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ARTICLES

Thinking Like Thinkers: Is the Art and Discipline of an “Attitude of Suspended Conclusion” Lost on Lawyers?

*Donald J. Kochan**

I. INTRODUCTION

In his 1910 book, *How We Think*,¹ John Dewey proclaimed, “[T]he most important factor in the training of good mental habits consists in acquiring the attitude of suspended conclusion.”² This Article comes at an opportune time, just after the centennial anniversary of that book, to reflect on its insights, explore that proclamation, and describe its meaning and significance in the enterprise of thinking generally and its importance in lawyering particularly.³ This Article briefly begins by commenting on Dewey’s larger corpus of work, especially his work on logic and legal reasoning. It will then highlight the importance of the attitude of

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1. JOHN DEWEY, *HOW WE THINK* (1910) [hereinafter DEWEY]. Dewey published what amounts to a revised (rather than a second) edition in 1933. JOHN DEWEY, *HOW WE THINK: A RESTATEMENT OF THE RELATION OF REFLECTIVE THINKING TO THE EDUCATIVE PROCESS* iii (rev. ed. 1933) [hereinafter DEWEY 1933]. Although the 1933 edition includes some interesting and important changes to the overall text, such changes in large part are immaterial to the general lessons from the original publication discussed in this Article. See B.H. Bode, Book Review, 13 *EDUC. RES. BULL.* 210, 210 (1934) (stating that the “basic point of view and the general approach remain unchanged” in the 1933 revision). It will be used only when helpful in providing additional clarity on the subjects involved herein.

2. DEWEY, *supra* note 1, at 13.

3. According to Dewey, “[*How We Think*] was written for pedagogical purposes rather than for strictly logical ends.” John Dewey, *An Analysis of Reflective Thought*, 19 *J. PHIL.* 29, 29 (1922) [hereinafter Dewey, *Reflective Thought*].

suspended conclusion to thinking and the importance of training and instilling the attitude. This Article examines competing habits of mind and covers methods to overcome them. This Article then argues for the importance of the attitude of suspended conclusion for legal thought and ends with a short conclusion on the importance of adopting a disciplined attitude of suspended conclusion generally.

This Article examines a foundational concept in the study of thought that was presented in *How We Think*: the attitude of suspended conclusion. If we think about the phrase “suspended conclusion” and break it into its component parts, we can see that (1) it does not foreclose an ultimate conclusion; (2) it simply requires suspension before conclusion; and (3) it means that there must be some prerequisite act—thinking—before conclusion and after suspension. When one adopts an attitude of suspended conclusion, one avoids being conclusory. One embraces doubt, accepts confusion and anxiety, examines alternative suggestions, overcomes impatience and habitual tendencies to rush toward an answer, and otherwise avoids the impulsive tendencies toward a premature conclusion.

This concept has seldom been discussed in the literature on legal education.⁴ In essence, it is an admonition that individuals should think like thinkers—they should dedicate themselves to the task of reflective thought. Dewey’s exposition on reflective thought presents the starting point for analysis of the suspended conclusion concept. Dewey explains:

In some cases, a belief is accepted with slight or almost no attempt to state the grounds that support it. In other cases, the ground or basis for a belief is deliberately sought and its adequacy to support the belief examined. This process is called reflective thought; it alone is truly educative in value, and it forms, accordingly, the principal subject of this volume.⁵

4. Dewey’s attitude of suspended conclusion has clearly been under covered in the literature. Searches in JSTOR and Westlaw discover the phrase suspended conclusion (or references to its specific use in Dewey’s work) in fewer than twenty academic articles, and even then, the treatment is minimal. In fact, the general field of alternative argumentation that suspended conclusion anticipates is under covered. Cf. Lisa T. McElroy & Christine N. Coughlin, *The Other Side of the Story: Using Graphic Organizers to Counter the Counter-Analysis Quandary*, 39 U. BALT. L. REV. 227, 227 (2010) (“Very little has been written about the construction and cognition of legal counter-analysis.”). Perhaps this lack of recognition is evidence of social psychologist Gustav Ichheiser’s general observation that “[n]othing evades our attention so persistently as that which is taken for granted.” GUSTAV ICHHEISER, APPEARANCES AND REALITIES: MISUNDERSTANDING IN HUMAN RELATIONS 8 (1970). For curious readers, Ichheiser’s work on attribution theory and on personology is analyzed in, for example, Floyd Webster Rudmin et al., *Gustav Ichheiser in the History of Social Psychology: An Early Phenomenology of Social Attribution*, 26 BRIT. J. SOC. PSYCHOL. 165 (1987).

