

CARL S. BJERRE

## MENTAL CAPACITY AS METAPHOR\*

**ABSTRACT.** Mental capacity is a foundational concept in contract law, but the term is metaphorical, and a detailed analysis of three representative judicial opinions shows that the explanations that courts give of the term are equally metaphorical. As such, the term illustrates well the cognitivist view that abstract concepts arise through an imaginative but orderly projection from the domain of bodily and social experience. Legal Realists such as Felix Cohen condemned metaphors for their supposed failure to constrain judges, but recent empirical work suggests that metaphorical thinking is indeed constrained, and accordingly thinkers such as Cohen would probably in fact have welcomed cognitive analysis of law, both for its methods and for its substantively progressive disposition.

### 1. INTRODUCTION

It is axiomatic that contractual obligations are not enforceable against a person who lacks mental capacity. The principle is inseparable from contract law's central ideal of personal autonomy.<sup>1</sup> And yet no one has ever noticed that the term "mental capacity" is entirely metaphorical. The term "capacity" refers literally not to mental ability, but rather to the volume of contents that a container is able to hold. To refer to mental ability using this word, then, is to use it metaphorically, that is, to describe one conceptual domain using terms that literally refer to another. In this article I show that contract law's use of the word "capacity" is just one aspect of a per-

---

\* I am grateful to Andrea Coles-Bjerre, Mark Johnson, Jim Mooney, and Steve Winter for valuable comments on a draft of this article, to Stephen Morse for insightful commentary at a panel of the International Congress on Law and Mental Health in Amsterdam, and to participants at the International Roundtables for the Semiotics of Law in Lyon, the American Association of Applied Linguistics in Portland, and the Association for the Study of Law, Culture and the Humanities in Austin. For much-appreciated editorial support I thank Sophie Cacciaguidi-Fahy and Anne Wagner, and for financial support I thank the Luvaas Faculty Fellowship Endowment Fund.

<sup>1</sup> As Duncan Kennedy points out, the doctrines under which we decline to enforce contracts are as constitutive of the regime of freedom of contract as the doctrines under which we do. D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power", *Maryland Law Review* 41/563 (1982) at 569–570.

vasive metaphorical system, and I explore the legal importance of that system against the background of the so-called Second Wave, or second generation, of the cognitivist revolution.

The vast amount of interdisciplinary work now flourishing in the cognitive sciences is devoted to understanding the patterns and dynamics of human thought. Using disciplines from linguistics to psychology to neurology, the cognitive sciences seek to move beyond complacent assumptions that the mind is a closed black box that resists analysis and just seems to work in an unproblematic and neutral way. The analysis of metaphor in discourse is just one facet of this new breed of cognitive analysis, and in this brief article I can only begin to give an account of even that facet. But by giving sustained attention to a single complex of metaphors in a single and heretofore neglected area of law, I hope to show how powerful these and related tools can be, while also demonstrating some important continuities between cognitive analysis and the earlier work of the Legal Realists.

Part 2 of the article shows that the phrase “mental capacity” is just the tip of an iceberg. This phrase is not an isolated figure of speech, but rather forms part of a pervasive mental network that helps to metaphorically structure the way judges and others conceive of mental power and, by extension, the mind. In Part 3, I closely analyze excerpts from three judicial opinions that are representative of contract law’s traditional view of mental capacity as the power to understand. I demonstrate that this traditional view rests on a complex of four principal metaphors drawn from everyday physical experiences such as containing, seeing, grasping and lifting. When judges and other wielders of the language write of mental capacity as the power to understand, they conceive of capacity in terms of those physical experiences. In Part 4, I first show that the cognitivist analysis of metaphor seems on a superficial level to confirm the critique of empty concepts that was articulated by the legal realists – represented here, for sharpness of focus, by Felix Cohen’s *Transcendental Nonsense and the Functional Approach* – and then I proceed to show that cognitivist analysis, properly understood, actually resonates deeply with Cohen’s affirmative program. In particular, a few simple cognitivist concepts suffice to establish with powerful empirical force that judicial construction of legal concepts derives from physical and social realities. Part 5 extends this portrait of the echoes between the two schools of thought by suggesting that cognitivism tends

to share legal realism's substantive orientation toward progressive reform.

Doctrinally, the article shows that the traditional approach to mental capacity remains dominant, and that only a feeble success has been achieved by a progressive approach that takes account of volition in addition to understanding. Jurisprudentially and linguistically, the article shows that both the traditional and the progressive approach are equally founded on metaphor; that both have a claim to conceptual legitimacy; that much of the traditional approach's dominance may be attributable to the strength and coherence of its metaphors; and that the progressive approach can potentially gain a similar dominance. Programmatically, the article supports the progressive approach on the simple grounds that concepts such as mental capacity should be constructed in a way that reflects the values we wish to advance — here, autonomy and the consensuality of transactions. The programmatic point is addressed only briefly because it is fairly clear as an analytic matter, but it is nonetheless a linchpin of the article. The success of the progressive approach can directly affect people's lives, and the fact that the jurisprudential and linguistic points give new power to the progressive approach shows that they can carry great practical value in addition to their theoretical interest.

## 2. METAPHOR'S CONCEPTUAL NATURE

Traditionally, American contract law has assessed a person's mental fitness to be bound by contract using only a single criterion: his or her power to understand the transaction.<sup>2</sup> Persons who do have the power to understand are said to have "mental capacity" and are therefore bound by the transaction, while persons who lack that power are said to lack mental capacity and are not bound. Notwithstanding occasional hints to the contrary,<sup>3</sup> this power to understand has remained the sole criterion for mental capacity for most of the decades since the birth of modern contract law. And despite the emergence in a few jurisdictions of a more progressive

---

<sup>2</sup> E.g., *Paine v. Aldrich*, 133 N.Y. 544, 30 N.E. 725 (1892). This case is further discussed *infra* in Part 3.

<sup>3</sup> See *infra* note 118.

approach involving volition,<sup>4</sup> most jurisdictions continue today to adhere to the traditional power-to-understand approach.<sup>5</sup>

The concept of mental capacity has never been examined with a view to the literal or non-literal nature of language. But when the subject is raised, one immediately notices the seeming peculiarity that the topic of power to understand is glossed by the term “capacity.” This word is literally a reference to containers rather than to mental power,<sup>6</sup> and of course, the mind is not literally a container of any kind.<sup>7</sup> When the word is used in reference to mental power, that reference operates by means of metaphor, that is, the description of one domain (often referred to as the *target domain*) in terms borrowed from another domain (the *source domain*). To use the term mental capacity is to describe the target domain, the mind, in terms borrowed from the source domain, containership. The container-related meaning of the word “capacity”, standing alone, would be an insubstantial basis on which to make any large assertions about this body of contract law, let alone about language or concepts generally. After all, homonymy is common in the English language: two meanings are often carried by a single word, as with the word “pen”, which can refer either to a writing implement or to a small enclosure for farm animals, and no one would argue that such a phenomenon alone has any great significance. But the case of “capacity” is much more than mere homonymy: the dual meanings of the term “capacity” are but one indication of a heavily systematic pattern of language and, it appears, of thought.

Traditionally, metaphor has been understood as a rhetorical device, as an ornament tacked onto independently formulated literal meanings, as a dispensable or persuasive embellishment of what would otherwise be ordinary speech or writing. But a very different view of metaphor began to emerge with the work of philosopher of

<sup>4</sup> See *infra* Part 5.

<sup>5</sup> See *infra* notes 100–101 and accompanying text.

<sup>6</sup> As a historical matter, the word initially referred only to containers: its root is “ability to receive” or “ability to contain.” *Oxford English Dictionary*, 2nd edn. Vol. 2 (New York: Oxford University Press, 1989) 857. Whether the other senses of the word that have emerged in the meantime are literal or metaphorical is a question of degree: some would view them as metaphorical extensions of a single literal core meaning, and others would view them as new, independently lexicalized literal senses of their own. For discussion of these other senses (and in particular the sense of having power by virtue of one’s office or position, as in “the heir apparent’s capacity as attorney-in-fact”), see *infra* notes 42 and 51–59 and accompanying text.

<sup>7</sup> The head is a container of sorts, but contract law is concerned with mental capacity and not cranial capacity.

language Max Black,<sup>8</sup> and under the impetus of George Lakoff and Mark Johnson's ground-breaking *Metaphors We Live By*<sup>9</sup> that view is now flowering in the fields of philosophy of language, linguistics, psychology, neurology, and the other cognitive sciences. The cognitivists propose that metaphor, far from being a post hoc embellishment of already-formulated thought, is a tool with which the mind constructs concepts in the first place. Metaphor doesn't just express thoughts in an interesting way; it helps to determine or discover them. Metaphors are a way in which we understand. In a word, they are not just linguistic, but conceptual.<sup>10</sup> And in this article I argue that the law of mental capacity to contract substantiates and is illuminated by the cognitivist view.

The cognitive view of metaphor is relatively unconcerned with single expressions or figures of speech, and concentrates instead on the patterns of thought and inference that are revealed by larger systems of expressions. Under the cognitivist view, a *metaphor* is distinct from the particular *metaphorical expressions* that instantiate, reveal, or give surface expression to a metaphor. Metaphorical expressions are particular linguistic figures of speech, and metaphors are more general conceptual structures that underlie and animate the particular metaphorical expressions.<sup>11</sup> Thus, "mental capacity" is just one metaphorical expression, and it instantiates the broader conceptual metaphor THE MIND IS A CONTAINER.<sup>12</sup> This

<sup>8</sup> M. Black, "Metaphor", in *Models and Metaphors: Studies in Language and Philosophy* (Ithaca: Cornell University Press, 1962), 25 reprinted in M. Johnson, ed. *Philosophical Perspectives on Metaphor* (Minneapolis: University of Minnesota Press, 1981).

<sup>9</sup> G. Lakoff and M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1987, with 2003 afterword).

<sup>10</sup> This emphasis on the role of metaphor in concept formation is in some ways related to, but more basic than, the emphasis that some rhetoric-based analysts place on the role of metaphor in argumentation, persuasion, or effective communication. See, e.g., J. Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis* (New York: Palgrave MacMillan, 2004). The study of thought is different from the study of the manipulation of thought, and though the former is surely a useful tool for the latter, it is also much more than that. By the same token, the cognitive framework of a speaker or writer is generally more subconscious than his or her pragmatic intentions, and thus potentially revealing in a different way.

<sup>11</sup> G. Lakoff, "The Contemporary Theory of Metaphor", in *Metaphor and Thought*, 2nd edn., ed. A. Ortony (Cambridge and New York: Cambridge University Press, 1993), 203.

<sup>12</sup> For ease of exposition this article refers to overall conceptual metaphors with small capital letters and to individual linguistic expressions with italics or quotation marks.

article, by the same token, uses the expression “mental capacity” only as the point of departure for an analysis of a complex of related expressions that are found in the case law. By analyzing selected excerpts from the case law I show that at least four conceptual metaphors are at work: THE MIND IS A CONTAINER metaphor already mentioned, as well as KNOWING IS SEEING; IDEAS ARE OBJECTS; and MENTAL WELL-BEING IS PHYSICAL WELL-BEING.<sup>13</sup>

### 3. TRADITIONAL CAPACITY CASE LAW AS A SYSTEM OF METAPHORS

This Part begins by relating the basic facts and the legal pronouncements from three representative mental capacity to contract decisions. Then, in Part 3.2, I analyze that raw discourse into four groups of expressions corresponding to the four metaphors on which this article centers. Though both sections of Part 3 remain relatively laden with concretes at the expense of theory, this is necessary groundwork and context for the theoretical explanation of the cognitivist treatment of metaphor, which is offered in Part 4.

#### 3.1. *Representative discourse from three judicial opinions*

One central chestnut in the mental capacity case law is *Paine v. Aldrich*, a New York Court of Appeals opinion from the late 19th century.<sup>14</sup> John Paine, six months before his death at age 92, sold a highly valuable block of New York City real estate to Elizabeth Noble, who then resold a portion of it to Elizabeth Aldrich. After Paine’s death, his grandson William Paine sued Aldrich, alleging that the sale to Noble was invalid due to the grandfather’s lack of mental capacity and that he, William, was therefore the parcel’s true owner by virtue of John’s will. The lower courts rejected William’s allegations and ruled in favor of Aldrich. The New York Court of Appeals affirmed, holding that the evidence supported the conclusion that John

had such mental capacity at the time of the execution of the deed that he could collect in his mind without prompting, all the elements of the transaction and retain them for a sufficient length of time to perceive their obvious relations to each other and to form a rational judgment in regard to them.<sup>15</sup>

---

<sup>13</sup> As discussed below, the number of conceptual metaphors actually involved here can be viewed as being even smaller. See *infra* note 79 (discussing Eve Sweetser’s Mind-As-Body Metaphor).

