

Who is On the Outside Looking In, and What Do They See?: Metaphors of Exclusion in Legal Education[†]

by David T. Ritchie^{*}

I. INTRODUCTION

Many people might assume that metaphors are linguistic devices that pithily play on associations between unrelated kinds of things.¹ These associations, many might further assume, show how deft an author can be at using a turn of phrase or how agile a speaker might be using

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1. Thomas Hobbes was of this view, maintaining that metaphors are language ornaments. THOMAS HOBBS, *LEVIATHAN* Pt. I, Ch. 4 (John Plamenatz ed., Prometheus Books 1962) (1651).

widely known imagery to illustrate a point.² Such assumptions are not completely arbitrary, as metaphors do indeed have important literary aspects. This device, though, is often presumed to be a mere literary or rhetorical trope³ designed to enliven one's language or show intellectual dexterity in discourse.⁴ Metaphor is, in this view, a mere trick designed to conceal or cover over the truth by making a superficial comparison with unrelated phenomena.⁵

In fact, there are well known theorists and jurists in Anglo-American jurisprudence who have expressed skeptical views about the power of metaphor in legal discourse.⁶ England's Lord Mansfield cautioned that "nothing in law is so apt to mislead [as] a metaphor,"⁷ and the British philosopher Jeremy Bentham suggested that metaphor was the antithesis of legal reasoning.⁸ This cynicism was picked up on this side of the Atlantic by the nineteenth century Yale law professor Wesley Hohfeld,⁹ and later by Benjamin Cardozo who suggested that metaphors in legal analysis and communication had "to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."¹⁰ Other prominent jurists, such as former U.S. Supreme Court Justice Felix Frankfurter,¹¹ agreed. More recently, the constitutional theorist Robert Tsai has said that "[l]egal scholars have traditionally understood metaphor as, at worst, a perversion of the law, and at best, as a necessary but temporary place-holder for more fully developed lines of argument."¹²

What if these skeptical views about the role of metaphor in human reasoning and communication are misplaced, however? If, as some have

2. David S. Miall, *Metaphor and Literary Meaning*, 17 BRIT. J. AESTHETICS 49 (1977).

3. Metaphor, <http://en.wikipedia.org/wiki/Metaphor> (last visited Apr. 23, 2007).

4. Using Metaphors in Creative Writing, http://owl.english.purdue.edu/handouts/general/gl_metaphor.html (last visited Apr. 23, 2007).

5. See GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 245 (1980).

6. See Eduardo Moisés Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, available at <http://ssrn.com/abstract=881100> (last visited Apr. 23, 2007); Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 235 (1994).

7. Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1057 n.9 (1989); Hibbitts, *supra* note 6, at 235.

8. Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 186 (2004); Peñalver, *supra* note 6, at 1.

9. See Hibbitts, *supra* note 6, at 235.

10. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926); Hibbitts, *supra* note 6, at 235.

11. *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 69 (1943) (Frankfurter, J., concurring); see Hibbitts, *supra* note 6, at 235 n.37.

12. Tsai, *supra* note 8, at 186.

persuasively argued,¹³ human cognition is profoundly metaphorical in nature,¹⁴ would not the evaluation and discussion of the role of metaphor in all areas of human enterprise take on a more important role in understanding how we as a species do the things we do?¹⁵ In fact, this is the emerging consensus.¹⁶ The academic literature in almost every area of human concern¹⁷ has embraced the importance of metaphor, not as linguistic chicanery but as a fundamental aspect of human reasoning about those areas of concern.¹⁸

Certainly, within the realm of legal scholarship, the status of metaphor has risen considerably.¹⁹ Dozens and dozens of articles have appeared in the last couple of decades²⁰ that acknowledge the importance of metaphor both in legal analysis and reasoning, and in the way lawyers, judges, and scholars communicate about the law. Virtually all of these contributions endorse the notion that metaphors in legal

13. See LAKOFF & JOHNSON, *supra* note 5.

14. Lakoff and Johnson argue that we “live by” certain sorts of metaphors. See generally LAKOFF & JOHNSON, *supra* note 5.

15. See Jacques Derrida, *White Mythology: Metaphor in the Text of Philosophy*, in MARGINS OF PHILOSOPHY 207 (Alan Bass trans., 1982).

16. It should be noted that this perspective, however, is not new. Aristotle, for instance, seemed to reserve a central role for metaphor in his philosophy of mind. See, e.g., Aristotle, *Poetics*, in 2 THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 2316 (Jonathan Barnes ed., 1984). More recently, the French philosopher Jacques Derrida traced the important role metaphor has played in the philosophical systems of George W.F. Hegel, Friedrich Nietzsche, Karl Marx, and Martin Heidegger. Derrida, *supra* note 15, at 208-19.

17. LAKOFF & JOHNSON, *supra* note 5, at 267-72; see, e.g., EVE E. SWEETSER, FROM ETYMOLOGY TO PRAGMATICS: METAPHORICAL AND CULTURAL ASPECTS OF SEMANTIC STRUCTURE (1990); GILLES FAUCONNIER, MENTAL SPACES: ASPECTS OF MEANING CONSTRUCTION IN NATURAL LANGUAGE (1985); RAYMOND W. GIBBS, THE POETICS OF MIND: FIGURATIVE THOUGHT, LANGUAGE, AND UNDERSTANDING (1994); RONALD W. LANGACKER, CONCEPT, IMAGE, AND SYMBOL: THE COGNITIVE BASIS OF GRAMMAR (1990); ZOLTÁN KÖVECSES, METAPHOR AND EMOTION: LANGUAGE, CULTURE, AND BODY IN HUMAN FEELING (2000).

18. LAKOFF & JOHNSON, *supra* note 5, at 267-72.

19. STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001) [hereinafter WINTER, A CLEARING IN THE FOREST]; see also Steven L. Winter, *What is the “Color of Law?”*, in CAMBRIDGE HANDBOOK OF METAPHOR AND THOUGHT (Ray Gibbs ed., 2005); Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323 (1992); Steven L. Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. 745 (1992); Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

20. For representative samples, see *supra* notes 6, 7, 8 & 19 and *infra* notes 26 & 27.

discourse are fundamental to the way we understand and use legal concepts. These endorsements have led to innovative and important discussions about the nature of legal analysis and communication in our tradition of jurisprudence.²¹ Following on the ground-breaking work of the philosopher and cognitive theorist Mark Johnson,²² Steven Winter has suggested that “a cognitive understanding of metaphor provides a more genuinely pragmatic alternative to the insistence on dichotomous thinking that so dominates and distorts contemporary legal thought.”²³ Leading voices in legal communication²⁴ have taken up this mantle,²⁵ evaluating how the metaphors used in business and corporate law indelibly shape the way we think about how business is carried out.²⁶ Some have even developed theories about how to construct and employ metaphors²⁷ in the context of the American adversary system.²⁸ In short, contrary to what Bentham and Cardozo thought, metaphor has come to be seen as a fundamental and liberating way of forming and expressing our intellectual imagination in the context of legal reasoning and communication.

21. One such conversation recently took place at the Walter F. George School of Law at Mercer University in Macon, Georgia, where a symposium brought together experts in cognitive science, legal communication, legal theory, philosophy, and religion. See *Symposium: Using Metaphor in Legal Analysis and Communication*, 58 MERCER L. REV. (Spring 2007).

22. Mark Johnson & Diego Fernandez-Duque, *Cause and Effect Theories of Attention: The Role of Conceptual Metaphors*, 6 GEN. REV. PSYCHOL. 153 (2002); Mark Johnson & Diego Fernandez-Duque, *Attention Metaphors: How Metaphors Guide the Cognitive Psychology of Attention*, 23 COGNITIVE SCI. 83 (1999); Mark Johnson, *Introduction: Why Metaphor Matters to Philosophy*, 10 METAPHOR & SYMBOLIC ACTIVITY 157 (1995); Mark Johnson, *Conceptual Metaphor and Embodied Structures of Meaning*, 6 PHIL. PSYCHOL. 413 (1993); Mark Johnson, *Embodied Knowledge*, 19 CURRICULUM INQUIRY 361 (1989); George Lakoff & Mark Johnson, *The Metaphorical Logic of Rape*, 2 METAPHOR & SYMBOLIC ACTIVITY 73 (1987).