5. DEWEY, *supra* note 1, at 1–2. Dewey states it more concisely in the 1933 edition:

Dewey then posits as his leading premise in *How We Think* that the mind must learn to suspend conclusion—to suspend judgment—at the outset of any approach to a problem that presents itself to the mind for thought.

The critical paragraph from *How We Think* for the purposes of the remaining discussion in this Article explains the pivotal importance of the suspended conclusion concept or rule for reflective thinking:

Reflective thinking, in short, means judgment suspended during further inquiry; and suspense is likely to be somewhat painful. As we shall see later, the most important factor in the training of good mental habits consists in acquiring the attitude of suspended conclusion, and in mastering the various methods of searching for new materials to corroborate or to refute the first suggestions that occur. To maintain the state of doubt and to carry on systematic and protracted inquiry—these are the essentials of thinking.⁶

This insight can become a powerful tool if implemented in a disciplined approach to the thinking process.

One attains the attitude of suspended conclusion when developing an art and discipline that quells the jittery impulse for the fix of a conclusion, that accepts an operative state of doubt, and that maintains the patience for careful and thorough inquiry before reaching an *eventual* conclusion. The thinker must approach every problem with an open mind and without a predetermined conclusion. The thinker must overcome the anxiety associated with suspense. A conclusion is the end of a reflective process, *not an end in and of itself*.

Perhaps this guidance is so obvious that it seems not to deserve this level of attention—the dedication of study to something so seemingly prosaic. I contend that there is new light to be gleaned from what otherwise seems ordinary. My challenge to the reader is to consider the following claim: this lesson indeed deserves such attention *precisely because it is so obvious but too often ignored* as to make its study intellectual.⁷ A discipline of following the rule of suspended conclusion can act

[R]eflective thinking, in distinction from other operations to which we apply the name of thought, involves (1) a state of doubt, hesitation, perplexity, mental difficulty, in which thinking originates, and (2) an act of searching, hunting, inquiring, to find material that will resolve the doubt, settle and dispose of the perplexity.

DEWEY 1933, *supra* note 1, at 12.

6. DEWEY, *supra* note 1, at 13.

7. Drawing again from Ichheiser: “[T]he contention that certain facts are ‘quite obvious’ must be considered not only as meaningless but even far worse than that: as a device for blocking the analysis of basic phenomena and preventing the incorporation of these phenomena into a theory of human relations.” ICHHEISER, *supra* note 4, at 11. With that in mind, I aspire in this Article to meet a standard of Alfred Whitehead, the well-regarded philosopher and mathematician: “Familiar things

like a trigger lock for the mind, disabling the tendency to “shoot first and ask questions later.”⁸ The rule of suspended conclusion must be engaged before firing the synapses of thought.

The potent suspended conclusion concept encompasses much of what a lawyer or student of law needs to know to properly and fully evaluate a legal problem. As such, this Article is written largely with the lawyer in mind, but the full discussion of the concept has implications for thinkers of all types.

Lawyers face a unique problem in their thinking in the form of debilitating tendencies specific to law that prevent them from adopting the attitude of suspended conclusion. The very nature of a lawyer’s professional obligations will serve as an impediment to successful adoption and application of the attitude. The tendency to become entrenched in a position and immovable from it is widespread in law, politics, and personal and professional relations of all types. Yet, because lawyers typically begin their professional task with a predetermined position, they are more susceptible to the tendency to seize and freeze⁹ on a particular position rather than fully explore a problem and potential conclusions. An attitude of suspended conclusion can lead to better thinking and arguing, and better outcomes in a variety of lawyering settings by fighting the tendency to seize and freeze. Lawyers should aspire to inculcate it as a discipline in their thought processes, even in the face of limitations to be discussed later.

There are several areas of seemingly related literature that need not be discussed in any detail in order to advance this Article’s thesis. This includes literature and study from several areas of educational philosophy, psychology, and pedagogy, as well as most of Dewey’s work outside the relevant portions of *How We Think*. This Article does not intend to enter areas already laid with substantial cover. This Article also does not enter the debate on teaching or learning techniques, processes, or methods, although I have briefly surveyed those subjects elsewhere.¹⁰

happen, and mankind does not bother about them. It requires a very unusual mind to undertake the analysis of the obvious.” ALFRED NORTH WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 4 (1925).

