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SYMPOSIUM:

Cognitive Legal Studies: Categorization and  
Imagination in the Mind of Law. A Conference in  
Celebration of the Publication of Steven L. Winter's  
Book, *A Clearing in the Forest: Law, Life, and Mind*

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## Afterword

Gary Minda

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## AFTERWORD

### STEVE WINTER'S *A CLEARING IN THE FOREST*\*

*Gary Minda*<sup>†</sup>

Law is a cerebral enterprise. Much of what happens, happens in the mind. One might think that lawyers, judges, and legal academics would have developed by a sophisticated understanding of how the legal mind does its work in the law. And, yet surprisingly, until now, there is no serious body of literature on the workings of the legal mind. How is it that judges and lawyers have entirely overlooked the important role of human cognition in the law? And what permits judges and lawyers to say without any queasiness that they know what it means to “think like a lawyer” when they in fact know so little about how lawyers think? These are questions that call out for a response and yet, not until now, few have bothered with such questions. The fact is, we are still in the dark ages when it comes to understanding how the mind works in the law. In this Symposium, readers have an opportunity to consider one of the first academic efforts to explain how humans actually make legal reasoning possible.

By most accounts, the mind is the thinking machine that processes information and permits lawyers to “think like a lawyer.” And, how does this machine actually do its work? In law school, law students learn logic and fallacy of legal arguments. The “IRAC” method for writing law, as every law student is taught to learn, is based on syllogistic reasoning,

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† Visiting Professor of Law, St. John's University School of Law (2001-2002); Visiting Professor of Law, University of Miami School of Law (2002-2003); Professor of Law, Brooklyn Law School.

which is thought to be the basic mode of legal reasoning in its purest sense. Issues are identified, relevant rules are discovered; the relevant rules are then “applied” to the facts, and out comes the “conclusion”—Judgment for plaintiff, or defendant. It is all about getting the “right” case in the “right” category. For sophisticated practitioners and judges, the reasoning process is a matter of common sense and pragmatic judgment. As Judge Richard A. Posner once described it in one of his famous moments of honest reflection: when confronted with difficult legal controversies in the law, experienced judges “roll up their sleeves” and “get a job done.”<sup>1</sup> Of course, the messy job of “how to do it” is left largely unanswered. For Justice Scalia, legal reasoning is mainly the exercise in following the rules, with balancing and totality-of-circumstances tests to cover those cases where the rules do not quite fit the facts.<sup>2</sup> As it turns out, however, balancing and totality of the circumstances are not the exception; they are usually the norm and when these tests are applied legal reasoning is far from consistent or predictable.

The fact is that there is little meaningful discussion to be found in the case law or in the legal literature on how reason does work in the law. Phrases like “reasoned elaboration” or “neutral principles” from the 1950s legal process culture only obfuscate what really happens when judges do law. An unescapable conclusion to be gleaned from the work of sophisticated legal philosophers like Ronald Dworkin is that reason is something that judges do when they make the law the “best it can be” with cryptic references to the “practical wisdom” of legal culture.<sup>3</sup> For all his grandiloquent talk of what philosopher-king judges might do in the law, Dworkin practices a kind of “as if” jurisprudence that never reveals how it is real world judges are supposed to “reason” their way to the right answer in the law. We are thus left wondering what exactly is it that judges and lawyers do when they are “doing” law?

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<sup>1</sup> Richard A. Posner, *Bad Faith*, NEW REPUBLIC, JUNE 9, 1997, at 34 (reviewing DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (fin de siècle)* (1997)).

<sup>2</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-80 (1989).

<sup>3</sup> See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986).

Recent work in the interdisciplinary field of cognitive sciences, however, makes it possible for the first time to understand how reason in the law does work.<sup>4</sup> Much of the learning in cognitive science is coming to define a new field of legal studies known as cognitive legal studies, due largely to the work of Steven L. Winter.<sup>5</sup> We are celebrating with this symposium Winter's most recent text, *A Clearing in the Forest: Law, Life, and Mind. A Clearing in the Forest*<sup>6</sup> is the culmination of many years of work based on the recent findings of cognitive science about how the human mind works in the law. *A Clearing in the Forest* is a compelling meditation on how the new learning about human cognition is informing some of the most intuitive understandings of the reasoning process used in the law, as well as challenging many misunderstandings and misconceptions about the nature of reason itself. After reading Winter, one can no longer deny the relevance of cognitive science in the law.

