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Intellect beyond Law: The Case of Legal Education

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ARTICLES

INTELLECT BEYOND LAW: THE CASE OF LEGAL EDUCATION

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Synopsis. Conceptions of intellect long basic to Western academic thought increasingly are being called into question. These conceptions, which equate intellect with finding and applying the "laws" that govern phenomena, have been seen to divorce us from realities of choice and self-creation that underlie the human experience. The first half of the Article develops these themes, suggesting the philosophical and practical importance of alternative, more expansive conceptions of intellect. The second half then illustrates these points, using legal education as a case study.

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W̲e may say there is a fairly certain structure of the law be-
cause judges will not frequently mean to invent concepts or
change old ones . . . . The concepts change with the social order
without our knowing it, new concepts come in without our realiz-

ing it . . . . *[That is] the reason why judges should not be par-
ticularly bright, or they would change the law consciously too
frequently.*[1]

The new universe of discourse and sensibility that is emerging re-
quires that we become increasingly aware that human beings are
self-interpreting creatures, and that those interpretations are con-
stitutive of what we are as human beings.[2]

The ethical problem with which we are concerned is the problem
of the sense in which every mature mind is the architect of its
own world.[3]

I. INTRODUCTION

The nomological[4] model of knowledge and rationality thoroughly domi-
nates Western academic thought. The reason the word "nomological" is
relatively unfamiliar, indeed, is that the concept to which it refers is so
taken for granted that we have little occasion to speak of it. The concep-
tion is manifested in today's common sense assumption that knowledge
consists of discovering and applying laws that underlie reality. Thus, with
respect to *products* of inquiry in a given field, we measure success by the
extent to which our knowledge of the laws that govern phenomena in that
field has become accurate, complete, and systematically expressed. With
respect to *processes* of inquiry in a given field, we measure success by the
extent to which we are able to bring to bear on phenomena in that field
the laws of logic (thereby achieving rationality with respect to manipula-
tion of concepts in the field) and of accurate perception (thereby achiev-
ing rationality with respect to acquisition of data in the field).

From the nomological perspective, "non-nomological" signifies only im-
perfection; it is the failure of a body of knowledge, theory, argument, or
the like, to be what it is supposed to be. This Article argues, however,
that our conceptions of intellect have neglected non-nomological modes of
understanding and that we have much to gain by remedying this neglect.

"Nomological" and "non-nomological" signify model-and-metaphor

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[1] Levi, *The Natural Law, Precedent, and Thurman Arnold*, 24 VA. L. REV. 587, 608
(1938)(emphasis added). *See infra* note 50.

[2] R. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY 113 (1976).

[3] C. WEGENER, LIBERAL EDUCATION AND THE MODERN UNIVERSITY 119 (1978).

[4] "Nomological" is used herein to mean the conception that phenomena are determined
by law. Nomological knowledge is knowledge in the form of propositional systems that: 1)
have a complete set of identified premises; 2) use terms susceptible of precise definition;
and 3) rely on accepted modes of logical or empirical proof. In the real world, most of our
processes and products of intellect (*i.e.*, explanations, arguments, and theories) are imper-
fectly nomological. However, it is appropriate to call them "nomological" when referring to
them in their aspect as aspiring to, or approaching, the nomological paradigm.

systems[6] for understanding intellect. The emphases embodied in those two systems can be glossed as follows:

Nomological	*Non-Nomological*
Mechanical	Organic
History-Conquering	History-Immersed
Closed	Open
Exteriorly Ordered	Interiorly Ordered

A. *Nomological*

1. Mechanical

The highest achievement of intellect would be to replicate intellect outside ourselves. Nomological intellect, for which the most worthwhile statements consist of terms that are operationalized, quantified, and/or all-or-none, can best be understood in terms of artificially-reproducible functions. The traditional model is a logic based on dualities of moved-mover, true-false, and present-absent.

2. History-Conquering

With respect to the enterprise of pure knowing, our goal is to transcend the limited perspectives of our historical situation and to construct permanent universal nomological structures that are good for all times and places. With respect to the enterprise of knowing for a purpose, our goal is technology that enables us to control ourselves and as much of the universe as we can reach.

3. Closed

The paradigm of knowledge is systematic propositional structures which, like mathematical systems, rest on a complete set of self-consistent axioms whose terms have fixed and certain meanings. Our goal is to develop knowledge systems sufficiently complete and accurate that all phenomena encompassed by the system can be predicted and controlled by it.

4. Exteriorly Ordered

Reality and rationality are governed by laws; our object is to learn and apply those laws. Data of perception are given, and we process them in accordance with the rules of rationality. Our chief intellectual purpose is to construct a perfect mirror of the objects and events that comprise

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[6] *See infra* text accompanying notes 33-36.

reality.

B. Non-Nomological

1. Organic

Models and metaphors derived from our experience of the organic —
e.g., "plasticity," "purposiveness," "coalescence," "flux," and "gestalt" —
are useful in understanding intellect, especially in understanding our
"subjective experience" of intellect.

2. History-Immersed

Intellectual life consists of moving from one situation to the next.
Throughout, our perspectives always are temporally bound. At each mo-
ment, we attend to aspects of phenomena according to the program of the
project that is the vehicle of our movement. Being immersed in our un-
folding history, we are both creator and created: we are in a relationship
of coevolution with the situations through which we move.

3. Open

Fundamental change and growth in understanding are essential, per-
manent conditions of intellectual life. The resource used in inquiry —
living knowledge — consists largely of concepts in flux. Ambiguity is an
essential feature of living concept systems. Paradox, antinomy, and com-
plementarity may be as true and as useful as logical systematicity.

4. Interiorly Ordered

The choices and projects of an intending "intellective I" comprise the
seat of rationality. Our conceptualizations, especially of ourselves and of
our works and institutions, are both discovery and creation: we are self-
creating beings.

C. Beyond the Nomological Tradition· Intellect, Self, and Being in the World

The nomological and the non-nomological are complementary. Each is
ground for, and can be adequately understood only in relation to, the
other. The conception of intellect underlying this Article, then, does not
reject the nomological, but rejects the domination by it that will be called
here "the nomological tradition."
     The central point is this: with Plato, Western thought crossed a Rubi-
con away from self, away from "subjectivity" and "human choice," to-
ward the objective and the nomological in our conceptions and projects of

intellect.[6] Descartes and Kant consolidated that movement.[7] But we have found that the ethos of objectivization dominates our thought in ways that impede understanding of human selves and human institutions.[8] On

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[6] In establishing his vision of a stable world knowable to reason, Plato overthrew sophistic, which sought "to rationalize the process by which opinion is formed and then effectively expressed," and the ethos of poetic, which entailed open participation in a narrative. Against those traditions, he established the primacy of static concepts, knowable to reason, that comprise essential reality. *See* E. HAVELOCK, THE LIBERAL TEMPER IN GREEK POLITICS 156, 193, 215-30, 241 (1957); E. HAVELOCK, PREFACE TO PLATO 47, 235-48 (1963).

[7] For Plato, an "idea" was a perfectly knowable essence perceived by the eye of the soul. Reflecting the scientific temper of his time, Descartes (1596-1650) naturalized "idea" by using it to refer to all the content of consciousness. He sought to identify and build a methodology of rationality upon those ideas which are "clear and distinct" and therefore indubitable.

Where Descartes stressed logical and mathematical inquiry, John Locke (1632-1704) stressed the empirical. Also seeking sources of indubitabilty, Locke held that in sense experience objects imprint themselves on the tablet of the mind. However, this left unsatisfactorily answered what thing this "tablet" is, and how sense impressions can give rise to complex ideas.

At the time of Kant (1724-1804), there was no adequate unified account of knowledge. Kant's solution was to posit that we possess concepts reflecting universal and necessary laws underlying both empirical knowledge, and logical and mathematical reasoning. Those concepts, arranged in broad categories ("space," "time," etc.), express the formal character of phenomena in the world. We "know" the world through those concepts, because the same logically structured, universal laws underlie them and the world. *See* R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 6-9, 38-69, 132-64 (1979); R. RORTY, CONSEQUENCES OF PRAGMATISM: ESSAYS 1972-1980 164-66 (1982). *See also infra* notes 29 and 32.

[8] People whose thought has seemed especially illuminating in this regard include: W. BARRETT, THE ILLUSION OF TECHNIQUE (1978); R. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY (1976); N. BOLTON, CONCEPT FORMATION (1977); F. CAPRA, THE TURNING POINT (1982); J. DEWEY, HOW WE THINK (1910); J. DEWEY, LOGIC: THE THEORY OF INQUIRY (1938); H. GADAMER, PHILOSOPHICAL HERMENEUTICS (D. Linge ed. 1976); K.J. GERGEN, TOWARD TRANSFORMATION IN SOCIAL KNOWLEDGE(1982)(hereinafter "TRANSFORMATION"); S. HAMPSHIRE, THOUGHT AND ACTION (1959); E. HAVELOCK, THE LIBERAL TEMPER IN GREEK POLITICS (1957); E. HAVELOCK, PREFACE TO PLATO (1963); M. HEIDEGGER, DISCOURSE ON THINKING (1966); G. STEINER, MARTIN HEIDEGGER (1978); G. LAKOFF & M. JOHNSON, METAPHORS WE LIVE BY (1981); R. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE (1974); R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979)(hereinafter MIRROR); R. RORTY CONSEQUENCES OF PRAGMATISM: ESSAYS 1972-1980 (1982)(hereinafter CONSEQUENCES); S. TOULMIN, HUMAN UNDERSTANDING THE COLLECTIVE USE AND EVOLUTION OF CONCEPTS 1972 (hereinafter HUMAN UNDERSTANDING); S. TOULMIN, THE USES OF ARGUMENT (1958); R. UNGER, KNOWLEDGE AND POLITICS (1975); C. WEGENER, LIBERAL EDUCATION AND THE MODERN UNIVERSITY (1978); L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

The root problem, it will be seen, is that the nomological tradition treats language and thought as phenomena that are "out there," as phenomena we are observing and whose laws we are seeking to discover. "Out there" is a metaphor attempting to render the "objectivization" half of an objective-subjective duality that, it will be seen, is central to the nomological tradition. While this spatial metaphor is used throughout the Article (as, for example, in "exteriorily ordered" and "interiorily ordered" in description of the nomological and non-nomological), one must recognize its limitations. Thus, *anything* can be objectivized, including "internal," subjective phenomena, which are precisely what the science of psychology does seek to objectivize.

a broad front, therefore, Western thought is seeking to recross the Rubicon.[9] The difference is that our aim now is not to occupy one versus the other bank, but it is to encompass the whole.

This Article empasizes[10] aspects of intellect that pertain to:

(a) change and adaptation in our thought;

(b) the temporal-experiential dimension of intellect—especially, the senses in which thought is action; and

(c) dimensions of freedom and self-creation in intellect.

The relationship between the nomological and non-nomological presented in this Article is comprehensible only when intellect is understood temporally—that is, in terms of the open, continually unfolding character of human thought. Thus, the themes of "post-nomological" thought presented in this Article must be understood as part of a historically-located project aimed at emancipation from the nomological tradition. Underlying this Article's perspective on what it *means* to discuss intellect, moreover, is the point that thinking about intellect is a reflexive process[11] in which our conceptions become part of the data out of which

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The point is that what matters is not what one looks at but how one conceives, and so creates, one's relation to it. The post-nomological perspective gives epistemological status to the interactive, open character of our relation to language and thought. *See, e.g.,* MIRROR, *supra*, at 359 (observing with approval that Gadamer substituted "the notion of *Bildung* (education, self-formation) for that of 'knowledge' as the goal of thinking").

[9] The people named in the preceding footnote are interested in reconstruction no less than in critique.

[10] From the nomological perspective, what counts in a thought system is that which the system holds true. The formulation in the text above this footnote is non-nomological in reflecting the view that a thought system is defined less by the propositions it holds true than by those it chooses to emphasize. *Cf.* R. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY (1976)("The most important and interesting challenges to any dominant orientation are those which force us to question the implicit and explicit emphases, that make us self-conscious not only of what is included in the foreground, but excluded or relegated to the background as unimportant, illegitimate, or impractical." *Id.* at 41.)

This need to choose, which is a concomitant of the temporality of human existence, gives rise to a basic issue of "epistemological status," of what is *important* to attend to as knowing. *See* J. KAPUT, *Mathematics and Learning: Roots of Epistemological Status*, in COGNITIVE PROCESS INSTRUCTION 289-303 (J. Lochhead & J. Clement eds. 1979)(elaborating the issue of "epistemological status" in the course of contending for the importance, *qua* knowledge, of presently neglected processes of learning and inquiry in mathematics). *See supra* note 8 (final paragraph).

[11] This reflexivity is manifested in science and philosophy in the following way. In science, intellect exists in a "ladder" of enterprises: (a) *First rung.* Phenomena in nature comprise the primary subject of science. Science is intellect looking at those phenomena. (b) *Second rung.* The philosophy of science is intellect looking at the *first rung* enterprise. Using parentheses to signify grouping as one does in mathematical notation, the *second rung* enterprise is: intellect looking at (intellect looking at natural phenomena). (c) *Third rung.* When we talk about the philosophy of science—for example, when we note different explanatory concepts used in the philosophy of science—we have intellect looking at the *second rung* enterprise. The *third rung* enterprise, then, is: intellect looking at (intellect looking at (intellect looking at natural phenomena)). (d) *Fourth rung, etc.* The two preceding

new conceptions are formed. In thinking about intellect we create ourselves.

In the academy today, intellect is a phenomenon, like any other, to be studied. Viewing intellect as an object of study, we make it datum—a given. The epistemology of intellect pursued in this Article, however, views thought about intellect as both discovery and creation. The subject of this inquiry is what-we-are-and-what-we-can-become as intellect. The more aware we are of this, the more intellectively competent we can become, and the more choiceful—and therefore free—can be our intellectual lives. The epistemology of intellect becomes, then, a quest for self-understanding, competence and freedom.

This Article's assertions about intellect are, in a sense, tautological. It points to certain human behavior, calls that intellect, and then says, "See, this is what 'intellect' is." But traditional nomological conceptions of intellect are no less tautological. For, the situation is that we lack neutral criteria for deciding what counts as a process or product of intellect, because intellection itself is what we *mean* by "neutral."

How, then, do we decide what counts as intellect? The Article addresses that question not in terms of an abstract "we" or the universalized positions common in philosophical discourse, but in terms of "I's" at

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sentences are intellect looking at the *third rung* enterprise, and so on.

What is happening is that each enterprise "level," examining or revising work done in the level "below," separates that work's conceptualizations from the subject of those conceptualizations, and considers (a) what the conceptualizations are, (b) how they came about, and/or (c) what else they might have been. Discourse in the philosophy of science typically combines the *second rung* and the *third*.

The corresponding ladder in philosophy, viewing philosophy in terms of its primary modern subject, epistemology, is as follows: (a) *First rung.* The underlying phenomenon is intellection — people perceiving, knowing, reasoning, etc. (b) *Second rung.* Philosophy is intellect looking at the *first rung* enterprise, it is intellect looking at intellect. It addresses questions such as, "How do we know?," "What is knowledge?," and the like. (c) *Third rung.* When we examine or critique theories of knowledge and the like generated in the *second rung* enterprise, we have: intellect looking at (intellect looking at intellect). (d) *Fourth rung,* etc. The preceding sentence is intellect looking at the *third rung* enterprise, and so on.

Much of the discussion in this Article is at the *third rung* level. This generally is so, for example, in its use of the terms "nomological" and "non-nomological." As is true of most discourse, however, the Article generally mixes levels.

With respect to enterprise rungs five, six, seven, and so on, there seems little to be gained by conceptualizing thought about thought in terms of such an infinitely extendible set of enterprise-levels. What does seem useful, is to keep in mind that we always can move to a "next level" to examine and revise thinking we have done, and that we regularly do so in thought.

The following question, now, may be asked: Do the preceding paragraphs purport to *stand outside* the reflexive flux they describe? The answer is "no," and this entails the paradox that all statements, including the present one, are subject to examination and revision. This, which is an "infinite regress" from a linear-logical perspective, is simply "reflexive" from the temporal perspective that is characteristic of the non-nomological. *See also supra* note 8.

work in the academic setting. In particular, the focus will be on projects and conceptions that shape our understanding of "intellect," "self," and "being in the world." The Article posits that it is our role as teachers that most directly challenges academics to examine and integrate those three dimensions of our thought. For, it is as teachers, preparing other selves for being in the world, that we most tangibly act out our conceptions of the relationship between intellectual ideals of the academy and being in the world.

The first four sections of the Article suggest how the nomological tradition has impeded recognition of the open and choiceful character of intellect. Section II develops this in relation to science and law, which are, respectively, paradigms of descriptive and prescriptive nomological structure. Sections III and IV show how the nomological tradition has undermined what may be termed the "ideology" of intellect in the academy, focusing on the ideals of truth (Section III) and liberal education (Section IV).

The second half of the Article begins by reviewing contemporary critique and reform in legal education, suggesting how these efforts have been hampered by the nomological tradition. Section VI then suggests an avenue of critique and reform, centered on the "skill of learning," that follows from themes of the post-nomological presented in Sections I-IV. The Article concludes by considering how we can work to increase coherence in the educational enterprise, offering a conception of theoretic dialogue that, too, builds on themes earlier presented.

II. PROJECTS OF INTELLECT

A. *The Project-Oriented Character of Knowing*

From the nomological perspective, valid reasoning must apodictically[12] establish the truth of one's conclusions, because, otherwise, there would stand between data and logic on the one hand, and conclusion on the other, a "decision to accept as so." This, in turn, would inject an inexplicable choice into the basic workings of rational deliberation. While such choice *is* inexplicable from the nomological perspective, it is fully understandable from the following non-nomological perspective.

The nomological tradition conceives knowledge as systematic bodies of true propositions. However, when we look at knowledge as it exists in the world, we see that it exists not in bodies of propositions, but in what we

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[12] "Apodictic" means that which "can clearly be shown or proved." WEBSTER'S NEW WORLD DICTIONARY 64 (2d Col. ed. 1972). Just as knowledge is taken to be flawed insofar as not nomological, and rationality in the empirical realm is supposed to consist in being compelled by data, see *infra* note 15, so proof is taken to be flawed insofar as not apodictic, and rationality in the logical realm is supposed to consist in being constrained by rule. CONSEQUENCES, *supra* note 8, at 164.

can call "project matrices." "Project matrix" means products of intellect corresponding to actual projects, such as writing a book, writing a judicial opinion, developing a theory, explaining an experimental result, or analyzing a body of principles.