8. Several other adages come to mind, such as “Look before you leap,” “Don’t put the cart before the horse,” “Don’t jump to conclusions,” “Fools rush in,” or “Don’t count your chickens before they hatch.” One must run the race before crossing the finish line.

9. Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 669 (2004) (discussing the seize and freeze tendency recognized in psychology and applicable to lawyers).

10. See Donald J. Kochan, “Learning” *Research and Legal Education: A Brief Overview and Selected Bibliographical Survey*, 40 SW. U. L. REV. 449 (2011) (documenting much of the available research in the “thinking like a lawyer” literature).

One particular body of scholarship and commentary that deserves special recognition because it is distinguishable from this Article is the pervasive and extensive literature on “thinking like a lawyer.”¹¹ Too much emphasis has been given to the idea of thinking like a lawyer and not enough to “thinking like a thinker.” A review of the literature reveals that there is little agreement on what thinking like a lawyer means or if it means anything at all.¹²

The discourse on thinking like a lawyer ranges across a number of approaches and critiques. This Article does not attempt to evaluate these varied opinions,¹³ endorse any particular view on the subject, or discern the relative truth or importance of the thinking like a lawyer mantra for the process of educating legal minds. Indeed, some conceptions of what it means to think like a lawyer may actually impede our ability to think like thinkers. Whatever thinking like a lawyer means or whatever process of learning techniques help achieve it in law school—theoretical versus practical or clinical, visual versus verbal, lecture versus Socratic Method, problems versus cases versus narratives, and other like disputes—a rule that guides lawyers away from instant gratification and the instinctual demand for answers and instead toward suspended conclusion and its implicit and concomitant demand for employing reflective inquiry surely fits within each approach. Rather than trying to figure out how a lawyer thinks, this Article aims to figure out how a thinker thinks and asks that each lawyer aspire *as a lawyer to be a thinker*.

This Article posits that the attitude of suspended conclusion is an important weapon in the arsenal of attack whenever one is asked to think and approach problems. John Dewey’s *How We Think* should be a must-read for lawyers and thinkers of all types,¹⁴ and it has particular insights and utility for training the mind (legal or otherwise). The training of good mental habits requires adopting the attitude of suspended conclu-

11. *See id.* For an excellent survey of the literature on the debates within academic scholarship surrounding the thinking like a lawyer concept, see Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 121 nn.1–33 (1994).

12. Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 413 (2007) (“Despite the popularity of the phrase, legal scholars have not agreed on a detailed conception of what ‘thinking like a lawyer’ means.”); *see* Kochan, *supra* note 10, at 451.

13. *See* Eric Mills Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 535–36 (1976) (“Since most law teachers perceive that legal education is failing in some critical way to do its job, there is no shortage of solutions proffered for this malaise.”).

14. *See* George W. Pieper, *The Educational Classics*, 4 HIST. EDUC. J. 78, 79 (1953) (listing *How We Think* as number fourteen on the list of great books in the field of education from a jury of 132 college and university professors).

sion and mastering the requisite methods of analysis that must be employed before reaching any resolution of a legal problem.

Before diving into the attitude of suspended conclusion, Part II briefly introduces the reader to John Dewey's vast corpus of work, principally to understand his influence and to narrow the scope of this Article. Part III discusses, again briefly, Dewey's limited work dedicated specifically to issues of legal reasoning and the application of logic to legal problem-solving. It explains that no single theory of logic or method is necessary to understand the attitude of suspended conclusion at the core of this Article's discussion.

Part IV moves into the heart of this Article's thesis, explaining the necessity and utility of training and instilling disciplined thought. This Part explains that there is a fundamental place in legal education for a focus on the thinking enterprise, and that every lawyer should understand and learn in his constant and continuing education of practice and experience the benefits of adopting an attitude of suspended conclusion in the exercise of his profession. Part V then expands the analysis and meaning of Dewey's attitude of suspended conclusion and explains the importance of developing an appreciation for an art and discipline for attaining that attitude.

Part VI provides a brief survey of the research related to psychological tendencies or poor habits that form barriers to the effective adoption of an attitude of suspended conclusion. We have learned that certain fallibilities exist in the human condition that disadvantage an individual's effective thought. Part VII explains that, through education and certain debiasing techniques, some of these debilitating tendencies may be overcome.

Finally, Part VIII questions whether lawyers are in a unique position where full adoption of an attitude of suspended conclusion in their practice is not only difficult but in some cases also impossible—particularly because lawyers most often advocate for a particular client and must commit to a client's position.