23. WINTER, A CLEARING IN THE FOREST, *supra* note 19, at 43.

24. The careful and informed reader might note that I have purposefully abandoned the traditional use of the label “legal writing,” opting instead to use the phrase “legal communication.” Legal communication comes closer to capturing the more expansive analytical and cognitive elements that are entailed in legal discourse.

25. *Certamente, este é um metaphor! C'est une métaphore!* Certainly, this is a metaphor!

26. Linda L. Berger, *What is the Sound of the Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIRECTORS 169 (2004).

27. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2002).

28. Clearly, this is not limited to application in the context of U.S. legal theory and practice.

In this Article, I intend to do two things. First, I will briefly discuss²⁹ the way in which metaphor has a formative and ontological effect on how we see and live in the world. Here, I will draw upon the work of George Lakoff and Mark Johnson, touching upon the notion that we “live by”³⁰ certain metaphors. In Part II of this Article, I will discuss the basic theory behind cognitive or conceptual metaphor. While not an exhaustive treatment, this discussion should orient the reader to the fundamental aspects of this theory. Then I will develop one particular category of metaphors that Lakoff and Johnson have identified,³¹ which has subsequently been picked up by others in discussions of contemporary political theory (especially in the European context).³² This class of metaphors relates to the theme of exclusion.³³ My decision to discuss this particular class of metaphors is not happenstance. These are metaphors that are frequently used in the legal academy to discuss the status of people who teach legal skills-related courses.³⁴

This leads me to my second task. The remainder of the Article (Part III) will be devoted to evaluating and discussing some of these metaphors of exclusion with an eye to the ontological effect they have upon those who teach legal skills courses³⁵ (particularly “legal writing”).³⁶ I must caution that this discussion is not simply another in a long line of calls for the increased status of legal writing and legal skills professors (although it might be that at some level as well), but is instead a look at how those of us in these positions sometimes unwittingly contribute to the reinscription of exclusionary metaphors and

29. I will not belabor the reader by duplicating efforts that are more fully exhausted elsewhere, including those offered in the present volume of work.

30. LAKOFF & JOHNSON, *supra* note 5, at 3–5.

31. *Id.* at 29–32.

32. See, e.g., Robin Peace, *Social Exclusion: A Concept in Need of Definition?*, 16 SOC. POL'Y J. NEW ZEALAND 17 (2001).

33. LAKOFF & JOHNSON, *supra* note 5, at 29–32.

34. See, e.g., Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS'N LEGAL WRITING DIRECTORS 108 (2006).

35. I understand the inherent weakness of maintaining the dichotomy of “doctrine” vs. “skills.” As I will explain later on, I prefer to abandon the dichotomy altogether. Nonetheless, in this preliminary discussion I have chosen to maintain the terminology currently used to minimize confusion.

36. See, e.g., Jan M. Levine, *Legal Research and Writing: What Schools are Doing, and Who is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51 (1998-2000); Jan M. Levine & Cheryl Beckett, *Status and Salary, in THE POLITICS OF LEGAL WRITING: PROCEEDINGS OF A CONFERENCE FOR LEGAL RESEARCH AND WRITING PROGRAM DIRECTORS* (Jan M. Levine, Rebecca Cochran & Steve Johansen eds., 1996).

ultimately to the re-entrenchment of the hierarchy itself. In my view, this reinscription, in turn, makes it impossible to change the dynamic of power and status that reigns in the contemporary legal academy.³⁷ If I am correct, we (those of us who teach legal skills) have as much responsibility as anyone for the current state of affairs. Who we are and how we are perceived can be changed. By recognizing that status is—in a very true way—a metaphorical relationship, we perhaps have more power to change our own situations than we might dare to imagine.

II. THE POWER OF METAPHORS OF EXCLUSION

The linguist George Lakoff and the philosopher Mark Johnson have, over the past twenty-five years, developed a robust theory of how metaphor works in the way humans analyze and make sense of the world.³⁸ Their work in this regard has been widely cited in fields as diverse as clinical psychology, cognitive science, law, linguistics, literary studies, philosophy, and politics.³⁹ Below, I will briefly discuss some of the salient features of the cognitive theory of metaphor, laying out its basic structure. This discussion is necessary, I believe, so that the reader can see why the last part of this Article contains some troubling implications. After setting out the basic features of the cognitive theory of metaphor, I turn to examining one particular set of metaphors that illustrate how this theory is used in constructing an understanding of a complex moral and political problem and analyzing that understanding. This category of metaphors relates to notions of exclusion. I am convinced that current debates surrounding the status of some members of law faculties in the United States can be amply explained by drawing on this theory of metaphor. As such, the following examination of Lakoff's and Johnson's work could have a far-reaching impact on an important and raging debate within the legal academy.

A. *The Cognitive or Conceptual Theory of Metaphor*

Advocates of the cognitive theory of metaphor maintain that metaphors are fundamental to the way we understand and experience the world.⁴⁰ George Lakoff and Mark Johnson, for example, have said that “our ordinary conceptual system is metaphorical in nature.”⁴¹ In essence, the way we think is dependent on metaphor.⁴² This theory has

37. See, e.g., Levine, *supra* note 36; Levine & Beckett, *supra* note 36.

38. See *supra* note 22.

39. LAKOFF & JOHNSON, *supra* note 5, at 243.

40. *Id.* at 4-5.

41. *Id.* at 4.

42. *Id.* at 6.

profound implications.⁴³ If this idea is correct, and it has gained wide currency,⁴⁴ then human cognition is determined in no small part by the ability to recognize, understand, and use metaphors.⁴⁵ This, in turn, suggests that who we are is determined by metaphors.⁴⁶ In effect, we “live by” metaphors in the truest sense.⁴⁷ Far from being a mere linguistic device, according to this view metaphorical reasoning is a metaphysical principle of the highest order.⁴⁸

Metaphors are ways of describing or illustrating one concept by equating it to something else.⁴⁹ The relationship between the first concept (“target” in Lakoff’s scheme) and the second concept (“source”) is one of ascription.⁵⁰ In ascribing the characteristics of the source concept upon the target concept, we are conveying meaning about the target concept by playing on one’s conceptual understanding of the attributes of the source concept.⁵¹ It is this relationship that conveys meaning, not the words that are used.⁵² In effect, when we are faced with understanding a concept that is new or difficult, we cognitively seek to relate the unknown idea to something we do know in order to make the new or difficult concept more intelligible.⁵³ Very often, perhaps almost always, this ascriptive relationship is created without consciously thinking about it.⁵⁴

Some, like Lakoff and Johnson,⁵⁵ suggest that this metaphoric aspect of reasoning is cognitive in nature.⁵⁶ That is to say, advocates of the cognitive theory of metaphor maintain that metaphors are deeply ingrained in the way our brains work.⁵⁷ According to Lakoff and

43. See, e.g., GILLES FAUCONNIER & MARK TURNER, *THE WAY WE THINK: CONCEPTUAL BLENDING AND THE MIND’S HIDDEN COMPLEXITIES* (2002); SARA F. TAUB, *LANGUAGE FROM THE BODY: ICONICITY AND METAPHOR IN AMERICAN SIGN LANGUAGE* (2001); MARK TURNER, *DEATH IS THE MOTHER OF BEAUTY: MIND, METAPHOR, CRITICISM* (1987); Lera Boroditsky, *Metaphoric Structuring: Understanding Time Through Spatial Metaphors*, 75 *COGNITION* 1 (2000).

44. See, e.g., *supra* note 43.

45. LAKOFF & JOHNSON, *supra* note 5, at 3-9.

46. *Id.*

47. *Id.*

48. Derrida, *supra* note 15, at 212.

49. LAKOFF & JOHNSON, *supra* note 5, at 3.

50. GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 276-78 (1987).

51. *Id.*

52. *Id.*

53. *Id.*

54. LAKOFF & JOHNSON, *supra* note 5, at 11.

55. *Id.* at ch. 1.