When knowledge is viewed from this perspective, an overriding realization is that, with respect to any proposition accepted in one project, in a subsequent project one may 1) decide more evidence is needed before one is willing to accept the proposition; 2) elaborate or qualify the proposition; or 3) abandon the proposition in favor of one drawn from another aspect or system of description.

In this sense, it is fundamental that there *is* a "decision" between data and logic on the one hand, and conclusion on the other, and that the rationality guiding that decision is provided by the goals and substantive purview of the project in which the decision is made. Thus, while acknowledging the importance of what we posit as extrinsic nomological structures in the conception and direction of our projects, we also need to see the plastic and creative character of knowing.

Underlying the project-oriented character of knowledge is the purposive character of cognition. The nomological faith is that in cognition we ingest, as it were, bits of reality. But this vastly understates the extent to which what we experience is of necessity our purposive interpretations of reality. Thus, cognition grasps not whole things but aspects of things. A given whole thing can be addressed as a chair, a body with such and such a mass, or a piece of modern art. The aspects of the world we choose to perceive, and the concepts in which we choose to conceive them, are a function of our purposes.[13] An intending (that is, a purposeful and choiceful) "I" is the seat of all action—not merely of motor movements, with which the word "act" generally is identified, but of mental processes as well.

We need a reformulated conceptual vocabulary with which to understand the integrality of "intention," "cognition," and "action." While, for many actions, intending and acting are separable events, in cognition we generally realize our intention in the action itself. The word "realize," here, means both "to discover" and "to create." These two meanings render, respectively, the (a) perceiving and (b) conceiving by which intellective "I" projects itself into being. The verb "project" has a double meaning as well. It means (a) to cast from "in here" to "out there" and (b) to cast from now into the future. Those two meanings, render, respec-

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[13] *See generally* N. BOLTON, CONCEPT FORMATION (1977); S. HAMPSHIRE, THOUGHT AND ACTION (1959).

Perception and conception are "correlative processes, two aspects of a single whole"; "our concepts develop as we organize the environment . . . and we organize the environment through our concepts." CONCEPT FORMATION at 20. Accordingly, in cognition, human beings are simultaneously "observers . . . agents . . . and language users." THOUGHT AND ACTION at 67.

tively, the (a) interactive (mind-interacting-with-world) and (b) temporal (present-into-future), dimensions of intentionality in cognition.

How, then, are we constrained by any rational order of reality and conception? The key to rationality is that the projects of individuals do not occur in isolation. Not only do we operate within a culture of language and thought, each project of intellect is an event-of-dialogue within a particular sub-community of that culture. The tradition of analytic empiricism defines one such sub-community, for example, while the literary tradition defines another, very different one.

The point of present relevance, in sum, is that knowing occurs as a function of projects of intellect, performed by individuals within a particular community of language, thought and aspiration.[14]

B. *Science*

Apart from mathematics, science, especially natural science, is as close as human institutions come to realizing the nomological ideal. Natural science today sets the standard of inquiry and of knowing to which the academy aspires. Therefore, it is especially important to recognize the extent to which the nomological tradition has impeded our understanding of the open, choiceful, and creative character of the projects of science.

1.   Choicefulness in Scientific Inquiry

The conventional paradigm of science holds that fields of science are defined extrinsically—that is, by the things or events that comprise the subject matter of the field. In this view, by finding and following the rules of knowing, one succeeds in holding a mirror up to those phenomena, reproducing them in one's explanations.[15] However, this view vastly understates the open, choiceful character of science.

At the core of each field of science is a set of "explanatory ambitions"[16] which are defined in terms of the "explanatory task[s]"[17] that the field has set for itself. These definitions can be understood partly in terms of the phenomena chosen to be explained and partly in terms of the forms chosen for the explanation. For example, atomic physics at the turn of the century set out to find "ways of accounting for the relevant properties of actual objects and substances in detail" in terms of sub-atomic struc-

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[14] From this perspective one understands that "[i]t is within the process of social interchange that rationality is generated," TRANSFORMATION, *supra* note 8, at 207, and that a grounding theory of rationality aptly can be termed "sociorationalism." *Id.* at 207-09.

[15] The belief is that data compel knowledge — that "the object which the proposition is about imposes the propositional truth." MIRROR, *supra* note 8, at 157. *See also infra* note 30.

[16] HUMAN UNDERSTANDING, *supra* note 8, at 151.

[17] *Id.* at 236.

tures.[18] Similarly, micro-economics today pursues the ambition of explaining economic activity in terms of an "equilibrium price-auction" model of purchase decisions.[19] In these, as in all cases, scientists have a "rich legacy of possible explanatory forms or patterns"[20] on which to draw. Choices among such patterns, made correlatively with definition of the field's explanatory objectives, turn on judgments as to the anticipated "intelligibility" and "fruitfulness" of such patterns in relation to the explanatory objectives.[21]

The nomological tradition embodies judgments about what comprises legitimate, fruitful inquiry. For example, social science today routinely adopts the premise that "individuals are exclusively motivated to maximize their private wants,"[22] at least in part *because* that premise yields the kind of quantified data and rigorously lawful explanations that correspond to the nomological ideal.

But it is in these nomological aspirations of social and psychological science that the nomological tradition is especially problematic. The problem is that when people seem to defy thus being controlled or understood, social science attributes the imperfections of its knowledge structures to the comparative youth of the science[23]—or to lack of rigor in its methods,[24] not recognizing that the aspiration to create nomological structures itself raises important issues. Thus, for example, a strong case can be made that higher human functions are in fact *not* completely law governed[25]—or, at least, that nomological methods of study have been unproductive in,[26] and seem poorly suited to,[27] the understanding of such functions.

The point of present relevance is less who is "right" and who is "wrong" with respect to such issues, than that our premises are chosen, and our choices influence what, as well as how, we know.

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[18] *Id.* at 151-54.

[19] L. THUROW, DANGEROUS CURRENTS: THE STATE OF ECONOMICS XVIII (1983).

[20] HUMAN UNDERSTANDING, *supra* note 8, at 156.

[21] *Id.* at 255.

[22] R. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY 229 (1976).

[23] *See id.* at 8, 32, 52 ("One could write the history of much of the social science during the past hundred years in terms of declarations that it has just become, or is about to become, a geniune scientific enterprise.").

[24] *See id.* at 43-44.

[25] *See* TRANSFORMATION, *supra* note 8, at 12-21, 60-68, 153-61 (asserting the open and indeterminate character of human processes such as voluntary action, intentionality, reflexivity, and self-interpretation).

[26] *See* TRANSFORMATION, *supra* note 8, at 4 n.4 and accompanying text (citing studies that emphasize the limited progress made by sociobehavioral science).

[27] *See* TRANSFORMATION, *supra* note 8, at 4-57 (comprehensive critique of the methodological premises of traditional sociobehavioral science, centered on the incompatibility of (a) the deterministic premises of nomological science and (b) human realities of voluntary action, intentionality, reflexivity, and self-interpretation). *See also infra* note 172 and accompanying text.

2. Organic Growth in Scientific Concepts

The conventional paradigm of science holds that the knowledge comprising each field is a logical structure of precise-term propositions, and inquiry proceeds by testing, extending, and reasoning with those propositions. This pushes our conception of science toward the model of a *completed* science—that is, toward science in which all major problematics have been resolved. This, in turn, serves to obscure the essential nature of a *living* science, in which nomological structures are not fixed but fluid.[28] Thus, the corpus of knowledge in a field of living science perhaps is best understood as comprised of pockets of nomological structure within a fabric of organically-growing concepts.[29]

3. Interpenetration of Concepts and Data

Our tacit model of mind is that it is a place in which one reasons *with* concepts *about* data.[30] In science, the dichotomy between concepts and data presupposed by such a model assumes the following form: it is supposed that in scientific inquiry, one either treats one's concepts as "given," and uses them to analyze or incorporate new data, or treats the data as "given," and tests the adequacy and accuracy of one's concepts against them. In the former case, the concepts comprise a nomological structure of fixed terms into which the data are to fit; in the latter, the fixed terms of nomological structure are amended to conform to objectively given data.

This model fails to reflect the extent to which concepts and data commonly "interpenetrate," in the sense that the inquirer simultaneously forms concepts and uses them to select, perceive and explain the data. Thus, in scientific inquiry, it is paradigmatic that problems are solved "by working on both the empirical and the formal levels at once."[31] Scientific inquiry, then, can be understood as the effort to construct fruitful relationships between concept and data.[32]

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[28] HUMAN UNDERSTANDING, *supra* note 8, at 189-91.

[29] *Id.* at 128. The nomological tradition understands the history of science as a "chronicle of successive propositional systems." *Id.* at 478. This is no less true of "historicist-relativist" (*e.g.*, Collingwood and Kuhn) than of "absolutist" (*e.g.*, Frege) philosophers of science. *Id.* at 54-59, 80-85, 126-27. At deepest levels, this nomological understanding rests on the Kantian conception that knowledge *is* propositions. *See* MIRROR *supra* note 8, at 154, 161. Understanding knowledge as an organically growing concept (*see* text above this note) is congruent with our individual (*see supra* text accompanying notes 13-14) and institutional, (*see* HUMAN UNDERSTANDING, *supra* note 8, at vii-viii, 82-85, 95-96, 185-90, 254-55, 413-14, 480, 485-87), experience of intellect, and so provides vital theoretic connection between knowledge structures and the projects through which those structures live.

[30] N. BOLTON, CONCEPT FORMATION 2 (1977)(basic "division between sensory experience on the one hand and ideas and hypotheses on the other"); *see also infra* note 32.

[31] HUMAN UNDERSTANDING, *supra* note 8, at 188.

[32] This challenges a distinction, basic to the nomological tradition, between sensory data

4. The Use of Models and Metaphors

Explanation consists chiefly in the application of models and metaphors.[33] As we conceptualize phenomena, we draw upon the vocabulary of "possible explanatory forms or patterns"[34] that comprise our intellectual heritage. It is fundamental, for example, that we conceptualize intangible phenomena by projecting into them patterns we have experienced in our contact with the physical world.[35] Customarily, we resolve abstract phenomena into entities or substances, and into forces that bring about movement or change in such entities or substances.[36] Scientific explanation often uses model and metaphor systems (e.g. "subtle fluid," "field system," "corpuscular," "holographic")[37] that also are used in other fields.[38]

For present purposes, the relevance of models and metaphors is that they signify in the work of intellect: *choicefulness*, inherent in our selection from among the stock of models and metaphors available to us; *creativity*, in our developing and adapting metaphor systems to the particular phenomena at hand; and an *"extra-propositional rationality"* inherent in the extra-propositional gestalts that comprise the structure of each model and metaphor system.

C. Law

At one level, the nonapodictic character of legal reasoning is a familiar and well-accepted idea.[39] Thus, legal scholars accept that legal reasoning

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and our interpretation of those data. *See* CONSEQUENCES, *supra* note 8, at 3; MIRROR, *supra* note 8, at 148-50. This distinction is crucial to philosophy as we know it. For only by separating data and concept, and positing the knowability or lawfulness of one, can we nomologically understand knowing. *See* MIRROR, *supra* note 8, at 172.

[33] "It is pictures rather than propositions, metaphors rather than statements, which determine most of our philosophical convictions," MIRROR, *supra* note 8, at 12; G. LAKOFF and M. JOHNSON, METAPHORS WE LIVE BY 3 (1981)("our ordinary conceptual system . . . is fundamentally metaphorical in nature"). *See infra* text accompanying notes 33-35. This is why it is essential, for intellective self-understanding, to *uncover* metaphors that, so often without our awareness, guide our thought. *See* R. BERNSTEIN THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY 111, 233 (1976).

[34] *See supra* text accompanying note 20.

[35] *See* G. LAKOFF & M. JOHNSON, METAPHORS WE LIVE BY 176-79 (1981). *Cf.* N. BOLTON, CONCEPT FORMATION 17-19 (1977).

[36] *Id.*

[37] *See. e.g.*, HUMAN UNDERSTANDING, *supra* note 8, at 255; F. CAPRA, THE TURNING POINT *passim* (1982); THE HOLOGRAPHIC PARADIGM *passim* (K. Wilber ed. 1982); L. VON BERTALANNFY, PERSPECTIVES ON A GENERAL SYSTEMS THEORY 12 (1975).

[38] HUMAN UNDERSTANDING, *supra* note 8, at 184-85, 255-56.

[39] This is especially true with respect to our role as legal educators (*see infra* note 50), in which we customarily tell our students legal issues have no clear answers, and the forms of argument we chiefly teach (*e.g.*, reasoning by analogy from precedent, cumulative weighing of disparate "factors," and the like) are self-evidently nonapodictic.

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essentially is an endless dialogue and that, in studying and critiquing the reasoning of judges, the scholar-critic is a kind of kibitzing "tenth Justice."[40]

At a deeper level, however, the nomological scholarly ethos holds that to study phenomena is to describe them in relation to laws that govern their rationality.[41] Accordingly, the scholarly study of judicial decision has centered on an effort to find it lawful in the sense either of logical lawfulness or causal lawfulness.

1. Logical Lawfulness

Reflecting the dominance of the model of deductive logic in Western thought, scholarly efforts to find legal reasoning logically lawful have centered on the model of a syllogism[42] in which concepts (applicable rules) are applied to data (facts of a particular case), to yield conclusions (legal rights and obligations in the particular case).

Recognizing that judges do not simply apply ready-made rules of law, scholars seek more sophisticated analyses of the "major premises" that ought to control judicial reasoning. They seek theories, for example, through which principles of value[43] or principles of institutional arrangement[44] can serve as sources of major premise. Acknowledging that a degree of judicial "discretion" nonetheless does exist, scholars seek to discount such discretion as merely marginal and unusual in judicial decision making.[45]

2. Causal Lawfulness

Two kinds of causal lawfulness are widely applied in the scholarly study of judicial decision making. One is personalistic. Here, judicial decisions are understood as the product of beliefs, background, and other

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[40] The nine Justices of the United States Supreme Court are able and conscientious students of the law; yet, they rarely are unanimous in a case of any interest. The bulk of legal scholarship treats issues of the kind addressed by courts, and while the scholarly articles are written in much greater depth and scope than are judicial opinions, we recognize that the basic modes of reasoning are the same.

[41] The nomological imperative, indeed, is stronger in law than in other fields of scholarship, inasmuch as the *legitimacy* of legal institutions depends on their decisions being lawful—that is, on their decisions not being chanceful or subjective. Counting ourselves as conservators of the judicial institution, we feel it our obligation to find and pronounce such patterns of lawfulness.

[42] *See* S. TOULMIN, THE USES OF ARGUMENT 96 (1958).

[43] *See, e.g.,* H. HART, & A. SACKS, THE LEGAL PROCESS 122, 668-69 (tent. ed. 1958); Ely, *The Wages of Crying Wolf, A Comment on* Roe v. Wade, 82 YALE L.J. 920, 944 (1973); Velvel, *Suggested Approaches to Constitutional Adjudication and Apportionment*, 12 U.C.L.A. L. REV. 1381 (1965).

[44] *See, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH 184-98 (1962).

[45] *See, e.g.,* H. HART, THE CONCEPT OF LAW 119-20 (1961). *See generally* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

characteristics of the judge.[46] The second is sociological, in which decisions are understood as caused by social forces—either by "political forces" (in both a direct[47] and an indirect[48] sense) or by organic societal determination of the concepts with which judges reason.[49]

3. Process and Choice: Perspective of the Deciding Judge

This quest for lawfulness, as important and as fruitful as it has been, neglects the dimensions of choice and temporality.[50] This neglect exem-

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[46] *See* Danelski, *Toward Explanation of Judicial Behaviour*, 42 U. Cin. L. Rev. 659 (1973).

[47] Societal control is exercised directly in the sense that judges generally either are elected, or are appointed by elected officials.

[48] It is postulated, for example, that through "mechanisms of internalization" judges come to absorb the "community consensus" or the "community agenda." Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan. L. Rev. 169, 259 (1968). *See also* Dahl, *Decision-Making in a Democracy: The Supreme Court as A National Policy-Maker*, 6 J. Pub. L. 279, 285, 293-94 (1957).

[49] *See infra*, note 50.

[50] A basic distinction is to be drawn between scholarly theory, on the one hand, and the anti-theoretic of legal realism, on the other hand. The legal realists, in their ascendancy in the period 1900-1940, overturned legal formalism (the idea that judicial decision is a matter of applying pre-existing rules) which long had been the conventional theory of judicial decision. The legal realists asserted that judicial decision is essentially intuitive — a doing of justice in the case at hand. *See generally* W. Rumble, American Legal Realism; Skepticism, Reform, and the Judicial Process (1968).

The destruction of legal formalism accomplished, legal realists pursued the nomological tradition principally through the causal determinism of social science. Classic expression of the resulting perspective is E. Levi, Introduction to Legal Reasoning (1948)—the most influential of all law school primers on legal reasoning—which locates lawfulness in a dynamic whereby society governs judicial decision by encoding its values in the concepts with which judges reason. *Id.* at 6-8.

This leads, in turn, to the rather remarkable position taken by Levi in the quotation at the head of this Article. This is a position in which a "naive confidence in established classification," S. Hampshire, Thought and Action 242 (1959), which otherwise is to be regarded as an undesired obstacle to self-understanding, is embraced as an essential mechanism for the control of judges. To be sure, this is "excellent sociology in as far as this is indeed the principal manner in which societies convey and instill their values . . . ." E. Gellner, Thought and Change 84 (1964). However, the relation it posits between the theorizing academic and the world (here, judges) seems unacceptable. *Cf.* Gross, *The Theory of Judicial Reasoning — Toward a Reconstruction*, 66 Ky. L.J. 801, 819 n.107 (1978) (noting instances of suggestion by legal scholars that we perpetuate the myth that judicial decision is essentially a matter of following rules).

Legal realism is a very strong force in the law schools today — indeed, it has been called the "intellectual framework" of legal education. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. Legal Educ. 247, 248 (1978). The frankly instrumental and anti-theoretic aspect of legal realism is softened in the law schools by a strong current of rhetoric, *cf.* Kelman, *The Past and Future of American Legal Scholarship*, 33 J. Legal Educ. 432, 434 (1983)("Law Day homilies"), asserting the transcendant character of legal thought. *See, e.g.*, Cramton, *supra*, at 251, 253, 257, 263 (rhetoric of transcendance invoked against the precepts of legal realism). The conventional ideology of the law school classroom

plifies a pattern basic to the nomological tradition.

