REALIZING THE RULE OF LAW IN THE HUMAN SUBJECT

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Abstract: The dominant understandings of the rule of law, legal interpretation, and judging are riddled with the untoward consequences of misunderstanding or ignoring the human *subject*. This Article takes that subject as the starting point, and asks how he or she can become lawful. Cutting a middle way between the usual analyses which look exclusively either to language or rules as the guarantor of legal objectivity, or to the subject as the intransigent impediment to lawfulness and objectivity, the Article identifies the necessary and sufficient conditions of an achievable rule of law by developing the implications of human subjects' desire for the real (and for conduct consistent with it). Not even law is so objective as to get by without the mind of the human subject, and the Article shows how human subjects become lawful exactly by becoming authentic subjects. The analysis proceeds by way of a deconstruction of jurisprudences, such as Ronald Dworkin's and Justice Scalia's, uninformed by the normative implications of human subjectivity itself.

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The very capacity to ask the question suggests the answer [that] there is no answer is suspect.

—Joseph Vining[1]

PROLOGUE

[O]ne may be willing to play the buffoon, but one wants to do it intelligently.

—Bernard Lonergan[2]

Some time ago I talked to a group of lawyers about how statutes should be interpreted. My objectives were several. I wished to persuade my audience that any *sound* handling of statutes must take its cues from the cognitive processes by which humans know linguistic meaning; that those processes are very different from what often is supposed; and that this difference has broad implications for the Rule of Law. It was a tall order, but the discussion following my talk revealed that I had been understood. This I found cheering, of course, but not just for the usual reason that when one speaks, one likes to be understood. I was arguing that meaning, legal meaning, can be known; and my interlocutors' grasp of my meaning was itself some evidence in support of the anti-skeptical thesis I was advancing. This was all very fine.[3]

Then, someone chimed in, "I didn't understand a word you just said" and delivered immediately—before I could comb the causes of his confusion—a soliloquy which revealed not just to me, but to all assembled, that he understood perfectly well what I had said. This was a gift. Had this person remained silent or said only that he did not understand, we might have believed him in the dark, a know-nothing. But he tried to be an intellectual terrorist—and failed! His performance demonstrated the very understanding he denied.

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[1] JOSEPH VINING, FROM NEWTON'S SLEEP 18 (1995).

[2] BERNARD LONERGAN, *Philosophical Positions With Regard to Knowing*, *in* 6 COLLECTED WORKS OF BERNARD LONERGAN: PHILOSOPHICAL AND THEOLOGICAL PAPERS 1958–1964, at 214, 224 (Robert C. Croken et al. eds., 1996).

[3] Compare the colloquy of Bernard Lonergan with an unnamed interlocutor following a talk by Lonergan on meaning: "[Lonergan]: Do *you* mean anything? Do *I* mean anything when I say, 'Don't read it, it can't be fun?' Supposing I'm wrong. Questioner: Well then, it's meaningless. [Lonergan]: No!—because you wouldn't know I was wrong, if it was meaningless." BERNARD LONERGAN, *The Analogy of Meaning*, *in* 6 COLLECTED WORKS, *supra* note 2, at 183, 212.

I begin with this vignette for three reasons. First, to a class of prospective readers, part of my announced topic, the Rule of Law, will portend a weary replay of tired arguments about the evils of judges' "reading into" legal texts their own "subjective" values and preferences. I plan nothing of the sort, and it is critical that the reader understand at the outset, in at least a preliminary way, that although I shall defend the possibility of the Rule of Law, I shall do so by arguing that frequently we have deeply misunderstood what a Rule of Law would be if we could achieve one. This Article is an extended attempt to show how the Rule of Law is possible exactly because of, not despite, the human subject. My argument, more specifically, is that the Rule of Law is achieved not through human subjects' being "constrained" by something outside themselves but, instead, through their fidelity to *inner law*. The notion of "inner law" will at first seem foreign to most readers, but compliance with it is, I shall argue, the very method by which the reader already understands my meaning at this very moment. It was by compliance with inner law that the would-be intellectual terrorist grasped my meaning.

Second, there is a tendency, exemplified in the terrorist's performance, to flee understanding, to deny that it has occurred or even can occur. Typically, however, the obscurantist is, as my interlocutor was, insufficiently self-effacing. He wishes to obfuscate, but *cleverly*. His very acts of cleverness betray that he has known what he denies knowing.

Third, such cleverness, I am duty-bound to alert the reader, will be used against you if you deny my claims about meaning or how it is known. If you deny my claim *that* linguistic meaning can be known, I shall use the very *fact* of your own grasp of my claim to demonstrate that meaning can be known. The fact will be used to prove the possibility. If you deny my claim about *how* linguistic meaning is known, I shall use the same sort of argument. You are then, as you proceed, assuming the risk of being hoisted by your own performative petard.

This kind of argument, the sort that explicates the conditions of the possibility of what you are already doing, is known as *transcendental*, and I shall have much to say about it below. I warn of it now because transcendental argument often irritates.[4] Transcendental argument tends, indeed is intended, to rankle in the mind. It is a radically

[4] *See, e.g.*, PIERRE SCHLAG, THE ENCHANTMENT OF REASON 57 (1998) [hereinafter, SCHLAG, ENCHANTMENT]; Pierre Schlag, *Normativity and the Politics of Form*, *in* AGAINST THE LAW, 29, 46, 93 (Paul F. Campos et al. eds., 1996) [hereinafter, Schlag, *Politics of Form*].

personal form of argument, argument about what *you* do. It invites you to live by the implications of what you have already chosen to do. By stopping now in response to this warning, you will also—to be sure—demonstrate that you have understood my meaning. And it is just this, the virtual ineluctability of the transcendental move, that makes it rock upon which to build a Rule of Law. The rock, though, is human, and the ineluctability only *virtual*: you can, instead, play the buffoon. Nothing prevents it, but nothing requires it. You are free for either choice. And this is sufficient to my present purpose—to show not that the Rule of Law is necessary (it is not), but that it is possible, because human subjects can, obedient to inner law, make and know meaning about how to live well.

I. The Question

> *We know that the rule of law remains deeply embedded in the rule of particular men and women. We know this, however, not as a fact that negates law but as an argument that always attaches to the rule of law.*
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> —Paul W. Kahn[5]

The question I wish to raise is whether the Rule of Law is possible. The answer for which I shall argue is that the Rule of Law is indeed possible—but only if it be understood as a specific form of, rather than as a blunt contrast to, the rule of men. Usually written off as a threat to the Rule of Law, the human subject emerges as the source of the Rule of Law exactly when the subject is understood as always already under *inner law*. By fathoming, rather than denying or obscuring, the human subject's generative role in positive law, we might reconceive the Rule of Law as worthy not of sarcasm but of human achievement.

This Article, since it is about what human subjects can do, is inevitably about what you and I and the neighbors, all of us being human subjects, can do. But rather than talk about the neighbors, whose mental lives remain mercifully opaque to us most of the time, I shall concentrate on the mental lives you and I have the best chance of knowing: I, my own; and you, yours. The core of this Article will be an invitation to you, the reader, to discover in yourself the cognitive acts by which you know whatever it is you know. That discovery will require "self-appropriation," a taking intellectual-hold of what you already are

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[5] Paul W. Kahn, The Reign of Law: *Marbury v. Madison* and the Construction of America 26–27 (1997).

and of what you already do. Offering a description of what I learn about myself through my own self-appropriation, I shall ask you whether and how the results of your self-appropriation differ. What I find at the root of my mental life is the operation of what I have called *inner law*, a basic norm given at the very threshold of my conscious and self-conscious life. It is to demonstrate the operation of that inner law in the *skeptical* reader that I shall use transcendental argument.

This turn to the subject as a strategy to build rather than to raze, is a reversal of the ordinary defense of the Rule of Law. The usual course is to start (and end) that defense outside the subject's subjectivity, in the external indicia of objectivity on which the Rule of Law is said to depend: rules, procedures, processes, plain meanings, original understandings, legislative intents, and so forth. Whatever its difference from the usual course of legal analysis, however, the project of self-appropriation has roots in the central Western philosophical tradition stretching from Socrates through Kant, beginning with the Socratic imperative, "Know thyself!"[6] My purpose, like Paul Kahn's, is to "turn the Socratic injunction of self-knowledge upon the rule of law."[7] But unlike Kahn, who concludes that the Rule of Law is mere myth, I shall conclude that the Rule of Law may yet be possible. The conditions of its possibility are what I explore at length in this Article.

A. *Reversing the Capitals*

But before proceeding any further, something needs to be said about what the *it* I have in mind really is. When asking a question that includes a concept as familiar as the Rule of Law, there is a tendency to think we know exactly what we are talking about; indeed, there is a tendency to think, at least before we think very much, that there is necessarily just one thing that we are thinking about. Under the sway of an unanalyzed Platonism, we are poised to approach the Rule of Law with the unconscious premise that there exists out there, *way* out there, a Form of the Rule of Law; having thus hypostasized the Rule of Law, we are apt quickly, and intelligently, to conclude that something so other-worldly has *zero* chance of instantiation in this shadowy world of ours. Starting with a concept of the Rule of Law drawn from

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[6] *See* PLATO, CHARMIDES 35 (Thomas G. West & Grace Starry West trans., Hackett Publishing Co. 1986) (164d). The imperative advocated by Socrates is, of course, older than Socrates. For Socrates' relationship to its Delphic source, see 1 H.W. PARKE & D.E.W. WORMELL, THE DELPHIC ORACLE 401–05 (1956).

[7] KAHN, *supra* note 5, at 35.

God-knows-where, to conclude that there's no hope for it here, is child's play, childish even.

There will be more to say later about how the long arm of Platonism raises and dashes our hope for the Rule of Law[8] (and conveniently ushers in an excuse for treating everything as a degraded form of politics). The point to emphasize now, at the outset, is that in putting the question, "Is the Rule of Law possible?," I am asking whether we can achieve something of which we already have a notion. That notion is fuzzy,[9] but it has clear contours to the extent it invokes a particular *contrast*, "the familiar contrast between 'the Rule of Law' and 'the rule of men.'"[10] The contrast seems so old and obvious—at least to those who would avoid being branded lawless—as to be a "first principle."[11] So timeless does that contrast seem, indeed, that we perhaps need reminding that it *entered* American law, and entered through the 1803 opinion in *Marbury v. Madison*, where Chief Justice John Marshall reported that "[t]he government of the United States has been emphatically termed a government of laws and not of men."[12] So fixed in our mind are the goals of that Marshall opinion that we can laugh, if nervously, at Paul Campos's sarcasm, "since *Marbury v. Madison* or time immemorial, which ever came first."[13]

Marshall in *Marbury* offered little explanation of the contrast.[14] Nor do those who have come after Marshall make clear the contrast's meaning. Indeed, it is Richard Fallon's observation that "[i]n American legal discourse, debates about the historical and conceptual

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[8] Such, indeed, is the perennial sport of ridiculing the aspiration to the Rule of Law in light of both the inevitable creativity of interpretation and the illusory character of textual "constraints" on judges. *See infra* text accompanying note 319.

[9] *See, e.g.*, GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 12 (1996) ("[W]e are never quite sure what we mean by the 'rule of law.'").

[10] Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 2–3 (1997).

[11] KAHN, *supra* note 5, at 155 ("When the [*Marbury*] Court tries to articulate the content of this jurisdictional rule, it is less than successful. It cannot rely on official status alone, without violating a first principle of the rule of law: that it is not a rule of men.").

[12] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). For its earlier manifestations in American law, see KAHN, *supra* note 5, at 260 n.5.

[13] Paul Campos, *A Heterodox Catechism*, *in* AGAINST THE LAW, *supra* note 4, at 9.

[14] *See* KAHN, *supra* note 5, at 17 ("*Marbury* does not offer a countertheory of the meaning of the rule of law. It 'proves' its understanding of the rule of law by displaying it, not arguing about it. It is itself the operation of the rule of law. The power of the opinion is precisely its ability to draw the reader into an appearance of law that it creates. Reading *Marbury* we see only the rule of law with its claims of indifference to individual political actors, of permanence, and of representation of the people."); *see also id.* at 19–27.

foundations of the Rule-of-Law ideal are seldom engaged directly."[15] What happens, instead, is that the Rule of Law gets hailed into court as the unquestionable last word in the quotidian dispute:[16] The Rule of Law seems malleable enough to be made to fit almost every side in every dispute.[17] It is the meta-position on which every side would take its well-deserved rest.

No one can be against it, but who knows what it is to be for it? Often, to be on the side of the Rule of Law amounts to no more than standing opposed to the rule of men. And that quickly leads to cynicism about the Rule of Law's being *anything* more than pious hand wringing to hide men's rule. For whatever one may say about legal realism as a *movement*, its leading insights have been assimilated. "[W]e are all legal realists now."[18] The Rule-of-Law-and-not-of-men is not as plausible as it used to be, and it never was. As Mary Ann Glendon observes, "[N]o American adult needs to be told that we live under a rule of men in the sense that laws are made, interpreted, and administered by real men and women."[19]

If no American adult needs to be told that ours is a government of men in the sense that laws are made, interpreted, and administered by real men and women, what *does* remain to be told is in what sense—if any—we might, with women and men creating, interpreting, and administering the laws, live under a Rule of Law. Failure to answer this question leads to serious-minded judgments, such as Professor Kahn's, that the rule of law is myth. It led Fallon himself to con-

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[15] Fallon, *supra* note 10, at 2.

[16] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633 (1996) ("It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); *id.* at 647 (Scalia, J., dissenting) (arguing majority's assessment of the Rule of Law's claims is "proved false" by historical practice); Planned Parenthood v. Casey, 505 U.S. 833, 854–71 (1992) (joint plurality opinion) (noting Rule of Law required fidelity to core holding of *Roe v. Wade*); *id.* at 953–55 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (maintaining that respect for Rule of Law required reversal of *Roe v. Wade*); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("The rule of law . . . is the great mucilage that holds society together."); Bell v. Maryland, 378 U.S. 226, 346 (1964) (Black, J., dissenting) (noting "this country" is "dedicated" to the Rule of Law).

[17] "No proposition is more common in a dissent than the claim that the majority has transgressed the limits of the rule of law by making new law." KAHN, *supra* note 5, at 20.

[18] Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1151 (1985); *see also* Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1198 & n.14 (1989) ("[W]e have all learned our lessons from legal realism. This is not to say that all have learned the same lesson.").

[19] MARY ANN GLENDON, A NATION UNDER LAWYERS 10 (1994).

clude that the Rule of Law is an "ideal" that "never can be completely attained."[20] Professor Fallon, for his part, finds utility in political ideals that we cannot achieve,[21] much as Professor Kahn thinks the Rule-of-Law myth worth perpetuating. One would still like to know what it would mean for the Rule of Law to be *possible*, however. An assessment of that possibility, as I have suggested, would seem to require an account of what human subjects can do and whether rule by law might be among those possible achievements.

The argument advanced in this Article is that the Rule of Law is possible if we break down, in a very specific and constructive way, the contrast between the Rule of Law and the rule of men. And so both to clarify that what I offer is not a defense of the inherited Rule-of-Law-not-of-men notion, and also to emphasize the linkage between any plausible Rule of Law and the rule of men, I am shifting, emphatically, to asking whether a less Olympian, more lower-case, version of the rule of law is possible of achievement. I have not yet identified what that notion is—but it will be a more homey, indeed human one, comfortably expressed in the lower case. This emphatic shift to the terrestrial is intended to signal a question broader than whether some single inherited notion, the Platonic Form of Rule of Law, is possible. I ask, instead, whether by taking the problematic human subject as our very starting point, we can achieve something worthily called the rule of law.

What I shall offer here is an account of how the human subject, as creator and interpreter and administrator of meaning, can operate *through* her subjectivity, not despite it, to realize something responsibly called *the rule of law.* My account will succeed if it can place the subject at the center of law without slipping willy-nilly into a subjectiv*ism*, the rule of men that is the contrast to the "objectivity" said to mark the capital-letter Rule of Law.[22] To confirm the shift in emphasis and order, I shall give the Subject an initial cap. The rule of law of which I

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[20] Fallon, *supra* note 10, at 38.

[21] *Id.* at 7, 55, 56.

[22] *See, e.g.*, Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 742, 744 (1982); *cf.* Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771–72 (1982) ("Try as we will, we cannot escape the perspectives that come with our particular backgrounds and experiences. Indeed, I imagine that not only particular interpretations but the *interpretive rules themselves* respond to our backgrounds and experiences. The very notion of constitutional adjudication as hermeneutics—a notion shared by Professor Fiss and his commentators—is 'sophisticated,' not just in the sense of being complex, but in what the Random House dictionary gives as the first definition, 'altered by education, experience, etc., so as to be worldly-wise.'").

find the Subject capable differs dramatically from the Rule-of-Law-not-of-men that invites contempt for the rule of law; but, for the reasons I shall develop, it succeeds exactly where the traditional "objective" accounts fail most conspicuously, that is, in identifying what, short of brute force, can "constrain" humans. To paraphrase Bernard Lonergan, a philosopher whose work lies everywhere in the background and sometimes in the text of this Article, truth is not so objective that it can get by without the mind of the human Subject.[23] What I mean to show is how the operation of human subjectivity can make an "objective" rule of law possible. To succeed in this account it will be necessary to walk an intellectual tightrope that bypasses the inherited anxiety that the rule of law is possible only if law is made "objective" and "constraining" by banishing subjectivity from the law.

B. *To, and From, the Question*

My topic is how the Subject makes possible a rule of law. But I shall have to begin not with the Subject, but with the subject of the Subject. Part II is about *getting to the Subject*, and how law—mirroring so much philosophy—has craved "objectivity" so much that it has sometimes denied the Subject a place in the law as the price of making law objective. It was, for example, the point of (what we now summarily summarize as) legal formalism to repress the Subject and thereby to produce a "mechanical jurisprudence," the boast of which was law's objectivity. And while we all know that *that* project failed, because the Subject intransigently refused to exit, American law-types nonetheless busy themselves with that *other* project: showing that the legal realists and "crits" alike are *not to be believed* that necessarily the Subject is everywhere, the law nowhere. The long and the short of that project, however, is that for the once neglected/repressed Subject we have substituted a variously "constrained" Subject, hoping that finally we shall have produced a Subject big enough to realize the capital-letter Rule of Law but small enough not to make trouble for it. The results, as I argue in Part II, are a conception of law that is unstable and muted panic that law and its rule ultimately exceed our abilities.

So bent have we been on constraining the Subject with something outside the Subject—with something *objective*—that we rarely reach the Subject. But we need to get to the Subject, for she is our

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[23] BERNARD J.F. LONERGAN, *The Subject*, *in* A SECOND COLLECTION 71–72 (William F.J. Ryan, S.J. & Bernard J. Tyrell, S.J. eds., 1974).

only hope. In Parts III and IV, then, I take the Subject as an object of inquiry (not a problem to be solved), asking the reader to explore with me the cognitive acts by which he or she knows anything at all—science, meaning, how to live. The conclusion I draw from this exercise in self-appropriation is that the Subject's—your and my—cognitive processes are always already assembled and structured, across the entire range of human knowing, by what I have called "inner law."

From this conclusion I proceed to argue, in Part V, that an *achievable* rule of law proceeds from fidelity to—but not constraint by—inner law. The argument, more specifically, is that any genuine rule of *law* is rooted in legal method, and authentic legal method, in turn, is rooted in the human cognitive method that is itself structured and assembled by inner law. To show that this claim is not as outlandish as it may sound upon first hearing, I show how aspects of it are anticipated and applied in the work of several American legal scholars, including Joseph Vining, James Boyd White, Mary Ann Glendon, and Paul Kahn.

Then, in Parts VI and VII, I take a concrete problem of statutory interpretation to elaborate and exemplify how the rule of law might look when rooted in the method by which human Subjects actually—not fictively—know meaning. I arrange the analysis to show how this method solves or dissolves problems that bedevil two leading theories of the rule of law and statutory interpretation, those of Antonin Scalia and Ronald Dworkin.

In Part VIII, finally, I step back both to situate my project and, in so doing, to try to meet an anticipated objection. The objection, in a word, would be that I have an agenda;[24] the objection, in several words, would be that while distracting my readers with discourse about something as bland as human cognition, I have smuggled natural law or even theology into the heart of the rule of law. As for the objection regarding agenda, I shall demur now and be done with it. My agenda is to make sense of law in light of what I take to be a persuasive account of how human Subjects know meaning, including legal meaning. If I am wrong, I stand to be corrected by writers of briefs for other conceptions of the place and nature of intelligence in law, and of course by the writers of clever briefs advocating no intelligence in law.

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[24] *Cf.* Pierre J. Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1631 (1991) ("As you might guess, this effort is not just a completely disinterested, purely altruistic attempt on my part to give various schools of thought something to think about. I have an agenda . . . .").

As for the two objections about content, natural law and theology—the reply of course will require more detail than is appropriate at the outset, but at least this much should be said here. One of the theses of this Article is that the human Subject is always already under a *law* operative in her by *nature*; what I find operative in the Subject might, therefore, be called a *natural law*. Like proponents of traditional natural-law ideas, moreover, I shall argue that law that we humans make, "positive law," must, if it is to be *law* in the fullest sense, be consistent with law that humans do not make, "natural law." But the natural law on which I take my stand, and the conditions of its satisfaction, differ so deeply from what "natural lawyers" have in mind, that nominal sameness risks obscuring profound difference. The "natural law" present to my mind consists not of natures, conformities with nature, propositions, basic goods, or self-evidences.[25] It consists, rather, in the conditions that the human mind itself issues for valid knowing (and doing).[26] What my position plainly shares with traditional theories of natural law, nevertheless, is the judgment that what we humans posit as *law* must conform to something more than, say, Hartian "rules of recognition." What I shall argue is that law and its rule, if they are to be truly *lawful*, must be rooted in human cognitive method and in the law (natural, if you please) by which it is structured and assembled.[27]

This position is similar to ones that have gotten certain law professors accused of being covert theologians. Of the gravamen of the second anticipated objection, then, I may also be guilty. Then again, a demurrer may be the more appropriate move, because the significance of the charge is not clear. At the risk of anticipating too

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[25] For a taxonomy and analysis of these, the most influential conceptions of natural law, see JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT 123–43 (1999). For a much more detailed and broad statement of the range of available notions of natural law, see generally the study by PAULINE C. WESTERMAN, THE DISINTEGRATION OF NATURAL LAW THEORY: AQUINAS TO FINNIS (1998).

[26] My position does have common ground with hermeneutic approaches to law. Indeed, I understand my stance as something of a middle-way between natural law and hermeneutics, though in this Article I have not made that case explicitly. For an insightful case for the convergence of the neo-natural law and hermeneutic positions, see Francis J. Mootz III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition*, 11 YALE J.L. & HUMAN. 311, 311 (1999).

[27] By putting my thesis thus I do not mean to obscure what I do not deny, *viz.*, that "positive law" not in conformity with natural law is still law in a non-focal sense of the word "law." *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 351–66 (1980). But what I shall deny, with Lon Fuller and others, is that assertions of such "law" can, inasmuch as they are unlawful in their cognitive origins, create a moral obligation of obedience. *See infra* text accompanying notes 271, 421.

much of my conclusion, and of misleading the reader by assimilating my position to someone else's, I ask you to begin by pondering this conclusion of law professor Joseph Vining:

> Neither lawyer nor theologian may like any suggestion that they are brother and sister. Theologians may not like it, thinking that lawyers are individuals peculiarly without belief of any kind. Lawyers may not like theology's other-worldliness and claim of universal domination. Turning to theology may seem a failure, a giving up of the reach to become a science like the other disciplines that escaped the domination of theology hundreds of years ago. But law that has not become a science may, if it recognizes the fact, teach a thing or two to the life sciences and the science of man. Law may indeed be a science of man. And it may be necessary to look into a mirror that leaves nothing out if law is to see itself for what it is. Theology may not be law any more than any metaphor is the same as that which it reflects. But it has the perhaps unique advantage that, like law, it leaves nothing out, not person, nor present, nor freedom, nor will, nor madness, nor the individual, nor the delight of a child, nor the eyes of a fellow human being, nor our sense of the ultimate, in its effort to make sense of our experience and make statements that are consistent and understandable in light of it all.[28]

My aim in this Article is to begin making sense of the rule of law "in light of it all," but *not* as an encyclopaedist, saying a little something about everything.[29] Instead, my method is the one suggested by Bernard Lonergan: "Thoroughly understand what it is to understand, and not only will you understand the broad lines of all there is to be understood but also you will possess a fixed base, an invariant pattern, opening upon all further developments of understanding."[30] To understand human understanding, and what it can and cannot achieve, I undertake an analysis of the Subject and, more specifically, how she knows anything at all, particularly meaning, specifically legal meaning. From this analysis of the Subject's cognitive life emerges the an-

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[28] JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 201 (1986).

[29] *Cf.* Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 692 (1990) ("Everything matters, always.").

[30] BERNARD J.F. LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING xxviii (1978) (italics omitted).

swer to my question, "Is the rule of law possible?" It is the *question*—or rather the *questioning* that is forever driving the wondering Subject—that operates as *inner law* upon the Subject. It is the *question*, not any answer, that provides a fixed base from which to construct the rule of law.

From the oblique angle of a study of human cognition we shall have come to a central question of Anglo-American jurisprudence—and we may have something to contribute to an answer. Law has long been hobbled by the hand wringing and reconstructive antics of what H.L.A. Hart felicitously termed the "disappointed absolutist,"[31] the jurisprude who wants law to be so determinate and self-sufficient as to be able to claim its own instances.[32] Analytic jurisprudence, even a whole lot of it, has been unable to deliver such an engine, and from this Article too the absolute-absolutist will go away empty-handed. But the reader should not now brace herself for a leveling, a paean to the honor in muddling-through. This Article is, after all, an attempt to rehabilitate the rule of law. If there is to be any leveling, it will be a leveling up. Paralyzed by "the extraordinarily unappetizing prospect"[33] that "we are all we have,"[34] we haven't gotten to know very well what it means to be men and women, not gods.[35] When we get to know ourselves, we just may find that we are transcendent. Men and women may not be cognitively capable of the absolute-absolute, but they are capable of a limited absolute. Transcendence, as when one Subject grasps another's meaning, occurs. That may not be what the absolute-absolutist had wanted, but it just may be what we need.[36]

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[31] H.L.A. HART, THE CONCEPT OF LAW 139 (2d ed. 1994).

[32] *See* Martin Stone, *Focusing the Law: What Legal Interpretation is Not*, *in* LAW AND INTERPRETATION 31, 34–49 (Andrei Marmor ed., 1996).

[33] Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979).

[34] *Id.*

[35] HART, *supra* note 31, at 128 ("[W]e are men, not gods.").

[36] *See* William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 470 (1977) (using Mick Jagger lyrics to summarize post-*Goldberg v. Kelly* trends in administrative Due Process).

II. Getting to the Subject

> *Sometimes it seems as if there is only one story in American legal thought and only one problem. The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it's never been part of the story.*
>
> *Until now.*
>
> —Pierre Schlag[37]

Rule of Law thinkers' current orthodoxy is that the Subject is somewhere in law. A thriving heterodoxy has it, however, that the Subject is everywhere, the law nowhere. Thinkers aspiring to the rule of law, therefore, think a lot about how to keep the Subject without losing law. The result is that the subject of the Subject is all over the legal literature: No longer pretending that we can get by *without* the Subject in law, many legal academics make something of a life wondering how we can get by *with* the Subject. The trouble is, little of this literature actually gets to the Subject as he is.

The most obvious reason for not getting all the way to the Subject is that by the rule of law we mean the Rule-of-Law-not-of-men. To be sure, we *are* all legal realists now; we know that behind the masks of the law,[38] subjects breathe.[39] But, in ways that I shall elaborate below, we think or unconsciously suppose that with those masks and other tools we fallen women and men might reconstruct the prelapsarian Rule-of-Law-not-of-men.[40] With metaphors and interpretive regimes, "reason" and "objectivity," theories and meta-theories,[41] we endeavor to carry on *as much as possible* as though we had not discovered the Subject in law.

None of those tools, however, nor the combination of them, will do the job. They precipitate the predicaments that have led not only to the ridicule but also to the repudiation of the rule of law they were

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[37] Schlag, *supra* note 24, at 1627, 1743.

[38] *See generally* John T. Noonan, Jr., Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks (1976).

[39] *See* John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom 3 (1998).

[40] *Cf.* Grant Gilmore, The Ages of American Law 111 (1977) ("In Heaven there will be no law . . . . In Hell there will be nothing but law, and due process will be meticulously observed.").

[41] "Leon Lipson . . . is rumored to have said, 'Anything you can do, I can do meta.'" Schlag, Enchantment, *supra* note 4, at 148 & 148 n.8.

created to serve. They not only make problems for the rule of law that the Subject cannot solve; they make the very Subject a problem for the rule of law. In Parts III and IV of this Article I attempt to lay bare the Subject who makes possible the rule of law. Prior to that, in this Part, my project is to clear a path to the Subject—identifying and critically evaluating the devices and detours that are thrown up to make us think that we can understand and do law without first knowing the human Subject.

The roadblocks are not in the first instance the creations of legal minds (though the lawyers have been eager to chip in). Their origins are much deeper. They are, in short, a function of the basic stances assumed by anyone making any statement about anything, including law. What I mean by this is that anytime anyone says anything about anything, she brings to bear certain basic positions on *three* basic issues: (1) what *is*, a metaphysics; (2) what counts as *knowing*, an epistemology; (3) what one is *doing* when one is knowing, a cognitional theory. No one can say anything about anything, including law, without taking a stance on each of these three basic issues. Very often, one's stances on these issues remain implicit, or only some of them are explicated. These general stances, however, are operative *whenever* one takes a position on a specific issue of law, and these stances control, in drastic and sometimes surprising ways, one's resolution of those specific issues. The single greatest factor in all this is the order in which the stances are assumed, and what controls that order.

Most commonly, people begin by taking a stance on what is real. The real seems so obvious as not to need analysis. We just talk about what *is*. The metaphysical stance is developed first, tacitly. But then the possibility of mistake is countenanced; indeed, mistakes occur. Then, typically, a stance on the next issue is developed; the necessary and sufficient conditions for knowing the real are set out, an epistemology—making it possible to distinguish the genuine article from the pretenders. Then, finally and not all that often, attention turns to what the Subject is *doing* when he or she is knowing the real. Variations on this seriation are possible, but they tend to converge on one result. When people start with the first, or with the second issue, or with a conflation of the two, and come to the third, if at all, with stances on the first and/or the second, the third will already seem irrelevant or intrusive. It is thus that the Subject comes to seem irrelevant to, or an outright problem for, the rule of law.

The specific burden of this Part is to explicate these three basic stances, the sequences in which they *can* be taken, and the consequences of the sequences in which they are *in fact* taken—all in law.

What I aim to show, more precisely, is that approaches to law that start outside the Subject lead to strange, sometimes even silly, consequences. The reader, eager to get to the Subject, might be tempted to proceed directly to Parts III and IV; the analysis in those Parts is, indeed, rather self-contained. But a clear inventory of the problems generated by not starting with the Subject is a contribution to my argument that starting from the Subject is not a detour or an alternative or a curiosity. But rather, whether we realize it or not, it is the condition of the possibility of meeting the concerns that forms the core of the rule of law—and, indeed, of meaningful and worthy human living.

To assemble that inventory, I canvass examples of four possible approaches to law and its rule. I begin with accounts of law that implicitly or explicitly take a stance on metaphysics first, that is, accounts that say first what law *is*. Then I proceed to accounts that give priority to the necessary and sufficient conditions for knowing law, an epistemology. Third, I turn to a group of accounts of law that equivocate between privileging metaphysics on the one hand or epistemology on the other. These accounts lead to that final category, the precious few accounts that begin neither with dogmatic pronouncement of what law is, nor of what counts as knowing it, but by asking "What am I, the Subject, doing when I am knowing law?" The sequence in which the questions are answered makes the difference. By not beginning with the question I just posed, the Subject gets squeezed into the analysis late in the day, if at all. The results are a Subject who is a problem for the rule of law and a rule of law that is beyond human reach.

A. *Metaphysics First?*

When we conclude that something just *is*, we need not ask how we know it, nor what we are doing when we know it. Lots of work is saved by this preemption. The only price is plausibility, a cost that takes time to grasp. Meanwhile, the idea that this thing just *is* can make considerable progress in the minds whose workings are being ignored. The Rule-of-Law-not-of-men is just such an idea.

Perhaps Paul Kahn is correct that Chief Justice Marshall's opinion in *Marbury v. Madison* is itself the greatest contribution to the creation of our regnant notion of the rule of law, the Rule-of-Law-not-of-men. But Pierre Schlag also is on to something when he observes

that we, the readers of *Marbury*, find "neither odd nor surprising"[42] the opinion's inattention to the "we" who "say what the law is."[43] Marshall may get the credit (or blame) for crystallizing the idea that *our* rule of law is to be of the "not of men" variety, but Marshall was working from within a legal tradition that made available the conceptual rudiments of a rule of law that was a Rule-of-Law-not-of-men.[44] The history of those concepts is complicated, and will concern us some below. My immediate interest is in how they function to make law and its rule so metaphysical, so real that the contribution of the Subject gets made explicit, if at all, only under duress.