## I. THE CENTRAL METAPHORS

*A Clearing in the Forest* begins with a short story from William James' book, *On a Certain Blindness in Human Being*.<sup>7</sup> This story sets forth a metaphor that helps to explain Winter's account of how law works and why law is irrepressibly an imaginative, creative quality of human reason. The story is about a trip that William James took to the mountains of North Carolina. On that trip, James said that he learned something about how human imagination constrains meaning.

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<sup>4</sup> The field of cognitive science is largely the result of the ground breaking works of George Lakoff and Mark Johnson. See, e.g., GEORGE LAKOFF & MARK TURNER, MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR (1989); MARK JOHNSON, THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON (1987); GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS (1987); GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980).

<sup>5</sup> See, e.g., Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989).

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

<sup>7</sup> THE WRITINGS OF WILLIAM JAMES: A COMPREHENSIVE EDITION 629, 630-31 (John J. McDermott ed., 1968).

James explains his initial impression of seeing the "coves" or "clearings" early settlers had cut into the forest in the valleys of the mountains to clear away a space for a log cabin and farm. In viewing these coves or clearings for the first time, James reports that his initial reaction was one of repulsion; what he saw was "unmitigated squalor."<sup>8</sup> In viewing the remaining charred stumps where trees once stood, James remarks on the destruction of the forest, and how what had "improved" was "hideous, a sort of ulcer, without a single element of artificial grace to make up for the loss of Nature's beauty."<sup>9</sup>

In asking a mountaineer about this, James said he wanted to know "[w]hat sort of people are they who have to make these new clearings?"<sup>10</sup> The mountaineer replied: "All of us. . . . Why, we ain't happy here, unless we are getting one of these coves under cultivation."<sup>11</sup> James reports that in hearing this he instantly came to understand that he had been "losing the inward significance of the situation," and that his experience had blinded him to the meaning of the cove to the settlers.<sup>12</sup> Where the clearing had once been seen as destruction and "denudation," the same spaces could be seen as a source of pride and beauty by those who chopped away the trees and made the forest their home. As James came to see, when the people who lived there looked at the clearing and the "hideous stumps" they saw "personal victory . . . honest sweat, persistent toil and final reward."<sup>13</sup> The clearing that was "an ugly picture on the retina" to James, was to the people who lived in the clearings "a symbol redolent with moral memories and sang a very paean of duty, struggle, and success."<sup>14</sup>

One way to understand the relevance of James' story to Winter's project is to consider how the relationship between the "forest" and the "clearing" has been imaginatively used by writers to talk about the importance of law. Hence, in Robert

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<sup>8</sup> WINTER, *supra* note 6, at ix.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> WINTER, *supra* note 6, at ix.

<sup>14</sup> *Id.*

Bolt's *A Man for All Seasons*,<sup>15</sup> another story that figures importantly in the beginning of Winter's book,<sup>16</sup> Bolt describes a conversation between Sir Thomas More and his future son-in-law, Roper, about the importance of showing deference to the law in the face of evil. Roper wants to do whatever is necessary to destroy evil, even if it means disregarding the law. Sir Thomas asks Roper: "What would you do? Cut a great road through the law to get after the Devil?" Roper responds: "I'd cut down every law in England to do that." Sir Thomas then explains:

Oh? And when the last law was down, and the Devil turned around on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—do you really think you could stand upright in the winds that would blow then?<sup>17</sup>

Here, Robert Bolt relies upon his reader's imagination of a forest to derive the importance of the law. Each tree in the forest is a law, and if the trees are cut down they will not be any protection for man. Unlike James's story that focuses on the meaning of the "clearing"; Bolt encourages his reader to focus on the meaning of the trees in the forest for an understanding of why it is important to show fidelity to the law.

In beginning his book with these stories, Winter asks us to consider how human thought is "irreducibly imaginative."<sup>18</sup> When we read these stories we instinctively understand the meaning of the "forest" because we share the author's experiences with the forest. The forest can both protect us and be something that needs to be tamed and civilized. The shared experiences about the nature of a "forest" thus become domain from which we draw information for understanding something else. This is how metaphor works cognitively. We draw information from a domain that we know about to help explain the target domain of the unknown. Metaphor, of course, is only one of several cognitive mechanisms used in human thought

<sup>15</sup> ROBERT BOLT, *A MAN FOR ALL SEASONS* (1960).

<sup>16</sup> See WINTER, *supra* note 6, at 1.

<sup>17</sup> BOLT, *supra* note 15, at 66.

