Contemporary Cognitive Theory and the Neglected Aesthetic Dimension of Dworkin’s Cognitive Sting

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INTRODUCTION

Contemporary cognitive science benefits from a number of developments in applied science. Revolutionary advances in imaging technology, material sciences, artificial intelligence, and robotics have lead to unprecedented breakthroughs in understanding the mind. And these advances, in turn, are possible due to the globalized, networked capitalist economy that produced them. Law is a part of this globalized capitalist society. One might say that in contemporary cognitive science is, in a sense, an artifact of global capitalism.

A likely criticism of contemporary cognitive theory, then, is that it is inescapably rooted in the logic and presuppositions of neoliberal capitalism. That is to say, the new cognitive science extends neoliberalism to encompasses the all of consciousness--the person, the world, the self, knowledge, language, culture, and of course law; that it threatens to reduce the depths of the human--the subtle mysteries of the lived experience of being alive--by to reductive logic of markets.

This charge against contemporary cognitive theory is perhaps not entirely without merit. It is clear, for example, that the dominant theories of cognition are dogmatically materialist, amoralist, and focus on individual cognition over social understanding--all features that are consistent with neoliberalism. But, I believe there not also resources within this field that can also challenge the logic of capitalism.

Neuroscience has the potential to challenge several presuppositions that have been foundational for analytic philosophy and for Anglo/American
jurisprudence as well. Recently, Evan Thompson and Dan Zahavi argue in their essay in the *Cambridge Handbook on Consciousness*, and elsewhere, that cognitive theorists should consider the phenomenology of Edmund Husserl as a resource for understanding such foundational issues as the relation between intentionality and consciousness, the relation between self-awareness and consciousness, the difference between imaginary visualizations and perception, and other issues that are investigated by cognitive theory. The call their proposal a neurophenomenology and view it as a contribution to a larger movement to naturalize phenomenology.

Their proposal holds implications for legal theory, since it challenges the analytic method that was dominant in the twentieth century Anglo/American jurisprudence suggesting great roles for Continental thought, especially Husserlian phenomenology.¹ This essay considers the implications of this of neurophenomenology for legal theory. It argues that a phenomenological approach to legal interpretation draws on dimensions to legal interpretation that have not been fully appreciated in recent jurisprudence.

**Cognitive Theory and Phenomenology**

Contemporary cognitive theory brings unprecedented scientific data and clinical experience to the questions that philosophers have asked. For that

¹ In this essay, "Husserlian phenomenology includes the work of his immediate students, including Roman Ingarden and Edith Stein. It excludes his more famous students whose work has tended to eclipse Husserl and distort the contemporary reading of him. Specifically, it excludes Martin Heidegger and Jacques Derrida, whose readings of phenomenology substantially altered it from Husserl's. For a discussion of this, see, Donn Welton, *The Other Husserl, The Horizon of Transcendental Phenomenology* (2000) 1-10.
reason, it has the potential to rewrite some to the basic presuppositions of philosophy. One potential area where this might occur is in the long-standing division between analytic philosophy and phenomenology. This view is advocated Thompson and Zahavi, that phenomenology has the potential to address a number of issues in cognitive theory. In their essay they note, for example, phenomenology considers issues regarding the relationship between intentionality and consciousness, the experience of temporal structure, and significance of embodied experience.

**WHAT IS PHENOMENOLOGY?**

A central feature of phenomenology is the conception of the “given.” In phenomenology, the investigator seeks to examine experience apart from preconceptions about the relationship between mind and world. It is not natural to do this; a changes in “attitude” are needed to accomplish this method. Husserl viewed the natural attitude to contain presuppositions about the division between interior and exterior (mind and world). He wanted philosophers to overcome these presuppositions by focusing on experience as such. The goal of examining what is given in a phenomenon is the guiding thread of phenomenology.

The “given” is the basic data of phenomenology. When it is examined, he believed it shows that consciousness is not exhausted by intentional representations—that is to say that there are mental states of conscious
awareness that are not directed toward any particular mental object. (Intention is not used in its commonplace meaning. It refers here to consciousness being directed toward some mental object). Generalized states of affectivity (for example, a generalized feeling of joy) may not be directed at any particular mental object. Also, much of our bodily awareness, such as the position of our limbs or one's awareness of the physiological, are not directed at a particular mental object. For Husserl, the generalized “background” mental states are of great importance for shaping the grammar and syntax that are constitutive of language and discourse.