The law according to Christopher Columbus Langdell is not the only, but it is certainly the favorite, example of law that just *is*. "Langdell's work," as Pierre Schlag observes, "reads like law's immaculate conception."[45] But in the case of the capital-letter Immaculate Conception, at least, we are clear that there were human Subjects—Anna and Joachim, by tradition—doing the conceiving, immaculate by grace. In the land of Langdell, by contrast, law is made to appear on

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[42] Schlag, *supra* note 24, at 1628.

[43] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[44] On Marshall's reliance in *Marbury* on abstract ideas in preference to the text of the Constitution, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 71–72, 74, 95–96, 197 (1985). Professor Currie observes of the Marshall Court that "the most striking fact is that most of Marshall's brethren were nearly invisible." *Id.* at 194. This was no accident. Prior to Marshall, the Court had generally followed the English practice of each jurist's producing an opinion in a contentious or difficult case. In Marshall's first term the practice was abandoned in favor of achieving whenever possible an "Opinion of the Court." KAHN, *supra* note 5, at 106. The force and effect of Marshall's own personal power on the Court dramatically undercut his Rule-of-Law-not-of-men, of course. "There is no 'who' under the rule of law. The most important example of this approach to *Marbury* is Alexander Bickel's *The Least Dangerous Branch*. Bickel tries to save law by making it continuous with other forms of politics. In spite of his attempt, this approach inevitably ends up hollowing out law from within .... [A] strategy is a way of understanding within a contested conceptual domain. The rule of law is a series of strategies for maintaining the appearance of law." *Id.* at 167. (footnotes omitted). Kahn continues:

> The law that we see hides the failures of the law that we do not see. Every appearance is both a revealing and a concealing. If *Marbury* represents the rule of law, not men, it also represents the victory of law without men. We have lost sight of Marbury himself. We are losing sight of all the real actors: Jefferson, Madison, Marshall, and Marbury. We see in their place only 'the people.' The ultimate victory of law is when we no longer see ourselves at all.

Id. at 174. I would say, rather, that we achieve *law* by transcending ourselves through knowing meaning we communally create, faithful to inner law, to live by. *See infra* text accompanying notes 427–437.

[45] Schlag, *supra* note 24, at 1632. We can finesse Schlag's peculiar substitution for the virgin birth which would seem more to his point.

stage alone, the *dramatis personae* nowhere to be seen. To be sure, it is Langdell who writes the treatises saying what the law of equity or contracts *is*, and as Schlag observes,

> We know Langdell. We've worked with Langdell. He's no Stanley Fish. On the contrary, Christopher understood perfectly well that he was an individual subject. And he could use the "I" indicatively and ontologically as well as the rest of us . . . . [W]henever Chris addresses a matter of pedagogy in [the preface to his contracts casebook], the "I" is all over the place. And yet, quite mysteriously, as soon as the law makes its appearance in the preface, the "I" vanishes. Chris disappears. Dean Langdell is removed.[46]

At that moment there is just the law. Law is, for aught that appears, just *out there*—alone, it "does it all."[47] The Subject is no part of the law that's already out there; law has been made to seem self-sufficient. "In Langdell's discourse," as Schlag explains,

> the doctrines not only mean, they *do* things to each other—frequently in a visible way. Doctrines doing things to other doctrines is hardly a unique characterization of Langdellian discourse. What is unique to Langdellian discourse is the uncharacteristic visibility and frequency of this doing and its apparent doctrinal self-actualization. Indeed, in Langdellian discourse the doctrines seem to negate, convert, modify, and limit each other without the apparent assistance of any social actor—not even the author. . . . They *arrive*. They are a *growth*. They are *extending*. Their growth can be *traced*. They are *embodied*. The law here is rendered in animistic terms. It is personified. . . . Soon it will even go so far as to make an appearance. Watch. "[T]he many different guises in which the same doctrine *is constantly making its appearance* . . . [is] the cause of much misapprehension."[48]

Why does something so implausible make progress in men's minds? The answer, as Schlag and a host of others have shown, is that some *thing* as implausible as a law that exists out *there* seems not only plausible but simply *true*, for the simple—though not the most ba-

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[46] *Id.* at 1633 (footnotes omitted).

[47] *See id.* at 1634.

[48] *Id.* at 1647 (footnotes omitted) (emphasis added) (quoting C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii–ix (1871)).

sic[49]—reason that it appears through the metaphors by which we are always already accustomed to describe reality. The striking but simple fact is that "I belong to my language far more than it belongs to me."[50] In the language we inherit and take for granted, we describe the real—what *really* is—as a collection of spatially extended objects. For example, when we want to emphasize their importance, our good or bad intentions are part of *the furniture of the real world.* When I really understand you, I *see* what you're saying. When your argument is nonsense, I *see through* it. When I think things through, I *balance* the relevant factors. We *draw lines.* Ideas are part of a *marketplace.* When life is really crummy, it's *empty.* When it's meaningful, it's *full.*[51] The examples could be multiplied endlessly.

If these spatial metaphors serve as aids for describing reality, they also disserve by making us think that reality is in fact only what is spatially extended. Most men and women find it almost impossible not to identify the real—what *is*—with the empirical component of human life. This easy identification is perhaps the greatest cause of a metaphysics-first stance and the host of problems in its wake. There will be much more to say about this below.

The point to note now is that in the (almost) unavoidable context of such a metaphysics, it is (almost) unavoidable to think about law as some thing—which, if it is real, is *already out there to be seen.*[52]

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[49] *See infra* text accompanying notes 50-52, 121–130.

[50] DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 50 (1987).

[51] On the place of metaphor in language, see, for example, GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS (1987); GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980). On the place of metaphor in law, see for example, among the abundant studies, MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY (1985); HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 2, 3, 5, 7, 14, 15, 186–98 (1992) ("marketplace of ideas," "wall of separation," "chilling effect," "captive audience," "shedding rights," "fire" leading to "conflagration"); SUSAN MINER, THE ROLE OF METAPHOR IN THE LANGUAGE OF LAW 8–20, 26–45, 86–104 (1993) (M.A. in English thesis, University of San Francisco); JUNE STARR, LAW AS METAPHOR: FROM ISLAMIC COURTS TO THE PALACE OF JUSTICE (1992); STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 43–68 (2001) [hereinafter WINTER, CLEARING IN THE FOREST]; Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stake for Law,* 137 U. PA. L. REV. 1105, 1159–1205 (1989) [hereinafter Winter, *Transcendental Nonsense*].

[52] Joseph Vining sees (so to speak) how all this works:

> If either the speaker we hear, or what is said, consists of an arrangement of constant and identical or replaceable units, the individuality of which arrangement is the probabilistic unlikeliness of an identical arrangement because of the large number of possible arrangements of such units; and if either the speaker or what is said, being such an object, interacts with other

And that, predictably, is what happens. "If the meaning of law is located in an object-form (*i.e.*, the doctrines and principles) whose operative meaning requires almost"—the 'almost' being *the* critical concession to which we shall return—"no contribution from any individual subject, then law itself is stable, self-identical, foundationally secure and bounded; it is, in other words, just like an object."[53] And once law is always already out *there*, object-like, the result is plain and predictable. "[T]he individual subject emerges only as a potential threat."[54]

To get the law located out there turns out to be not so simple, however. On the one hand, as Schlag observes, "In Langdell's universe, things happen, thoughts get thought, and the passive voice gets used a lot. . . . When it is law that is produced, the 'I' is kept out of sight (and out of mind)."[55] But the "I" can't be kept totally out of sight. The law that is out there must, if it is to be *ours*, be known. If there is to be a knowing of law, then there will have to be Subjects. And this, of course, promptly throws law's vaunted *objectivity* into doubt. "If one concedes . . . that the subject is necessary to read this order, what guarantees that this subject will read the order of the object correctly?"[56] The reading by which the Subject knows the law is the inevitable contribution, the contribution that required the "almost" above. From the instant it has to be acknowledged, it should make law's metaphysicians nervous.

But Langdell does not seem to have been the nervous sort, so the obvious question is what kept him secure in law's objectivity. The answer is that Langdell regarded law as a *science*.[57] The view that law is a

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> such objects according to what are called "rules," which may change but which are ultimately translatable from words into mathematical notations and into the causal postulates of the physical world; then I might say the experience of Shakespeare is or would be impossible . . . . Then I would say law is impossible and must be abandoned. "No," everyone would say. They might ignore me as I say it, this fragment of speech. But they would not say, "So what?"

Vining, *supra* note 1, at 20–21.

[53] Schlag, *supra* note 24, at 1635.

[54] *Id.* at 1636.

[55] *Id.*

[56] *Id.*

[57] "Law, considered as a science, consists of certain principles or doctrines . . . ." LANGDELL, *supra* note 48, at vi (quoted in Schlag, *supra* note 24, at 1634); *cf.* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 13 (1983) (noting that a fully scientific law was an "aspiration" of Langdellians).

science was, indeed, "[t]he heart of [Langdell's] theory."[58] But what could this *possibly* mean?[59] Does it amount to *anything* more than justifying *controversiale per controversialius*? This all depends on what one means by "science."

Aristotle is the person credited as the inventor of the first semblance of a *method* for investigating the natural world.[60] Sometimes Aristotle was willing to identify knowledge generated through that investigative method as science.[61] But more often and more typically, Aristotle restricted science to another kind and body of knowledge, *viz.*, certain and immediate knowledge of what is unchanging. This meant that for Aristotle, mathematics alone was true science, for in it alone did contingency play no part.[62] The axioms of mathematics were unchanging and, according to Aristotle, known not through experience and induction from it, nor through dialectic, but instead "immediately" through "intuition."[63] It was the availability of this infallible, "intuitional," way of knowing that made true science possible, and set it ahead of all other claims to knowledge.

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[58] Grey, *supra* note 57, at 5.

[59] *Id.* at 16 ("On first encounter, the very idea of 'legal science' held by Langdell and his followers is baffling."). The Langdellians' aspiration to a "legal science" was by no means unprecedented. For a compendious account of the Roman jurists' adoption of Aristotelian techniques contributing to a "science of law," see PETER STEIN, REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS 33–48 (1966); on the emergence of medieval "legal science," see HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 120–64 (1983).

[60] W.K.C. GUTHRIE, 6 A HISTORY OF GREEK PHILOSOPHY: ARISTOTLE: AN ENCOUNTER 130 (1981). On pre-Aristotelian "science," see R.G. COLLINGWOOD, THE IDEA OF NATURE 2–3, 29–48 (1945).

[61] GUTHRIE, *supra* note 60, at 131. "Leibniz remarked that Aristotle was the first to think mathematically in fields outside the strictly mathematical." COLLINGWOOD, *supra* note 60, at 47.

[62] W.D. ROSS, ARISTOTLE'S PRIOR AND POSTERIOR ANALYTICS 14 (1949); *see also id.* at 51–75; GUTHRIE, *supra* note 60, at 47–48, 170–86; ARISTOTLE, POSTERIOR ANALYTICS 2, 6 (H.G. Apostle ed., Peripatetic Press, 1981) (71b9-16, 73a21).

[63] ARISTOTLE, *Posterior Analytics*, *in* THE BASIC WORKS OF ARISTOTLE 186 (Richard McKeon ed., 1941) (II.19, 100b-10-15). G.R.G. Mure provides this translation:

> [T]here will be no scientific knowledge of the primary premisses, and since except intuition nothing can be truer than scientific knowledge, it will be intuition that apprehends the primary premisses—a result which also follows from the fact that demonstration cannot be the originative source of demonstration, nor, consequently, scientific knowledge of scientific knowledge. If, therefore, it is the only other kind of true thinking except scientific knowledge, intuition will be the originative source of scientific knowledge.

Id. at 108, 186. *But cf.* JONATHAN BARNES, ARISTOTLE'S POSTERIOR ANALYTICS 80–82, 248–60 (1975). *See generally* PATRICK H. BYRNE, ANALYSIS AND SCIENCE IN ARISTOTLE 170–71, 181 (1997).

Strange as it may seem, Langdell took half (but only half) of what was to Aristotle true science. What Langdell affirms is that law has premises which can be worked with like the axioms of geometry—"not merely human constructs, but rather obvious and indubitable physical truths about the structure of space, from which nonobvious truths (like the Pythagorean theorem) can be proved by sequences of indubitable deductive steps."[64] What Langdell rejected of the Aristotelian notion of science is the notion that law's axioms are to be conceived as "rationally self-evident intuitions." Langdell understood law's axioms instead "as especially well-confirmed *inductive generalizations about the physical world.*"[65] As Professor Thomas Grey explains, "Langdell believed that through scientific methods, lawyers could derive correct legal judgments from a few fundamental principles and concepts, *which it was the task of the scholar-scientist like himself to discover.*"[66]

To be sure, once one has admitted, as Langdell very self-consciously did, that there is a *method* of discovering law, the Subject is on stage. There is *someone* providing the metaphysics. But if, as appears, the Subject's contribution did not present Langdell with a problem for law's certainty, this should be only because Langdell thought that law's "axioms" were grasped by the Subject as Aristotle thought those of mathematics were, through some process that prevented the Subject's intrusion.[67] However, the process by which Langdell's axioms are known is, again, not intuition but induction[68]—a procedure that itself can become certain only when conducted through statistical probabilities,[69] a procedure not known to Langdell

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[64] Grey, *supra* note 57, at 18.

[65] *Id.* (emphasis added). "For legal science" as understood by Langdell, "the universe of data was not the totality of sense experience of the physical world, but rather the restricted set of reported common law decisions—hence Langdell's often-reviled remark that all the materials of legal science were to be found in printed books." *Id.* at 20 (footnote omitted). *See* C. Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 118, 124 (1887) (quoted in Schlag, *supra* note 24, at 1633 n.17).

[66] Grey, *supra* note 57, at 5 (emphasis added).

[67] Trying to make Langdell's "legal science" plausible, Professor Grey explores the possibility that "intuition," some "sixth-sense," provided the missing link, and notes that to admit "intuition" would be to violate Langdell's commitment to law's being principled. *See id.* at 23–24.

[68] As Professor Grey notes, to Langdell and like-minded thinkers geometric axioms apparently seemed verifiable by sense-perception alone, whereas sense-perception seemed unable to validate law's axioms and conclusions. *Id.* at 20–21. On bare "sense perception's" incapacity to verify *anything*, see *infra* text accompanying notes 109–115.

[69] *See* IAN HACKING, THE EMERGENCE OF PROBABILITY 176–85 (1984).

(and not obviously relevant, at all events, to a normative rather than an explanatory/descriptive enterprise).[70]

While imputing the prestige of science to law, Langdell and those in his image simply fail to tell us exactly what the "legal scientist" is *doing* to know law's "axioms." The Subject who would tell you the law plunges pell-mell into telling you *the law*.[71] As Joseph Vining says succinctly, "The scientist qua scientist leaves himself out of his picture of man. Scientific jurisprudence left the judge out of its picture of law."[72] Only as an afterthought is the question, "How do you know what it is you know?" answered, and predictably that answer—"scientific method"—secures the legitimacy of what has already been reported. But the vague invocation of scientific method, and the false ascriptions of certainty to what is an inductive enterprise, invite the contempt summed-up in Felix Cohen's remark that the devices of the legal traditionalist "are supernatural entities which do not have a verifiable existence except to the eyes of faith."[73] But faith, of course, faith even merely in humans, was what the modern "law as science" project was bent on avoiding from the start.[74] It was the legacy of legal realists such as Cohen to identify the actual and inevitable shortcomings of the Langdellian enterprise. When the legal realists' critique of "legal science" succeeded, as it did, legal science "disintegrated."[75]

B. *After the Fall from Metaphysics*

What, then, is one to do? One alternative is to give up, and of such despair there are examples of every stripe—from radical multi-

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[70] *But see infra* text accompanying notes 199-203.

[71] "Langdell's most common form of doctrinal discourse was simple dogmatic pronouncement . . . ." Grey, *supra* note 57, at 14; *cf.* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 91 ("Scholars who spend too much time debating how to conduct a discourse may never be able to say anything.").

[72] VINING, *supra* note 28, at 39. Or at least it tries to. The project always fails, because it has to. Should it be surprising that "[critics of formalism] have had little luck caging and exhibiting mechanical jurisprudents (all specimens captured—even Blackstone and Joseph Beale—have had to be released after careful reading of their texts)"? Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 430 n.106 (1987) (quoting R. DWORKIN, TAKING RIGHTS SERIOUSLY 15–16 (rev. ed. 1977)).

[73] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935).

[74] On how the modern legal ambition to be rooted in science slides into faith, see SCHLAG, ENCHANTMENT, *supra* note 4, at 19–29. The Medieval aspirations to a legal science had, of course, a different notion of science as their model.

[75] Schlag, *supra* note 24, at 1657–58.

culturalism to garden-variety Critical Legal Studies. A more hopeful alternative is to admit outright that for the rule of law to be possible, law must be knowable and known, and then to stipulate the necessary and sufficient conditions of that knowledge, the task neglected by the Langdellian. Professor Schlag calls that project "reconstruction," because, whether or not they recognize it, those engaged in it are trying to put the Subject and object back together again after a disintegration—back together after the Subject exploded out of the law that was supposed to be a self-sufficient object waiting to be known in splendid purity.

The reconstructionist is a legal thinker whose project is "to privilege epistemology over ontology."[76] Epistemology is, indeed, her trade. Having conceded that the Subject has a role in producing law, she wants to show that somehow the Subject really can know the law *objectively*. So she busies herself setting out the necessary and sufficient conditions of the Subject's objective knowledge of law. She busies herself answering the question, "What counts as knowing—rather than creating or inventing—law?"

Her answer is any number of variations on one theme: reason. Lawyers who are epistemologists rather than metaphysicians are always explaining how "reason," a possession of the Subject, can be used to get to law, the object, *objectively*, never subjectively. "[T]he effective existence of reason can be considered a condition of possibility for what American legal thinkers and actors take to be 'law' itself."[77] As Schlag explains,

> It is the possibility of a publicly accessible and recognizable reason that enables legal actors to claim that power, interest, prejudice, and personal proclivities are constrained and controlled by an overarching frame known as the rule of law. Reason is thus an essential aspect of the rule of law. . . . From the perspective of the rule-of-law ideal, the exhaustion of reason is tantamount to an admission that legal actors do not know what they are doing, that the law is, in a word, lawless.[78]

Reason is essential to the rule of law because it is the great hope for access to something beyond the Subject, *viz.*, the law that is out there *objectively*. The self-imposed burden of the reconstructionist is to show

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[76] *Id.* at 1661–62.

[77] SCHLAG, ENCHANTMENT, *supra* note 4, at 20.

[78] *Id.* at 20–21.

how reason can put the Subject into contact with, so that he can be subordinated to and guided by, the object, law.

But what is this "reason" on which depends the avoidance of lawlessness? The question may seem idle or pedantic; after all, Westerners have casually referred to the "faculty of reason" for almost two-and-a-half millennia. It should therefore be easy enough to describe it. And, indeed, to describe it turns out to have been much *too* easy. Reason has been described with almost pathological frequency. And since this marvelous faculty of reason has rarely been thought to be physically isolable (Descartes' association of it with the pineal gland being a conspicuous exception), the descriptions of it have varied widely. The reconstructionist, ever eager to set things right, is at all times ready to shift the ground about *what* reason is in order to ensure *that* reason is (in charge).[79] But from amidst the shifting descriptions and conceptions emerges what Professor Schlag identifies as "ego-centered reason." The world is ego-centered reason's oyster, as Schlag explains: "As its name indicates, ego-centered reason affirms the validity of the rule of reason as determined by the individual rationalist self."[80]

To understand ego-centered reason (and its consequences), it helps to recall Descartes, *the* rationalist. Descartes received from his immediate intellectual forebears the hallowed distinction between *opinio* and *scientia*,[81] and with what was passing under the latter title at the end of the Middle Ages, Descartes was remarkably unimpressed. Medieval thinkers allowed as *scientia* what was supported by the better *authorities*, but the very plurality of "authorities" convinced Descartes that authority itself could not be the source of science. Descartes's next move is familiar to anyone remembering Philosophy 101. Science, Descartes concluded, could be nothing other than what he him-

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[79] *Id.* at 19–29.

[80] Schlag, *supra* note 18, at 1210–11. Rationalist consciousness

> posits a strongly idealist conception of reason in which the rationalist self knows few (if any) limits on its ability to understand and rationalize the world. Ego-centered reason understands that all claims or arguments about the nature of law or the world are addressed to the rational ego itself. The rationalist self is radically free—it need not (and should not) accept any claim that would de-center itself or its reason in adjudicating the nature of reality.

Id. at 1211.

[81] Descartes was heavily imbued with the scholasticism of his period. *See generally, e.g.*, ETIENNE GILSON, ÉTUDES SUR LE RÔLE DE LA PENSÉE MÉDIÉVALE DANS LA FORMATION DU SYSTÈM CARTÉSIEN (1951).

self found indubitable after calling everything into radical doubt.[82] When Descartes undertook to settle what was scientific by subjecting everything to radical doubt, he struck out on his own. "For Descartes . . . what most matters in life is no longer played out in the dimensions of community and tradition."[83] Descartes sought, as Michael Oakeshott put it, "to live each day as if it were his first."[84]

"Has something close to genuine *scientia* been achieved in any area of human inquiry?," asks Jeffrey Stout. "Only, Descartes concludes, in arithmetic and geometry, which now become the model for all science."[85] Knowledge of this sort was, for Descartes in a way reminiscent of Aristotle, the result of an immediate *intuition,* a kind of "mental look." For Descartes, as Stout explains: "One discovers truth in the privacy of subjective illumination, and this truth is underlined by a kind of self-certifying certainty. . . . [W]e are told, in effect, that when it comes to objective certainty, either you have it or you don't."[86] You have it, according to Descartes, exactly if you intuit it or see it clearly and distinctly *with the eyes of the mind.*[87]

Roughly two centuries later Alexis de Tocqueville observed that America was the country where Descartes's precepts were "least studied and best followed,"[88] and only the other day, in his *The Constitution and the Pride of Reason,* Steven Smith called our collective attention to how the Cartesian mentality worked its way into American law. The view at the time of the founding, Smith shows, was that law was to be the product of "reason," and reason in turn was to be the achievement of the lone and doubting individual unshackled from mere authority, unburdened of the weight of the blind accumulation called tradition.[89]

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[82] JEFFREY STOUT, THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY, AND THE QUEST FOR AUTONOMY 49 (1981); *see also id.* at 25–61.

[83] *Id.* at 49.

[84] *Id.* at 7 (quoted without citation).

[85] *Id.* at 49.

[86] *Id.* at 49–50.

[87] *See* DESCARTES, *Rules for the Direction of the Minds, in* THE PHILOSOPHICAL WORKS OF DESCARTES 1, 7–8, 33 (E.S. Haldane & G.R.T. Ross eds., 1911).

[88] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 429 (quoted in Mary Ann Glendon, *Knowledge Makes a Noisy Entrance: The Struggle for Self-Appropriation in Law, in* 10 LONERGAN WORKSHOP: THE LEGACY OF LONERGAN 119, 120–21 (Fred Lawrence ed., 1994)).

[89] STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 25–30 (1998); *see also* ERNEST GELLNER, REASON AND CULTURE 157 (1992). On the complex of philosophical positions adduced to support the Constitution, see also generally MORTON WHITE, PHILOSOPHY, *THE FEDERALIST,* AND THE CONSTITUTION (1987).

Contemporary examples of this mentality—examples, ironically, of summonses to regard reason the way people once did—are ready to hand. Worried that the Right and the Left have united in a conspiracy to debunk reason, Suzanna Sherry commends the Enlightenment notion of reason to law because of its repudiation of "the millennium of superstition, other-worldliness, mysticism, and dogma known as the Middle, or Dark, Ages."[90] Personal revelation and institutional power were no longer valid sources of authority. Instead, the human capacity to reason, in all its splendor, would control the future.[91]

One wonders whether someone writing such things could have any first-hand knowledge of what such as Aquinas, Duns Scotus, and John of St. Thomas managed to say about reason notwithstanding that they had to say it, if at all, during the age some call dark. At all events, Sherry's reason, for all its putative power, remains rather opaque and mysterious. "In some ways," writes Sherry just a page after reason's boast, "it is easier to describe what reason is by explaining what it is not."[92] And predictably, Sherry takes the easier way out, as do so many others.

Though J. Harvie Wilkinson, for example, strikes a more moderate tone, the "reason" to which he tethers the legitimate exercise of the Article III judicial power is equally undescribed. At one point he even suggests that there is nothing to be described, because "reason" is only a cover for more basic judicial commitments: "The law's faith in reason must represent something more. Reasoning is a proxy for other values and preferences: order over chaos, evolution over revolution, thought over passion, prolonged argumentation over precipitate action."[93] One wonders how this differs from saying that science is a proxy for superstition.

Whatever is claimed for reason by such as Sherry and Wilkinson, however, is dwarfed by the super-human reason insinuated into the

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[90] Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 456 (1996) (quoting RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 21 (1993)).

[91] *Id.*; *see also* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997).

[92] Sherry, *supra* note 90, at 455. Sherry goes a long distance toward describing reason as conformity with "logic." *Id.* at 455–56. My own position, as I shall develop it *infra*, is exactly that logic can be used to produce the propositions that intelligence produces, but that "logic" is not itself a criterion by which to judge propositions.

[93] J. Harvie Wilkinson, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 797 (1989)

lap of law by Ronald Dworkin in the "person" of Hercules.[94] Dworkin's mythical judge is well-known to legal readers. So familiar with the man are we, indeed, that we may forget that he is not man at all; the strangeness of thinking of law in terms of a reasoning-machine never incarnate, even in the glory-days of Sherry's Enlightenment, seems to have worn off. But the bizarreness of the enterprise had not escaped John Noonan when he wondered, "[W]hy should this imaginary construct be used to explain the actions of real judges?"[95] To Dworkin and Hercules we shall return later, but now I would just note that Dworkin's Hercules epitomizes the reconstructionist move; so successful is the reconstruction—if fiction counts as success—that what gets built exceeds the merely human artifact that had disintegrated.

Dworkin, along with so many other leaders in today's legal academy, learned enthusiasm for "reason" at the knees of Henry Hart and Albert Saks and their "legal process" materials.[96] Hart and Sacks and their cooperators were not mechanical jurisprudes; indeed, they were acutely aware that persons, and specifically their "reason," would have to be called into service, and about reason Hart and Saks wrote with conviction and force. Infamously, indeed, they instructed the interpreter of a legal text to assume, "unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[97] What holds the whole process together is a *faith in reason*.[98] Reason is believed in, and its hegemony assumed. The faith in reason is strong enough that the Black Box is never opened.[99] And faith remains, of course, exactly what Descartes and the enlightened following him had meant to deliver us from.

> Enlightenment rationality has become so successfully ingrained in our processes, forms, and practices that, ironically, we have (almost) completely lost the quintessentially

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[94] Ronald Dworkin, TAKING RIGHTS SERIOUSLY 105 (1977) ("I have invented, for this purpose, a lawyer of superhuman skill, learning, patience, and acumen, whom I shall call Hercules."). *See also id.* at 105–30.

[95] NOONAN, *supra* note 38, at 174.

[96] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[97] *Id.* at 1378.

[98] *See* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 703–05 (1993); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, *in* HART & SACKS, *supra* note 96, at lxii–lxviii.

[99] *See* Schlag, *supra* note 18, at 1211–12.

> Enlightenment capacity to question. . . . We have come to believe in our own rationality in a fundamentalist manner. . . . The rationality of the Enlightenment has become so successful, so hegemonic, that it has become immobilized through its own institutionalization. [100]

The Enlightenment's faith in reason exceeds in its dogmatism any genuine Christian conception of faith.[101]

Reconstruction—the attempt to take the world by "reason"—has, at the end of the day, less chance of succeeding than the efforts of all the king's armies and all the king's men to reconstruct Humpty Dumpty. The efforts are foreordained to fail because—unlike the case of Humpty—the inherited pieces were never the pieces *of some one.* They cannot be fitted back together, because they never did fit together. Starting *in medias res,* the legal epistemologist is saddled with a sack of shards that simply cannot be united unless and until she understands the principle of that unity—the contents of the Black Box that is human intelligence. That requires, in turn, that she promote herself from an epistemologist into a student of the human Subject, but that promotion is resisted.

C. *Still Falling, for Mystery*

Some legal minds are still pinning their hopes on the Black Box, but others have given up on "reason" as a starting point. Those in the latter camp are eager to find—or create—virtue in *merging* law and law-finder, object and Subject, metaphysics and epistemology. For these minds, "legal meaning is located neither in the subject nor in the object, but in some *unspecified* synthesis, circumvention, mediation, or transcendence of the subject-object relation."[102] Mystery is no longer the embarrassment but the boast.

Consider, for example, Charles Fried's post-reconstruction stance. Lawyers, Fried tells us, know something that even philosophers do not. What is this knowledge known only to the cartel? "The answer is simple: the law."[103] After playing the Hart and Sacks game, one

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[100] Schlag, *Politics of Form, supra* note 4, at 73.

[101] *Cf.* AVERY DULLES, THE ASSURANCE OF THINGS HOPED FOR: A THEOLOGY OF CHRISTIAN FAITH 233 (1994) ("The assent of faith, then, can coexist with a realization that faith is a risk and that it hovers over an abyss of nonevidence.").

[102] Schlag, *supra* note 24, at 1660 (emphasis added).

[103] Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know,* 60 TEX. L. REV. 30, 57 (1981).

might have thought that law was accessible to all (reasonable) people of reason, but not so according to Fried: "There really is a distinct and special subject matter for our profession."[104] Not only that; there is also "a distinct method down there in that last twenty feet"[105] where lawyers alone can go.

> It is the method of analogy and precedent. Analogy and precedent are the stuff of the law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the mass of particular details. Analogy is the application of a *trained, disciplined intuition* where the manifold of particulars is too extensive to allow our minds to work on it deductively.[106]

This, Fried hastens to add, "is not a denial of reason; on the contrary, it is a civilized attempt to stretch reason as far as it will go."[107] But it is, as Fried himself boasts, "an artificial reason."[108]

This is a typical post-reconstruction strategy. While seeming very common-sensical, with lots of talk about such homegrown ingredients as precedent and analogy, the post-reconstructionist tells us—*mirabile dictu*—that there is something wonderful or magical or just-plain-mystical that happens to make law possible. Subject and object are brought together, for example, by "a trained, disciplined intuition."[109] In *The Lost Lawyer*, Anthony Kronman has seen what this is about:

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[104] *Id.*

[105] *Id.*

[106] *Id.* (emphasis added).

[107] *Id.*

[108] When King James I claimed that law's being founded upon reason allowed the king as well as the judges to decide cases, Lord Coke replied that cases were to be decided by something the king lacked, "the artificial Reason" of law. Fried, *supra* note 103, at 39–40 n.15 (quoting E. Coke, Reports 63, 65 (pt. 12, 4th ed. 1738), *reprinted in* 77 Eng. Rep. 1342, 1343 (1907).

[109] Fried is no doubt right that judges, even judges sophisticatedly self-conscious about the judicial process, believe in intuition. Often that belief is tacit, but occasionally it gets explicated, as it did by Cardozo in *Hynes v. New York Cent. R.R. Co.*, 231 N.Y. 229, 235–36 n.3 (1921) (explaining that the maxims found inadequate to decide this unusual case were framed *"alio intuitu,"* thus implying that an *intuitus* would provide the solution to this case, too). Richard Posner takes Cardozo to task for providing in his opinion in *Hynes* "no reason" for his decision in the case. Richard Posner, Cardozo: A Study in Reputation 53 (1990). Posner fortifies his own claim that Cardozo did not, in fact, have a reason present-to-mind by calling attention to Cardozo's extra-judicial admissions about how *Hynes* was decided. *Id.* at 53–54.

> At this point it is tempting to seek refuge in the concept of intuition, a mode of knowing that, as Kant remarked, is distinguished by the immediacy of its relation to its objects. Intuition is a form of understanding, but one that is incapable of discursive explication. Unlike other forms of knowledge, the sense or content of an intuition cannot be conveyed by arguments alone. To have an intuition is just to see that something is the case, to apprehend its obviousness in the same direct way that I apprehend, for example, the shape and color of the book I happen at the moment to be holding. Intuition is thus, in the most literal sense, a form of insight, the intellectual equivalent of physical vision. It is how we see things with the mind's eye.[110]

Aristotle and Descartes, those inveterate believers in intuition, would be delighted. In answering the simple questions, "What am I doing when I am knowing law?," and "Why is doing that knowing law?," the intuitionist would reply, "intuiting" and "just 'cuz." And as Bernard Williams once observed, when the answer is "intuition," the answer is that there will be no answer. What Fried forgets is what Professor Stout recognized as to Descartes himself: "intuitive certainty looks useful only when not needed."[111]

Fried is not alone in trying to do better than Enlightenment reason. I think of the promoters of "craft." Craft, we are told, is the non-

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[110] ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 66 (1993) (citation omitted).