Thus, it is fundamental to thought in the nomological tradition that the word "reasoning" confounds two very different things: reasoning as *demonstration* (or product) and reasoning as *inquiry* (or process). The nomological paradigm is conceived in terms of reasoning as product. The paradigm tells us what form the product of our inquiry is to take. To the extent one's processes of inquiry can be understood as the application of propositions within a nomological structure, those processes, too, conform well to the nomological paradigm. However, the problem is that much inquiry, including judicial deliberation, conforms poorly to this paradigm. Yet, dominated by the nomological imperative, we strain to understand inquiry in nomological terms. We strain to understand judicial reasoning, for example, as the application of premises to facts.

When, however, we move to a dimension of "intellective interiority," congruent with the experience of the deciding judge, the process of inquiry assumes a different aspect. Rather than premises deductively leading to conclusions, the reality more nearly is that premises and conclusions interpenetrate, emerging "correlatively and tentatively"[51] in deliberation. Viewed from this "interior" perspective, too, the facts of the case at hand and the resource of legal concept, are seen to interpenetrate much as they do in science, in the sense that each is used to select, interpret, and inform the other. Finally, corresponding to the use of models and metaphors in science, this perspective helps reconcile the logic of deduction with plastic and creative application of precedent in analogical judicial reasoning.[52]

The resulting conceptions of judicial decision are not ones calculated to express "fetters that bind"[53] the judicial mind. Their purpose, rather, is to pursue an epistemology of "interiority" that can guide the judicial mind, and others who engage in legal reasoning, along paths of self-

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wraps legal realist practice in "Law Day" rhetoric.

 [51] Dewey, *The Logical Method and Law*, 10 CORNELL L.Q. 23-24 (1924). Patterns of concept, data, and conclusion take shape wholistically in the judge's mind. This account requires one to understand the sense in which "discretion" is pervasive and paradigmatic in judicial decision, the judge more like an artist painting a canvas than a mere follower of rules.

 [52] The quest for philosophically grounded theory that accommodates such reasoning must be as far-reaching as the questions of knowledge and of rationality broached in this Article. *See, e.g., infra* note 65 and accompanying text. The irony is that, while legal scholars pursue the nomological paradigm of natural science (*see infra* text accompanying notes 99-104) and seek nomologically defined theoretic fetters to control the openness of judicial decision (*see infra* note 53), Stephen Toulmin shows us that the openness of judicial decision provides a paradigm for the work of natural science. *See* HUMAN UNDERSTANDING, *supra* note 8, at 86-88, 94-95, 167-68, 498.

 [53] *See* Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM L. REV. 359 (1975).

understanding.[54]

III. THE IDEOLOGY OF ACADEMIC INTELLECT: TRUTH

Western philosophy traditionally has pursued the "objectivist" ideal that there is an external, independently existing reality, and that we can develop means to generate the set of propositions that truly describes that reality.[55] With the ascent of modern analytic empiricism, however, the explicit theory of the academy increasingly has become the "nominalist"[56] view that we accept our propositional structures not because they are "true," but because they work in performing functions of prediction, explanation, or control. This makes the ideal of truth "hollow" because, in accepting one set of propositions, we understand that another, entirely different set might perform those functions just as well. This granted, how can we ever say we have found—indeed, how can we meaningfully say we are pursuing—*the* "truth"?

While it may seem that the relativism and purposivism embraced by this Article lead necessarily to the nominalist positions, this Article argues to the contrary, as follows. The ideal of truth-seeking is not fallacious. Instead, it is our theories, no longer able to understand the ideal, that are at fault. Thus, through modern analytic empiricism, the nomological tradition has divorced its theoretic—and therefore our intellectual self-understanding—from a belief in truth that (as presently will be shown) is the actual ideology of inquiring intellect.[57] The fact that one "believes in" the pursuit of truth lacks intellectual significance—indeed, the belief itself appears intellectually indefensible—if, as the nominalist perspective of contemporary nomological thought tells us, we are pursuing a chimera.

But, assuming this is a problem, how could we respond? The first step is to note the genesis of our situation. As set in the traditional ideology of truth, the meaning of the word "objectivism" opposes it to nominalism. However, a subtle shift has occurred in modern analytic empiricism whereby "objective" has come to mean simply "*non*-subjective"; to mean public, replicable, and lawful, as opposed to private and nonrational.[58] This shift away from the original sense of "objectivism" (which, for clar-

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[54] *See infra* note 174 ("open theory" vs. "closed theory").

[55] "Objectivism" is "any of various philosophical doctrines that stress the external, independent existence of what is perceived or known." WEBSTER'S NEW WORLD DICTIONARY 981 (2d ed. 1972). *See also infra* note 65. *Cf.* Realism, "the doctrine that universals or abstract terms are objectively actual: opposed to nominalism." WEBSTER'S NEW WORLD DICTIONARY *supra*, at 1182.

[56] "Nominalism" is "a doctrine . . . that all universal or abstract terms are mere necessities of thought or conveniences of language and therefore exist as names only and have no general realities corresponding to them." *Id.* at 965. *See infra* text accompanying note 61.

[57] For the sense in which this is so, see *infra* text following note 61.

[58] *See infra* note 64 and accompanying text.

ity, we now call the "objectivist-realist" position) toward the second (nominalist) sense in our working theoretic of academic intellect, has not seemed important *because it does not matter to the nomological tradition.*[59] From the perspective of the nomological tradition, what matters is that knowledge be expressed in nomological structures, without concern for how one conceives the relationship between those structures and the reality to which they refer.

This shows the sense in which the ideal of truth-seeking has lost its theoretic grounding because of the conception, basic to both the objectivist-realist and the nominalist versions of the nomological tradition, that thought, language, and reality are phenomena "out there." That conception makes the question of truth the question of an "out there" relationship between language and thought on one hand, and reality on the other. It makes the crucial question whether we can identify some propositions as the ones that are a true mirror of, or—to change the metaphor—that truly hook onto,[60] reality. The objectivist-realist and the nominalist perspectives reach opposite conclusions on that question; but, equally bound by the nomological tradition, they conceive the issue identically.

A thesis of this Article is that truth-seeking can recover its theoretic grounding only by embracing dimensions of "subjective" internal experience that the nomological tradition has led us to neglect. Pursuing this thesis, let us consider the following standard statement of modern scientific nominalism:

> For Newton, science was a voyage of discovery on an uncharted sea. The objective of the voyage was to discover the islands of truth. The truths existed in nature. Contemporary science has been hard put to shake the yoke of this dogma. [We must understand, however, that][s]cience and common sense inquiry alike do not discover the ways in which events are grouped in the world, they invent ways of grouping.[61]

Now, the question is this: as he wrote those words, did Jerome Bruner believe them to be true? As he wrote those words, did it *matter* to him, at the deepest levels of self, that he did believe them to be true?

The evident answer to both questions, yes, is rooted in the fact that intrinsic to cognition is a belief that our conceptions are so. The paradox that this applies, also, to assertions of the nominalist position leads us to see that we are immersed in language and thought in ways we cannot escape. To be sure, conceptualization of a subject done at one moment ("moment A") always can be reconsidered during a subsequent moment

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[59] It matters to philosophers, *see infra* note 65, but in this aspect, the enterprise of philosophy grows increasingly esoteric and removed from the rest of academic inquiry. *Id.*

[60] This metaphor is used in MIRROR, *supra* note 8. *See, e.g., id.* at 265, 385.

[61] J. BRUNER, A STUDY OF THINKING 7 (1956).

("moment B"). Bruner, thus, can look at the passage quoted above and observe that it, too, is merely a construct of his devising; but this does not mean that statements in "moment B" signify freedom from immersion. For in moment B one is no less immersed in the reflection of *that* moment.

The nomological tradition, whether in its objectivist-realist or its nominalist form, holds centrally that we can transcend subjective experience through an objectivizing intellect. Neither the objectivist-realist nor the nominalist version of nomological thought ascribes theoretic significance to "subjective states" such as immersion or belief.

To be sure, our conception of intellect must accommodate the aspect of ourselves as nominalists in which we posit a cognitive reality of our own making. Equally, however, it also must accommodate the significance of our belief in, and commitment to, the truth of our conceptions as we experience them.

It follows that the ideal of truth must be grounded in the aspirations and commitments of intellective "I". In this view, the theoretic of the ideal of truth is to be found in conceptions that describe not relationships between propositions and reality, but *our own* relationship, the relationship of intellective self, to the project of seeking truth.

In the nomological tradition, intellection and valuing seem unalterably separate realms[62] or, at least, their reconciliation seems a distant hope.[63] But this is because we have viewed *both* intellection and valuing from a posture of objectivized intellect that manifests and perpetuates their separation.[64] Specifically, we conceive ourselves as observers of, rather than as participants in, the phenomena of intellect, and so have lost the power to generate "objective" conceptions of intellect congruent with its "subjective" valuings and aspirations.

The proposed shift negates, by "subjectivizing," the ideal of truth only from the perspective of the nomological tradition itself. Such shifts are characteristic of the broader project in which we are now engaged: re-understanding the intellective ideals by which we live.[65]

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[62] *See, e.g.,* Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685, 1685, 1712 *passim* (1976)(rule and value as inherently antinomous components of judicial decision-making).

[63] *See, e.g.,* R. UNGER, KNOWLEDGE AND POLITICS 143 (1975)(integrative conceptions of which "we have only the faintest awareness"); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality,* 46 S. CAL. L. REV. 617, 654 (1973)(a "form of thought which . . . may not be within reach in the foreseeable future").

[64] A basic thrust of post-nomological thought is to challenge the necessity, viability, utility, and morality of this dichotomy. *See infra* Section VII B(3)("Moral Being vs. Technologism").

[65] *Cf.* S. TOULMIN, THE USES OF ARGUMENT 234-45 (1958) (arguing that our conception of "reason" should be freed from domination by an apodictic ideal that in fundamental ways has distorted our understanding of what human reasoning is). *See also* R. UNGER, KNOWLEDGE AND POLITICS 103, 107-11, 124, 141-44 (1975); C. PERELMAN & L. OLBRECHTS-TYTECA,

It seems the final nausea to understand that, with such shifts, we create ourselves. But this nausea is due to loss of an orientation to which we had grown accustomed: that embodied in nomological conceptions of intellect, reason, and truth. To paraphrase the quotation that stands at the head of this Article, it may seem that people "should not be particularly bright," since otherwise we will recognize that the conceptions by which we live are of our creation, and will change them unwisely or too often. But such is to suggest we live unconsciously, and there can be no turning back to that.

IV. THE IDEOLOGY OF ACADEMIC INTELLECT: LIBERAL EDUCATION

Today, liberal education primarily means general education. This corresponds to the precept that breadth of knowledge humanizes, and that to pursue "liberal studies" is to pursue knowledge for its own sake. While, of course, there is merit to this ideological strand of liberal education, its

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THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 1-10 (1969); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 617, 654 (1973). *See generally*, Ayer, *Isn't There Enough Reality to Go Around? An Essay on the Unspoken Promises of Our Law*, 53 N.Y.U. L. REV. 475 (1978).

In Western thought, philosophy has sought to superintend the theoretic of intellect, reason, and truth. Thus, what traditionally has differentiated philosophy from science is that philosophy seeks theories of knowledge, (*i.e.* criteria for deciding what true knowing is), that provide a *foundation* for science. MIRROR, *supra* note 8, at 132. Becoming properly "scientific" and "rigorous" under the aegis of modern analytic empiricsm, philosophy today signifies analytic method of no certain content. *Consequences, supra* note 8, at 215-17, 221; MIRROR, *supra* note 8 at 5. Thus, the philosophy that sired modern analytic empiricism has been "devoured by it own offspring," (W. BARRETT, THE ILLUSION OF TECHNIQUE 24 (1978)), and the idea that philosophy gives the rest of us criteria for true knowing becomes increasingly removed from reality. *See* MIRROR, *supra* note 8, at 5. Because analytic philosophy *exists as* the search for such criteria, (*id.* at 131-311 [especially pp. 132, 171-72], 340 n.20), philosophers today pursue their arguments about true knowing, *see e.g., id.* (describing contemporary analytic philosophy, in its various forms and applications), while the rest of us turn to nominalism.

Richard Rorty, rejecting the traditional ideal of truth, (*see* CONSEQUENCES, *supra* note 8, at xiii-xvii, 3-17), is right to fault that ideal for producing an "objectionable self-confidence," (MIRROR, *supra* note 8, at 386), that leads to stuckness — to the idea that inquiry stops whenever we find out what really is so, and that we are now accomplishing this for many of the topics we address nomologically. *Id.* at 377, 386-87. But much of this problem, it appears, arises *because* we identify truth with "out there" propositions about how things are.

Rorty accepts truth as an ideal when it is understood as "no more and no less than the best idea we currently have about how to explain what is going on." *Id.* at 385. But what such an ideal adds to nominalism is not clear; indeed, elsewhere Rorty dismisses the word truth as an "empty compliment" we pay our current beliefs. *Id.* at 10.

Surely the matter can't end there. When Rorty posits the "*best* idea we currently have about how to explain . . .," to what dimension of normative distinction does he refer? Philosophical inquiry is, as Rorty states, a dialogue we are fated to pursue as long as "sparks fly upward." *Id.* at 389. But why do we each go on? What do we each seek? With no name for that, how can we speak intelligibly about the soul of intellect?

limitations are expressed in a second precept holding that mere knowl-
edge is not the point, and that what counts is the formation of "charac-
ter"[66] or of "an active methodical intelligence [that is] . . . able to think
. . . about unfamiliar matters."[67] This is the ideal of an education that
prepares people to "realize [their] potentialities to the full;"[68] involves
"the whole range of human potentialities, functions, and satisfactions;[69]
and presents educators with "questions about human beings as such."[70]
The goal is "to nurture the traits of mind and spirit characteristic of
those who have achieved a consistent view of themselves and the complex
physical and social world in which they live."[71]

It is fair to say that in American universities today, liberal education is
drowning in vocationalism (that is, in concern with preparation for spe-
cific occupational roles), and in the increasingly specialized research in-
terests of faculty.[72] These forces—vocationalism and specialized academic
interests—both are aspects of what we will call "technologism." In the
academy, technologism means education intended as preparation for de-
ploying the particular methodologies and pursuing the particular ends
that define what it is to be "competent" within a given vocation or aca-
demic discipline. Academics readily recognize the technologism present in
preparation for nonacademic vocational pursuits. We may be less able to
recognize the comparably narrow vocationalism present in preparation for
a career in an academic discipline.

To understand the significance of technologism, one must see the sense
in which it encompasses privatism. Presented often in opposition to the
cognitive, instrumental, and technological, "privatism" stresses themes of
subjective, personal, emotive, nonverbal and mystical self. Principal ex-
pressions of this ethos in Western thought are humanistic psychology,[73]
and a variety of psychological-religious-poetic accounts of self and of in-
terpersonal connection.[74]

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[66] C. WEGENER, LIBERAL EDUCATION AND THE MODERN UNIVERSITY 83 (1978).

[67] Bowra, *The Idea of a Liberal Arts College*, 50 LIBERAL EDUC. 185, 188 (1964)(Bulletin
of the Association of American Colleges).

[68] *Id.* at 187.

[69] C. WEGENER, *supra* note 66 at 78.

[70] *Id.*

[71] E. McGRATH, THE GRADUATE SCHOOL AND THE DECLINE OF LIBERAL EDUCATION 2
(1959).

[72] *See, e.g.*, newspaper account of January 1984 annual meeting of Association of Ameri-
can Colleges, presenting as lead story that "in the view of many of the nearly 450 college
and university administrators" in attendance, the liberal arts have become a "disaster area"
in American higher education because "colleges and universities have become so preoccu-
pied with training students for jobs and with encouraging professors to pursue arcane re-
search specialities." Los Angeles Times, Jan. 16, 1984, pt. 1, at 3, col. 3.

[73] *See, e.g.*, C. ROGERS, CLIENT-CENTERED THERAPY (1951); A. MASLOW, TOWARD A PSY-
CHOLOGY OF BEING (1968).

[74] *See, e.g.*, M. BUBER, I AND THOU (1958); F. FROMM, *Psychoanalysis and Zen Bud-
dhism*, in ZEN BUDDHISM AND PSYCHOANALYSIS (1960).

Technologism embodies a dualism that divorces intellect from self in the following manner: technologism claims intellect for the domain of the technological, while ceding self to privatism.[75] Privatism, claiming self, cedes intellect to the technological.[76] In these conceptions, privatism and the technological define each other and, together, reinforce the objective-subjective duality that is central to the nomological tradition.

One consequence is that educators, our professional identities increasingly defined in terms of competence in the nomological structures of our fields, feel neither qualified nor chartered to meddle with students' emotive-conative selves. Therefore, the ideal of liberal education, rooted in those selves, is lost, like the ideal of truth, to the explicit theoretic of academic intellect. Now, one can fault this duality—more specifically, one can fault the technological as dehumanizing or self-alienating,[77] and privatism as anti-intellectual or narcissistic.[78] Such critique, however, is of limited use unless it leads somewhere.

Again, the starting place is to see how we arrived at our present situation. A concomitant of modern analytic empiricism is that, with the elaboration of our work into specialized research disciplines, academics increasingly are removed from what it is to be intellect-and-self in the world *outside* the academy, or indeed, in other disciplines within the academy.

The preeminent theoretician of liberal education, John Dewey, sought ways to understand intellect in terms meaningful outside the academy.[79] He sought approaches to education whereby values accepted as the ends of liberal education meaningfully refer to what it is that people do in their lives. While Dewey's prescriptions are of limited use to the present inquiry,[80] the key point is that Dewey was wrestling with the problem that matters: the problem of intellect, self, and being in the world. Dewey's quest can be understood as a search for ways to understand higher education that: (a) express a culture of intellectual community—a culture common (i) among academic disciplines, and (ii) within and without the academy; and (b) have programmatic as well as theoretic signifi-

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[75] *See* W. BARRETT *supra* note 65, at 191 (underlying "the technological era" is intellect's insistence on attending only to that which is "measurable, numerable and calculable.")

[76] *See* M. BUBER, *supra* note 74, at 3-14 (dichotomizing the world of ideas and the world of direct relation, and asserting the primacy of the latter); E. FROMM, *supra* note 74, at 110-11, 132-33 (asserting as the "highest form" of knowing the direct conscious experience which occurs without intellection and reflection—similar to the "intuition" posited by Spinoza).