56. *Id.*

57. *Id.*

Johnson and those who follow their views, metaphors make so much sense to us because we are—at base—creatures who understand concepts in metaphorical terms.⁵⁸ As Lakoff and Johnson put it, “we systematically use inference patterns from one conceptual domain to reason about another conceptual domain.”⁵⁹ Cognitive—or conceptual—metaphor theory is a systematic aspect of our analytical abilities.⁶⁰ Lakoff and Johnson suggest that our pervasive use of metaphor in analyzing and describing phenomena flows from the fact that our bodies interface with the world in certain ways.⁶¹ This has been taken so far as to mean that our brains are wired in ways that recognize and utilize metaphorical relationships.⁶² These relationships are, in this view, neurological in nature.⁶³

Others, like the philosopher Donald Davidson, have rejected this notion as being wrong-headed.⁶⁴ According to Davidson, metaphors can only be propositional in nature.⁶⁵ As such, metaphors are merely contingent linguistic constructs that hold no independent truth-value.⁶⁶ This concept is a return to the widely held notion that metaphors are not fundamental to human reasoning but are instead simply a contingent matter of the language we choose to use in explaining things.⁶⁷ This view has been discussed at length by, among others, Steven Winter,⁶⁸ who suggests that Davidson’s views are not borne out by the evidence in cognitive theory.⁶⁹ According to Winter, and ultimately to Lakoff and Johnson, “Thought is not primarily linguistic and propositional, but embodied and imaginative”⁷⁰ As Lakoff and Johnson themselves put it, “[M]etaphor is a natural phenomenon. Conceptual metaphor is

58. *Id.*

59. *Id.* at 246.

60. *Id.* at 7-9.

61. *Id.* at 246; GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH* 81-93 (1999).

62. LAKOFF & JOHNSON, *supra* note 5, at 257-59.

63. *Id.*

64. DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* 263-64 (1994).

65. *Id.*

66. *Id.*

67. This view is what Lakoff and Johnson refer to as “the single biggest obstacle” to understanding a cognitive or conceptual theory of metaphor. LAKOFF & JOHNSON, *supra* note 5, at 245.

68. Steven Winter has a very intriguing and persuasive discussion of this debate in Chapter 3 of his book *A CLEARING IN THE FOREST*. See *supra* note 19.

69. WINTER, *A CLEARING IN THE FOREST*, *supra* note 19, at 47.

70. *Id.*

a natural part of human thought, and linguistic metaphor is a natural part of human language."⁷¹

I will not go into the specifics of the neurobiology behind the cognitive or conceptual theory of metaphor here.⁷² For purposes of this discussion, I will accept the claims of Lakoff, Johnson, and Winter that metaphorical reasoning is a deep cognitive aspect of our analytical processes.⁷³ The interesting part of this claim is the constitutive nature of metaphor in our analytical frameworks.⁷⁴ Whether metaphor is a fundamental cognitive aspect of reasoning brought about by neurobiological,⁷⁵ social,⁷⁶ or phenomenological⁷⁷ causes—or some complex mixture of them all⁷⁸—is not really necessary to the application of the theory.⁷⁹ Others have done a much better job laying out the cognitive science⁸⁰ and philosophy of mind⁸¹ behind the theory of Lakoff and Johnson⁸² than I could possibly do. What is useful in the present discussion, however, is that Lakoff, Johnson, and Winter appear to be correct in noting that metaphorical reasoning seems to be a fundamental aspect of human reasoning. In other words, the relationship between how we analyze and use concepts and metaphorical reasoning seems to be borne out. It does not appear that metaphor is simply a linguistic device that is used to illustrate complex points. Something deeper is implicated. Understanding why and how this works conceptually or biologically may be interesting, but it is not a prerequisite to the use or attractiveness of the theory itself.⁸³

71. LAKOFF & JOHNSON, *supra* note 5, at 247.

72. See, e.g., Eve Leeman & Susan Leeman, *Elements of Dynamics IV: Neuronal Metaphors—Probing Neurobiology for Psychodynamic Meaning*, 32 J. AM. ACAD. PSYCHOANALYSIS & DYNAMIC PSYCHIATRY 654 (2004).

73. LAKOFF & JOHNSON, *supra* note 5, at 3-9.

74. *Id.*

75. See, e.g., Leeman & Leeman, *supra* note 72.

76. Richard H. Brown, *Social Theory as Metaphor: On the Logic of Discovery for the Sciences of Conduct*, 3 THEORY & SOC'Y 169 (1976).

77. KÖVECSES, *supra* note 17.

78. Mark Johnson & Tim Rohrer, *We Are Live Creatures: Embodiment, American Pragmatism, and the Cognitive Organism*, in 1 BODY, LANGUAGE, AND MIND (Jordan Zlatev, Tom Ziemke, Roz Frank & Rene Dirven eds., 2005).

79. LAKOFF & JOHNSON, *supra* note 5, at 272-73.

80. Tim Rohrer, *The Cognitive Science of Metaphor from Philosophy to Neuroscience*, in 6 THEORIA ET HISTORIA SCIENTIARUM 27 (2001); EARL R. MACCORMAC, A COGNITIVE THEORY OF METAPHOR (1987).

81. See generally LAKOFF & JOHNSON, *supra* note 5.

82. See Rohrer, *supra* note 80.

83. Thanks to my friend Jack Sammons for pointing this out so clearly.

So what is this cognitive or conceptual theory of metaphor, and how does it operate? Simply put, the way that human beings conceive of and make sense of the world is driven by a conceptual system.⁸⁴ Our conceptual system is a tether to reality.⁸⁵ In essence, we could not make sense of the world and the things that happen in the world without some field of reference.⁸⁶ This field of reference allows us to grapple with phenomena that we confront, and make sense of those phenomena in a way that allows us to operate productively.⁸⁷ We experience the world in terms of our conceptual field of reference and literally create our realities by relating phenomena to that field of reference.⁸⁸ According to proponents of the cognitive or conceptual theory of metaphor, this conceptual system is metaphorical in nature.⁸⁹

Advocates of the cognitive or conceptual theory of metaphor maintain that human beings always “understand[] and experienc[e] one kind of thing in terms of another.”⁹⁰ This may seem somewhat banal on its face, but for theorists like Lakoff and Johnson, the implications are profound. For example, we often conceptualize argumentation between people in terms of violent conflict.⁹¹ The *argument is war* metaphor is pervasive in our culture and perhaps every culture.⁹² We say things like “your claims are *indefensible*,” “he *attacked every weak point* in my argument,” and “h[er] criticisms were *right on target*.”⁹³ According to Lakoff and Johnson, these are not simply convenient and artful ways of describing arguments.⁹⁴ They actually form how we think about arguments.⁹⁵ In other words, we cannot understand the act of arguing without the relationship between arguing and war coming forth in our minds and structuring our conceptual scheme. The terms of the latter (war, the source concept) form our understanding of the former (arguing, the target concept).⁹⁶ Our understanding is structured according to this pattern.⁹⁷

84. LAKOFF & JOHNSON, *supra* note 5, at 3.

85. WINTER, A CLEARING IN THE FOREST, *supra* note 19, at 6.

86. *Id.* at ch. 1.

87. *Id.* at chs. 1–3.

88. *Id.* at 67.

89. LAKOFF & JOHNSON, *supra* note 5, at 3.

90. *Id.* at 5 (emphasis omitted).

91. *Id.* at ch. 1.

92. *Id.*

93. *Id.* at 4.

94. *Id.* at ch. 1.