[111] Stout's observation should be given its context:

> A long tradition, often eclipsed from view (even, for much of its history, hidden from itself), has raised analogous questions about Cartesian subjectivity. The problem comes down to this: intuitive certainty looks useful only when not needed. When we need a disagreement settled, inner persuasion, whether philosophical or theological in kind, contributes nothing. Appealing to intuition as the basic tool for the reconstruction of *scientia*, Descartes lands in the same kind of dialectical corner as the Protestant proponents of inner persuasion. In both cases we want to know how to tell genuinely objective certainty from mistakenly heartfelt conviction. But we are told, in effect, that when it comes to objective certainty, either you have it or you don't. Rational disputation grinds to a halt, its gears stripped of what intersubjective norms of discourse would provide. Nothing goes further toward the undoing of Descartes's philosophy than the propositions he confidently presents as intuitive which most of us, several centuries later, are inclined to judge obviously false.

Stout, *supra* note 82, at 50.

algorithmic, indeed unspecifiable, judicial relation to law.[112] It seems to be a kind of mysterious art that deciding judges, at least the good ones, have for producing—but not from whole-cloth—the law.[113]

> The craft notion allows rule-of-law thinkers to maintain a desired ambiguity in answering the question of whether law is principally, or even usually, theory or practice, universal or contextual, immanent or transcendent, and so on. Precisely because the rule-of-law approach represents law as craft—as a way of doing things—the approach is simultaneously easy to recognize in gestalt terms but difficult to identify in terms of its constitutive jurisprudential commitments.[114]

When pressed to make craft seem less mysterious and more plausible, its peddlers are likely to compare it or reduce it to "common sense" or "good judgment" or "practical reason."[115]

But there is in this last move "something tendentious."[116] Craft enters the legal lexicon as an alternative to the disappointments of the reason-driven account of law. But when the *je ne sais quoi* looms *too* large, when someone *really* wants to know what it is and whether it is legitimate, it is fortified by some (unjustified and unanalyzed) allegiance with the very notion(s) it was hailed in to replace. "To say that good judgment allows the rule-of-law thinker to 'know' which doctrine applies when is a bit too self-congratulatory."[117] What we need is an account of what separates good judgment from bad. As long as some *nescioquid* stands at the center of law, whether it be craft or good judgment or even practical reason, law remains essentially "unregulated"[118]—lawless.[119]

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[112] *Cf.* KRONMAN, *supra* note 110, at 211–25; *see also* RICHARD A. POSNER, OVERCOMING LAW 33–80, especially 37–63, 70 (1995).

[113] *See* POSNER, *supra* note 112, at 70 ("When craft is a mystery, the identity of the craftsman conveys valuable information.").

[114] Schlag, *supra* note 24, at 1663.

[115] *See* Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001, 1013 & n.55 (1988).

[116] Schlag, *supra* note 24, at 1665.

[117] *Id.* Schlag continues, "Is good judgment here something more than a nice name for arresting certain potentially problematic lines of inquiry? And if so, is 'good judgment' all that different from 'lack of imagination' or 'intellectual mediocrity?'" *Id.* (footnote omitted).

[118] *Id.* at 1661.

[119] *See id.* at 1660. There are, as Schlag would be quick to concede, abundant instances of legal theories that invoke these concepts without ending in self-conscious mystery; of these I shall give some examples below. *See infra* text accompanying notes 120–134.

The question that remains after metaphysics, epistemology, and mystery have failed jointly and severally to make *law* plausibly possible is this: Is there in the house a Subject cognitively competent to realize law and its rule? The question can be avoided but not escaped; the rule of law is certainly not inevitable, but it may be possible. To know whether it is, the Subject himself has to come in for analysis. The Subject has to be for a moment not a problem but precisely the object of inquiry.

D. *Intimations of the Subject*

Throughout this Part, I have been categorizing and exemplifying approaches to law according to which of three issues they resolve first (either explicitly or implicitly). So far, I have considered those that primarily proceed from either a metaphysical or an epistemological stance, or from a studied preference for a mysterious half-way house. So far, moreover, my analysis has paralleled that of Pierre Schlag, as the preceding pages indicate. The reason is that Schlag's postmodernist project is, like my project, about getting to the place of the Subject in law. As a result of this commitment to ferreting out the Subject in law, Schlag is among the few legal analysts who have seen clearly what the next step must be, after metaphysics, epistemology, and merger fail: "a cognitive approach to law."[120]

But here, somewhere in this vicinity, Schlag and I part company, and it is important to see exactly where and why. Schlag adopts a "cognitive approach" to law, but his purpose emphatically never extends to making familiar what human Subjects do cognitively. Schlag adopts a "cognitive approach" because "cognition is a foreign territory for legal thinkers."[121] A "cognitive approach" is Schlag's tool for his primarily negative project to work a "diremption"[122] from lawyers' largely unnoticed captivity to a Black Box. So captivated by reason are we, according to Schlag, that we "scorn Cartesian rationalism"[123] only to subject its successors to some version of a rationalist analysis.[124] "When one is enchanted by reason, it does not feel like enchantment at all. Instead, it feels quite reasonable."[125]

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[120] *See* Schlag, *supra* note 18, at 1195.

[121] *Id.* at 1246.

[122] *See id.* at 1208–09.

[123] *Id.* at 1198.

[124] *See id.* at 1204–05.

[125] SCHLAG, ENCHANTMENT, *supra* note 4, at 1. Mary Ann Glendon has a slightly different way of making the same point, from a very different angle:

Schlag claims to be unenchanted, unimpressed by what is said to be reasonable. So am I. But what I hope to show in the remaining parts of this Article is that while Schlag is right to try to place the Subject within law, and while Schlag is right to criticize the approaches to law that exalt "reason" without understanding what it is, Schlag is too quick to jettison human intelligence in its unreified form. An accurate recovery of the cognitive *processes* of the Subject leads to a rehabilitation, rather than a dismissal, of the place of intelligence in human life and law. Like Schlag, I think we need to think about how to think.[126]

If Schlag stops well short of my project, verging on my project is the rich and probing work of Steven Winter. Professor Winter is among those who have appreciated the place of metaphor, and specifically spatial metaphor, in forming the ways and contents of our thinking.[127] Like me, Winter wishes "to reconceptualize law in light of what we are learning about the human mind."[128] Also like me, Winter concludes—a conclusion I have yet to justify—that "law is no different than any other product of human cognition."[129] Again like me, Winter concludes that human thought is shaped—metaphorically, of course—by the metaphors it uses.[130] Winter concludes, finally, that

> [o]ur problems with law are products of human rationality. Because it is "LAW," it pretends to clothe itself in objectivity and invites us to expect more than human rationality can deliver. Disillusioned, some overreact and proclaim loudly that the emperor has no clothes at all. Understanding the cognitive structure of law itself may help us redress our very human dilemma. We are not entirely naked, but the threads we

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> Comparative analysis can often shed light on a problem by throwing into relief those of our own practices that escape attention just because they are so familiar. Statutory interpretation affords a telling, though embarrassing, example. Film buffs will understand if I put it this way: when it comes to dealing with statutes, we American lawyers are like Igor in the scene from *Young Frankenstein* where Gene Wilder as the doctor says, "Perhaps I could do something about your hump"—and Marty Feldman as Igor replies, "What hump?"

Mary Ann Glendon, *Comment*, *in* A Matter of Interpretation 95 (Amy Gutmann ed., 1997).

[126] *See* Schlag, *supra* note 18, at 1205 ("The debates have become far too subdued. It is thus no surprise that epistemological and hermeneutic inquiries in law are widely understood to be about *what to think* (substance) as opposed to the infinitely more disturbing *how to think* (form).").

[127] *See supra* text accompanying notes 50–51.

[128] Winter, *Transcendental Nonsense*, *supra* note 51, at 1106–07.

[129] *Id.* at 1106.

[130] *See, e.g.*, *id.* at 1136–59.

> wear are surely woven by human hands. We need to know that, and to take it into account in assessing our predicament. Some urge us to go further and replace law with something else, such as a frankly political discourse. But that would not ameliorate our predicament. We will still be who we are.[131]

We shall still be who we are, indeed. But the question is, "Who are we?" What Winter has told us, relevantly, is that law proceeds through metaphors that the mind's make-up makes likely but not necessary.

> LAW is a purely human creation, an imaginative product of the human cognitive capacity. To understand the cognitive structure of LAW is . . . to understand law's *social* meaning. Because we "routinely speak these ideas and images to each other," they are constitutive of our social reality. To understand law as a cognitive construction from these lived dimensions of experience is to see [sic] that theories of law based on positivism and natural law are inherently wrong because they are incomplete; each procrustean principle merely captures one aspect of a more complex cognitive dynamic.[132]

That more complex cognitive dynamic, alas, is never fully revealed by Winter. The contingency of the language of law is unmasked by an exploration of its cognitive origins, but cognition itself is never fully probed. Winter must go on to warn of law's "inevitable violence"[133] because he has failed to discover and follow the true normative dynamic—the inner law—that assembles and structures the otherwise contingent parts of law he has identified. It is to an analysis of that that I now turn, answering Winter's question, "Who are we?"[134]

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[131] *Id.* at 1198.

[132] *Id.* at 1222–23 (citation omitted). Winter's most recent work moves beyond this in promising ways. It came to my attention too late for consideration here. *See generally* WINTER, CLEARING IN THE FOREST, *supra* note 51.

[133] Winter, *Transcendental Nonsense, supra* note 51, at 1223.

[134] Neil MacCormick also has seen that *this* is the question to be answered.

> The point is that we must attend to the data of our own and others' imputed *consciousness* in making sense of 'the world of the ought.' On this view, conceptual inquiries into normative terms or concepts and the uses we make of them stand not in contrast with, but as a variety of, empirical inquiry. That the only available data are immediately available data revealed by our self-awareness as conscious acting subjects engaged in intelligible interaction with

III. The Subject

> *[M]an observes, understands, and judges, but he fancies that what he knows in judgment is not known in judgment and does not suppose an exercise of understanding but simply is attained by taking a good look at the "real" that is "already out there now."*
>
> —Bernard Lonergan[135]

The question to which I come is whether—and if so, how—the human Subject is cognitively competent to create a rule of law. To answer that, I turn to the Subject, and invite you, the reader, to explore with me the operation of your own cognition.[136] The burden of this Part is to discover you, the Subject, in your cognitive dimension.

A. *Neither Linguistic Analysis Nor Phenomenology—Nor Even Scholasticism*

This exercise in self-discovery is suggested and will be guided by the work of Bernard Lonergan (1904–84), a thinker little known in the academy in the United States today, but "considered by many intellectuals," according to *Time* magazine in the 1960s, "to be the finest philosophic thinker of the 20th century."[137] While Lonergan's name and language will appear in the text, my purpose—it will not be amiss to repeat—is less to write about some third-person called Lonergan than to achieve something of Lonergan's own purpose, *viz.*, to acquaint people with their own cognitive processes and, by helping them to understand how their efforts at knowing fail or succeed, to introduce them to that "fixed base" from which knowing proceeds and can be criticized.[138] Still, a word of introduction to this figure so foreign to law is in order.

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other like subjects does not make them less respectable or genuine than those amassed by "external" observation.

Neil MacCormick, Contemporary Legal Philosophy: the Rediscovery of Practical Reason 3 (1983). MacCormick and I differ on how the data of one's own consciousness are known. *See infra* text accompanying notes 182–186.

[135] Lonergan, *supra* note 30, at 412.

[136] *See, e.g.*, Schlag, *supra* note 24, at 1673 ("The problem is one of the subject: is there anyone who is normatively and epistemically competent to make the Constitution to mean *in a way that Fiss might approve*?") (emphasis added).

[137] Time, Jan. 22, 1965, at 60.

[138] Joseph Flanagan, Quest for Self Knowledge: An Essay In Lonergan's Philosophy 11 (1997) ("Lonergan himself always insisted that his purpose was to put people in touch with themselves so that they could learn to philosophize out of their own concrete, actual experiences.").

Lonergan was a member of the Society of Jesus, a Jesuit, and spent a long interval teaching and writing in Rome, in Latin. But if this curious fact goes a long way to explaining the relative obscurity of so brilliant a thinker, the reader should not infer from it that Lonergan was at all provincial. Much of Lonergan's lecturing and teaching (including at Harvard), and certainly what he regarded as his most significant books, *Insight: A Study in Human Understanding* (1958) and *Method in Theology* (1972), were in English. The leading reason for Lonergan's relative obscurity, apart from the sheer intellectual difficulty of his pathbreaking work, is perhaps the related fact that he philosophized in neither of the two leading philosophical traditions of the twentieth century, *viz.*, analytic philosophy and phenomenology. Lonergan came out of the Scholastic philosophical tradition, but his own interests and aspirations were universal and ecumenical. "[B]ecause of his own quite original understanding of the achievement in modern mathematics and science and his own retrieval of Aristotle's and Aquinas's thought,"[139] Lonergan sought to establish the unified ground of all potential human knowing. A review of Lonergan's book *Insight* in *Newsweek* captured the movement of his mind: "With that boldness characteristic of genius Jesuit philosopher Bernard Lonergan has set out to for the twentieth century what even Aquinas could not do for the thirteenth: provide an 'understanding of understanding' that can illuminate not only the broad patterns of all accumulated knowledge but also reveal an 'invariant pattern' for further developments in human understanding."[140] Working out the implications of the invariant structure of human understanding, Lonergan's writings ranged from logic and natural science through theology and philosophy to economics and political science. Lonergan never applied his insights to law in a more than passing way.

What a sustained application of Lonergan's account of knowing promises for law is an identification of the formative and normative role of the *question* in legal knowing, a most consequential fact overlooked by most philosophizing since Socrates and little appreciated in contemporary jurisprudence. To the extent it is informed by Lonergan's insights, then, this Article too cannot be assimilated to the products of either analytic philosophy or phenomenology. What Lonergan has to say about human cognition, which I am attempting to press into law's service, cuts against the grain all the way down. The

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[139] *Id.* at 12.

[140] *A Great Christian Mind*, NEWSWEEK, Apr. 20, 1970, at 75.

reader is asked to be patient with the project. Because Lonergan's own language can be difficult, I shall also rely on the words of Joseph Flanagan, one of Lonergan's most lucid yet creative expositors.[141] Flanagan's work, like Lonergan's, aims to acquaint people with the processes by which they in fact know. Flanagan's language is well-tailored to this purpose, at least if one gives it a chance to operate. Further, it is neither, and aims to be neither, analytic philosophy nor phenomenology.

Throughout, this Part is primarily an invitation to self-appropriation—as described above, a taking hold of the activities by which you, the Subject, know what you know, if you know anything at all. After the basics have been set out, I shall in a more explicit way ask you, the reader, to conclude for yourself whether you know anything at all, and, if you do, how you do. Whether the reader can agree with my conclusions, or will have to revise them, will depend on the results of her own self-appropriation. The reader is asked to assent to no more and no less than can be verified "through research in the laboratory of self."[142]

> [T]he dynamic, cognitional structure to be reached is not . . . the abstract pattern of relations verifiable in Tom and Dick and Harry, but the personally appropriated structure of one's own experiencing, one's own intelligent inquiry and insights, one's own critical reflection and judging and deciding. The crucial issue is an experimental issue, and the experiment will be performed not publicly but privately. It will consist in one's own rational self-consciousness clearly and distinctly taking possession of itself as rational self-consciousness. Up to that decisive achievement, all leads. From it, all follows. No one else, no matter what his knowledge or his eloquence, no matter what his logical rigour or his persuasiveness, can do it for you.[143]

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[141] Some readers of Lonergan find his prose style off-putting. Others among his readers find his style not only fine but compelling. Lonergan himself seems to have chosen his language carefully. *See* Frederick E. Crowe, *Preface to* 4 BERNARD LONERGAN, COLLECTED WORKS OF BERNARD LONERGAN, at xiii–xiv (Frederick E. Crowe & Robert M. Doran eds., 1988).

[142] Michael Vertin, *Is There a Constitutional Right of Privacy?*, *in* 16 LONERGAN WORKSHOP: LONERGAN AND THE HUMAN SCIENCES 1, 46 (Fred Lawrence ed., 2000).

[143] LONERGAN, *supra* note 30, at xviii.

This is research in the laboratory of the self; nothing more, nothing less. There is in it no dogma, only your self.

B. *What I Am Doing When I Am Knowing, and Why That Is Knowing*

The famous first line of Aristotle's *Metaphysics* is his report of what he thought he knew to be true of all people—that by nature they desire to know.[144] What Aristotle thought to be true of all Toms, Dicks and Harrys, I experience to be true of me; it may be true of you, but only you can know that. I find myself continually curious to figure things out, to catch on, to know what is meant. Though I can neither see nor hear nor smell nor taste nor touch it, I discover in myself an *active wonder*—a dynamic desire to know. "Operative within . . ."—marvels Lonergan—"is the Eros of the mind, the desire and drive to understand . . . ."[145] So awash are we in e-mail and the Internet and our potency to manipulate "information" that we may startle to face the fact about ourselves that what gets the data-gathering engine jump-started in the first place is a *desire* to know.

Ever fresh but unable to exhaust the basic wonder that drives me to know, questions are its constant manifestation. "This primordial drive [to understand] is the pure question. It is prior to any insights, any concepts, any words, for insights, concepts, words, have to do with answers; and before we look for answers, we want them; such wanting is the pure question."[146] These questions of mine, exactly because they are *questions*, call for answers. They call for and will be satisfied by nothing less than discovery—by nothing other, though perhaps quieter, than the Archimedean "*Eureka*, I've got it." The questioning in which my wonder, my natural desire to know, constantly and spontaneously issues is my most basic heuristic.[147] A heuristic is what guides

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[144] ARISTOTLE, THE COMPLETE WORKS OF ARISTOTLE 1552 (Jonathan Barnes ed.) (I.1, 980a1) ("All men by nature desire to know.").

[145] LONERGAN, *supra* note 30, at 221. Lonergan knew that the desire could be evaded. As Mary Ann Glendon observes, "Our intelligence leads us to wonder, and to formulate questions. (At least that is the way it's supposed to work. Lonergan once remarked to some lethargic students in a Boston College class on *Method in Theology* that I audited: 'If you don't wonder, you won't try to understand; you'll just gawk!')." Glendon, *supra* note 88, at 125. The fact and likelihood of evasion of the dynamic desire to know will, indeed, require intelligent response. *See infra* text accompanying notes 146–153.

[146] LONERGAN, *supra* note 30, at 9.

[147] "The basic heuristic is the question that guides you toward an insight by transforming inner or outer sensible experiences into potentially intelligible experiences, known unknowns. Questioning, then, is a spontaneous, a priori way of knowing your own not knowing, and of leading you toward an insight. Questioning is not itself an a priori under-

toward a "*Eureka.*"[148] The questions I ask are the fundamental tool by which I discover what I do not know. They are questions, because I lack their answers. Without these questions, there could be no answers, no coming to know.[149]

These spontaneous questions do not occur in a vacuum. I not only question; I also *experience.* By "experience" I mean the sensory flow, constant while I am awake, of my sensing as well as my imagining, feeling, and remembering. Over these I have some but not total control. Whether I like it or not, through my neurophysiological structures I am steadily experiencing sights, sounds, smells, memories, and so forth.[150] And regardless of whether they occur under or out of my control, the contents of the sensory flow are for me givens—"data" in the root sense of that word.

This experiencing is not—much of Western philosophy to the contrary notwithstanding—knowing. If the data of my experience themselves made me a knower, there would be no point to questioning them. But, as I began this section by observing, I *do* question, and what I question—to begin with—are the data of my experience. And there is to my questions a point: this questioning is heuristic; it undertakes to discover something in what has been presented. By gawking at or even pawing the Rosetta stone, I'll never approach its meaning; to head toward meaning I have to *question* what I see.

What I am claiming may seem—because millennia of philosophizing have made it seem—obscure, but it is really very plain. It is,

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standing, but it does disclose that a questioned experience is an understandable experience." FLANAGAN, *supra* note 138, at 95.

[148] Archimedes' *"Eureka"* is simply the first person active perfect of the Greek verb *heuriskein,* "to discover," of which the English word, heuristic, is the adjectival or, by now also nominal, form. HENRY GEORGE LIDDELL & ROBERT SCOTT, A GREEK-ENGLISH LEXICON 729 (1985) (see under heurisko); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1064 (1961) (see under heuristic).

[149] I have chosen to be guided by Lonergan's phenomenology of cognition and of the question because it is the one I can validate in my own experience. But if no other thinker's account of human cognition and of the place in it of the question has surpassed Lonergan's, it should also be said that others, such as Socrates, Aristotle, and Bacon, certainly have gone far in appreciating "the question." MICHEL MEYER, QUESTIONS AND QUESTIONING (1988); TRACY, *supra* note 50, at 18–27. For a rich modern analysis of the question's place in human understanding, see 4 ERIC VOEGELIN, ORDER AND HISTORY THE ECUMENIC AGE 316–35 (1974); *see also* R.G. COLLINGWOOD, THE IDEA OF HISTORY 269–74 (rev. ed. 1993); ESTHER N. GOODY, QUESTIONS AND POLITENESS 1–43 (1978); DAVID GRANFIELD, THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY 206–07, 217, 251 (1988); Alain Lempereur, *Law: From Foundation to Argumentation,* 24 COMM. & COGNITION 97, 106 (1991).

[150] *See* FLANAGAN, *supra* note 138, at 81.

after all, only when I stop gaping at the black marks I see on the page and *ask* what they are that I am on the way to *knowing* anything. This questioning, though it takes many grammatical forms, is of the sort, "What is it?" As Joseph Flanagan explains,

> [t]he key to your ability to arrive at [an] answer is the way your question orients you toward that answer, even while not knowing what that answer is. In other words, the answer is not simply an unknown; rather, it is a known unknown. The question reveals your questioned experience as a possibly intelligible experience . . . .[151]

As questioned, experience reveals experience to be as far as I have come, the limit of current "knowing;" but as questioned, experience is also transformed into an opportunity for me, the experiencer, to become a knower. It transforms mere experience into a *known-unknown.*

The movement from experience to knowledge by way of questioning is not automatic, however. My questioning starts the process moving, but an answer is not inevitable. Staring at the black marks and asking, "What are they?," does not itself generate an answer. Some flash, some catching on, is required. Lonergan calls that act an "insight." What insight does is to postulate an intelligible pattern in the given data.[152] Insights, like the dynamic desire to know, are not visible; but they occur—at least they are a part of my conscious life, when, for example, I think that I have caught the meaning of some cartoon, or think that the markings on the wall mean something. These insights, these "catchings on," are remarkable cognitive events. They transform you, all of a sudden, from a dolt into a person with a bright idea, from someone who simply experiences to someone who understands. As Flanagan points out:

> [O]nce Newton had grasped that problems of quadrature were the reverse of ordering tangents, he could not understand how Fermat and Pascal could possibly have missed this point. After all, Newton mused, it was lying right there in the

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[151] *Id.* at 17; *see also id.* at 158–59.

[152] Lonergan would also say, and mean by it the same thing, that the insight offers an "interpretation" of the data. I have avoided talking this way, however, so that it will be clear that what most legal theorists refer to as "interpretation" requires not only what Lonergan calls interpretation but also "judgment." *See infra* text accompanying notes 167–173.

> diagrams on the paper in front of them. He assumed that they must have had "bandages over their eyes."[153]

What Fermat and Pascal lacked was not the experience that is ocular vision. What they lacked was insight. An insight is what Archimedes had, all of a sudden, in the baths of Syracuse.

Insights cannot be forced. When we try to catch on and simply do not, insight cannot be compelled to occur. But if the *exact* preconditions of insight cannot be specified,[154] still much can be said about how to make their occurrence more or less likely.[155] Insights can be made more probable, as Lonergan argued strenuously, by filling the mind with questions or, more precisely, by letting the dynamic human eros to know unfold in questions.[156] "[T]he mind needs to be well-stocked more with questions than with answers," wrote Lonergan, "else it will be closed and unable to learn."[157] Socrates, by the questions he asked, made it more likely that the slave boy, Meno, would

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[153] FLANAGAN, *supra* note 138, at 16–17 (citation omitted).

[154] Mary Ann Glendon, *Comparative Law as Shock Treatment*, 11 METHOD: J. OF LONERGAN STUD. 137, 137(1993) ("Insight, Lonergan teaches, is mysterious.").

[155] Bruce Anderson, *Current Views on Legal Reasoning: The Problem of Communication*, 15 METHOD: J. OF LONERGAN STUD. 151, 161 & n.15 (1997) ("Mary Ann Glendon . . . writes 'Insight, Lonergan teaches, is mysterious.' . . . In my opinion, Lonergan does not teach us that insight is mysterious. Lonergan's book *Insight* goes some way toward explaining the nature of insight."); *cf.* Glendon, *supra* note 154, at 137–39 (noting how insights become more likely through participation in vital traditions of collaborative pursuit of knowledge); *see infra* text accompanying notes 156–172.

[156] As Lonergan wrote:

> [I]nsight is a function, not of outer circumstances, but of inner conditions. Many frequented the baths of Syracuse without coming to grasp the principles of hydrostatics. But who bathed there without feeling the water, or without finding it hot or cold or tepid? There is, then, a strange difference between insight and sensation. Unless one is deaf, one cannot avoid hearing. Unless one is blind, one has only to open one's eyes to see. The occurrence and the content of sensation stand in some immediate correlation without outer circumstance. But with insight, internal conditions are paramount. Thus, insight depends upon native endowment and so, with fair accuracy, one can say that insight is the act that occurs frequently in the intelligent and rarely in the stupid. Again, insight depends upon a habitual orientation, upon a perpetual alertness ever asking the little question, "Why?" Finally, insight depends on the accurate presentation of definite problems. Had Hiero not put his problem to Archimedes, had Archimedes not thought earnestly, perhaps desperately, upon it, the baths of Syracuse would have been no more famous than any others.

Lonergan, *supra* note 30, at 5.

[157] BERNARD LONERGAN, *Method: Trend and Variations*, *in* A THIRD COLLECTION: PAPERS BY BERNARD J.F. LONERGAN, S.J., 13, 17 (Frederick E. Crowe ed., 1985).

understand how to double the area of a square. In addition to questions, images are also helpful. To understand in mathematics, for example, it may help to have diagrams. Socrates provided Meno with some.

But in addition to the helpful but dispensable diagrams in the sand or on a blackboard, there are the images that are *in*dispensable to our thought. We have already observed these in action in the metaphors of language and of legal language specifically.[158] But before they are in written or spoken language, these images (and others) are in our *mental* language. Without these internal images, as Aristotle long ago noticed, we cannot think.[159] For example, we define a point as a position without magnitude, and as we think about the mathematical intelligibility that is the point, we do so with an image, a mental picture that has magnitude. Try thinking about a point without having in mind an image that possesses magnitude; it is not, for me, possible.

About the risks of these indispensable mental images there will be something to say later.[160] The immediate point—the critical one—is that the images are not themselves what the mind knows. When the mind knows, for example, a point, it knows what has no magnitude; yet because it knows this *through* an image that does have magnitude, it is tempted to think that the image itself is what is known.[161] Lonergan refers to this as picture thinking, the notion that the pictures through which the mind knows are the limit of what the mind in fact "knows."[162] But what the mind reaches is not just a mental picture but the reality of which the image is a mental picture. What the mind reaches in insight is not removed from reality but, rather, reality itself in its intelligibility.

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[158] *See supra* text accompanying notes 41–52.

[159] Aristotle found it impossible. ARISTOTLE, *supra* note 144, at 685-86 (DE ANIMA III.7, at 431a14–15, 16–17, 431b1) ("[T]he soul never thinks without an image.").

[160] *See infra* text accompanying notes 243–250, 355–416.

[161] Flanagan writes:

> To define a point as a position without magnitude means conceiving an intelligibility that refuses to be limited by images. Images have size, but positions without magnitude have no sizes, not even infinitely small sizes. The intellect has broken through to the realm of pure intelligibility, yet intellects still need images to think even though they can and do transcend these images. The trick is to grasp that the images are simply heuristic or pointers.

Flanagan, *supra* note 138, at 38.

[162] *See* LONERGAN, *supra* note 30, at 164–68.

Or at least insights purport to accomplish this. Not all insights are created equal, however. "[I]nsights," as Lonergan liked to say, "are a dime a dozen."[163] Mary Ann Glendon puts the point more sharply: "Some are duds."[164] This point is critical: None comes stamped with the certitude claimed for "intuition" by Aristotle and Descartes. We can think we have caught the joke, but might the joke be on us? We think that the graffito on the wall means that Peter was thought to be buried there, but might it be a collection of chance markings meaning exactly nothing? We can think that geometrical quantities cannot be multiplied and divided (as numerical quantities can be), but might we be wrong? The insight that postulates an intelligibility in the givens of experience may be correct, or not. The understanding may be right, or wrong. Insight and the understanding it generates are not yet knowledge.

An understanding that may or may not be correct is not the end. The mind is after not only understanding, not only bright ideas; it is also after whether those insights are correct, whether the understanding has gotten reality right. We wonder whether we are correct, so we question the insight. Insight was an answer to the question, "What is it?" The discovery whether an insight is correct or not is itself the answer to another question, indeed to another *kind* of question, the "Is it so?" question. We ask of what is proposed in the insight, "Is it so?" We ask, "Is the joke *really* another one about lawyers?" "Does this *in fact* mean that Peter was thought to lie here?" "Can geometric quantities *actually* be multiplied and divided?"[165] When what the original insight proposes is then subjected to further questioning, it is transformed into an hypothesis, an idea in need of verification.[166]

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[163] LONERGAN, *supra* note 23, at 36.

[164] Glendon, *supra* note 88, at 125.

[165] On this insight in the history of mathematics, see FLANAGAN, *supra* note 138, at 39; *see also* CARL B. BOYER, HISTORY OF ANALYTIC GEOMETRY 61 (1956).

[166] Flanagan writes:

> The question, Is it so?, ... does two things. First, when an idea, opinion, proposition, or scientific law is questioned in this way, it is transformed into a questionable idea. It becomes an idea or hypothesis that stands in need of verification. You may think you have a brilliant idea, but spontaneously you find yourself wondering, Is it so? Once this critical wondering begins, then your idea is transformed into a conditional idea that may or may not be true. Second the question, Is it so?, is a normative orienting that directs you toward a judgment that you have not yet judged. We already pointed out that a questioned experience is a known-unknown. Now we are identifying a second known-unknown, namely, a questioned idea that is known as a possibly intelligible idea, but unknown as an actually intelligible idea. Thus your desire to

"Is it so?" questions call for answers different in *kind* from the answer to the earlier "What is it?" question. The answer to the "Is it so?" question depends upon another—indeed another *kind* of—insight. Insight of the sort I earlier described might be called a "direct insight," because it proposes an intelligibility to be found *in* the data. Insight of the second sort Lonergan refers to as a "reflective insight." This latter sort of insight is the result of the Subject's reflecting on whether the data in fact support the bright idea proposed by the direct insight. The reflective insight is an answer to the question, "Do the data support the hypothesis?" The issue settled in the reflective insight is, in a word, the sufficiency of the evidence.

> According to Lonergan, direct insights occur frequently and are "a dime a dozen." But direct insights do not necessarily discover truth. Some insights may be correct and others may be wrong. Critical reflection . . . is initiated by puzzling and by questions that ask "Is it true?" "Is it so?" These questions lead to reflective insights and judgments of fact. The attitude of the inquiry is characterized by the question—"Is-it-so?" Questioning leads to *reflective insights* which discover the link between prospective judgments and the sufficiency of the evidence for making *judgments of fact* regarding the truth or falsity of direct insights and formulations.[167]

The reflective insight settles the question *whether* the data show that the joke is actually about lawyers, that the marks on the wall in fact mean to identify the place of Peter's rest, that geometrical quantities can indeed be multiplied and divided. The question is settled when, pursuant to the reflective insight, I *judge* the data sufficient or insufficient to sustain the direct insight. The answer to the "Is it so?" question is a *judgment.* It is in judgment, and exactly in a judgment, that knowledge occurs.

Your own experience of "judging" this or that may be familiar enough that you, the reader, are disposed to accede to Lonergan's

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> question spontaneously takes you, first, beyond sensible experiences into the field of intelligible experiences and, second, beyond possibly intelligible experiences into the field of actually intelligible experiences. Wondering does this spontaneously, normatively, and with a certain amount of nagging insistence.

Flanagan, *supra* note 138, at 122.