<sup>18</sup> Winter, *supra* note 6, at 5.

that Winter explores to ascertain how reason works in the law. A principal claim of Winter's book is that developments in cognitive theory make it possible to describe the cognitive mechanisms that enable humans to reason.

What is striking about Winter's two introductory stories by James and Bolt is that they help to illustrate what is wrong with the way "reason" is understood in the law. As Winter explains, the standard account of legal reasoning is based on the "objectivist" view that "understands the world as made up of determinate, mind-independent objects with inherent characteristics or 'essences.'"<sup>19</sup> The basic notion that is widely held is that "reason" works because we can ascertain the truth of observable features of our world. In thinking of reason in this way, it becomes easy to see why those in the law would think of legal reasoning as "abstracting from a judicial opinion or other authoritative legal text the principles that express the necessary and sufficient conditions, properties, or criteria that characterize it."<sup>20</sup>

Winter argues that this is not how we actually reason in the law. As literary writers know, however, reason is imaginative and grounded in shared experience. Winter can thus be read as advancing a literary or poetic insight. He proclaims: "[R]ationality is imaginative and grounded means, quite simply, that we use physical and social experience and general cultural knowledge to categorize and understand."<sup>21</sup> Much of the effort of legal theorists is based on the goal of justifying law as a constraint on the human mind. Hence, Sir Thomas tells Roper that all hell will be unleashed if others follow his advice and fail to follow the commands of the law. Constraint is what keeps judges in line and it is constraint that is thought to limit judicial imagination. This is why Richard A. Posner does not believe that law and literature have much in common; lawyers and judges, unlike literary writers, are required to follow and respect the conventions of the law.<sup>22</sup> Much of the writing about law is thus aimed at justifying law as constraint; meta-theories are offered and considerable time

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<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.* at 7-8.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> See RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

is devoted to debating the existence or non-existence of reasons for constraint.

A second principle claim of the book is that in order to understand how the mind does work, we need to “shift our focus away from *metastructures* (or lack thereof) to the cognitive and cultural *infrastructures*, if we are going to make any sense of the phenomenon of law.”<sup>23</sup> Instead of looking outside to find the structures that are thought to give law regularity as a source of constraint on human action, Winter examines the inner world of human cognition.<sup>24</sup> The fact that the law *does* work is what Winter wants to explain. He argues that by looking to the infrastructures of human cognition we can begin to understand how and why the phenomena of human persuasion works in the law to give law its regularity in application and predictability. The “recurring structure” and “repeatable pattern” that we find in law can in fact be explained cognitively in terms of the bodily experiences and cultural context.<sup>25</sup>

In this important sense, Winter’s text helps to bring out the significance of mental *context* for better understanding the contingent nature of legal thought. Winter wants us to read the law by considering the viewpoint of the mountaineer in William James’ story. Winter wants us, in other words, to understand that “*legal meaning* must be lived if it is to continue to be recognized as such.”<sup>26</sup> In order to *live* in the life of the law one must come to grips with the human dimension of cognitive thought as it works in the law to *do* things. The promise of cognitive legal studies is that it offers us a way to better understand how concepts and rights in the law are connected to human imagination grounded in the world of experience and culture.

When William James saw the coves cut into the forest of the North Carolina mountains for the first time, his mind’s eye reacted to the way humans had destroyed a beautiful forest. What he failed to see was the meaning of the coves for all of those who lived and died on the land. What he failed to see was that the coves cut into the forest were a source of beauty and

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<sup>23</sup> WINTER, *supra* note 6, at 11.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 333-47.

<sup>26</sup> *Id.* at 351.



hope for those who struggled to survive in the mountains. What James came to see was a new source of meaning in the practices and commitments of the people who lived on the mountains. Winter wants us to rediscover the meaning of our law in our own practices and commitments. To do what he wants us to do, we must first come to understand how reason in law actually works and what it means. This is what one can learn from reading Winter's text.

