

Brooklyn Law Review

Volume 67

Issue 4

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*

Article 5

3-1-2002

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Recommended Citation

Lawrence Joseph, *The Subject and Object of Law*, 67 Brook. L. Rev. 1023 (2002).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol67/iss4/5>

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THE SUBJECT AND OBJECT OF LAW*

Lawrence Joseph[†]

I.

In an essay that I wrote almost a decade ago, *Theories of Poetry, Theories of Law*,¹ I explore and compare, on the one hand, the language of literary texts (especially poetry), and, on the other, the language of legal texts (especially judicial opinions). My analysis of the language of literary texts starts with an essay by Raymond Williams, *When Was Modernism?*² Modernist writers, according to Williams, “denaturalized language.” They broke “the allegedly prior view that language is either a clear, transparent glass or mirror.” They also made “abruptly apparent in the texture of narrative the problematic status of the author and his authority” A Modernist text is “self-reflexive.” It “assumes the cent[er] of the public and aesthetic stage.”³ The self (or subject, in the sense of the self as subject) assumes an objective (a “public and aesthetic”) dimension. The language of the subject is formed into an object of *aesthesis*—an object its listener or reader will feel or perceive.

William Carlos Williams, in a piece he wrote in the early 1930s on Marianne Moore’s poetry, put it this way: “Moore undertakes in her work to separate the poetry from the subject entirely—like all the moderns. In this she has been

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¹ Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 VAND. L. REV. 1227 (1993).

² Raymond Williams, *When Was Modernism?*, 175 NEW LEFT REV. 48 (1989).

³ Joseph, *supra* note 1, at 1229; Williams, *supra* note 2, at 48-50.

rarely successful and this is important."⁴ Moore cannot completely separate her poetry from its subject matter because it is impossible to do so. Why? Because a poet uses language. Because language is a human act, by its very nature it includes the voice of the person who speaks or writes it. Moore "never falls from the place inhabited by poems."⁵ The space inhabited by the poet's self—her subject matter and her expression—is physical, sensual, a place both subjective and objective, formed by the poet into an object of her expression, the poem.

Christa Wolf, quoting Anna Seghers, speaks of the writer as "the curious crossing point where object becomes subject and turns back into object." "The reservoir that writers draw on in their writing," Wolf says, "is experience."⁶ Experience "mediates between objective reality and the authorial subject."⁷ Although the experience that Wolf speaks of is "socially meaningful," it still must take into account the "importance of the subjective dimension."⁸ Writing is a process that runs continuously alongside life. By, through, and in her writing, a writer becomes, and is, deeply involved with the world. Indeed, the writer must be prepared to experience as much "unrelenting" exposure as possible not only to the world's realities, but also to the changing realities both she and her subject matter inexorably undergo. This interaction between the writer and her material (material which includes the text itself) forms "a new reality," one different from "the one you saw before," one in which "everything is interconnected and fluid."⁹ The created text shatters expressions that are ossified, reified—"pre-ordained by . . . ideology."¹⁰ The individual author's involvement with her subject reflects truths deeper than the invisible truths of the subjective self, or "I," truths deeper than the reigning "objective" truths of politics, ideology, or economics. The most authentic expressions of subjectivity and, or, objectivity are those shaped, formed, and given

⁴ Joseph, *supra* note 1, at 1233; WILLIAM CARLOS WILLIAMS, *IMAGINATIONS* 312 (1970).

⁵ Joseph, *supra* note 1, at 1233; WILLIAMS, *supra* note 4, at 312.

⁶ CHRISTA WOLF, *THE FOURTH DIMENSION: INTERVIEWS WITH CHRISTA WOLF* 21-24 (1988).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 22.

¹⁰ Joseph, *supra* note 1, at 1233; WOLF, *supra* note 6, at 21-24.

meaning by a writer's unrelenting imaginative intervention into the world in which all of us live.

II.

Historically, jurists, judges, and practitioners alike assumed that legal language was objective, neutral, and verifiable. The first theorists to challenge this orthodoxy were the legal realists.¹¹ The realists' project raised the status of legal thought from objectively presumed, formalized rules onto a different doctrinal plane of thought (one presumed equally objective) based not on the "transcendental nonsense" of a "mechanical jurisprudence," but, instead, on policies grounded in social, political, and economic realities.¹² The philosophical or literary dimensions of legal language were not realist concerns.¹³

The subjective quality of legal language did not become a jurisprudential issue until the mid-1970s. By the early eighties, critical writing on the objective and subjective dimensions of legal language had become highly sophisticated, extensive, and far-reaching. Questions about the objective meaning of legal texts dominated American legal thought.¹⁴

In 1983, Robert Cover's *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative* appeared in the *Harvard Law Review*.¹⁵ Cover declared: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning"¹⁶ Legal prescriptions, "even when embodied in a legal text," cannot escape their "origin and end in experience, in the narratives that are the trajectories plotted upon material reality by our imagination."¹⁷ Law is a system of "tension"; it is "a bridge linking a concept of a reality to an imagined alternative—that is, . . . a connective

¹¹ Joseph, *supra* note 1, at 1234-35.