[77] *See, e.g.,* W. BARRETT *supra* note 65, at 212-19.

[78] *See, e.g.,* C. LASCH, THE CULTURE OF NARCISSISM (1983); Marin, *The New Narcissism,* HARPER'S, Oct. 1975, at 47.

[79] *See, e.g.,* A. WIRTH, EDUCATION IN THE TECHNOLOGICAL SOCIETY: THE VOCATIONAL-LIBERAL STUDIES CONTROVERSY IN THE EARLY TWENTIETH CENTURY 169-217 (1971).

[80] The degree of Dewey's faith in scientific method, popular democracy, and mass education, and in the way those three principles could be combined (*see id.* at 182-206), is anachronistic in relation to Western society as we now know it.

cance for higher education.

There must be many ways to understand higher education that are responsive to this quest. The remainder of this Article will pay much attention to one such idea, to be called here "self-reflective learning." Responsive to emphases of goal and concept—especially to themes of intellective interiority—that are the focus of this Article, "self-reflective learning" means learning that is characterized by "a persistent shifting back and forth between doing something and thinking about doing something—or [better yet] . . . between thinking about something and thinking about the thinking, until the moments become so normally related they are no longer sharply distinguished . . . ."[81]

We tend to conceive reflection as using knowledge to achieve understanding. This contrasts with the focus of self-reflective learning, for which the "moment of philosophizing"[82] is not an application of philosophy to self, but is a way that intellect relates to self; it is manifested in qualities of mind corresponding to reflective, perceptive, and self-aware intellect.

The sine qua non for teaching and learning so conceived is intellect understood as being in the world—intellect, that is, as being in our projects. The meaning of that idea becomes tangible only in relation to concrete settings in higher education. The remainder of this Article develops "self-reflective learning" in the specific context of legal education. First, however, it briefly describes current patterns of thought and practice in legal education, in terms of which the significance of self-reflective learning must be understood.

V. PRINCIPAL CONTEMPORARY THEMES OF CRITIQUE AND REFORM IN LEGAL EDUCATION

A professional lifetime in the law must be projected in terms that are broad and open. This follows from the wide range of tasks that "general legal practice" entails, the diversity of professional roles in addition to legal practice that law school graduates commonly undertake, and the fact that laws, legal institutions, and their social context, continually and rapidly change. Therefore, the crucial question for law schools is, *In what terms are we to conceive the knowledge, skills, and attitudes that comprise the goals of a coherent program of general legal education?* Broadly speaking, the way we answer that question today may be found in the three broad classifications—"doctrinal," "theoretic," and "practical"—into which we divide our thought about law school instruction.

Most law school courses are "doctrinally" defined in that they are named for, and cover, one of the subject matter (doctrinal) categories into

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[81] C. WEGENER, *supra* note 66, at 97.
[82] *Id.* at 138.

which substantive law is divided in our thought and practice. In addition to teaching students fundamental principles of its subject matter, a major purpose of each such course is to help develop (typically, through use of the casebook method of instruction)[83] skills required in applying substantive law to problem situations. These skills, sometimes referred to collectively as "thinking like a lawyer," will be referred to here as "doctrinal skills."

The great emphasis in our general degree program, then, is on instruction in doctrine and doctrinal skills through the casebook method. Nonetheless, for years there has been widespread agreement that, while sound as applied to the first year of law school, this approach is progressively less adequate through the second and third years.[84]

Thus, the first year of law school has a prescribed curriculum whose subject matter is self-evidently important because it is the foundation for subsequent law study. Moreover, doctrinal skills instruction is rewarding in the first year, since, starting with little such skill, students typically undergo striking cognitive development during the year. But these conditions change markedly in the second and third years of law school. In those years, doctrinal skills teaching and learning occur at a much-reduced level of rigor and of individual growth.[85] Additionally, in the second and third years, the prescribed curriculum of the first year gives way

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[83] The principal assigned reading generally is a casebook, containing edited appellate judicial opinions and a wide range of commentary, problems, and questions pertaining to the cases and to the issues they address.

[84] *See, e.g.,* K. LLEWELLYN, THE BRAMBLE BUSH: ON LAW AND ITS STUDY 139 (1951); STOLZ, *Training for the Public Profession of the Law (1921): A Contemporary Review,* in TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971, 142, 143 (1971)(Report of the Curriculum Study Project Committee of the Association of American Law Schools); Gellhorn, *The Second and Third Years of Law Study,* 17 J. LEGAL EDUC. 1, 4-6 (1964); Stone, *Legal Education on the Couch,* 85 HARV. L. REV. 392, 407 n.50 (1971).

[85] *See, e.g.,* Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform,* 59 CORNELL L. REV. 221, 276 (1974). Rather early in their law school career, many students conclude they have grasped the essentials of doctrinal skills learning and correspondingly reduce their effort. *Id.* at 277. Our three-year law school program fosters this pattern. Thus, after the rigorous Socratic case class of the first-year, a common teaching mode of the second and third years is one that has been called the "avuncular Socratic" (Cramton, *The Current State of the Law Curriculum,* 32 J. LEGAL EDUC. 321, 328 (1982)) which demands, and receives, a lesser level of preparation and in-class performance by students. *See also* I. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 162 (1977)(study suggesting that law school classes are less interactive than we generally suppose). Once students have passed out of the first year, they become "yearling priests" of the law school community, who minister to the first-year neophytes beneath them. *See* K. LLEWELLYN, *supra* note 84, at 130-31. Our system of education does not significantly differentiate students who are at the beginning of their second year from those who are at the end of their third year. The most comprehensive reconsideration of the general degree program by the present generation of American law teachers concluded that two years should be enough. *See infra* text accompanying note 143.

to a "bewildering array"[86] of elective courses, reflecting no "structure or theory" of curriculum design.[87]

Therefore, the consensus today is that the domination of doctrinal skills instruction must give way, in the second and third years, at least,[88] to a blend that adequately treats the *practical dimension,* conceived chiefly as applied skills[89] instruction, and the *theoretical dimension,* conceived as intellectual breadth and depth.[90]

A.   The Practical Dimension

During the 1970s both the bench and bar exerted considerable pressure on American law schools to devote more attention to practical skills training.[91] This attention did not address, however, what might have seemed the crucial question: What *dependable minimum* of practical skills competence should our graduates have?[92] The question was not addressed because it appeared to defy answer. Thus, in light of (a) the expense of practical skills training (due to the large number of instructor hours it requires), (b) the number of different skill categories to be covered, and (c) the high value placed on, and therefore the time devoted to, doctrinal

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[86] Boyer & Cramton, *supra* note 85, at 230.

[87] *Id.* The suggestion has been made that we have abandoned "collective responsibility . . . for the curriculum as a whole." Cramton, *supra* note 85, at 327; Sandalow, *The Moral Responsibility of Law Schools,* 34 J. LEGAL EDUC. 163, 164 (1984)("disarray of . . . the curriculum" is a symptomatic of a "larger failure": the seeming inability of the law schools "to address fundamental issues concerning the goals of legal education").

An underlying problem is that the principal scholarly interest of law professors is the study of particular doctrinal fields. This specialized interest, as Karl Llewellyn rather excoriatingly put the matter, tends to make doctrinal instruction in the second and third years an "instrument for producing unplanned concentration of good teachers' minds on propogating, at all costs, tiny, mostly unimportant, intricacies of narrow positive doctrine." K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 384 (1962). *See also infra* text following footnote 105. The result is that the teacher's enthusiasm far exceeds that of the student—creating a gap we seem unable to bridge and, worse, sometimes unwilling to address. *See* Strauss, *Teaching Administrative Law: The Wonder of the Unknown,* 33 J. LEGAL EDUC. 1, 6 (1983).

[88] The expanded approaches referred to in the text following this footnote are not confined to the second and third year curriculum. *See, e.g.,* Brest, *A First-Year Course in 'Lawyering Process',* 32 J. LEGAL EDUC. 344, 344, 350 (1982).

[89] Applied skills include: legal drafting; negotiation; litigation: appellate advocacy; litigation: trial preparation; litigation: trial practice; interviewing and counseling; legal planning and counseling.

[90] *See* Gorman, *Legal Education At the End of the Century: An Introduction,* 32 J. LEGAL EDUC. 315, 319 (1982).

[91] *See* LAW SCHOOLS AND PROFESSIONAL EDUCATION: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION OF THE AMERICAN BAR ASSOCIATION 10-13 (1980).

[92] *See infra* note 155 (first paragraph). *Compare* Llewellyn, *The Place of Skills in Legal Education,* 45 COLUM L. REV. 345, 345 (1945)("*reliable* and *minimum* professional competence")(emphasis in original).

instruction, it appears impossible that our goal could be *any* minimum level of competence in the various categories of practical skills used in lawyering.

In addition, we have tended to assume without question the inviolability of the elective character of the second and third year curriculum,[93] perhaps not fully accepting that our students' interest in freedom of course selection might need to give way to the public's interest in a dependable minimum of professional competence in our graduates.

While there has been substantial growth in the number and size of applied skill courses, the primary emphasis increasingly has shifted to a "pervasive" approach, whereby in doctrinal courses, students are presented with problems that require use of one or another of the applied skills.[94] Though there are benefits to the pervasive approach,[95] it has two serious weaknesses. First, it does not provide a dependable minimum of applied skills coverage, thus leaving to chance which skill categories the student encounters during the law school years. Second, it does not present practical skills as conceptually coherent wholes. The fragmentary encounters characteristic of the pervasive method do not merely fail to develop patterns of conceptually coherent skills learning, they may suggest to students that such learning is unfeasible or unimportant.[96]

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[93] Given that serious questions have been raised about the adequacy of the core education being received by our students, (*see, e.g.,* Cramton, *Current State of the Law Curriculum,* 32 J. LEGAL EDUC. 321, 327 (1982)(questioning whether our graduates have "the basic knowledge, skills and attitudes that any decent lawyer should be expected to have"); Boyer & Cramton, *supra* note 85, at 231 (questioning whether "the law schools are inculcating a common professional culture, a common core of values and knowledge"), and the fact that expanding the core (i.e., required) curriculum seems one obvious response, *see, e.g.,* Gorman, *supra* note 90, at 319-20), there are remarkably few references to this idea in the legal education literature. Faculty and students wish to maintain the diversity of the upper level curriculum, since this permits faculty to teach in areas of their scholarly interest (*see supra* note 87), and students to learn in areas of their personal, or anticipated professional, interest.

[94] *See, e.g.,* Holmes, *Education for Competent Lawyering — Case Method in a Functional Context,* 76 COLUM. L. REV. 535, 566-72 (1976); *Developments,* 32 J. LEGAL EDUC. 282, 283-84 (1982).

[95] This approach can improve doctrinal skills learning by putting problems of doctrinal interpretation and application into the real-world contexts in which students will encounter them as professionals. This means that students think about doctrine, as one commentator has put it, the way lawyers do, "tactically" (Macaulay, *Law Schools and the World Outside Their Doors II: Some Notes on Two Recent Studies of the Chicago Bar,* 32 J. LEGAL EDUC. 506, 514 (1982)), so that students are learning not to "think like law professors" (*id.* (emphasis omitted)), but to think like lawyers.

By the same token, the pervasive approach can deepen practical skills learning by placing applied skills problems in a specific doctrinal context currently being studied. The use of large-class doctrinal courses for such instruction means that more students are exposed to practical skills learning at a much-reduced cost.

[96] The problem is one of conceptual focus and coherence in law study. *See infra* text accompanying notes 111-14. A concern one has is that history is repeating itself. The perva-

Use of the pervasive method is further complicated by the fact that many law professors have substantial reservations about law school instruction in applied skills. Thus, while virtually all accept that some amount of practical instruction is necessary, many feel that applied skills basically should be learned through experience *after graduation* because (a) it is extremely difficult for law schools to teach applied skills,[97] and (b) it is the proper function (and more than sufficient challenge) of the law school years to lay an intellectual foundation for the student's subsequent professional life. This view is especially strong in the "more respected" law schools whose programs and faculty heavily influence the self-image and aspirations of the legal education profession.

This view is deeply grounded. Law schools wish to be honored members of the academic community and not to be viewed as trade schools. This is not simply a matter of appearance or of status; it corresponds to a genuine aspiration to *be* academic. Many law faculty, it has been observed, are "refugees"[98] from the pedestrianism and moral ambiguity of practice; having fled that environment, they resist its introduction to the law school. A final constraint on practical training in law schools is that, especially under the presently favored "pervasive" approach, such training competes directly with the theoretic dimension for the time and attention of law professors in their courses.

B.   *The Theoretic Dimension*

Our conception of intellectual breadth and depth, as a dimension to be added to the law school program, has come increasingly to include social science. This has led to an increase in social science courses, often in a form colloquially called "law and . . ." (e.g. "law and economics," "law

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sive approach that today seems the wave of the future, (*see also infra* discussion of "intellectual breadth and depth") was persuasively critiqued forty years ago by a leading legal educator:

> The modern complexity of material is accompanied also by an increase in the range and type of problem in our classes: dabs of legal history, of jurisprudence, large chunks of the problems of judicial policy, problems of counseling suggested by the instructor's experience or the annotations of the casebook, materials of economic or of social or political background — all these come in, but they come in helter-skelter: 'The place for that is not a separate course; it ought to be part of every course'."

Llewellyn, *The Place of Skills in Legal Education, supra* note 92, at 355.

[97] Not only is the individual attention entailed in practice and feedback expensive, critics point out that inside the law school it is difficult to replicate the real-world conditions under which one learns to do the applied tasks of lawyering. Paradoxically, the more prestigious, wealthier schools that can best afford such instruction tend to be less interested in it. Cramton, *The Current State of the Law Curriculum,* J. LEGAL EDUC. 312, 325-26 (1982). *See also* text following this footnote.

[98] Simon, *Homo Psychologicus: Notes on a New Legal Formalism,* 32 STAN. L. REV. 488, 552-53 (1980).

and psychology").[99] However, such courses—each taken by relatively few students and at no designated point in their law school career—do not provide a foundation on which teachers in other courses can build. Thus, as in the case of practical skills, emphasis has come to be placed on the pervasive method; that is, on integrating social science perspectives into doctrinal courses.[100] However, this also has serious weaknesses. One's understanding of a discipline should be built by systematic assimilation of its basic principles of substance and method. Instead, in the pervasive method, students encounter disciplines in a way that tends to produce fragmentary and superficial understanding of them. Further, as the application of social science perspectives to law becomes more developed, it becomes progressively less feasible for law teachers not specializing in a given discipline to incorporate it into their doctrinal courses.[101] With respect to teachers who do specialize, instruction through the pervasive method becomes less satisfying to the teacher[102] and/or less comprehensible to the student.[103]

An assumption that underlies the use of social science to increase intellectual breadth and depth in the law school program is that students are to adopt the empirical-theoretic perspective that animates the work of scholarly systems-building. However, especially in the pervasive method, the student's focus is more often on instrumental application of whatever bits of social science learning are relevant to the problem at hand.[104]

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[99] *See* Cavers, *Signs of Progress: Legal Education, 1982,* 33 J. LEGAL EDUC. 33, 43 (1983)(indicating prominence of economics, and of sociology, psychology, and psychiatry, among social science subjects treated in such courses.)

[100] *See, e.g.,* Gellhorn & Robinson, *The Role of Economic Analysis in Legal Education,* 33 J. LEGAL EDUC. 247, 254-65 (1983); Cavers, *supra* note 99 at 43. This follows generally from the long term movement of the casebook method toward encompassing a wider range of materials and perspectives. *See supra* note 96.

[101] *See* Bergin, *The Law Teacher: A Man Divided Against Himself,* 54 VA. L. REV. 637, 647 (1968).

[102] "The serious social scientist in a law school resembles the artist who delivers letters to pay the bills. Teaching becomes a job." George L. Priest, Oral Presentation to the Plenary Session, Annual Meeting of the Association of American Law Schools, Cincinnati (January, 1983)(official audio transcription)(omitted in edited text later published, *see infra* note 103).

[103] Priest, *Social Science Theory and Legal Education: The Law School as University,* 33 J. LEGAL EDUC. 437, 440 (1983)("the low level of theoretical training and interest of law students frequently makes one wonder whether the effort is worthwhile") (edited version of oral presentation, *see supra* note 102).

[104] There is an important difference between study pursued "on its own terms and for its own sake" (Dean Terrance Sandalow, Oral Presentation to the Section on Teaching Methods of the Association of American Law Schools, Annual Meeting of the Association of American Law Schools (January 1981)(official audio transcription)), and study pursued for instrumental application. *Id.* When it is proposed that law professors take a leave of absence for self-education in fields such as "economics, sociology, criminology, philosophy, mathematics, computer technology, or some branch of the physical sciences" (Allen, *One Aspect of the Problem of Relevance in Legal Education,* 54 VA. L. REV. 595, 599 (1968)), one can only

In addition to social science, the other principal resource for intellectual breadth and depth in the law school curriculum is legal scholarship in the rationalist-jurisprudential tradition. This scholarship covers a spectrum extending from doctrinal critique (in which the nomological faith is that through rigorous reasoning we can apodictically critique judicial decisions and identify correct doctrinal results), to jurisprudential systems-building (in which the nomological faith is that we can create generalized nomological structures—e.g., theories of justice—from which normative conclusions of law or morals can be logically drawn).

The great bulk of published legal scholarship is at the former end of the spectrum. Law school professors are identified chiefly as specialists in particular doctrinal fields and are expected to demonstrate and share that expertise. Being principally[105] an exercise in doctrinal skill, this scholarship embodies and perpetuates our emphasis in legal education on doctrinal skills.

While the scholarship of jurisprudential systems-building enters the law school arena indirectly as conceptual background for work of law professors in scholarship and in teaching, its presence in the curriculum occurs, like social science, through (a) special subject (legal theory) courses, and (b) pervasive incorporation into doctrinal courses. For essentially the same reasons as those cited above with respect to social science, jurisprudential scholarship has limited effect as a source of intellectual breadth and depth in the general degree program.[106]

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suppose that the principal application of such learning in legal education would be in the instrumental dimension described by Dean Sandalow in the following terms: "Today one cannot practice anti-trust law or environmental law without having a knowledge of economics. One cannot really practice labor law without having some knowledge of statistics. One cannot practice in the personal injury field without having acquired a good deal of information about human biology . . ." Sandalow, *supra*. Such instrumentally-oriented instruction is of course, valuable, but we need to be clear about its limitations as a source of "intellectual breadth and depth".