Before venturing further, it is important to caution that one should not dismiss this premise as too obvious to study. Dewey has a knack for revealing the importance of many things that are seemingly ordinary but analysis of them is critical to educators and other thinkers alike. Dewey "gives voice to the ordinary, the issues that everyone must recognize once they take seriously the problems of educational practice."¹⁵ By the end of the Article, it should be clear that reaching an understanding of

15. Thomas F. Green, *Unwrapping the Ordinary: Philosophical Projects*, 100 AM. J. EDUC. 84, 105 n.8 (1991).

the attitude of suspended conclusion and stamping it in our minds is an effort beyond the ordinary. Exposing the counterproductive deceptions of obviousness and ordinariness attached to concepts like the attitude of suspended conclusion and consequently appreciating the seriousness of adherence to that disciplined attitude are central themes in the discussions that follow.

II. A BRIEF NOTE ON DEWEY AND HIS LARGER CORPUS OF WORK

The lessons in *How We Think* serve lawyers and legal thinkers well in dealing with some of the “thinking problems” they must overcome to be successful. Although *How We Think* was originally intended as a guide for elementary school teachers,¹⁶ most of its teachings transcend time and apply regardless of educative stage.¹⁷ In 1920, Samuel Chester Parker (then Dean of the College of Education at the University of Chicago) wrote: “John Dewey is himself one of America’s greatest thinkers and is at the same time a trained psychologist who has specialized in the study of thinking processes Consequently, his book *How We Think* (1910) deserves very special study.”¹⁸ Some view publication of *How We Think* as a key moment in the history regarding the research and theory of human problem-solving.¹⁹

16. Laurel N. Tanner, *The Path Not Taken: Dewey’s Model of Inquiry*, 18 CURRICULUM INQUIRY 471, 476 (1988).

17. In a contemporary review, B.H. Bode, a philosophy professor then at the University of Illinois, praised the universal lessons of *How We Think*:

Professor Dewey’s qualifications for the task he has set himself are too well known to require comment; it is sufficient to say that in this book he is even more successful than usual. Teachers of all kinds will find the book a source of stimulus and enlightenment, and they will doubtless give to it the cordial welcome which it so eminently deserves.

B.H. Bode, Book Review, 18 SCH. REV. 642, 645 (1910). See also W.B. Pillsbury, Book Review, 20 PHIL. REV. 441, 442 (1911); Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 660 (2006) (“John Dewey’s advice to teachers in generations past is still vital and important today.”); cf. Edward Rubin, *What’s Wrong With Langdell’s Method and What to Do About It*, 60 VAND. L. REV. 609, 648 (2007) (“[L]aw students . . . generally arrive in law school with almost no knowledge of the legal system Thus, a substantial amount of intellectual development occurs during the course of their three years.”).

18. Samuel Chester Parker, *Problem-Solving or Practice in Thinking IV*, 21 ELEMENTARY SCH. J. 257, 257 (1920) [hereinafter Parker, *Problem-Solving IV*]. Parker discusses Dewey’s suspended conclusion concept in SAMUEL CHESTER PARKER, METHODS OF TEACHING IN HIGH SCHOOLS 194 (rev. ed. 1920) [hereinafter PARKER, METHODS OF TEACHING] (“The maintenance of the attitude of suspended conclusion . . . means that [the student] will evaluate . . . hypotheses in an open-minded and unbiased way.”).

19. See, e.g., Irving Tallman et al., *A Theory of Problem-Solving Behavior*, 56 SOC. PSYCHOL. Q. 157, 157 (1993) (“Research and theory about human problem-solving have a long and circuitous history. Although this has been a central theme for students of human behavior at least since the time of John Dewey (1910), it is difficult to identify any consistent, cumulative body of knowledge about problem-solving that has been generated by nearly a century of research.”). But see Cecil Miller,

There can be little doubt that Dewey has been an intellectual force of high recognition.²⁰ Dewey was a prominent, prolific, and pioneering pedagogue.²¹ His contributions have been extensively discussed throughout the literature of varying academic disciplines.²² Dewey's body of work is voluminous,²³ known for its accessibility to diverse readership, and touches on a variety of areas from education to philosophy to social theory.²⁴ His works have made an impact on a number of important debates ranging from fields of philosophy and education to social reform.²⁵ This Article neither attempts nor intends to fully digest that massive contribution to thought.²⁶

This Article's endeavor will be successful only if it is narrowed to Dewey's work on suspended conclusion within his concept of reflective thought and almost exclusively limited to its explication in *How We*

Complete and Incomplete Acts of Thought, 77 ETHICS 67, 67 (1966) (questioning the universal applicability of Dewey's theories on method in *How We Think* to the social sciences).