¹² *Id.* at 1235; see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

¹³ Joseph, *supra* note 1, at 1235; see STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 2, 286 (2001).

¹⁴ Joseph, *supra* note 1, at 1235-41.

¹⁵ Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

¹⁶ *Id.* at 4 n.3.

¹⁷ *Id.* at 5.

between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative."¹⁸ Cover's vision of the language of law as imaginatively plotted and projected onto material reality by those both individually and collectively involved in the legal system was monumental, placing the subjective and objective complexities of legal language, and law itself, into full critical play.

Two years after *Nomos and Narrative*, Robin West saw that a new strain of legal criticism had arisen, one "utopian," "visionary," or "aesthetic" in character.¹⁹ But West also pointed out that the first person narratives employed by the authors of the new criticism were expressed in a language quite different from the language required of judges, legislators, and practicing lawyers. Those who write legal criticism "do not decide cases, vote on bills, or undertake the representation of clients and hence the furtherance of those clients' interest." Legal theorists do not make law.²⁰ Although, as West says, "[j]udges, legislators, and lawyers" cannot escape their "personal histories when formulating a theory of human nature and social interaction upon which to ground their work," they must, if they are "acting responsibly, . . . keep these narrative instincts separate from the act of lawmaking, or at least weigh them against other institutional concerns."²¹ The making and practicing of law requires, at some point, some process of objectification.

III.

One strategy behind *Theories of Poetry, Theories of Law* was to tackle the notion of legal objectivity by an aesthetic analysis of language. I focused on the aesthetics of poetry because poetry—the most condensed form of literary verbal expression—contains virtually every dimension of language. The common ground that I discovered between law and literature seems simple: Both involve issues of language, as

¹⁸ *Id.* at 9.

¹⁹ Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 203 (1985).

²⁰ *Id.* at 211.

²¹ *Id.*

well as issues of how language is, or ought to be, expressed. I found, however, the dissimilarities between law and literature equally critical. Terry Eagleton has spoken of what he calls the "true sublime" in writing, the "infinite, inexhaustible, heterogeneity of . . . [a] sensuous, non-functional delight in concrete particularity [that flows] from the dismantling of abstract rational exchange-value."²² In a post-Modernist, post-Marxist world, a sense remains that certain forms of imaginative expression profoundly resist being completely reified by processes of commodification. "[W]e have to find a way to resist . . . commodification in the letter of the text," Eagleton says, in the same way, for example, that "Keats found a way of resisting commodification by sensuousness, by a kind of shameless overlaying of the language which brought down on [Keats'] head charges of cockney vulgarity from the guardians of literary consciousness."²³

Is it possible for legal language to resist commodification in the same way that the sensuous language of, let's say, a poem by Emily Dickinson, resists it? Forms of literature do not reify; what, in fact, arguably makes a form of verbal expression literature is that literature is language that resists reification because of how it is expressed. However, unlike the language of literature, the language of those who make and practice law (the language of judges, legislators, and practicing lawyers) is, at a definite point and to a great extent, socially, economically, politically, and institutionally reified into forms of language to be known and obeyed, executed and enforced, bought and sold. Expressions of law embody, and are embodied in—integrate and are integrally a part of—the practice of violence, the allocation of power, the distribution of money, and the dispensing of privilege (which in turn bestows wealth). Law, like literature, is a language game, but, unlike literature, the object of the game is not to express forms of sensuousness or feeling. The language of law embodies violence, power, and money. It is a language game complexly unique both in its expressions and in the consequences of its expressions.

²² Terry Eagleton, *Action in the Present: An Interview with Terry Eagleton*, in POLYGRAPH: VERSIONS OF THE PRESENT: MODERNISM/POSTMODERNISM 30, 34 (Henry Schwarz & Richard Dienst eds., 1989).

²³ *Id.* at 35-36.

IV.