Neurophenomenology

Thompson and Zahavi believe that this insight is useful for understanding some developments in neuroscience. Michael Gazzaniga described the current state of the field in his 2009 Gifford Lectures, published as Whose In Charge, Free Will and the Science of the Brain.² He describes the emerging view of consciousness as a phenomenon arising from a dynamic interaction among modules in the brain, and between the brain and the cultural, social, and physical environments. He suggest that these interactions produce inputs to an interpreter module that attempts, post hoc, to integrate, unify, and coordinate the mind. Consciousness, emerges from the interpreter module trying to make sense of the valances among these brain modules and the dynamic interaction of the brain with the physical, social, and cultural environment.

Thompson, along with Francisco Verela, advance a theory of "embodied dynamism" which views the mind as emerging from a dynamic, embodied system. They advocate a multidimensional approach that views experience as central to the emergence of cognition, and not merely epiphenomenal of it. Thompson writes of his approach, "mind science and phenomenological investigations of human experience need to be pursued in a complementary and mutually informing way." Both phenomenology and the embodied dynamic view hold that the mind constitutes—brings things to awareness—in intentional activities of consciousness. Both suggest that the constitution of awareness are not evident in everyday experience, but requires a specialized analysis to disclose. They call this integrative approach neurophenomenology.

An illustration can be found in the neuroscience of reading. Recent research on reading has been particularly useful for early literacy education. Maryanne Wolf, a childhood development psychologist summarized some of the recent developments in her book, *Proust and the Squid*. Of particular interest is this passage,

The reading brain is part of [a] highly successful two-way dynamics. Reading can be learned only because of the brain’s plastic design, and when reading takes place, that individual brain is forever changed, both physiologically and intellectually. For example, at the neuronal level, a person who learns to read in Chinese uses a very particular set of neuronal connections that differ in significant ways from the pathways used in reading English. When Chinese readers first try to read in English, their brains attempt to use Chinese-based neuronal pathways. The act of learning to read Chinese characters has literally shaped the Chinese

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3 Thompson, 14.
reading brain. Similarly, much of how we think and what we think about is based on insights and associations generated from what we read.\textsuperscript{4}

The act of reading displays many of the features that Gazzaniga summarized in his lectures.

It is a complex mental activity that is shaped by the cultural, social, and physical environment. A written language is possible only within a cultural tradition in which the symbolic representations of language develop, slowly over time. It is a social activity that is accomplished only with some effort by each individual reader in conjunction with a more experienced reader. And, it takes place only with a physical culture of reading, whether it is cuneiform clay tablets or the pulp paperback, or the latest e-book device, there must be a physical culture of literacy that supports the activity. These features, the cultural, social, physical, interact with the brain, giving it certain physical properties—the neurons of Chinese readers are organized somewhat differently than those of English readers. This is not a static relationship. Each element interacts with the others; each contributes to the dynamic system and each is shaped by it.

A neurophenomenological approach to these conclusions suggests that the dynamic interaction of language, symbol, culture, society, body, affectivity and mind that constitutes the act of reading is dynamic and only partially a available to consciousness. There are many subtle variations to the experience, the consequences of which are difficult to predict. For example, the shift from print to electronic media has far ranging consequences that will shape the mind of future generations of readers through changes that are far reaching. Will there be changes to the planetary environment brought about

\textsuperscript{4} Id. at 5.
by the reduction in the use of paper? How does the shift to electronic text shape the physical brain features of a linguistically defined population? What will be its influence on social and cultural attitudes towards reading, and so on. Some of these variations are signative or pictorial, but others are not object-directed. That is, what changes in mood or attitude are introduced? How might changes in affectivity contribute to the construction of cognition? They do so indirectly or as background moods and attitudes, all being integrated post hoc by what Gazzaniga calls integration module.