<sup>14</sup> 133 N.Y. 544, 30 N.E. 725 (1892).

<sup>15</sup> 133 N.Y. at 546.

Another influential early opinion is *Sutcliffe v. Heatley*,<sup>16</sup> decided by the Supreme Judicial Court of Massachusetts. Mary Sutcliffe had suffered from an evidently serious case of epilepsy for about ten years, among other possible mental impairments. She mortgaged her real estate, and her conservator sued to invalidate the mortgage documents on the grounds that Sutcliffe lacked mental capacity. The court articulated the law as follows:

The test in cases of this kind is whether the person executing the instrument had sufficient mental capacity to be capable of transacting the business. If she could not understand the nature and quality of the transaction or grasp its significance, then it was not the act of a person of sound mind. There may be intellectual weakness not amounting to lack of power to comprehend. But an inability to realize the true purport of the matter in hand is equivalent to mental incapacity.<sup>17</sup>

And, in reliance on the fact-finder's conclusions that Sutcliffe "did not have sufficient mental strength to care properly for her property and to understand the effect of the [mortgage documents]," the court ruled that the mortgage documents were void.

A modern Alabama decision, *Lloyd v. Jordan*,<sup>18</sup> rounds out this short sampling of opinions. In 1983, George Lloyd, who was then married to Olivia, had purchased an annuity naming Betty Lou Jordan and Marion Pitts – his daughters by a previous wife – as beneficiaries. George and Olivia later divorced, but remarried in 1987, and shortly after their remarriage Olivia obtained a form for George to sign, making herself the annuity beneficiary instead of Betty Lou and Marion. However, George had been suffering from mental problems since a few months before the remarriage, and was declared non compos mentis a month after it. Olivia herself testified that she "couldn't say" that George "knew what he was doing" on the day he signed the form. The probate court ruled that the change-of-beneficiary form was not effective, and the state Supreme Court affirmed, quoting extensively from a legal encyclopedia:

[E]ach party must be of sufficient mental capacity to appreciate the effect of what he is doing.... There is no contract where one of the parties was, by reason of... mental aberration, or otherwise, incapable of understanding and appreciating the nature, force, and effect of the agreement..., as where he was unable to do so

---

<sup>16</sup> 232 Mass. 231, 122 N.E. 317 (1919).

<sup>17</sup> 232 Mass. at 232–233.

<sup>18</sup> 544 So.2d 957 (Ala. 1989).

because insane, or mentally infirm, or because of incapacity resulting from lunacy, idiocy, senile dementia or imbecility, or any other defect or disease of the mind.<sup>19</sup>

The court added that

a person's contract will not necessarily be invalidated because he was aged, mentally weak, and feeble in mind....<sup>20</sup>

but, on the strength of the evidence, upheld the determination that Betty Lou and Marion were the beneficiaries of the annuity.

As shown below, each of these three excerpts is heavily freighted with metaphorical expressions demonstrating the non-literal conceptions that judges and others have of ideas such as mental power. Moreover, the metaphors involved in these three excerpts are representative of metaphorical discourse that recurs over and over in this area of the case law.<sup>21</sup> A different selection of opinion excerpts would generate a somewhat different sampling of metaphorical expressions, but not a significantly different body of metaphors.

### 3.2. *The opinions analyzed*

Each of the opinions excerpted above is, of course, an elaboration of the single legal principle already discussed, namely that mental capacity to contract depends upon a person's power to understand the transaction. But it is striking that each of the opinions explains that principle almost entirely in metaphorical terms, and that the numerous metaphorical expressions in the excerpts turn out to instantiate only four principal metaphors: THE MIND IS A CONTAINER; KNOWING IS SEEING; IDEAS ARE OBJECTS; and MENTAL WELL-BEING IS PHYSICAL WELL-BEING.

Each of these metaphors is important in its own right as a component of the way we think (in life generally as well as in law). And the fourth metaphor, MENTAL WELL-BEING IS PHYSICAL WELL-BEING (or actually a subset of that metaphor, which I call MENTAL

<sup>19</sup> 544 So. 2d at 959, quoting 17 C.J.S. Contracts § 133(1) (Brooklyn: Academic Law Book Co., 1963), at 858–859. It is startling to see offensive language like this being used in such a recent case, even if only through quotation to an older source, and I reproduce and analyze it here only because of the probative value of the metaphors that it instantiates.

One significant passage of the C.J.S. quotation is omitted from the text above and discussed *infra* note 118.

<sup>20</sup> *Id.*

<sup>21</sup> The excerpts given here do tend to be denser than usual in the concentration of their metaphorical expressions, but this atypicality merely streamlines the exposition and does not change its substance.

POWER IS PHYSICAL POWER), is particularly illuminating for purposes of this article because it shows how the “mental power” sense of the word “capacity” is related to its other prominent legal sense, “position held” (as in “In my capacity as Mayor, I hereby declare February 23 to be Founders’ Commemoration Day”). But the central importance of the detailed analysis of the opinions’ metaphors that follows is two-fold. First, it shows that the metaphorical expressions have an astonishing degree of mutual coherence. And second, it shows that together, the four metaphors exhaust virtually every statement in the excerpts. Thus, nearly everything of significance in the judicial language is to be found by analyzing the metaphors, and one is left marveling at the fact that the statements of law are little more than metaphorical confections. But as Part 4 shows in depth, this fact is no reason to condemn metaphor as a tool of judicial reasoning.

The four principal metaphors emerging from the opinion excerpts, and the way that the various particular expressions from those excerpts fit into the metaphors, are examined in detail in this Part 3.2. The detailed network of correspondences and resonances demonstrated here can be somewhat dizzying before it is cast into a simplifying theoretical framework (as Part 4 will do). But rather than belaboring an as-yet useless-appearing theory first and then rehabilitating it with facts, it seems preferable to unleash the unruly facts first and then show the explanatory power of the theory. I offer here just one foretaste of the theory that will follow in Part 4, which is that the myriad metaphorical expressions analyzed here can all be marshaled into order using four powerful and simple linguistic concepts. The four concepts are polysemy (multiplicity of meanings), inferential correspondence (coherence between the various instantiations of a metaphor), novel extensions (the expressive functionality of newly invented expressions within a metaphor) and diachronic semantic change (the metaphorical nature of meaning-shifts across time). Examples of all four concepts are at work in the analysis below, and will be tied together in Part 4.

### 3.2.1. *THE MIND IS A CONTAINER*

We begin with the metaphor that the MIND IS A CONTAINER simply because it most centrally underlies the expression “mental *capacity*.” The same metaphor also underlies a number of other expressions that are a common feature of our ordinary patterns of thought. For example, *sound mind* refers to mental health, but we also routinely use the term *sound* to refer to structural solidity, as

in the phrase *sound construction*, and perhaps the reason for this double meaning is that we conceive of the mind as a container, which functions well when soundly constructed and poorly when not. Similarly, we call people *narrow-minded* or *broad-minded*, with reference to the configuration of their mental containers; pop psychologists explain that some people *compartmentalize*, meaning that they tend to over-separate various contents of their mental containers; and in slang a person may be described as a *crack-pot*, which clearly refers to the structural unsoundness of a mental container, much along the lines of “sound mind.”

The three judicial opinion excerpts reflect the same patterns of thought, repeatedly describing the mind in terms of a container. To begin with, *Sutcliffe* refers to being of *sound* mind, and as already seen, one important meaning of soundness is structural solidity or quality of construction, as with a house that has a “sound foundation”.<sup>22</sup> *Lloyd* refers to *dementia*, which is defined by more than one authority as the condition of being *out of* one’s mind,<sup>23</sup> as if our minds were containers that we are within while mentally well and outside of while mentally unwell. *Paine* refers to an ability to collect elements of a transaction *in* the mind, and the container-related meaning of “in” is of course clear. *Sutcliffe* refers to being *capable* of transacting business, and though the word “capable” today refers to general ability, it is directly related to the word “capacity” both in derivation and in meaning: one early definition of *capable* is “able to take in, receive, contain, or hold; having room or capacity for”.<sup>24</sup> Against this background, the fact that the *Paine* and *Sutcliffe* opinions both refer to mental *capacity*, and that *Sutcliffe* also uses its antonym *incapacity*, stand much more clearly revealed as instances of metaphorical expressions derived from the ability or absence of ability to contain.

### 3.2.2. KNOWING IS SEEING

The second principal metaphor at work in the quoted passages is KNOWING IS SEEING. A number of scholars have noted that the mental phenomenon of knowing or understanding is often referred to in terms of the physical phenomenon of seeing. For example, we

<sup>22</sup> This sense may be derived from an additional sense of “sound,” i.e. healthiness. See *infra* note 47 and accompanying text.

<sup>23</sup> *Oxford English Dictionary*, Vol. 4 (1989), 434–435; *Webster’s New International Dictionary of the English Language*, 2nd edn (Springfield, Massachusetts: G & C Merriam & Co., 1943), 695.

<sup>24</sup> *Oxford English Dictionary*, Vol. 2 (1989), 856.

say “I *see*” when we mean that we understand, and with similarly metaphorical meanings we say “his motives are *transparent*”, “your explanation is *unclear* (or *opaque*)”, “can you *shed some light* on the matter”, “her remark was *brilliant*”, “the detective *revealed* the truth,” “Franklin *discovered* that lightning is a form of electricity”, “the proposal *looks* different from my *point of view*,” and so on through examples that are pervasive and virtually infinite.<sup>25</sup> Judicial opinions on the question of mental capacity similarly often refer to a mentally ill person’s “*lucid* intervals.”

*Paine* rests upon this same metaphor when it refers to the need to *perceive* the obvious relations between a transaction’s elements: the main sense of “perception” is an interaction between the body’s sense organs and the physical world. The word is not specific to the sense of sight as opposed to hearing or the like, but if any clarification is needed, *Paine*’s immediate context of perceiving the *obvious* relations between the transaction’s elements makes clear that sight is the reference, since the term “obvious,” in reference to the senses, generally means obvious to the sight. *Paine* goes on to refer to forming a judgment *in regard to* the elements, and though the primary sense of this phrase is “about”, the underlying root of “looking at” is evident.

Finally and most important, the word *understand* (in *Sutcliffe* and *Lloyd* as well as innumerable other glosses on mental capacity) seems itself to be a metaphorical extension from the ideas of light or seeing. The word’s meaning evolved in Old English, and a definitive analysis of it has eluded the experts so far, but one appealing theory rests on the point that *under-* in Old English carried a sense of “among,” and that “standing among” would be associated with physical closeness and therefore with knowing,<sup>26</sup> predominantly

<sup>25</sup> E. Sweetser, *From Etymology to Pragmatics* (Cambridge and New York: Cambridge University Press, 1990), 28–48; G. Lakoff and M. Johnson, *Philosophy In the Flesh* (New York: Basic Books 1999), 238–240; G. Lakoff and M. Johnson (1987), 48; C.J. Kay, “Metaphors We Lived By: Pathways Between Old and Modern English”, in *Essays on Anglo-Saxon and Related Themes in Memory of Lynne Grundy*, eds. J. Roberts and J. Nelson (London: King’s College 2000) 273, 283–284.

<sup>26</sup> E.g., O. Jäkel, ‘The Metaphorical Conception of Mind: ‘Mental Activity is Manipulation’, in *Language and Cognitive Construal of the World*, eds. J.R. Taylor and R.E. MacLaury (Berlin and New York: Mouton de Gruyter 1995), 224. Leonard Bloomfield also wrote that the “stand close to” or “stand among” sense of “understand” “must have been central at the time the compound was formed,” but is now obsolete. L. Bloomfield, *Language* (London: George Allen and Unwin Ltd. 1933), 433.

through the sense of sight one presumes. Alternatively, the Old English language and literature scholar Carole Hough shows in a recent article that the verb *standan* in Old English carried not only the sense of “to stand, to remain” but also the sense of “to appear, to shine”.<sup>27</sup> She therefore suggests that the modern meaning of “understand” is attributable to a metaphorical shift in the meaning of *standan* from the source domain of physical illumination to the target domain of mental illumination, just like the metaphorical shifts in meaning “see”, “transparent” and the other terms discussed here.

### 3.2.3. THINKING IS OBJECT MANIPULATION

The third metaphor at work in the opinion excerpts is also a standard part of our thinking pattern: THINKING IS OBJECT MANIPULATION. We understand the process of thinking in terms borrowed from the physical manipulation of objects.