Winter's text demonstrates how "meaning-making" in the law is shaped and constructed from human imagination situated within a physical, cultural, social, and ideological milieu. I read Winter as arguing that we should better understand the meaning we make in the law in order to understand how law might better serve us in creating the kind of society we desire. For Winter, the new lessons about the mind should help us better understand how we can do things with the law in the course of constructing and reconstructing the world in which we live.<sup>27</sup> In doing so, we can discover what it means to be human in the law. As Winter explains:

[O]nce we recognize that meaning is constituted in our imaginative interactions with the environment, we can begin to understand ourselves as human—that is, as beings who think in terms of our situation, form our categories in contact with our experience, and modify that situation and that experience by the meaning we discover in them.<sup>28</sup>

## II. THE COGNITIVE INSIGHTS OF A *CLEARING IN THE FOREST*.

*A Clearing in the Forest* offers some important new ideas about how reason works in the law. Drawing from the work of George Lakoff and Mark Johnson and other cognitive scientists, Winter develops his insights from three basic ideas about the nature of human cognition: (1) reason in the law is embodied and imaginative and not syllogistic and logical as some believe; (2) metaphor is a central modality of reason in law, and not merely an ornamental device used to spice up language; and (3) ideas and concepts in the law can be shown

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<sup>27</sup> *Id.* at 356.

<sup>28</sup> WINTER, *supra* note 6, at 356-57.

to have a contingent grounding in human experience.<sup>29</sup> These three insights challenge some of the basic notions about how language, reason, concepts, and categories work to give meaning to things in the law and how law's claim to reason can be put into question.

My own work in the law of boycott reveals how Winter's three foundational principles of human cognition can explain the mess that judges have created with their use of traditional forms of legal reasoning in dealing with boycott questions in different substantive areas of the law.<sup>30</sup> Judges have organized their knowledge and understandings of boycott phenomena by reference to imaginative categories structured by idealized cognitive models ("ICMs") of boycott. These models are used in adjudication to create legal categories that distinguish between boycotts of different groups—labor, civil rights, and commercial organizations. The legal categories operate as fixed points in legal reasoning, even though the imaginary boundary lines between the categories are quite transparent and highly revisable. The models give rise to distinct prototypical cognitive effects that judges use to render what they believe to be legally correct answers about boycott activities of different groups in society.

Thus, labor boycotts, framed by an ICM arising out of the meaning of Trade Union unrest in the early part of the last century, have been used to deny otherwise peaceful, and obviously political, labor boycotts of constitutional protection under the First Amendment. On the other hand, civil rights boycotts, framed by an ICM arising out of governmentally sanctioned racial discrimination, have been accorded First Amendment protection. The inconsistency posed by the case law is never seriously examined because the models used to frame legal analysis about boycotts arise from substantively different imaginative grounds—mob violence (labor), democratic participation and self-help (civil rights), or competitive process (business/antitrust). What reveals the imaginative and metaphoric nature of the boycott decisions are the colorful images that judges use to justify their results. In the early common law of labor boycotts, judges labeled

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<sup>29</sup> *Id.* at 5-6.

<sup>30</sup> GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* (1999).

otherwise peaceful labor boycotts as "acts of murder," and even today secondary boycotts are described as if they were like "cancer" that must be cut out of the body.<sup>31</sup> The imaginative representation of boycott as "murder" seems strange, but it makes perfect sense in light of the prototypical effects of an imagined category of boycott that equates peaceful labor-boycott activity with uncivilized, animalistic behavior.

We cannot expect to understand how legal reasoning works in the law of boycott, or anywhere else for that matter, until we understand how metaphor performs cognitively to justify and legitimate highly contested issues in the law. We can continue to pretend that the law is neutral and logical, but only if we deny the metaphoric nature of how reason works. As Gary Peller has insisted: "[L]egal discourse can present itself as neutral and determinate only to the extent it denies its own metaphoric starting points."<sup>32</sup>

*A Clearing in the Forest* offers a methodology for discovering the metaphoric starting points of law's reason. In doing so, Winter helps to reveal the politics of law which critical legal studies scholars famously argued in their earlier critiques of law's reason.<sup>33</sup> Winter uses the new learning about the way the mind works from cognitive science to explore why law does work as "law" and why law is a profoundly ideological activity. Law works as "law" because judges and practitioners rely upon a shared "social process of persuasion" that operates in terms of background normative experience.

For example, when judges thought of labor boycotts as "acts of murder" in early common law, they relied upon a highly ideological understanding of the meaning of labor associations that associated labor activity with acts of violence.<sup>34</sup> The horrific images of riotous mobs and bombs exploding, made famous in the history of the labor movement, became the linguistic ground for legal vilification of labor boycotts in the modern era. The ideological dimension of boycott law has since become pronounced, as Winter argues in

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<sup>31</sup> See *id.* at 33-42, 101-08.

<sup>32</sup> Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1182 (1985).

<sup>33</sup> See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* ch. 6 (1995).