[105] The text refers to legal scholarship as located on a "spectrum" because, in varying degrees, doctrinal scholarship incorporates modes characteristic of the jurisprudential. This often is the case, for example, with respect to constitutional law scholarship, which presents basic issues of social theory (*see, e.g., supra* notes 43-44), or new and open fields such as environmental law. *See, e.g.,* Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality,* 46 S. CAL. L. REV. 617 (1973). With the importance now accorded social science learning in law, doctrinal scholarship increasingly includes this element as well.

[106] *See supra* note 96. The more basic problem is the increasing distance between specialized nomological scholarship on the one hand, and intellect in the world on the other. Robert Stevens sounds a crucially important theme when he observes that legal scholarship has come to display a "remarkable dependence on dictating and constraining theories" (Stevens, *American Legal Scholarship: Structural Constraints and Intellectual Conceptualism,* 33 J. LEGAL EDUC. 442, 447 (1983))(replacing former orthodoxies of "black-letter law" with new orthodoxies of "black-letter theory"). *Id. See also* Francis Allen's suggestion that legal scholarship is producing "a body of literature curiously remote from actual social purposes and dynamics." Allen, *Legal Scholarship: Present Status and Future Prospects,* 33 J. LE-

The root problem is the same with respect to jurisprudential scholarship and social science scholarship. This problem can be understood in terms of the way we present to our students the nomological structures of our scholarship. This can be paraphrased as follows:

> You are encountering—for the most part serendipitously throughout the curriculum—increasingly "high tech" systems of nomological structure, from the jurisprudence of Rawls to the psychology of emotive self. Each nomological structure, increasingly, claims normative and descriptive self-sufficiency. While we help you out, sometimes, with special discipline and interdisciplinary courses, essentially it is up to you to put it together and to make it your own. Yet, in substantial part, "putting it together" is not the point. These years of law school are intended to awaken your mind to what it is to understand the world of laws and legal institutions. We believe that the various nomological perspectives —however piecemeal your encounters with them—will serve this purpose, and will enable you to inform your personal and professional life with the scholarly perspectives of critical, broadly thoughtful, inquiring mind.

The problem with this message is that, in fact, students are graduating:

> (a) with a keen sense that social science, like the technology of reasoning, matters chiefly in immediate and instrumental ways — chiefly (i) in constructing, as advocate, arguments about causes and consequences in the world, and (ii) in exercising control over information, institutions, and individuals so as to serve one's client's ends; and
>
> (b) with little understanding what these nomological structures, singly or in the aggregate, otherwise might signify in one's intellectual and professional life.

GAL EDUC. 403, 405 (1983). *See also infra* note 181.

John Rawls derives principles of justice from a mind experiment in which people consensually construct a society before knowing what roles they themselves will play in the social order. J. RAWLS, A THEORY OF JUSTICE 118-92 (1971). The economic analyst derives measures of economic worth from a mind experiment in which people bargain, *in abstractu*, as potential adversaries in a personal injury suit. A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 37 (1983). Ronald Dworkin posits a judge of "superhuman" skill, learning, patience and acumen and, identifying the sort of data such an intellect could assimilate, develops a theory of judicial decision that incorporates such modes of decision-making. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975).

The issue is not whether such scholarship is useful and important in its own sphere. Rather, as the text following this footnote suggests, the issue is how such scholarship is to enter the lives of our students in ways that will "provide the theoretical bases . . . a serious profession needs." Stevens, *supra*, at 448. *See also infra* note 181.

C. Conclusion

The foregoing problems have a wide range of causes and consequences, for which there are no simple solutions. The particular focus of this Article is on the question with which the section began: In what terms are we to conceive the knowledge, skills, and attitudes that comprise the goals of a coherent program of general legal education?

From that perspective, the matter of most interest is the way in which the categories "doctrinal," "theoretic," and "practical" dominate our thought and practice. In particular, what is of concern is the extent to which intellect and intellectual development are understood exclusively as (a) doctrinal skill and (b) scholarly theoretic (which, in turn, is understood in terms of nomological system). The thesis of this Article is that there are ways to understand intellect and intellectual development that can help us move beyond conceptions of legal education whose limitations now seem to entrap us.

Having assessed in general terms the situation of higher education, this Article suggested that "self-reflective learning" is an idea that can usefully broaden our conception of intellect and of intellectual development. We return now to the idea of self-reflective learning, to elaborate it in terms that, while including reference to legal education and to problems we have just considered, apply to higher education generally. Suggesting conceptions of intellect that can help us better define and pursue the goals of general legal education, self-reflective learning responds to our need for an ideology of intellect that establishes commonality between the academy and the world outside.

VI. SELF-REFLECTIVE LEARNING

Increasingly, one finds suggestions in the literature that law schools should instruct students in the "skill of learning."[107] The rationale for such instruction is evident enough: given the breadth of the tasks lawyers perform and the context of continual change in which they perform them, what could be more important than an ability to acquire needed knowledge and skills on one's own after graduation? To the limited extent developed in the law schools, instruction in the "skill of learning" occurs mainly in the setting of clinical legal education, where it is identified with "experiential learning"—that is, with learning through real life experience

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[107] *See, e.g.,* Gorman, *supra* note 90, at 315, 319; Cramton, *supra* note 85, at 321, 323. Klare, *The Law School Curriculum in the 1980's: What's Left,* 32 J. LEGAL EDUC. 336, 341 (1982); Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn From Experience Through Properly Structured Clinical Supervision,* 40 MD. L. REV. 284 (1981); LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 10 (1979)(Report and Recommendations of a Task Force of the American Bar Association Section of Legal Education and Admissions to the Bar); Amsterdam, *Clinical Legal Education — A 21st Century Perspective,* 34 J. LEGAL EDUC. 612, 613 (1984).

as opposed to learning in the classroom.[108]

"Self-reflective learning" is an aspect of, or better, a way of understanding, the skill of learning. As will be seen, it views *all* learning as "experiential" in the sense that it views learning as a function of the way one relates to one's experience. What follows, therefore, conceives the skill of learning in a way that is as applicable to academic (i.e., "classroom" and "book") learning, as it is to learning in the workplace.

A.   Basic Concepts of Self-Reflective Learning

Whether an action is physical (e.g., swimming) or cognitive (e.g., briefing a case), one can think about the action while engaged in it (to guide how one does it), or after one has engaged in it (to consider how one might do it better next time). We also can perform actions without thinking about them, as where the action is one we "already know how to do" and therefore do "intuitively." It may seem anomalous to suppose one can engage in cognitive action without thinking about it, but the "thinking about" to which we have reference here is thinking that is reflexive: it is looking at oneself, or, more precisely, at what one has thought or done.

For some purposes, it may be useful to distinguish whether self-reflection is done to "guide ongoing" activity, or to "look back at completed" activity. Thus, self-reflection "guides ongoing" activity when the self-reflection is woven into action—as, for example, reflecting about my swimming stroke while I perform it. A corresponding instance, then, of "looking at completed" activity, is reflecting about my swimming stroke while viewing a film of myself swimming.

However, these two kinds of self-reflection are the same, in the following sense. Both are thinking in the present about one's actions and their consequences, toward the end of guiding what one may wish to do or think in the future. The point of this observation is that self-reflection is to be understood both as a way of doing things and as a way of learning to do things. Thus, while we will be referring throughout this section to "self-reflective learning," it would be more accurate to talk about "self-reflective-learning-and-doing," since self-reflection is no less validly a principle of acting than of learning. In both instances, the "skill of"[109]

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[108] *See, e.g.,* Kreiling, *supra* note 107, at 285.

[109] Consistent with current thought, this Article uses a vocabulary that differentiates knowledge (the "cognitive or intellective domain"), skill (the "performance domain"), and attitude (the "affective or feeling domain"). *See* Kreiling, *supra* note 107, at 287 n.10 (glossing the basic taxonomy used by Benjamin Bloom and his colleagues). However, it is important to understand the limitations of those distinctions. Our thought and action always mix all three. The "skill of" self-reflective learning refers also to *knowledge* in the sense of cognitive understanding of self-reflection, and *attitude* in the sense of a valuing of self-reflective learning and recognition of its importance.

Education, generally, is conceived in terms of specific knowledge and competences to be taught. What we chiefly seek as sophisticated educators, then, is more adequate definition

self-reflection signifies *being intentional about* (i.e., being aware-and-purposive in) one's conceptualization of experience.

As the idea is developed here, "intentionality in the conceptualization of experience" incorporates concepts presented earlier in this Article. For example, it was noted that "intentionality in conceptualization" is an idea that integrates functions which the nomological tradition dichotomizes as "discovering" what was already there and "creating" what was not. Thus, in its aspect as discovering, the skill of intentionality in conceptualization signifies achieving *awareness* of one's conceptualizations. In its aspect as creating, it signifies achieving effective *direction* of one's conceptualizations.

1. Principles of Self-Reflective Learning

a. The teacher views learning from the perspective of an intentionally conceptualizing student, for whom skills learning, whatever the subject skill may be, means understanding the processes and products that comprise the work at which the skill aims.

b. To view skills learning from this perspective means to view it as the learning of a language in terms of which students come to conceive and direct the processes and products of their work.

c. Guiding students in such language development centers on fostering the use of conceptual frameworks or strategies in the conceiving and structuring of work.[110]

d. The student's immediate purpose in the use of frameworks and strategies is to achieve competence in the tasks at hand. However, the underlying purpose, paramount from the present perspective, is to develop the skill of intentionality in conceptualizing one's experience.

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of the specific knowledge and competences it is our goal to impart, and more effective methodologies for imparting them.

While acknowledging the importance of that knowledge-and-competence-centered conception of education, what is being suggested here is the importance, also, of a learning-and-inquiry-centered conception of education. This requires a shift, on the part of ourselves and of our students, in what Gregory Bateson has called the "hierarchy of logical types." G. BATESON, MIND AND NATURE: A NECESSARY UNITY 114 (1979). *See id.* at 121-24, describing the difference between learning particular new behaviors and learning to learn new behaviors. This is an application of the broader point that our goal in self-reflective learning is to *normalize* "thinking about thinking." *See supra* text accompanying note 81.

[110] *See, e.g.,* G. BELLOW & B. MOULTON, LAWYERING PROCESS: CLINICAL INSTRUCTION IN ADVOCACY (1978); S. BROWN & E. DAUER, PLANNING BY LAWYERS: NONADVERSARIAL LEGAL PROCESS (1978). While efforts now are being made to develop such frameworks and strategies in relation to legal writing and legal reasoning (*see, e.g.,* J. DERNBACH & B. SINGLETON, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD (1981)), we are still at an early stage in supporting self-reflective learning of cognitive process. *See also* COGNITIVE PROCESS INSTRUCTION: RESEARCH ON TEACHING THINKING SKILLS 1-4 (J. Lochhead & J. Clement eds. 1979)(describing efforts to teach learning and problem-solving skills in fields of higher education other than law).

e. Three kinds of conceptual systematicity are important in self-reflective learning. A major shortcoming of "pervasive" methods of instruction, to which reference earlier was made,[111] is that they tend to impede all three.

1. Conceptual focus: Because we attend not to whole things but to aspects of things, an important question always is to what aspects are we attending, and with what degree of conceptual clarity. In foundational learning of the skill of intentional conceptualization of experience, it is important that teaching-learning situations permit explicit conceptual focus.[112]

2. Conceptual continuity: The focus needs to be carried through time. For example, in relation to the tasks in which one is instructed, there should be coherence in the conceptual focus that occurs before the task, during the task, and in feedback on performance following the task.[113]

3. Conceptual comprehensiveness: In understanding and organizing complex work, one needs to go from wholes to parts; it is of the essence that one learns to understand, generate, and apply frameworks and strategies not only in relation to bits of tasks, but in ways that integrate complex whole tasks.[114]

f. Self-reflective learning rests on a learning-centered conception of knowledge whereby any explicit framework or strategy the student is given is understood as a resource to be used in an open process of exploration and individuation.[115]

g. Self-reflective learning requires understanding what it is to approach learning within a broader context of self. This includes: 1) a sense of the experiential and purposive roots of one's beliefs of fact and of value; 2) a sense of what it is to surface, examine, and alter those beliefs; and 3) a

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[111] *See supra* text accompanying notes 94, 96 and 100.

[112] By contrast, the models of serendipitous and intuitive learning that dominate our thought about legal education (*see infra* note 126) leave it to the student to make sense of his or her experience, on the belief that this is the way learning must occur. *But see infra* note 115.

[113] *See, e.g.,* Gross, *California Western Law School's First-Year Course in Legal Skills,* 44 ALBANY L. REV. 369, 377 (1980)(illustrating conceptual continuity in a "three-step process of concept formation").

[114] A weakness of the casebook method is that law students rarely engage in projects that embody whole-task perspectives basic to legal work.

[115] One tends to think of the frameworks and strategies that guide work in terms such as "check-lists" of steps to be followed, "tips" on effective work method, or as other similarly explicit directive. This leads to questioning the intellectual worth of such instruction, or withholding it for fear of "spoon-feeding" the student. The conception offered here emphasizes the aspect of frameworks and strategies as a "vocabulary" in terms of which to perceive and structure processes of work for oneself (*see, e.g.,* P. ELBOW, WRITING WITHOUT TEACHERS 12-75 (1973)(suggesting a vocabulary in which to understand the processes of writing)), which one adapts to one's own cognitive structure. The idea is that conceptual explicitness in instruction need not close or restrict learning and inquiry but, on the contrary, can open and facilitate it.

sense of the basic processes by which one learns.[116] Recognizing that, in most contexts of higher education, explicit attention to such matters may be practicable only to a limited degree, the broader aspiration is to create an environment that awakens students to such dimensions of experience, so that they may explore them on their own.

B. Self-Reflective Learning Contrasted with Present Practice

For the lawyer and the law student, intentional conceptualization of experience means intentionally conceiving and structuring law work. The pattern of law school practice that is of concern, from this perspective, is that the casebook method is not effective at teaching how to engage in the intentional conceptualization of the processes and products of law work. Several illustrations of this problem follow.

1. The casebook method tacitly represents that the case analysis and synthesis it teaches are essentially the same as that done in law work generally. In fact, however, the case analysis and synthesis done by lawyers in legal problem solving is vastly more complex then operations learned in the casebook method.[117] In most law schools, the only place in the three-year law school program this latter universe of operations is dependably encountered by students is the traditional first year "research and writing" course. Allocated relatively meager resources[118] and placed in the already overfull first year program, this course barely scratches the surface of the complex reasoning with legal materials that is basic to legal

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[116] *See generally,* C. ARGYRIS & D. SCHON, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS (1974). For a specific application, see *infra* notes 129-32 and accompanying text.

[117] *See* Gale, *Legal Writing: The Impossible Takes a Little Longer,* 44 ALBANY L. REV. 298, 311-17 (1980); Gross, *California Western Law School's First-Year Course in Legal Skills,* 44 ALBANY L. REV. 369, 378 n.27 (1980)(identifying basic legal reasoning and writing operations performed by lawyers, generally not treated in depth in the casebook method).

The casebook method culminates in examinations in which, typically, students apply legal principles to a fact situation. These examinations differ markedly from the reasoning and writing patterns of lawyer projects, in that the latter require 1) selecting and reasoning with a universe of legal authorities (cases, statutes, etc), and 2) much greater care and depth in the analysis and writing process. In essay examinations, students, working under great time pressure, typically must move through a large number of issues, as the exam seeks to touch most areas covered in the course.

[118] First-year "research and writing" courses have been called, with reason, the "neglected orphan" of the law school curriculum. *See* Actenberg, *Legal Writing and Research: The Neglected Orphan of the First Year,* 29 U. MIAMI L. REV. 218 (1975). The courses generally are taught by recent graduates on a one- or two-year appointment, or by tenure-track faculty who take the assignment as a chore to be performed for as short a time as is politically feasible. This "revolving door" syndrome in staffing is a predictable consequence of the conditions under which the teacher works: i.e., attempting to teach an extraordinarily wide range of skills to too many students (whose principal concern, in any event, is performance in their substantive courses), in too short a time.

problem solving.[119] The present point is not that we fail to teach those operations effectively, though that is troublesome enough. The point is that this omission undermines development of the skill of intentionality in the conceptualization of law work, by teaching that conceptually systematic study of the more complex operations is unfeasible or unimportant.

2. Concepts such as "issue," "rule," and "holding" that are central to case law study are artifacts of the casebook method.[120] Yet, the casebook method generally hypostatizes them as objective features of the cases themselves.[121] This misleadingly universalizes casebook processes, suggesting that case analysis in law work generally turns on rendering cases in terms of the analytic constructs used in the casebook method. At a more basic level, thus presenting analytic constructs as a property of the

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[119] By the end of the research and writing course, students typically will have learned the rudiments of using a law library, written a half-dozen expository and persuasive legal work products, and presented an oral appellate argument.

[120] The point in the text above this footnote is well demonstrated in Julius Stone's classic, Stone *The Ratio of a Ratio Decidendi*, 22 MOD. L. REV. 597 (1959)(rebutting Arthur Goodhart's assertion that one can identify *the* rule or holding ("ratio decidendi") of a case, (Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930)). Stone shows the enormous range of propositions for which a case can stand, including, crucially, variation in the generality with which the *ratio* is couched. Stone, *supra* at 603-04.

A central focus of law students in the casebook method is abstracting from each case one or more propositions for which the case is taken to stand. *See, e.g.*, B. SIEGEL, How TO SUCCEED IN LAW SCHOOL 1-74 (1975); Cavers, *In Advocacy of the Problem Method*, 43 COLUM L. REV. 449, 452 (1943)(basic "trick of the trade," generally learned by the second year, consists in reducing cases to something approximating "Restatement blackletter" rules).

There is nothing wrong with students doing this, and such abstraction of a rule or holding is an important aspect of legal reasoning. But it is one small piece of a much larger context in which cases are to be understood chiefly as a plastic resource whose meaning emerges when they are read as a group and in relation to a specific problem situation. The point is that students will come to *understand* this, in conceptually and operationally adequate terms, only by working with the plasticity to which Julius Stone refers, repeatedly and intensively in lawyering projects throughout their three years. *See also supra* note 117 (observing that law school examinations entail reasoning with abstracted rules, rather than with the authority itself).