[167] BRUCE ANDERSON, "DISCOVERY" IN LEGAL DECISION-MAKING 98 (1996); *see also* Glendon, *supra* note 88, at 125 (describing the process of reflection).

claim that within our cognitive life we make judgments. But what Lonergan claims for judgment's place in cognition is not at all banal, and should not pass unnoticed. Lonergan's claim is not that by judging the Subject becomes an opinion-holder, nor even that the Subject takes possession of "justified belief." Lonergan's claim is that thanks to reflective insight, preceded by experience and direct insight and reflection, the Subject in judgment can become a *knower.*

Lonergan's explanation of how reflective insight occurs, thereby transforming understanding into knowledge, is of the sort that has seemed to some unsatisfying. It was, for example, only slightly out of context that Richard Rorty grumbled (as only he can) that "[i]n no case does anyone know what might count as a good answer."[168] And there is, it must be said, *something* of a mysterious quality to reflective insights, as there was to direct insights. But also like the preconditions of direct insights, the preconditions of reflective insights can be understood and to some extent arranged. First, questions for reflection must be allowed to occur. Second, all the relevant questions must be answered. Third, the evidence must be judged sufficient or not. Fourth, there is no fourth step. As Lonergan explains bluntly,

> [A]n insight is correct if there are no further, pertinent questions. At once it follows that the conditions for the prospective judgment are fulfilled when there are no further, pertinent questions. Note that it is not enough to say that the conditions are fulfilled when no further questions occur to me. The mere absence of further questions in my mind can have other causes. . . . As the mere absence of further questions in my mind is not enough, so it is too much to demand that the very possibility of further questions has to be excluded. If, in fact, there are no further questions, then, in fact, the insight is invulnerable; if, in fact, the insight is invulnerable, then, in fact, the judgment approving it will be correct.[169]

To follow Lonergan's self-appropriation is to get used to the discomfiting reality that questions are the sole measure of our knowing. If, but only if, all relevant questions have been answered, the insight is invulnerable and knowledge has been achieved in the judgment that the evidence is sufficient. The real difficulty is to grasp—and then to

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[168] RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 341 (1979).

[169] LONERGAN, *supra* note 30, at 284–85.

live by—the fact that in the process of coming to know, *the asking and answering of questions is not epiphenomenal.*[170] Quite simply: "[P]rior to the criteria of truth invented by philosophers, there is the dynamic criterion of the further question immanent in intelligence itself."[171]

This is Lonergan's stance on the second of the three basic issues that I developed in Part II, the epistemological issue—Lonergan's answer to the question, "Why is doing that—*i.e.*, asking and insightfully answering questions through experiencing, understanding and judging—knowing?" The reason that the process of asking questions and insightfully answering them in judgment produces knowledge, according to Lonergan, is that inasmuch as questions for reflection—the "Is it so?" questions—are transcendent, so must their answers be. Questions for reflection are "transcendent" in the sense that they go beyond—they transcend—mere bright ideas that are a dime a dozen, to ask whether what intelligence has proposed is *really* so. And thus their answers, if there be any (one can be intellectually inert or uninsightful), will be transcendent, statements of what really *is*. "[A]nswers are *to* questions, so that if questions are transcendent, so also must be the meaning of corresponding answers. If I am asked whether mice and men really exist, I am not answering the question when I talk about images of mice and men, concepts of mice and men, or the words, mice and men."[172] The crucial issue, of course, is whether Subjects *in fact* answer questions, whether transcendence *in fact* occurs.

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[170] *See* LONERGAN, *supra* note 3, at 198–99 & n.37 ("Knowing consists in answering questions. Meaningless questions and meaningless answers are neither questions nor answers. If our knowledge is constituted by answering questions, our knowledge is constituted by meaning. . . . Now this view of human knowing is extremely paradoxical for the perceptionist, for a man like Kant—to whom our knowing is in immediate relation to the known only through *Anschauung*, taking a look (for Kant, what you take a look at are phenomena)—or for [Etienne] Gilson, for whom our knowledge is not merely idealist and logical, but is of things that really exist outside the mind insofar as, beyond taking a look with our eyes, we also take a look with our intellects. According to the formulation, or the caricature, we look with the eyes of the body and we see particulars; we look with the eyes of the mind and we see universals. We look again, and we see the nexus between universals, and so reach principles. We look still once more to see the connection between propositions, and so we arrive at syllogisms. Knowing consists in looking on that view. . . . [Q]uestions and answers are a mere epiphenomenon, a manifestation, expression, of the looking that constitutes knowing."). A comparison of Lonergan's and Kant's cognitional stances is beyond my compass here, but see generally GIOVANNI B. SALA, LONERGAN AND KANT: FIVE ESSAYS ON HUMAN KNOWLEDGE (Robert M. Doran ed., 1994).

[171] LONERGAN, *supra* note 30, at 221.

[172] BERNARD LONERGAN, *Cognitional Structure*, *in* 4 BERNARD LONERGAN, COLLECTED PAPERS OF BERNARD LONERGAN 213 (Frederick E. Crowe & Robert M. Doran eds., 1988).

We come to the transcendental argument of which the reader was warned in the Prologue.

C. *A Transcendental Interlude*

No human need be a knower. The ground of human knowing is not necessity but contingent fact. Whether one is in fact a knower—whether you are a knower, whether I am a knower—is itself a question to be answered.

So, are you a knower? The question, you will notice, does not ask whether you know some *thing*. Nor does it ask whether you must or will always be a knower. It asks, rather, that you make a concrete judgment of fact about whether you are now a knower. This requires what above I called research in the laboratory of the self. The difficulty of such research is that your *experience* of yourself makes you assume that you *know* yourself. But mere experience is not knowledge, *not even in the laboratory of the self*. Though our experience of ourselves is immediate, our knowledge of self is, as all our other knowledge, mediate—that is, it is mediated through the process of questions and answers based on insightful understanding and judgment of experience.[173] There is, in my cognitive life, no "intuition" that will enter to provide direct and certain access. To know whether you are a knower, you have to question and insightfully understand and judge the experience of your self. This is what I have referred to as self-appropriation.

So, the question remains, are you a knower? You may not be, in which case you will have nothing to say—because you will not understand, among other things, my question. But if you answer, "yes" or "no," "maybe" or "maybe not," you *are* a knower. Why? Because you could not (meaningfully) respond if you had not first known. Not only that. The fact of your response is itself evidence that you know through the pattern of acts I have described. Why? Because in the process of responding to my question, at the very least in seeing my black marks on the page, you will have experienced; through questioning that experience insightfully and understanding my meaning, you will have reached an hypothesis about it; and questioning that hypothesis and concluding whether the evidence was sufficient for your hypothesis, you will have judged.[174]

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[173] *See* FLANAGAN, *supra* note 138, at 134–35.

[174] For more execution, as well as explication, of transcendental argument in Lonergan's terms, see *id.* at 134.

Such, then, is the transcendental argument for how you know. It capitalizes on your performance as a knower and on the prospect of pointing out to you your operative self-contradiction. The point of such argument is not to "prove" to you, in the sense of demonstrating a mathematical proof or hitting you over the head, that you are a knower or that you know in the way I have proposed.[175] Rather, my pointing out to you that prior to argument and quite apart from demonstration, you are a knower, and this thanks to a series of acts structured and assembled through the questioning that issues from the basic human eros to know, is an invitation to you to grasp what you are already doing and to fathom its implications. Again, you may deny my claims; you may disavow that you are a knower. Indeed, you may not be a knower. Once you have experienced my claims, understood them, and denied them, however, you will have performed the very activities whose occurrence you are denying. "The ultimate basis of our knowing is," in Lonergan's words, "not necessity but contingent fact, and the fact is established, not prior to our engagement in knowing, but simultaneously with it. The skeptic, then, is not involved in a conflict with absolute necessity. He might not be; he might not be a knower. Contradiction arises when he utilizes cognitional process to deny it."[176]

Pierre Schlag smells a rat in transcendental argument, part of reconstructionists' conspiracy to make objectionable views of reason seem eminently, indeed enchantingly, reasonable. Schlag claims, more specifically, that "[t]he obvious bootstrap character of this move," the move of transcendental argument, "seems to have largely escaped notice."[177] In the case of the thinkers he mentions, Jurgen Habermas and Karl-Otto Apel, the character of the "move" certainly did not escape their notice.[178] And, in any event, bootstrapping it is not. The argument does not attempt to get something it is not enti-

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[175] *See id.* at 135 ("You do not 'prove' the act of playing tennis to someone."). On what one can hope to achieve through such argument, see *infra* notes 176–180 and accompanying text.

[176] LONERGAN, *supra* note 30, at 332.

[177] Schlag, *Politics of Form*, *supra* note 4, at 46.

[178] Transcendental argument is well-explained and contextualized (from Kant to Karl-Otto Apel) in FRANKLIN I. GAMWELL, THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD 85–153 (1990), and in; RALPH C.S. WALKER, KANT 14–27 (1978). For other brief treatments, see T.E. Wilkerson, *Transcendental Arguments*, 20 THE PHIL. Q. 200–12 (1970). For more extended analysis of this form of argument, see generally REINHOLD ASCHENBERG, SPRACHANALYSE UND TRANSZENDENTAL-PHILOSOPHIE (1982) and TRANSCENDENTAL ARGUMENTS AND SCIENCE (P. Bieri et al. eds., 1979).

tled to; it is the interlocutor's own preference (for cognitive success), not someone else's preference, that is being used against her or him. Transcendental argument calls attention to what you are doing when you succeed cognitively; it identifies instances in which you are enjoying the benefits of a successful procedure while denying that the procedure is worth choosing; and it leaves open, as it must, the possibility that you will choose to the play buffoon.

Performative self-contradiction remains always—it bears repeating, against the charge that transcendental argument seeks what it is not entitled to—a possibility. This is, as they say, a free country: You are at liberty to live in self-contradiction. You are free to deny the very knowing you demonstrate. Nor is this "freedom" purely hypothetical, as the case of the intellectual terrorist demonstrates. People resist getting to know themselves and appropriating the functions by which they in fact always-already have succeeded as knowers. They prefer to deny that knowledge occurs through the pattern of activities I have described based on self-appropriation, and they continue to talk as if knowledge were a matter of bare experience or intuition. Unmoved by transcendental argument, people will persevere in operative self-contradiction.

These refusals and contradictions have consequences that have to be reckoned with. As Lonergan liked to say, anyone who denies that the activities of knowing occur is in effect "disqualifying himself as a . . . non-reasonable, non-intelligent somnambulist."[179] But people do *not* disqualify themselves. They set up institutions in which problems are to be resolved without recourse to the activities by which humans in fact know. Brute experience is substituted for intelligence, force is deployed to preempt questions and answers. There will be much more to say about this in Part VIII, in the context of what Lonergan calls "bias" and "the flight from understanding."[180]

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[179] BERNARD J.F. LONERGAN, METHOD IN THEOLOGY 17 (1972).

[180] *See infra* text accompanying notes 399–404.

IV. The Hegemonic Question

> *We cannot endow people with intelligence. Intelligence fundamentally is this capacity to ask questions, and this capacity is entirely from nature. . . . We ask questions even with regard to the beyond.*
>
> —Bernard Lonergan[181]

The conclusion reached in Part III is that the answer to the question, "What am I doing when I am knowing?," is not some single activity—such as reasoning or seeing or intuiting—but rather the complex of dynamically structured acts of insightfully experiencing, understanding, and judging. It is through those acts, and those alone, that the Subject becomes a knower. The picture painted so far, however, is not complete, for the Subject, while always proceeding through that invariant structure of dynamically related acts, knows in different patterns. Those patterns, their conditions and their achievements, are the topic of this Part. Exploration of them sets the stage for approaching, in Part V, the specifically *legal* pattern of knowing.

A. *Questions and Method*

"*We learn,*" as David Tracy writes, "when we allow the question to impose its logic, its demands, and ultimately its own rhythm upon us."[182] If we do not ask, we cannot answer; and if we do not answer, we do not know. But though the question comes from our core and is the necessary condition of our knowing anything at all, we can—and do—control the *kinds* of questions we ask; and our choice of questions controls what we can learn. The sort of question we ask determines not the specific contents but the generic structure of what will be discovered.

This point, critical to understanding how to know the sort of question to ask to come to know law, can best be approached first from the angle of modern "science," where the logic of question and answer has been most fully worked out. It was—at the risk of getting ahead of the story—the success-story that is modern science that in fact stimulated Lonergan's own self-appropriation, the results of which he described as "generalized empirical method."[183]

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[181] Bernard Lonergan, *Understanding and Being*, *in* 5 Collected Works of Bernard Lonergan 164 (Elizabeth A. Morelli & Mark D. Morelli eds., 1990).

[182] Tracy, *supra* note 50, at 18 (emphasis added).

[183] Lonergan, *supra* note 157, at 140–44.

We are accustomed to refer to "science" *en bloc*, to distinguish it—whatever *it* is—from every other body of human knowledge. Right below the surface of the monolithic label "science," however, there turn out to be different bodies of knowledge. The leading division is between (what I shall call) classical science and statistical science.[184] Classical scientists, such as Galileo and Newton, wish to discover the unchanging function between two or more unchanging variables, and to keep those variables from changing they abstract from particular cases. What the classical scientist proffers as science is the classical law, an unchanging correlation among unchanging quantities. What the classical scientist understands of the universe are its systematic regularities under idealized frequencies.[185] Whereas Aristotle had limited science to what does not change, classical scientists found a way to make the study of mutating nature "scientific."[186]

> Generalized empirical method operates on a combination of both the data of sense and the data of consciousness: it does not treat of objects without taking into account the corresponding operations of the subject; it does not treat the subject's operations without taking into account the corresponding objects. As generalized empirical method generalizes the notion of data to include the data of consciousness, so too it generalizes the notion of method. It wants to go behind the diversity that separates the experimental method of the natural sciences and the quite diverse procedures of hermeneutics and of history. It would discover their common core and thereby prepare the way for their harmonious combination in human studies.

Id. at 141.

[184] Lonergan also observed scientists using two other methods, genetic method and dialectical method. *See* FLANAGAN, *supra* note 138, at 103–07. These are not discussed at this point in the text, because my purpose is only to exemplify scientific methods, not exhaustively to describe or explain them. The discussion here is meant only to provide the necessary explanatory context within which to begin to differentiate the dramatically different kinds of questions that can be asked.

[185] *See* FLANAGAN, *supra* note 138, at 96–97 (explaining classical method and exemplifying it with Galileo's idealized conditions for measuring the times of falling bodies and correlating those times to the distances through which they fell); *see also* LONERGAN, *supra* note 30, at 35–46, 130–31, 136–37.

[186] Descartes was the great innovator, and E.A. Burtt nicely catches the direction in which this new scientific thought surged: "*Descartes' real criterion is not permanence but the possibility of mathematical handling*; in his case, as with Galileo, the whole course of his thought from his adolescent studies on had inured him to the notion that we know objects only in mathematical terms." E.A. BURTT, METAPHYSICAL FOUNDATIONS OF MODERN PHYSICAL SCIENCE 110 (1955). When Descartes undertook to doubt everything and affirm only what he himself found to be certain, he was, as Richard Rorty observes, "fighting (albeit discreetly) to make the intellectual world safe for Copernicus and Galileo." RORTY, *supra* note 169, at 131.

Classical science emerged only moments before a discovery that made possible the emergence of a totally new kind of science.[187] The discovery of statistics made possible a science of the probable.[188] Whereas Aristotle had limited certain knowledge to what does not change, and whereas classical scientists had limited scientific knowledge to systematic functions as they obtained in the abstract, statistics offered the possibility of certain knowledge of what changes and changes unsystematically. While the classical scientist identifies what some function is under idealized conditions, the statistical scientist identifies what the *actual* frequencies of those functions are.[189] The classical scientist identifies system, the statistical scientist identifies non-systematic regularities.

What divides these two bodies of knowledge from each other is not that each is the product of a different Black Box. Each is the product of the same human intelligence asking and answering a different *kind* of question. The sort of question put by the classical scientist is, "What is the unchanging correlation between two or more unchanging variables?" The statistical scientist asks the different kind of question, "How often does this function in fact occur?" As Flanagan explains, "The difference between these two notions of science and their respective heuristic procedures is that they ask different types of questions, which in turn anticipate different types of insights, different types of formulations, and verifications."[190] But always behind these drastically different bodies of knowledge, behind these different lines of questioning, there is always already the unity that is the human mind asking and answering questions of experience. "[B]oth the classical notion of science and classical laws and the statistical notion of science and statistical laws are based on questioning experiences, understanding those experiences, formulating an understanding of those experiences, and then verifying the formulations of this understanding of questioned experiences." What we call "science" is just a

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[187] *See* STOUT, *supra* note 82, at 50. The medievals, to be sure, had had a notion of probability; indeed, the casuists of Descartes's generation made great use of it in their theories of "probabilism." *See id.* at 47–48; *see also* JOHN MAHONEY, THE MAKING OF MORAL THEOLOGY: A STUDY OF THE ROMAN CATHOLIC TRADITION 135–43 (1989). But these earlier notions of probability rested probability on the number and kind of *authorities* that stood for or against a position.

[188] *See* MORRIS KLINE, MATHEMATICS IN WESTERN CULTURE 340–94 (1953). *See generally* IAN HACKING, THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL STUDY OF EARLY IDEAS ABOUT PROBABILITY, INDUCTION AND STATISTICAL INFERENCE (1975).

[189] *See* FLANAGAN, *supra* note 138, at 1–17, 67–68, 98, 100.

[190] *Id.* at 98.

working out of the question and answer method of human intelligence itself, with the result that what one asks controls what one can come to know.[191]

That "science" is an essay in question and answer, not the product of some simpler act, has other ramifications. A single judgment—the answer to a single question—is never the end of the matter. A single question issuing in a single answer resolves only a very narrow inquiry. Knowledge enters, and then develops, only when judgments are added to and built upon, and where necessary correct, earlier judgments. Once a natural scientist, for example, has reached the answer to a question, she does not the next time start from scratch, living each day as if it were her first. A successful scientist does not start from studied ignorance of past questions and answers.[192] If, as Lonergan observed, it was through the development of a method shaped by human cognitive processes that science first took off, it was the specifically *methodical* character of those processes that allowed intellectual progress.[193]

"Method," as Lonergan explains, "is not a set of rules to be followed meticulously by a dolt,"[194] turning out recipe-like the same result every time. Method is not a set of *rules* at all. Method is, rather, "a normative pattern of recurrent and related operations yielding cumulative and progressive results."[195] When the asking and answering of a specific type of question occurs not episodically but repeatedly and in light of past answers to the same type of question, progressive and cumulative results become possible and then actual. Scientific knowledge enters, as all human knowledge does, not from self-certifying intuition as Aristotle and Descartes thought,[196] not by living each day as if it is one's first—but from wonder, followed by questions of experience, direct insights which are in fact hypotheses, questions of those bright ideas, reflective insights, and finally a judgment—with the process always poised to start all over again in light of what has come before. "The wheel of method not only turns but also rolls along."[197]

There is an additional reason—already implicit—that even as to very narrow issues knowledge may enter only methodically, rather

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[191] *See id.* at 99–100.

[192] *See* LONERGAN, *supra* note 179, at 4–5.

[193] *See* Glendon, *supra* note 88, at 119–44.

[194] LONERGAN, *supra* note 179, at xi.

[195] *Id.* at 4.

[196] *See supra* text accompanying notes 60–63, 80–87.

[197] LONERGAN, *supra* note 179, at 5.

than all at once. A single judgment is the answer to only a single, narrow question, but still it may not be a judgment of certainty. The criterion for true judgments is, as I have observed, none other than questioning, and as Flanagan explains, "The norm for true judgments is sufficient evidence precisely as sufficient, and such evidence is sufficient when your insights meet the issues and problems precisely and correctly. The standard for correct insights, then, is correct questioning,"[198] and correct questioning occurs, as observed above, when one lets all relevant questions occur.[199] But sometimes judgment must be reached in the absence of answers to all relevant questions, and then the judgment will be one short of certainty.[200] But this admission does not entail a plunge into a cognitive abyss. As Lonergan explains,

> [T]he question for reflection can be answered not only by 'Yes' or 'No' but also by 'I don't know'; it can be answered assertorically or modally, with certitude or only probability . . . . The variety of possible answers makes full allowance for the misfortunes and shortcomings of the person answering, and by the same stroke it closes the door on possible excuses

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[198] FLANAGAN, *supra* note 138, at 128.

[199] Flanagan writes:

> Let us recall the emphasis I have placed on the way that asking what or why governs and directs you toward a known-unknown that becomes known through an insight and how the question, Is it so?, orients you to a further known-unknown that becomes known through a judgment. Furthermore, questioning not only motivates you, but it does so normatively. Questioning sets the standards by which you measure your answers. Thus, your judgments must meet the criterion of your own questioning. You keep reflecting and wondering whether your prospective judgments really are so, and only when all the relevant questions are answered, do you then proceed to commit yourself to a yes or no. Not only does questioning direct you, but it also obliges you to follow the standard it sets, and it compels you to assent when and only when you have sufficient evidence. The normative orientation of wondering requires that you follow its direction. You cannot know what really is so unless you understand and correctly judge the reality in question. However, the reality in question is a limited reality . . . .

Id. at 136–37.

[200] LONERGAN, *supra* note 30, at 272. Lonergan also notes that "the question as presented can be dismissed, distinctions introduced, and new questions substituted." *Id.* This should occur when the question is headed in the wrong direction. For example, the Pythagoreans began to advance understanding when they substituted for the pre-Socratic question, "What is the basic stuff out of which everything is made?," the question, "What are the forms that make things what they are and can become?" *See* COLLINGWOOD, *supra* note 60, at 51–55; FLANAGAN, *supra* note 138, at 27. The result of the emergence of that new question was the flowering of understanding beginning with the Pythagoreans but culminating in the work of Plato and then of Aristotle.

> for mistakes. A judgment is the responsibility of the one that judges.[201]

When the best that we can do now is—as often happens—a probability, there will be further questions to be answered later, to be built upon what we have known probabilistically already. The unavailability of certainty in the instant—as by intuition or a mental look—calls for methodical progress, if progress there is to be.

The notion of the probabilistic judgment will have caught the attention of the absolute-absolutists and the statisticians alike, so something more should be said about it. "The probability of judgment," as Lonergan explains,

> differs from the probability investigated in studying statistical method. As has been seen, the probable expectation answers a question for intelligence by assigning an ideal frequency from which actual events non-systematically diverge. But the probable judgment answers a question for reflection and, though it anticipates a divergence between the judgment and actual fact, still the ground of this anticipation lies, not in a non-systematic element in the facts, but in the incompleteness of our knowledge. Hence, judgment about things, about correlations, and about probability expectations, may be certain and may be only probable.[202]

Probabilistic judgments, though short of certainty, are not mere guesses. While the guess is a wayward surge beyond the evidence, the probabilistic judgment results from rational procedures. The probabilistic judgment is a closing-in on, a converging upon, completeness. "What," asks Lonergan, "can be meant by such metaphors?"[203] Lonergan answers, "No one surely makes a probable judgment when he can make a certain judgment; yet how can the probable be known to approach the certain, when the certain is unknown?"

> Fortunately, such paradox is not as acute as it may seem. We seek the truth because we do not know it. But, though we do not know it, still we can recognize it when we reach it. In like manner we also are able to recognize when we are getting near it. As we have seen, the self-correcting process of learn-

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[201] LONERGAN, *supra* note 30, at 272.
[202] *Id.* at 299.
[203] *Id.* at 300.

> ing consists in a sequence of questions, insights, further questions, and further insights that move towards a limit in which no further, pertinent questions arise. When we are well beyond that limit, judgments are obviously certain. When we are well short of that limit, judgments are at best probable. When we are on the border-line, the rash are completely certain and the indecisive full of doubts. In brief, because the self-correcting process of learning is an approach to a limit of no further, pertinent questions, there are probable judgments that are probably true in the sense that they approximate to a truth that as yet is not known.[204]

B. *Answers and Dialectic*

So successful was the combination of classical and statistical science, that today by *science* we almost always mean "natural science." One goes down a rung or two when one talks about the social sciences.[205] But still more discredited or at least unappreciated, since science's success became so conspicuous, is the pattern of knowing concerned with human living. "Living is not something we do abstractly; it is concrete and particular . . . ."[206] Human intelligence proceeding by the two complementary lines of natural science—classical and statistical—will never know the particular as such; both of these patterns of knowing bypass the particular as such, the former in favor of an idealized function, the latter by counting actual particular cases only to discover the ideal frequencies from which particular cases diverge in nonsystematic ways.[207] There is, however, a method by which the particular itself as such can be known, and it is a method with which we are all experientially familiar. Lonergan calls it "common sense" knowing.[208] Common though it is, "the remarkable historical success of mathematical and scientific knowing . . . made the more

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[204] *Id.*

[205] "One descends a rung or more in the ladder when one speaks of behavioral or human sciences." LONERGAN, *supra* note 179, at 3. Lonergan continues immediately: "Theologians finally often have to be content if their subject is included in a list not of sciences but of academic disciplines." *Id.* On the relationship of legal knowing to theology, see *infra* text accompanying notes 417–424.

[206] FLANAGAN, *supra* note 138, at 70.

[207] *See id.* at 68.

[208] Lonergan means by common sense something akin to what Aristotle meant by *phronêsis* and Aquinas by "practical wisdom" (*prudentia*). *See* BERNARD LONERGAN, *Aquinas Today: Tradition and Innovation*, *in* A THIRD COLLECTION, *supra* note 157, AT 44.

familiar and ordinary way of knowing much more difficult to appreciate and appropriate."[209] Indeed, as Flanagan goes on to note, "[i]n the development of scientific knowing there has been not only a prejudice against common-sense knowing, but also a major attempt to discredit and invalidate it."[210]

Common-sense knowing is motivated by the desire to develop intelligent ways of living. This way of knowing is as old as people's asking and answering questions about how to hunt, fish, build homes, organize communities, and so on. The questions that mark this pattern of knowing are those aimed at knowing how to do the tasks that people need to do in order to live. There is nothing abstract or theoretical about common-sense knowing; it aims to know things in relation to us as human Subjects engaged in the business of trying to live well.

Though not theoretical, common-sense knowing is, or at least can be, thoroughly competent within its specialized range, nor can scientific knowing replace it.[211] The successful fisher really *knows* how to reel them in, and the scientist's knowledge about fishes cannot replace what the fisher knows about fishing;[212] the virtuous man knows how to live, and what the moral philosopher can offer does not replace that knowledge. Common-sense knowing is as successful as individuals and communities have been in asking and answering questions about how to live well. Law, of course, is largely about common-sense knowing, individuals and the community asking and answering questions about how to live well.[213] There will be much more to say about this below.[214]

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[209] FLANAGAN, *supra* note 138, at 69.

[210] *Id.* at 69.

[211] *See id.* at 69–72, 90–91.

[212] *See* LONERGAN, *supra* note 30, at 179 ("[T]he sciences have theoretical aspirations, and common sense has none. The sciences would speak precisely and with universal validity, but common sense would speak only to persons and only about the concrete and the particular. The sciences need methods to reach their abstract and universal objects; but scientists need common sense to apply methods properly in executing the concrete tasks of particular investigations, just as logicians need common sense if they are to grasp what is meant in each concrete act of human utterance. It has been argued [by Lonergan] that there exists a complementarity between classical and statistical investigations; perhaps it now is evident that the whole of science, with logic thrown in, is a development of intelligence that is complementary to the development named common sense. Rational choice is not between science and common sense; it is a choice of both, of science to master the universal, and of common sense to deal with the particular.") *Id.*

[213] But for the ways in which too much common sense is a liability to law, see *infra* text accompanying notes 396–402.

[214] *See infra* text accompanying notes 250–265.

Still more misunderstood and denigrated than common-sense human knowing is *symbolic* human knowing, another pattern of knowing integral to law. Not reducible to any pattern of scientific or common-sense knowing, symbolic knowledge is the body of answers to the question, "What does it mean?" Symbols, carriers of meaning, are, as Lonergan often emphasized, of many kinds. The smile itself has a meaning—and if you doubt it, savour your reaction next time the smile of approbation mutates into the pseudo-smile of contempt.[215] But in addition to such meaning, there is the meaning of the spoken or written word, *linguistic* meaning. If you deny the claim, your are, of course, in operative self-contradiction.

The reader may be scandalized that it has taken so long and so many words for me to get to this point of saying something about *language.* Law is, as many legal scholars are by now eager to claim (with the obligatory citation to Wittgenstein),[216] full of language, indeed perhaps a "language game." And with much of the import of that claim, I shall agree, for reasons that will follow in Parts V, VI and VII. But the course and content of the analysis to this point have been designed to show what much Anglo-American jurisprudence systemically overlooks, *viz.*, that "*it is not language that explains knowing but rather knowing that explains language.*"[217] What self-appropriation of human knowing generally and of several of its specific patterns has shown us is that symbolic human knowing is just one form of—indeed, is con-

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[215] Lonergan writes:

> [A] smile does have a meaning. It is not just a certain combination of movements of lips, facial muscles, eyes. It is a combination with a meaning. Because that meaning is different from the meaning of a frown, a scowl, a stare, a glare, a snicker, a laugh, it is named a smile. Because we all know that meaning exists, we do not go about the streets smiling at everyone we meet. We know we should be misunderstood.

LONERGAN, *supra* note 179, at 59.

[216] *See* SCHLAG, ENCHANTMENT, *supra* note 4, at 86–87 ("But even as American legal thinkers and actors relax their conception of reason, even as they perform the obligatory bow to Wittgenstein, they cannot resist adding something more .... [T]he journey through Wittgenstein turns out to be a detour .... We are back [where we started] because the rule-of-law thinkers never really wanted to leave in the first place. The rule-of-law thinkers need to retain some distinction between reason and unreason in order to decide what counts as law and to distinguish law from prejudice, dogma, rent seeking power politics, and the like."). For a fine compendious statement of how the Lonerganian and Wittgensteinian positions map onto each other, see Hugo Meynell, *Lonergan, Wittgenstein, and Where Language Hooks Onto the World, in* CREATIVITY AND METHOD: ESSAYS IN HONOR OF BERNARD LONERGAN 369–81 (Matthew L. Lamb ed., 1981).

[217] FLANAGAN, *supra* note 138, at 182 (emphasis added).

tinuous with all—other human knowing, which is through question and answer.

But if symbolic and common-sense knowing are each structured by the invariant pattern of human intelligence itself, still the details by which those forms of knowing advance are importantly different from those by which classical and statistical knowing advance. The human Subject asking "What should we do?" or "What does this mean?" cannot answer those questions exactly as either a statistical or classical scientist would answer the questions proper to his own line of inquiry. Like those scientists, the would-be common sense or symbolic knower will insightfully ask and answer questions about experience; but because she asks about the particular, and particularly about how to live and what this or that means, she must anticipate different kinds of verifications and answers.

The name for the method of human intelligence particular to common-sense and symbolic human knowing is *dialectic.* Edgar Bodenheimer elaborates how dialectic works:

> The term "dialectic" is derived from the Greek word *dialegesthai,* which means to discuss a matter with someone, to argue out a problem with him. Ordinarily, where this method of communication is used, two or more parties to a conversation endeavor to arrive at the truth by means of a dialogue or debate, by posing and defending contradictory arguments. It is, however, also possible that a person will carry on a dialectical conversation with himself, by weighing the merits of opposing viewpoints, by considering the practical consequences of their respective adoption, and by arriving at a conclusion after a thorough appraisal of all facets and angles relevant to a problem. In contrast to rigid, apodictic demonstration of a proposition, a dialectic discussion of a problem by two or more persons under optimum conditions move [sic] in an atmosphere of openmindedness and fluidity which leaves room for a full elaboration of differences of opinion, for a free and mutually advantageous give and take, for concessions of points of debate and adjustments of positions.[218]

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[218] Edgar Bodenheimer, *A Neglected Theory of Legal Reasoning,* 21 J. LEGAL EDUC. 373, 378 (1969).

Dialectic is the mind's way of growing in knowledge of particular matters for which the mind's starting points, its verifications and even its conclusions, will be uncertain. When the question is how to live, when the question is what this means, the certainty anticipated in scientific method, classical and statistical, is out of the question. But that is not to suggest that dialectic is an exception to what I have claimed is the invariant pattern of all human knowing. As Mary Ann Glendon explains, dialectic is "[s]imilar to scientific method . . . it attends to available data and experience, forms hypotheses, tests them against concrete particulars, weighs competing hypotheses, and stands ready to repeat the process in the light of new data, experience, or insight."[219]

Dialectic is a neglected aspect of human knowing, degraded by the Enlightenment and for a long time largely lost to consciousness. But it is, as it happens, how we get to know meaning and the ways in which we ought to live. And philosophers are now in the process of rediscovering this fact,[220] as are some legal minds (as I shall observe below). That process is not easy, however, for the discovery is not altogether welcome. It involves getting used to the discomfiting reality that it is only by questions and answers, and an ungainly process of give-and-take, that knowledge of living and of meaning enters. David Tracy brings all this together, including the place of the Cartesian ghost and transcendental argument:

> We are human beings, not angels. In medieval arguments, angels were understood as created beings more powerful than humans but not divine. They lacked bodies and thereby sense knowledge, yet they functioned with extraordinary intuitive intellectual powers. Their intellects sound oddly like Descartes's model of human knowing. Angels, therefore, have some other way of knowing than our pedestrian, discursive way. Angels need only intuit to know. And each does so alone, not in a community of inquiry, for each exhausts its own species! But we humans must reason discursively, inquire communally, converse and argue with ourselves and

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[219] GLENDON, *supra* note 19, at 238.

