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Charley's Corner

Some Cognitive Science for the Reference Staff

by Charles R. Dyer, Retired Director of the San Diego County Public Law Library. All views expressed in this column are my own alone.

I have contended in previous columns that it is the business of public law librarians to help self-represented litigants learn to navigate their way through the courts and to "think like a lawyer." Here is a quote from a recent speech of mine to a group of attorneys and judges:

> Most citizens have a developed sense of law and morality, which comes from their cultural roots, their parents and education, their religion, and their own life experience. That knowledge base, or "vocabulary", using the postmodern term, will give meaning to words that are different from the meaning that the legal community generally gives them and that judges ruling in specific situations would use. A lawyer's job, being well versed in the proper vocabulary, is to represent the client and get the best deal he can, employing the proper vocabulary. A law librarian's job, working with a *pro per* [California term for self-represented] litigant, is to help that person learn enough on his own to develop a sufficient sense of the proper vocabulary so that he can get closer to getting his own best deal. While a lawyer's job for any individual client would take longer and be harder on the lawyer, the librarian's job is psychologically more difficult for the litigant. And the fact that the time is shorter makes it even more so, as indeed many lawyers often try to help their clients understand what they are doing for them, but at a slower pace. The courts need to know that printed forms and computer kiosks will work only for those who already possess the knowledge and intelligence to make the shift in vocabulary easily. Ultimately, the least served will need human help. Unless and until every person can have his own lawyer, there will be a huge need for public law libraries. And if every person had his own lawyer, we'd still need public law libraries.

Subsequent to that speech, I began to study Professor Steven Winter's book *A Clearing in the Forest: Law, Life, and Mind*.[1] Winter's book, and much of his recent work, has been a part of his mission to try to bring cognitive science into the study of law. The particular type of cognitive science that Winter uses is that promulgated by George Lakoff, a linguist at UC Berkeley, and Mark Johnson, a philosopher at the University of Oregon. Their view is one of a number of competing ones within cognitive science. They have been developing it for over twenty years and have conducted substantial empirical research, but it is noteworthy that a lot of other recent

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[1]University of Chicago Press, 2001.

scientific evidence about neural pathways within the brain has supported their view. I believe their work, as elaborated by Winter, would be useful for public law libraries in fulfilling the mission that I noted above.

To contrast his thinking from the traditional, Winter begins with an argument from a 1988 article by Professor Frederick Schauer, in which Schauer asked us to consider a rule prohibiting "live animals on the bus."[2] Does it bar a live goldfish in a sealed plastic bag? Schauer indicates that because the fish is literally an "animal," that prohibition should apply. A decision maker interpreting the rule in light of its purpose, on the other hand, would allow the fish because it does not threaten the kind of mischief (e.g., disturbing the passengers) contemplated by the rule. For Schauer, the split between the rule and its underlying purpose is a consequence of the rule's formulation in language:

> The language in which a rule is written and the purpose behind that rule can diverge precisely because that purpose is plastic in a way that language is not.... It is because purpose is not reduced to a concrete set of words that it retains its sensitivity to novel cases, to bizarre applications, and to the complex unfolding of human experience.[3]

Winter takes on Schauer's view. Schauer is trying to eliminate the problems of decision making by requiring the decision maker to follow the strict dictates of the rule. Winter points out that, by strict definition, the rule would then apply to a slide for a microscope containing live paramecia. Indeed, strictly, it would apply to the humans on the bus.

Winter uses this example to show that rules are really applied using analogy to a prototypical case, and that the actual sense of the word "animal" is based in part on the context of using it in conjunction with the situation of riding on a bus. The prototypical case is the rambunctious dog who disturbs passengers. Cases that are not close to the prototype are not even considered as problematic, e.g., the slide with the paramecia. A case close to the prototype, such as a seeing-eye dog, requires more consideration. In his book, Winter does not go so far in his analysis to consider the additional problem that keeping a seeing-eye dog off the bus would violate a superior rule, the Americans with Disabilities Act.

At the San Diego County Public Law Library, we had an instance when a rather nervous patron insisted on bringing her small dog into the library because it had a calming effect on her and therefore was medically needed. The supervisor at the time made a pragmatic decision to let the dog remain because the dog was not creating any disturbance and the patron without her dog may well create more disturbance or at least waste everyone's time. For us, the legal problem was whether the patron's condition would legally constitute a "disability" under the ADA, but the operative problem was really the essence of the library's rule prohibiting animals in the library. (Would that we could prevent the occasional roach or mouse just by passing a rule.)

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[2]Frederick Schauer, "Formalism," 98 *Yale L.J.* 509, 533 n. 70 (1988).

[3]*Id.* at 532.

For the limited purposes of this column I will attempt a quick summary of the Lakoff and Johnson cognitive theory. Human intelligence uses mental maps (sets of neurons with specific dendrite connections to other neurons) to create prototypical memories of sensory experience so that they can be used later without having to be relearned. Your idea of an "animal," for instance, would normally use a prototype of a common animal with whom you regularly interact, e.g., your dog. When using the word "animal," your brain re-uses the mental map as a starting point, so you think of a particular animal as being either similar to a prototypical one or further removed. Winter uses the example of the word "bird" and notes that we are more likely to think of a robin when hearing or reading the word than to think of a penguin. This method of thinking enables the human brain to ingest considerably more meaning with minimal brain use. Think of it as somewhat like using a vector-created computer design, rather than a bit map, and being able to re-use the vector in subsequent similar instances.