The "issue" of a case generally is taken to be the rule or holding couched in question form. This redundancy presumably is what led Karl Llewellyn to omit "issue" in the case briefing elements he proposed. K. LLEWELLYN, *supra* note 84, at 54-55. As is reflected in general usage, "holding" is the narrowest possible statement of what the court decided. While "rule," "holding," and "issue" are used with great variability from one professor to another, all seem to project the assumption that their understanding of each term is self-evident and self-evidently correct. The point is not that we "ought" to have a uniform understanding of these terms. The point is that we ought to make continuing *discussion* of *all* these questions more central to law study.

[121] *See supra* note 120. Especially in the first-year of law study, which is when students' basic conceptions of legal authority and work with the law are formed, an underlying premise of case class discussion is that the student is striving to state *correctly* the issue, rule, and/or holding of the given case.

cases undermines student learning of the principle, crucial to intentionality in the conceptualization of cognitive experience, that analysis of cases, as of anything, is a function of one's tasks and purposes.

The consequence of this absence of functional contextualization of law study constructs can be illustrated with the term "issue." "Issues" can have a clear ("nonarguable") answer or, *per contra*, can have no clear answer (i.e., be "arguable"). This differentiation ought to be presented as basic to understanding the character of any given instance of "issue analysis," and be recognized as a function of the context in which the issue analysis is being done.[122] Instead, the very idea of the distinction is systematically obscured.[123]

Due to these, and a multitude of comparable causes, *law students fail to acquire an adequate idea of what it is to conceptualize the processes and products of legal work.*[124] Worse, the idea they do acquire is that

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[122] One of the most basic things lawyers learn is to identify propositions of law they can accept as so. In the planning context, this takes the form of seeking to build one's client's contractual or other arrangements on the *"safe bedrock"* of established law. Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM L. REV. 345, 361 (1945)(emphasis in original). In the litigation context, this takes the form of deciding what propositions to treat as nonarguable in constructing one's reasoned position for the court. *See infra* note 123.

[123] In law school, to discuss an "issue" is to discuss a point of application of law to fact, without particular regard for whether the application is arguable. The conventional understanding of law school examinations is that the "issues" one discusses all are arguable. However, if one reads law school examination answers with this dimension in mind (see, *e.g.*, S. KINYON, INTRODUCTION TO LAW STUDY AND LAW EXAMINATIONS IN A NUTSHELL 131-368 (1971)), one sees that most of the legal reasoning in which the student is engaged consists in analyzing the factual situation into the legal terms and frameworks *within which*, then, the arguable points are addressed.

Lack of conceptual clarity on this distinction is basic to the Socratic case class, which reflects in turn, a comparable confusion in the Socratic dialogues themselves. Thus, Socrates (*i.e.*, Plato) presents the dialogues as a process of *inquiry* in which the participants, led by Socrates, work together to root out error. In fact, however, the dialogues are a process by which Socrates *imposes* his definitions and frameworks in a dialectic of demonstrative reasoning. E. HAVELOCK, THE LIBERAL TEMPER IN GREEK POLITICS 209-15 (1957)(Socratic dialogue as a fundamental subversion of the open dialogue that had characterized sophistic and that is characterized by deliberative intentionality. *See infra* text accompanying notes 129-30). The resulting confusion is the one earlier remarked as basic to the nomological tradition (*see supra* text following note 50), between reasoning as demonstration and reasoning as inquiry.

In the Socratic case class in law school, students find themselves, for much of the time, attempting to fathom the definitions and frameworks assumed by the professor in his/her Socratic dialogue with the class. It is not common in Socratic classes, in the first-year at least, to posit and systematically address issues as arguable. For this effectively to occur, the participants must: stipulate together that the issue will be treated as arguable; work together to identify parameters of permissible and/or effective argument; and explore together patterns of argumentation that ensue. To the extent one is concerned with reaching a conclusion (as a case class may not be, but a judge is) that then becomes the final step in an explicit, systematic joint process of "inquiry".

[124] The underlying problem is that *students'* "law work" (*i.e.*, law study), in which they form their basic conceptions of what it is to work with the law, occurs essentially outside the

their relatively unreflective modes of conceptualizing law work are the standard of intellectual accomplishment to which we in the law aspire. This idea, established in the first year of law school, becomes ingrained during the second and third years as the students' relation to their law work becomes progressively less effort-full and less conceptually intentional.[125] Underlying this all, finally, is the problem that the models and metaphors that dominate our thought about legal education are, precisely, ones of serendipitous and nonintentional ("intuitive") modes of functioning.[126]

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ken of the instructional process. Law schools do not instruct students in this law work on the belief (a) that its processes are too mundane to warrant such instruction and too idiosyncratic for such instruction to be feasible, and (b) that the essence of the learning process is for students to figure this out on their own. Law faculty thus cede instruction in the students' basic processes of law work to an informal law student culture and commercial publications of various kinds.

The notion that it is inappropriate, unfeasible, or unimportant for us to guide students in these processes is a shortcoming basic to the traditional system of legal education. Thus, we simply have no terms in which to understand what it might be to help students conceptualize, as an example, the process of rendering course material into a coherent structure (a project central to law study that students call "course outlining", and on which law faculty generally give little guidance). Even further removed from our traditions is the notion that the main reason to guide students in this project would not be to help them better understand the material (though it would do that), but to help them better understand what it *means* to "understand" the processes and content of law. *See also supra* note 115 and accompanying text. One difficulty, I believe, is that were we to confront more clearly what students in fact learn to do in law study, we also would confront all the things they learn to do badly, or do not learn to do at all.

    [125] *See supra* note 85.

    [126] The traditional conception of legal education is rendered by the poem from which Karl Llewellyn's classic THE BRAMBLE BUSH (1951) took its name:

        There was a man in our town
          and he was wondrous wise:
        he jumped into a Bramble Bush
          and scratched out both his eyes —
        and when he saw that he was blind,
          with all his might and main
        he jumped into another one
          and scratched them in again.

Id. at frontispiece. This poem presents the processes by which the student is reborn able to "think like a lawyer" as something that *happens to* students, rather than as something they understandingly do for themselves. *Cf.* Strong, *The Pedagogic Training of a Law Faculty,* 25 J. LEGAL EDUC. 226, 226 (1973)("The teacher's function is a species of psychic osmosis whereby learning is induced in the student.")

Analogous conceptions are expressed today in the scientific determinisms of personality psychology and the psychology of learning. *See, e.g.,* Kelso, *The 1981 AALS Conference on Teaching Contracts: A Summary and Appraisal,* 32 J. LEGAL EDUC. 616, 634-35 (1982)(likening effective Socratic case class teaching to "programmed instruction" that turns on a well structured process of positively reinforcing desired behavior); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education,* 37 CIN. L. REV. 93, 145-46 (1968) (stressing the role of positive reinforcement).

The passivizing influence of traditional modes of legal education has been criticized in a

The idea of self-reflective learning is offered here less as a programmatic solution to all these problems than as an example of the kind of intentionally-conceived vocabulary of intellective interiority which ought to be central to our understanding and teaching of "thinking" skills. Let us consider several vehicles by which self-reflective learning might be taught and learned in the law school setting.

C.   Vehicles of Self-Reflective Learning

1.   Writing

The word "write" has two meanings. As a concrete activity, it means putting one's thoughts into words and then putting those words onto paper. We have this meaning in mind when we call writing a "communication skill." In a second and much broader sense, however, "write" refers to all one does in a project that culminates in a written product (as in, "I have to write a paper for this course.").

The first sense, the concrete activity sense, of "writing" so dominates our thought that this second sense must be understood as a synecdoche (a figure of speech in which part stands for whole). The collapsed perception embodied in this synecdoche betrays our relative blindness to the processes that comprise the writing project. That blindness is manifest in the extent to which instruction in "writing" focuses on the written product (its "substance" and "style"), rather than on the processes by which it was produced.

In higher education, it is coming to be understood that writing projects *are* intellect at work and that helping students see and direct those processes is central to development of their intellective competence.[127]

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political dimension. *See, e.g.,* Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 594 (1982)("double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system"); TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971 43 (1971)(Report of the Curriculum Study Project Committee to the Association of American Law Schools)("It has long been somewhat paradoxical that law teachers have proclaimed democratic values from autocratic roles"). Also, it has been criticized in a psychological dimension. *See, e.g., id.* ("traditional relation between law students and teachers . . . has tended to reinforce . . . aggressive, authoritarian, and dependent traits"); I. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 162 (1977)(dependence of law students faulted for producing "arrogance, combativeness, narrowness, and, deep within perhaps, some suppressed self-revulsion and self-doubt"). The more serious casualty may be self-aware, self-directed functioning understood not merely as a political or psychological, but as an *intellectual* value.

[127] While for law schools, the relevant literature includes, of course, works that treat the processes of legal reasoning and research that accompany legal writing (*see, e.g.,* works listed *supra* note 110), more basic resources explicate the complex intellectual processes that culminate in well-organized written work. *See, e.g.,* P. ELBOW, WRITING WITHOUT TEACHERS (1973); L. FLOWER, PROBLEM-SOLVING STRATEGIES IN WRITING (1981); L. FLOWER & J. HAYES, A PROCESS MODEL OF COMPOSITION (1979)(unpublished Report prepared under contract with

The chief obstacle to development of such teaching and learning lies not in the ineffability of the processes, but in *our failure to understand the importance of this dimension of intellectual development and to allocate to it the resources it deserves.*

From the perspective of this Article, the importance of such teaching and learning is magnified further by the fact that writing projects are a principal vehicle through which to build patterns of conceptual self-awareness that can generalize, then, to other kinds of purposive activity.

2. Collaborative Learning

To the limited extent it is used as an educational device, collaborative work generally is viewed as (a) a medium of peer learning in which students expand their understanding through interchange with other students; and (b) an occasion for practicing interpersonal and communication skills entailed in cooperation. From our present perspective, however, what is important is that collaborative work can be used to foster development of the skill of self-reflective learning.

In collaborative work, one has occasion to conceptualize aspects of process and product that otherwise are dimly perceived, if perceived at all. *Interactive* conceptualization is especially important because language, language-learning, and the thought processes they embody, are, in deepest senses, social phenomena: our ways of thought are developed, paradigmatically, through interaction with others.[128] Hence, an important benefit of collaborative work is that one can develop-through-use the vocabulary one subsequently will use, on one's own, in conceptualizing the processes and products of one's work.

The educational benefits of collaborative work are, of course, increased by a context in which the work is understood as an occasion for learning. This suggests a second educative value of collaborative work—that it can foster development of learning-centered modes of interaction.

Characterized by what we can call "deliberative intentionality,"[129] these

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the National Institute of Education); E. MAIMON, WRITING IN THE ARTS AND SCIENCES (1981); A. SCHOENFELD, *Can Heuristics Be Taught?*, in COGNITIVE PROCESS INSTRUCTION 315-36 (J. Lochhead & J. Clement eds. 1979); M. SCRIVEN, REASONING (1976); M. SHAUGHNESSY, ERRORS AND EXPECTATIONS, 226-74 (1977); Sommers, *Revision Strategies of Student-Writers and Experienced Adult Writers*, 31 C. Composition & Com. 378 (1980).

[128] *See, e.g.,* S. HAMPSHIRE, THOUGHT AND ACTION 144 (1959); HUMAN UNDERSTANDING, *supra* note 8, at 36-37.

[129] This signifies a shared understanding between participants in dialogue that they are open to being changed by the dialogue. Having theoretic roots in non-nomological conceptions of reasoning, (*see, e.g.,* D. Linge, *Preface* to H. GADAMER, PHILOSOPHICAL HERMENEUTICS xx (1976); Hardwig, *The Achievement of Moral Rationality*, 6 PHIL. & RHET. 171, 181-83 (1973)), this entails awareness of the limitations of a conception of dialogue in which the dialogue situation is fixed in terms of "your position," "my position," and the nomological structures on which our respective positions depend.

are modes in which one is willing to disclose one's conceptions and beliefs; is open to having those conceptions and beliefs changed; and is willing to "confront" the other in a spirit of mutuality.[130] Such modes of open dialogue are functional in a variety of ways. Relatively unfamiliar in contemporary Western culture,[131] they comprise a neglected but important dimension of professional competence in law as well as in other professions.[132]

The point of present relevance is that this open dialogue is a *principal resource for self-reflective learning* outside the setting of formal education.[133] In developing, through collaborative work, the student's ability and willingness[134] to engage in such dialogue, one contributes significantly to the development of the skill of self-reflective learning.

As noted above with respect to writing, more attention now is being paid, in higher education, to the use of collaborative work as an educational device.[135] Here too, the issue increasingly shifts from whether it is feasible to include such dimensions in our teaching, to whether we understand and accept their importance.

3. Observational Learning

To the limited extent it is now used as an educational device, the utility of observational learning is taken to be that one observes, in order to emulate, people proficient in a skill one is seeking to learn. From the perspective of self-reflective learning, however, observational learning is an occasion to practice conceptualizing the processes and products that embody the skill one is seeking to learn.

For this purpose, it is essential that observational learning be structured so as to accommodate principles of self-reflective learning such as those set out above. Thus, for example, students have much to gain by evaluating other students' written work, *if*, as the present perspective em-

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[130] *See* W. TORBERT, LEARNING FROM EXPERIENCE: TOWARD CONSCIOUSNESS 160-61, 165 (1972).

[131] *Id.* at 12, 18-19.

[132] *Id.* at 5-17. *See generally* C. ARGYRIS & D. SCHON, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS (1974).

[133] Working in the tradition of a therapy-centered conception of learning, W. TORBERT and C. ARGYRIS & B. SCHON, *supra* note 116, focus on specially constructed "trainer"-led processes. *See* W. TORBERT, *supra* note 130, at 165-66, 171-72 ("educators" and "trainers"); C. ARGYRIS & D. SCHON, *supra* note 116, at 96, 97-109 ("instructors"). While they advert to the question of how such processes are pursued on one's own (*see, e.g.*, W. TORBERT, *supra* note 130 at 158-63), that is not their principal focus.

[134] At the risk of repeating the point excessively (*see supra* note 109) the article intends, throughout, a compound of what we generally differentiate as knowledge, skill, and attitude.

[135] *See, e.g.*, BRUFFEE, *The Brooklyn Plan: Attaining Intellectual Growth Through Peer-Group Tutoring*, in 64 LIBERAL EDUC. 447-68 (1978). Kenneth Bruffee has helped at least two law schools incorporate principles of collaborative work in their first-year legal writing courses.

phasizes, this is done in ways that foster development of a conceptual language useful in seeing and directing their own work.[136]

Findings in the field of teacher education suggest that the effectiveness of observational learning (specifically, trainee observation of teachers at work in the classroom) may be greater where the observational experience is structured as a vehicle for concept formation.[137] This, in turn, suggests the utility of observational learning in other kinds of professional education, for example in clinical internships, *if* adequate provision is made to support conceptual learning dimensions.

In some respects, it is easier to observe others than to observe oneself. This often may be so, for example, with respect to patterns of work that are deeply ingrained or those about which one feels defensive. In many contexts, therefore, intentionally conceptualizing the behavior of others may serve as an easier "first step" in learning to observe oneself.

4. Future-Directed Learning

Thus far we have considered instruction in self-reflective learning in terms of student practice of that skill. It is also useful, however, to consider instruction in which students (a) "think forward" to the work situations for which they are preparing and, with that context in mind, (b) deliberately acquire resources and expectations that will support self-reflective learning in those situations. Two examples follow:

a. Given an aim to support self-reflective learning after graduation, one might attach particular importance to dependable student learning of the following, as categories of "subject matter coverage," within an area of doctrinal law:

1. "Landmark" units of current legislative and decisional law; principal resources and strategies for doctrinal research/analysis in the area;

2. Thematic structure of main principles and purposes of law and institutional arrangement;

3. Principal or characteristic areas of change or uncertainty, and their source in policy or doctrinal conflict;

4. Principal or characteristic questions of strategy that arise in planning, and conflict resolution, in the area.

The intellective utility of such instruction, it must be emphasized, derives from thematic coherence in its presentation and assimilation, and recognition that particulars now imparted are less important (since they will change) than understanding what it is to conceptualize a field of doctrine in ways functional for legal problem solving.

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[136] This requires the sort of conceptual coherence in writing instruction that is referred to *supra* text accompanying notes 112-14.

[137] *See* D. Gliessman, The Concept Acquisition Model in the Development of Teaching Skills (April 1979)(unpublished paper presented to American Educational Research Association, San Francisco).

b. While courses in applied skill now focus on teaching the skill itself, a "future-directed" perspective suggests the importance of attending to learning the skill after graduation. Such attention can take the form of: developing a conceptual vocabulary of process and product in which self-learning later can take place; making the *idea* of subsequent self-learning as tangible and as valued as possible; and suggesting practical strategies for use in self-learning of the skill.

Related to this is the use of clinical internships not merely for learning specific knowledge or skills encountered in the internship, but also for learning how to learn in the work environment.[138] Here too, the essential thing is that students understand the internship as an academically supported introduction to later learning.

The future-directed perspective suggests, finally, that we should establish as a minimum of applied skills training received by *all* students in *all* major applied skill areas, instruction whose goal is to impart an understanding of the nature and importance of the skill, and strategies for self-learning in the skill. At present, the case is that many students who do not take a course in a given applied skill graduate with dim awareness that there *is* such a skill, let alone what it would be to study it on one's own.

VII.   THE PROBLEM OF CHOICE AND COHERENCE: THEORETIC DIALOGUE IN THE LEGAL EDUCATION COMMUNITY

Section V began with the question, "In what terms are we to conceive the knowledge, skills, and attitudes that comprise the goals of a coherent program of general legal education?" The preceding section suggested the theory and the program of "self-reflective learning" as one, partial response. But the problem to which we now turn is that this—or any

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[138] *See generally* Kreiling, *supra* note 107. Specifically, from the present perspective, the goal is to learn to engage in self-reflective learning under conditions of the work situation. Crucial conditions of lawyering are the transaction cost of lawyer work, and the tactical context in which problems are presented. McCauley, *supra* note 95, at 514. *See also* C. ARGYRIS & D. SCHON, *supra* note 116, at 4 (importance of learning under real-life conditions); *id.* at 3-19, 157 (action-oriented character of theory).