[220] *See, e.g.*, J.D.G. EVANS, ARISTOTLE'S CONCEPT OF DIALECTIC 103–14 (1977); MICHEL MEYER, FROM LOGIC TO RHETORIC (1986); PRACTICAL REASONING IN HUMAN AFFAIRS (J.J. Golden & J.J. Pilotta eds., 1986); P. CHRISTOPHER SMITH, THE HERMENEUTICS OF ORIGINAL ARGUMENT: DEMONSTRATION, DIALECTIC, RHETORIC 197–201 (1998). Aristotle, it should be noted, was committed to dialectic as the method of knowing those forms of being not knowable by intuition (as to which, see *supra* text accompanying notes 60–63).

> one another. Human knowledge could be other than it is. But this is the way it is: embodied, communal, finite, discursive. Transcendental arguments on argument can play a limited but real role in analyzing certain necessary conditions for the contingent reality of human discursive communication.[221]

C. *Transcendent, Again*

To some readers this may all sound like so much circularity (virtuous or vicious), and to that objection I shall turn in a moment. But first, it will be well precisely to explicate Lonergan's stance on the basic metaphysical issue, that is, Lonergan's answer to the question, "What do you know when you do that?" What, in other words, do you know exactly in judgment?

The answer will be a general metaphysics but of a sort very different from the traditional categorical ones that tell us something about the *content* of being, that tell us what the stuff that we could possibly know looks or feels like.[222] What you know, in a metaphysics grounded in self-appropriation, is a *conditioned whose conditions are met* or, in Lonergan's phrase, a "virtually unconditioned." Judgment, as observed above, transforms a *conditional* synthesis (of data and the intelligibility of the data proposed in the direct insight) into an *unconditional* synthesis. The judgment is your commitment that a conditioned's conditions have (or have not) been satisfied. It is in the commitment—which is the judgment—that the Subject goes beyond her interiority by transcendent knowing. As Lonergan explains,

> [T]rue answers [to questions for reflection] express an unconditioned. Mice and men are contingent, and so their existence has its conditions. My knowing mice and men is contingent, and so my knowing of their existence has its conditions. But the conditions of the conditioned may be fulfilled, and then the conditioned is virtually an unconditioned; it has the properties of an unconditioned, not absolutely, but de facto. Because human knowing reaches an unconditioned, it transcends itself.[223]

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[221] TRACY, *supra* note 50, at 27.

[222] *See* LONERGAN, *supra* note 179, at 25.

[223] Bernard Lonergan, *Collection*, *in* 4 COLLECTED WORKS, *supra* note 141, at 213.

What you know by asking and answering all relevant questions is a conditioned whose conditions happen to be met. This is a "limited absolute."[224] When you have let all relevant questions occur and have not judged until you have answered them, then what you affirm in judgment is what you know: not everything about everything, but that the conditions of the conditioned are in this limited case satisfied. You have reached the real. "The process of knowing," as Lonergan explains,

> moves beyond subjectivity by the mere fact that you reach an unconditioned. You step in, through judgment, into an absolute realm. There is nothing outside being that can take a look at it and have being as its object. If it is outside being, it is nothing. You move through [the] judgment, through the [virtually] unconditioned, to an absolute realm, and in that realm you find not only objects but also yourself.[225]

The virtually unconditioned is the content of a metaphysics based on self-appropriation, what is known through asking and answering all relevant questions.[226]

Even in the probabilistic judgment, however, though a virtually unconditioned is not reached, the mind is closing-in on it; a judgment that a conditioned's conditions are probably satisfied *is* reached. Whether the question for reflection is answered with certainty or only with probability, that judgment is your personal commitment that the evidence supporting the hypothesis is (or is not) probable. This is a

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[224] FLANAGAN, *supra* note 138, at 126–27, 136–37, 207–08.

[225] BERNARD LONERGAN, *supra* note 181, at 172–73. Joseph Flanagan's explanation of this aspect of cognitional method is clarifying:

> Judging, then, borrows from the first two levels the contents for which it finds "sufficient evidence," and so asserts, Yes, it is so, or No, it is not so. The simple yes or no may not seem significant, but it is important to notice what the judgment does to the synthesis of the first two levels. No longer is the synthesis a conditional synthesis, since it has been transformed through judging into an unconditional synthesis. The assertion, Yes, it is so, utters an absolute, and when you affirm unconditionally it is because you have grasped that the conditions have been given, as you have understood them to be given. This absolute is absolute only because the conditions are given. In other words, it is not a completely unconditioned absolute; rather, it is an absolute by virtue of its conditions having been given. It is a limited absolute.

Flanagan, *supra* note 138, at 126–27.

[226] For a working out of this metaphysics in terms more elaborate than here relevant, see, for example, FLANAGAN, *supra* note 138, at 149–93, and LONERGAN, *supra* note 30, at 431–87.

far cry from the nescience that insists that we know nothing unless we know everything about everything thanks, say, to an intuition that grants its own imprimatur.

By now, predictably, the skeptic will have been confirmed in his suspicion that there is dogmatism here; and the absolute-absolutist, for his part, will be feeling the disappointment of the "limited absolute" that is the "virtually unconditioned"—not to mention the burden of the fact that often a probabilistic judgment is the best we can do under the circumstances. So, before turning in Part V to work out a legal method in light of cognitive method, a little more should be said both to quell the complaints and to fulfill my promise to say why the argument I have advanced on behalf of knowledge is not viciously circular.

What I have been doing in Parts III and IV, and what I have asked you the reader to do with me, is to use Lonergan's insights to take possession of the cognitive processes by which you and I already succeed in knowing what we know. It is the fact that knowledge does occur that establishes that it can occur. The fact is used to prove the possibility. If the reader in fact knows nothing whatsoever, then that is the end of the matter. But really, there is little doubt about whether the reader does know something. The trick is to discover *how* your cognitive successes occur and then to increase the satisfaction of their conditions precedent. The trick is a difficult one, however, because of the ingrained expectation that *really* to know is directly to confront, as by intuiting or by taking a Cartesian "mental look." Self-appropriation, at least mine and Lonergan's, leads to the conclusion that knowledge does occur, but *not* by intuition or ocular confrontation. These acts of knowledge by intuitional or ocular confrontation could, of course, occur; there is no necessary reason for their not occurring. But the question is whether they *do* occur, and Lonergan's answer and mine is that they do not. My knowledge of my own coming to know is, rather, by way of the compound of dynamically related acts I have been describing and explaining.

That series of acts, and the ultimate criterion that is not a look or an intuition but simply the answering of all relevant questions, is not viciously circular because we *do* succeed in knowing; we in fact reach the limited absolute. The fact of knowledge is affirmed, but only of a *limited* absolute. There is here nothing either dogmatic or skeptical. Lonergan's powerful statement of the process, what it produces, and what can prevent its success, is worth quoting at length:

> When Newton knew that the water in his bucket was rotating, he knew a fact, though he thought that he knew absolute space. When quantum mechanics and relativity posit the unimaginable in a four-dimensional manifold, they bring to light the not too surprising fact that scientific intelligence and verifying judgment go beyond the realm of imagination to the realm of fact . . . . Our present concern is that we are committed to [that realm of fact]. We are committed, not by knowing what it is and that it is worth while, but by an inability to avoid experience, by the subtle conquest in us of the Eros that would understand, by the inevitable aftermath of that sweet adventure when a rationality identical with us demands the absolute, refuses unreserved assent to less than the unconditioned and, when that is attained, imposes upon us a commitment in which we bow to an immanent Anagke.[227]

> Confronted with the standard of the unconditioned, the skeptic despairs. Set before it, the products of human understanding are ashamed. Great are the achievements of modern science; by far are they to be preferred to earlier guesswork; yet rational consciousness finds that they approximate indeed to the unconditioned but do not attain it; and so it assigns them the modest status of probability. Still, if rational consciousness can criticize the achievement of science, it cannot criticize itself.

> The critical spirit can weight all else in the balance, only on condition that it does not criticize itself. It is a self-assertive spontaneity that demands sufficient reason for all else but offers no justification for its demanding. It arises, fact-like, to generate knowledge of fact, to push the cognitional process from the conditioned structures of intelligence to unreserved affirmation of the unconditioned. It occurs. It will recur whenever the conditions for reflection are fulfilled. With statistical regularity those conditions keep being fulfilled. Nor is that all, for I am involved, engaged, committed. The

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[227] *Anagke* is the Greek noun meaning (roughly) necessity. For a fuller account of its senses and nuance, see LIDDELL & SCOTT, *supra* note 148, at 101.

> disjunction between rationality and non-rationality is an abstract alternative but not a concrete choice.[228]

The "immanent Anagke"—the criterion that is the further question—is the *inner law* that sets the conditions of the possibility of the human Subject's coming to know anything at all.[229] By the same stroke it sets the general conditions for the pursuit of a rule of law.

V. The Rule of Law of Methodical Questions and Answers

> *The question what the law "is" is not so very different from the question what we "are."*
>
> —Joseph Vining[230]

From the conditions of being a generally self-appropriated knower I turn now to those of being a self-appropriated specifically *legal* knower. By proceeding in this order, from the activities of human knowing in general to the activities of legal knowing specifically, it becomes possible to accomplish several, related purposes: first, to provide a normative account of a rule of law in terms of legal method that takes its shape from the conditions of human cognitive method; second, to identify what in current notions of "rule of law" and "legal method" reflects self-appropriation; and third, to exemplify how a rule of law and legal method thoroughly grounded in self-appropriation—the *inner law*—solve predicaments generated by similar notions untutored by self-appropriation. Having *begun* with an account of human knowing in general, I am in a position to say something about how specifically legal knowing *must* work (if it occurs at all), and thus to distinguish self-appropriated legal notions from those built upon simplifications or evasions of the actual process of human knowing.

A. *The Legal Questions; the Legal Data*

In the context of an argument against the widespread notion that knowing meaning is (at best) really just a matter of brute experience, Lonergan used the process of coming to know specifically *legal* meaning as an example.

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[228] Lonergan, *supra* note 30, at 331–32.

[229] For a philosophically rich account of the place of "inner law" in legal practice, see generally Granfield, *supra* note 149.

[230] Vining, *supra* note 1, at 128.

> [I]f you want to do a study of law courts and go in with a machine that will measure the decibels of the sounds made by the different speakers or the arrangement of the people in the room on different sides and places, and so on, you will not understand anything about the law court.[231]

What you will have missed is the *meaning*. "To get a start" at knowing that meaning, Lonergan continues, "you have to have a common apprehension of what a law court is and what its function is."[232] To become a knower of legal meaning, in other words, is not merely to experience something. To become a legal knower is, rather, to ask and answer the right questions of the right data. To become a legal knower is to understand and judge the data of legal meaning.[233] What I have just said in summary I shall now take in stages.

The question—with an important qualification to be noted shortly—is first. As I have emphasized, the questions you ask determine the kind of knower you can become. People become scientists by choosing methodically to ask and answer certain kinds of questions—about the functions between variables under idealized conditions, for example, or about the actual frequency of occurrences—of the data of the natural world. People become common-sense knowers by methodically asking of the data of experience how life is to be lived well, and then insightfully answering. People become symbolic knowers by methodically asking of data of experience their meaning, and then insightfully answering. To become a specifically legal knower one must begin by asking of the right data, "What is the legal meaning?," and then go on insightfully to understand those data and then judge that understanding as true or false, probable or improbable. And one must do so methodically.

The sort of question you ask determines the generic structure of what you can know, while the data of which you ask those questions determine what will be the contents of your answers. It is in this sense that the data, not the question, are primary. To reach legal meaning one has to ask the right questions *of the right data*. What the right data are, however, is not itself—because nothing is, *pace* John Finnis—self-evident. To be asking for "legal meaning" is already heuristically to be

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[231] LONERGAN, *supra* note 3, at 204.

[232] *Id.*

[233] After his observation that one must have a "common apprehension of what a law court is and what its function is," Lonergan continues: "Any scientific knowledge of the law will be a further understanding that will presuppose that meaning that pertains to the constitution of data for a human science as such." *Id.*

aiming for not just any meaning but for the one that is *legal*. To determine what are the right data to question for that *legal* meaning, requires an inquiry that ends in a judgment about the meaning of the word "legal"—and as Joseph Vining understands, "What one means in saying 'court,' for instance, or 'the law,' is not fixed by rule or dictionary. There is no absolutely necessary answer to the question what one means or someone else means (though much in law turns on the answer)."[234] To ask for "legal" meaning already is to deploy a meaning of the word "legal." Without—to borrow Lonergan's phrase quoted above—a "common apprehension" of the meaning of that and related words, one cannot know whether the data one questions are the carriers of *legal* meaning at all. Perennial notions of justice, or something called a Restatement (Second), may or may not contain evidence of "what the law is." The person who would say what the law is—that is, the person who wants to know legal meaning—must begin by determining what "legal" and related words mean; only then can she proceed to determine what the right data are.

What, then, is the "common apprehension" about what the data of *legal* meaning are? Vining's candid answer will provide a starting point:

> Lawyers do not have nice specifications of what evidence can be looked to when inquiring what the law is on a matter. There is a technique, which is to focus upon a canon of texts and, if they are available, upon central texts generated by an institutional arrangement that is usually hierarchical in form. But in reading those texts, reading them seriously to understand them, lawyers do not "exclude evidence" (as a litigating lawyer would say), close their eyes to evidence of meaning (or lack of meaning). Some of that evidence is of the form we call sociological. All the evidence is about the life of the aspirations and ways of thinking with which lawyers work. . . . There is as a consequence no notion of the "purely legal." Legal discourse is not a closed system. The meaning of texts is a real meaning.[235]

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[234] VINING, *supra* note 1, at 12; *see also* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 103 (Yale Univ. Press 1986) (1962) ("No answer is what the wrong question begets, for the excellent reason that the Constitution was not framed to be a catalogue of answers to such questions.").

[235] VINING, *supra* note 1, at 75–76.

What Vining here designates "a technique"—the reading of authoritative texts—is in fact the *primary* technique of the American legal system,[236] as the whole of Vining's work elegantly reveals.

But if we are agreed that law proceeds through the reading of authoritative texts, still we must know what it means to "read." We must, in other words, ask and answer the question—to Vining's mind "that deepest of questions . . ."—"[W]hy turn to texts in the first place?"[237] The profundity of the question, as well as the very need to put it, stems from the plain fact that "the text" is, at one level at least, merely a group of spatially ordered black marks.[238] These are what we *see* when we look to the text. "Words and sentences on paper are as such no different from the branches of a tree. They are tracings, marks, contrasts of light and dark."[239] But we look to the text for more than we can see; to know legal meaning—to become a symbolic human knower—is not merely to gape at something. Beyond what we can see is language, the range of *possible* meanings of those black marks. But what "lawyers are paying attention to [in the text] is most certainly not the words, which in themselves are sounds like sounds of the sea."[240] *Beyond* language's words, the *possible* meanings, is meaning itself.[241]

The "beyondness" of meaning is hard to stay with. "There is always an enormous difficulty, an enormous struggle in law particularly, to recall and keep in mind that language is evidence of meaning, not meaning itself."[242] The difficulty is in living with the fact that what we are after is invisible. "We cannot see meanings."[243] Even when it is *law* we seek, what we are after is legal *meaning*, so what we seek eludes our gaze, our touch, our ear: "[T]here is no law which anyone can take

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[236] *See, e.g.*, Steven Smith, *Idolatry in Constitutional Interpretation*, *in* AGAINST THE LAW, *supra* note 4, at 157, 159 ("The activity of law is devoted to the interpretation of authoritative texts: judicial opinions, statutes, and constitutions.").

[237] VINING, *supra* note 1, at 113.

[238] *See* LONERGAN, *supra* note 30, at 582.

[239] VINING, *supra* note 1, at 59.

[240] *Id.* at 115.

[241] *See id.* at 90–91 ("How can meaning be 'beyond language'? 'Beyond' has been well crafted by its users, though like so many old metaphors its roots are in the physical and the geographical. Its resonances help it convey how it itself can be used, how its use—the use of the word 'beyond'—is the very denial of the silence to which 'meaning beyond language' might be thought to relegate anyone who thinks of attempting to speak. Is 'what is beyond' beyond the grasp? It is, if the grasp is physical. That 'what is beyond' is beyond the physical—beyond the marks, the sounds—is precisely what leads to the reaching and maintains the hard effort of reaching.").

[242] VINING, *supra* note 1, at 239.

[243] FLANAGAN, *supra* note 138, at 91.

you by the hand and point to."[244] To move from what we can see, through the meanings that language makes *possible,* to the *real* meaning—this is to move from experience through understanding to knowledge in judgment thanks to insight.

B. *The Legal Answers*

There is a risk that by now what I am arguing will have started to seem so inevitable as to have been the reader's excellent position from the beginning. In talking to legal academics about what you have been reading here, occasionally I hear them say that they do not see what makes my stance significantly different from the standard accounts: almost all of us, after all, are talking (and talking and talking) about how law is reached through (interpretive) *judgment.* So, am I saying anything that is different except in the eccentricities of expression?

My answer is both yes and no. On the one hand, there is much in law, and even in current theorizing about "interpretation," that reflects some amount of self-appropriation. Vining's work comes immediately and powerfully to mind, and other splendid examples of varying kinds will follow in due course. On the other hand, there is little—though there *is* a little—in the books and articles that clearly reflects what self-appropriation discloses, namely, that *knowledge* occurs in judgment, not in experience nor even in understanding. Those who rather readily think they "basically" agree with me should reconsider that agreement, fathoming that my claims that if you insightfully ask and answer all relevant questions about legal meaning, you have reached a limited absolute, a conditioned whose conditions are met; and that if you are converging on the virtually unconditioned, you have reached a probabilistic judgment about a limited absolute. We do not ordinarily talk this way—and so doing so helps to clarify just what is at stake.

The ordinary course of the mind is to think that knowledge is by ocular confrontation, and when pressed about how knowledge occurs to suppose that it is by some sort of occult *mental* look (what Lonergan called "picture thinking") or intuition. Self-appropriation, however, reveals that there are no "intuitions" or "mental looks," that seeing is just one aspect of experience, and that by itself experience is never knowledge. Knowledge requires questioning of experience, resulting

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[244] VINING, *supra* note 1, at 223.

in a direct insight, which is itself questioned so as to determine whether the evidence in fact supports the direct insight. Knowledge of any kind, including of meaning, is the consequence of asking and answering questions. Reality is known, if at all, in judgment—and judgment is the answer to the question, "Is it so?" If someone knows legal meaning, it is because she has insightfully asked and answered questions that led her to a virtually unconditioned. If you have not asked and answered questions about legal meaning, you cannot—I submit—know legal meaning.

The process of insightful asking and answering questions to know meaning can be spelled-out in greater detail. The person who reads a text to know its meaning, whom I shall refer to as the interpreter—keeping in mind that by an interpretation I mean a *judgment* of meaning—will be asking what the text's meaning is. The text—the black marks—is not itself meaning. "Language is evidence, and all evidence is in the past."[245] To move from the evidence to what it is evidence of, the interpreter requires insights about what the creator of the evidence thought about what evidence was needed for the persons to whom that creator wished to communicate meaning to move from evidence to meaning. The evidence of meaning may be more or less adequate. People sometimes do not say what they mean, and sometimes we nonetheless know what they meant.[246]

This process of knowing meaning is work enough, but there is yet more, for the interpreter ordinarily will wish to communicate to some new audience the meaning she has discovered[247]—to *say* "what the law is." And to do that she will have to judge what evidence (what black marks, what sounds) will be necessary for her audience to grasp her meaning. Her black marks or sounds, her language, will succeed not simply by echoing the language of the original, interpreted expression whose meaning has been known, but only if it can convey its meaning to a new audience.[248] That, in turn, is a matter of knowing

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[245] *Id.* at 91.

[246] Lonergan works this out in deep and precise detail in INSIGHT, *supra* note 30, at 556–57.

[247] Here my usage differs from Lonergan's. This communication, not the prior judgment of meaning, is what Lonergan means by "interpretation" in INSIGHT. *See id.* at 562–63. By an interpretation, Lonergan also sometimes means the direct insight. *See id.*

[248] *See* FLANAGAN, *supra* note 138, at 182–83 ("[J]udgments arise from the question, Is it so?, and they do so within a context of earlier judgments. A context implies a set of related judgments that provide answers to a set of related questions. Since judgments emerge in response to questions, it is imperative in grasping an author's meaning to know the orienting desire that directed the questions that he or she was asking .... A major

the habitual intellectual development and insightfulness of the audience;[249] different audiences will grasp different meanings upon scrutiny of the same evidence. To reach a judgment about what evidence of meaning must be given for one's meaning to be known, judgments will have to be allowed to build upon judgments.[250]

The difficulty, first of knowing and then again of communicating legal meaning, should not be underestimated; it will concern us considerably below.[251] Here the point to note is that what self-appropriation discloses is that to know something (say, a meaning), it is not necessary to know everything about everything. To know something, it is both necessary and sufficient to reach a virtually unconditioned, and this is accomplished by answering all the relevant questions. The affirmation in judgment of this limited absolute is itself knowledge of what is affirmed.[252] No "look"—not even a "super-

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problem for Socrates was that the words, through which the new contexts of knowing and meaning were to be expressed, were the ordinary, familiar words that were expressive of a quite different context of meanings. This problem illustrates that meanings, while carried in words, depend primarily not on the words themselves, but on the prior acts of knowing that explain and ground the acts of meaning. Meaning is the same as knowing, except that meaning adds to knowing the problem of expressing our knowing to an audience through different linguistic forms. Expressions of any knower's knowing may be adequate or inadequate, clear or obscure, but such expressions by themselves are not true or false. The truth or falsity of statements lies in the acts of judgments made by knowers, who then express those judgments in any language that these knowers may choose and in any appropriate combination of the words and phrases of that language.").

[249] *See, e.g.*, LONERGAN, *supra* note 30, at 562.

[250] Lonergan writes:

> [I]t is all very well to talk glibly about the habitual intellectual development and the deficiencies of the original and the present audience and the determination of the differences in the practical insights governing the original expression and the simple interpretation. But it is quite another matter to set about the investigation of such obscure objects, to reach something better than a mere guess about them, and to find an appropriate and effective manner of communicating the fruits of one's inquiry. Reflective interpretation is a smart idea, a beautiful object of thought. But is it a practical possibility? Has it ever been achieved?

Id. at 563.

[251] On the question of legal communication, see ANDERSON, *supra* note 167, at 151–68.

[252] Steven Smith finds this diet unsatisfying. Having persuaded me that the metaphysics on which much of our law is premised is discredited (*see* SMITH, *supra* note 89, at 15–72), Smith thinks I cannot then attempt to reconstruct it through recourse to epistemology. I agree, and that is why I bypassed epistemology in favor of human cognition as a starting point. Smith then objects that my starting point and the general metaphysics in which it results (the "virtually unconditioned") does not "answer, deflect, or dissolve the metaphysical question." But that is true only if one starts with metaphysics. If you start with human knowing and then identify the real as that which is affirmed in correct judgments,

look"—just to "make sure" that what is affirmed in judgment is really so, is either necessary or possible.[253] Even short of the virtually unconditioned, moreover, there is the probable judgment. And while judgment itself is a simple act (rooted in what was referred to above as a "reflective insight," a grasp of the sufficiency of the evidence for what is proposed in the direct insight), the process of arriving at the reflective insight is not itself simple or algorithmic. It is, as observed above, dialectical.

C. *More Questions; More Dialectic*

But if, as I have been suggesting, people find law by asking the right questions of the right data, still this picture remains incomplete. Women and men seeking law—on and off the bench—are asking questions not just about meaning, but about how to live and live *well.* They are asking, to be sure, about meaning, what has been *said* to be "the law;" but they, like those who earlier said "what the law is," are, at the end of the day, after answers to the questions of common sense. The process of seeking the meaning of legal texts is always already part of the human enterprise of learning how to live; it is already, if I may say so, an extension of inner law to the outer law that would

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that is a metaphysics—as much, I think, of a metaphysics as one can get (and as much of one as one needs). The real just is what is affirmed in correct judgments: To ask for more is to ask for a resurrection of the metaphysics whose death Smith has announced. And to be satisfied with the best products of human intelligence is not to be a fideistic believer (*cf.* Steven D. Smith, *Believing Like A Lawyer,* 40 B.C. L. REV. 1041, 1098–1137 (1999)) (arguing that what lawyers affirm implicitly or explicitly in their legal practices is best described as an exercise in "belief"), but an intelligent human. *See infra* text accompanying notes 423–445.

[253] Lonergan was thorough in his rejection of the position that knowledge occurs and is verified by way of a look:

> You cannot settle this question of the difference between the given and the abnormally produced by saying that when you are normal you are able to take a look to see what is there, and when you are not normal you look and see what is not there. In either case all you have is the look, and to know whether you are normal or abnormal you would have to have a super-look in which you would look not merely at your looking but at what it was looking at. The difficulty would recur with regard to the super-look. Some super-looks might be normal and others abnormal. There is no solution on the side of the look. The solution has to be on the side of inquiry, intelligence, working out the characteristics of abnormal and normal states, and making the judgment that when these characteristics arise the man is out of his head, and he will not be held responsible for what he says and does.

Lonergan, *supra* note 181, at 175.

measure and order our common life so that we can live, live with other peoplewell.

Take the example of the common law judge. What judges in that image were doing—though it is not all they were doing—was methodically asking and answering common-sense's questions, and they did so with a view toward cumulative and progressive results. Anglo-American common law itself was, indeed, a working model of self-appropriated, methodical human knowing, in fact, of dialectic.[254] What the common-law judge did was to ask common-sense's questions, and reach reflective insights by a dialectical process of sorting and shuffling, converging for the most part on judgments that were only probably true. And he did so, moreover, not by living each day as if it were his first, but by building on what had gone before. The cumulative and progressive results of the common law process were possible because its judicial and other practitioners saw themselves as contributing to the development of a tradition—building on, and potentially correcting, what had gone before. The progress was possible only because the judge did not resolve each case by creation of a rule *ex nihilo*.[255] As Professor Glendon observes, paraphrasing Lonergan: "The wheel of dialectical reasoning not only turns but also rolls along."[256]

That the method of the common law was dialectic has been little appreciated, in part because its best practitioners were so busy successfully performing it that they did not stop to appropriate it.[257] But there can be little doubt that dialectic is what they were doing. Indeed, as it happens, many of the metaphors by which we describe dialectic itself come from legal practice. Flanagan observes, for example, that the reflective insight is preceded by a process metaphorically referred to as a "weighing of the evidence," during which "you cross-examine the adequacy and validity of your own understanding."[258]

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[254] GLENDON, *supra* note 19, at 237.

[255] On the place of tradition in the development of law, see Glendon, *supra* note 88, at 119–41; *see also* Peter Stein, *Logic and Experience in Roman and Common Law*, 59 B.U. L. REV. 433, 441–51 (1979) (arguing that Roman law and English common law each advanced through selective application of logic and experience to what had gone before).

[256] GLENDON, *supra* note 19, at 239 (attributing phrase to Lonergan). *See supra* text accompanying notes 183–221.

[257] *See, e.g.*, GLENDON, *supra* note 19, at 231 ("[T]eachers and scholars of law had never [before the 1970s] consciously appropriated the foundations and dynamics of their own discipline. They could 'do' law very well, but they were tongue-tied when it came to explaining and defending their ingrained, habitual doings."). But there were important partial exceptions, as Glendon notes. *Id.* at 131–33.

[258] FLANAGAN, *supra* note 138, at 123–24.

And it was the habitual practice of this sorting and shuffling by the likes not only of Benjamin Cardozo and Learned Hand, but of the countless other judges who toiled in anonymity, that gave the common law that greatness that is still its boast.[259]

And their method simply did not include "certainty" among its excellences. Dialectic, in law as elsewhere, contents itself with, indeed specializes in, the dubitable. It doesn't leave the dubitable where it found it, however. "[D]ialectical reasoning begins with premises that are in dispute. It ends, not with certainty, but with determining which of opposing positions is supported by stronger evidence and more convincing reasons."[260] And this, as Professor Glendon notes, is what has earned dialectic the contempt of those thinkers who measure "knowledge" by the standard set by Descartes.[261]

> Dialectical reasoning's weakness . . . is that it can never yield the satisfaction of a mathematical proof. But, as Aristotle pointed out long ago, no other form of reasoning is of much use "in the realm of human affairs." In law and politics, premises *are* uncertain and one *can't* be sure of being right, but it is crucial to keep trying to reach better rather than worse outcomes. Dialectical reasoning is a leaky vessel. But it's what we've got.[262]

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[259] *See* GLENDON, *supra* note 19, at 124–29.

[260] *Id.* at 238; *see also* LONERGAN, *supra* note 30, at 408–11 (identifying absurd and unexpected consequences of Descartes's precept of universal doubt).

[261] *See* GLENDON, *supra* note 19, at 238; *see also* Marcelo Dascal & Jerzy Wróblewski, *Transparency and Doubt: Understanding and Interpretation in Pragmatics and in Law*, 7 LAW & PHIL. 203, 203–09 (1988).

> The pragmatic concept of clarity [urged by the authors against the Cartesian concept] permits a reinterpretation of the traditional maxims *interpretatio cessat in claris* and *clara non sunt interpretanda* within the framework of a pragmatically oriented theory of legal interpretation which fits the description of the current use of legal language. Neither as a starting nor as an ending point of the understanding of a text is clarity an absolute given. Consequently, legal language has to tolerate the existence of interpretative doubt, even concerning the question of whether a text must or must not be interpreted.

Dascal & Wróblewski, *supra*, at 222.

[262] GLENDON, *supra* note 19, at 238 (citation omitted). For a rich understanding of the place of dialectic in legal thinking, see CHAIM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 107–13, 125–47 (1980), and THE NEW RHETORIC 62–72 (1979); *see also* PETER GOODRICH, LEGAL DISCOURSE 85–124 (1987); Bodenheimer, *supra* note 218, at 373–402.

Science aims in the long run for certainty, but specific legal knowings occur always under the press of time. We cannot postpone our living until we have learned everything, let alone with certainty. "What the law is"—legal meaning about how we should live together—must be established within the available time.[263] Sometimes, in my experience, judges take years to decide the meanings of statutes (whilst prisoners languish in the penitentiary); but usually within hours or days or, at most, months, the judge must say "what the law is." A probabilistic judgment of meaning likely will be as much as the seeker of law can produce. "If one demands certainty, one is assured of failure. . . . But we can achieve a good—that is, a relatively adequate—interpretation . . . Somehow conversation and relatively adequate interpretations suffice. As Hilary Putnam reminds us: in some situations, 'Enough is enough, enough is not everything.' Sometimes less is more."[264] The probable judgment is not—for all the reasons I have been developing—a mere roll of the lexicographic dice. And though each case must come to an end, still that need not be the end of the matter. Legal knowledge can grow, if, but only if, there is method—that is, a normative pattern of recurrent and related operations yielding cumulative and progressive results.[265] But do we systemically deny ourselves this aspiration?

D. *The Structure of a Different Common Law for the Age of Statutes*

Whatever the glory of the common law, now we live in a legal world composed largely of statute law, and the pressing questions have become, "What is to be done with statutes? How are they to be interpreted?" The lack of a generally accepted approach was diagnosed more than a half-century ago,[266] but as Justice Scalia wrote not long

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[263] Collingwood puts the analogous point about knowing facts this way:

> If any juror says: "I feel certain that a year hence, when we have all reflected on the evidence at leisure, we shall be in a better position to see what it means," the reply will be: "There is something in what you say; but what you propose is impossible. Your business is not just to give a verdict; it is to give a verdict now; and here you stay until you do." This is why a jury has to content itself with something less than scientific (historical) proof, namely with that degree of assurance or belief which would satisfy it in any of the practical affairs of daily life.

COLLINGWOOD, *supra* note 149, at 268.

[264] TRACY, *supra* note 50, at 22–23 (citation omitted).

[265] *See supra* text accompanying notes 183–221.

[266] HART & SACKS, *supra* note 96, at 1169 ("Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement

ago referring to the interpretation of statutes, "We American judges have no intelligible theory of what we do most."[267] Yet there is—understatement here is unavoidable—a surfeit of books and articles about interpreting statutes. What has been missed in most of them, however, is an appreciation of some or all of the following propositions for which I have been arguing: (1) human knowing occurs and advances through a cumulative and progressive set of activities propelled and structured by the dynamism of questioning, not by one simple act; (2) common-sense and symbolic knowing are, like classical and statistical science, distinct patterns of knowing, which anticipate their own patterns of reflection and verification; (3) human knowing primarily explains language, not the reverse; (4) human intelligence can sometimes reach certain knowledge, but about meaning and how to live only probabilistic knowledge is likely; (5) the probability of such knowledge-claims can be increased through the dialectical, methodical process of question and answer that is simply one application of the basic question and answer method that grounds and advances all human knowing.