Phenomenology and Legal Interpretation

What then does this suggest about Hart and Dworkin? First, I believe that Hart and Dworkin would agree that the rule of recognition is interpretive by nature. Hart viewed the “internal perspective” as a mode of interpretation in which the rule of recognition can be understood. He believed that the rule of recognition had to be assessed from a perspective that was informed of how it worked, yet also distant enough to be critical of it. Dworkin’s semantic sting argument sought to question how it worked, and though he is widely held to have misunderstood Hart, he was right to call attention to the nature of the hermeneutic that Hart was envisioning. Dworkin’s later constructive project broadens the field of interpretation considerably, viewing legal meaning as “entirely” hermeneutical and inclusive of moral “principles.” (Dennis Patterson is particularly critical of this “interpretation all the way down” aspect).
The contribution of the phenomenological perspective is multifold, but there are few aspects of particular importance. One is the inclusion of the non-directed form or awareness in the hermeneutic horizon. That is to say, what is given in an experience includes these non-representational or non-directed aspects that shape meaning. This is an idea that has been mostly rejected in Anglo/American philosophy, and yet it seems to be suggested by the emerging model of consciousness. Significantly, moral meaning seems to have elements that are deeply affective, working in the background of the preconscious mind in affective moods and predispositions. Neither Hart nor Dworkin are equipped to consider moral intuitions as inherent predispositions that shape action and only afterward are added into an interpretation of what occurred.

A second is the idea that what is being interpreted is not simply a "text" or a "text analogue." It is a dynamic system where the text has meaning in a cultural, social, and physical interaction with a massively complex neural network. The meaning of a text is the meaning of a lived experience of it occurring at a particular moment and with particular circumstances. These are changing constantly, causing the meaning of the text to undergo subtle variation as the text is constituted, but this happens beyond the range of what is noticed. Change a text from black to red and the experience will shift with different affective possibilities. The mind integrates these shifting tides with cultural and social forms and reference. To say that the stability of meaning comes from within the mind through conceptual analysis or from the perception of the world through empirical analysis misses the dynamism of the interaction between the interior and exterior.
This point is hinted at by many philosophers, for example Wittgenstein's insistence that the meaning lies in ordinary usage, particularly as Stanley Cavell understands it. Also, Willard Quine's argument against the sharp separation of concept and experience in his early essay, “The Two Dogmas of Empiricism.” Phenomenological thinkers from Paul Ricoeur's argument for dreaming as a form of philosophy in his book on Freud and Philosophy, or Charles Taylor's plea for a hermeneutical approach to the human sciences.

Finally, there is a tendency to believe that the whole “meaning” of an experience is exhausted by the atomistic parts that can be reduced to concepts and described in the grammar and syntax of propositions. The dynamic view of consciousness suggests that the meaning of an experience exceeds what can be conceptualized—that there is a surplus or superabundance of meaning in many experiences. This is an idea that has been well worked in phenomenological studies of religious symbols. For example, the meaning of a cross to a believing Christian is not reducible to the concept of it nor the meaning accessible though the grammar and syntax of the propositions of formal doctrine. It's meaning has to do with all of a life taken as a whole, oriented toward seeking the meaning of it. Ritual, music and art contribute to the interpretive whole, making the excess of meaning a palpable reality for the believer.
The Aesthetic Dimension

This leads to the final point of this essay. Several years ago Mark Johnson and George Lakoff wrote an influential book on the philosophical significance of the mind being embodied for philosophy. Johnson has more recently suggested\(^5\) that philosophers would do well to consider aesthetic experience as illustrative of a kind of experience that brings the mind's many modules and external dynamism into a highly integrative judgment. Johnson looks to John Dewey's work on aesthetic experience as illustrative of the sort of approach that he is advocating. He believes that focusing on experiences like the experience of aesthetic judgment will restore an insight into the way meaning is formed that has been ignored since Descartes. For him, a legacy of the Cartesian dualism has been to devalue the rich integration of affective, conceptual, and perceptual that takes place in human consciousness. This is a view that finds many connections to phenomenology.

The significance of Johnson's proposal for legal thought is suggested by number of proposals for considering the aesthetic dimension to interpretation. For example, Paul Kahn argues in his book on “cultural studies of law” that the aesthetic dimension to the rule of law is poorly understood. He means that the claim that the rule of law has some sort of aesthetic dimension has been a part of the Anglo/American and European legal culture, but that claim is largely forgotten today. Duncan Kennedy has argued for an aesthetic approach founded in Lacanian psychology. Also, Martha Nussbaum's many defenses of the humanities and bringing the humanities into the law school classroom.

\(^{5}\) Mark Johnson, The Meaning of the Body
This then is the claim that I advance in my essay: that in fact, some work in contemporary cognitive theory suggests that human beings seek haltingly and frailly after highly integrative experiences; the kind of experiences that are exemplified by beauty. The question of how law is legitimated in a polity is not only a matter of rules and principles, it is that, it also has to something to do with the art, literature, music, etc. that are significant to forming the meaning of law from the internal point of view. If this dimension to our self-understanding is lost, then I think we move a step closer to being trapped in Weber's iron cage.