantly describes develops over time and can be dangerous if it comes too early either in a lifetime or in the life of an institution. Imagine the inner smile a parent might feel when

³¹ WINTER, *supra* note 6, at 297-309. I agree with Winter that the Court was wrong in *Bronston v. United States*, 409 U.S. 352 (1973), to reverse the defendant's perjury conviction. Certainly it is a misleading response to the question: Do you have a bank account in Bank X to answer "the company has an account there," when you know you also have a personal account there. Whether the Court was lulled by the rationalist model or just generally loathe to find criminal liability in cases of doubt is much less clear to me.

³² WINTER, *supra* note 6, at 112.

³³ *Id.* at 309.

he asks his young child why she didn't pick up the lost \$100 bill before the wind took it too far away. "Daddy," she replies, "you told me never to go in the road."

Perhaps one way to describe our situation using Winter's own terminology would be to see the rationalist notion of categorization as a product of "prototype effects."³⁴ Just as Winter sees a dining room chair as more representative of a chair than a beanbag, perhaps the binary category forms the core or prototype of our notion of category. The point would not be so much to re-orient the lines of future inquiry into the nature of law. We want as much as possible to change the subject to focus on the complex thought processes that decision-makers and law creators go through as law is made and applied. But Winter's entire book is aimed at the process of "antinomial capture" (faith in rules or needless dismay over rules' inadequacies) that has allegedly blinded judges and legal scholars alike. Think what an addition it would be to chart the source of this rampant misconception.

My second quibble goes deeper into the heart of Winter's approach. For several reasons, I am much less persuaded than he is that cognitive theory rescues us from the long-standing preoccupations of the anti-formalists. Let's take for granted (and I have no trouble with this) that cognitive theory provides a sound antidote to concerns that a "rogue judge" will ignore the law and instead opt to impose his or her political predilections on an unsuspecting public. Is this really the problem that has led realists and critical legal scholars to focus on indeterminacy in law?

Winter argues that in most cases, judges will be restricted to only those interpretations of the existing legal materials that find resonance in the social practices of the community.³⁵ True enough. He also notes that only a deeply fractured community need fear that judges will fail to maintain some sort of stability even as they alter the legal landscape to fit changing social reality.³⁶ Fine. The question, however, is ought we to turn ourselves over to the particular kind of

³⁴ *Id.* at 76-86.

³⁵ *Id.* at 327-31.

³⁶ *Id.* at 329.

stability etched for us by the judges who happen to have clawed their way into judicial robes?

The conventional answer, and the one Winter and all anti-formalists reject, is that the legal materials themselves are sufficiently binding that a judge in good faith should reach the same outcome in most cases. With this long since discredited view, it almost doesn't matter who makes it to the bench. Once we all agree, however, that the legal materials are sufficiently indeterminate so as to create room for judicial discretion, why should we be at all comforted by the fact that the room created is not infinite or open-ended?

Winter says that the indeterminacy is there but that judges can be counted on to use it in more or less predictable ways.³⁷ This claim, however, needs much more elaboration. In his book, Winter shows convincingly that there are cognitive structures and patterns that can be helpful in explaining why some alternatives were more likely to be adopted than others. But this is too easy a target. Even the most vocal proponents of legal indeterminacy have long agreed that law is often predictable.³⁸ It is not enough then to provide compelling reconstructions of famous opinions such as Justice Hughes' argument in *Jones v. Laughlin*.³⁹ If I am a strong opponent of federal power, will I really be comforted to know that the metaphors Justice Hughes adopts to bring about my undoing have a basis in changing social reality? Suppose I am deeply troubled by such changes and view the courts as my best hope to turn things back in my direction?

The general point is that the anti-formalist critique begins not with the idea that there are an infinite number of plausible positions in a legal dispute, but that there are at least two. Moreover, in many cases the two positions will line up with deeper disputes within society. If the judge who makes the choice can find plausible arguments within the existing culture for either of those two positions, what difference does it make to the losing side that many other positions were foreclosed to the judge as a result of cognitive constraint? Now

³⁷ *Id.* at 152-54.

³⁸ See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 12 (1984).

³⁹ 301 U.S. 1 (1937).

it may be a more viable political strategy to focus on how to change the judge's mind than to spend time demonstrating over and over again that the judge is making a political choice. But this is a much more interesting argument than an approach faulting the critics for overstating the nature of indeterminacy.

Moreover, the anti-formalists are troubled by concerns that receive too little emphasis when we repeatedly paint judges as trying to "make sense" of the case before them. Imagine, for example, a fact pattern in which a supervisor makes a few inappropriate and suggestive remarks to his female employee, sends her flowers on her birthday, asks her out once but takes no for an answer, and then passes her over for a promotion. If she sues under Title VII, it might be plausible to treat the various incidents as isolated or as part of a pattern, and to treat the denied promotion as connected to or wholly independent of the other activity.