According to Lakoff and Johnson, abstract thought uses these same mental maps for parts of our mental processing. We come to understand abstract ideas through analogy to sensory experience. There are certain common uses, such as patterns like "More is up." So we speak of the "upper class" or "higher in the organization" as patterns for describing abstract relationships. In this manner, metaphor becomes a vital component of abstract thought. Similarly, prototypes become a component and give meaning to terms used in abstract thought (and rules). Context and the intention of the user (thinker, speaker, etc.) when employing abstract ideas affect which metaphors get used, and by that, which mental maps get used.

Another conclusion of their research is that, as a particular mental map is used over and over, it is reinforced. Its connections between neurons become stronger, and its ability to be remembered (and thus reused) over a longer period of time are increased. That conclusion obviously matches with our common sense notion that repetition improves memory. Recent scientific evidence has also supported that claim.[4]

An interesting aside comes from the book *Animals in Translation*,[5] wherein Temple Grandin, an autistic person who earned a Ph.D. in animal behavior, notes that animals (other than human) and autistic people share a trait in that they both have difficulty making the translation from sensory experience to abstract thought. What actually scares the cat about trips to the vet is not the fear of the rabies vaccination, but the fear created by the unfamiliar surroundings and smells. That is why the cat stays quieter while it remains in its carrier and fights coming out. Grandin gives an example of a lion who was caged in order to move it. The trainer threw in a pillow, thinking that it would provide the lion comfort, like a cat would have had from its experience of sitting on pillows. Instead, the lion ate the pillow and died. Grandin notes that grass or straw in the cage would have served the purpose better because that was what the lion was familiar with.

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[4]See, e.g., Sandra Blakeslee, "Cells That Read Minds," *New York Times* (Jan. 10, 2006, Science section) at http://www.nytimes.com/2006/01/10/science/10mirr.html?th&emc=th .

[5]Temple Grandin and Catherine Johnson, *Animals in Translation* (New York: Schribner, 2005).

Public law librarians often find themselves explaining to a self-represented litigant that his or her case is not nearly as unique as that person thinks it is. In part, the problem is that the patron throws in all sorts of legally irrelevant facts. In part, since the patron has not handled such a case before, or perhaps any legal matter before, the patron has not yet learned, not to mention reinforced, the abstract concepts that are very obvious to those trained in law. Typically, procedural matters which are routine to litigating attorneys take longer to learn than the substantive law of the case, just because there is more there to learn.

On the other hand, occasionally, a public law librarian must tell a self-represented litigant that it appears that his case is indeed more unique than he realizes. The patron was hoping to get away with filling our a simple pre-made form for his case and not have to learn a lot of law or do a not of study. At the San Diego County Public Law Library, we have even had patrons parking in the three-minute passenger zone and running into the library to get the "form" the court clerk sent them over to get. But we also get many referrals from the Small Claims Advisor's Office and the Family Court Facilitator's Office for matters too complicated for their pre-made packets of materials.

At many public law libraries, librarians are teaching classes to self-represented litigants. I have seen some marvelous teachers among us who are very capable of making the class very interesting to their students. The usual rule for such teachers is to respect the innate intelligence of the students, while avoiding jargon as much as possible. And a little humor usually helps. I now believe much of the skill displayed in such settings is the ability of these librarian-teachers to use the everyday metaphorical patterns most all members of American society possess to get their points across, rather than to fall back on the more obtuse concepts of the professions of law or library science.

As a public law librarian who began in academic law libraries and a continuing reader of scholarly journals, I would sometimes cringe at the inexact words librarian-teachers would use when teaching. I now see that I was at times too concerned for the edges of meaning, the places where the concepts would be misapplied, and not enough concerned for getting across the primary sense of the concept, the prototypical sense. We have always known that, in our short classes for library patrons, we cannot get into the depth of explanation and nuance of meaning that law students get in law school or that clients get when given the full story by their attorney. But how do we get the essence across in such a short time? There now appear to be ways that this can be done.

Or, rather, what I should be saying is that there now appear to be some theories as to how it gets done. It doesn't hurt to have a little theory to support your practice. Some of us, myself included, can improve our techniques when we know the underlying concepts. (There I go again, using one of those metaphorical terms to present an abstract idea.) If we are going to help people think like a lawyer, then first we need to understand how people think. We need to learn the metaphors and prototypes that most people use. We then need to learn the metaphors and prototypes that lawyers use. Or more accurately, we need to learn to see the metaphors and prototypes that we instinctively know they use.

Grandin would want to know how Schauer's proverbial "live animal on a bus" might think. The bus driver might want to know how the bus company's lawyer might think. The lawyer would want to know how the judge in the case would think. The litigant is going to come ask us, "How am I supposed to think?" Note that I said, "How am I supposed to think?" not "What am I supposed to do?" That would be legal advice. We advise how a self-represented litigant can find out and create his own legal advice. Or, to use a metaphor familiar to us, on the information highway, as navigators, we must also be tour guides who can speak different languages, and there are a lot of different kinds of "animals" on the bus.

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I wrote this column back in January, but submitted a different one because Kim wanted something pertaining to that issue's theme. Subsequently, I submitted a paper on this same topic to the AALL Lexis-Nexis Call for Papers. I am pleased to report that my paper, "The Queen of Chula Vista: Stories of Self-Represented Litigants and a Call for Using the Cognitive Theory of Metaphor to Work With Them," was a winner in the Open Division. I will be making a ten-minute presentation at the AALL Meeting program on the Lexis-Nexis Call for Papers, Monday, July 10, at 2 p.m. Hopefully, you will see the full version in the *Law Library Journal*.