“Ideas are objects that you can *play with*, *toss around*, or *turn over in your mind*. To understand an idea is to *grasp* it, to *get* it, to *have it firmly in mind*. Communication is *exchanging ideas*. Thus, you can *give* someone ideas and *get ideas across* to people. Teaching is *putting ideas into* the minds of students, *cramming their heads full of ideas*. To fail to understand is to fail to grasp, as when an idea *goes over your head* or *right past you*. Problems with understanding may arise when an idea is *slippery*, when someone throws *too many things at you at once*, or when someone *throws you a curve*”.<sup>28</sup>

By the same token we say “Let me get my thoughts *in order*,” “let me *gather* my thoughts,” “I am *groping* for the rest of the idea,” “he *picked up* Italian quickly,” “her thoughts are *scattered*,” and

<sup>27</sup> C. Hough, “New Light on the Verb ‘Understand’”, in *New Perspectives on English Historical Linguistics: Selected Papers from Glasgow, 21–26 August 2002*, Vol 2, eds. C.J. Kay, et al. (Philadelphia: John Benjamins, 2004) 139. In Hough’s analysis, the prefix *under-* is not semantically important (and its main function is perhaps to convert *standan* from an intransitive verb to a transitive one). *Id.* at 146. For other possible analyses of “understand” including a summary of the literature, see generally J. Newman, “How to Understand *understand*”, *Neuphilologische Mitteilungen* 102 (2001), 187–190.

<sup>28</sup> G. Lakoff and M. Johnson (1999), 240–241. The quoted references to “exchanging,” “giving” and “getting across” ideas are allusions to what Michael Reddy dubbed the Conduit Metaphor, in which meaning is understood as the contents of packages that are transmitted from person to person. Michael J. Reddy, “The Conduit Metaphor: A Case of Frame Conflict in Our Language About Language,” in Ortony (1993), 164.

“he is *mixed up*.” And the same pattern of metaphorical expression is at work with somewhat more antiquated or legalistic expressions: the term *deranged*<sup>29</sup> derives from the same root as the words “arrange” and “rank,” and to say that a person is deranged is therefore to speak of his or her disarrangement of objects.<sup>30</sup> The same is true of the phrase “mental *disorder*.” And the law-Latin phrase *non compos mentis* (which derives from *componere*, meaning to put together or compose, plus *mens*, meaning mind) is still sometimes used in contemporary judicial opinions.<sup>31</sup>

*Paine* refers to *collecting* the *elements* of a transaction, and thereby the ideas essential to an exchange are described in terms borrowed from the domain of physical objects.<sup>32</sup> In the same vein, *Paine* refers to *retaining* the elements, as if they were objects that might roll away, and to *forming* a judgment, as if the judgment were a malleable physical substance to be shaped or configured.<sup>33</sup> The judgment should be *rational*, a term whose contemporary meaning is purely mental but whose roots are tied to reckoning,<sup>34</sup> that is, counting or enumerating of objects. *Sutcliffe* refers to *grasping* a transaction’s *significance*, and “grasping” is of course primarily something that we do to an object with our hands.<sup>35</sup> (Similarly,

<sup>29</sup> E.g., *Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001).

<sup>30</sup> *Oxford English Dictionary*, Vol. 4 (1989), 495.

<sup>31</sup> E.g., *Knight v. Lancaster*, 988 S.W.2d 172, 177 (Tenn. App. 1998) (quoting trial judge).

<sup>32</sup> See G. Lakoff and M. Johnson (1999), 240–241.

<sup>33</sup> The non-physical senses of the term “form” are more important than the non-physical senses of the other terms discussed here, perhaps chiefly due to the word’s use in Plato. However, in *Paine*, it is clearly a metaphorical sense of the physical meaning that is intended. See also R. Williams, *Keywords: A Vocabulary of Culture and Society*, Rev. edn. (New York: Oxford University Press, 1983), 137–140 (observing that the word’s uses span “the whole range from the external and superficial to the inherent and determining”).

<sup>34</sup> *Oxford English Dictionary*, Vol. 13 (1989), 218–219; C.T. Onions, ed. *The Oxford Dictionary of English Etymology* (New York: Oxford University Press, 1966), 741, 744. The sense of “rational” as reckoning is visible in contemporary English terms such as “ration” and “ratio.” This sense is also tied to the prevalent computational view of the mind as a computer program that manipulates 1’s, 0’s and other symbols. See generally G. Lakoff and M. Johnson (1999), 257–265. See also *infra* note 36 and accompanying text.

<sup>35</sup> The term “grasp” is particularly important because the entire IDEAS ARE OBJECTS metaphor is sometimes articulated in the terms UNDERSTANDING IS GRASPING. E.g., S.L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago and London: University of Chicago Press, 2001a), 58.

“significance” is derived from the noun “sign,” which is primarily a physical mark on an object.<sup>36</sup> *Sutcliffe* refers to realizing the *purport* of a matter, and the root of “realize” is “thing” (as visible in current legal terms such as a trust “res” or “real property”),<sup>37</sup> while the root of “purport” is that which is carried from one place to another (as visible in contemporary English words such as “portable,” “porter” and “portamento”).<sup>38</sup> *Sutcliffe* goes on to refer to “the *matter in hand*,” and not only is “in hand” a wonderfully direct metaphorical expression but “matter” itself has a root sense of physical substance.<sup>39</sup> *Lloyd* refers, twice, to *appreciating* the effects of an action or agreement, and the root of that verb is to set a price to something.<sup>40</sup> A much more important instantiation is *Sutcliffe*’s term *comprehend*, which is derived from the Latin *prehendere*, meaning “to grasp” or “to seize”.<sup>41</sup> And even more important are the terms *capacity* or *incapacity* (used in all three opinions), *capable* (used in *Sutcliffe*) and *perceive* (used in *Paine*): each of these terms is derived from the Latin *capere*, to take.<sup>42</sup>

#### 3.2.4. MENTAL WELL-BEING IS PHYSICAL WELL-BEING

The fourth principal metaphor appearing in the case excerpts takes two different forms. Its more general form, MENTAL WELL-BEING IS PHYSICAL WELL-BEING, is not as pervasive as the other three metaphors discussed above, but it does appear in non-legal as well as

<sup>36</sup> *Oxford English Dictionary*, Vol. 15 (1989), 449–453.

<sup>37</sup> *Id.*, Vol. 13, 277, 272–274.

<sup>38</sup> To use “purport” in its usual modern sense as “carrying meaning” is to use the Conduit Metaphor, *supra* note 28. In addition to the many instantiations given by Reddy, one closely related to “purport” is “conceptual freight.”

<sup>39</sup> *Oxford English Dictionary*, Vol. 9 (1989) 479–482. The physical meaning of “matter” is still somewhat current, in phrases like “mind over matter.”

<sup>40</sup> *Id.*, Vol. 1, 581. This root of “appreciate” is visible in modern English words such as appraise, precious and depreciate.

<sup>41</sup> *Id.*, Vol. 3, 630–631. This derivation is visible in modern English words such as apprehend and prehensile.

<sup>42</sup> Onions (1966), 142, 667. The terms “capacity” and “capable” were also discussed in terms of the MIND IS A CONTAINER metaphor, *supra* note 24 and accompanying text, and “capacity” is also an important instantiation of MENTAL POWER IS PHYSICAL POWER, discussed in the text below. The fact that the same words can instantiate more than one metaphor is natural. See the discussion of cross-metaphorical coherence, *infra* notes 74–79 and accompanying text.

“Perceive” is also related to the Latin *percipere*, “to seize.” Onions (1966), 667; *Oxford English Dictionary*, Vol. 11 (1989) 520.

legal discourse, as when we refer to “mental *illness*” or “brain *death*.” Similarly, *Lloyd* refers to a person being *insane*, and this is simply the negative of the word “sane” which derives from terms meaning “healthy”.<sup>43</sup> *Lloyd* also refers to a person being mentally *infirm*, which carries a primary sense of physical weakness or ill health.<sup>44</sup> Finally, *Lloyd* refers to a *disease* of the mind, and the primary meaning of “disease” is clearly physical, even without reference to the word’s root in “ease” meaning “absence of pain”.<sup>45</sup>

The metaphor’s more specific form is MENTAL POWER IS PHYSICAL POWER. (This form is a subset of MENTAL WELL-BEING IS PHYSICAL WELL-BEING because having physical power is one attribute of a person who is in a state of health or well-being). *Sutcliffe* and *Lloyd* both refer to intellectual or mental *weakness*, *Lloyd* refers to mental *febleness*, and *Sutcliffe* refers to mental *strength*, all terms in which the physical meaning seems to be more prominent, if not historically earlier, than the mental.<sup>46</sup> *Sutcliffe* refers to a *sound* mind, an adjective that often means “healthy,” as in the phrase “sound mind and body” so often used in wills.<sup>47</sup> *Lloyd* refers to *imbecility*, which apparently derives from the expression “without a stick,” in the sense of being without physical support and therefore physically weak.<sup>48</sup> And three phrases from *Sutcliffe* all have senses relating directly to physical power: *inability* to realize, *capable* of transacting, and *power* to comprehend. (The terms *inability* and *capable* are both based on the adjective “able,” which seems primarily to refer

<sup>43</sup> *Id.*, Vol. 14, 457, Vol. 7, 1013. The Latin root is *sanus* and the French root is *sain*. The OED does not give a physical sense for “insane” in English, and notes that “sane” is almost entirely restricted to the mental sense. But the physical roots of the word are visible in current English words such as “sanitarium” and “sanitary,” and the evolution from a physical to a mental meaning evidently occurred in the source languages, before the words were brought over into English.

<sup>44</sup> This sense is echoed in the current English “infirmity,” and in the Spanish and Italian *enfermo* and *infermo* meaning “sick.”

<sup>45</sup> *Oxford English Dictionary*, Vol. 5 (1989), 33.

<sup>46</sup> The OED shows the physical sense of “strong” to substantially predate the mental sense, though the physical and mental senses of “weak” and “feeble” seem to be roughly coeval. *Id.*, Vol. 16, 946–951; Vol. 20, 33–37; Vol. 5, 798.

<sup>47</sup> E.g., In the Matter of the Estate of Janya Krokowsky, 182 Ariz. 277 (1995). The fact that the word “sound” in this phrase applies to both mind and body tends to show that the word has the same sense in both connections. See J. Lyons, *Semantics*, Vol. 2 (Cambridge: Cambridge University Press, 1977), at 405–409 (phrases such as “She arrived in a taxi and a flaming rage” are zeugmatic and may indicate that the shared word “in” has two different functions or meanings).

<sup>48</sup> Onions (1966), 462.

to physical strength.<sup>49</sup> Similarly, the term *power* derives from sources such as the French *pouvoir*, meaning “be able,” and the idea of “act[ing] upon a person or a thing” is prominent in the OED’s first definition of the term.<sup>50</sup>)

Finally and most significant as an instantiation of MENTAL POWER IS PHYSICAL POWER, the central term *capacity* (from all three opinions) has at least three clear senses relating to physical power. The first two, which are relatively minor senses of the word, are “holding power,” which relates to the size of a container, discussed above, and “the power of absorbing heat, etc.,” as in the capacity of a conductor of electricity.<sup>51</sup> But of greatest interest is the third power-related sense of “capacity,” namely the important law-related sense of role, office, position or authority. This is the sense of the word that is illustrated by phrases such as “I am signing this agreement only in my individual capacity, and not as agent of Acme corporation” or “In my capacity as Sheriff, I hereby place you under arrest.” And it is clear that this sense refers to powers, at least in a general sense: certain roles confer powers that a person would not otherwise have, such as (in the Sheriff example) the power to arrest. But the real interest of this sense of “capacity” arises only when we realize that such powers are more precisely called “authority”: occupying the role of Sheriff doesn’t physically enable arrest (except perhaps in trivial and accidental ways),<sup>52</sup> and instead it merely confers the authority to arrest.<sup>53</sup> The distinction is between power on the one hand and authority or legitimacy of the exercise of power on the other.

Notwithstanding the distinction, however, the role-related sense of “capacity” does bear on physical power and not just on authority. This point is established first by examples from non-legal discourse,

<sup>49</sup> Perhaps the term “able-bodied” is a retronym that became necessary after the term “able” was expanded to cover non-physical abilities, much like the terms “natural person,” “acoustic guitar” or “analog watch” became necessary in order to preserve the historically primary senses of the nouns.

<sup>50</sup> Oxford English Dictionary, Vol. 12 (1989) 259.

<sup>51</sup> *Id.*, Vol. 2, 857.