A Clearing in the Forest provides us a wonderful new lens through which to litigate such a case. As the woman's lawyer, one might try as hard as possible to make the facts fit with what Winter might refer to as the idealized cognitive model of harassment.⁴⁰ Here the key would be to fit the facts as closely as one could to a "quid pro quo sex for advancement" narrative. A subsequent retrospective view of a judicial opinion denying her claim might also look for ways in which the judge was not convinced that the case resembled a familiar idealized cognitive model ("ICM").

Yet, of course, another possibility is that the judge in question is generally hostile to all sexual harassment claims and will do whatever he can to interpret an ambiguous situation against the woman. In this case, Winter might say that the law was entirely "determinate" in that one could have predicted the woman would lose. But the power afforded to such a "biased" judge is an understandable concern. Additionally, a legal system that afforded the judge a platform to write an opinion that purportedly "makes sense" of the outcome could be a source of genuine and legitimate anger.

⁴⁰ For a discussion of idealized models which relies heavily on the work of George Lakoff, see WINTER, *supra* note 6, at 88.

Generalizing from this example, one might say that Winter and other anti-formalists both have valid standpoints from which to criticize judicial outcomes. The familiar anti-formalist position is that indeterminacy in the legal materials leaves judges room to import outside political views. The judge who is hostile to harassment, for example, might be more likely to see a series of "isolated incidents" than a coherent pattern of inappropriate conduct. Winter rightly calls our attention to the opposite side of the coin. The categories we call upon judges to determine and the decisions we ask them to make often already reflect many of the deeper values at stake. Our judge, for example, may actually be hostile to harassment claims precisely because he tends to believe women see patterns where men do not intend them. Thus, his so-called politics may come from his "making sense" of the facts rather than his effort to impose a vision onto an ambiguous narrative. I applaud Winter for emphasizing the importance of this standpoint. But I think he makes a mistake to so quickly dismiss the more garden-variety fears of political manipulation that dominate the work of many other legal theorists.

Nor would I want to lose the critical bite available to anti-formalists who highlight judicial flip-flops on matters of method. Suppose, for example, that a particular judge writes a great opinion in one case showing how a series of seemingly isolated comments actually form a pattern of behavior that constitute assent to a commercial contract. This same judge then rejects an effort to link together a similar pattern of incidents in the context of a sexual harassment case. I would find enormous value in the kind of analysis Winter might do in showing how the nuances of the cases and the available idealized cognitive models might have made it perfectly predictable that the judge would rule one way in one case and one way in the other. But I would also be thrilled to read a stinging critique of the judge for politically manipulating facts to get his way in both instances.

A final point along these lines would be to ask Winter for additional help with the aspect of judicial opinions that the realists have forever added to our legal culture, the emphasis on future consequences. The familiar point is that judges in doubt over the meaning of the legal rules will shift focus to consider the real world impact of a decision one way or the

other. Take, for example, the current issue under discussion concerning whether the attack on the World Trade Center was one incident or two.⁴¹ Suppose a judge in good conscience decides this could be interpreted either way and thus rules for the insured on grounds that the consequences to the insured would be more severe if the per incident cap barred total recovery. Another judge might agree that the issue could go either way but would have ruled for the insurance companies so as to stabilize prices in the insurance market. Winter's analysis would lead us rightly to conclude that in a certain sense such policy concerns are involved in every case, not just the rare events of September 11. That's because the meaning of each legal rule depends on context and the context always includes the future consequences of a decision either way. How then will cognitive theory help us to predict the role of consequentialist analysis in legal decision making?

These quibbles aside, or perhaps because of them, the easiest thing to say about the breathtaking scope of *A Clearing in the Forest* is that it paves the way for new topics of inquiry into the nature of legal decision making and offers hints at a whole new agenda for the teachers of law. To this latter topic I now turn.

III. TEACHING LAW DIFFERENTLY: PLANTING COGNITIVE SEEDS

Consider the following straightforward assessment of what it means to teach law: Law is impossible if it cannot be communicated from one person to another and from the state to its citizens. Verbal and written language are the predominant, if not exclusive, forms for the communication of law. Accordingly, to succeed, law teachers must devote considerable time teaching students about the nature, origins, properties, strengths, and weaknesses of language.

Or consider the slightly more complex but equally irrefutable argument: Law is unworthy of university study

⁴¹ According to newspaper accounts \$3.6 billion turns on whether insurers may properly invoke the cap on liability per occurrence or whether this cap must be paid twice, once for each event. See Jonathan D. Glater, *Trade Center Leaseholder Sues a Big Reinsurer*, N.Y. TIMES, Nov. 8, 2001, at B1.

unless it aims to link the existing rules governing human conduct with some notion of what those rules ought, in fairness, to be. In short, law, if not each individual lawyer, must strive for some form of justice. Justice, however, is an elusive concept whose analysis depends on delving deeply into the nature of persons. How do individuals come to have a concept of justice? What forms of reasoning lead us to distinguish between what is and what ought to be? There may be no answers to such questions, but certainly one could not really grasp the enterprise of law if one failed to ask them. Accordingly, to succeed, law teachers must develop a curriculum and method of instruction that directly addresses questions of human nature and human psychology.