20. The Center for Dewey Studies at Southern Illinois University (SIU), Carbondale has the most comprehensive collection of research materials by or about Dewey and continues to increase awareness and understanding of Dewey's work and influence. CTR. FOR DEWEY STUDIES AT SIU CARBONDALE, <http://www.siu.edu/~deweyctr/index.html> (last visited June 30, 2011); see also Jo Ann Boydston, *The Dewey Center and the Collected Works of John Dewey*, 13 FREE INQUIRY 19 (1992) (describing the Dewey Center at SIU collection as its (now former) director).

21. HENRY J. PERKINSON, TWO HUNDRED YEARS OF AMERICAN EDUCATIONAL THOUGHT 218 (Univ. Press of Am. 1987) (1976) ("Dewey wrote some forty books and over seven hundred articles.").

22. In fact, collecting the work on Dewey's work itself required herculean efforts by two massive projects that were undertaken to catalogue the vast literature discussing the subject of John Dewey. The first comprehensive effort for a bibliography of commentary or biography on Dewey was published as CHECKLIST OF WRITINGS ABOUT JOHN DEWEY, 1887-1977 (Jo Ann Boydston & Kathleen Poulos eds., 2d ed. 1978) and WORKS ABOUT JOHN DEWEY, 1886-1995 (Barbara Levine ed., 1996) (including more than 4,900 entries of books, articles, or other material about Dewey and his work). Some significant biographies about Dewey include GEORGE DYKHUIZEN, THE LIFE AND MIND OF JOHN DEWEY (1973); SIDNEY HOOK, JOHN DEWEY: AN INTELLECTUAL PORTRAIT (1939); and THE PHILOSOPHY OF JOHN DEWEY (Paul A. Schilp ed., 1939) (including a biographical chapter by his daughter, Jane).

23. A comprehensive collection of John Dewey's work has been published in the thirty-seventh volume THE COLLECTED WORKS OF JOHN DEWEY, 1882-1953 (Jo Ann Boydston ed., 1969-1991), which is comprised of three series: THE EARLY WORKS OF JOHN DEWEY, 1882-1898 (Jo Ann Boydston ed., 1969); THE MIDDLE WORKS OF JOHN DEWEY, 1899-1924 (Jo Ann Boydston ed., 1976); and THE LATER WORKS OF JOHN DEWEY, 1925-1953 (Jo Ann Boydston ed., 1976). See also MILTON HALSEY THOMAS, JOHN DEWEY: A CENTENNIAL BIBLIOGRAPHY (1962).

24. Dorothy H. Evensen et al., *Where Have You Gone, John Dewey?: Locating the Challenge to Continue and the Challenge to Grow as a Profession*, 108 PENN. ST. L. REV. 19, 25 (2003) ("Dewey lived a long, productive life and was one of the most prolific yet popular philosophers of any era."). For help working through it all, see JO ANN BOYDSTON, GUIDE TO THE WORKS OF JOHN DEWEY (1970).

25. Barbara Levine, *Preface* to WORKS ABOUT JOHN DEWEY, 1886-1995, at x (Barbara Levine ed., 1996) ("Saluted by *Life* magazine in 1990 as one of 'the 100 most important Americans of the 20th century,' Dewey's thoughts and ideas have influenced contemporary thought for over a century and continue to arouse attention today.").

26. See PERKINSON, *supra* note 21, at 218.

Think. To understand these focused concepts, it is unnecessary to delve into the full body of Dewey's diverse work and thought. I leave that to more ambitious authors who have come before²⁷ and to those who will undoubtedly examine the man and his work in all its complexities in the future.

Dewey's work is so diverse that it cannot help but evoke substantial commentary ranging from praise to sharp controversy and criticism. Barbara Levine²⁸ explains:

At one time or another Dewey wrote about education, philosophy, politics, logic, psychology, and ethics, and seemed equally at ease in all these fields. At times his writings stimulated agreement; at times they piqued curiosity; at times they provoked sharp controversy and criticism. In recent years they have continued to stimulate, pique, and provoke.²⁹

Given these realities, it would be foolish to attempt to tackle the entire field of Dewey's work. Thus, Dewey's philosophies on *how we learn* and his work on social policy and in other fields are necessarily outside the scope of this Article.