One reason for resistance to the requirement of dialectic is the supposition, which I have emphasized, that knowledge occurs by some simpler process. We are forever looking for ways to cut off the questioning or at least to reduce it. We prefer to be released from the exigent demands of the question. But even when there emerges an awareness that knowledge amounts to no more than answered questions, to hand ourselves over to dialectic is not easy. We long, it seems, for more certainty than dialectic delivers.

And one of the reasons for the emergence of statute law is, of course, to clarify and limit the starting points of judicial reasoning, and thereby to increase law's certainty; and it is no doubt true that *in general* a judge confronted with a statute has a surer starting point than a judge working within a vast body of exclusively judge-made law. Much of the reduction of law to statutes goes forward in the name of maintaining (or creating) democratic rule and legislative supremacy—and there is, no doubt, *something* to this.[268] It also goes forward

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of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.").

[267] Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION 3, 14 (Amy Gutmann ed., 1997).

[268] How much "democracy" it delivers depends, of course, on what one means by that word. *See, e.g.*, Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530–33 (1997) (book review) (Justice Scalia's formalism is not in fact empirically defensible as

in the name of the Rule-of-Law-not-of-men—and there is no doubt *something* to that as well.

The fundamental mistake, however, one against which this Article is directed, is to think that a "statute," or any black marks, can obviate the exigency for questioning. Whatever its content, and whatever its source, law is meaning (about how to live well), and meaning is known, as is everything else that can be known, in the judgments that are answers to questions. The black marks that emerge from the legislature simply are data which do not themselves resolve the question of how the legal meaning of which they are evidence is to be found.[269] If a statute is a surer starting-point for saying "what the law is," this cannot be because of any property of the black marks as such. A common law for the age of statutes would recognize the place of dialectic in gaining legal knowledge, the "balancing" and "weighing" and "cross-examination" that precede the ordinarily probabilistic judgments of meaning.

Relatedly, it would recognize the point systemically missed when analysis of "the law" starts with black marks rather than with the Subject. Law is in the first place answers to questions about how to live. Often those answers are cast in the form of text, but the text remains in service of—or at least should, if it is not to defeat the purpose for which it was created—human Subjects' intelligently working out ways to live well. To the extent participants in our legal culture mean for law to contribute to progressive and cumulative answers to the questions about how to live well with other people, then the data of legal meaning will be understood not as episodic shots in the legal dark but as potential contributions to a methodical advance in ordered living.[270] "As we seek order, we can meaningfully remind ourselves that order itself will do us no good unless it is good for something. As we seek to make order good, we can remind ourselves that justice itself is impossible without order, and that we must not lose order itself in the

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3 (1997) (book review) (Justice Scalia's formalism is not in fact empirically defensible as a democracy-forcing tool of interpretation).

[269] *See* GLENDON, *supra* note 19, at 185 (characterizing statutes as "data" produced by legislatures).

[270] The critics, as Mary Ann Glendon has noted, imagine that law is exempt from the requirement, which everyone concedes to "science," to build on and correct what has preceded. *See* GLENDON, *supra* note 19, at 138–43. Pierre Schlag is typical as he misses the point: "Conservatives always appear bearing the gifts of tradition and the past, asking us to conserve these gifts and thereby to preserve our communities, and perhaps even our very identities." Schlag, *Politics of Form*, *supra* note 4, at 80.

attempt to make it good."[271] The answers to questions about how to order our living not only in the present, but the morrow as well, do not admit of easy answer; worthy answers to today's questions build on and potentially correct the answers to yesterday's questions. A "legal method" that was not methodical would not, I think, produce *law* at all, for reasons to which I now turn in the final three Parts.

VI. Insisting That Law Be Meaningful

> *Nothing is clear in law except that method makes it so. To the extent that there are unresolved problems of method, there are unresolved problems of meaning, and following on these are unresolved problems of authority, obligation, and obedience.*
>
> —Joseph Vining[272]

The activities by which we know law are the same basic activities by which we know anything else we might know. For the reasons developed above, however, the person who would know law faces challenges unknown to, say, the statistician.[273] An example of the process of knowing law may help (1) get straight the place of the question in legal knowledge, (2) show how legal method should be shaped consistent with the place of the question, and (3) demonstrate how an appreciation of the place of the question dissolves or vaults some otherwise intractable problems for law. I take an example in administrative law because of its particular capacity to illuminate the fault-lines in the current debate about "statutory interpretation"—and with the lines thus clear, to show something of what a self-appropriated legal knower would do about them. I take an administrative law example, moreover, to provide the background to an issue to be explored in Part VII, *viz.*, how carefully legal texts, even "bureaucratic" texts, should be read.

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[271] Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 657 (1958); *see also* J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 Yale L.J. 105, 112 (1993) ("The study of subjectivity is important to jurisprudence because we must recognize the different contributions we make to the object of understanding when we approach it for different purposes. Legal understanding is not simply the apprehension of preexisting properties of an object. It is a purposive *activity* of subjects. It is something that we do.").

[272] Vining, *supra* note 28, at 214.

[273] *See supra* text accompanying notes 200–204.

A. *"The Meaning the Statute Intended"?*

Section 203(a) of Title 47 of the United States Code requires communications common carriers to file tariffs with the Federal Communications Commission (FCC), subject to section 203(b) which authorizes the Commission to "modify any requirement" of section 203.[274] When AT&T lost its hallowed monopoly because competition, as from MCI, materialized during the 1970s and 1980s, the FCC responded by relaxing filing requirements for nondominant carriers—that is, for every carrier save AT&T. In due course, AT&T challenged the agency's order, which the United States Court of Appeals for the District of Columbia Circuit then vacated.[275] The Supreme Court granted MCI and the government's petition for *certiorari,* and then affirmed the Circuit's decision in an opinion by Justice Scalia, from which Justices Blackmun and Souter dissented in an opinion by Justice Stevens.[276] The case presented the question, wrote Justice Scalia, "whether the Commission's decision to make tariff filing optional for all nondominant long distance carriers is a valid excuse of its modification authority."[277] The Court's answer was in the negative.

To say whether the answer to that question *should* be yes, or *should* be no, is not my present purpose. What I am after is an account of what Justice Scalia thinks he is *doing* when he is knowing law, his stance on the most basic of the three basic issues. The data for determining Justice Scalia's answer are available not only in the example and explanation of his opinions; there is also his scholarly writing. In his essay, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and the Laws,* Justice Scalia begins by asking, "What are we looking for when we construe a statute?"[278] The Justice's answer to this question—what he regards as "the basic question"[279]—is at the same time an answer to Joseph Vining's "deepest question."[280]

Scalia's very asking the question reveals that he knows that the Subject turning to a statute must *do* something. This is not, then, a simple metaphysics-first notion of law. In textualism, Justice Scalia's

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[274] 47 U.S.C. § 203(a).

[275] MCI Telecomm. Corp. v. Am. Tel. & Tel., 512 U.S. 218, 223 (1994).

[276] *Id.* at 219. Justice O'Connor did not participate. *Id.*

[277] *Id.* at 220.

[278] Scalia, *supra* note 267, at 16.

[279] *Id.*

[280] *See supra* text accompanying note 237.

"philosophy of interpretation,"[281] the Subject is on the scene; what a Langdellian concedes under duress is admitted outright. The Subject must "construe" the statute. Scalia, though a "textualist," knows with respect to Congress what Joseph Vining posits with respect to another lawmaking body: "The piece of writing that emerges from Parliament is not the law. It is evidence of the law, which is used in the course of arriving at a statement of law."[282]

On the way to a statement of law, what Scalia's construer is after—the known-unknown to be discovered—is "'*the meaning which the subject is authorized to understand the legislature intended.*'"[283] Statutory interpretation is not "psychoanalysis of Congress;"[284] the construer is not after that elusive beast, "legislative intent." But it does matter whether that much-maligned species is not merely elusive but mythical, for the textualist construer is after its cousin: "a sort of *'objectified' intent*—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris.*"[285] But does *that* beast—the "objectified intent"—exist? Has Scalia avoided the "intentionalist fallacy?"[286]

Justice Scalia's tactile metaphor ("place[] alongside") is unfortunate[287]—unfortunate because it masks the difficulty of the procedure by which, according to Scalia, law is known. This becomes clear as Justice Scalia goes on to distinguish textualism from the rude theories of statutory interpretation with which, it seems, sometimes it is conflated. Textualism, Justice Scalia explains, is the view that "[a] text should not be construed strictly, and it should not be construed leni-

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[281] Scalia, *supra* note 267, at 23.

[282] VINING, *supra* note 1, at 26.

[283] Scalia, *supra* note 267, at 17 (emphasis added) (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 57 (1882) (citation omitted)).

[284] United States v. Pub. Util. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

[285] Scalia, *supra* note 267, at 17 (initial emphasis added).

[286] *See* Frank Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 535 n.3 (1983); *see also* Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION 329, 353 (Andrei Marmor ed., 1995) ("[t]here is simply no fact of the matter concerning a legislature's intentions apart from the formal specification of the act it has performed"); Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 645–46 (1995) (explaining why "legislative intent" does not exist).

[287] *Cf.* United States v. Butler, 297 U.S. 1, 62 (1935) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with former.").

ently; it should be construed *reasonably*, to *contain* all that it fairly means."[288] Reason has been invoked and relied on, but is never explained; and the text—presumably the two-dimensional black marks on the page—has been said to be containers of meaning. That is not all, however, because Justice Scalia then clarifies that what he is after in the container is not the meaning *simpliciter* but, rather, "the original meaning of the text . . . ."[289] "This exercise," as Professor Merrill observes, "places a great premium on cleverness."[290]

Anticipating just such cleverness in the Court's approach to the case, the *MCI* petitioners provided in their briefs the following definition of "modify" from *Webster's Ninth New Collegiate Dictionary* (1988): "to make basic or fundamental changes in, often to give a new orientation to or serve a new end."[291] Aggressively conceding that most other dictionaries gave no such wide definition of "modify," and likewise conceding that the very dictionary cited included other, narrower definitions of modify, petitioners observed unexceptionably that "*Chevron* controls here," which meant that for the Court to reverse, it would have to conclude that Congress itself settled on some other meaning or at least ruled out the meaning settled on by the agency.[292] As Justice Scalia wrote in *MCI*:

> Reviewing courts may forego *Chevron* deference only if the statutory term at issue "cannot bear the interpretation adopted by the [agency]." Where, as here, Congress has not

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[288] Scalia, *supra* note 267, at 23 (emphasis added).

[289] *Id.* at 38.

[290] Thomas Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994).

[291] *See* Brief for Federal Petitioners at 16–17, *MCI*, 512 U.S. 218 (1994) (No. 93–356); Brief for Petitioner MCI at 20, *MCI*, 512 U.S. 218 (1994) (No. 93–356).

[292] Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–44 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." [citations omitted]). For further discussion of *Chevron*, see *infra* text accompanying notes 365–366.

> merely left an issue open, but has expressly delegated discretion to the agency, deference is at its Zenith. It cannot be argued that the "plain meaning" of Section 203 forecloses permissive detariffing.[293]

By citing a dictionary definition both supportive of their own understanding of the statute and admittedly inconsistent with other dictionary definitions, petitioners hoped to serve up evidence showing *both* the reasonableness of the FCC's interpretation of the statute *and* the ambiguity necessary to trigger *Chevron* deference. Scalia saw the point. "In short," he wrote, "they [petitioners] contend that the courts must defer to the agency's choice among available dictionary definitions."[294]

Justice Scalia was having none of it:

> The word "modify"—like a number of other English words employing the root "mod-" (deriving from the Latin word for "measure"), such as "moderate," "modulate," "modest," and "modicum"—has connotation of increment or limitation. Virtually every dictionary we are aware of says that to modify means to change moderately or in a minor fashion.[295]

Justice Scalia proceeded to cite six dictionaries giving as a definition of modify to make "minor" or "small" changes. But what of the definition cited by petitioners? Did it not establish at least that "modify" is ambiguous and that, therefore, the FCC's interpretation permissibly resolved an ambiguity? Not so much, according to Justice Scalia. The dictionary cited by petitioners was a derivative of *Webster's Third New International* (1976), that was itself "out-of-step."[296] Which meant, apparently, that it was wrong—for Justice Scalia went on to say that "it is hard to see" how "'modify'" could mean "both (specifically) major change and (specifically) minor change," and then concluded:

> [W]e simply disagree [that modify could have both meanings]. "Modify," in our view connotes moderate change. It might be good English to say that the French Revolution "modified" the status of the French nobility—but only be-

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[293] Brief for Petitioner MCI, *supra* note 291, at 20 (citations omitted).
[294] *MCI*, 512 U.S. at 226.
[295] *Id.* at 225.
[296] *Id.* at 227.

> cause there is a figure of speech called understatement and a literary device known as sarcasm.[297]

Not willing to let well-enough alone, Justice Scalia went on to opine that it must have been "an intentional distortion[], or simply careless or ignorant misuse, [that] formed the basis for the usage" reported in the out-of-step dictionary.[298] Finally, by discovering that the narrower definition of modify was the only one given in dictionaries contemporaneous with the enactment of section 203, Justice Scalia ended up pitching the result on a lexicographical ground after all.[299]

Or did he when he wrote, "We have not the slightest doubt that this is the meaning the statute intended"?[300] Do statutes intend? "To intend," in common and correct modern English usage, is for a mind to make a move of a certain kind—something presumably not possible for a statute. "To intend" also sometimes means in correct modern English usage "to mean" or "to signify."[301] And one can easily see how either meaning can be reached by modest extension of the other—as well as that that extension obscures the question critical in this context, *viz.*, the question as to whether what is the issue is meaning or (legislators') collective mental content. But this in fact is no instance of catachresis, for we *do* know what Justice Scalia meant—and we know this without needing to deny that the word "intend" *can* mean what Scalia does not here mean.

B. *Living by the* Ipse Dixit

Leaving aside for a moment whether the textualist project works, there is no secret about what Justice Scalia is up to. He begins from the position that the people through their elected representatives are to make law which the judges are to apply. That is how Justice Scalia reads the Constitution; that, if you like, is his "meta-position."[302] And in consulting a meta-position to decide how to approach statutes, Justice Scalia is in not only good, but the only, company to keep once the Subject is on the scene. The Subject needs to know what to *do* about the black marks, needs to know what to do when he turns to the text.

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[297] *Id.* at 227–28.

[298] *Id.* at 228.

[299] *MCI*, 512 U.S. at 228.

[300] *Id.*

[301] WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed.), s.v. "intend."

[302] *See* Jane S. Schacter, *Metademocracy: The Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995).

What Jane Schacter might call a "meta-position" is what William Eskridge and John Ferejohn call an "interpretive regime,"[303] what Robert Cover calls a "secondary text,"[304] what James Boyd White calls "a language, . . . a way of reading and writing and speaking,"[305] what Joseph Vining calls "legal method"[306]—each of these regards what the Subject is to do with the black marks, what he is to do to know what the meaning (that known-unknown) is. Each of these, to the extent it reflects self-appropriation, would be an attempt to indicate the data to be questioned, the questions to be asked, and the method of the questioning. Each of these, to the extent it imagines that the black marks are something other than evidence to be questioned for meaning, is after and will deliver something short of meaning.

There is no difficulty in placing Justice Scalia. As I have observed, he regards the black marks as containers, bins of objectified intent. As he does so, Justice Scalia is perfectly aware that the black marks themselves do not determine what is to be done with them. What the Subject is to do is, in Scalia's language, what the Subject is "authorized" to do. For his part, Justice Scalia is working to alter the scope of the authorization, not by fiddling with Congress's black marks, which is not an option for the judge,[307] but by "changing the judicial culture,"[308] which may indeed be *the* option of the textualist judge.[309] In common-law courts, the judicial culture allowed, indeed called for, a wide judicial authorization; common-law courts, as Justice Scalia understands, made law what it *ought* to be.[310] Aware that the judicial power is not "a Platonic essence,"[311] Justice Scalia cannot cite the lone language of Article III itself, "the judicial Power,"[312] for his authoriza-

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[303] William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* NOMOS XXXVI: THE RULE OF LAW 265, 267 (Ian Shapiro ed., 1994).

[304] Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

[305] JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 78 (1985).

[306] VINING, *supra* note 1, at 109–18.

[307] VINING, *supra*, note 1, at 6.

[308] Gordon Wood, *Comment*, *in* A MATTER OF INTERPRETATION 49, 63 (Amy Gutmann ed., 1997).

[309] *Cf.* Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and The Supreme Court*, 1978 SUP. CT. REV. 345, 405 ("The procedural foundations of the judicial process were laid long ago, and the basic role of the courts seems firmly established by both tradition and constitutional prescription.").

[310] Scalia, *supra* note 267, at 8–9.

[311] Paul Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 265 (1990).

[312] U.S. CONST. art. III, § 1.

tion to stop Article III courts from doing what courts did at common law, *viz.*, asking and answering common-sense's questions guided only (loosely) by precedent.[313] Justice Scalia describes his meta-position as the Constitution's structure and, above all, *democratic* source and purpose.[314] And democracy is the idea, according to Scalia, that "the majority rules"[315]—which, according to Justice Scalia, requires textualism, the hegemony of legislatively-created receptacles of objectified intent.

It is Justice Scalia's hope that something so much sturdier than mere meaning—which it is conceded does not stand up to anyone who does not wish to respect it—will better resist the anti-democratic antics of the would-be activist judge. "Our legal culture," Professor Glendon is no doubt right, "explains why many American friends of democratic and rule-of-law values have been driven to espouse what most civil lawyers would regard as excessively rigid forms of textualism."[316] But so much does Justice Scalia want laws to be sturdier than the activist-judge is cunning, that he does not ask what the statute *means*.

The magnitude of the omission merits emphasis. Meaning, which is something only persons make, has been banished, driven out to be replaced by the black marks that (we are told) contain objectified intent. (Scalia, you will recall, had the statute itself "intend[ing].")[317] Though bizarre, this reductive progression is predictable, for the reason grasped by Paul Kahn:

> Understanding the legal meaning of an event is a problem of interpretation. Interpretation always has the quality of reaching for a meaning that is already there—even if we don't know where. Interpretation is not an act of poetic creation.

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[313] *Cf.* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 87 ("Justice Scalia's model for judicial rulemaking in constitutional law is not that of the common law, but of the civil code. Here is the codifier at work: first, state the general rules; second, rationalize the existing messy patter of cases by grandfathering in a few exceptions and doing the best you can to cabin their reach; and third, anticipate future cases in which the rule might be thought problematic and dispose of them in advance . . . .").

[314] *See, e.g.*, Scalia, *supra* note 267, at 9 ("All of this [judge-made law] would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy.").

[315] Antonin Scalia, Of Democracy, Morality, and the Majority, Address at Gregorian University (May 2, 1996), *in* 26 ORIGINS 82, 88 (1996).

[316] Glendon, *supra* note 125, at 113.

[317] *See supra* text accompanying notes 265–266.

> Neither is it the presentation of a meaning that already exists in some other mind—perhaps the mind of the text's author. Nevertheless, it is easy to see why legal interpretation often falls into the language of intent. This language creates a metaphoric space in which the idea can be imagined as waiting to be discovered by the interpreter.[318]

But this is *only* imaginative, because there is nothing to be discovered in space that does not exist. While talking about text, original meaning, and objectified intent, Scalia has bypassed the *meaning*—the known-unknown—*that was to be known.* Indeed, rather than knowing meaning, Scalia is creating it.

The magnitude of the self-promotion merits emphasis. What Scalia has done is to say what the black marks *must* mean, regardless of what they *do* mean. What they must mean is called their "original meaning." But their "original meaning" turns out to be what they *will* mean, *regardless of whether they in fact mean something else.* Recall that in *MCI,* Scalia tells us what "modify"—and thence the statute—*must* mean and "mean" that it will, from that time forward, because Scalia and four other judicial votes said so.[319] The *corpus juris* drops out, to be replaced by the *corpus (vel mensque arbitrium) Scaliae.*[320] The process by which Scalia becomes the autonomous lawmaker is subtle, but Professor Merrill was on to it when he observed that "the textualist interpreter does not *find* the meaning of the statute so much as *construct*

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[318] KAHN, *supra* note 5, at 92; *cf.* Paul F. Campos, *Against Constitutional Theory, in* AGAINST THE LAW, *supra* note 4, at 119 ("To imagine that one *should* read a text so as to discover what its author intended by it is to mistakenly assume that it is possible to do anything else. But . . . any reading of a text that is really a *reading* of that text simply consists of a search for authorial intention . . . ."). Joseph Vining understands that it is not so simple: "Writing is not conveyance of an inner state, but of something of which the inner state at any time is evidence sometimes more and better, sometimes less and worse." VINING, *supra* note 1, at 343.

[319] Gordon Wood draws this consequence from the role Scalia has assigned the judge: "Textualism, as Justice Scalia defines it, appears to me to be as permissive and open to arbitrary judicial discretion and expansion as the use of legislative intent or other interpretative methods . . . ." Wood, *supra* note 308, at 63. "Justice Scalia's claim is that the new textualism imposes *more reliable constraints* on judges. Justice Scalia fails to make his case, . . . the new textualism is no more constraining than the traditional approach." Eskridge & Frickey, *supra* note 98, at 676. "Justice Scalia's methodology is a return to the nineteenth century treatise approach to statutory interpretation." William N. Eskridge, Jr., *The New Textualism,* 37 UCLA L. REV. 621, 623 n.11 (1990).

[320] I put the point thus to show—*pace* Scalia—that it is not the Latin of the maxims of construction that sets my course against textualism. *See* Scalia, *supra* note 267, at 25 ("Many of the canons were originally in Latin, and I suppose that alone is enough to render them contemptible.").

the meaning. Such a person will very likely experience some difficulty in deferring to the meanings that other institutions have developed."[321] Scalia apparently forgot, when he was framing his philosophy of interpretation, that "he who lives by the *ipse dixit* dies by the *ipse dixit*."[322]

C. *The Tyranny of the Meaningless*

The antidote is, as so often happens, worse than the ailment. Responding to the "mindless" charge that textualism is a form of *formalism*, Scalia chants "Long live formalism. It is what makes a government a government of laws and not of men."[323] The mindlessness, as it happens, is on the other foot. Formalism is out of touch—not to mention "out-of-step"—with itself and with everything else that moves and breathes. "'Formalism,'" as Joseph Vining explains, "pretends that evidence of the way a term or notion works in the world is not relevant to what the term or notion may be or may mean in law, and that law is a closed system . . . ."[324] The pretending is predictable, but consequential: "There is always the temptation in law to approach a statute as if its words had meanings in themselves and by themselves—the authoritarianism sometimes shown by those devoted to maintaining the supremacy of democratic politics and legislative authority."[325] By the authoritarian, Vining means claimed authority behind which

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[321] Merrill, *supra* note 290, at 372.

[322] Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting); *cf.* Sunstein, *supra* note 268, at 567 ("There's nothing wrong with Justice Scalia's arguments in the abstract. And in an imaginable world, not unrecognizably far from our own, some or all of those arguments might become convincing. But there's also nothing right about Justice Scalia's arguments in the abstract. Whether those arguments are convincing depends on a range of practical and predictive judgments about the capacities of different governmental institutions. Justice Scalia does not defend necessary practical or predictive judgments or even identify them as such. He writes instead as if his particular, sometimes radical, conclusions can be grounded in apocalyptic arguments about the slippery slope and in high-sounding abstractions about democracy."). I agree with Sunstein that Scalia's justification needs to be more empirical, but I depart from Sunstein inasmuch as I think that the primary empirical data are cognitive, not institutional. *See also* Philip E. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 258 (1992) ("In my judgment . . . the great virtue of the new textualism—its rigidity—is also its essential vice. I lack the faith of the new textualists that human beings can come up with one reading of a statute that compels the human mind to accept it . . . ."). Professor Frickey's deepest mistake is to think that the mind *must* assent to anything. *See infra* notes 441–445 and accompanying text.

[323] Scalia, *supra* note 267, at 25.

[324] VINING, *supra* note 1, at 76.

[325] *Id.* at 240.

there is no meaning, no mind, no person. Language, the language of law, is made authoritarian by the removal of the persons who with that language *mean* something. As we heard Vining say above, "Legal discourse is not a closed system. The meaning of texts is a real meaning." Vining then goes on: "To the degree it is not, what is put forward is a species of tyranny."[326]

For questions and answers about legal meaning, textualist-formalism substitutes judicial creation masked as judicial discovery. "[T]extualism triumphant would," in the first place, "lead to a permanent subordination of the *Chevron* doctrine"[327]—judges saying "what the law is" without the assistance of agencies, except where the judges allow that the text is "ambiguous."[328] But the price is not only the allegedly democratic one, that "judges are making law." The price also is the introduction of the authoritarianism that is lawless in order to secure the rule of law. No matter how much we want it to be, "[t]he rule of law . . . is not," as Paul Kahn explains, "a thing (not even in someone's mind) but a way of seeing and understanding."[329] Law and

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[326] *Id.* at 76; *see also* KAHN, *supra* note 5, at 153 ("Nor does *Marbury* pursue the cynical tautology that law is whatever those with political power decide it is . . . . Rather, the rule of law is a common vision . . . . It is a way of apprehending the political order that is common to all members of the polity.").

[327] Merrill, *supra* note 290, at 371–72.

[328] It is Scalia's view, as Professor Merrill explains, that:

> [T]extualism is a more objective method of interpretation than intentionalism, and thus generates less 'agency-liberating ambiguity' that requires courts to move beyond step one . . . . As long as each of these rival groups seeks to persuade swing Justices that its preferred method is more restraining of judges than the other method, each group has an incentive to avoid the conclusion that any given statute is ambiguous, and thus that deference to agency interpretations is appropriate. The second explanation, which is longer term, focuses on the style of interpretation associated with textualism. Textualism tends to approach problems of statutory interpretation like a puzzle, the answer to which is found by developing the most persuasive account of all the public sources (dictionaries, other provisions of the statute, other statutes) that bear on ordinary meaning. This in turn tends to make statutory interpretation an exercise in ingenuity—an attitude that may be less conducive to deference to decisions of other institutions than the dry archival approach associated with formalism . . . . This active, creative approach to interpretation is subtly incompatible with an attitude of deference toward other institutions—whether the other institution is Congress or an administrative agency. In effect, the textualist interpreter does not *find* the meaning so much as *construct* the meaning. Such a person will very likely experience some difficulty in deferring to the meanings that other institutions have developed.

Id. at 354, 371–72.

[329] KAHN, *supra* note 5, at 92.

its rule are no thing; nor are they "out there," thing-like. "[B]ut the plain fact," as Lonergan put the point powerfully, "is that there is nothing 'out there' except spatially ordered marks; to appeal to dictionaries and to grammars, to linguistic and stylistic studies, is to appeal to more marks."[330] All a dictionary can offer even the most careful reader are "empirical descriptions of a probabilistic kind."[331]

The rule of law goes forward, if at all, through our best efforts to create and then living by our best efforts to *know* real legal meaning (meaning about how to live together well). It is Subjects—not black marks—who mean. The Subject looking for legal meaning must be looking for the meaning of which the black marks are evidence—and to find it, she must be asking and answering the questions that legal method itself makes the right ones. At the end of the available day, as observed above, the answer to the question, "What does this statute mean?," may admit of answers only of a probabilistic kind. But though short of certainty, it has the advantage of being about what the relevant legal speakers meant, rather than about what a universe of speakers have meant by this individual word in contexts now lost to us. David Tracy understands this:

> [T]exts are not dictionaries. In texts, words do not have meaning on their own . . . . We converse with one another. We can also converse with texts. If we read well, then we are conversing with the text. No human being is simply a passive recipient of texts. We inquire. We question. We converse. Just as there is no purely autonomous text, so there is no purely passive reader. There is only that interaction named conversation. Whenever we allow the text to have some claim upon our attention, we find that we are never pure creators of meaning. In conversation we find ourselves by losing ourselves in the questioning provoked by the text. We find ourselves by allowing claims upon our attention, by exploring possibilities suggested by others, including those we call

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[330] LONERGAN, *supra* note 30, at 582.

[331] VINING, *supra* note 1, at 56; *cf. id.* at 85 ("A literal meaning of a word is merely a possible meaning. Only agreement between speakers could conceivably produce a literal meaning that was anything more than a possible meaning. There is no legislative power in some majority of speakers that could make a possible meaning into the actual meaning."). On the trends in the Supreme Court's use of dictionaries, see, e.g., Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 275 (1998); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994).

> texts. If we want to converse with the author, that is another conversation.[332]

When what we are after is the real meaning of purportedly legal texts, there is no short-cut—no time-saving *–ism*—that will bypass the ungainly, untidy congeries of procedures that is *legal method.* "If there is to be law it must be the product of legal method."[333] But to know legal method is to know nothing less than, as James Boyd White understands,

> a way of making a world with a life and a value of its own. The conversation that it creates is at once its method and its point, and its object is to give to the world it creates the kind of intelligibility that results from the simultaneous recognition of contrasting positions.[334]

Legal conversation, our discursive engagement in legal method, not only settles how we shall live, but also contributes to making us who we are to be. Law is constitutive rhetoric.[335] To participate in law is, in James Boyd White's terms, to be part of a rhetorical community, and to be a part of a community is to create oneself.

Our Lonergan-inspired self-appropriation led to the same conclusion differently expressed. To know law is to know legal meaning, and to know legal meaning is insightfully to experience, understand, and judge the data of legal meaning; this requires, in turn, knowing what the right—the legal—questions and data are. To become a legal knower there is no neat pattern to follow, just as there is no algorithm to follow to know the data and questions that allow one to become a scientific or statistical knower. But people become these all the time, by learning the language of the relevant community—the "scientific

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[332] TRACY, *supra* note 50, at 60.

[333] VINING, *supra* note 1, at 135.

[334] JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 267 (1984).

[335] *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 138–42 (1987); WHITE, *supra* note 305, at 28–48. Joseph Vining puts it this way:

> If we create by faith, what we create is the meaningful world. The fact we create it and must create it to live does not entail that it is not real or really meaningful. It is all we know. There is no comparison to be made of the relative reality of a meaningful world we create and the reality of a world we do not create. The world we know is the world where we live, the world where we live is the world that allows us to live, the world that allows us to live is the world we create.

VINING, *supra* note 1, at 141.

community"—and at the same time reconstituting the community and themselves.[336] The fact proves the possibility.[337] And the movement from possibility to fact is important:

> Meaning is constitutive not only of communication but also of the human being, of the man. For those who are not infants, morons, knocked unconscious, insane, meaning is constitutive of living. Not only does meaning constitute communication, it constitutes *us* insofar as we are specifically men and women, specifically human beings. It is not the sole constituent. A man in a coma is still a man. A man in an insane asylum is still a man. All that is missing is the meaning. But when you say that all that is missing is the meaning, you realize that meaning constitutes the significant or important part of human living.[338]

To know law is to participate in legal community, and not to participate in legal community is not to know law.

VII. Putting the Subject Back at the Center

> *It is strange to talk of Hercules when your starting point is Harry Blackmun.*
>
> —John T. Noonan Jr.[339]

Ronald Dworkin's conception of law comes in some respects close to the self-appropriated one to which I have been contrasting Scalia's. But the differences are profound.[340] To explore these differences, with a view toward exposing what in Dworkin's approach exemplifies, and what in Dworkin's approach lacks, self-appropriation, I return to my example: the judge faced with the question, "whether the Commission's decision to make tariff filing optional for all non-

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[336] *See, e.g.*, Bernard Lonergan, *Time and Meaning, in 6 Collected Works: Philosophical and Theological Papers*, *supra* note 2, at 94–121; Lonergan, *supra* note 30, at 200–03.

[337] Tracy, *supra* note 50, at 63 (citation omitted) ("Whether we notice or not, society and history are always already there. They are there every time 'someone says something to someone about something.'").

[338] Lonergan, *supra* note 336, at 196.

[339] Noonan, *supra* note 38, at 174.

[340] Dworkin's position has shifted over time; so shifty is he, indeed, that "to pin him down" seems not to be possible. *See* Steven D. Smith, *Law Without Mind*, 88 Mich. L. Rev. 104, 108 (1989). When I refer to "Dworkin's position," therefore, what I refer to is my best attempt to identify where Dworkin stood on these issues the day before yesterday.

dominant long-distance carriers is a valid exercise of its modification authority." This, the reader will recall, is the question with which Scalia began, although in the end he answered the very different question, "What *will* the word 'modify' mean in section 203(b)?"

A. *A Judge of Method*

Scalia began by stating a "question" because it is judicial custom to say that the case or controversy before the court presents a question. But having put the question, Scalia stopped asking and answering questions. Pierre Schlag describes such a procedure as "prerational," because "it asks no questions and takes things as given. It is extremely secure in its understanding of the world; it does not allow the internal intellectual distance that would permit self-reflection."[341] Proceeding this way, Scalia looks to the black marks, inevitably discovers there no meaning, and then declares what the law *will* mean unless "overruled" by Congress.