These arguments are not new. They were well understood by many during the heyday of legal realism. Roberto Unger's 1975 *Knowledge and Politics*⁴² was a tour de force performance convincingly returning us to the impossibility of separating legal and political questions from more epistemological and philosophical ones. As should be clear from my description in Part I, *A Clearing in the Forest* deserves a proud place in this cognitive tradition for having added considerable depth and countless insights. Winter wants to change the subject of discussion from whether the law works as its theoretical defenders suggest, to how legal rules work the way its practitioners observe.⁴³ For law teachers such a shift should have dramatic consequences for how we introduce students to law and what topics we emphasize. Human tendencies that ground and shape our ability to construct legal and normative systems might replace common law doctrines as the core of the law school's first year.

Our current law school curriculum divides legal issues around what Professor Winter might describe as idealized cognitive models of basic human interactions. So we imagine a readily understandable deal between a buyer and seller and fashion a course in contracts, a readily understandable injury caused by a stranger and fashion a course in torts, and so on.

⁴² ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975).

⁴³ This is the theme of his discussion of narrative (chapter 5), case analysis (chapters 6 & 7), rules (chapter 8), analogical reasoning (chapter 9), and statutory interpretation (chapter 11). WINTER, *supra* note 6, at 104-38, 139-85, 186-222, 296-331.

Notice, however, that even these most traditional courses are taught in ways that belie the formalist approach to law. No one teaches as if simply learning legal rules was key to successful practice. It is commonplace instead that law school is about teaching our students how to "think like a lawyer." Almost as commonplace is the wry observation that, however often we say this, we provide precious little content about what it means.

Winter's turn to cognitive theory presents us with an opportunity and a vocabulary to change all this. Take, for example, his sustained focus on the process of categorization. The fashioning, re-fashioning, and interpretation of categories cuts across all legal doctrines. Yet, although our students spend three years watching us pull categories apart, we rarely do them the favor of providing names for the familiar problems with categorization that they will face as lawyers or that judges face when deciding cases. Occasionally we define important interpretive techniques such as narrowing and broadening a holding in an appellate case. But seldom do we show the application of such techniques in a systematic fashion. Nor do we identify thought structures that make certain narrowing of cases likely to be more persuasive than others. No wonder our students are shocked when our lengthy exam hypotheticals call upon them to apply legal reasoning techniques to issues they have never quite faced before.⁴⁴

What would law teaching look like if we were to make the following reversal of our customary approach, or what Professor Winter might call a gestalt switch?⁴⁵ We could move the traditional doctrinal categories of tort, property, contracts, administrative law, constitutional law, etc., into the background. They are, after all, a historical artifact attempting to find the appropriate level of abstraction from appellate cases to give law a more universal and scientific feel. Our goal now

⁴⁴ Michael Fischl and I attempt to remedy this surprising gap in law teaching with a sustained analysis of the patterns in legal argument that create the opportunity for professors to build so many ambiguities into exam questions. Fischl & Paul, *supra* note 1, at 21-193. As will become clear from the text, I view our project and Professor Winter's as close cousins. All three of us see thought patterns and structures of argument not as the exclusive preserve of fancy theory courses but as at the absolute core of law practice and any sound legal education.

⁴⁵ Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991).

would be to abstract from the problems of lawyering and judging in a different way. So we would move into the foreground the complex and familiar riddles that decision-makers encounter when attempting to impose orderly law on disorderly life.

This is much less radical that it sounds when one considers that most law schools have long offered courses in statutory interpretation, courses that adopt precisely the kind of cross-cutting strategy to which I refer. Many law schools also put one course into the first year, sometimes called Elements of the Law, aimed at looking across doctrinal boundaries.⁴⁶ Because such courses are an anomaly, however, students often treat them as a necessary evil to be overcome so they can get back to real work. It's interesting that despite the widespread adoption of both types of courses, so little common vocabulary has emerged from them. Most lawyers know the difference between a literal and a purposive reading and most are familiar with a few canons of interpretation. What I am looking for, however, is an entirely new vocabulary that would call to mind familiar problems that one should expect to encounter in interpreting a statute or a case. The closest analogy I can draw is Joseph Heller's unforgettable coining of the phrase "Catch 22" to describe the paradox encountered by pilots who could not be grounded on the basis of mental unfitness unless they so requested but for whom the filing of a request was proof that the pilot was mentally fit.⁴⁷ What would law school teaching be like if we could identify Catch 23, Catch 24, Catch 25, etc., that fit the roles of lawyers and judges that we send our students out to fill?⁴⁸

Consider first how we might conceptualize this sort of switch in legal education if we were thinking broadly about education as a whole. Most sports camps, for example, will divide classes into various sports—one hour of baseball, one hour of basketball, one hour of football, etc. In each sport, we

⁴⁶ For a sterling effort along these lines, see SOIA MENTSCHIKOFF & IRWIN P. STOTZKY, *ELEMENTS OF THE LAW* (1981).