95. *Id.*

96. *Id.*

97. *Id.*

Let us look at this metaphor for a moment to see what exactly Lakoff and Johnson mean. When we liken arguments to war we do not literally mean that people engage in actual physical acts of war or violence when they argue (although this has surely been known to happen).⁹⁸ Instead, we are employing a cognitive association between the two kinds of activities. This association helps us make sense of the activity. For example, we often plan our arguments by thinking in strategic ways.⁹⁹ Or we feel like we have won when our opponent has been vanquished (or driven from the field). This existential aspect is important. When we operate conceptually according to these deep cognitive associations, we actually engage the target concept (arguing) in the terms of the source concept (war).¹⁰⁰ How we understand arguing, how we do it, and how we explain it all employ the association with war.¹⁰¹

According to Lakoff and Johnson, a host of common metaphors help us understand the world.¹⁰² Lakoff and Johnson have identified structural metaphors,¹⁰³ orientational metaphors,¹⁰⁴ ontological metaphors,¹⁰⁵ and a whole host of other common metaphorical concepts¹⁰⁶ that provide fields of reference for our understanding of the world and our place in it.¹⁰⁷ The common thread between these sorts of metaphors is that all of them “have entailments through which they highlight and make coherent certain aspects of our experience.”¹⁰⁸ Lakoff and Johnson go on to say that metaphors “create realities for us, especially social realities. A metaphor may thus be a guide for future action. Such actions will, of course, fit the metaphor. This will, in turn, reinforce the power of the metaphor to make experience coherent.”¹⁰⁹ In other words, the use of metaphor enables us to understand but

98. As in the recent example of the Mexican federal elections, where representatives of the National Action Party (PAN) and the opposition Party of the Democratic Revolution (PRD) came to blows over disputed election results. See Luis Rubio & Jeffrey Davidow, *Mexico's Disputed Election*, FOREIGN AFFAIRS (Sept./Oct. 2006) <http://www.foreignaffairs.org/20060901faessay85507/luis-rubio-jeffrey-davidow/mexico-s-disputed-election.html> (last visited Apr. 23, 2007).

99. LAKOFF & JOHNSON, *supra* note 5, at 4.

100. *Id.*

101. *Id.*

102. *Id.* at ch. 2.

103. *Id.* at chs. 1-3.

104. *Id.* at ch. 4.

105. *Id.* at ch. 6.

106. *Id.* at ch. 10.

107. See, e.g., *id.* at ch. 12. Others have picked up on this as well. See, e.g., *supra* note 17.

108. LAKOFF & JOHNSON, *supra* note 5, at 156.

109. *Id.*

commonly will constrain that understanding as well. Often these constraints will be based in our shared cultural meanings.¹¹⁰ As Lakoff and Johnson put it, “The most fundamental values in a culture will be coherent with the metaphorical structure of the most fundamental concepts in the culture.”¹¹¹ This might explain why the *arguing is war* metaphor has such currency¹¹² in U.S. culture.¹¹³ Since we understand some things in terms of other things, we are conceptually limited in what we can understand by what we already know (in terms of our root epistemological and cultural understanding). Our limitations are reinscribed. We will continue to understand arguments in terms of violent conflict because this is what we know.¹¹⁴ Conceptualizing arguments in other ways (cooperative ways, for instance) would be difficult because the inscription and reinscription run so deep conceptually and cognitively.¹¹⁵

While much more could be said about the specifics of this theory,¹¹⁶ enough has been outlined for present purposes. Thus far I have discussed how the cognitive or conceptual theory of metaphor maintains that metaphors are fundamental to our understanding, that these metaphors structure how we see the world, provide us with meaning and reference, and serve as a tether to our relationship with phenomena in the world. Often these metaphors are based in shared cultural understandings and have both an enabling and a limiting effect on our understanding. These basic concepts have important implications. In areas like law¹¹⁷ and politics,¹¹⁸ for instance, how we relate to one another in the world is set in place by metaphors that cut deep—deep across cultural, economic, historical, and ideological lines.

110. *Id.* at ch. 5.

111. *Id.* at 22.

112. Or why the *idea as currency* metaphor is as pervasive.

113. LAKOFF & JOHNSON, *supra* note 5, at 4.

114. *Id.*

115. *Id.* at chs. 1–3, 5.

116. Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845 (2007).

117. WINTER, A CLEARING IN THE FOREST, *supra* note 19; Steven L. Winter, *Re-Embodying Law*, 58 MERCER L. REV. 869 (2007).

118. GEORGE LAKOFF, THINKING POINTS: COMMUNICATING OUR AMERICAN VALUES AND VISION (2006); GEORGE LAKOFF, WHOSE FREEDOM?: THE BATTLE OVER AMERICA'S MOST IMPORTANT IDEA (2006); GEORGE LAKOFF, HOWARD DEAN & DON HAZEN, DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES (2004); GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK (2002).

B. Metaphors of Exclusion

According to proponents of the cognitive or conceptual theory of metaphor, certain kinds of metaphors provide us with fundamental fields of reference so that we can make sense out of new or developing circumstances by relating them to other things we understand.¹¹⁹ One category of these fundamental fields of reference is container metaphors.¹²⁰ Container metaphors are spatial in their basic orientation. Such spatial metaphors set out reference points for our understanding.¹²¹ When we say things like “he is in love,” “that statement was out of bounds,” and “we are in trouble,” we are making reference to the way we see things fitting into our conceptions of the world as a physical, bounded place.¹²² Container metaphors make sense at one level because we are physical creatures who conceive of ourselves as set off from the rest of the world.¹²³ They are, in essence, phenomenological in an important and fundamental way. We can take things in (sensory data, information, among other things), and we can project things outward to the world.¹²⁴ This disposition is so pervasive that we try to impose such an orientation on practically every aspect of our interface with the world.¹²⁵ Our relationships (“he is *in* love,” “we are on the *outs!*”), our spaces (“move *in* to the apartment,” “you are *in* my personal space”), our conceptions of morality (“that was *outside* the bounds of acceptable behavior”), and our notions of law (“*in* the four corners of the document,” “it was *within* his rights to do such a thing”) are all largely conceived of in terms of container metaphors.¹²⁶ Some conceptions of knowledge are themselves container metaphors.¹²⁷ The strict sense of formal logic also plays on the *in or out* orientation of this metaphoric conception.¹²⁸

One specific application of container metaphors concerns discussions of exclusion.¹²⁹ Our political notions of who is in power or who is left

119. See *supra* Part II.A.

120. LAKOFF & JOHNSON, *supra* note 5, at 10-12, 29-32.

121. *Id.* at 29-32.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. WINTER, A CLEARING IN THE FOREST, *supra* note 19, at 62-64.

128. *Id.*

129. Peace, *supra* note 32; Anthony Judge, *Social Exclusion: A Metaphoric Trap? Moving Beyond False Dialogue*, www.laetusinpraesens.org/docs/socexc.php (last visited Apr. 23, 2007).

out play on this set of metaphors.¹³⁰ In fact, much of how we relate to others in our personal, social, political, and professional relationships depend on this sort of spatial orientation.¹³¹ Group identity and the granting of privilege and right depend on container metaphors.¹³² It is not too much to say that this set of metaphors actually structures the way we see and understand such relationships.¹³³ In other words, this metaphorical relationship actually expresses our reality in this context.¹³⁴

Political scientists and social theorists have used this relationship in discussing the relationship of certain marginalized groups within modern industrial societies,¹³⁵ particularly in the social context of the European Union.¹³⁶ Often these discussions explicitly acknowledge the work of Lakoff and Johnson in describing how the metaphors of exclusion help to give meaning to and constrain the dialogue concerning who is excluded, why they are excluded, and what are the implications of such exclusion.¹³⁷ According to these theorists, the fundamental existential experiences of whole groups of people are literally being determined by the metaphors that are employed when discussing the relationships the members of these groups maintain in society vis-a-vis those in more mainstream social groups.¹³⁸

Robin Peace has said that debates over the inclusion and exclusion of individuals from certain social programs depend largely upon the container metaphors discussed above.¹³⁹ She goes on to suggest that these container metaphors are linked with other metaphors to create a

130. See *supra* note 118.

131. LAKOFF & JOHNSON, *supra* note 5, at 17. For an interesting application of this, see Reginald Oh, *Re-mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305 (2004).

132. Oh, *supra* note 131.

133. This seems to directly support Lakoff and Johnson's views.

134. Peace, *supra* note 32, at 24.

135. Andries Du Toit, *'Social Exclusion' Discourse and Chronic Poverty: A South African Case Study*, 35 DEVELOPMENT & CHANGE 987 (2004).