An issue this raises for the law schools is how to pursue intellectual ideals associated with the academic enterprise embodied in patterns of thought McCauley denigrates as "think[ing] like *law professors*" (McCauley, *supra* note 95, at 514 (emphasis in original)), and *also* face up to the question how those intellectual ideals will enter the professional lives of our students. At times we seem more interested in asserting the difference and superiority of academic modes of thought, (*see* Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968)(positing the role of "Hessian-trainer" for ourselves and, thereby, positing the role of Hessian for our students)), than in considering how such modes are to enter the professional lives of our students. The dominant response at present seems to be to think of our students as possessing a "double-identity," differentiating their identity as "lawyer" from their identity as "mind." *See* White, *The Study of Law as an Intellectual Activity*, 32 J. LEGAL EDUC. 1, 10 (1982).

other—response to the problem of "coherence" in legal education re-
quires a bind of dialogue within the legal education community that pres-
ently seems lacking. This section addresses that problem with the follow-
ing two-part thesis:

a. *Critique*: We have not made adequate use of theoretic dialogue in
the legal education community; this is due in part to nomological concep-
tions of what theory and theory development are.

b. *Proposal*: We can benefit correspondingly by attending to post-nom-
ological conceptions of theory and of theory development.

A. Critique

Several factors combine to impede coherent theoretic dialogue in the
legal education community.

1. Disassociation of Theory From the Role of Teacher

By and large, we do not feel that it is necessary to have well-developed
theories about what we do as teachers. This is attributable to the nomo-
logical tradition in the following respect. Theory is associated with aca-
demic study in distinction to practical, actional dimensions we enter as
teachers. Theorizing about education is seen as more properly the prov-
ince of education professors because their scholarship is in that field.

This may be contrasted with conceptions of theory developed in this
Article, which seek congruence between theory and action.[139] Thus, as the
term is used here, "theory" is simply a conceptually coherent account of
what one is doing. For teachers, in this view, theory about education
means conceptions of goal and method that permit one to plan, discuss,
and reflect upon one's experience as a teacher. Thus, in referring to dia-
logue as "theoretic," I simply mean dialogue in or about theory, without
the common connotation of moot or divorced from application.

2. Against Conceptual Coherence in the Legal Education Program: The Ideology of Lone Rangerism

Some commentators have attributed the lack of coherence in the law
school program to the ethos of "long rangerism," that is, to beliefs and
practices that stress the independent functioning of each member of the
faculty.[140] Insofar as our problems stem from a lack of coherence, the

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[139] Whereas the nomological tradition understands "theory" in terms suggested by its ety-
mological relation to "spectator" and "theatre", (*see* E. KLEIN, 2 A COMPREHENSIVE ETYMO-
LOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 1603 (1967); MIRROR, *supra* note 8, at 11
(continued domination by Platonic "ocular metaphors")), the present perspective empha-
sizes theory as beliefs of fact and value that are integral to our thought and action in the
world. *Id. See also* C. ARGYRIS & D. SCHON, *supra* note 116, at 3-19.

[140] *See, e.g.,* Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321,

commentators conclude, "the enemy is us."[141] Lone rangerism is not merely a self-serving refusal to accept the discipline necessary for coherent community. Lone rangerism is a deeply grounded ideology of academic intellect. The main tenet of this ideology is that the genius of the academy is the genius of the individuals who comprise it. Consistent with this tenet is that there *ought* to be as many different visions of education as there are law professors. This is the ideological predicate for the lone ranger view of the law school curriculum, in which (a) the important thing is not what subjects students take, but that students be exposed to a variety of competent modes of addressing the world of law; and (b) to the extent we must attend to subject matter coverage, our obligation is to provide the needed basic courses and to offer a variety of courses from which students can choose according to their interests.

From the perspective of this ideology, the only "coherence" needed in the law school program is a coherence we now have in abundance. It consists of standards of faculty retention that assure each teacher's competence (a) in the modes of instruction we use to teach substance and skills through doctrine-specific courses, and (b) in whatever substantive field(s) comprise the teacher's scholarly expertise. To the extent change is desired, this perspective concludes, the road to reform lies through experimentation in the individual classroom.[142] Thus, the ideology of lone

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327 (1982); Michelman, *The Parts and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352, 355 (1982).

[141] *Cf.* Gorman, *Legal Education at the End of the Century: An Introduction*, 32 J. LEGAL EDUC. 315, 319 (1982); Cramton, *supra* note 140, at 333.

[142] Over the past several years there has been a marked increase in the number of several-day "workshops" sponsored by the Association of American Law Schools that bring together teachers to exchange ideas and, in some instances, to engage in practice-teaching and critique with respect to instruction in a particular subject area. *See, e.g.,* Strauss, *supra* note 87; Kelso, *supra* note 126. While these workshops are a source of valuable support for the individual teacher, they tend to reinforce, rather than challenge, the prevailing conception of legal education described in Section V: doctrinal instruction accompanied by pervasive attention to applied skills and to intellectual breadth and depth.

More collegially-minded law teachers advocate "small-group faculty experimentation." *See, e.g.,* Gorman, *Legal Education at the End of the Century: An Introduction*, 32 J. LEGAL EDUC. 315, 319 (1982). An example of a vehicle for small-group work is the "major sequential program" concept proposed by a faculty committee at the Harvard Law School. *See,* REPORT OF THE COMMITTEE ON EDUCATION PLANNING AND DEVELOPMENT, HARVARD LAW SCHOOL, *Order and Progression in the Upper-Level Curriculum* (Tent. Final Draft, April 23, 1982)(hereinafter cited as MICHELMAN REPORT, after Prof. Frank I. Michelman). In this program, a "limited number" of second and third year students would take up to one-half their total second and third year credits in field-specific study consisting of "an ordered cluster of courses, seminars, and other activities such as self-study units, student tutorials, practice projects and field placements." *Id.* at 1, 4. While the proposal has much to recommend it, its potential benefits appear limited by the fact that (a) it reaches only some students, and (b) its relatively labor-intensive character may make it a difficult reform for less wealthy schools to adopt. At a more basic level, predicated as it is on the model of creating " 'schools' within the school" (*id.* at 12), the proposal in some measure simply moves to

rangerism finds sufficient coherence in the status quo and has little interest in the proposition that increased programmatic and conceptual coherence may be feasible or desirable.

3. Neglect of Theory in Important Projects of Self-Study by the Legal Education Community

a. *The Carrington Report*

Published in 1972, the Carrington Report reflects a major effort by the legal education community to rethink the three-year general law degree program.[143] Rather than present a thematic assessment of issues and options facing us, the Committee formulated a "Model Course Announcement," setting forth a concrete program of legal education.[144]

While stimulating and enlightening, this method of reporting the Committee's work failed to guide a thematically-informed discussion of the goals and methods of general legal education.[145] The legal education community focused instead on a dramatic structural aspect of the "proposed" curriculum, whereby the general degree program would be reduced from three years to two, with an optional third year devoted to specialized legal study. The major finding of the study was taken to be not how the general degree program could be improved, but that the general degree program should be reduced in favor of specialized legal training.[146]

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another level the fundamental issues of conception and of faculty interest described in Section V.

[143] REPORT BY THE CURRICULUM STUDY PROJECT COMMITTEE TO THE ASSOCIATION OF AMERICAN LAW SCHOOLS, TRAINING FOR THE PUBLIC PROFESSIONS OF THE LAW: 1971 (1971)(published as Pt. One, Sec. II, of the Proceedings of the Association of American Law Schools, 1971 Annual Meeting)(hereinafter cited as CARRINGTON REPORT, after Paul D. Carrington, Director). The Committee had 14 members. The Report acknowledges principal assistance by 19 other individuals (*id.* at second title page) and expresses gratitude for the contributions of an additional 93. *Id.* at i-iii.

[144] *Id.* at 4-33 (ch. 2). *See also infra* note 145. The Report has four Appendices. Appendix I (68 pages) is a heavily edited version of A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921)(hereinafter cited as REED REPORT), a classic study of American legal education to which the CARRINGTON REPORT presents itself as a kind of sequel. CARRINGTON REPORT, *supra* note 140, at v. Appendix II (42 pages) is a "contemporary review" of the REED REPORT. *See infra* note 145. Appendix III (55 pages) is an edited version of two articles by Brainerd Currie (1951, 1955) on the materials of law study. Appendix IV (9 pages) is a contemporary comment on Appendix III, chiefly on Currie's theme that more social science instruction is needed in the law schools.

[145] In Chapter 3, CARRINGTON REPORT, *supra* note 143, at 34-73, the Committee sets out its rationale for the "Model" curriculum. However, the 17 pages of this Chapter devoted to the general degree program, *id.* at 34-50, are so generalized, or focused on particulars of the Model, as to be of very limited use in supporting broad based reconsideration of generalist legal education.

[146] *See, e.g.,* Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 229 (1974)(first full paragraph). The REED REPORT, *supra*

Seventeen months after the report's release, the American Bar Association, the chief accrediting agency for American law schools, entertained a proposal that its accreditation requirement be reduced from three years to two to accommodate programs such as that espoused in the Carrington Report.[147] The underlying issues were: What are the goals of the general degree program? and, Can the two-year program dependably achieve them? The report did not explicitly state and address those issues in terms tied concretely to the law school world; nor does it appear that proponents conceived or presented their case to the American Bar Association in such terms.[148] The proposal was defeated.[149]

Doubtless, there are many reasons the committee chose a strategy of exemplification rather than of thematic development in drafting its report. But it seems relevant in this regard that the Director's preface to the report begins with these words: "American legal education, like most, is a mindless growth . . . . This is the way that such institutions should grow; not from a single arrogant concept, but as a flourishing of many individual wisdoms."[150] The perception, perhaps, was that to develop a coherent theoretic would have been, by definition, to espouse a "single arrogant concept," whereas the model curriculum, by its very nature, was simply a vehicle for discussion.[151]

Identification of coherent theory with "single arrogant concept" follows all too easily from a conception of theory as fixed nomological structure. This view of theory leads, in turn, to the understanding that we must

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note 144, was titled *Training for the Public Profession of the Law*, and the Carrington Committee pointedly titled its report, *Training for the Public Professions of the Law* (emphasis added). *See also infra* note 148.

[147] *See* Stolz, *The Two-Year School: The Day the Music Died*, 25 J. LEGAL EDUC. 37 (1973).

[148] Professor Preble Stolz was cast as the Report's principal theoretician in the sense that it was he who wrote Appendix II, a "Contemporary Review" of the REED REPORT. *See supra* note 144. Professor Stolz's review chiefly: (a) criticizes our traditional emphasis on the lawyer as a generalist (CARRINGTON REPORT, *supra* note 143, at 165-75 ("the fiction of a unitary bar [has been] one of the law's least constructive flights into fantasy," *id.* at 174; "image of omnicompetence," *id.*)); and (b) questions the need for a general degree program of three years duration. *Id.* at 176-78.

Professor Stolz's subsequent account of the American Bar Association's consideration of the proposal (Stolz, *supra* note 147) also presents the central point as being the limitations of generalist legal education. Thus, the thrust of his "advocate's view of the arguments presented against the proposal," (*id.* at 40), is this: he first cites Dean Abraham Goldstein's statement that "at the time when law is perhaps more complex than ever before, and occupying more areas of our economic and social life, [it seems curious that] we would acquiesce in the notion that lawyers can be trained in two-thirds the time" (*id.* at 45). He then responds, "No one who has studied the legal profession thinks that all or any lawyers are omnicompetent generalists. The bar is specialized and getting more so, and, given that reality, no one could suppose that all lawyers should be trained in the same way." *Id.*

[149] *Id.* at 40.

[150] CARRINGTON REPORT, *supra* note 143, at iv.

[151] *See id.* (third paragraph).

choose between "single arrogant concept" and "mindless growth." How-
ever, as argued later in this Article, theoretic dialogue is an important
third mode of community intelligence.[152]

b.   The Foulis Report

The Foulis Report is the product of an eight-year study of American
legal education conducted under the aegis of the American Bar Associa-
tion.[153] The report is a paradigm of the ideology and rhetoric of scientific
empiricism.[154] However, it also stands as a reminder that empirical re-
search alone cannot provide the guidance a community needs when ad-
dressing complex issues of goal and method.[155]

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[152] In light of the passage quoted above (*see supra* text accompanying note 150), the fate
of the Report makes its miscommunication ironically complete. Thus, rejection by the
American Bar Association, and lack of subsequent attention by the legal education commu-
nity (*see* Gorman, *Legal Education at the End of a Century: An Introduction*, 32 J. LEGAL
EDUC. 315, 317 (1982)("little discernible impact")), have been absorbed into the culture of
American legal education as the lesson that "[d]ramatic proposals for restructuring legal
education" are not well received by the law schools or the bar, (*supra* note 146, at 229), and
that it "seems likely that reform and innovation in established institutions like the law
schools will be a gradual and incremental process, reflecting the net results of innumerable
individual decisions by legal educators and administrators rather than dramatic restructur-
ing." *Id.* at 234.

[153] REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE FOR A STUDY OF LEGAL ED-
UCATION OF THE AMERICAN BAR ASSOCIATION: LAW SCHOOLS AND PROFESSIONAL EDUCATION
(1980)(*Foulis Report* after Ronald J. Foulis, Chairman).

[154] The bulk of the Report is a review of studies of legal education that employ social
science methodology. The premise throughout is that "empirical findings" will "suggest"
how to resolve, or will "serve as the foundation for," or "help to form the predicate for"
resolving, the basic issues that confront us. FOULIS REPORT, *supra* note 153 at 2, 25. *See also
infra* notes 155-56.

[155] Gathering and statistically analyzing data is the easy part. The hard part is interpret-
ing the data, and applying the data, and our interpretations of them, in action. This point is
simple, but is inadequately reflected in the Foulis Report. Manifestations of a gap, in the
Report, between the realm of data gathering on the one hand, and of data interpretation
and application on the other, include the following:

1. The quality of advocacy in the courts was one of the main issues that precipitated the
FOULIS REPORT. *Id.* at 10-13. The Report's principal data on this issue indicated that: (a)
there was not a dramatic problem with respect to lawyer competence (*id.* at 63-67 (*e.g.*, (i)
87% of trial lawyers were deemed at least minimally competent, *id.* at 64; (ii) " 'on the
whole, the ratings present a very favorable picture of the quality of [trial] advocacy in the
district court's [citation omitted]," *id.* at 65 and (iii) the quality of appellate advocacy gen-
erally was rated higher than trial advocacy, *id.* at 67)); and (b) lawyers who reported they
had not had a law school course in trial advocacy generally performed better than those who
had. *Id.* at 67. Beyond observing that the latter fact "may be due to some unidentified
factors" (*id.*), and that from a litigant's perspective, a "single inept performance" is too
much (*id.* at 68), the Report neither challenges, nor affirms, those conclusions. One is left,
therefore, with a nagging sense that, on this issue at least, ritualized reciting of data rather
overshadows the importance of interpretive and applicational reasoning with them.

2. The Report does not discuss how we are to define the minimum level of applied skills
competence students should have when they graduate. The Report recommends that the

The latter point may seem trivial in its obviousness; it is made important, however, by the extent to which the nomological tradition leads our community to channel its energies into objective empirical research[156] such as this, and correspondingly to neglect arts of community that are, in many ways, more difficult.

American Bar Association advocate that law schools provide *all* students instruction "in such fundamental skills as: oral communication, interviewing, counseling, and negotiation" (*id.* at 103), but does not consider what it would entail, in terms of program or cost, for the schools to do so. The Report also recommends that instruction in "litigation skills" be offered "to all students desiring it." *Id.* However, (a) the Report undermines this recommendation by observing that "[h]owever laudable the objective . . . it will be difficult and expensive to implement" (*id.* at 69); and (b) the Report, by omitting this from the list of skills *all* students are to learn, effectively concludes, without discussion, that *no* minimum introduction to litigation skills is needed by all our graduates—despite the fact that, as noted above, competence in this skill was one of the chief concerns that gave rise to the Report. *Id.* at 10-12.

3. Rather more than on the issue of applied skills instruction, the principal focus of the Report's Conclusions (*id.* at 91-94), though not of its Recommendations to the House of Delegates of the American Bar Association (*id.* at 103-04), is on the following problem: because the pursuit of status and prestige looms so large in the legal profession (*id.* at 91-94), the " 'least qualified' " students from " 'lesser' " law schools "end up doing the relatively low prestige work of the profession" —resulting in "the inequitable distribution of legal talent (at least as talent is defined by the profession)." *Id.* at 94. The Report's development of this theme reflects disjunction between data on the one hand, and their interpretation and application on the other, in several ways:

(a) The Report's use of quotation marks, and its parenthetical, in the excerpts quoted immediately above, signify that the Report regarded the basic conceptions in terms of which the issue is defined ("lesser," "least qualified," and "legal talent") as *problematic.* But the Report nowhere addresses these basic ambiguities, so that the issue itself is left without conceptual foundation.

(b) As important as this issue of "inequitable distribution" may be, i) it was not raised in the thoroughgoing prospectus (Boyer & Cramton, *supra* note 146), on which the work of the Committee was based (the "first order of business" of the Foulis Committee was to commission this "agenda" for its work, Report at vii); and ii) the Report does not consider the issue's programmatic implications. The consequence is that one cannot see the Report's treatment of this issue as part of a coherent course of community research, dialogue, and action.

4. It may seem unfair to fault the Report for failing to do, or be, more than the data and circumstances permitted. But the "more" one might have wanted here is greater *explicit* recognition that data, interpretation, and action are an integral triad, in this, as in most problems of community intelligence. In fundamental ways, this lack is attributable to the scholarly ethos of scientific empiricism that makes it difficult for the academic, plying his trade, to look beyond or behind objectivizing formulations of the type, "We have reason to conclude that . . .;" "There seems to be solid evidence to support the conclusion that . . .;" "The research we have reviewed reflects . . .;" and "We have evidence for concluding that . . . ." *Id.* at 92-93. *See also infra* notes 156 and 181.

[156] This reflects an ideology that is deeply "entrenched in the social disciplines: the belief that increased systematic empirical understanding . . . [will] virtually lead to the intelligent formulation of policies." R. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY xii (1976).

4. Radical Critique of Legal Education and the Continued Ascendancy of Nomological Thought

When a problem is deeply rooted, one looks to radical critique to bring the sources of difficulty to light. However, the two major instances of radical critique of legal education in the present generation—while they have benefited the community greatly—have not carried us beyond the nomological tradition.

a. Humanist Critique

In the 1960s humanist[157] law teachers mounted a sustained attack on the adversarial dialectic of the traditional case class, seeing in it a depersonalization of the student and of the professional role.[158] This critique was much needed and had a permanent reforming effect on American legal education. Of present relevance, however, is that the critique, and the establishment's assimilation of it, not only failed to challenge, but helped consolidate, the nomological tradition.