⁴⁷ JOSEPH HELLER, *CATCH 22* 46-47 (1962) (1955).

⁴⁸ I have begun work on devising a first year law school curriculum along these lines and presented my preliminary thoughts under the title "Catch 23 - What Would a Law Culture and Humanities Curriculum Look Like" in Philadelphia at the 2002 conference of the Association for the Study of Law, Culture and Humanities.

can almost hear the coach repeating to the players the familiar refrain, "keep your eyes on the ball." Indeed, it is hard to imagine a more conventionalized expression, and thus as Winter's teachings would predict, the phrase has become a metaphorical projection for all sorts of situations in which a person with a project is urged not to lose sight of the goal. Purposes are Destinations. No matter how many times coaches tell us, however, many of us literally find ourselves taking our eyes off the ball and thus failing to catch it or hit it when it comes our way. Why? Sometimes we are focusing too much attention on our own performance (is my swing even?); sometimes we fear the pain to be inflicted by the oncoming tackler; sometimes we are thinking ahead to the next act (passing the ball to the open woman). Imagine then a sports camp that rearranged itself so that it had a one-hour clinic called "Keeping Your Eyes on the Ball." In such a clinic, players would be put in various situations from different sports and asked to attend to the reasons why they had taken their eye off the ball at a crucial moment. Each individual might learn about his or her own tendencies to be distracted and as a result become a better player in all sports than he or she might have become by focusing on one sport alone. Perhaps in a world where sports are fixed, it might make sense to focus only on the techniques useful in your particular sport. But in law, where legal categories are constantly shifting, the ability to abstract conceptual skills of a similar kind might prove enormously instructive.

In my experience as a law student, the best example of the attempt to foreground a patterned conceptual issue was Duncan Kennedy's extensive re-visiting of the age-old conflict between rules and standards.⁴⁹ In his terminology, rules are those legal directives that call upon the decision-maker to apply them directly with little appeal to the underlying purposes which led to the adoption of the directive in the first instance.⁵⁰ His easiest example involved constitutional provisions that establish that a person who reaches the age of eighteen is eligible to vote. In contrast, a legal directive that

⁴⁹ See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

⁵⁰ *Id.* at 1687-88.

attempted to resolve the same issue with resort to a standard might make eligibility to vote rest on whether the potential voter had reached sufficient maturity to make an informed choice. Kennedy's classic article then explores some of the basic conceptual maneuvers with which every lawyer should be familiar. Rules, for example, tend to be both over and under-inclusive from the perspective of the underlying purpose at which they are aimed.⁵¹ Thus, some seventeen year olds are undoubtedly as mature as most adults and some nineteen year olds are probably still not to the point where we would respect their political judgment. Rules, however, have the advantage of removing some discretion from the decision-maker and thus creating greater confidence in the objectivity of the law. My point here is not to rehearse fully a rules/standards analysis but to use this as an illustration of what law school could move to the foreground if we took Winter's insights and the phrase "thinking like a lawyer" seriously.⁵²

I teach the rules/standards dichotomy to my property students every year and find they remember it better than almost anything else we cover. My favorite year was when students pushed to compare the rules/standards debate to an imaginary one between standards/discretion. In this class, the proponents of discretion attacked the champions of standards for rigidly believing that the law or similar written guidelines should identify in advance those criteria a decision-maker should use to determine a just outcome. Better, for example, to run a grant competition in which the funds go to those deemed (in tautological fashion) "most grantworthy" than to those whose proposals are the most "inventive and likely to bring significant change." The latter has the rule-like advantages of allowing the grant writers to guide their behavior and tailor their application toward some sort of standard. But what happens when the granting committee reads a proposal and finds it neither particularly original nor at all certain to produce change? As it turns out, though, it is the only application relating to global warming and the committee now

⁵¹ *Id.* at 1689.

⁵² For more of my thoughts on this problem see Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779 (1991) (arguing that Kennedy's only significant mistake was attempting to link a political valence to each side of the rule/standard dichotomy).

concludes this is an area deserving funds. The students point out that when the world is rapidly changing the seemingly open-ended standard looks like the closed-ended rule in comparison to a system that gives even greater discretion to the decision-maker.

Such conceptual play in class is exactly what I hope to be encouraging. And I knew I was on safe ground when our local legal newspaper last fall published an article on real estate practice by a local attorney that detailed the difference between rules and standards in terms that would have made Duncan Kennedy proud. Yet no course in the curriculum as it now stands is explicitly charged with covering the rules/standards debate and thus it is haphazard whether students formally encounter it at all.

The rule/standards debate may appear too simplistic to warrant calls for its inclusion as anything more than a riff in the standard property or contracts course. But, of course, the point, as *A Clearing in the Forest* so clearly demonstrates, is that there are almost an infinite number of these sorts of conceptual patterns built into the project of law. All we have to do is begin searching. Here's my latest favorite. So far, I am calling it a "two-fer."