<sup>52</sup> Admittedly the person occupying the role of Sheriff might have access to things like the keys to the local jail, and thus have the physical power to arrest, while the same person in her private capacity might not. But most uses of the term, such as “signing in my individual capacity rather than my corporate officer’s capacity,” do not involve facts such as these.

<sup>53</sup> See, e.g., W. R. Bishin and C. D. Stone, *Law, Language and Ethics* (Mineola, New York: Foundation Press, 1972), 807 (considering the relationship of roles to rules and viewing a role as “a master rule which reconciles and directs the actions of those who take it”).

showing that the two concepts are metaphorically linked in people's thoughts. Consider one natural phrase that a private actor might use to express a thought about the limits of governmental morals regulation: "It's my house so I can do whatever I want in it." What the speaker is referring to is his or her personal authority, but with the phrase "*can* do" this meaning is expressed metaphorically in terms of the domain of physical power.<sup>54</sup> By the same token, consider a scenario in which a sheriff carries out an act that she does not have the authority for, for example an arrest for peaceful expression of dissent. One natural way that the victim might express a protest about this lack of authority is "You can't do that!," and this usage of the verb *can't* expresses the authority point metaphorically in terms of physical power.<sup>55</sup> Tellingly, a variety of other modal verbs of possibility,

<sup>54</sup> As applied to the physical domain the phrase "can do" is true only within limits (because there are physical limitations on what the speaker can do even in his or her own house), and in any case a statement that is equally true in the physical domain could be made about someone else's house. The only appropriate meaning of the phrase is the metaphorical one.

<sup>55</sup> In this example, as applied to the physical domain, the phrase "You can't do that!" is clearly false, because by hypothesis the unauthorized arrest is in fact being done. Here, too, the only appropriate meaning of the phrase is the metaphorical one.

A note of caution might be order about characterizing "can" and "can't" in the phrases above as metaphorical. Metaphor is at its heart a bringing together of two different domains, and it is a question of degree and judgment whether one domain is different enough from another to make a phrase truly metaphorical rather than a mere matter of generality of discourse within a single domain. For example, describing an argument in terms of a fight is metaphorical for a person who sees fights as literally including only physical conflict, but non-metaphorical for a person who sees fights as literally including verbal or emotional conflict as well. G. Lakoff and M. Johnson (1987), 83–86. By the same token, I view "You can't do that" in the text above as metaphorical, because I generally understand physical power and legitimacy of exercise of power as being different domains, but those with a more complacent view of the distribution of force in society might consider the legitimacy point to be merely a subset of the physical point: what can be done is a fortiori legitimately done.

For an in-depth discussion of the law concerning abuse of governmental authority and its metaphorical underpinnings, see S. L. Winter, "The Meaning of 'Under Color of Law'", *Michigan Law Review* 91 (1991), 323. Among other things, Winter shows that the concept of "under color of law" in 42 U.S.C. § 1983 is partially rooted in the same KNOWING IS SEEING metaphor discussed *supra* notes 25–27 and accompanying text. *Id.* at 391–395. Additional examples of non-legal discourse that support Winter's KNOWING IS SEEING argument are "looking at the world through *rose-colored* glasses," "taking a *jaundiced* view," and "seeing something in a *new light*" or a "*different light*." (Winter's article goes on to explain that the primary root of "under color of law" is the link of color to coats of arms and other indicia of royal authority. *Id.* at 396–404.)

compulsion and the like work in the same way: “As a judge, I *must* follow the precedents,” “No, you *are free to* reach the right result,” “All the same, I feel *constrained* to rule against the defendant,” and so on.<sup>56</sup>

The phenomenon of performative utterances, too, shows that the role-related sense of “capacity” is closely related to physical power. Greatly simplifying J.L. Austin’s rich analysis,<sup>57</sup> performative utterances are those that affect the world rather than simply describing the world, as with the pronouncements “I now pronounce you husband and wife,” “We find the defendant guilty,” or “I hereby bind Acme Corporation to this agreement.” Performative utterances are characterized not by truth or falsity, but rather by what Austin calls felicity and infelicity or success and failure: a successful performative affects the world by the sheer fact of its pronouncement, while an unsuccessful one does not. And one of Austin’s conditions for successful utterance of a performative is closely tied to the role-related sense of “capacity.” If a person stands up in court at the conclusion of a trial and says “We find the defendant guilty,” but the speaker is a spectator rather than a member of the jury, then the speaker lacks the authority to issue a verdict and the purported act of convicting the defendant is unsuccessful.<sup>58</sup> In sum, the role-related “capacity” in which a person acts is directly related to the success of his or her performative utterances, and is thus related in an unexpectedly rich and direct way to the power to affect the physical world.<sup>59</sup>

---

<sup>56</sup> Cf. E. Sweetser (1990), 49–75 (showing that the root sense of modal verbs, as in “John *must* be home by ten (because his mother requires it)” is the basis for their epistemic sense, as in “John *must* be home already (because I see his coat)”).

<sup>57</sup> See generally J.L. Austin, *How To Do Things With Words*, 2nd edn. (Cambridge: Harvard U. Press, 1975).

<sup>58</sup> As Austin writes, “The particular persons . . . in a given case must be appropriate for the invocation of the particular procedure invoked.” *Id.* at 34. Austin notices that the English language contains various terms for failures of this condition, including “ultra vires,” “not entitled,” and, notably for purposes of this article, “incapacity.” The infancy-related meaning of “capacity” in contract law is explained by this same reasoning. Contracts are performative utterances, and infancy is a status-related grounds for the lack of success of those utterances.

<sup>59</sup> One illustration of this insight comes from the standard legal phrase *power of attorney*. The phrase designates a performative utterance by which one individual confers on another the authority to act on his or her behalf, and it is illuminating that this utterance is designated by the term “power.”

## 4. THE REALIST CRITIQUE AND THE MIND'S REALITIES

The foregoing analysis of *Paine*, *Sutcliffe* and *Lloyd* has, in one sense, completely torn them apart. Once the various instantiations of the metaphors are taken away, virtually nothing remains, because almost every significant word used in the excerpts has been revealed as part of one of the four metaphors.<sup>60</sup> The judicial texts have been shredded like embroidered handkerchiefs in a basketful of kittens.

*Paine*, *Sutcliffe* and *Lloyd* were, of course, selected in part because of the density of the metaphors they contain, and I do not mean to suggest that a similar process of metaphorical analysis would quite so thoroughly shred every text, judicial or otherwise. But the pervasiveness of the metaphors shown here is useful for highlighting the Legal Realist critique of metaphor, exemplified by Felix Cohen's then-brash, now-canonical article entitled *Transcendental Nonsense and the Functionalist Approach*.<sup>61</sup>

4.1. *Cohen's critique of metaphor*

If Cohen had directed his attention to this body of case law, he would doubtless have derided the concept of mental capacity as being a "supernatural" or "metaphysical" reification,<sup>62</sup> a meaningless and obfuscatory rationalization for judicial decisions reached on other grounds. The purported explanations of mental capacity given in cases like *Paine*, *Sutcliffe* and *Lloyd*, Cohen would have said, simply fail to provide any genuine conceptual substance. Just as he did with the location of a corporation, the personhood of a labor union, or the property rights involved in a trade name, Cohen would have argued that the concept of mental capacity does not independently

---

<sup>60</sup> The few other significant words in the excerpts are also interestingly metaphorical, but those metaphors are omitted for brevity because not crucial to this article's arguments. It does, though, bear noting that *aberration* (in *Lloyd*) is an instantiation of the common metaphor THINKING IS MOVING. Other common instantiations of this metaphor are phrases such as "reach a conclusion," "reach a verdict," "where does that argument take you," "train of thought," "mental block," "his thoughts go in circles," and "her thoughts wander." The root of "aberration" is the Latin for "wander," as seen in contemporary English words like *err*, *errant* and *error*. See generally Lakoff and Johnson (1999), 236. Uses of this metaphor in connection with mental capacity are briefly discussed *infra* notes 119–20 and accompanying text.

<sup>61</sup> F.S. Cohen, "Transcendental Nonsense and the Functionalist Approach," *Columbia Law Review* 35 (1935), 809.

<sup>62</sup> *Id.* at 811, 813.

exist as a determinant of judicial decisions, any more than a Platonic essence does.<sup>63</sup>

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.<sup>64</sup>

Mental capacity would be another in the array of “magic ‘solving words’ of traditional jurisprudence.”<sup>65</sup> On this line of thought “there is no there there”<sup>66</sup> other than what judges smuggle in, and the purportedly august judicial pronouncements about mental capacity are only so much inarticulate hand-waving. What is needed instead, Cohen urges, is a “functional approach” that, taking its lead from advances in the social sciences, will “more and more seek to map the hidden springs of judicial decision”<sup>67</sup> while also carrying out a progressive ethical critique.<sup>68</sup>

<sup>63</sup> Similar arguments are made throughout the realist literature as a part of the writers’ attack on formalism. See W. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973), 10; E.A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: The University Press of Kentucky, 1973), 74–94. For a more sophisticated discussion of metaphor as a masculine fiction that is necessary for judgment, see J.L. Schroeder and D.G. Carlson, The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law, *Cardozo L. Rev.* 24/2481 (2003), 2514–15.

<sup>64</sup> F.S. Cohen (1935), 812. Llewellyn uses strikingly similar rhetoric in discussing the remedies of an aggrieved seller of goods. He writes that the remedies issue is solved by “locating a mythical – or should I say more accurately ‘mystical’? – essence known as Title, which is hung over the buyer’s head or the seller’s like a halo.” K. N. Llewellyn, “Through Title to Contract and a Bit Beyond,” *New York University Law Quarterly* 15 (1938), 159, 165.

On the subject of metaphor in particular, Hohfeld and Cardozo also famously wrote of its tendency to obscure. Hohfeld wrote, “Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional.” W.N. Hohfeld, *Fundamental Legal Conceptions As Applied In Judicial Reasoning* (Westport, Conn: Greenwood Press 1978) (1919), 30. And Cardozo wrote, “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Berkey v. Third Ave. Ry.*, 155 N.E. 58, 61 (N.Y. 1926).

<sup>65</sup> F.S. Cohen (1935), 820.

<sup>66</sup> Gertrude Stein, *Everybody’s Autobiography* (New York: Random House, 1937), 289.

<sup>67</sup> F.S. Cohen (1935), 833.

<sup>68</sup> See generally *id.* at 829–849.

And at first blush, the degree to which *Paine*, *Sutcliffe* and *Lloyd* are confected so thoroughly of metaphor, does strongly support Cohen's invective. Each of the three courts is making an earnest attempt to explain the concept of mind on which their decisions turn – but in each case a close look at the explanations shows the concepts to be empty, or even worse: a dog's breakfast of confused and nonsensical cacophony.<sup>69</sup>

#### 4.2. *The reality that the mind creates*

At a deeper level, however, cognitive theory shows that an astonishingly high degree of order exists within the metaphorical expressions. Far from being empty, they are in fact deeply meaningful. This Part 4.2 outlines the empirical basis for these points, bringing life and shape to the raw information that was presented in Part 3. After that, Part 4.3 suggests that this orderliness would likely have led Cohen himself to welcome cognitive analysis, both in its methods and in the apparent tendencies of its outcomes.

To begin with, there is a tremendous degree of order within each of the metaphors presented above. Many of them obviously involve *polysemy*, that is, the fact of a single word or expression having more than one related meaning (as “capacity” can refer to mental ability but also to containership, “sound” can mean mentally healthy but also well-constructed, “see” can mean know but also visually perceive, “scattered” can mean mentally disorganized but also physically disorganized, and so on). As discussed in Part 2, English words often carry multiple senses, and no one would argue that simple homonymy alone has any great significance,<sup>70</sup> but the multiple senses of “capacity,” “sound” and the other words at issue here are much more than mere homonymy, in that the multiple senses of these words are related to each other as the multiple senses of “pen” are not. Each of the polysemies involved in this article has both a physical, concrete sense and an abstract, mental sense, and the relationship between the two senses is that we conceive of the latter sense metaphorically in terms of the former.

Moreover, the various polysemies show an *inferential correspondence* between each other, that is, a given polysemy coheres with, or makes sense in conjunction with, the other expressions that instantiate the

---

<sup>69</sup> The sheer volume, density, and multiplicity of allusions in the opinions seems particularly overwhelming in light of Part 3.2's piece-by-piece analysis.