Dworkin, by contrast, insists that our legal practice, or at least the aspect of it that Dworkin commends to us, "consists in an approach, in questions rather than in answers . . . ."[342] Dworkin is aware that there are many legal practitioners at bench and bar who imagine that what "the law is" is "out there,"[343] to be known by looking in the books where authoritative words lie[344] "recalcitrant."[345] Textualists, if one believes their story that they are discovering rather than creating law, fit this category. But to proceed this way misses, to Dworkin's mind, what most judges within our legal practice are in fact—and what all judges within our legal practice ought to be—doing when they turn to legal text. Dworkin's meta-position, Dworkin's understanding of the legal method of judges in "our own political culture,"[346] is that they are creatively to interpret the text so as thereby to create a community of principle. "Embedded" in statutes and the legal practice and the

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[341] Schlag, *supra* note 18, at 1208.

[342] RONALD DWORKIN, LAW'S EMPIRE 239 (1986).

[343] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 172 (1985).

[344] DWORKIN, *supra* note 342, at 7 (On the plain fact or semantic view of law, "The law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past. If some body of that sort has decided that workmen can recover compensation for injuries by fellow workmen, then that is the law . . . . So questions of law can always be answered by looking in the books where the records of institutional decisions are kept."). For an insightful summary of Dworkin's statement of the "plain fact" view of law, see STEPHEN GUEST, RONALD DWORKIN 125–26 (1991).

[345] DWORKIN, *supra* note 343, at 169.

[346] DWORKIN, *supra* note 342, at 216.

doctrinal area of which they are a part, according to Dworkin, are *legal principles,* and these the interpreter is to discover.[347] It is exactly "through interpretation of more concrete enactments that we can identify the principles which we have together embraced . . . ."[348]

The interpreter is to be no mere midwife, however. What the interpreter's efforts are to yield is a construction. "[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong . . . ."[349] In performing all of this principle-maximizing, the judge is to be guided by an overall demand for "integrity." As he goes about his constructive work, the judge is to take into account as much as possible about not only the "local" area of the litigation and the immediate legal practice, but also about the whole body of law and the legal system—so that his resolution of the case before him contributes to the development of a principled body of law and "community of principle."[350]

Shouldering this weighty task, the judge often must make many hard choices about the most difficult questions of politics and political morality, with the result that much of what he produces will be controversial. Though his responsibility is not to introduce his private morality into law but instead to unpack and develop the principles already embedded in law, his conceptions of those principles are bound to be controversial: "A judge must ultimately rely on his own opinions in developing and applying a theory about how to read a statute . . . . He knows, of course, that his opinion . . . is itself controversial . . . . [But h]is own political convictions, which the[] various questions [before him when he interprets a statute] engage, are the only ones he has."[351] What the judge must do is to reach a judgment. Whereas the plain fact or semantic approach to law imagines that the law will be plain and there to be seen by the judge (and other participants), Dworkin's judge resolves a conflict.

> Integrity does not enforce itself: judgment is required. That judgment is structured by different dimensions of interpretation and different aspects of these. . . . The interpretive judgment must notice and take account of these. . . . The in-

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[347] *See, e.g.*, Ronald Dworkin, *In Praise of Theory* (The Order of the Coif Lecture), 29 ARIZ. ST. L.J. 353, 355–57 (1997).

[348] *Id.* at 373.

[349] DWORKIN, *supra* note 342, at 52.

[350] *See id.* at 188, 264.

[351] *Id.* at 334.

> terpretive judgment must notice and take account of these several dimensions; if it does not, it is incompetent or in bad faith, ordinary politics in disguise. But it must also meld these dimensions into an overall opinion: about which interpretation, all things considered, makes the community's legal record the best it can be from the point of view of political morality.[352]

This is a long bill of particulars—so long, indeed, that Dworkin explicates it through Hercules, the "imaginary judge of superhuman intellectual power and patience" who, as we saw, moved Professor (now Judge) Noonan to ask why we should talk of Hercules when our starting point is someone—each one of us—so much more ordinary.[353] Noonan's point is not pedantic—particularly if we are after a rule of law of which humans are capable. Dworkin is anxious to meet it. "Hercules," as Dworkin tells the story, "shows us the hidden structure of their [real judges'] judgments. . . . He has no vision into transcendental mysteries opaque to them. . . . He does what they would do if they had a career to devote to a single decision . . . ."[354] Dworkin's Hercules *does* have the advantage, from the perspective of plausibility, that he does not know by intuition or mental looks. He is, commendably, "a judge of method."[355] And his method, as we have seen, is to ask questions, which he answers in judgment,[356] with new questions methodically building on what has gone before. Moreover, he knows his questions and the data to question because he interprets the legal practice of which he is already a part. So far, so good.[357]

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[352] *Id.* at 410–11.

[353] NOONAN, *supra* note 38, at 174. *See supra* text accompanying note 339.

[354] DWORKIN, *supra* note 342, at 265.

[355] *Id.* at 240.

[356] By which I do not mean to suggest that Dworkin has in mind anything like the "virtually unconditioned." *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, PHIL. & PUB. AFF. 87 (1996) (arguing *inter alia* against the possibility of Archimedean epistemology). Considerations of space rule out undertaking a thorough analysis of these complex matters here, but at least this much should be said. A self-appropriated epistemologist does not seek a view-from-nowhere, a place *outside* being from which to look down at being. To that extent he sides with Dworkin. But against Dworkin he would insist upon the virtually unconditioned (an Archimedean point not allowed by Dworkin) and would thus avoid replacing genuine objectivity with the admonition "You'd Better Believe it."

[357] In the interest of simplifying the argument, I leave to another day the question whether Dworkin thinks that his judge "knows" law in anything resembling Lonergan's sense. I suspect the answer is in the negative. *But cf.* DWORKIN, *supra* note 342, at 235 ("We might say . . . that the constraint is 'internal' or 'subjective.' It is nevertheless phenomenologically genuine . . . . We are trying to see what interpretation is like from the point of

B. *"Our" Judicial Practice?*

But has Dworkin correctly interpreted "our" legal practice, the point of "our" legal method? He paints, it seems, with too broad a brush. The judicial authorization in the New York courts in 1889, from which comes *Riggs v. Palmer*,[358] Dworkin's favorite exemplification of legal method, was rather plainly in the common-law model as Justice Scalia describes it.[359] But even if there is dispute about the details of the judicial authorization with respect to statutes in Article III courts today, there can be no question that it is not as broad as at common law. That, at least, is the point of *Erie R.R. Co. v. Tompkins*,[360] as well as the judicial opinions leading up to *Erie*[361] and the cases leading away from it to the present.[362] Among the cases leading away from it, of course, are those showing the marks of Justice Scalia's (purported) attempts to narrow the federal judicial authorization. There are also, to be sure, the cases showing the marks of Justices who take a more expansive view of what the federal judicial authorization is and ought to be.[363] And what this establishes *at the*

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view of the interpreter, and from that point of view the constraint he feels is as genuine as if it were uncontroversial, as if everyone else felt it as powerfully as he does.").

[358] 22 N.E. 188, 189 (1889) (murdering legatee could not inherit because the statute that did not on its face make an exception for murdering legatees in fact prohibited them from inheriting as the statute was read in light of the legal maxim that no one is to profit by his own wrong).

[359] *See supra* text accompanying note 268.

[360] 304 U.S. 64, 79 (1938) ("Thus the doctrine of *Swift v. Tyson* [that federal courts sitting in diversity have a general common law making power in the absence of state constitutional or statute law] is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'"). *See generally* TONY FREYER, THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981).

[361] *See, e.g.*, Mutual Life Ins. Co. v. Johnson, 293 U.S. 335, 339–40 (1934); Burns Mortgage Co. v. Fried, 292 U.S. 487, 495 (1934); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting); Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 390–411 (1893) (Field, J., dissenting).

[362] *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996); Boyle v. United Tech. Corp., 487 U.S. 500 (1988); Guar. Trust Co. v. York, 326 U.S. 99, 103–04 (1945) (considering Rules of Decision Act merely declarative of what law would have been anyway); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (deciding on same day as *Erie* to uphold special federal common lawmaking power of federal courts sitting in diversity).

[363] *See* Charles Fried, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 305–06 (1992); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989); *cf.* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); MARTIN REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 29–46 (1991); Thomas Merrill, *The Common Law Powers of the Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Thomas Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 330–31 (1992); Paul J. Mishkin, *The Variousness of "Federal Law": Compe-*

very least is that the federal judicial authorization is *contested* in a way that Dworkin's monolithic, generic conception of the judicial role—which makes no distinction even between state and federal judging—eclipses.[364]

But the contest is not simply about what federal, as opposed to state, judges ought to do when turning to statutory text. The contest also concerns what federal judges should do when turning to those specific statutes that Congress creates to be administered in the first place by agencies. Although Dworkin arguably goes some distance toward handling this with his instruction that the judge is to give effect to the principles of the body of law to which the relevant statute belongs, I know of nothing in Dworkin's writings that suggests he knows that there is a "counter-*Marbury*, for the administrative state,"[365] the rule of *Chevron*. That case has the agency interpreting the statute in light of its mandate and experience, with the court saying "what the law is" only when the statute is said by the court to be unambiguous and not in need of, and not admitting of, interpretation in light of an agency's experience. Hercules appears never to have heard that "there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes. Rather, the judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act."[366]

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tence and Discretion in the Choice of National and State Rules for Decision, 105 U. PA. L. REV. 797, 802–04 (1957).

[364] *See* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 280–81 (1992) (noting that much post-1789 state common lawmaking was authorized by state statutes of reception, of which there is no analogue for Article III courts).

[365] Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).

[366] Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983); *see also* ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 90 (1975) ("There are legal systems in which the line between legislation and adjudication is hazy from the start. This is especially true in a tradition of judge-made law like the Anglo-American common law. A system in which judges both make the law and apply it is not self-evidently inconsistent with a situation of legal justice as long as some screen can be interposed between reasons for having a rule and reasons for applying it to a particular case."); Bator, *supra* note 311, at 264, 265 ("It is history and custom and expediency, rather than logic that determine what needs to be the participation of the judges in this enterprise. . . . The judicial power is neither a Platonic essence nor a pre-existing empirical classification. It is a purposive institutional concept, whose content is a product of history and custom distilled in the light of experience and expediency."); *cf.* Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) ("When a court or agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation . . . ."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*,

What I have been suggesting is that Dworkin misreads or at least silently resolves many hotly contested questions about the scope of the federal judicial authorization. Dworkin has the judge doing with the black marks much more than there is agreement he should. And Dworkin is surely at least as entitled as Antonin Scalia to try to alter the legal culture, though he would be more credible were he to admit the degree to which his enterprise is normative rather than merely descriptive. From this line of analysis, I want now to turn to another, and ask whether Dworkin's implicit *normative* claim about the judicial role is consistent with self-appropriation. The answer, I think, is mixed, but largely in the negative.

Hercules, as I noted above, is a judge of method. He is methodical in the sense that he seeks law by asking questions, rather than by merely gaping at the black marks or by enjoying vision "into transcendental mysteries." He is methodical in the additional sense that he is not living each day as if it were his first; his answers are built on prior answers. Hercules, however, is not a team-player. "The man works alone."[367] He does not engage in dialogue. But what is more, the man who works alone is, in fact, *no man at all.* And while Dworkin is at pains to convince us that the mythical Hercules lays bare the pattern by which real judges know law, the fact is that he does not. David Tracy's encapsulation of the method of human knowing is again relevant: "[W]e humans must reason discursively, inquire communally, converse and argue with ourselves and one another. Human knowledge could be other than it is. But this is the way it is: embodied, communal, finite, discursive."[368] To be sure, Hercules does reach judgments that are answers to questions, and in this respect he bears more resemblance to a real judge than does, say, Charles Fried's intuitional judge; to this extent, Dworkin's own future work would be fortified by his rooting it clearly in the facts of human cognition rather than in Herculean fantasy. But starting with Hercules misleads

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89 COLUM. L. REV. 452, 487–88 (1989) ("[A] key assumption of *Chevron*'s 'judicial usurpation' argument—that Congress may give agencies primary responsibility not only for making policy within the limits of their organic statutes, but also for defining those limits whenever the text and surrounding legislative materials are ambiguous—is fundamentally incongruous with the constitutional course by which the Court came to reconcile agencies and separation of powers."). Morton J. Horwitz traces the "rule of law" anxieties generated by the emergence of the administrative state in his TRANSFORMATION OF AMERICAN LAW 1870–1960, at 213–46 (1992).

[367] SCHLAG, *supra* note 18, at 1213 n.76; *see also* Frank I. Michelman, *Traces of Self Government*, 100 HARV. L. REV. 4, 76–77 (1986).

[368] TRACY, *supra* note 50, at 27.

Dworkin. Hercules' mandate—to make law the best it can be all by himself—is formed in light of an almost angelic view of intellect and the time available to such super-human species. What the human judge who lacks even sufficient opportunity (let alone limitless time) needs to know is what to do in the time available. That is not simply to make the most of what we have.[369] Dialectical reason is too leaky a vessel. Minds that work mostly through probabilities require a more modest mandate. And such minds must work together, not in splendid isolation.

C. *More of What?*

There is a final, related problem with Hercules and his labors. Hercules never learns, at least not in any fundamental way, from experience. He spends his time, as Dworkin would have him, trying to give effect to the principles already embedded in law. His universe is just as closed as—if rather wider than—the one Scalia would have us believe confines the textualist. Concentrating on principles, moreover, Hercules has cut himself off from the minds of Subjects and their meaning—and he thus has severed himself from what gives authority. As Steven Smith has observed, "it is hard to think of any recommendation for a regime of law created by the 'interpretation' of disembodied words that have been methodically severed from the acts of mind that produced them. Such a regime would represent a step back in the direction of the rule of fortuity."[370] What it may have to recommend it, of course, is someone's fondness for the principles allegedly embedded in law right about now. The enterprise is (as Michael White felicitously phrases it) one of *stopping history* where one likes it.[371]

My objection is not simply aesthetic. Under a self-appropriated legal method, the Subject looks to the data of putatively legal meaning and then proceeds by question and answer, methodically building on prior answers, while remaining existentially open, meeting the demands of the eros to know, to answer new questions—common

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[369] *See, e.g.*, VINING, *supra* note 28, at 115–16.

[370] Smith, *supra* note 340, at 119; *see also id.* at 112 ("If the statute is understood not as the expression of a collective decision by the established political authority but rather as a kind of thing-in-itself, a free-floating text, then why is its right to command any greater than that of, say, the political treatise or the science fiction novel?"); Smith, *supra* note 236, at 180–88.

[371] *See* MICHAEL J. WHITE, PARTISAN OR NEUTRAL?: THE FUTILITY OF PUBLIC POLITICAL THEORY 81–121 (1997).

sense's questions—about fresh data. Conventions about the width and depth of the appropriate openness of the federal judicial officer—the data to be questioned, the questions with which to question them, and the identity of other authoritative creators of meaning—shift, through contested fights about the meaning of grants of authority. The best reason for not shifting in Dworkin's direction is that Dworkin has the judge doing *both* too much *and* too little. He has Hercules trying to make the most of what we already have, and nothing of anything else.[372] To follow Dworkin is, as Paul Kahn observes understatedly, to "lose[] sight of law's politically contested character."[373]

To follow Dworkin is also, less glamorously but at least as significantly, to lose sight of the point—the contested point—of the modern administrative state sought to be entrenched through *Chevron*. Agencies are delegated power to solve problems that do not admit of, or at least will not receive, detailed Congressional solution, and the meaning of statutes by which that power is delegated is "supp[lied]"[374] not by the legislature alone, nor simply by the judiciary in combination with the legislature, but by agencies in concert with the courts and Congress. Thus, more concretely, for a court to "answer" a question about an administrative statute's meaning by proceeding directly to a dictionary definition, or for a court to take such a statute as a spring-board for maximizing the principles it finds in the legal context, is to overlook what the Court long ago recognized about what Congress may mean when enacting administrative statutes:

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[372] *Cf.* KAHN, *supra* note 5, at 92 ("The present meaning of the legal order always appears to be fully constituted by its own past. Ronald Dworkin's image of the judge as someone who is writing a new chapter in a chain novel is a close approximation of this experience. Yet Dworkin confuses reading and writing in the process of interpretation. Legal interpretation *reads* the event as if it were a chapter in a book that is already written yet previously inaccessible. To say that the legal meaning of the event is exhausted in its possibility is not to say that we know these possibilities before the event occurs. Legal interpretation is a reading of possibility out of actuality. We see through the event itself to the rule of law that was always there, even if unrecognized.").

[373] *Id.* at 45.

> The rule of law is indeed a complete account of our experience of the political. It is, nevertheless, a contested account. Dworkin's overwhelming focus on the problem of judicial discretion presents a picture of law's rule, on the one side, and of the personal preferences or beliefs of the judge, on the other. But the important contest is not between law and the personal or private aspects of the judge. Rather, it is between conflicting appearances of political meaning.

Id. at 45–46.

[374] *See supra* text accompanying notes 365–366.

"The word [in the statute] 'is not treated by Congress as a word of art having a definite meaning . . . .' Rather it 'must be read in the light of the mischief to be corrected and the end to be attained.'"[375]

In every case, the question includes what Congress means, but what Congress means is not to be found in a dictionary. "A literal meaning of a word is merely a possible meaning. Only agreement between speakers could conceivably produce a literal meaning that was anything more than a possible meaning. There is no legislative power in some majority of speakers that could make a possible meaning into the actual meaning."[376] But as for the actual meaning of the statutes, to the extent Congress has created the agency to be a source of legal meaning, no longer can the question be exclusively one of what Congress means, nor of what the judicial officer alone would have it mean. Determining the actual meaning of the statute cannot be separated from the task of determining who *all* the relevant speakers of legal meaning are and what they have said. And to know this, one must—as I first observed above, objecting to the lonely eminence shouldered by Scalia's textualist—be participating in legal community:

> In the law . . . every speaker is particularly located, both rhetorically and socially. He or she is a lawyer or judge, a judge of state or federal court, a lawyer arguing to a jury or making a motion to a judge, and in every instance is situated as well with reference to a set of prior and arguably authoritative texts: constitutions, statutes, earlier cases, and the like . . . . The authority of the legal actor is never self-established,

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[375] NLRB v. Hearst Publ'ns, 322 U.S. 111, 124 (1944); *see also* Gray v. Powell, 314 U.S. 402, 411–13 (1941) ("In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here . . ., the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner . . . . It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action . . . . To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed."); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 263 (1955) ("[P]roperly understood the doctrine in *Gray v. Powell* is as traditional as it is sound.").

[376] VINING, *supra* note 1, at 85.

> but always rests, at least in argument, upon prior texts, which provide the standards that govern the authority they establish. This means, among other things, that the legal speaker must always look outside himself for his source of authority; that his every action rests upon a claimed interpretation of those sources of authority; and that these interpretations, of necessity, are compositions to which he asks that authority be given.[377]

But if he looks *outside* himself to find something to interpret to establish his own authority, he must look *inside* himself to know the norms to comply with in order to produce an authoritative interpretation of the ground of his authority. The authoritarianism that is tyranny can proceed without this authority. But an authoritative rule of law is achieved, I have argued, only as putative authority proceeds in fact from inner law that ever insists upon replacing nescience with knowledge, not stopping short of transcendent meaning (about how to live well). Lonergan summed up the consequences of this insight: "Human living really is a struggle for meaning, an effort, because meaning is constituent of human living. The effort to live is fundamentally the struggle for meaning."[378]

D. *Caveat Lector*

After all that I have written about statutes and their interpretation, it may be well to remind the reader that I am under no misapprehension that I have provided a "theory of statutory interpretation" or even an interpretation of section 203(b). What I have sought to provide is an account of what form such a theory must take *if*—but only if—saying "what the law is" is to be a matter of knowing and then pronouncing legal meaning (rather than, for example, merely creating meaning or entrenching principles) in the context of our purposive efforts to order human living. What I have argued is that no matter how much we would like legal language to be a "constraint" upon legal actors, there is no getting around the fact that there is no road higher than fidelity to the meaning of texts as created by all ac-

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[377] JAMES BOYD WHITE, JUSTICE AS TRANSLATION 96 (1990). "The rule of law subsumes discretion not by insisting on a single answer but by locating the meaning of the discretionary act outside the decision itself—for example, in the allocation of the authority to decide." KAHN, *supra* note 5, at 83; *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 49 (1994).

[378] LONERGAN, *supra* note 336, at 106.

tors with authority, which authority itself is affirmed only by knowing the meaning of the grants of that authority to create legal meaning.[379] Resisting the urge to simplify, a self-appropriated approach to statutes will *inevitably* make contestable claims about the relevant sources of legal meaning.[380] "As for law, it . . . partakes of the radical uncertainty of the rest of life, the want of firm external standards."[381] The identities of the authoritative texts and authoritative speakers have to be settled, and the speakers will have to put the right questions to the right data.[382] These are not activities I have performed in this Article.

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[379] As Paul Kahn has explained, the strength of *Marbury* and its view of the rule of law is won by treating law as something that can be seen, and reading as seeing: "In a paradox of power, the Court denies that it is even reading the Constitution. *Marbury* seeks to create an appearance of 'just seeing,' even when what it sees is a text . . . . One need not learn how to read this law; it need only be sighted. Reading introduces the possibility of error; sight is pure." KAHN, *supra* note 5, at 223.

[380] *See generally* DENNIS PATTERSON, LAW AND TRUTH (1996). From a very different starting point, Patterson anticipates conclusions in some respects close to my own. The theory of "dynamic statutory" interpretation worked out by Professor Eskridge clearly has common ground with my own position. *See generally* ESKRIDGE, *supra* note 377; William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). But Eskridge's position differs from mine in the critical foundational respect that my approach to statutes is from the angle of the *normatively dynamic* mind that creates and interprets them. By not studying the mind itself (except in the limited context of a discussion of hermeneutics), Eskridge's position lacks a normative justification deeper than making the best of a social practice in which we happened to be engaged. *See* ESKRIDGE, *supra* note 377, at 58–68.

For examples of accounts that refuse impatiently to cut short the search for meaning see KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS (1999), and Robert Araujo, *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L.J. 225, 240 (1998) (rooting statutory interpretation in the method of human intelligence). A similar approach is implicated in Gary Lawson's acute observation that knowing law is like knowing fact. *See Proving the Law*, 86 NW. U. L. REV. 859, 861–77 (1992). What Lawson finds lacking in law—a standard of proof for claims of legal meaning—I have supplied from self-appropriation: the virtually unconditioned and the judgments that converge on it. *Cf.* Larry Alexander, *Proving the Law: Not Proven*, 86 NW. U. L. REV. 905, 913 (1992) (discussing Lawson's position and criticizing Dworkin's legal theory on the ground that "there is nothing in the world to which to ascribe probabilities" that a principle "fits" a set of legal facts).

[381] WHITE, *supra* note 377, at 267.

[382] Statutes that concern administration present a particularly rich and ripe opportunity for exemplifying the irreducibility of the problem of settling on *who* the authoritative creators of meaning are. The Supreme Court has sometimes submerged or skirted the issue by transmuting the question about who in the administrative state will "say what the law is" into a question about whether a statute is "ambiguous" or not. *See, e.g.*, Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843–44 (1985) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . . Sometimes the legislative delegation to an agency is implicit rather than explicit.") Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. 187, 189 (1992) ("Its detractors portray *Chevron* as itself a delegation, one that abandons to adminis-

And even once they have been performed, by me or by you or by the nine Justices of the Supreme Court, disagreement about meaning will occur. "How is this disagreement to be faced, by the judge applying the law, by the believer trying to follow it?," asks James Boyd White:

> The traditional Muslim answer has been that all of the several readings are valid, notwithstanding their inconsistency, if they are each reached by a mind diligently engaged, in good faith, in a search for its meaning. The judge or the be-

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trative agencies the judicial authority and obligation to 'say what the law is.'") What this overlooks is that you cannot settle the question of ambiguity without first knowing who all the relevant meaning creators are and what they have said. What the Court treats as the issue of whether the statute is "ambiguous" is, in other words, a question of legal method and, more specifically, the question of who authoritatively creates the meaning of the statute, and how. The Court has come closest to recognition of this in connection with how an agency's power to interpret its organic statute differs from its power to interpret the Administrative Procedure Act. *See, e.g.*, Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994) (finding that "burden of proof" in the APA, 5 U.S.C. § 556(d), was to be defined by the Court); United States v. Fla. East Coast Ry. Co., 410 U.S. 224, 236 n.6 (1973) (concluding that APA "is not legislation that the Interstate Commerce Commission, or any other single agency, has primary responsibility for administering.").

But by generally not facing the issue directly, that is, by not asking the extent to which the agency has the power to create statutory meaning, the Court has been led to treat meaning-creation by the agency as a virtually all-or-nothing proposition: either the statute is "unambiguous," in which case the agency is not to contribute to its meaning; or it is "ambiguous," in which case the agency's interpretation is to receive maximum deference. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992) ("In effect, *Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch."). The trouble with the Court's approach is not that it fails to give effect to the principles of the relevant legal context (*see* Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 35 (1995); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 777–78 (1995); *see generally* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023 (1998)), but that it uses a fiction about binary legal clarity to decide the contested issue of *who* the authoritative meaning creators are. Peter Strauss was exactly right that in *MCI*, "the root issue for Justice Scalia is one of delegation," but it was an issue that Scalia purported to resolve on wholly other grounds *On Resegregating the Worlds of Statute and Common Law*, 9 SUP. CT. REV. 429, 495 (1994). *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 143 (1990) ("An ambiguity is not a delegation of law-interpreting power."). Occasionally the Court approaches this stance. *See, e.g.*, ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994) ("When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight . . . ."); Miller v. Fenton, 474 U.S. 104, 114 (1985) ("At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.").

> liever can follow any of them and still follow the law: but his choice too must arise from a good-faith search for meaning, within his capacities. A world of difference is thus created; it is kept from the prison-house of "single meanings"—of thinking that meanings translate directly from text to text—by honest attention to language, to particularity of phrase and context; it is kept from the chaos of indifferent relativism—of thinking that nothing can be known or understood, no common values held—by a principle of humility and sincerity . . . .[383]

More dangerous than the Subject who merely does her best is the person who would do nothing until she can (pretend to) get it exactly right.[384]

VIII. TRANSCENDENT; *THEREFORE,* NOT NONSENSE

> *The content of the law, the obligation to obey it, and the specification of what obedience consists of emerge not one after another in the mind—or in legal analysis—but together.*
>
> —Joseph Vining[385]

From talk of transcendence and method we passed to the nitty-gritty of administration and the question of how to know the meaning of a specific, not at all exotic, statute. The starting point was not sublime, but the way-station might well be ridiculous. Administration is ridiculous—though powerfully efficient and efficiently powerful—*if* it proceeds through something short of Subjects' creating and knowing legal meaning, meaning about how to live together well. And, as it happens, legal theorists and actors on all sides are cutting short the creation and search for the real meaning of legal sources, in order—it is said—to provide the "constraints" thought requisite to a Rule-of-Law-not-of-men.

But women and men cannot be eliminated if a rule of law is to be achieved; text, even "legal text," cannot rule *ex proprio vigore.* To keep

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[383] WHITE, *supra* note 377, at 268.

[384] *Cf. Waiting for Langdell I: Interview of the Authors by Sandy Levinson, in* AGAINST THE LAW, *supra* note 4, at 25 ("In 'A Heterodox Catechism' I [Paul Campos] argue that it's no coincidence that Hart and Sacks weren't able to publish *The Legal Process.* They literally *couldn't* get to the end. They literally couldn't stop. I try to tie it in with a kind of modernist illness that since you have to be God and you have to get it right, you can never actually do it.").

[385] VINING, *supra* note 1, at 246.

men but dish meaning, moreover, is to remit men to an authoritarian hollow of their own making. Joseph Vining and James Boyd White, on whose work I have placed so much emphasis, refuse to settle for less-than-meaningful law. Their work shows beautifully how self-appropriated human Subjects go about fashioning a rule of law.

The work of Vining and White has come in for sharp criticism exactly for its hope to find meaningful law even in the bureaucratic state. The detractors urge that there is nothing or precious little to be found there—and that the game is, in any event, not worth the candle.[386] The objection is most plausible when it suggests that Vining and White (among cognate others) seek to make us *believe* or *hope*—because certainly no one can *know* such a thing—that the emperor is clothed after all.[387]

My response is that Vining and White at least give us an emperor—or rather, in this period in history, they show us the possibility of democratic rule by human Subjects under inner law.[388] They give us back to ourselves. And if we find ourselves, what we find is that we can lead lives that are hollow or lives that are meaningful and worthwhile. The choice is ours—but it is a choice. Through methodical questions and answers, we can reach the limited absolutes that are judgments of real legal meaning, the authoritative speakers of legal meaning engaged in answering questions about how to order our common life. Or, we interpreters and potential speakers can instead obnubilate or gape or guffaw or declare. We can pretend to read—while creating instead a little something from nothing. Something as meaningful as a Hallmark card can pass for law, for awhile.

In this final Part, I round out the notion of the rule of law embodied in questions and answers as I briefly assess the claim that natural law or theology has crept into my account of the rule of law. I begin by considering from a new angle the place of texts in our legal practice. From there I turn to the question of where that sine qua non of the rule of law, objectivity, has gotten to in my account. And finally,

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[386] *See, e.g.*, SCHLAG, ENCHANTMENT, *supra* note 4, at 94; Schlag, *Politics of Form*, *supra* note 4, at 29–31, 49–51, 64–66, 98–99; Pierre Schlag, *Clerks in the Maze*, *in* AGAINST THE LAW, *supra* note 4, at 218, 234).

[387] *See, e.g.*, VINING, *supra* note 1, at 5, 15–16, 22, 34, 107; JAMES BOYD WHITE, ACTS OF HOPE (1994).

[388] *See* VINING, *supra* note 28, at 145. The position faced with texts behind which there is no mind "is worse than that of a courtier of the emperor who wore no clothes, passing a sock to him knowing all the while that there was no sock. At least there was an emperor." *Id.*

I return to my claim that to know legal meaning is, whether we like the sound of it or not, to transcend ourselves.

A. *Texts in the Context of Human Bias*

The unifying objective of this Article has been to explain what a rule of law would be like if it were rooted in the way Subjects in fact know—and know specifically how to live together well—rather than in inherited metaphysical and epistemological misunderstandings. Following Lonergan's lead, I used the heuristic structures and methods of natural science to point toward the structure and method of all human knowing. But if all human knowledge is on a continuum with "scientific" knowledge, because any human knowledge is the body of answers to a body of methodical questions, still the pretensions of science of the natural sort hobble our efforts to grasp the legitimacy of other bodies of knowing. Even as natural science itself is convulsed by questions about what is really going forward in "science," the *scientistic* mentality prevails. One not only descends a public rung or two[389] when one talks of "unscientific" subjects. One also risks not being "understood" by the science Ph.D.'s—"I didn't understand a word you just said . . ."—whose official stance is that they *care* not to understand what is not "scientific."[390]

Of the several dynamics at work in the ascendance of the scientistic mentality, several require mention if we are to understand what stands between ourselves and a rule of law of questions and answers. Lonergan calls the mental pathologies that prevent our living by questions and answers "biases," and I shall follow him in this usage, though not in the details of his taxonomy. As we have "seen," we know in *judgment* but we think we know by sight. And after we have spent time unlearning the consequences of our spontaneous love of our vision, we easily regress to supposing that sometimes, somehow, vision—"mental looks," the "super-look," "intuition" or (in Thomas Nagel's phrase) the "view from nowhere"—will enter to provide certainty. Ocularity is *the* Western notion of how knowledge occurs[391]—from

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[389] *See supra* text accompanying note 205.

[390] *See* VINING, *supra* note 1, at 144–45, 186; FLANAGAN, *supra* note 138, at 69; *see also* Joseph Vining, *On the Future of Total Theory: Science, Antiscience, and Human Candor*, 23–25, (Inaugural Lecture at the Erasmus Institute, Notre Dame University, 1999) (published and circulated as one of the "occasional papers" of the Erasmus Institute and available from the Institute).

[391] *See* LONERGAN, *supra* note 30, at 412; *see generally* RUDOLPH ARNHEIM, VISUAL THINKING (1969); MARTIN JOY, DOWNCAST EYES: THE DENIGRATION OF VISION IN TWENTIETH

Plato to Descartes who, as we "saw," imagines himself reaching certainty by "mental looks."[392] In Ian Hacking's judgment, "the Cartesian world was thoroughly visual,"[393] and if there is any doubt about what world we live in, recall that what Descartes initiated—and what is commended to us by law's reconstructionists—is the En*light*enment.[394] What cannot be seen simply does not exist or is at all events discounted. What is seen is *supposed* to be true. Mental activities other than seeing are epiphenomenal with respect to knowledge.