Consider a rule structure that requires a claimant to make one of two showings in order to gain special favor from the decision-maker. The example that first came to my attention is the structure of equal protection doctrine under the U.S. Constitution as defined by the Supreme Court.⁵³ An individual who believes she has been discriminated against at the hands of government has two ways she can get the Court to take her case seriously. First, she can show that she is a member of what the Court calls a suspect class. So, for example, if Texas decided to pay reduced welfare benefits to people with Spanish surnames to help combat illegal immigration from Mexico, a Mexican-American woman could almost certainly receive an injunction prohibiting the state plan from taking effect. Because national origin is a suspect

⁵³ As shall be clear from the text, I owe the example and much of my thinking on the topic to two creative and conceptually rich articles by Julie Nice. See articles cited *infra* note 55. She takes the topic in a different direction from the one pursued here but it was her work that alerted me to the intrinsic interest in the equal protection problem the Court faces.

class the Court would analyze the regulation using strict scrutiny to determine whether there was a compelling state interest that was narrowly tailored to meet the state's objective. Texas could not possibly make such a showing.

Second, a claimant can obtain strict scrutiny if what she has lost is considered by the Court to be a fundamental right. So, for example, if New Jersey was fighting overpopulation and made it a crime for a woman over forty to have a child, a forty-one year old woman could probably have this statute invalidated as well. Age is not a suspect class, but the right to bear children is fundamental. New Jersey's claims that medical risk goes up at forty would never be enough to show either a compelling state interest or that the statute was narrowly tailored.

If, however, a particular claimant can make neither showing (i.e., neither membership in a suspect class nor loss of a fundamental right), then the government is typically permitted to regulate as long as there is a rational relationship between the line drawn and a legitimate governmental aim. For example, when the government changed regulations governing food stamps to withdraw them from workers displaced as a result of labor strife, the Court found no constitutional violation.⁵⁴ The Court has found no fundamental right to food stamps and displaced workers are not part of any historically suspect class.

Now comes the fun part. Suppose the Court is asked to resolve a case in which the group that has suffered has not been judicially determined to be a suspect class, but the group has many characteristics that would make it eligible for such a classification. Moreover, assume that what has been taken from the affected parties is something very important but not so significant as to have been found by the Court to be a fundamental right. In two innovative and wonderful articles, Julie Nice has noticed just such circumstances present in three cases where the Court has found an equal protection violation without finding either a suspect class to be present or a fundamental right to be taken.⁵⁵ She notes that in *Romer v.*

⁵⁴ *Lyng v. Castillo*, 477 U.S. 635 (1986).

⁵⁵ Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392 (2000); Julie A. Nice, *The Emerging*

*Evans*⁵⁶ the Court invalidated an amendment to the Colorado Constitution without finding either that sexual orientation is a suspect class or that any fundamental right was lost as a result of the peculiar provisions preventing municipalities from adopting anti-discrimination protection for gay citizens. In *Plyler v. Doe*,⁵⁷ the Court prohibited Texas from denying a public school education to undocumented immigrants, even though undocumented aliens have never been held to be a suspect class and the court had explicitly refused to declare a fundamental right to an education. And, in *M.L.B. v. S.L.J.*⁵⁸ the Court found an equal protection violation in Mississippi's scheme denying an indigent woman who could not afford to pay for a transcript the right to appeal. The Court, of course, has never held wealth to be a suspect class. Nor has it held that the right to a civil appeal is fundamental even in the context where the underlying issue was the termination of the woman's parental rights. What accounts for these decisions?

Professor Nice offers an illuminating explanation, suggesting that in many cases a class of Americans may be considered more seriously deprived and thus more worthy of suspect classification when what has been lost is significant.⁵⁹ Similarly, she argues that we may care more about a particular loss if it seems to be something most often taken from a historically deprived group.⁶⁰ As she describes it, rights and classes are co-constitutive of each other and the Court is implicitly acknowledging this in the three cases she cites.⁶¹ This accounts, she argues, for an emerging "third strand" in equal protection cases.⁶² I find her analysis intriguing and have no interest in disputing it here.

Instead, I want to generalize from the problem she so astutely identifies. Let's start with a simple example from outside the law. Suppose you were on a diet and had two rules for yourself. One rule was that you would allow yourself a

Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes, 1999 U. ILL. L. REV. 1209 [hereinafter *Third Strand*].

⁵⁶ 517 U.S. 620 (1996).

⁵⁷ 457 U.S. 202 (1982).

⁵⁸ 519 U.S. 102 (1996).

⁵⁹ Nice, *Third Strand*, *supra* note 55, at 1222-26.

⁶⁰ *Id.*

⁶¹ *Id.* at 1226-48.

⁶² *Id.*

small dessert after dinner if you had skipped lunch on the same day. The other was that you would allow yourself dessert if you had run your typical four miles that day. It is 8 p.m. and that small bowl of frozen yogurt is quite tempting. You reflect back on your day and recall that you had a dry bagel, nothing on it, and black coffee at noontime. You also cut your run short after 3 ½ miles when it started to rain. May you indulge? At first blush, of course not. You have not met either standard and thus no yogurt for you.