At the heart of Steven Winter's *magnus opus*, *A Clearing in the Forest: Law, Life, and Mind*, is a radical insight: Law, Winter says, exists within a complex reflexive relationship between experience, imagination, and meaning.²⁴ There is no law without the reflexive, imaginative relationship of its participants, both individually and collectively. Law, in concept and in reality, is neither more nor less than the language of our individual and collective contributions to what law means.²⁵

Because law is expressed in language, and because language is in part subjective, the language of law is in part subjective. The language of law requires a speaker, or speakers, a voice, or voices—the human and social experience of an “I” or a “we.” Law's language is, however, also in part objective: Subjective expression is variously structured by the world that the speaker inhabits, shaped by metaphorical “objects,” formulations of humanness deeply embodied in the world that gives rise to their expression. These formulations are objectified by the expectations of legal participants and by their apprehension of the social world, and through the expression of legal rules which, of course, take shape in language. This objectification of legal thought in language necessitates some degree of reification. However (and it is an important however), because this reification requires thinking, speaking subjects—and because the law must be spoken, written, or enacted by a person or persons—the forms, or reifications, of legal language are, in essence, phenomenological.

A Clearing in the Forest exposes and rejects reifications of complex social practices and understandings which, as reifications, fail to take into account the deeply physical and experiential, or phenomenological, realities of meaning. Law, which requires meaning, is, as Winter demonstrates, created by and within complex interactions of mind, body, and the world. These interactions come into existence through ongoing, deepening, imaginative expressions of language. Even the most

²⁴ WINTER, *supra* note 13, at 215.

²⁵ *Id.* at 214-15, 346-51.

shopworn of jurisprudential examples, H.L.A. Hart's "no vehicles in the park," becomes for Winter an extended meditation on the cultural history of the park as conceived by republican theorists, and transformed by successive waves of working class park-goers and Progressive planners.²⁶ Law, as it is today, is a distillation of history, culture, and social conflict critically deficient in its expression, a faded residue of a rich, human life-world—a world toward which the law merely gestures. The condensed verbal form of the legal rule—unlike the condensed emotional sensuousness of a poem—expresses less than it knows, yet means more than it can express. Legal thought that recognizes this can get at, if not transcendental truths, then at least those truths that arise out of the unrelenting exposure of the mind and imagination to the objective realities of law. Or, to paraphrase a passage from Wallace Stevens' poem "Chocoura To Its Neighbors" (quoted by Winter²⁷): To speak law, as lawyers, humanly, from the height or from the depth of human things, that is law's acutest speech.

V.

Drame, a book of prose by Phillippe Sollers, is, in its English translation *Event*, followed by an essay, *Drame, Poeme, Roman (Event, Poem, Novel)*, by Roland Barthes.²⁸ In a footnote, Barthes observes:

²⁶ *Id.* at 201-06, 263-66.

²⁷ *Id.* at xvii. The passage from Chocoura To Its Neighbors that Winter quotes is: "To say more than human things with human voice/ That cannot be; to say human things with more/ Than human voice, that, also, cannot be/ To speak humanly from the height or from the depth/ Of human things/ that is acutest speech." *Id.* (quoting Wallace Stevens, *Chocoura to its Neighbors*, in *THE COLLECTED POEMS OF WALLACE STEVENS* 300 (1954)).

²⁸ PHILLIPE SOLLERS, *DRAME* (Editions de Seuil, 1965); PHILLIPE SOLLERS, *EVENT* (Bruce Benderson & Ursule Mollinaro trans., 1986) (with an essay by Roland Barthes).

It is in fact possible to read *Event* like a very beautiful poem, the indistinct celebration of language and of the woman beloved, the path of one toward the other, like Dante's *Vita Nova* in another era: *Event* may be the infinite metaphor of "I love you," which is the single transformation found in all poetry.²⁹

"Remember," Winter says in *A Clearing in the Forest*, "that metaphor is a conceptual mapping from a source domain to a target domain that preserves inferential structure."³⁰ Put in Winter's terms, Barthes' insight is that "I love you" is one of poetry's deepest sources; *Event* essentially is a "conceptual mapping" of "I love you" expressed (or inferentially structured) within the projected domain of the book itself. The book is the infinite metaphor: The metaphor is the endlessly profound cognitive mapping, by, in, and through expression, of the primary human issue of "I love you." Metaphor is the transformation through expression of intrinsically human domains.

VI.

In a recent essay, *Taking Moral Argument Seriously*, Robin West takes on what she calls Ronald Dworkin's antipositivist conception of law. Dworkin's jurisprudence is, West says, moral:³¹ For Dworkin, "[t]he legal actor is loyal to law, principally understood in light of a conception of justice, not positive law as authoritatively pronounced by a court or legislative body. Legal argument, in turn, is the practice that gives daily voice and substance to this distinctively moral loyalty."³² The jurisprudential function of the moral principles identified by Dworkin render the law not only determinate, but also substantively just. Yet, West maintains, "both Dworkin and his critics may be wrong to think that justice requires such a high degree of determinacy."³³ If law incorporates moral principles of justice, then the lawyer, as well as the judge, while holding and articulating the law, is, essentially, an

²⁹ *Id.* at 87.

³⁰ WINTER, *supra* note 13, at 31.