<sup>70</sup> See *supra* text accompanying note 7.

same metaphor. Thus, within KNOWING IS SEEING, when someone's motives are *transparent* then it is easy to *see* what he or she intends to do, but a *covert* goal will not be known until it is *revealed*. A person's *brilliant* remark will *shed a lot of light* so that we understand *in a flash*. And so on. Similarly, within THINKING IS OBJECT MANIPULATION, if a person *throws* several *big* ideas at you at once, it may be hard to *catch* them all, and you might need to *collect your thoughts*. Many similar examples can be adduced for each of the four principal metaphors discussed in this article, as for other conceptual metaphors throughout the language.

These inferential correspondences help to bring out one reason why so much of our common thinking about abstractions tends to be metaphorical. The metaphors generally have their source domain in the concrete world of our physical, motor, social and sensory experiences (touching, seeing, lifting, exchanging and so on), and their target domain is generally in the abstract or mental realm (such as, for purposes of this article, thinking, understanding, reasoning, communicating, etc.). Our everyday experience gives us a great deal of immediate knowledge about the physical source domains, and we use this knowledge about the source domains in order to draw inferences about the target domains. From everyday life we know, for example, that transparent surfaces permit us to see the objects behind them, and that opaque surfaces do not, and if KNOWING IS SEEING then we can use our direct knowledge about transparency and sight to construct inferences about knowledge. In cognitivist terms, metaphors have entailments, and we reason with these entailments in order to develop knowledge about abstract realms that we cannot directly touch or see or lift.<sup>71</sup> (Perhaps for this reason, the various cross-domain correspondences in a given metaphor are each sometimes referred to as a *mapping*,<sup>72</sup>

<sup>71</sup> E.g., M. Johnson, "Metaphor-Based Values in Scientific Models," in L. Magnani and N.J. Nersessian, *Model-Based Reasoning: Science, Technology, Values* (New York: Kluwer Academic/Plenum Publishers, 2002), 3 (showing how our knowledge of a source domain structure is used "to construct a parallel knowledge of the target domain").

<sup>72</sup> *Id.* As a rough cut, it may help to understand the concept of mapping "in the mathematical sense of a set of ordered pairs, where the first element of each pair is from the source domain and the second is from the target domain." R. Jackendoff and D. Aaron, Review article, *Language* 67 (1991), 320, 335 (reviewing George Lakoff and Mark Turner, *More Than Cool Reason: A Field Guide to Poetic Metaphor* (Chicago: University of Chicago Press, 1989)). However, understanding metaphorical mapping in terms of mathematical mapping is itself a metaphor, and this metaphor like others has come to be rejected in favor of one based on neural theory. See G. Lakoff and M. Johnson (1987), 252–257; S.L. Winter (2001a), 27–36 (discussing neural and metaphorical mappings).

because the same kind of multi-point parallelism exists between a source domain and a target domain, on one hand, and between a given spatial terrain and its cartographical representation, on the other.<sup>73</sup>)

Inferential correspondence is not limited to expressions within a single metaphor: it also reaches, even more powerfully, *across* metaphors. Notice that all three of our judicial opinion excerpts use at least three of this article's four metaphors for mind, and that two of the three excerpts use all of the four metaphors.<sup>74</sup> And as a logically obvious but practically important corollary, none of the three excerpts depends on only one metaphor – in other words, the metaphors in each of the excerpts are “mixed.” The term “mixed metaphor,” of course, is almost always used pejoratively, but this is only because most users do not notice the many occasions on which mixed metaphors are used in a way that is not objectionable. A phrase like “I *smell a rat*, but I will *nip him in the bud*”<sup>75</sup> involves impermissibly mixed metaphors, because the entailments of its two principal metaphors (perhaps VILLAINS ARE ANIMALS and THWARTING IS TRUNCATING) do not overlap. Rats do not have buds to be nipped in. By contrast, a phrase like “Now I *see* the point that *went past me* before” involves equally mixed metaphors (KNOWING IS SEEING and THINKING IS OBJECT MANIPULATION), but the mixing in this case is permissible, because the entailments of the two metaphors do overlap. Objects that have passed can sometimes be seen – especially when one *looks back at* them.<sup>76</sup>

<sup>73</sup> It is interesting to observe that this sense of the word mapping is itself metaphorical, as are the terms “source” and “target” domains, which speak of meaning or concept-formation in terms of projectiles. The literal roots of the word *metaphor* itself mean “to carry over,” and the original historical extension of that term to refer to meaning is also metaphorical. For a discussion of this point see S.L. Winter (2001a), 53 ff.

<sup>74</sup> The only minor misfit is *Paine*, which has no instantiation of MENTAL WELL-BEING IS PHYSICAL WELL-BEING.

<sup>75</sup> Adapted from a 1790 speech by Boyle Roche in the Irish Parliament, *quoted in* Bryan A. Garner, *A Dictionary of Modern American Usage* 426 (New York: Oxford University Press, 1998)

<sup>76</sup> See G. Lakoff and M. Johnson (1987), 91–96. The metaphorical use of the phrase “look back at” is echoed by the word “review,” which now has a purely mental meaning but formerly meant “see again.” Oxford English Dictionary, Vol. 13 (1989), 831.

The limited and therefore pejorative use of “mixed metaphor” is, in this way, much like the word “coercion” in Hale's view. See Robert L. Hale, “Coercion and Distribution in a Supposedly Non-Coercive State,” *Political Science Quarterly* 38 (1923), 470 (arguing that coercion, properly understood, applies far beyond the usual context of contracts that are voidable on the grounds of duress).

Similarly, *Paine* refers in a single sentence to whether the grandfather could “collect” and “retain” elements “in his mind” for long enough to “perceive” their “obvious” relations, and this sentence alone uses three of the four principal metaphors (THINKING IS OBJECT MANIPULATION, THE MIND IS A CONTAINER, and KNOWING IS SEEING). But this mixing of metaphors makes perfect sense to us because the three sets of entailments overlap: in the physical world it is entirely natural to maintain control of OBJECTS by placing them in a CONTAINER, and to derive knowledge from them by SEEING them, and because these physical domains overlap so naturally, we understand the target domains as doing so, too.<sup>77</sup> A similar process of drawing harmoniously on several different metaphors at once is shown by the other opinions, and by discourse in general, whether

---

<sup>77</sup> A number of similar coherences can be drawn among this article’s four principal metaphors. For example, on a global level, THINKING IS OBJECT MANIPULATION coheres with MENTAL POWER IS PHYSICAL POWER in that greater physical power entails greater ability to manipulate objects. Thus we speak metaphorically of *handling weighty matters*, having a *strong grasp* of a subject, and *brushing away the fluff*. And on a more particular level, cross-metaphorical coherences account for the fact that a number of phrases from *Paine*, *Sutcliffe* and *Lloyd* appeared under more than one of the metaphors. For example, “capacity” and “capable” were discussed in connection with both the OBJECT MANIPULATION and the CONTAINER metaphors, and this semantic overlap is natural, because taking an object (with one’s hand, for example) is much like containing something in a container. The other sense of “capacity” meaning “role” was discussed in connection with the PHYSICAL POWER metaphor, but it also relates to the CONTAINER metaphor: Steve Winter points out that it is conventional to speak of persons as acting *in* a certain capacity or as *occupying* a role (and that these are particular cases of the widespread and more general STATES ARE LOCATIONS metaphor). S.L. Winter, “Death is the Mother of Beauty,” *Harvard Law Review* 105 (1992), 745, 768 (reviewing Thomas C. Grey, *The Wallace Stevens Case: Law and the Practice of Poetry* (Cambridge: Harvard University Press, 1991)). And in a sustained discussion of the metaphors for power, he shows that power is conceived in terms of a resource that “can be accumulated and stored, as in a container,” until one is “powerful (i.e., ‘full’ of power).” S.L. Winter, “The ‘Power’ Thing,” *Virginia Law Review* 82 (1996), 721, 752–753 (italics in original).

“Perceive” was discussed in connection with both the SEEING and the OBJECT MANIPULATION metaphor, and this indicates the deep fact that the concept of seeing itself is metaphorically related to the domain of physical manipulation, as illustrated by phrases such as “*run your eyes over my draft*” or “*pick out Waldo from the crowd*.” See E. Sweetser (1990), 38.

Sweetser speaks in terms of a single overall metaphor that she calls the Mind-As-Body Metaphor. *Id.* at 28. She might see this article’s four principal metaphors as subsets of a single metaphor, THE MIND IS A BODY. Whether one lumps or splits on this subject does not seem to be of much practical importance, in light of the fact that inferential correspondence takes place both within single (larger) metaphors and across several (smaller) metaphors.

legal or non-legal. And this phenomenon is of great value for the richness and utility of our abstract concepts. It is true that each metaphor, as seen above, has numerous entailments even when taken on its own. But these entailments are limited: as Lakoff and Johnson remark, “To say that something is viewed as a CONTAINER OBJECT with an IN-OUT orientation does not say very much about it”.<sup>78</sup> The source domain of any single metaphor structures the target domain, but when the target domain is particularly important or complex (as with the notable example of the mind), each domain offers only a *partial structuring*. To help round out the structuring of complex concepts, we naturally reach for other, complementary source domains with overlapping entailments.<sup>79</sup>

In addition to polysemy and inferential correspondence, a third remarkable type of order at work here is the phenomenon of *novel extensions*, which carry the idea of inferential correspondence one step further. We all routinely invent brand new metaphorical expressions that fit seamlessly into already-existing conceptual networks. To take just one example, a colleague of mine, recalling her days in law school, described having studied so much for a tax law exam that she was “afraid to tip her head.” We know from daily life that if a container is tipped, its contents can spill out and become useless, and so this casual expression, though invented on the fly in the course of casual discourse, fits intricately and perfectly into the rest of the metaphorical system that we are calling THE MIND IS A CONTAINER.<sup>80</sup> It shows that the network of correspondences is even more finely meshed than a scouring of the dictionary would reveal, and indeed that it is indefinitely extendible.

<sup>78</sup> Lakoff and Johnson (1987), 61. The authors detail elsewhere the particular entailments of the concept of containership. See M. Johnson, *The Body in the Mind: The Bodily Basis of Meaning, Imagination, and Reason* (Chicago and London: University of Chicago Press, 1987), 21–23 (five concepts related to spatial boundedness or enclosure: protection, restraint, fixity, accessibility or inaccessibility, and transitivity); George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (Chicago and London: University of Chicago Press, 1987), 272–273.

<sup>79</sup> On the other hand certain metaphors for mind, or for other complex concepts, are not consistent with each other. See generally G. Lakoff and M. Johnson (1999), 248.

<sup>80</sup> The ease with which novel extensions are generated and understood lends further aptness to the metaphor of cross-domain mapping. By analogy, if the corner of 14th and Broadway is mapped onto a grid at point E10, and the corner of 125th and Broadway is mapped onto the same grid at point C30, it is fairly easy to determine that the corner of 66th and Broadway lies at or around point D21, even if that corner has not been pre-designated on the grid.

In fact, much of the polysemy that one does find in the dictionary was doubtless originally developed through what, at the time, were novel extensions. And this point leads us to the final type of order to be discussed here: *diachronic semantic change*. Words that now refer principally to the mind (or to knowing or ideas or mental well-being) formerly referred exclusively to physical containers (or to sight or objects or physical well-being, respectively), and the current mental meanings are clearly derived from the former physical meanings. For example, today we use *comprehend* only to talk about a mental phenomenon, but the word comes from the Latin *prehendere*, meaning to seize, a manipulation-of-objects sense that is clearly linked to today's "mental seizing" meaning of the word. Similarly, today's mental term *confusion* comes from the Latin *fundere*, meaning to pour or mingle together, another manipulation-of-objects sense that is clearly linked to today's "mental mingling" meaning of the word. Today's term *non compos mentis* (which one might have thought obsolete until reading the cases) comes from the Latin for *to put together* or *to compose*. Today's slang term *crazy* seems to come from a Norse root meaning "to crack",<sup>81</sup> and the link between the historical meaning of a cracked container and today's meaning of mental incapacity is clear. As a last example, already touched on above, today's term *deranged* derives from the same root as the words "arrange" and "rank," and once again the link is clear between that historical meaning (grounded in the metaphor that THINKING IS OBJECT MANIPULATION) and today's mental meaning.

The Berkeley linguist Eve Sweetser, in particular, has argued that much of historical semantic change is attributable to metaphor. In her simple and powerful words, "If a word once meant A and now means B, we can be fairly certain that speakers did not just wake up and switch meanings on June 14, 1066. Rather, there was a stage when the word meant both A and B."<sup>82</sup> The dual-meaning stage to which Sweetser refers is the direct historical counterpart of the polysemies that we have already noticed in today's language. And the fact that the initial duality of meaning has grown more or less invisible to today's speakers does not detract from the metaphorical nature of the modern word: the fact that the word describes a target domain in terms of a source domain

---

<sup>81</sup> Onions (1966), 226. This explains why the word "crazed," in the context of pottery, means having a cracked glaze.