If you can stick to this regime, more power to you. Here's why I'd be likely to partake. In the end, the reason behind both the no-lunch rule and the four mile requirement is the same. Lunch puts in calories. Exercise takes them off. Thus the combination of a light lunch and an almost full workout is quite likely to be a greater net contribution to weight loss than either one alone. Even though the rules crafted for the diet are separate, it would be rather stubborn to insist on keeping them that way. And since the diet rules are those that I have probably imposed on myself, I would have little trouble concluding that coming close twice was good enough. Perhaps this is why my diets never work.

Can we learn anything from this example that is helpful to our constitutional law problem? Do the two judicially-created strands of equal protection analysis fit together in the same way as diet and exercise? Not exactly. There's no simple mathematical equation that suggests we can add together the amount of discrimination suffered by a particular group to the weight of what has been lost in a particular case to reach a constitutional conclusion about whether the Equal Protection Clause has been violated. Certainly, however, we can see why a court will struggle when facing a case with a claimant who belongs to a group that is almost a suspect class and who has lost something almost as important as a fundamental right. On one hand, there's a strong formalist tendency to tell the claimant no. Sorry, we can imagine a judge saying, you just didn't meet either of the required standards. On the other hand, from a purely conceptual standpoint a court might be very tempted to look at the case more broadly. If the government is to be watched more closely when there is a suspect class and when it takes away something fundamental, shouldn't it also be watched more closely when the claimant

gets close on each? Is the formalist or the more conceptual approach more likely to be adopted by a decision-maker? This is precisely the kind of question I want to see brought to the foreground of a good legal education.

Let's look at the same problem again in a different context to show how familiar it truly is. In my current role as associate dean, I get all kinds of requests from students wishing to get the most out of their education. One request I faced recently hit me, you guessed it, as a "two-fer." Connecticut rules permit law students to practice before our courts when properly supervised. To be so certified, students must "have completed legal studies amounting to at least two semesters of credit, or the equivalent if the school is on some basis other than a semester basis except that the dean may certify a student under this section who has completed less than two semesters of credit or the equivalent to enable that student to participate in a faculty-supervised law school clinical program."⁶³ The University of Connecticut runs an evening division program. Accordingly, we have students who have completed a full year in this program, and thus two semesters, but for whom, ordinarily, certification would not be available because students earn fewer credits during the first year of the evening program than in the day program.

Our school is also home to a not-for-profit advocacy group directed by a fabulous attorney who supervises many of our students. This director is a member of our adjunct faculty, so work for this advocacy group might constitute a "faculty-supervised clinical program." Ordinarily, however, I would not read it this way. If a first-year student wanted to work in this program, I would conclude that the exception in the Connecticut practice rules was meant to apply only to our more formal legal clinics, which in fact are not open to first-year students.

You probably already see the question. What should I do with a student who has finished one year in the evening program, and is thus close on that requirement, and, who wants to work in our advocacy center, and is thus close on that one as well? Here the context is different from the diet or even the constitutional law case. The Court in equal protection cases

⁶³ CONNECTICUT PRACTICE BOOK § 3-16(a)(2) (1998).

is following precedent it has set out for itself. As a mid-level bureaucrat I am bound to follow the dictates of the practice rules. Would it thus be illegitimate for me to certify the student on the grounds that she has gotten close on each of two different requirements?

Clearly the point of requiring two full semesters is because the drafters wanted to make sure that the student has enough legal background to function effectively. Clearly the drafters also believe that a formal program run by a faculty member might make up for gaps in student background. Isn't it likely that the fine supervision and careful organization in a not-for-profit center on our campus will contribute to a good experience and thus could make up for the minimal gaps remaining after one full year of school in the evening division?

My guess is that most lawyers would urge me to say no to these students. More important, I imagine the reaction of many to this kind of problem would be strong and visceral, but that this reaction would not readily match some pre-determined set of ideas about broad political issues. This is why I agree with Winter that attempting to chart judicial outcomes by solely looking at classic left/right politics is likely to prove unsuccessful. Indeed, sometimes I have to shake my head to remind myself that people who disagree with me almost violently on issues, such as what to do with "two-fers," often are my staunchest allies when it comes to electoral politics.

I want my students to think through problems such as the existence of "two-fers" because I know they will encounter them in practice. My fear is that, in our current curriculum, students experience comments from professors such as, "Have you considered the structure of the intellectual problem faced by the judge?" as flights of frivolity employed to keep them interested in otherwise dull topics. But there is a lot to be said in trying to systematize the "two-fer" issue. How did the two requirements get set up in the first instance? Are they aimed at producing the same goals? Did the decision-maker consider and reject a broad standard for grouping all considerations into a more open-ended balancing test? Will the number of cases presenting the "two-fer" problem swamp the basic rules? Is there a meaningful way to cabin the "two-fer" exception within the particular context? Until and unless we identify such

issues for students, we are likely to get the same reaction I got when I told a group at our alumni association that I was working on the “two-fer” problem and provided a brief explanation. Quickly the question came back, why would anyone ever want to say yes just because a claimant had come close on each of two independent requirements? I was scared to ask why anyone would ever want to say no?