<sup>34</sup> MINDA, *supra* note 26, at 47-52.

his book,<sup>35</sup> precisely because “judges are [today] acting in good faith, unaware of the normative entailments of the conceptual materials with which they work.”<sup>36</sup> It is the commonplace nature of metaphoric reason that gives law its ideological content. The imaginative nature of the legal mind, assuming that we can talk of such a thing, is the product of a particular context, a particular culture, and a unique institutional setting. What Winter’s text does then is to reveal how the so-called rational modes of legal analysis are in fact the product of a highly selective legal imagination that has developed out of the ground of its own institutional, cultural, and personal experiences.

### III. REPTILES IN THE WEEDS

In reading the William James story about his experiences in the forest of North Carolina mountains, I am reminded of what Justice Stevens had said about the dangers of the forest. To quote Justice Stevens: “A court must be wary of claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.”<sup>37</sup> This quote was used by Justice Stevens to explain the pitfalls of using case precedent to explain the legal meaning of boycott. Justice Stevens explained that the word “boycott” was like the word “conspiracy,” in that, in the law, it had a chameleon-like nature; these words were capable of changing its meaning from context to context.<sup>38</sup> Once we begin to focus on context as a ground for ascertaining the meaning of things, we begin to run into the same interpretative problems that judges and lawyers face on an everyday basis in their attempt to apply the law to “facts.” The same imaginative structures that enable judges to apply laws in surprisingly new ways renders the entire ground of context like quick sand—regularity of law can be swallowed up at any moment by surprisingly new ideas about the facts and context.

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<sup>35</sup> WINTER, *supra* note 6, at 331.

<sup>36</sup> *Id.* at 331.

<sup>37</sup> NAACP v. Claiborne Hardware Co., 458 U.S. 886, 934 (1982).

<sup>38</sup> *Id.*

Consider, James's story about the "clearing" that had been cut into the forest of the North Carolina mountains that initially caught his attention and imagination. In observing those clearings, James learned to understand how meaning was contingent upon the actions of the people who cut the coves into the forest. However, that same context may conceal a long lost meaning that has since been repressed in the imagination of the people now living in the coves. Maybe William James should have reflected more on how the land that the mountaineer cleared came at the expense of Native Americans who were driven from the forest. Their cognitive imagination has been wiped clean from the landscape. Maybe their blood and lost culture is one of the reptiles hidden in the forest that Justice Stevens warned us about. The reptile is always there hiding in the weeds and waits to be discovered by the eye of an imaginative observer. Once discovered, the reptile comes out of the weeds and we are faced with new and possibly dangerous interpretative accounts. We have largely forgotten the ground that was once the world of another culture because our law and its reason no longer provide us with a means for discovering knowledge of that world. We should be wondering if there are other reptiles hidden in the forest. *A Clearing in the Forest* reminds us that unless we get beyond the sedimentations of meaning we have created with our human imagination, we will, as Winter explains, "remain prisoners of the social field—the very clearing in the forest—that we ourselves have made."<sup>39</sup>

The problem is that the legal mind is wedded to a sedimented legal culture that is ideologically structured to persuade us that reason in the law works like a machine to logically manufacture outcomes or results. The ideology of the legal culture also creates its own imaginative world for dealing with the complexities of life. The legal culture thus motivates us to think of the judge as a neutral decision maker who logically follows the rules laid down. Ironically, the legal culture cements the view of legal reasoning as constraint in the minds of judges and lawyers by reference to a host of imaginative metaphors that imagine the rule of law as stable and determinant authority. The cognitive tools used in legal

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<sup>39</sup> WINTER, *supra* note 6, at 356.

analysis are used by judges as if they were neutral, when the tools are skewed by normative assumptions drawn from the context and background of legal culture. The law works, however, because legal actors instinctively rely on a host of subtle cognitive tools to give law and legal persuasion the appeal of justification and regularity.

The grossly under-theorized nature of reason in law merits attention, and Steve Winter's book is one of the most ambitious efforts to date to shed new light on the problem. Winter's contribution not only breaks new ground in understanding how reason in the law does work; it also provides a new dialogue for better appreciating the human dimensions of law generally. The critical cognitive tools of analysis that Winter offers allows one to discover the "reptiles" as well as get at the meaning behind the "trees," "clearings," and other imaginative features of the "forest" we humans have created in our discourses about law. For that we owe Winter a measure of gratitude for laboring so long in the developing coves of cognitive legal studies. It is thus bitter-sweet that he will be leaving us here at Brooklyn Law School for new challenges and new honors at Wayne State University School of Law. I, for one, thank him for being an intellectually stimulating and committed colleague and friend. He will be missed.