<sup>82</sup> E. Sweetser (1990), 9.

remains true, whether the original imaginative projection is done by the speaker herself or by a forebear many generations removed. I would go so far as to say that diachronic semantic change is really a form of intellectual history – not the history of elite thought that is usually designated by that term, but the history of thought from the ground up. It is intellectual history based on life as it was lived by innumerable language-users whose names and stories are now lost, but whose creative thinking processes are preserved in the historically shifting meanings of today's superficially stable words.<sup>83</sup>

Overall, there is great explanatory power, elegance, and common sense in the cognitivist concepts sketched above. As an empirical matter the claim that our abstract discourse is highly orderly is undeniable, and it is hard to remain unconvinced that this linguistic orderliness is far from accidental and in fact corresponds to an underlying conceptual orderliness. The figurative expressions in *Paine*, *Sutcliffe* and *Lloyd* are not a dog's breakfast but a feast, not a cacophony but an open-ended orchestral composition.

---

<sup>83</sup> The term "dead metaphor" is sometimes misleadingly used to refer to words such as these, or to other metaphorical expressions that have become conventionalized. E.g., G. Lakoff and M. Turner (1989), 55; H.W. Fowler, *A Dictionary of Modern English Usage* (London: Oxford University Press, corr. ed. 1937), 348–49. This term – which is itself a metaphorical expression – fails to distinguish between conceptual metaphors and the particular metaphorical expressions that instantiate them. See *supra* Part 2. Though a given conventionalized expression is no longer active in the conscious imagination of present day speakers, that same expression will often be part of a metaphor that remains very much alive in other instantiations. See, e.g., S.L. Winter (2001a), 47–56. Winter uses the example of "perception" (which as noted above derives from the Latin "to take") and shows that it is part of the Conduit Metaphor, *supra* note 28, which remains very much alive in expressions such as "The professor *delivered* a superb lecture, but only the exceptional students were able to *take it all in*. The less gifted students had to *struggle* before they *grasped* the point." *Id.* at 51–54. Cf. L. Fuller, "Legal Fictions," *Illinois Law Review* 25 (1930), 363, 373–77.

Nietzsche's powerful passage about the way that metaphors grow invisible with the passage of time is also relevant here: "What then is truth? A mobile army of metaphors, metonyms, and anthropomorphisms.... Truths are illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins." F. Nietzsche, "On Truth and Lie in an Extra-Moral Sense," in *The Portable Nietzsche*, ed. Walter Kaufmann (New York: Penguin Books, 1977), 46–47. See generally R.W. Emerson, "The Poet," in *Essays and Lectures* (New York: Library of America, 1983), 457 ("The etymologist finds the deadest word to have been once a brilliant picture. Language is fossil poetry."); J. Derrida, "White Mythology: Metaphor in the Text of Philosophy", in *Margins of Philosophy* (Chicago: University of Chicago Press, 1982, Alan Bass trans.).

### 4.3. *Cohen and the cognitive approach*

The concept of capacity that Felix Cohen would have so harshly derided turns out not to be empty, but to be full of meaning. The concept that he would have dismissed as purely metaphysical turns out to be deeply rooted in physical daily life. While Cohen of course is right that the metaphors examined here designate nothing intrinsically determinate in the world, the other side of that coin is that these metaphors have nonetheless become relatively determinate by virtue of our shared and consistent patterns of thought. Men and women live, think, act and adjudicate as if there are realities such as mental capacity, and metaphors are a large part of the way that that living, thinking, acting and adjudicating happens. The title of Lakoff and Johnson's first book resonates deeply: metaphors are indeed just human creations, but they are human creations that we live by.

Accordingly, at a deeper level, even Cohen – despite his condemnation of metaphor – would surely have welcomed the cognitive approach to metaphor into legal analysis, had he lived to see it flower.<sup>84</sup> This is true in at least three related ways. First, one of Cohen's central themes (and one of the Legal Realists' in general) is that judges are active creators of the law rather than mere passive appliers of it.<sup>85</sup> Cohen's scorn for "metaphysical" legal concepts is designed to underscore his insight that judges are free to (and do in fact) shape those concepts with their decisions, rather than vice versa. Laudatorily paraphrasing a passage from Bertrand Russell, Cohen writes that "we are to redefine the concepts of abstract thought as constructs, or func-

---

<sup>84</sup> Winter has written wide-rangingly on the kinship between legal realism and cognitivism, and on the ways that the latter has developed the initial insights of the former. See S.L. Winter (2001a), *passim*, 42 ("if Llewellyn and the other legal realists were alive today, they would be the first to turn to the study of the mind better to understand life and law"); S.L. Winter, "Making the Familiar Conventional Again," *Michigan Law Review* 99 (2001b), 1607.

Winter also shows that Cohen's *Transcendental Nonsense* piece is subject to the same reliance on metaphor that Cohen himself condemns, and thereby makes a point about "the ubiquity and necessity of metaphor in human thought." See S.L. Winter, "Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law", *University of Pennsylvania Law Review* 137 (1989), 1105, 1161. Winter calls this point "obvious," and indeed it is, but not until one has spent some time and thought absorbing the cognitivist analysis of language in one or more specific contexts, such as the capacity context explored in this article or the other sustained treatments undertaken by Lakoff, Johnson, Winter or Sweetser, among others. See also *infra* note 95.

<sup>85</sup> See e.g., F.S. Cohen (1935), 842 (essence of realistic jurisprudence is "the definition of law as a function of judicial decisions").

tions, or complexes, or patterns, or arrangements, of the things that we do actually see or do.”<sup>86</sup> And the cognitive approach to metaphor makes the same point about human abstract concepts in general: not only is there no “heaven of legal concepts”,<sup>87</sup> there is no heaven of abstract concepts of any kind. Instead, say the cognitivists, our abstract concepts are humbly and richly earthbound due to their origin in daily physical life. Cohen’s own words fit the cognitivist viewpoint with striking prescience: abstract thoughts are, again, “constructs” and “arrangements” of “the things that we do actually see or do.”

The second strong resonance between Cohen’s article and the cognitive approach arises from the first. Cohen’s insights about law’s contingent, plastic nature led him to call for scrutiny of “what courts do in fact”.<sup>88</sup> He maintained that there are “significant, predictable, social determinants” that “govern the course of judicial decision”,<sup>89</sup> and that “[l]egal criticism is empty” without “objective description” of those causes.<sup>90</sup> And similarly, cognitive science, with its interdisciplinary focus on understanding the operations of the human mind, is devoted precisely to an objective description of those determinants.<sup>91</sup> Cohen acknowledges only in passing that judges are human,<sup>92</sup> but

<sup>86</sup> *Id.* at 826.

<sup>87</sup> *Id.* at 809.

<sup>88</sup> *Id.* at 816. Cf. O.W. Holmes, Jr., “The Path of the Law”, *Harvard Law Review* 10 (1897), 457, 461 (“the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”). Cohen himself quotes this clarion pronouncement no less than three times. F.S. Cohen (1935), 828, 835.

<sup>89</sup> *Id.* at 843.

<sup>90</sup> *Id.* at 849. Cf. K.N. Llewellyn, “Some Realism About Realism – Responding to Dean Pound”, *Harvard Law Review* 44 (1931), 1222, 1236–1237 (famously calling for the “temporary divorce of Is and Ought for purposes of study,” because “no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing”). See generally J.H. Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill and London: University of North Carolina Press, 1995).

<sup>91</sup> It is true that some of the cognitive sciences do not obviously fit under Cohen’s rubric of the “social” determinants of judicial action, because some of them tend to be more infra- than intra-personal. But Cohen’s reference to the “social” cannot fairly be read as dismissing them, particularly in light of the explicit attention that Cohen gives to the importance of the insights of psychology. E.g., F.S. Cohen (1935), 834.

<sup>92</sup> *Id.* at 843. Max Radin lingered longer on the idea, writing with mock anthropological gravity, “Judges, we know, are people. I know a great many. Some were my school-mates – some I met elsewhere than in school. They eat the same foods, seem moved by the same emotions, and laugh at the same jokes. Apparently, they are a good deal like ourselves.” M. Radin, “The Theory of Judicial Decision: Or How Judges Think”, *American Bar Association Journal* 11 (1925), 357, 358.

there is great importance in that simple fact, because much of the discipline that we call legal thinking is just a subset of the ordinary thinking. This article's treatment of mental capacity is just one indication that cognitivism's insights do have strong explanatory power as applied to judicial thinking.<sup>93</sup> All in all, with its emphasis on subconscious patterns, cognitive analysis can be seen as a remarkably direct response to Cohen's call to "to map the hidden springs of judicial decision".<sup>94</sup>

Even without more, then, it becomes clear that the cognitivist treatment of metaphor is something that Cohen would have welcomed as a kind of friendly amendment to his own work, notwithstanding his simple condemnation of metaphor as being empty and obfuscatory.<sup>95</sup> The cognitivist treatment of metaphor was obviously not within the scope of Cohen's thinking, because it has begun to develop only during the decades after his death. But just as a sound theory of contract interpretation makes allowances for language gaps not foreseen by the parties, so must a sound understanding of intergenerational legal history.

And Cohen's realism resonates with cognitive analysis on a third level as well, namely a substantive orientation toward progressive reform. In terms of the Is and Ought of which Llewellyn called for the "temporary divorce",<sup>96</sup> this third level is a matter of the Ought, while the first two levels discussed above were matters of the Is (or should we say the Is Not, in the case of the non-transcendent nature of concepts). As applied to the subject of contractual mental capacity, a discussion of the third level is more complex than the first two because it introduces an alternative, progressive streak in the case law.

---

<sup>93</sup> A great deal of Steve Winter's work has been devoted to the same thesis, as applied not only to metaphor but also to other aspects of the cognitive sciences. See also Symposium, "Cognitive Legal Studies: Categorization and Imagination in the Mind of Law," *Brooklyn Law Review* 67 (2002), 941.

<sup>94</sup> See *supra* notes 65–68 and accompanying text. Cohen's paraphrase of Russell, *supra* note 86 and accompanying text, resonates here as well, as does Cohen's very next sentence (which also seems to be intended as part of the paraphrase): "All concepts that cannot be defined in terms of the *elements of actual experience* are meaningless." F. S. Cohen (1935), 826 (emphasis added). The call for study of the roots of human decision-making and the rejection of concepts as anterior to human construction are flip sides of each other.

<sup>95</sup> This point presents no inconsistency either with Winter's point that the cognitivist approach to metaphor is "quite different" from the one that Cohen articulates in his *Transcendental Nonsense* piece, Winter (1989), 1160 n. 167, or with his discussion of Cohen's own reliance on metaphor, see *supra* note 84.

<sup>96</sup> See *supra* note 90.

## 5. THE POSSIBILITY OF PROGRESS

*Paine, Sutcliffe* and *Lloyd* represent the view that has remained dominant since the 19th-century emergence of modern American contract law: mental capacity is based solely on whether a person has power to understand the transaction. However, in a few jurisdictions in recent years, a progressive minority position has emerged that adds a second criterion. According to the progressive position, a person has mental capacity only if she has power to understand the transaction and also is able to “act in a reasonable manner in relation to [it]”.<sup>97</sup> One example might be a person suffering from the manic stage of bi-polar disorder: faced with a proposal for a disadvantageous contract, she may have a fine understanding of the fact that it is disadvantageous but nonetheless be unable to avoid entering into it.<sup>98</sup> Under the traditional approach to capacity, this person would be bound by the contract, but under the progressive approach she would not. Thus the addition of the volitional element represents a more forgiving (or, depending on one’s ideological position, more lax) position with respect to the obligations represented by contract, and this of course is what makes it progressive.

This broader view of the circumstances under which a person should be excused from obligations corresponds to a broader view of what constitutes adequate mental power. Consistent with basic tenets of contract law,<sup>99</sup> both the traditional and the progressive views decline to bind persons whose minds cannot genuinely

---

<sup>97</sup> E.g., Restatement (Second) of Contracts § 15(1)(b). This approach first emerged during the 1960s in a lower-court case from New York, *Faber v. Sweet Style Manufacturing Corp.*, 242 N.Y.S.2d 763 (Sup. Ct. 1963), and in the drafts of the Second Restatement of Contracts, which was finally published in 1981. While the Restatement’s formulation was still in draft, the highest court of the State of New York adopted those drafts’ approach in the well-known case of *Ortelere v. Teachers’ Retirement Board of the City of New York*, 303 N.Y.S.2d 362, 250 N.E.2d 460 (1969) (Breitel, J.). Completing a nice little *pas de deux*, the commentary to the final version of the Restatement cites the *Ortelere* case as support for the new test. Restatement (Second) of Contracts § 15, comment b and Reporter’s Note (1981 and supps.).