136. Peace, *supra* note 32, at 23–24; Judge, *supra* note 129. One could say much about the way these metaphors are, or can be, employed in social policy debates in the United States. One thing is clear, however, official debates in the United States steer clear of using the “social exclusion” title when discussing social welfare, poverty, race, class, and gender. There are some obvious reasons for this, but discussion of this will have to wait for another day. I use the explicit adoption of the term “social exclusion” in the European context to illustrate the direct correlation between the policy debate and the metaphoric terms employed in carrying out the debate.

137. Peace, *supra* note 32, at 24.

138. *Id.*

139. *Id.*

complex array of representations that lock policy debates into preset patterns.¹⁴⁰ She says, for example:

The terms being used to describe social exclusion in this context entail complex metaphorical associations. On the one hand a number of constructs that are not, of themselves, referring to space and place directly are inflected by language that implies downward movement. Terms describing social exclusion are coupled with terms such as “decline”, “least”, and “below”. On the other hand, other constructs are coupled with terms that invoke a sense of circularity and entrapment. Social exclusion is inflected by association with words such as “trap”, “cycles”, “web”, “cumulative” and “lifecycle”, all of which tend to intensify notions of sticky complexity and inevitable negativity.¹⁴¹

Many of these metaphors will be familiar to us here in the United States as well, as we have a long history of describing our own policy debates concerning race, class, and gender in these ways.¹⁴² The interesting thing about this use is the almost transparent way the metaphors comprise our understanding of the concept in play.

These associations are so direct that the language of the debate itself is defined by the metaphors used.¹⁴³ According to Peace, the policy makers who discuss exclusion use a host of metaphors that have ceased to be simple metaphors, but actually create the reality which these same policy makers must address.¹⁴⁴ These include: “being on the margins, least-privileged groups, detachment from work relations, . . . cycles of exclusion, . . . web of disadvantages, cumulative handicaps that engender vicious circles, situations of risk, below the poverty line, poor spaces, poor islands, shanty towns, ghettos, clandestine residential zones, and random residential zones”¹⁴⁵

We literally think of people out of the mainstream as being “excluded,” “left behind,” “on the fringes of society,” and “on the bottom of the barrel.”¹⁴⁶ This association works for us whether we are discussing the inner city neighborhoods of Chicago, the slums of Dublin, the *favelas* of Rio de Janeiro, or the ghettos of Soweto. We can almost see¹⁴⁷ the

140. *Id.* at 24–29.

141. *Id.* at 24.

142. For an interesting discussion, see J. Mitchell Morse, *Race, Class and Metaphor*, 35 C. ENG. 545 (1974).

143. Peace, *supra* note 32, at 24.

144. *Id.* at 24–25.

145. *Id.* at 24.

146. *See id.*

147. For an interesting discussion about the visuality of metaphors in U.S. law, see Hibbits, *supra* note 6.

poverty when we discuss social problems in these terms.¹⁴⁸ That is to say, the metaphors create powerful images in our minds that make direct the representations between the target and the source concepts.¹⁴⁹

This takes on an important complexion when we look at how official definitions of social exclusion are employed.¹⁵⁰ For example, one European social agency has defined the concept in the following way:

Social exclusion is a set of processes, including within the labour market and the welfare system, by which individuals, households, communities or even whole social groups are pushed towards or kept to the margins of society. It encompasses not only material deprivation but also more broadly the denial of opportunities to participate fully in social and civil life.¹⁵¹

This is a direct description of how people live in certain social circumstances, not just an artful way of describing their plight. In other words, we actually think about poverty, social conditions, opportunity, and material well-being in these terms. These things are, as we have just seen, defined in these terms.¹⁵² One would have to search long and hard for a better, or more obvious, example of how important metaphors are to our understanding than this. Far from being mere linguistic flights of fancy, these metaphoric concepts define the realities of human existence for millions of people across the globe.¹⁵³

But this description covers over one important aspect of this debate. If we complacently and uncritically accept too readily the metaphors that are common in debates surrounding social exclusion, we run the risk of reinscribing and reifying these metaphors.¹⁵⁴ This, in turn, makes it impossible to change the terms of the debate.¹⁵⁵ Just as using the war metaphor for arguing casts the latter in terms that disguise and conceal other aspects of the social interaction (such as cooperation, among other things), hastily accepting the terms of social exclusion can potentially conceal more subtle aspects of the social relationships implicated and can make the debate appear overly simplistic or mechanistic.¹⁵⁶ One student of the social exclusion debate has said:

148. Peace, *supra* note 32, at 23–25.

149. LAKOFF, *supra* note 50, at 276–78.

150. Peace, *supra* note 32, at 26.

151. *Id.*

152. *Id.*

153. LAKOFF & JOHNSON, *supra* note 5, at 243–44.

154. See Judge, *supra* note 129, at 1.

155. *Id.*

156. *Id.*

“Exclusion” has the obvious consequence of implying that some people are “shut out,” which is clearly totally unacceptable. However it tends to structure thinking in terms of obvious mechanistic responses such as how they should be “let in”. Simplistic proposals invite simplistic counter-proposals. Furthermore the metaphor sets up a mind set that echoes the past tendencies to create fortified walled cities and monasteries to keep unwanted people out and to protect the privileged.¹⁵⁷

Surely the metaphors surrounding exclusion are useful in showing how certain people and groups are disadvantaged by social policies, class structures, government initiatives, racism, and so on.¹⁵⁸ But can these very metaphors be counter-productive to those who find themselves in such disadvantageous circumstances? The answer seems to be yes.¹⁵⁹

When the association between a source and target concept are so close, the metaphors used can become overly mechanical.¹⁶⁰ If individuals or groups who are disadvantaged identify too closely with the metaphors of exclusion, an “us vs. them” dichotomy is constructed that itself reinforces the patterns of disadvantage.¹⁶¹ The metaphors of exclusion “only work[] if there is agreement on a single boundary and on the unquestionable value of what is on the inside compared to what is on the outside.”¹⁶² In this way, using these metaphors can actually be counterproductive because such use cuts off different ways of conceptualizing the problem of disadvantage.¹⁶³ The use of these metaphors also explicitly pits the disadvantaged against the advantaged.¹⁶⁴ This makes productive dialogue highly unlikely.¹⁶⁵ As Anthony Judge puts it, “The ‘exclusion’ metaphor may therefore be highly motivating for those outside, but it may be totally counterproductive in motivating those inside to respond to their condition.”¹⁶⁶

So what is the answer to this dilemma? If, as Lakoff and Johnson assert, metaphors are fundamental to our understanding, how does one counter the tendency to conflate widely accepted metaphorical constructs with reality? In other words, how can we cut loose the tether between

157. *Id.*

158. See, e.g., Ayse C. Çağlar, *Constraining Metaphors and the Transnationalisation of Spaces in Berlin*, 27 J. ETHNIC & MIGRATION STUD. 601 (2001).

159. See, e.g., Judge, *supra* note 129.

160. LAKOFF & JOHNSON, *supra* note 5, at 253.

161. Judge, *supra* note 129, at 2–4.

162. *Id.* at 2.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

war and argument, and between exclusion and disadvantage, so that new—and perhaps more socially constructive—metaphors can be employed? The answer to these questions lies in the cognitive theory of metaphor itself.¹⁶⁷ When a single metaphorical structure is used, the sort of simplistic or mechanical association and conflation discussed above is likely to occur.¹⁶⁸ But each reality contains overlapping metaphorical structures.¹⁶⁹ Arguments are like war, but they are also like journeys, and like buildings, containers, and so on down the line.¹⁷⁰ We get a fuller picture of the target concept (argument), when we understand the overlapping source concepts (war, journey, building, container, among other things).¹⁷¹ To view arguments only in terms of the metaphors of war is overly simplistic. A truer, and more metaphorically rich, way of discussing arguments would account for all the sorts of metaphors that illustrate and illuminate aspects of the target concept.¹⁷² Simply put, cognitive metaphor theory is not an exercise in reduction; it is an expression of conceptual imagination and possibility.¹⁷³

Returning to metaphors of exclusion, then, a fuller appraisal of the dynamics of disadvantage would acknowledge the container metaphors associated with this structural relationship but would not reify them into concrete categories that freeze the relationship in place.¹⁷⁴ More expansive metaphorical structures can and should be used to illustrate and illuminate the complexity of disadvantage and social inequality.¹⁷⁵ Metaphors of exclusion show us part of the picture, a vital and important part perhaps, but not necessarily the whole picture—maybe not even a significant part of the entire landscape.¹⁷⁶ Opening up the horizons of a concept by evaluating the various metaphorical structures that can be brought to bear on that concept is an interpretive act of the highest magnitude.¹⁷⁷ By doing so, we can use our cognitive tools to imagine new ways of conceptualizing problems and addressing them. This sort of enterprise can be useful whether the scope of disproportionate power relationships is on a societal level (as with class, ethnicity,

167. LAKOFF & JOHNSON, *supra* note 5, at chs. 17–18.

168. *Id.*

169. *Id.*

170. *See, e.g., id.*

171. *Id.*

172. *Id.*

173. *Id.* at Afterword, 2003 at 253.