“Two-fer” problems appear with large stakes as well as small. Consider this example provided by my colleague Laura Dickinson. She tells me that under international law, there are generally two justifications for one state to use force against another. The first is the right of self-defense under Article 51 of the United Nations Charter. The second is the right to act (with the approval of the United Nations Security Council) when there is a threat to international peace and security. Our case justifying our action against the Taliban might be seen as falling just short on either one.⁶⁴ Our self-defense case might falter because we would have trouble showing that a state actor had effective control over Al-Qaeda in such a way to justify our attacking that state. Merely having terrorist actors within a state’s territory cannot be enough to give rise to grounds for attack. Otherwise, countries would be authorized in attacking each other all over the world. Thus, even if we face the requisite credible threat from Al-Qaeda to justify self-defense, we may not face such a threat from any state actor.

Again, with respect to the second grounds for action, a threat to international peace and security as determined by the Security Council that justifies the use of force might be considered close, but not quite. The Security Council issued several resolutions condemning the attacks and describing them as a threat to the peace, but did not explicitly authorize the use of military action in response against the government of Afghanistan. Is it legitimate for the United States to combine (note that if I said amalgamate, that would have a different connotation) these two arguments into one broader argument to support our actions? Do we now have enough

⁶⁴ Let me stress that I am not making any argument about what the best reading of the legal materials would show. I merely use this as a high stakes example. Let me stress even more strongly that although this example was provided to me by Professor Dickinson the views and comments expressed here are mine alone.

examples of “two-fer” to have made the point that identification of this sort of thing will contribute to better lawyering?

Linking back now to *A Clearing in the Forest*, we can see why Professor Winter’s work, even without his outstanding contributions from cognitive theory, so powerfully moves us toward different ways of teaching law. The traditional curriculum takes its cues from what Winter might describe as a false search for objectivity. We divide courses based on doctrinal categories, thereby creating the appearance that the rules governing judicial decisions stem from certainty within the materials themselves. If there’s a torts controversy, let’s all turn to the law of torts for a “solution.” Now, of course, people don’t actually teach torts this way, and much of what I am suggesting already occurs in our nation’s classrooms. But students who have spent years in courses dividing the world into categories (math, English, science, history, foreign language) cannot help themselves in concluding that we mean to do the same with law school courses. When we emphasize that the rules versus standards debate, the complexities of statutory interpretation, or something more idiosyncratic such as the “two-fer” problem cuts across doctrinal categories, we hear them muttering under their breath, “That’s nice, dear, now where are we going for dinner?” (or words to that effect).

There is, of course, something even worse than the idea of our students looking exclusively to the legal materials in search of concrete solutions. That would be if we spent so much time teaching across categories that they reached the conclusion that solutions existed only in the minds of the judge. As I explained a bit in Part I, I think *A Clearing in the Forest* devotes slightly too little time to the familiar ups and downs of “policy analysis.” Judges do sometimes conclude from indeterminacy within the legal materials that their task is to fashion a solution that will decrease costs and increase benefits, or that will reduce administrative burdens. An individual judge’s psychology might be very important in determining how he or she will make such decisions. Accordingly, judicial subjectivity is important and quite often it will be difficult to distinguish such subjectivity from old-fashioned politics. Everyone knows for example that judges appointed by Democrats are on the whole more likely to worry

about anti-discrimination claims while those appointed by Republicans generally will be concerned with employer flexibility. But no one needs three years of law school to learn this.

The challenge as we move forward and continue to learn from works of cognitive theory such as *A Clearing in the Forest* is to determine how to teach law in a way that focuses on the interaction between the judge and the legal materials. One way to do so is to identify cognitive riddles, such as the “two-fer” problem, that judges will face routinely but for which they will have otherwise developed no formal vocabulary. Some day, after all, our students will become the judges. If we can teach them to imagine their situation with the zest for life and for learning reflected in *A Clearing in the Forest*, we will have changed the world. Why haven’t we started?

IV. **OVERCOMING RESISTANCE: THE COGNITIVE STRUCTURE OF DISCIPLINE**

I have no conclusive answer explaining the “puzzling persistence” of the traditional law school curriculum. The undeniable inertia that troubles all institutions certainly plays a key role. Teachers who have succeeded along one path for many years will be understandably reluctant to try another. A law school that charts a course different from its peers risks losing students and teachers who are eager to assure themselves the stature garnered from mastering the traditional curriculum. And the sheer work involved in devising a credible alternative curriculum is enough to deter aspiring reformers in a world where prestige and resources flow to those who write more rather than those who teach differently.