<sup>98</sup> See *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV* 357–358, 382 (Washington, D.C.: American Psychiatric Association, 1994) [hereinafter *DSM-IV*] (describing a complex of symptoms including “increase in goal-directed activity” such as “simultaneously tak[ing] on multiple new business ventures without regard for the apparent risks”); cf. *Faber v. Sweet Style Mfg. Co.*, 40 Misc.2d at 215 (“manic-depressive psychosis affects motivation rather than ability to understand”).

<sup>99</sup> See *supra* note 1 and accompanying text.

embrace the contract, but the two views represent starkly different assessments of which minds qualify for that dispensation. (And the traditional approach can by no means be dismissed as merely a dissipating holdover from older benighted times. Only a few jurisdictions have embraced the progressive approach,<sup>100</sup> and a number of jurisdictions continue to steadfastly embrace the traditional approach even today.<sup>101</sup>) At issue are questions much more basic than what the legal rule should be. The questions go, instead, to the nature of the mind: What does a properly functioning mind *do* with respect to a transaction? What *is* a properly functioning mind with respect to a transaction? What *counts* as mental power that is indispensable to personal autonomy?

And the two approaches' differing answers to these questions correspond in significant part to the shaping effects of metaphor. Metaphors do not simply help to constitute concepts; they inevitably help to constitute them *in certain ways*, with certain contours. It is the nature of every metaphor is to highlight some aspects of the target domain – those that fit into the cross-domain mapping<sup>102</sup> – while concomitantly hiding other aspects of the target domain. Simply speaking, some similarities are played up and some dissimilarities are played down.<sup>103</sup> This overall simplifying effect

---

<sup>100</sup> In addition to the New York courts, Massachusetts has adopted it, as have Texas, Maine and perhaps a small number of other states. The first such Massachusetts opinion was authored by Justice Robert Braucher, who not coincidentally was the initial Reporter for the Restatement (Second) of Contracts. See *Krasner v. Berk*, 319 N.E.2d 897. In Texas, see *Nohra v. Evans*, 509 S.W.2d 648 (Ct. Civ. App. 1974), and for Maine's remarkably unthoughtful treatment, see *Bragdon v. Drew*, 658 A.2d 666 (Me. 1995); *Estate of Marquis*, 822 A.2d 1153 (Me. 2003). See also *Gore v. Gadd*, 522 P.2d 212 (Or. 1974) (“[a]ssuming, without deciding,” that the volitional element should supplement the traditional element, while finding the evidence to be insufficient to permit avoidance of the contract on either ground). *Forman v. Brown*, 944 P.2d 559 (Colo. Ct. App. 1996) is inapposite because its language about volition relates only to the subject of insane delusions, a different branch of the law from that being examined here. Overall, virtually no jurisdictions have embraced the volitional test since the 1970s, let alone in a conscious and purposive manner. This makes all the stronger the point that the traditional approach is no mere holdover.

<sup>101</sup> See *infra* notes 109–114 and accompanying text.

<sup>102</sup> See *supra* note 72 and accompanying text.

<sup>103</sup> See G. Lakoff and M. Johnson (1987), 10–13, 157–158. More precisely, the cross-domain correlations give rise to perceptions of similarity, rather than highlighting similarities that are already there in some perceiver-independent way. *Id.* at 244–245; cf. T. W. Joo, “Contract, Property, and the Role of Metaphor in Corporations Law”, *U.C. Davis Law Review* 35 (2002), 779, 784–86.

is at the root of metaphor's utility in helping to constitute our conceptualization of a target domain.<sup>104</sup> And if, in the traditional case law, the concept of capacity is derived principally from the four metaphors that shape *Paine*, *Sutcliffe* and *Lloyd*, then what is being simplified away are precisely those aspects of the mind that correspond to taking action in the real world. In the metaphors of *Paine*, *Sutcliffe* and *Lloyd* the source domains are generally passive, that is, they do not involve features from which mappings relating to action in the world can be drawn. A CONTAINER, for example, is a fairly passive receptacle that is filled or emptied by external forces and that exercises force only over its own contents rather than over the rest of the world.<sup>105</sup> The predominant metaphors of the traditional case law, then, hide the aspects of mind that relate to action in the world, self-control, or freedom of choice, and accordingly those aspects of the mind simply don't count.<sup>106</sup>

<sup>104</sup> In a haunting passage that gives new depth to metaphor theory's mapping imagery, Borges captures this inevitable linkage between simplification and utility: "...In that Empire, the Art of Cartography attained such Perfection that the map of a single Province occupied the entirety of a City, and the map of the Empire, the entirety of a Province. In time, those Unconscionable Maps no longer satisfied, and the Cartographers Guilds struck a map of the Empire whose size was that of the Empire, and which coincided point for point with it. The following Generations, who were not so fond of the Study of Cartography as their Forebears had been, saw that that vast Map was Useless, and not without some Pitilessness was it, that they delivered it up to the Inclemencies of Sun and Winters. In the Deserts of the West, still today, there are Tattered Ruins of that Map, inhabited by Animals and Beggars; in all the Land there is no other Relic of the Disciplines of Geography." J.L. Borges, "On Exactitude in Science," in *Collected Fictions* (New York: Viking, 1998, Andrew Hurley trans.), 325. With his characteristic self-masking Borges attributes this passage to "Suárez Miranda, *Viajes de varones prudentes*, Libro IV, Cap. XLV (Lérida 1658)."

<sup>105</sup> The source domain of PHYSICAL WELL-BEING, and especially its subset PHYSICAL STRENGTH, initially appears to be an exception to the passivity point, but upon further reflection the active forces being exercised in these metaphorical mappings are only within the mind, and not on the outside world. For contrasting exercises of force on the outside world, other metaphors are needed. See *infra* notes 119–120 and accompanying text.

<sup>106</sup> As Johnson writes in the context of metaphors for the concept of attention, "[t]he source domain of a particular metaphor determines the 'ontology' of the target domain, and thereby determines what counts as relevant phenomena. . . . The metaphor tells you what to take as important." M. Johnson (2002), 13. Cf. S.L. Winter, "The Metaphor of Standing and the Problem of Self-Governance," *Stanford Law Review* 40 (1988), 1371, 1500 (articulating the features that are highlighted or suppressed by the individualist metaphor of "standing" in litigation).

Against this background, the case for enlarging the concept of capacity to include a volitional element is compelling. If concepts like capacity are judicially constructed, then they are judicially modifiable, and now that psychiatry has shown the traditional approach not to adequately cover cases such as bi-polar disorder it is indefensible to ignore that learning.<sup>107</sup> The analogy with physical duress is strong: it is inconsistent with contract's ideals of autonomy to bind a person whose apparent consent is the product of compulsion.<sup>108</sup> It should be immaterial whether the compulsion stems from without or from within, particularly when the compulsion from within is provable by means of psychiatric evidence.

And yet the progressive approach has not been very successful in the courts.<sup>109</sup> *Ortelere v. Teachers' Retirement Board of the City of New York*, the first case to firmly establish the volitional element, was decided over a dissent,<sup>110</sup> and succeeding decisions quickly narrowed *Ortelere's* holding to apply only to affirmative acts rather than failures to act.<sup>111</sup> *Ortelere's* only lower-court antecedent was vehemently rejected in California on the very weak

---

<sup>107</sup> See *DSM-IV* (1994), 357–62, 382–401; *Ortelere*, 250 N.E.2d at 464 (“These traditional standards governing competency to contract were formulated when psychiatric knowledge was quite primitive. They fail to account for one who by reason of mental illness is unable to control his conduct even though his cognitive ability seems unimpaired. When these standards were evolving it was thought that all the mental faculties were simultaneously affected by mental illness. This is no longer the prevailing view.”) (citations omitted).

<sup>108</sup> Restatement (Second) of Contracts § 174. There is of course a competing concern related to upholding the predictability of contract. See *infra* note 116 and accompanying text. But contract law has been easily able to yield on this front in the case of duress.

<sup>109</sup> See also E.A. Farnsworth, *Contracts*, 4th edn (New York: Aspen Publishers, 2004), 229 (traditional approach “is almost universally accepted by the courts”).

A similar, more widely known story of conservatism can be told about the insanity defense in criminal law. See, e.g., J. Kaplan et al., *Criminal Law* (New York: Aspen Publishers, 2004), 579–628 (recounting the growth of the *M'Naghten* rule into the ALI's volition-accommodating Model Penal Code, and the sudden retrenchment that followed John Hinckley's attempted assassination of Ronald Reagan). Regarding a metaphoric dimension of discourse in the Hinckley case, see *infra* note 120.

<sup>110</sup> *Ortelere*, 25 N.Y.2d at 206.

<sup>111</sup> E.g., *McCarthy v. Levitt*, 399 N.Y.S.2d 301 (App. Div. 1977).

basis of a Civil Code provision that any first-year law student could have sidestepped.<sup>112</sup> The supreme courts of two other states have also expressly rejected the volitional element, one of them on facts involving a person suffering from bi-polar disorder – the paradigmatic case that would justify liberalizing the law in this area.<sup>113</sup> Other jurisdictions remain stonily silent about the volitional element, even when presented with the same opportunity for progressive dicta that other jurisdictions (including, arguably, the *Ortelere* court itself) moved to embrace.<sup>114</sup> Overall, the volitional element has encountered at least as much rejection as it has acceptance, where it has not been ignored altogether.

There is a further marker of the progressive approach's halting trajectory: even the authorities that do recognize the volitional element also limit it with a requirement that the other party "have reason to know" of the first party's lack of capacity.<sup>115</sup> The reasoning for imposing this requirement is an asserted need to "balanc[e] competing policy considerations," namely the protection of the individual on one hand and the protection of the stability or predictability of contract on the other.<sup>116</sup> But identically competing policy considerations also affect the traditional approach, and the traditional approach is not subject to any similar reason-to-know requirement.<sup>117</sup> In fact, such a requirement has been explicitly rejected in connection with lack of power to understand, notably in

---

<sup>112</sup> *Smalley v. Baker*, 69 Cal. Rptr. 521 (App. Div. 1968), rejecting *Faber v. Sweet Style Mfg. Co.*, *supra* note 97.

<sup>113</sup> *McAlister v. Deatherage*, 523 So.2d 387 (Ala. 1988) (reversing summary judgment against buyer of real property who suffered from bi-polar disorder but adhering to traditional view of capacity); *Estate of McGovern v. State Employees' Retirement Board*, 517 A.2d 523 (Pa. 1986).

<sup>114</sup> E.g., *Hauer v. Union State Bank of Wautoma*, 532 N.W.2d 456 (Wisc. App. 1995); *In Re Nellie K. Ellis*, 822 S.W.2d 602 (Tenn. App. 1991).

<sup>115</sup> See Restatement (Second) of Contracts § 15(1)(b) ("he is unable to act in a reasonable manner in relation to the transaction *and* the other party has reason to know of his condition") (emphasis added); *Ortelere*, 25 N.Y.2d at 205 (endorsing the draft version of the Restatement requirement).

<sup>116</sup> *Id.*

<sup>117</sup> E.g., Restatement (Second) of Contracts § 15(1)(a); *Orr v. Equitable Mortgage Co.*, 33 S.E. 708 (Ga. 1899) ("since an insane person is incapable of making a contract, the mere fact that the other party to an alleged contract did not know of the incapacity would not restore the capacity to contract"); E.A. Farnsworth (2004), 229.