³¹ Robin West, *Taking Moral Arguments Seriously*, 74 CHI. KENT L. REV. 499 (1999).

³² *Id.* at 501.

³³ *Id.*

architect of justice and of a just society, as well as being an enforcer of order.³⁴

If, as West says, law incorporates moral principles of justice, then the question “what is morally just?” is—like “I love you” in poetry—an essential source domain of law. From it emanate conceptually mapped metaphors of what moral justice means. The domain of metaphors—the domain of expressions of what is moral and just—is structured both by its deep, human source and by the imaginative depth of its expression. However, as West continues, in American law today “we have no developed account,” no developed expression, of

what even the narrow virtue of legal justice might be or of what traits of character it requires, what view of the person it entails, or what kind of society might best facilitate its dispensation. . . . [W]e have no developed or competing understandings of the substantive legal consequences of various cognitions of substantive, social, or political justice.³⁵

In American law today, there is no recognition of the cognitive fact that law must rest on our conceptual mapping and expression of what is morally just. It is therefore incumbent on legal educators—if they are serious in their pedagogical and scholarly missions—to “develop, debate, sift through, improve upon, dwell on, preserve, learn, and teach, as an integral part of law, competing and credible theories of justice.”³⁶ The world of law, of the lawyer and of the law scholar, should be a world where the implications of a moral conception of justice can be self-consciously traced and expressed. As West observes:

[I]t is hard to think of any group, professional or otherwise, other than lawyers, with the expertise and the professional inclination to work through in a detailed way the implications of various understandings of justice for various doctrinal areas of law. There is no reason, in short, for lawyers not to at least acknowledge the subject of justice as peculiarly within their province. It is a curiosity, and maybe even a scandal, that lawyers in this century have not done so.³⁷

³⁴ *Id.* at 502.

³⁵ *Id.* at 503.

³⁶ West, *supra* note 31, at 502.

³⁷ *Id.* at 505.

The legal profession and legal academy, therefore, not only ought to, but must, take seriously the project of objectified moral argument.³⁸

What lawyers, in other words, must do is develop, debate, sift through, improve upon, dwell on, preserve, learn, and teach, through individual and collectivized expressions, the moral bases of justice. "Our refusal to do so over the last thirty years," West declares, "has left us with unpalatable alternatives[:]"

[T]he nihilist insistence on the left that all there is in the social world worth pondering is power; the libertarian insistence on the right that all that can be justified is the satisfaction through market mechanisms of desire; and the fundamentalist and generally religious-based claim that the authority for moral truth must come from not just extra-legal but extra-human sources. These stances cannot possibly yield theories of justice, or moral truth, sufficient to ground morally compelling legal arguments. We know this and as a result have eschewed the project of justice altogether. As a result we have created an academic and professional world void of any sense of virtue and even ignorant of the competing possible conceptions of the virtue of justice that at least in the eyes of others ought to be the defining virtue of the legal profession and legal academy both.³⁹

Or, as Winter might say, our present theoretical orthodoxies, by ignoring the deeply human issues of what is moral and just, fail in meaningful ways to connect subject and object. They present no alternatives except, on the one hand, those theories of external—objective—constraint, or, on the other, theories bottomed on pure, unrestrained subjectivity.⁴⁰ Our present theoretical orthodoxies fail to explore the cognitive dimensions of language and experience by which law is sustained—fail to build for us a bridge across which to connect the subjective and objective meanings of justice and morality. Or, as West, echoing Winter, might say, our present theoretical orthodoxies fail to *dereify* our understandings of justice and moral truth, fail to show us how the legal and moral language of justice is "constituted and sustained. . . in the forms of life that give meaning to our categories, concepts, and values,"⁴¹—

³⁸ *Id.* at 515.

³⁹ *Id.*

⁴⁰ WINTER, *supra* note 13, at 11, 104-05, 132-33, 353.

⁴¹ *Id.* at 332.

fail to reconcile our values and contingencies in a way that embodies a "true humanism"⁴² which "we ourselves have made."⁴³ The subject and object of law—both in practice and in theory—is found in our language and our expressions of moral justice, expressions that arise out of our minds and our imaginations, from our senses and within our experiences, within the unrelenting pressures of a world of money and violence and power which we, as lawyers, choose to inhabit.

⁴² Steven L. Winter, *Human Values in a Postmodern World*, 6 YALE J. L. & HUMANITIES 233, 245 (1994) ("What is perhaps proper to our time is to disassociate humanism from the idea of a humanity fully guaranteed by natural law, and not only reconcile consciousness of human values and consciousness of the infrastructures which keep them in existence, but to insist on their inseparability.") (quoting MAURICE MERLEAU-PONTY, *SIGNS* (Richard C. McCleary trans., 1964)).

⁴³ WINTER, *supra* note 13, at 357.