Colleagues sympathetic to my project caution me about a deeper problem. They fear my emphasis on cognitive structures stresses a kind of abstract reasoning not easily accessible to a majority of students. I am warned that students are more comfortable learning about the external world than they are learning structures of thought or attending to how their categories of understanding effect what they are learning. My whole point, however, is that there is nothing unusually

abstract about conceptualizing real world problems in terms of repeated patterns. I have tried to show that patterns of argument are familiar even to young children.⁶⁵ And in *Getting to Maybe*, Michael Fischl and I show how even law teachers who champion the virtues of doctrinal categories in fact test students on their conceptual skills.⁶⁶ In that book we develop a vocabulary that foregrounds the kinds of issues tested by the conventional exam and treats the doctrinal categories as merely exemplary of such issues. We have been enormously gratified by student reaction.

A Clearing in the Forest, however, has led me to develop a new hypothesis for some of the deep-seated resistance to the cognitive turn in law. Professor Winter talks often about the embodied nature of human reason. He stresses the way reason is portrayed as "cold," "linear," "stiff."⁶⁷ The mystery, however, is what people would find appealing about such a rational function. Aren't we normally drawn to the warm and fuzzy? Why would we want our legal system to represent a "rigid" form of reason?

Certainly the appeal of formalism takes us part of the way there. Law may be most revered by formalists when it appears to have few rough edges and to give us no choice but to comply. There is a rational component to our love of rules. We hope they will protect us against decision-makers manipulating the system in undesirable ways. But there is also a spirit for rule-following that goes beyond a grudging respect for law as a necessary evil. What instead causes people to take pride in rule-following?

My current assessment is that experiences where we find ourselves preparing for hardship ground the cognitive model for this sort of love for the law. What experience is more counterintuitive, for example, than the "rigors" of basic training or the "no pain, no gain" mantra of contemporary exercise? Winter eloquently describes one model of law as "following the rules" as if they defined the "straight and narrow" path through life as a journey. Suppose, however, that the deeper model for "discipline" is that of military or physical

⁶⁵ Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988).

⁶⁶ See generally Fischl & Paul, *supra* note 1.

⁶⁷ WINTER, *supra* note 6, at 58.

training. This might cause people to be suspicious of all sorts of teaching and all sorts of law that make it appear as though we are making things up as we go along. Consider, for example, the hostility toward scholarly work that does not remain firmly embedded within a “discipline,” which is the very same word we apply to the rigors of forcing ourselves to get to work in the first instance. If we followed our immediate physical desires, to take another example, how could we ever fight through the pain of a marathon run or the arduous experience of the obstacle course? When President Bush says we have replaced the mantra of “if it feels good, do it” with that of “let’s roll,” he is playing on deeply held stereotypes about virtue.⁶⁸ Virtue is saying no to pleasure for the sake of greater gain. Precisely this same notion energizes, or as Professor Winter might say, “motivates” much of the hostility we experience toward those who prize innovation within law.

Viewing law through the lens of intense physical training thus reveals another kind of resistance that one would expect to the idea that cognitive structures form the backbone of judicial decision-making. One key insight within *A Clearing in the Forest* is that there is a sense that judges are making things up as they go along, even if, as Winter argues so well, they are constrained in what they can persuasively imagine. This sense of invention, one which acknowledges indeterminacy but attempts to chart it systematically, still stands squarely against the conventional notion of the judge as merely the object through which the law speaks. It also stands in opposition to our notion of the citizen constrained to follow the law no matter what. Such anti-intellectualism would seem anathema to citizens in a democracy—don’t think about what you are doing, “just do it.” But if one thinks of law in the exercise or basic training context, the whole appeal of law as rules begins to fall into place. The last thing one usually does during exercise is to dwell at any given moment on whether it might make sense to stop.

To make this metaphor stick, of course, I need a two-step argument. First, I must draw an analogy between the love of physical discipline (exercise, etc.) and the love of rules. I

⁶⁸ George W. Bush, State of the Union Address, Jan. 29, 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

think this is pretty easy. Remember my earlier example about losing weight. Who would not feel at least somewhat comfortable describing the frozen yogurt eater who does not skip lunch or run four miles as a *cheat*? If Winter is correct that many human constructs begin with embodied knowledge, what better metaphor exists for formal law than the dietary rules and exercise regimens we encounter in early childhood?

The second step in my argument is somewhat harder. How does a love of rules translate into a faith in doctrinal categories as the proper method of teaching? Here I think of torts and contracts as the intellectual equivalent of push-ups and sit-ups. They may be good for our (intellectual) muscles but from them we learn too little. Doctrinal categories hold out the promise (although, again, no one actually teaches them this way) that we can master law by learning a few basic concepts that govern our most fundamental transactions. Compare the similar goal of trying to build various muscle groups with repetitive but unreflective exercises. Hard work, but not necessarily hard thought, is the name of the game.

The introduction of cognitive theory to law presents an opportunity for a new approach. Winter encourages us to think about teaching neither as a vehicle for communicating formal rules nor as an opportunity for examining subjective intentions. The goal instead is to devise a way of conceptualizing law that stresses the interactions between the people who author, interpret, apply, and enforce the law, and the law as it exists in written form and in the social settings in which we find ourselves. My own project is to keep working hard at identifying the cognitive structures of interaction and using these as a means of teaching my students to think about the law differently. I don't see them preparing for battle so much as learning to dance.