*Sutcliffe*. The *Sutcliffe* court wrote, “It is no defense that the other party acted fairly and without knowledge of the want of mental faculty or of any circumstances which ought to have put him on inquiry.”<sup>118</sup>

One explanation for this inertia in the case law can be found in the power and coherence of metaphor. The four metaphors underlying cases like *Paine*, *Sutcliffe* and *Lloyd* are intuitively appealing, convincingly coherent and very workable until one matches them up against the volitional aspects of mind that they hide. The volitional aspect of the mind, too, might establish itself firmly in the case law if it were argued and adjudicated in terms of a similarly well-developed system of metaphors, with similar networks of projections from the domains of daily physical and social life. Judging from existing cognitive work, one would anticipate that a metaphorical system supporting capacity as volition would center on source domains such as MOTION, COMPULSION and LINEARITY, because these are closely associated with causation and free will. As one example, the earliest forthright volition case in the contracts area quotes approvingly from a reference to action “*under the control of an insane impulse. . . which deprived him of the capacity of*

<sup>118</sup> 232 Mass. at 233. Intriguingly, even before its supposed emergence in the 1960s with *Faber*, *Ortelere* and the Restatement (Second), the volitional element of mental capacity already appears to have led a quiet but inconsequential life, where it appears doubtful that any reported decisions turned on it. One early treatise writer explains the “correct definition” of insanity in part as follows: “The mental disorder must be such as to deprive the person affected of moral *freedom of action*, and weaken or destroy the *governing* powers of the mind *over the actions*. Man, being a *free moral agent*, is bound by his *choice of action*, however *weak* his will may be as opposed to the *impulse to act*, provided he has the *opportunity of choice*. When the mind is diseased to a sufficient extent, he has not such *power of choice*, but his physical being *must follow* where the *vagaries* of the diseased mind *lead*.” G.A. Smoot, *Law of Insanity* (Kansas City, Mo.: Vernon Law Book Company, 1929), 9. Along the same lines, the U.S. Supreme Court summarized the jury instructions in a mental capacity case by referring to the ability to execute “a contract . . . or other instrument requiring *volition and understanding*. . .” *Dexter v. Hall*, 82 U.S. (15 Wall.) 9, 20 (1873). (Interestingly, the actual jury instructions in this case are also reported, but contain no reference to volition as opposed to understanding. *Hall v. Unger*, 11 F. Cas. 261 (1867). One can only conclude that the volitional element was taken for granted by the Justices.) And the editions of a pedestrian, hardly-innovative legal encyclopedia that circulated between the 1960s and 1980s stated that capacity requires each party not only to “appreciate the effect of what he is doing,” but also “to be able to exercise his will with reference thereto.” *Estate of Farris*, 159 N.W. 417 (Iowa 1968) (quoting 17 C.J.S. Contracts § 133(1)(a)); *Lloyd*, 544 So.2d at 959 (quoting same); *Knight v. Lancaster*, 988 S.W.2d 172 (Tenn. App. 1998) (quoting same).

*governing his own conduct in accordance with reason.*"<sup>119</sup> The progressive case law already contains a few similar examples,<sup>120</sup> though this body of law is still too sparse to support much of a descriptive account. We can already see two points. First, the discourse on the volitional aspects of capacity will tend to be just as metaphorical as the traditional judicial discourse on understanding. And second, the metaphors for volition will tend to be different from the metaphors for understanding. Both of these points accord nicely with what one would expect based on cognitive theory: varying ways of conceiving the mind will be expressed with varying sets of dominant metaphors. And accordingly, differing metaphors can tend to support differing degrees of liberality in the case law.

By showing first that the traditional approach has no sole or a priori claim to conceptual legitimacy, and second that a volitional supplement to capacity law can potentially be just as legitimate, cognitive analysis helps to open the way to substantive and progressive reform of this area

---

<sup>119</sup> *Faber v. Sweet Style Mfg. Corp.*, 242 N.Y.S.2d at 768. On the metaphorical conceptualization of causation and free will, see, e.g., Lakoff and Johnson (1999), 170–234. As the authors explain, “action is conceptualized . . . as self-propelled movement and difficulties in acting as things that impede self-propelled movement.” *Id.* at 190. As illustrations from everyday speech they give examples such as “casting off chains” and “opening doors,” which accord with the metaphors from *Faber* given in the text.

<sup>120</sup> For example, *Ortelere* refers to “persons whose contracts are merely *uncontrolled reactions* to their mental illness.” 25 N.Y.2d at 205. Another New York case characterizes *Ortelere* as “the *impulse test*,” and speaks of an “*eccentric mind*” and of persons who are unable to “*control* their conduct.” In the Matter of the Estate of ACN, 509 N.Y.S.2d 966 (Surr. Ct. 1986). Similar metaphors appear in another New York case, *Fingerhut v. Kralyn Enterprises, Inc.*, 337 N.Y.S.2d 394 (Sup. Ct. 1971). Another case using the volitional approach refers to “the *erratic* and *irrational conduct*” of the person who made the contract. *Farnum v. Silvano*, 540 N.E.2d 202 (Mass. App. 1989). And another refers to “*motivation*, or *exercise of will*,” “*distort[ion of] the will*, and “*free volition*.” *Nohra v. Evans*, 509 S.W.2d 648 (Tex. Civ. App. 1974). (In addition, the prosecution’s closing argument in the *Hinckley* case, see *supra* note 109, presents a rich opportunity for analysis of related metaphors for volition. The text of that closing argument is available at <http://www.law.umkc.edu/faculty/projects/ftrials/hinckley/hinckleytranscript.htm>.)

Space precludes a close analysis of these metaphorical expressions, but it should be clear that they all invite analysis using the tools that were discussed in Part 4.2 (that is, polysemy, inferential correspondence, novel extensions and diachronic semantic change). And the *Faber* court’s use of “under” fits with the widespread metaphor CONTROL IS UP. See, e.g., S. L. Winter (1991), 391 (discussing “*under color of law*”).

Expressions such as these dovetail well with the expressions used in connection with duress. This not only reinforces the doctrinal parallel drawn above (see *supra* note 108 and accompanying text) but also helps to establish why that parallel might seem appropriate in the first place.

of the law. (A similar progressive tendency also appears elsewhere in the still-emerging body of cognitive work as applied to law,<sup>121</sup> and this tendency makes sense for two related reasons. First, formalism in law tends to be conservative<sup>122</sup> and cognitivism is pervasively anti-formalist.<sup>123</sup> And second, cognitivism shows existing orders to be human constructions and thereby makes them to vulnerable to normative criticism.<sup>124</sup>) In this way the third level of continuity between the realists and the cognitivists emerges. It is certainly clear that Cohen and the realists were committed to progressive law reform,<sup>125</sup> and cognitivism's tendency to open up the

<sup>121</sup> See, e.g., S.L. Winter (1988), 1515 (calling for the metaphor of standing to be reanimated so as to encompass altruism rather than individualism); S.L. Winter (1989), 1234–1236 (grounding his attraction to a cognitivist view of law in his experiences with the civil rights movement); G. Minda, *Boycott in America: How Imagination and Ideology Shape the Legal Mind* (Carbondale: Southern Illinois University Press, 1999); C.S. Bjerre, "Project Finance, Securitization and Consensuality", *Duke Journal of Comparative and International Law* 12 (2002), 411 (using the concept of scalar categorization to question the categories of consensual transaction and true sale); A. Coles-Bjerre, "Preferential Transfers, Plain Meaning and the Patterns of Cognition", to appear (using image-schema transformations to establish the legitimacy of competing approaches to preference avoidance in bankruptcy).

<sup>122</sup> E.g., R.J. Mooney, "The New Conceptualism in Contract Law," *Oregon Law Review* 74 (1995), 1131, 1151; Jay M. Feinman, *Un-Making Law: The Conservative Campaign to Roll Back the Common Law* (Boston: Beacon Press, 2004); J.M. Feinman, "Un-Making Law: The Classical Revival in the Common Law", *Seattle University Law Review* 28 (2004), 1. Cf. D. Kennedy, "Form and Substance in Private Law Adjudication", *Harvard Law Review* 89 (1976), 1685.

<sup>123</sup> One aspect of this anti-formalism is cognitivism's emphasis, illustrated by this article, on the fact that abstract language does not conform to reality in some single, objectively correct way. Cognitivism's treatment of categorization, which is beyond the scope of this article, is perhaps an even more powerful aspect of its anti-formalism. See, e.g., G. Lakoff (1987); C.S. Bjerre, "Definition-Building and Cognition," to appear (analyzing the phenomenon of contractual and statutory definitions that extend markedly beyond conventional usage); S.L. Winter (2001a), 186–222 (showing that many so-called rules actually operate like standards due to the non-classical nature of categories).

<sup>124</sup> As Winter puts it, "to expose the infrastructures of legal reasoning is also to facilitate a more penetrating critique, one that cuts to the very root of suffocating conventional wisdom." *Id.* at xiii.

<sup>125</sup> Cohen writes that "[t]he functional approach permits ethics to come out of hiding," and calls for "bring[ing] into play a critical theory of values." F.S. Cohen (1935), 847, 849. On a more general level, Morton Horwitz makes clear that "[f]or many purposes, it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism." M.J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (New York and Oxford: Oxford University Press, 1992), 169. See generally L. Kalman, *Legal Realism at Yale 1927–1960* (Chapel Hill and London: University of North Carolina Press, 1986).

existing legal order to legitimate alternatives is very much in accord. Cognitivism's commitment to empirical reality<sup>126</sup> need not entail any lack of interest in reform, and as applied to the law there has been no such lack of interest. The separation of empiricism and reform is at most, in Llewellyn's words, only a "*temporary* divorce of Is and Ought for purposes of study".<sup>127</sup>

Nonetheless, the reformist dimension of cognitive analysis should not be overstressed. The overwhelming lesson of cognitive work across all of its fields has been that the patterns of human thought are deeply wedded to life's physical and social realities.<sup>128</sup> And those lived realities are part and parcel of the inertia of the status quo. As applied to the construction (judicial and otherwise) of legal concepts, this means that the dominant metaphors are inherently rooted in the ways that we live today,<sup>129</sup> and this fact tends to reinforce the prevailing patterns of judicial thought. It tends to cause judges and others to think naturally in status quo terms rather than in innovative ones, and it can even tempt judges or others to avoid whatever conceptual innovations they may nonetheless encounter for the sake of being persuasive.<sup>130</sup> In all, the insight that abstract concepts such as mind or understanding or volition do not have fixed and determinative content is no practical license for untrammelled or radical innovation. The true lesson of cognitive analysis of metaphor is one of both liberation and constraint. Abstract concepts are human creations, but those creations come about in large part through interaction with the world, and

<sup>126</sup> See *supra* notes 88–94 and accompanying text.

<sup>127</sup> K.N. Llewellyn (1931), 1236 (*italics* in original).

<sup>128</sup> The fact that the metaphors for understanding (*supra* Part 3) and volition (*supra* notes 119–120 and accompanying text) are so clearly tied to the physical and social experiences of containing, seeing, being physically compelled, and so on, is a clear illustration of this principle.

<sup>129</sup> The influence of diachronic semantic change, *supra* notes 81–83 and accompanying text, enriches this point somewhat, but only by also rooting our concepts in the ways that our linguistic forbears formerly lived, centuries ago – hardly a spur to reformism in its unconstrained varieties.

<sup>130</sup> Winter makes a similar point on a more general level: "law works as 'law' because the social processes of persuasion mean that judges will be constrained to replicate the most mainstream values and understandings." S.L. Winter, "The Next Century of Legal Thought?" *Cardozo Law Review* 22 (2001), 727, 771 (reviewing Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge and London: Harvard University Press, 1997)). As a result, law "enforces (and reinforces) the dominant normative views of the culture." *Id.* See also S.L. Winter (2001a), 357; S.L. Winter (2001b), 1636.

therefore we do not have a wholly free hand in shaping or reshaping them.

## 6. CONCLUSION

I hope to have shown in this article that the traditional approach to contractual mental capacity has no sole claim to legitimacy, and that it would be equally legitimate – though equally metaphorical – to expand capacity doctrine to encompass a volitional element. The metaphorical nature of both competing approaches may initially be startling, but to insist upon their metaphorical nature is by no means to criticize the soundness of the concepts. Metaphor is not incompatible with legal reasoning, or with reasoning in general – on the contrary, it is an intrinsic part thereof. The lesson for legal analysis is not to shun metaphor, or to seek liberation from it, but rather to realize that this aspect of thought is part of how the law functions, and that we can use it as an opening for reform though we must also live within its constraints.

The cognitivist complex of ideas – of which metaphorical analysis is only one aspect – holds great potential for the advancement of legal theory. The essential role that it reserves for creative individual and social meaning-making provides a fresh ground from which to continue the modern critique of classical, deductivist, mechanical legal reasoning. But at the same time, the constrained and world-bound nature of that creativity should be a comfort to those who seek to carry out their reforms at a measured pace. In this generation of legal theory as in that of the realists, we should bear in mind Lon Fuller's eloquent image of Society and Law, or Llewellyn's Is and Ought, as two blades of a pair of scissors. Both blades cut, but neither can cut without the other.<sup>131</sup>

*University of Oregon School of Law*  
*Eugene, Oregon 97403-1221*  
*USA*  
<http://www.law.uoregon.edu/faculty/cbjerre/>

---

<sup>131</sup> Lon L. Fuller, "American Legal Realism," *University of Pennsylvania Law Review* 82 (1934), 429, 452