174. *See, e.g.,* Judge, *supra* note 129.

175. *Id.* at 4–5.

176. *Id.*

177. LAKOFF & JOHNSON, *supra* note 5, at 249–50.

gender, and race, among other things), or on an institutional level (within discourse communities or professional groups, for example). In the last part of this Article, I discuss the use of exclusion metaphors within the legal academy, an example of an institutional dialogue that seems, in some ways, to have fallen into the trap identified above. It is my hope that this discussion will allow us—all of us within the legal academy—to reimagine the problem of faculty status—and the disproportionate relationship between doctrinal (or casebook) faculty and legal skills faculty (particularly legal writing faculty).

III. ALWAYS A BRIDESMAID AND NEVER A BRIDE?¹⁷⁸

An ever-growing body of scholarship in the legal academy makes the case for why professors who teach legal skills (advocacy and clinics, for example) and legal writing should be given the same benefits, pay, and status as other members of their law school faculties.¹⁷⁹ These articles generally do a very good job of outlining the disparities in treatment that skills professors face in law schools across the United States.¹⁸⁰ One commentator has said that “[l]egal writing isn’t the stepchild of legal education, as it’s sometimes called. It isn’t even the foster child. It’s more like an abused child.”¹⁸¹ The disparities are, in fact, quite remarkable.¹⁸² Legal skills professors often have their offices segregated from casebook faculty, are given inferior academic titles (like “instruc-

178. The use of this particular metaphor is deliberate, as much of the debate concerning the issue of status in legal education (particularly in the context of those who teach legal writing) focuses on the genuine and important issues of gender bias. *See, e.g.*, Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253 (2004); Elizabeth M. Iglesias et al., *Labor and Employment in the Academy—A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment Law and Section on Minority Groups*, 6 EMP. RTS. & EMP. POL’Y J. 129 (2002); Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293 (2004); Ann C. McGinley, *Discrimination in Our Midst: Law Schools’ Potential Liability for Employment Practices*, 14 UCLA WOMEN’S L.J. 1 (2005); Richard K. Neumann, *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419 (2004); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467 (2004).

179. *See, e.g.*, *supra* note 178.

180. *Id.*; *see also* Duncan Kennedy, *Introduction to Symposium on Dismantling Hierarchies in Legal Education*, 73 UMKC L. REV. 231 (2004).

181. Bryan Garner, *Legal Writing: How Serious is Your School About Writing?*, STUDENT LAW., Oct. 2000, at 16, 18.

182. Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools are Doing and Who is Doing the Teaching (Three Years Later)*, 9 SCRIBES J. LEGAL WRITING 113 (2003-2004).

tor”), are unable to participate in faculty governance, and have “circumscribed academic freedom, separate and unequal pay scales, and other indicia of second-class status.”¹⁸³ It is also no secret that the vast majority of legal skills professors are not in tenured or tenure-earning positions on the faculty.¹⁸⁴ This body of scholarship has contributed to the growth and professionalization of the field of legal writing, certainly.¹⁸⁵ As one scholar puts it, the value of this scholarship “heightens the prestige of the legal writing faculty, not only among our colleagues, but among our students, who will be less likely to view us as second-class citizens.”¹⁸⁶

One frequent theme of such scholarship has been the use of metaphors of exclusion.¹⁸⁷ One scholar, for example, has said that the relationship between casebook and skills professors in law schools is akin to the segregation between blacks and whites in the United States.¹⁸⁸ A well-known law school dean equated this relationship with the Hindu caste system in India,¹⁸⁹ where casebook professors fill the ranks of the upper-caste Brahmins while skills professors reside in the second lowest caste.¹⁹⁰ Another well-known legal writing scholar has said that there are “commonalities between the treatment of legal writing [in the legal academy] and the type of social stratification that exists elsewhere in society.”¹⁹¹ Finally, the status of legal skills professors has been called

183. Durako, *supra* note 178, at 255.

184. See Association of Legal Writing Directors (“ALWD”) 2006 Survey, at i, available at [http://www.alwd.org/alwdResources/surveys/2006%20survey%20results%20report%20\(final\).pdf](http://www.alwd.org/alwdResources/surveys/2006%20survey%20results%20report%20(final).pdf) (last visited Apr. 24, 2007).

185. Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 VT. L. REV. 371 (2003); Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93 (2005); Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887 (2002); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105 (2003). For an interesting student viewpoint on this see, Melissa A. Moodie & Brette S. Hart, *The Missing Link: The Need for Good Writing Programs in Law Schools*, 74 J. KAN. B. Ass’n 9 (2005).

186. Michell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 LEGAL WRITING 329, 331 (2005); see also Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 LEGAL WRITING 225, 227-28 (1999).

187. See *supra* note 129.

188. Durako, *supra* note 178, at 253-56.

189. Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRECTORS 12 (2001).

190. *Id.* at 14-15.

191. Stanchi, *supra* note 178, at 469.

a “pink ghetto.”¹⁹² These metaphors have illustrated the stark realities of the relationship largely non-tenured¹⁹³ (mostly women)¹⁹⁴ skills professors maintain with their tenured (mostly male)¹⁹⁵ casebook¹⁹⁶ colleagues on the faculty. As Kathy Stanchi has put it, “The legal writing profession is a place where the complexities of institutionalized inequality, economics and gender bias intersect.”¹⁹⁷ A whole host of metaphors of exclusion have been used to make this case.¹⁹⁸

In the years since this scholarship started appearing with some regularity in law journals and law reviews, the benefits, pay, and status of legal writing professors have increased in many places.¹⁹⁹ There are now more people in tenure-track legal writing positions than ever before,²⁰⁰ and the compensation schemes of many legal writing professors have improved dramatically in recent years.²⁰¹ Given this information, it seems that the advocacy some have maintained on behalf of those who teach legal writing has borne fruit.²⁰² There are some signs, however, that deans and faculty members at many institutions are resistant to continuing progress.²⁰³ In fact, notwithstanding the advances just mentioned, there is a widespread perception that much, much more needs to be done.²⁰⁴ So why has the political advocacy not

192. Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000); Susan Ayres, *Pink Ghetto*, 11 YALE J.L. & FEMINISM 1, 2 (1999).

193. See ALWD 2006 Survey, *supra* note 184.

194. Stanchi, *supra* note 178, at 467.

195. *Id.*

196. I adopt the term “casebook professors” here, coined by Mary Beth Beazley, because like Professor Beazley I reject the notion that those who teach casebook courses are teaching doctrine or substance, while skills professors teach technical skills. Both casebook and skills faculty members are teaching doctrine and substance. The pedagogical approaches may vary, but the aim is the same. See Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers)*, 10 LEGAL WRITING 23, 25 n.13 (2004).

197. Stanchi, *supra* note 178, at 469.

198. Durako, *supra* note 178, at 254.

199. There was a significant positive shift in salary, teaching loads, and contract status from 1999 to 2006. See ALWD 2006 Survey, *supra* note 184, at 6.