What the *ocular bias* ensures is that when we want something we can rely on, what we reach for mentally is something we can hold with our gaze. "[W]hen literate cultures are in crisis, the crisis is most evident in the question of what they do with their exemplary written texts."[395] And so, in law, we reach for texts *considered as black marks*—supposing that law is some *thing* that we can see or touch. "Written texts seem to provide stability for literate cultures. At the same time, written texts are exposed to great instability when intellectual and moral crisis occurs."[396] The instability results from the disruption in the habitual patterns by which such texts are created and approached. One attempt at stabilization—that is itself caused by and causes a destabilization—would reduce law to a *thing*, a textual repository of (say) "objectified intent." We might refer to the bias that insists that what really *is*, is *out there*, the bias of extroversion. When this bias obtains, metaphysics is first, and Subjects are little in evidence. Nor is meaning, which can never be *seen*, anywhere to be found.[397]

The two biases I have described lead—and, as observed above, have led historically—to the denigration of symbolic and commonsense knowing. But common sense itself, despite what I have said in favor of its competence for getting things done here and now, begets

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CENTURY FRENCH THOUGHT 21–82 (1993); Hans Jonas, *The Nobility of Sight: A Study in the Phenomenology of the Senses*, *in* THE PHENOMENON OF LIFE: TOWARD A PHILOSOPHICAL BIOLOGY 135–56 (1982).

[392] *See supra* text accompanying notes 85–87; *see also* RORTY, *supra* note 168, at 45 ("[I]n the Cartesian model, the intellect *inspects* entities modeled on retinal images .... In Descartes's conception—the one which became the basis for 'modern' epistemology'—it is *representations* which are in the 'mind.'").

[393] IAN HACKING, WHY DOES LANGUAGE MATTER TO PHILOSOPHY? 32 (1975).

[394] *See supra* text accompanying notes 76–101.

[395] TRACY, *supra* note 50, at 11.

[396] *Id.*

[397] "The transcendent produces such agony now, that we want to deny it .... The principal way of avoiding the transcendent has been to conceive or define thought as representational. Words or images come to mind. They appear, we are something of a recipient or observer of them." VINING, *supra* note 1, at 329.

a kind of bias, a bias against what is not about the here and now. The common-sense knower as such is interested in the *hic et nunc*, and so long as one is engaged only in common-sense knowing, one will not plan for the future. Bare common sense ignores the question of how to order things in the long run.

Not only that. The Subject who is strictly a common-sense knower denies the prerogatives of other specializations. The common-sense knower disavows the legitimacy of differentiated consciousness, trying all the time to reduce everything to common sense.[398] When Subjects whose consciousness is informed primarily by common sense get hold of what is not primarily common sense, their next move is to install common sense instead. Bias working itself out manifests what Lonergan calls "the flight from understanding."[399]

Consider the pattern in law. Legal communities emerge in order to provide for peaceful and intelligent ordering of human life, first through decisions and then through rules.[400] The legal community is constituted by shared meaning, and as the legal community grows, its meanings complexify, and the list of authoritative speakers is regularized.[401] This is full of promise, for as Flanagan observes, nothing less than the "stages of human historical process . . . depend on the methods that people have developed to deliberately control their lived meanings . . . ."[402] But decline is at least as possible as progress. When, impatient with language it does not understand, common sense supplants other forms of language produced by other forms of consciousness aimed at other forms of meaning, decline is not knocking but thundering at the door.[403] To replace the developed language of

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[398] *See, e.g.*, LONERGAN, *supra* note 30, at 207–44. Lonergan writes:

> Even in the sphere of practice, the last word does not lie with common sense and its panoply of technology, economy and polity; for unless common sense can learn to overcome its bias by acknowledging and submitting to a higher principle, unless common sense can be taught to resist its perpetual temptation to adopt the easy, obvious, practical compromise, then one must expect the succession of ever less comprehensive viewpoints and in the limit the destruction of all that has been achieved.

Id. at 234.

[399] *See, e.g.*, *id.* at xi–xii, xiv.

[400] I mean this claim to be descriptive not normative. *See e.g.*, STEIN, *supra* note 59, at 1–25 *passim*.

[401] *See* WHITE, *supra* note 387, at 96–97.

[402] FLANAGAN, *supra* note 138, at 256.

[403] *Compare* Oliver Wendell Holmes Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1899) (determining that when interpreting legal sources including statutes, "we ask, not what this man meant, but what those words would mean in the mouth of

law with the simple language of common sense is to hollow out and shrink law from within. "[C]ommon-sense knowers," as Flanagan explains, "must realize and acknowledge their own limitations and agree to cooperate with knowers whose insights and ideas have their source, not in short-term objectives and practices, but in long-term concerns and consequences."[404] How this cooperation is to be arranged will concern us shortly.

B. *Objectivity, "Authentic Subjectivity," and Natural Law*

But first I would re-affirm that while law is the result of the emergence of a community of specialized meaning, law does properly contain its own element of common sense. Law, as I have observed repeatedly, is not just about texts and their being read and given coercive effect; it is also, more basically, about Subjects' asking and answering questions about how to live together well. But living is not just—we hope—today. Law is properly concerned with the here and now, but law's ambition is also to extend its ordering into the future. Thus, as Mary Ann Glendon explains, building on Lonergan's insights, "[t]he life of the law is not logic, but neither is it raw experience. What animates the law is the habit of critical, ongoing, reasoned reflection on the contents of common sense."[405] To the extent that the concerns of common sense are taken up and subjected to long-term, progressive solution—as they were at common law, through the asking and answering of questions about not only the present but also the future—progress may occur. To the extent that bias deems the methodical processes of human intelligence irrelevant to the prob-

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a normal speaker of English, using them in the circumstances in which they were used . . . ."), *with* POSNER, THE PROBLEM OF JURISPRUDENCE 241 (1990) (noting Holmes's "aphoristic style . . . may reflect a . . . skepticism about the power of rational thought."). Justice Frankfurter knew the reason not to give statutes an "ordinary language" meaning across the board: "If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

[404] FLANAGAN, *supra* note 138, at 87.

[405] GLENDON, *supra* note 19, at 238.

lems of human living, decline has set in.[406] "The problem," as Lonergan concludes, "is real."[407]

Nor is it at all remote. In this world in which we are all legal realists, what lawyers of every stripe—from Scalia to Dworkin—are after is what Plato himself aspired to: the rail that runs surely through our judgments.[408] Scalia's rail is the "objectified intent" contained in the text, which he hopes to extend as far as possible in a rule of law that is the law of textual rules.[409] Dworkin's constraining rails, law's "principles," are already as broad as one could hope; their boast, indeed, is that they leave no gaps in law's empire. Both Scalia and Dworkin, each in his own way, find little place for dynamic intelligence in law. Scalia is hoping—in the name of democracy, ironically—pretty much to eliminate the need for it, through the proliferation of textual rules and recourse to the objectified intent they contain.[410] And in Dworkin's case, it is "theory"—not human intelligence—that "must do the real work"[411] in securing law's dominion. What Plato was after, and what Scalia and Dworkin think they have supplied (each in his own way) is, in a word, objectivity. What has been the consuming issue of philosophy since Plato has been the consuming issue of American jurisprudence since at least Langdell. "[T]he problem of constraining the subject," as Pierre Schlag understands, recurs in most of the conventional problematics of legal analysis:

> delimiting judicial review
> constraining interpretation
> confining judicial activism
> preventing judicial tyranny
> securing objective meaning in adjudication
> curtailing judicial discretion

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[406] *See* LONERGAN, *supra* note 30, at xiv–xv ("What is worse, the deteriorating situation seems to provide the uncritical, biased mind with factual evidence in which the bias is claimed to be verified. So in ever increasing measure intelligence comes to be regarded as irrelevant to practical living. Human activity settles down to a decadent routine, and initiative becomes the privilege of violence.").

[407] *Id.* at 632.

[408] *See* Stone, *supra* note 32, at 37–49.

[409] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

[410] Scalia, *supra* note 267, at 25 (arguing that "formalism" is "what makes a government a government of laws and not of men").

[411] Dworkin, *supra* note 347, at 371; *see also* Patrick McKinley Brennan, *Discovering the Archimedean Element in (Judicial) Judgment*, 17 LAW & PHIL. 177, 190–91 (1998).

and so on up until the present day.[412]

What the standard accounts—from Scalia to Dworkin—fail to grasp is that "constraint" simply does not lie on the side of the object, no matter how "objective" it is. The solution lies instead on the side of the Subject. The truth, again to paraphrase Lonergan, is not so objective as to be able to get along without the mind of the human Subject. Objectivity is a characteristic not of things "out there," but of the Subject's judgments. Judgments are objective inasmuch as they reach a virtually unconditioned. They reach a virtually unconditioned exactly if all relevant questions are answered; they merely converge upon, but do not reach, a virtually unconditioned if they are closing in on the end to relevant questions. Objectivity, then, is a matter not of running into something hard—but of answering the questions of experience and of reflection.[413] Objectivity—as Lonergan liked to say—is a matter of "authentic subjectivity."[414] To put this the other way around, authentic subjectivity—and, if my self-appropriation is correct, only authentic subjectivity—gets the Subject to the real.

Authentic subjectivity is, in turn, a matter not of intuition or taking a mental look, but of insightfully experiencing, questioning, understanding, more questioning, and then judging only to the extent that relevant questions have been answered. As I observed above, when all questions have been answered, the Subject transcends mere interiority to know what is real: "You move through judgment, through the unconditioned, to an absolute realm, and in that realm you find not only objects but also yourself."[415] Lonergan's sloganistic way of identifying the conditions of the Subject's achieving transcendence is to say that she or he must follow the "transcendental precepts." These are four: Be attentive, to experience; Be intelligent, in the ways you understand the data of experience; Be reasonable, when you judge; Be responsible, when you choose.[416]

The first three of these transcendental precepts are just specifications of what we have already explored, *viz.*, the activities that

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[412] Schlag, *supra* note 24, at 1638.

[413] *See* LONERGAN, *supra* note 182, at 170–80.

[414] *See, e.g.*, LONERGAN, *supra* note 179, at 292 ("Genuine objectivity is the fruit of authentic subjectivity. It is to be attained only by attaining authentic subjectivity. To seek and employ some alternative prop or crutch invariably leads to some measure of reductionism. As Hans-Georg Gadamer has contended at length in his *Warheit und Methode*, there are no satisfactory methodical criteria that prescind from the criteria of truth.").

[415] LONERGAN, *supra* note 182, at 172–73.

[416] *See, e.g.*, LONERGAN, *supra* note 179, at 20.

must be performed and performed well if the Subject is to achieve knowledge: experiencing, understanding, judging. The final precept concerning choice, however, goes beyond the conditions of knowledge to the conditions of correct conduct, a topic to which Lonergan's contribution is substantial. To explore choice in detail here would take us beyond the already broad scope of this Article, though something more will have to be said about it in the next section, for common-sense knowing and law are, after all, about how we (should) choose to live.[417]

But there is a prior point that must be observed here: Reports of natural law from the ancients through John Finnis have the natural law telling us what we should do or avoid. The natural law, on these theories, amounts to an incrementally revealed list of both prescriptions and proscriptions of conduct.[418] On Lonergan's account, by contrast, we encounter "natural law" long before we ask for specifications of correct conduct. We encounter it in the exigence that is the dynamic eros for the real as it is worked out through the precepts corresponding to the several levels of human cognitive process. "[B]efore they are ever formulated in concepts and expressed in words, those precepts have a prior existence and reality in the spontaneous, structured dynamism of human consciousness."[419] The natural law is, on Lonergan's account, that "immanent Anagke," the unrevisable exigence of the further question. Compliance with that *inner law* leads to as many answers as we have questions. "Natural law is not constituted by an 'objective code'; it is constituted by a set of dynamically related operations on the part of each individual person."[420]

When natural law is understood in these terms, the wall usually alleged to separate "positivist" and "natural law" legal theories turns out to have been a ruse.[421] If to know legal meaning requires compliance with *the* natural law in its first three precepts, then to call for a

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[417] The full basis and implications of Lonergan's ethics are well worked out in KENNETH R. MELCHIN, HISTORY, ETHICS, AND PROBABILITY (2d. ed. 1999) and KENNETH R. MELCHIN, LIVING WITH OTHER PEOPLE (1998).

[418] *See* COONS & BRENNAN, *supra* note 25, at 123–36.

[419] *Id.*

[420] Michael Novak, *Bernard Lonergan: A New Approach to Natural Law*, 41 PROC. AM. CATHOLIC PHIL. ASS'N 246, 248–49 (1967); *see also* LONERGAN, *supra* note 30, at 604 ("[T]he root of ethics, as the root of metaphysics, lies neither in sentences nor in propositions, nor in judgments but in the dynamic structure of rational self-consciousness .... Such a method not only sets forth precepts but also bases them on their real principles, which are not propositions or judgments but existing persons ....").

[421] For a statement of the traditional natural-law-versus-positivism problematic, see, for example, LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 2–3 (1987).

law without natural law is to call only for confusion. It is possible to do so—and it happens all the time. Such people are like the intellectual terrorist with whom I began; they intelligently comply with the natural law in order persuasively to advocate chaos. But one should never overlook that those who advocate confusion in the public square rarely settle for it in their own backyards.[422] Natural law, in the sense stated, is the root of any genuine rule of law.

C. *Faith—in Law?*

"[N]o one wants to be called a natural lawyer."[423] But perhaps even more to be avoided, in the legal academy, is a theological appearance. To the run-of-the-academy lawyer, theology amounts to a repository of benighted authoritarianism. But the contempt is bilateral, not unilateral. Though the academic lawyer is little aware of it, the theologian views many lawyerly creations as both benighted and authoritarian.[424] And it is no doubt true that some religions and some legal systems all the time, and other religions and other legal systems some of the time, are both benighted and authoritarian.

My immediate interest, however, is in what law *can* be, and what I have been suggesting is that law becomes worthy of respect through its authority. Law's authority I have rested, in turn, on law's being the known meaning of the Subjects authorized to answer our questions about how to live together well and thereby incrementally to contribute to the creation of a legal and lawful community—complete legality depending for its realization on all Subjects' engaging authentically in the community's shared search for worthwhile living.

To settle for anything short of our best knowledge of real meaning about how to live well is to settle for something unworthy of re-

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[422] *See* LONERGAN, *supra* note 30, at 599–600 ("The average mind can invent lies about matters of fact; it can trump up excuses; it can allege extenuating circumstances that mingle fact with fiction. But hypocrisy is no more than the tribute paid by vice to virtue. It falls far short of the genuine rationalization that argues vice to be virtue, that meets the charge of inconsistency not by denying the minor premise of fact but by denying the major premise of principle. But the revision of major premises is a tricky business; it is playing fast and loose with the pure desire to know in its immediate domain of cognitional activity; and so the majority of men, instead of attempting rationalization themselves, are content to create an effective demand, a welcoming market, for more or less consistently developed . . . myths and . . . philosophies" not rooted in self-appropriation.).

[423] Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 165 (1982).

[424] *Cf.* VINING, *supra* note 28, at 195 ("Moral and political philosophers with whom lawyers consort tend to have a view of theology as authoritarian, trading on mindless and fearful obedience, very much the kind of view, it should be said, that theologians have of law.").

spect. I have described the process of knowing legal meaning—legal method—as a practice of methodical question and answer about how to live well. Such legal method, I observed, is transcendental method deployed in a specific context. Legal method is *transcendental* to the extent that by it, Subjects transcend the confines of their solipsistic interiority by knowing *real* meaning about how to live together well. The legal method I have advanced, with the help of the work of Professors Vining, White and Glendon, has as its justification nothing more or less exalted than the dynamically structured pattern of cognitive activities by which the Subject is in fact transcendent. The legal implications of generalized empirical method for which I have argued are neither exotic nor mysterious. For such bizarre notions as intuition and law's "artificial reason," for untutored incantations of "reason," there has been substituted a detailed phenomenology of human knowing.

But apart from the paranoid reasons for seeing theology or queer transcendental entities in my account, there are indeed sound and sufficient reasons for finding in my approach affinities to theology. There is, first, the careful reading of texts. Several legal analysts, including Joseph Vining, have recently emphasized the similarity between the lawyer's and the theologian's close reading of authoritative texts,[425] and whether either professional is flattered by it, the similarity seems hard credibly to deny. That lawyers follow such a method may seem odd, as Vining observes:

> Looking up what some old men said, jumping when some new men speak—these things need to be explained. They need explanation, as a mother jumping when her child calls and a scientist looking to what an experimenter said long ago do not, at least in the modern world. So, too, does lawyers *poring* over what these individuals say, whether new or old, need to be explained.[426]

The explanation is that what these old women and men produce is our evidence of the law, and *if* we turn to their texts to find the law,

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[425] *See, e.g.*, SANFORD LEVINSON, CONSTITUTIONAL FAITH 16, 17 (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 3, 17 (1984); *see also* MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 136–45 (1988); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 97–100 (1982).

[426] VINING, *supra* note 28, at 153–54.

there will be no way other than a close reading.[427] Real legal meaning is known only through fidelity to the transcendental precepts. "The ordinary legal text stands somewhere between piece of journalism and sacred text or studied work of art. Legal method holds it there."[428] If meaning is what is sought, then a posture approaching Talmudic slouch is not optional. "Lawyers are as attentive as priests to the details of a recorded statement of law."[429] As Vining appreciates: "Both lawyer and theologian argue from texts because otherwise there is nothing particular to talk about . . . . But there is always something behind the texts. There is no understanding of them without interpretation, and no interpretation without creation and imagination, reaching behind to what is *there* for us now."[430] It is not those such as Vining, who insist upon the search for real meaning, that make law dreary, dull, mindless—bureaucratic.[431]

But there is more. The reader of law's texts who is looking to say "what the law is" is not looking to dig up something static from the past, but to create what will be *law.* As Vining explains,

> The question presented by legal rules is less likely to be "I know what this means, shall I obey?" than "How shall I read this and with what attitude?" Decision making consists of weighing purposes, values, factors, channels of thought. Rules are not self-executing, in law. There is always, in law, a decision maker, and what are called rules in law are expressions of considerations to be taken into account by a decision maker. They focus not on themselves as a self-contained system but upon decision-making activity pointing forward. Talk of rights and rules of a static kind, projecting an image of law standing off by itself, obscures the focus that legal

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[427] *See* VINING, *supra* note 1, at 115 ("Close reading, reading in every detail and in every way, is at the very center of what lawyers *qua* lawyers do, and other parts of lawyers' method and the institutional structure of law are designed to make close reading possible.").

[428] *Id.* at 6; *cf.* James Gordley, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 41 AM. J. COMP. L. 367, 380–84 (1993) (noting that American legal academics lack any shared sense of what law and legal scholarship are for); *Waiting for Langdell I*, *supra* note 384, at 20 ("[L]aw has never really achieved the status of an intellectual discipline. Legal academics have not been in control of the materials; we have not been in control of any method; and so it's not a surprise that after a while, one should turn around and find that there is not much there.").

[429] VINING, *supra* note 1, at 223.

[430] VINING, *supra* note 28, at 192.

[431] *Cf.* Schlag, *Politics of Form*, *supra* note 4, at 94; *Waiting for Langdell I*, *supra* note 384, at 5–6.

> rules have in fact, always a decision that must be made, at the edge of lives that have not been lived before, in a world that has not been seen before.[432]

Poised on the brink of a world never before known, the legal decision-maker does not possess a rule—"the law"—ripe for "application." He has evidence of legal meaning from the past; he has also the question what will be *law* in the world we are now creating.

In other words, the question "What *is* the law?," always already has to be the question, "What ought the law be?" For if the Subject who will say "what *the law* is" will say something that *ought* to be obeyed, she must be able to say that this *should* be done or that this *should* be avoided. Unable to say this, the Subject can pronounce something that it may be expedient to pretend to obey. But that same Subject cannot call for very obedience.[433] "Legislation is the arbitrary which we allow—but also limit. To make the point in its strongest form, it could be said legislation is lawless behavior, except that by a paradoxical trick we make legislative statutes materials we use in determining what the law is."[434] The authority of a legal text is not automatic; it must be earned. "Law moves forward, else it is not law. It could not be known otherwise, for it would dissolve into the fractured world. Law has an inner dynamic, born of its very realism, its axiomatic concern with the actual. In Christian and Jewish theology this movement forward is called eschatology. In law it is usually called working toward justice."[435]

In Lonergan's terms, this is called being *responsible.*[436] The demands of that inner dynamic toward the real are not exhausted by knowing. That desire is for the real—and it seeks its own extension from knowledge into action. The transcendental precepts are not three but four. After you have been attentive, intelligent, and reasonable in your knowing of what has been put forward as law for a world

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[432] VINING, *supra* note 28, at 217–18.

[433] *Cf. id.* at 212 ("If what a man does is search for meaning, that 'is' of what he does is not separated from the 'ought' of our lives by such an impassable chasm. Who are we, lying deep within ourselves, but the selves (in part) that we want to be and wish we were? One half views law from the outside, perhaps, when one lays it side by side with other similar phenomena to help place it in one's mind. But when we say law is or authority is, it is never clear that we distinguish or can distinguish the existence of what we have in mind from its effective normative claim upon us.").

[434] VINING, *supra* note 1, at 253.

[435] VINING, *supra* note 28, at 108.

[436] LONERGAN, *supra* note 179, at 9, 11.

that no longer exists, be responsible, in your choosing.[437]The fact is that in one stroke transcendental method, by uncovering and revealing the single, fundamental, and radical exigence of the human spirit for full self-transcendence . . . shows not only that the human person's genuine *self-realization is self-transcendence,* but also that the *basic human "fact" is a drive for "value,"* that in the most radical sense, *the human person's "is" is an "ought."*[438]

Responsibility means making one's acting consistent with one's knowing of how we ought to live in light of what has been put forward as law for a past world *and* in light of the now. Grasping that the inherited data of legal meaning were law for a world that has passed away, the responsible Subject looks to inner law for guidance in the world he or she would invest now with *law.*[439] Law's minds are reading texts, but they are reading not just to know what was law for the past—they are reading for answers to the question, What now is the *law*? Mechanistically to "apply" what has been inherited—assuming such a thing is even possible—is to proceed irresponsibly; the responsible mind *cares* about how to live responsibly in the now.[440] Joseph Vining has a profound way of putting this:

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[437] *See id.* at 20

[438] WALTER E. CONN, CONSCIENCE: DEVELOPMENT AND SELF-TRANSCENDENCE 214 (1981).

[439] *See generally* BERNARD LONERGAN, *Dialectic of Authority, in* A THIRD COLLECTION, *supra* note 157, at 5–12 (Fredrick E. Crowe, S.J. ed., 1985). *See* FLANAGAN, *supra* note 138, at 77–78 ("*Antigone* expresses the tension between Creon's administering the laws of the city and Antigone's observing the pious customs of the family. But how does Creon know if the laws he is upholding and administering are just laws? To a large extent, the laws that leaders and judges employ are normative procedures for making decisions which have been inherited from prior norms and decisions, and these in turn depend on prior cultural communities. In other words, there is this fundamental question that any cultural authority may have to face: How reasonable and just are the inherited cultural norms that provide the standards for communal judgments and decisions? To answer this question, cultural authorities need a transcultural norm that is not dependent on any cultural context, but that grounds and orders each and every cultural context. Creon's case could be compared to Newton's when he thought he was thinking and measuring in a completely universal framework but was, in fact, operating in quite a limited framework. However, the limits of that framework were hidden from him. Creon, like any civic leader, experiences, understands, judges, and decides within a cultural horizon whose limits are hidden, unless he can shift from a limited cultural context and move into a transcultural or historical horizon.").

[440] As Mary Ann Glendon explains, "We are now in the process of adding a layer [to law] that will reflect the circumstances of our own time and whatever intelligence we are able to bring to bear .... [I]t is incumbent on us to be attentive, intelligent, reasonable and responsible ... in 'the visions we project.'" GLENDON, *supra* note 335, at 141–42; *see also, e.g.,* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 34 (1989) (in the nineteenth cen-

> Meaning exists *now,* it is said. That is true . . . . But discovery of meaning behind a text, it is also said or implied, would, even if it were possible, be discovery only of a historical fact, a person bound to time and place, an "is," not a voice with a claim upon our attention. That is not true. That is expression only of an assumption against transcendence of time and place, an assumption that persons and the personal, acknowledgment of whom is a half-turn away from science, must be in history, in process; reflection also of the assumption that to say is only to do, that saying something is only doing something. Doing, acting, can be put into process, its pattern into system or form: it is not beyond process, system, form. To acknowledge that beyond is to take a full turn away from science.
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> That is the full turn taken by law, and that turn is the reason law is the loose thread in thinking that is distinctively modern or postmodern, confidently positivist, or confidently historicist. Law pulls constantly away from science, because it is the companion of responsible action in which suffering is brought and responsibility taken for it, and suffering is experienced if action is not taken. Orders are given in law, and the order given is searched for in the materials of law, the texts, statements of law.
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> Just how complete the turn from natural science must be, how deep the difference might be down to a vision of the very nature of the universe itself, is in the one word care. For law, mind is caring mind. Mind that does not care is no mind to seek, no mind to take into oneself, no mind to obey: it has no authority.[441]

If the Subject is to say what the *law* is, his must be not only a careful but also a caring mind.[442] The rule of law would be the meaningful

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tury "the notion of *legitimacy* was increasingly coming to be identified with *legality,* understood as the quality of enactments which are formally correct and issued according to established procedures . . . . The idea that legitimacy can be conferred by law, however, is by no means self-evident . . . . [A]s the bureaucratic, secular state has increasingly injected its own content and pursued its own aims in family law, the relationship between legality and legitimacy has become ever more problematic.").

[441] VINING, *supra* note 1, at 31–32.

[442] As Anthony Kronman understands, any institution "will always require, at the point of its actual application to human affairs, a tolerance for compromise and the ability to

achievement of authentic Subjects;[443] absent minds that care, law is not ruling. The mind that does not care has disobeyed inner law and is not *pro tanto* worthy of obedience. The faith that is necessary for *law* is the faith that those Subjects who call for our obedience are themselves authentic, innerly lawful.

> Legal analysis consists of working with texts. . . . [T]his is what the legally trained do when asked to find the law and say what the law is . . . .
>
> Are they foolish to engage in this kind of activity? Is it a front, a cover? Is it beside the point, superfluous or superstructural? The question is always with us . . . [The] answer [is] of the not-if kind. Not foolish, not superfluous, if law is to have authority. Not if law is to hold us, evoke our willing acceptance rather than our resistance. Not if law is to be a source to be looked to in discovering what we ought to do. Perhaps we do not or ought not to want that; but if we do not, then we cannot complain about disintegration, disap-

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work, by means of a practical wisdom irreducible to rules, toward greater coherence and overall good sense." Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1611 (1985). The work of scholars suggesting that statutory interpretation inevitably involves, or at all events should involve, "practical reasoning" resembles my own position in some respects, but differs sharply inasmuch as I undertook a cognitional analysis exactly to penetrate the mystique and unpredictability that have attached to "practical reason" since it got denominated a "faculty."(*See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992); Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127 (1998); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985)).

[443] Michael Novak, a student of Lonergan, puts the same point more generally:

> We may take it, then, that the fact of this drive to understand [as explicated by Lonergan] is sufficiently recognized, and that its analysis is well under way. The goal of the drive to understand is to understand all that can be understood. This intention drives us step by step along the discursive path of human understanding, and lights our way both by policy and by singular decision through the concrete complexities of what we try to do in the world.
>
> Who am I? At least this: an intelligent subject who sometimes understands and who sometimes knows; and a subject whose ultimate horizon is all that is to be understood; whose personal development follows upon fidelity to the drive to understand both in realistic and objective doing, and in realistic and objective knowing; and whose intellectual and moral life advances from horizon to horizon in a rhythm of rest and action.

MICHAEL NOVAK, BELIEF AND UNBELIEF: A PHILOSOPHY OF SELF-KNOWLEDGE 106 (1965).

> pearance of authority, of respect, and of self-respect, or loss of meaning in the modern state.[444]

The answer, as Vining says, is of the "not-if" kind. Law and its rule are only possible, not necessary.[445]

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[444] VINING, *supra* note 28, at 40.

[445] *See id.*

> The fruit of unauthenticity is decline. Unauthentic subjects get themselves unauthentic authorities . . . . Just as sustained authenticity results in increasing responsibility and order, increasing reasonableness and cohesion, increasing intelligence and objective intelligibility, increasing knowledge and mastery of the situation, so sustained unauthenticity has the opposite effects. But the remedy for the opposite effects lies beyond any normal human procedure. There is no use appealing to the sense of responsibility of irresponsible people, to the reasonableness of people that are unreasonable, to the intelligence of people that have chosen to be obtuse, to the attention of people that attend only to their grievances . . . . I have placed the legitimacy of authority in its authenticity. But besides the legitimacy of authority, there also is the assertion of that legitimacy, its legitimation. Legitimation is manifold. It occurs on any of the many differentiations of consciousness. In early human society it is a matter of myth and ritual. In the ancient high civilizations it became a matter of law. Among the loquacious and literary Greeks law was reinforced first by rhetoric and later by logic. Historians discovered that different laws obtained at different times and places. Systematizers sought to draw up codes that would express the eternal verities for all times and places. Philosophers sought principles that would underpin this or that system. But if the legitimacy of authority lies in its authenticity, none of these solutions is adequate.

LONERGAN, *supra* note 439, at 9, 11. A position that comes close to my own is Joseph Vining's, summarized in his essay, *Law and Enchantment: The Place of Belief*, 86 MICH. L. REV. 577 (1987). Steven D. Smith is right to wonder whether Vining thinks that "legal theory shares the faith in transcendent authority found in religious belief." Smith, *supra* note 236, at 158. But what Smith's analysis misses that Vining's and mine insist upon, is that it is Subjects that transcend, and not by the notorious "blind faith" but through the conscientious application of their cognitive equipment. *See id.* at 158–59. But while I have emphasized Vining's and my agreement that law that is caring is a world apart from the "science" that is *scientistic*, my position differs from Vining's inasmuch as I have traced caring mind to the structures by which the Subject knows not only meaning but the natural world. As Lonergan captures the point, "Being a scientist is just an aspect of being human, nor has any method been found that makes one authentically scientific without heading one into being authentically human." LONERGAN, *supra* note 439, at 21; *see also* Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 871–74 (1988) (rejecting Enlightenment "reason" as foundation for law in favor of rhetorical argumentation and, ultimately, the character that alone makes it succeed).

EPILOGUE

Need it be said that we do not have to obey even ourselves?

—Joseph Vining[446]

I worked out a transcendental argument to convince you, the reader, to choose intelligence—to T.S. Eliot's mind, the only method.The point was to show you what you are *in fact* doing when you are knowing—in the hope that you will choose to do more of it. What transcendental or any other argument can *do,* is very limited. Inner law is an invitation; it is constraining, coercive only in the sense that its satisfaction is a necessary condition of ordered, worthy human living. You are always "at liberty" to deny the conditions of the cognitive success you demonstrate. You are also always "free" to be inattentive, unintelligent, unreasonable, irresponsible.

The avoidance of lawlessness must begin on the inside, in an act of will. Our "'taking' [of the world] is not forced upon us; it would be a decision."[447] I can always be the obscurantist. "[T]hat I understand you is something of a choice . . . ."[448] Nothing makes me do it. I do it only *if* I care to understand you. We shall have a rule of law *if,* but only if, Subjects care to obey the transcendental precepts.

When people give up choosing performative self-contradiction, when people begin to live by demands of the question—choosing to be attentive, intelligent, reasonable, responsible—we use such words as *conversion.*[449] Not all conversions are religious, but perhaps some are. There is, in any event, no alternative, no short cut. There are only Subjects—and they either use their intelligence or they do not. But to

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[446] VINING, *supra* note 28, at 95.

[447] VICTOR PRELLER, DIVINE SCIENCE AND THE SCIENCE OF GOD: A REFORMULATION OF THOMAS AQUINAS 172 (1967); *see also* DAVID BURRELL, ANALOGY AND PHILOSOPHICAL LANGUAGE 242 n.33 (1973) ("[T]he real as intelligible is the product of a decision: a decision to accept as sufficient the reasons which support one's claim to know."(quoting Michael Novak)); RICHARD RORTY, *Texts and Lumps, in* OBJECTIVITY, RELATIVISM, AND TRUTH (PHILOSOPHICAL PAPERS VOL. 1) 78, 81 (1991) ("Facts are hybrid entities; that is, the causes of assertibility of sentences include both physical stimuli and our antecedent choice of response to such stimuli.").

[448] VINING, *supra* note 1, at 17.

[449] Lonergan has a fully-elaborated taxonomy of conversion. For a summary see Lonergan, *supra* note 179, at 338 ("[O]bjectivity is reached through the self-transcendence of the concrete existing subject, and the fundamental forms of self-transcendence are intellectual, moral, and religious conversion. To attempt to ensure objectivity apart from self-transcendence only generates illusions."); *see also* FLANAGAN, *supra* note 138, at 262–68 (explaining "method as conversion"); LONERGAN, *supra* note 30, at 624–26 (observing place of satire and humor in conversion).

live intelligently is not just a choice, but also an exigence. For as Paul Kahn asks ominously, "Are there angels to govern us? No. We can rely only on ourselves. And we are not angelic. Are we adequate to the task? Only history can tell."[450] Life obedient to inner law is contingent. One always can choose to play the buffoon—as can an entire culture, for a season.

[450] KAHN, *supra* note 5, at 25.