The humanist critique was structured by the duality of privatism and the technological that, as we have seen,[159] is basic to the nomological tradition. The critique identified itself with privatism by asserting against cognitive and instrumental conceptions of self, the importance of emotive, valuing, private self.[160] The critique embraced as well the nomological structures of the science of psychology,[161] and the legal education community—both in defending against the attack and in assimilating what it found valid in the attack—accepted that as the relevant conceptual vocabulary.[162] The psychological perspective now has grown into a basic definition of professional role whereby the function of lawyers is to care for

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[157] Recognizing there are those who legitimately resent such appropriation of the approbative "humanistic" to refer to a particular ideological viewpoint (*see e.g.*, Gellhorn, *'Humanistic Perspective': A Critique*, 32 J. LEGAL EDUC. 99, 100 (1982)), the text uses the term to mean concern for the interest of self-actualization, and for the emotive, valuing, private dimensions of our experience.

[158] *See infra* notes 160-61.

[159] *See supra* text following note 74.

[160] *See, e.g.*, Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 452, 461 (1970)("hypertrophy of the intellect" [citation omitted]; "cutting off our hearts and living in our heads"); HUMANISTIC EDUCATION IN LAW: REASSESSING LAW SCHOOLING 21-26 (1980)(publication of Project for the Study and Application of Humanistic Education in Law). *See also infra* note 164. *See generally*, J. HIMMELSTEIN, BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM (1981).

[161] *See, e.g.*, I. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE (1977); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968).

[162] *See, e.g.*, Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971); Boyer & Cramton, *supra* note 146, at 258-70 (thoroughgoing ratification of Stone, *supra*, and of the psychological perspective generally). *See also infra* note 164.

the psychologically understood well-being of their clients.[163]

These perspectives have enriched legal education. But, by emotivizing perception of the student's situation and of the professional role, they have left our conceptions of intellect trapped in the duality of privatism and the technological.[164]

b. Radical Left Critique

Grounded in Marxism, the radical left perspective includes as well the broad eclecticism of "Critical Legal Studies."[165] While this critique has challenged Western liberal thought in basic ways, its alternative visions are nomological in that they aspire to self-sufficient thought systems that describe end states toward which society should strive, or processes through which society's destiny should unfold.[166] The theories this produces are of great interest, but have relatively little relation to concrete · projects in the world.

With respect to the law school program, radical left critique has chiefly produced advocacy of (a) social science instruction that will equip stu-

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[163] *See* Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 496-525 (1980). *See infra* note 164.

[164] As Simon, *supra* note 163, observes, the psychological vision persistently denigrates the idea that intellectively understood principles are needed to mediate the exercise of power by lawyers. *See,e.g., id.* at 493-94, 499-500, 502-03, 506-11, 524, 535-37.

The psychological perspective emphasizes the "affective at the expense of the cognitive" (*id.* at 490), and its "reduction of the world to personal feeling, and therapeutic pedagogy . . . reinforce[s] and legitimate[s] the instrumental self and its manipulative apparatus" (*id.* at 550). This creates an environment in which: (a) the well-being of our students counts more than the interests of the public we are preparing them to serve; (b) one is not surprised to see the sentence, "We use 'manipulation' here without intending a pejorative connotation," (I. SHAFFER & R. REDMOUNT, *supra* note 85, at 211); and (c) the problem of student dependence and disempowerment in the law school regime is assessed not in terms of student self-understanding and intellective autonomy, but in terms of how we can engender in students a greater sense of self-esteem. *See* Boyer & Cramton, *supra* note 146, at 258-67, 275-81; Stone, *supra* note 162, at 427 ("The critical problem facing legal education is how to mitigate the traditional syndrome of disengagement [in the second and third years of law school] by devising educational techniques that help the student readjust his ego-ideal and reinforce his sense of self-esteem.")

See also infra note 181.

[165] *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 563-64 n.1 (1983).

[166] R. UNGER, KNOWLEDGE AND POLITICS (1975) (based on precepts of a "unitary human nature" as "the final basis of moral judgment" (*id.* at 221), pursuit of a "doctrine of community" by which the "ideal of universal community" can be manifested, to the extent feasible, in an actual social order, *id.* at 260-61). *See Mirror, supra* note 8, at 381-83 (noting that Habermas commits the "primal error of systematic philosophy" in attempting to ground thought in a priori, universal truths about the human condition). *See also,* J. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY 192, 206-08, 220 (1976)(based on forms of inquiry and communication corresponding to identified cognitive interests, Habermas' pursuit of a "quasi-transcendental" philosophical system).

dents to be informed critics of the social order,[167] and (b) radical reform within the law schools.[168]

B. Proposal: Post-Nomological Theory and the Arts of Community

This Article argues that we need a more coherent conception of the knowledge, skills and attitudes that are the goals of legal education. The preceding critique has shown how nomological conceptions of theory and of community impede theoretic dialogue that might help lead to such coherence.

What response to this problem, then, does the post-nomological perspective suggest? Among conceptions presented in Section Six, in connection with self-reflective learning, is the ideal of "deliberative intentionality" and "open dialogue."[169] This, it was said, signifies dialogue in which one is willing to disclose one's conceptions and beliefs; is open to having those conceptions and beliefs changed; and is willing to "confront" the other in a spirit of mutuality.[170]

Reflecting strategies of open, learning-centered interaction with others, the ideal of deliberative intentionality and open dialogue assumes special significance from the post-nomological perspective. This significance can be elaborated, as follows, in relation to three important themes of post-nomological thought.

1. Emancipation vs. Consolidation

Where the nomological tradition values theory that will help elaborate and consolidate prevailing knowledge structures, post-nomological theory seeks to challenge and transform those structures.[171] It therefore values strategies of inquiry that conduce to critique and change. Such strategies—which include, for example, (a) the articulation of minority interpretation, (b) extension to the borders of absurdity, (c) the search for antithesis, and (d) the search for alternative metaphors [172]—are basic to

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[167] *See, e.g.*, Klare, *The Law School Curriculum in the 1980's: What's Left?*, 32 J. LEGAL EDUC. 336, 343 (1982).

[168] *See, e.g.*, Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 610-15 (1982).

[169] *See supra* text at notes 129-32.

[170] This is in contrast to a mode basic to (a) nomological science, *see* Torbert, *supra* note 130, at 64-65, and (b) contemporary professional education and practice, *see* Argyris & Schon, *supra* note 116, at 139-52, in which one's aim is to persuade and control rather than to undergo change oneself.

[171] *See, e.g., supra* notes 6-9 and accompanying text.

[172] *See* TRANSFORMATION, *supra* note 8, at 139-44, where these four strategies are presented as part of a richly developed examination of contemporary sociobehavioral science—including examination of respects in which the nomological tradition has stultified growth and change in the theories of that science. *See id.* at 111-39.

Gergen's basic questioning of the precepts of nomological sociobehaviorial science, *see*

this Article's development of themes of post-nomological thought.

Moving beyond the nomological conception of theory and community, emancipation emphasizes ideals of community process such as deliberative intentionality and open dialogue, that are suited to an enterprise of critique and change.

2. Incompleteness vs. Self-Sufficiency: "Open" vs. "Closed" Theory

The nomological tradition yields a paradigm of knowledge as proposition structures from which conclusions of prediction, explanation and control can be deductively derived. To permit prediction and control, such structures must be self-sufficient, in the sense that they must encompass all the laws and facts that determine the phenomena addressed.

The corresponding post-nomological conception is of theory as incomplete. This principle of incompleteness holds that every knowledge structure is dependent on other, outside knowledge structures. Challenging the precept of the nomological tradition that academic competence means competence in the nomological structures of one's scholarly perspective, the principle of incompleteness emphasizes that one should seek continually to contextualize and critique one's own theory in relation to other theories.[173]

This embraces the ideal of "open" as opposed to "closed," theory. Reflecting a growth-centered view of knowledge, the ideal of open theory values theory more for the insights to which it may lead, then for its

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supra notes 26 and 27 and accompanying text, leads to "a new way of thinking about scientific activity," *id.* at 192, that stresses the creativity of the scientific enterprise, *id.* at 201-07, and suggests the special importance—for science—of four broad strands of Western thought: (a) "the hermeneutic-interpretive movement," (b) "dialectics," (c) "the critical perspective," and (d) "the ethogenic alternative." *See id.* at 192-200. *See also supra* note 14.

[173] As applied to the theory of self-reflective learning presented in Section Six, for example, this leads one to recognize that, while focused on self-reflective learning as a valued set of goals and methods, the theory of self-reflective learning needs to ground itself, too, in its limitations. Thus, it is a major failing in the way C. ARGYRIS & D. SCHON, *supra* note 116, have formulated their work on experiential learning that they (a) identify learning-oriented modes (which they call "Model II" behavior, *see id* at 85-95), with *competence* and (b) identify opposite modes of behavior (closed and controlling—"Model I," *see id.* at 63-83), with *lack of competence.* In fact, both modes of behavior are competent, depending on the setting. *See* Simon, *supra* note 163, at 533-37. The significance of this mistake is not merely that it overstates the virtues of Model II modes of behavior and incorrectly dismisses Model I. The larger point is that it misrepresents the basic issue facing people at work in the world, which is the issue of choosing how to be. This is an example of the way psychological doctrine tends to skirt issues of choice and power. *See supra* note 164 and *infra* note 181.

As an example from another field, what emerges from critiques of the law-and-economics perspective (*see, e.g.,* Michelman, *Reflections on Professional Education, Legal Scholarship, and the Law-and-Economics Movement,* 33 J. LEGAL EDUC. 197 (1983)), is that a central weakness is its failure to see and develop itself in relation to (a) its own limitations, and (b) other social science perspectives.

promise to produce self-sufficient nomological structures.[174]

The post-nomological perspective emphasizes, finally, that the condition of incompleteness, and the deep interdependence it imports, are essential, permanent features of theory—or, rather, of the *living* theories[175] that are the ground of intellectual life.

3.　Moral Being vs. Technologism

As was earlier observed,[176] "technologism," an ethos combining the ideals of nomological structure and privatism, now dominates the academy. In technologism, we cling ever more tightly to the ideal of certainty[177] and permanence[178] that underlies the nomological tradition. Thus, today the radical left is justified by radical doctrine; the psychological perspective is justified by psychological doctrine; and the rights jurisprudent is justified by a doctrine of justice. For issues not thus doctrinally resolvable, all we can do is raise questions.

In consequence, our relations in community increasingly are governed by the "black-letter theory"[179] of nomological structure. As we thus become progressively more removed from what it is to be intellect-and-self in the world outside the academy—or, indeed, in other disciplines within the academy—coherence among our perspectives, as well as connectedness with the lives of our students, diminish as ideal and as reality.[180]

What underlies our situation is this: the ethos of technologism denies that we academics confront fundamental issues of value choice in our own intellectual lives. For, it teaches that the function of the academy self-evidently is to teach and practice (a) competence in the knowledge and

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[174] *See, e.g.,* S. EISENSTADT, *Sociology: Development of Sociological Thought,* in 15 INTERNATIONAL ENCYCLOPEDIA OF THE OF THE SOCIAL SCIENCES 23, 27-30 (1968)(contrasting "closed-system" and "open-system" theories in sociological thought). What one is addressing here is a matter of degree and not of absolutes. The issue is the extent to which one's conceptual universe is "open," rather than whether it is open. For discussion of open theory in another context, see W. TORBERT, LEARNING FROM EXPERIENCE: TOWARD CONSCIOUSNESS 150-52 (1972)(describing the character and virtues of an open theory of experiential learning).

Karl Llewellyn begins his classic THE COMMON LAW TRADITION: DECIDING APPEALS (1960), by describing fourteen "major steadying factors in our appellate courts." *Id.* at 19-51. Corresponding to the balance of the book, this presentation of factors is much too discursive to serve as what anyone would call a "theory" of judicial decision. Yet, such a concatenation of "factors," openly addressed, may have more value as a framework for learning, inquiry, and understanding, than most of the nomological accounts of judicial decision the rationalist-jurisprudential tradition has managed to construct.

[175] *See supra* note 28 and accompanying text.

[176] *See supra* text accompanying notes 72-76.

[177] *See supra* note 65.

[178] The ideal of permanence "has served as the primary impetus behind the development of modern science," TRANSFORMATION, *supra* note 8, at 2, signifying a search for timeless, universally applicable laws that describe how nature *is.*

[179] *See supra* note 106.

[180] *See supra* notes 102, 103, 106, 138 and accompanying text.

skills that comprise one's discipline, and (b) adherence to traditional intellectual virtues such as patience, courage, and integrity. And where do we confront deep value *issues* here?

To be sure, technologism suggests, our students will encounter the full force of moral ambiguity in decisions they make in the world. But resolution of such ambiguity by *academics themselves* is not central to the ideals and the processes that constitute the community of academic intellect.[181]

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[181] Our students are preparing for professional roles in which they will continually confront issues of power, choice, and value. A principal source to which they will look for guidance is the written and unwritten standards of the bar. The fact that "legal ethics" courses do not receive the attention they deserve, (*see, e.g.,* Gee & Jackson, *Current Studies of Legal Education: Findings and Recommendations,* 32 J. LEGAL EDUC. 471, 503-04 (1982)), is less significant than the fact that academic intellect is fundamentally uncomfortable with moral education, addressed in terms other than (a) "Law Day homilies" (*see supra* note 50), or (b) raising questions.

Thus, the academic is comfortable asking, *can* a "good person" be a lawyer? Elkins, *Moral Discourse and Legalism in Legal Education,* 32 J. LEGAL EDUC. 11, 24, 49, 51 (1982). But a question more relevant for our students is this: "How can I, aspiring to be a good person, learn to make decisions on questions of power, choice, and value in my professional life?" The academic tends to dismiss concern for the process of finding answers as betraying a naive belief that these questions *have* answers. *Cf. id.* at 21-22.

Reference earlier was made to Boyer & Cramton, *supra* note 146, (hereinafter, *Agenda*). As also noted, *supra* note 155, the *Agenda* was written as a prospectus for a major program of social science research in legal education, and of reform predicated on such research. Given the increasing importance of the social science orientation in the law school culture, and the prominence of the *Agenda* itself, one must attach significance to the way the *Agenda* treats the question of power, choice and value.

In a section on *The Emotional Climate of the Law Schools, Agenda* at 259-70, the *Agenda* turns to "the longstanding debate over the proper role of the law schools in training students for ethical behavior and professional responsibility." *Id.* at 267. (Thus treating issues of value as a subcategory of the emotional and subjective, *see also id.* at 295-96; Kreiling, *supra* note 107, at 287 n.10 (allocating "values, attitudes and beliefs" to the "affective or feeling domain")), is a central feature of psychologized self-conception.)

The *Agenda* follows its introduction of this topic with the passage quoted below. The passage is set out in full to enable the reader to attend not only to its substance, but also to its scientific-empiricist epistemology, (*see also supra* notes 155 (last paragraph) and 156), which—pervading the *Agenda*—seems increasingly identified with competence as an academic.

> The psychoanalytic critics are now asserting that ethical behavior is much more of an emotional than a rational matter: the intellectual exercise of defining the applicable facts, principles, and competing interests in an ethical problem situation is only a first step, and one that may easily lead to unethical action if it is not supplemented by a proper emotional response to conflicting loyalties. Moreover, sociological commentators have expressed doubt that the law schools can effectively 'socialize' their students to behave ethically in later years when they encounter situations in practice where institutional and group forces create pressure toward unprofessional conduct. Yet, even if one focuses solely on the intellectual content of professional responsibility, the question arises whether inculcation of principles officially sanctioned by the organized bar is consistent with the scholarly ideals of academic freedom and free, open, skeptical inquiry.

This, then, is where the nomological tradition has led—and it is an impossible position. For, choosing and valuing are inseparable; any ethos that blinds us to the fundamental value issues, in the sense of issues *we* resolve, in our academic lives, blinds us also to the value dimensions of our academic lives.

It is above all for this reason that the post-nomological perspective, with its emphasis on choice, change, and self-formation, asserts that we need ideals of intellect more congruent with the value choices that in fact underlie the academic enterprise. We need, in short, conceptions of intellect, and of theoretic dialogue in the academy, that bring us more in touch with our identity as moral beings.

Post-nomological conceptions of intellect explored in this Article are responsive to this quest;[182] for, the thrust of those conceptions is that choice permeates our lives as academics. Issues of moral being arise most compellingly because our choices affect other people. Beyond influencing the lives of individual students, academics exercise a deeper power in shaping the theories, and hence the self-conceptions, by which society lives.[183] Theoretic dialogue congruent with such choice and power, then, is seen to be an essential mechanism of responsible action, by which we each can account to our students and to the academic community for what we do, and the academic community can account to society at large.

VIII. CONCLUSION

At one level, this Article argues that post-nomological thought gives us important new ways to see projects of science, of law, and of education.

Id. at 267-68 (citations omitted). The *Agenda* then concludes its consideration of this issue with the following:

> It is a perversion of [a university's] facilities to use them primarily and directly as an element in a policing scheme, especially when the standards of conduct involved are prescribed very largely by a relatively small group. It seems clear that rules of legal ethics, no matter how sincerely they are framed, can express the public interest only as that interest appears to lawyers so long as they are framed by lawyers.

Id. at 268 (citation omitted).

To be sure, the ideals of scientific empiricism and objectivized intellect have great value. But, in the present context, where do they lead with respect to moral education Specifically, what do they say about the proposition that moral action entails *working with*, applying and improving as one can, the body of principles one finds in the world of one's work?

At the heart of the matter, and the reason the Article has addressed here law school instruction in "legal ethics and professional responsibility," is that this issue mirrors our relation to our own work, and the difficulty we have reconciling with the ideology of academic intellect community issues of power, choice and value presented for resolution *by us* in the academic setting. *See* Simon, *supra* note 163 at 553-54. *See also supra* note 164.

[182] One of the most important of these is the ideal of deliberative intentionality and open dialogue—since it contributes to the arts of community *that are the processural foundation for the inquiry itself. See also supra* note 14 and accompanying text.

[183] *See* TRANSFORMATION, *supra* note 8, at 97-98, 201, 204-05.

At a deeper level, however, the Article argues that *however* and *whatever* we academics choose to see, these are choices for which we have a moral responsibility to account.

Thus, as we leave the nomological ideals of certainty and permanence, we move to another set of ideals, the ideals of morality, self-creation and community. These, then, become the epistemological ground for crucial questions about intellect: How are we to conceive ideals of intellect, and how are we to make those ideals more fully present in our own and in our students' lives?