200. See *id.*

201. See *supra* note 178.

202. SOURCEBOOK ON LEGAL WRITING PROGRAMS xiii (2d ed. 2006).

203. The American Law Dean’s Association (ALDA) has long opposed requirements by the American Bar Association (ABA)—the accrediting body for all law schools in the United States—that would increase the status of those who teach legal skills courses. See Posting of Craig Smith, craig.smith@law.vanderbilt.edu, to dircon@lists.washlaw.edu (Jan. 17, 2007) (on file with author).

204. See, e.g., Mary S. Lawrence, *The Legal Writing Institute the Beginning: Extraordinary Vision, Extraordinary Accomplishment*, 11 LEGAL WRITING 213 (2005).

worked? Is it simply a matter that those in power (tenured, male) refuse to share their privilege with those they believe are beneath them (untenured, mostly female)?²⁰⁵ Is there an “institutionalized status system” that “reflects a rigid and empty adherence to a set of artificial and contrived rules of prestige and rank that are unjustifiable and enforced by power and dominance rather than reason?”²⁰⁶ At one obvious level, this is surely part of the answer.²⁰⁷ The legal academy is certainly one bastion of power and privilege,²⁰⁸ and change comes hard to such institutions.²⁰⁹ In my view, though, something else is at work.

The metaphors of exclusion have become so pervasive in the debate between casebook and skills faculty that I worry the categories have become too concrete. By making the case for why people who teach legal skills courses are currently treated unfairly, and explaining how this injustice should be remedied, an interesting thing has happened. The rhetoric used to explain the exclusion of skills faculty members from the mainstream of the legal academy (“hierarchy,” “locked out,” “left behind,” “segregation,” “ghetto,” among others) has come to be so closely associated with the relationship between individuals who teach casebook courses and those who teach skills courses at most U.S. law schools that this rhetoric (and the metaphors used) inscribes (and reinscribes) the very nature of the relationship.²¹⁰ By showing how casebook faculty have treated skills faculty as outsiders, the exclusionary status has come to define how skills faculty see themselves. As Duncan Kennedy has

205. See generally Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000); Marina Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988); Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMPLE L. REV. 117 (1997); Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775 (2001); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997); Richard K. Neumann, *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313 (2000); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 1 (2001); Kathryn M. Stanchi & Jan M. Levine, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551 (2001).

206. Stanchi, *supra* note 178, at 468.

207. See *id.*

208. *Id.*; Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?* 40 ARIZ. L. REV. 105, 139 (1998).

209. Eichhorn, *supra* note 208, at 139.

210. There are ways to combat this, of course. See Suzanne E. Rowe & Susan P. Liemer, *One Small Step: Beginning the Process of Institutional Change to Integrate the Law School Curriculum*, 1 J. ASS'N LEGAL WRITING DIRECTORS 218 (2002).

said, “The categories are self-perpetuating: working in one of the categories disables you from working in the other, and, just as important, most likely makes you prefer working in your category.”²¹¹ The “us vs. them” dialogic has become reified to the point that skills faculties actually do see themselves as different: different in pedagogy, different in teaching loads, different in focus (teaching vs. scholarship), and so on. This, in turn, has the strange effect of seeming to legitimize the claims of casebook faculty members that skills “instructors” are different.²¹²

Just as the terms of the social exclusion debate in Europe have become concretized—making progress on poverty, education, welfare, and so on difficult—the terms of exclusion (flowing from the exclusion and container metaphors) used by skills faculty members have locked in place the dichotomous relationship between themselves and casebook teachers. And thus, the cycle continues. I am not suggesting that the metaphors of exclusion used in this context (or any other for that matter) are illegitimate. The criticisms aimed at the legal academy by skills professors who have diminished status are well-deserved in my opinion. I am only questioning whether the continued adherence to these metaphors is as effective as many might assume. I am asking whether we might find a better way out of the current predicament.

In my view, there should be no difference at all between skills and casebook faculty. The dichotomy makes no sense, from either perspective. I do not want my colleagues who teach administrative law, contracts, secured transactions, international law, tax, and trusts and estates to treat me differently because I teach skills courses, of course, but neither would I ever act as though I am different (vis-a-vis the basic expectations of the profession). Luckily, I teach at an institution with a faculty who treats me (and others who teach skills classes) in the same way any other faculty member is treated. I, naturally, believe that such treatment is warranted, especially since I and my colleagues on the faculty who teach skills do not act differently. We are held to, and meet, the same expectations as anyone else on the faculty with regard to teaching, scholarship, and service. I am not naive, however. I know that at many institutions, people who teach skills courses do not have this luxury. I am merely suggesting that the dynamic goes both ways. If we want to get out of the ghetto, break the segregation, subvert the hierarchy, become part of the club, and so on, we need to focus on what we do and how we do it. We can neither reinscribe these categories of

211. Kennedy, *supra* note 180, at 234.

212. One extremely uninformed and terse discussion in this context is Stewart Harris, *Giving Up Grammar and Dumping Derrida: How to Make Legal Writing a Respected Part of the Law School Curriculum*, 33 CAP. U. L. REV. 291 (2004).

exclusion with our own actions, nor with calls for “different” treatment because our classes place certain demands on us.

This reinscription can be illustrated most clearly in terms of the discussion surrounding the production of scholarship by skills professors.²¹³ Over the years, casebook faculty members have maintained that skills professors do not produce the quantity or the quality²¹⁴ of scholarship that would warrant their being considered fully-fledged members of the legal academy.²¹⁵ As a result, skills professors have been severely disadvantaged by the members of the academy in terms of status and compensation.²¹⁶ This is assuredly a wretched consequence, even if there is some logic (albeit somewhat twisted and quite probably sinister) to it.

The mere fact is, however, that the legal academy (like other academies in modern education) places an extremely high value on the production of scholarship by its members.²¹⁷ Faculty members at almost every law school in the United States²¹⁸ are required to produce some sort of scholarship in order to meet the basic obligations of their position and the expectations of others within the profession.²¹⁹ Many rationales have been offered to justify such a requirement, including:

213. See, e.g., James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 ST. THOMAS L. REV. 711 (2006); Eichhorn, *supra* note 208.

214. The quality of legal scholarship generally is a very controversial issue. One good discussion of evaluating legal scholarship can be found in Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988). Traditional legal scholarship tends to focus on “abstract theory at the expense of practical scholarship.” Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1993). Because legal skills professionals tend to write more practically oriented articles and books, they are at a disadvantage in this system. For a good article that discusses a shift in this focus, written by two professors who have both practiced law for significant periods and have taught both legal skills and casebook courses, see David Hricik & Victoria S. Salzmann, *Why there Should be Fewer Articles Like this One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U.L. REV. 761 (2005). Such a shift would lead to significant advantages for those who teach and write about practical legal issues. *Id.* at 779.

215. See generally Harris, *supra* note 212.

216. See *supra* note 199.

217. See generally Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373 (1998).

218. There is at least one law school that I know of personally that essentially has no such requirement. The name of that law school, however, has been omitted to protect the innocent.

219. Philip F. Postlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL EDUC. 157, 158–59 (2000).

advancing the knowledge of humanity;²²⁰ enhancing teaching effectiveness;²²¹ affecting the work of others in the profession;²²² and serving as a vehicle for personal and professional growth and transformation.²²³ Whatever the reason (or, most likely, combination of reasons), the requirement of producing scholarship is—at most law schools—at least as important as teaching (and in some schools, perhaps more important).²²⁴ As a result, anyone wishing to be taken seriously as a member of the legal academy in the United States needs to act accordingly.²²⁵

Those of us who teach legal skills courses are no exception to this.²²⁶ As Lisa Eichhorn put it, “[T]hose who teach [legal] writing should use scholarship as a means both to inform the academy of the substance of legal writing as a discipline and to increase their own status within that academy.”²²⁷ She notes, correctly in my view, that doing scholarship can break the pattern of division between casebook and legal skills professors, thus allowing a new relationship to emerge from old hierarchies.²²⁸ More recently, legal writing teachers Suzanne Rowe and Sue Liemer, both respected scholars within the ranks of the legal academy and who teach legal writing, have said that skills professors need to “act like ducks” in this context in order to be accepted by their casebook colleagues.²²⁹ The idea here is that legal skills professors must do all the things that any other member of a law faculty would do in order to be accepted.²³⁰ This is especially true of the production of scholarship given the important role that producing scholarship plays in

220. Linda H. Edwards & Terrill Pollman, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEGAL WRITING 3, 15 (2005); see also Stephen L. Carter, *Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2080 (1991); Banks McDowell, *The Audiences for Legal Scholarship*, 40 J. LEGAL EDUC. 261, 270 (1990).

221. Edwards & Pollman, *supra* note 220, at 15–16; see also Ronald Benton Brown, *A Cure for Scholarship Schizophrenia: A Manifesto for Sane Productivity and Productive Sanity*, 13 NOVA L. REV. 39, 49–51 (1988); Clark Byse, *Legal Scholarship, Legal Realism and the Law Teacher’s Intellectual Schizophrenia*, 13 NOVA L. REV. 9, 29–30 (1988).

222. Edwards & Pollman, *supra* note 220, at 16; see also Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847–48 (1988).

223. Edwards & Pollman, *supra* note 220, at 17; see also James Boyd White, *Why I Write*, 53 WASH. & LEE L. REV. 1021, 1031–32 (1996).

224. Postlewaite, *supra* note 218, at 157–59.

225. *Id.*

226. Eichhorn, *supra* note 208, at 140.

227. *Id.*

228. *Id.* at 140–41.

229. Rowe & Liemer, *supra* note 210, at 224–25.

230. *Id.*

defining the academy.²³¹ Acting “like a duck” and producing scholarship is “invaluable in breaking into the hierarchy of the legal academy.”²³² Linda Edwards and Terri Pollman (also well-recognized scholars who happen to teach legal skills courses) recently noted that the production of scholarship seems like a vital aspect of professional expectations of legal skills professors.²³³ They have said that “if writing is important for the development of faculty members who teach subjects other than writing, it is doubly important for the development of those whose primary teaching area is the writing process itself.”²³⁴

It is certainly clear that many legal skills professors have learned this lesson.²³⁵ All across the United States, legal skills professionals—no matter what status they are accorded at their particular institution—are producing and publishing scholarly works in a variety of fields, not just legal writing and clinical or practical skills.²³⁶ There seems to be some correlation, as I suggested earlier, between the arrival of this body of scholarship on the scene and the upward shift in status (albeit slow) that many legal skills professionals have enjoyed.²³⁷ Legal skills faculty members have started to “find their own voices.”²³⁸ These voices are heard²³⁹ in all the halls of the legal academy, in all aspects of the doctrinal debates of law and legal theory, and throughout the legal profession.²⁴⁰

This sounds like a success story. It is, in fact, in many ways testament to the work and determination of people who have faced significant and sustained barriers to their inclusion in to the legal academy. Many of the people who have produced this impressive body of scholarship have done so with little or no support from their institutions.²⁴¹ Some who teach legal skills courses, however, have not joined this movement. Many decry the high workloads of their classes and the demands of skills pedagogy.²⁴² These workloads and demands

231. Eichhorn, *supra* note 208, at 141.

232. Boland, *supra* note 213, at 734.

233. Edwards & Pollman, *supra* note 220, at 5.

234. *Id.*

235. *Id.*

236. *Id.*

237. Rowe & Liemer, *supra* note 210, at 225.

238. Edwards & Pollman, *supra* note 220, at 57.

239. For an interesting discussion of the relationship between the verbal and the written see Eichhorn, *supra* note 208; *see also* Grant, *supra* note 185, at 382–84.

240. *See* Edwards & Pollman, *supra* note 220.

241. *Id.* at 5.

242. *See* Boland, *supra* note 213, at 734; Eichhorn, *supra* note 208, at 140; Grant, *supra* note 185, at 391–92; Pollman, *supra* note 185, at 925–26.

are surely an issue. But it is almost as if some within the legal skills community identify so closely with the status divisions set in place by those in power in the traditional hierarchy (casebooks professors who produce scholarship vs. skills professors who do not produce scholarship) that they resist the move to be like the other. There is clearly some resistance within the legal skills community to do this vital part of what it will take to join the ranks of the legal academy. I suspect that this resistance is based, at least in part, on taking the metaphors of exclusion so seriously that the metaphors (“left out,” “shut out,” “disadvantaged,” “ghettoized,” among others) define reality. Because these metaphors have become reified, some in the legal skills community think “why bother?” I have been told by an alarming number of people who teach, or have taught, legal skills courses that “since we’ll never be part of the club, why should I act like I want to be in the club?”

This seems like a classic case in which the metaphors of exclusion have been taken to heart so deeply that no other way of discussing the relationship between various parts of the legal academy seems possible. However, new ways of characterizing the relationship between casebook and skills faculties are possible. New alliances can be formed. We need to imagine the possible. We need to construct new metaphors that will change the dynamic within the legal academy. I am not entirely certain what these metaphors should be, but I am sure that they should highlight the common enterprise of preparing students for dynamic legal practice in an evolving marketplace, an enterprise that casebook and non-casebook professors are committed to.²⁴³

There is, however, a ticket for admission. Professors who teach legal skills classes, some of whom desperately want the title “Professor” to be part of their increased status, should remember that in all parts of the academy—not just the legal academy—scholarship is an important part of the job. Complaining that we are “left out” or “ghettoized,” or that “we get no scholarship support” and “our teaching loads are so high,” does not substitute for the price of admission. The positions supported by these metaphors of exclusion that dominate legal skills scholarship are overly simplistic, mechanistic responses to the hierarchy presently in place. These metaphors may be true; they may even be accurate descriptions of the situation, but they are not the only reality. We can create alternative realities that are better captured by other metaphors, metaphors that overlap to show a fuller picture of the academy and what we hope it to be. Exclusionary metaphors are part of that picture, but

243. This is a project that all members of the legal education community need to engage in. Constructing new metaphors is not an easy thing, but doing so can yield tremendous results for the entire legal academy.

I hope they are a diminishing part. Other metaphors can open up different avenues for discourse,²⁴⁴ and can readjust the hierarchies within the legal academy.

IV. CONCLUSION

Metaphors are powerful things. As the cognitive or conceptual theory of metaphor developed by George Lakoff and Mark Johnson shows, metaphors have substantial real world and existential consequences. Metaphors are not simply literary devices that capture ideas with interesting or pithy language. Metaphors really do affect the way we live and understand. When people are disadvantaged, for example, metaphors of exclusion help to capture that disadvantage and illustrate the effects of the disparate power dynamics. But there is a danger in using metaphors of exclusion in this way. Such metaphors can concretize the dynamics between the advantaged and the disadvantaged in a way that dichotomizes complex interactions. These metaphors can also cover over other possible ways of describing and constructing the dynamics between the advantaged and the disadvantaged. This is especially the case when the disadvantaged themselves identify so closely with the metaphors of exclusion that they cannot see any other way of dealing with those who hold the advantage except in the terms of the exclusionary metaphors. Such a situation creates a self-perpetuating cycle.

This is exactly the case, in my view, in the context of the disparity between casebook and skills faculty members in U.S. law schools. While the metaphors of exclusion initially helped bring to light and capture an admittedly unjust and reprehensible state of affairs in the U.S. legal academy, they have since become reified into categories that perpetuate and reinscribe the dynamic of disadvantage for those who teach skills related courses. Far from blaming the victim, I am suggesting that if we change the nature of the metaphors that illustrate and capture the relationship between casebook and skills faculty members, we may well be able to change the dynamic itself. This will require people who teach skills courses to take responsibility for their work (particularly their scholarship) in ways that will take away easy and convenient criticisms, criticisms that allow law school administrators and casebook faculty members to treat us differently. If we want to be treated the same, then we need to act like we want to be treated as fully-fledged members of the academy and produce in ways that show we deserve it. Part of this production should be a long term concerted project on our part to create

244. LAKOFF, *supra* note 50, at 405–15.

new metaphors that better capture our contributions to legal education, and to modern legal practice in the United States.