It is not necessary to understand or address his full range of views on the arts, ethics, political systems, democracy, war, economic systems, capitalism, socialism, the individual and society, social change, pragmatism, naturalism, religion, morality, culture, being, science, evolution, metaphysics, reality, or a host of other matters—all subjects within the universe of Dewey's work. Nor is it even necessary to understand or address to the full extent his theories and reflections on philosophy, sociology, or other works on psychology. Moreover, the fact that some of Dewey's work may be claimed to be ideologically charged or the result of certain political preferences on his part should be irrelevant to this discussion, as suspended conclusion is neutral on many of these topics and should be embraced regardless of such issues.

Nor must we explore comprehensively Dewey's views on those areas more closely related to the subject of this Article, such as education, pedagogy, experiential learning and other participatory pedagogies, knowledge, logic, or inquiry. For example, in one of the very few articles discussing Dewey's theories as they relate to law school education, Ed-

27. See, e.g., Evensen et al., *supra* note 24, at 22 (describing Dewey's basic philosophy of education and the learning process).

28. Levine is the long-time textual editor at the Center for Dewey Studies at Southern Illinois University and editor of the valuable bibliographical reference text, *Works About John Dewey*. See Staff, CTR. FOR DEWEY STUDIES AT SIU CARBONDALE, http://www.siu.edu/~deweyctr/info_staff.html.

29. Levine, *supra* note 25, at x.

ward Rubin focuses on Dewey's theories relating to *how to learn*—learning processes, mental development, experiential learning, etc.—rather than the more basic, limited concept discussed in this Article.³⁰ Similarly, a recent book by Paul Maharg delves into Dewey but in ways irrelevant to this Article.³¹ That book advocates a transactional and technology-enhanced transformation toward the democratization of legal education, discussing Dewey's social views on education and his views on legal logic³²—areas again outside this Article's lens.

This part of Dewey's work is beyond the scope of this Article precisely because it distracts from the isolated importance of the suspended conclusion concept, which endures as a guiding rule regardless of what teaching method is employed or what belief on learning processes is embraced.³³ One need not agree with Dewey's progressivism or views on public education, for example, to measure the merit of the suspended conclusion concept.

Whether you agree or disagree with Dewey in any of the areas mentioned above, he is a fascinating intellectual figure. This Article will remain agnostic on all but the suspended conclusion concept. My hope is that those who disagree with Dewey on other things can set aside those differences and independently evaluate the merit of suspending conclusion.³⁴ By narrowing the discussion here to only that concept, the importance of the attitude of suspended conclusion will be presented and absorbed with greater clarity than would a comprehensive survey of Dewey's scholarship and opinion. I expect that some may argue that this particular concept cannot be divorced from Dewey's overall philosophies, but I cannot now theorize the supporting argument enough to provide an anticipatory response, for the suspended conclusion concept is ideologically neutral. Should this Article's segregation of the suspended conclusion concept meet such a retort, however, I will meet the challenge at that time. Finally, as the suspended conclusion concept is only a useful shorthand and template for discussion of principles accepted and adopted by other persons and under different terms, this Article need not rest on

30. Rubin, *supra* note 17, at 645–49.

31. See generally PAUL MAHARG, TRANSFORMING LEGAL EDUCATION: LEARNING AND TEACHING THE LAW IN THE TWENTY-FIRST CENTURY (2007).

32. *Id.* at 7.

33. Rubin's acknowledgement of Dewey's overall contribution, however, is worth noting. Rubin states that Dewey is "one of America's most distinguished philosophers" and suggests that "[w]hile Dewey's approach to education—and to epistemology for that matter—has been a matter of controversy, the basic insights that underlie his approach are central to nearly all theories of pedagogy in the twentieth century." Rubin, *supra* note 17, at 646, 648.

34. One might say that I am asking the reader to suspend conclusion on the merits of suspended conclusion.

an appeal to authority but instead on the truth and utility of the basic premises themselves.

III. DEWEY'S WORK ON LOGIC AND LEGAL REASONING

Parts of Dewey's broader work include discussions of legal reasoning and logic that have some utility and application in this Article's analysis, but their relevance is limited. Dewey only minimally directed his attention to legal reasoning.³⁵ Nonetheless, his few forays³⁶ into law deserve brief discussion.

The only notable publication by Dewey regarding both logic and legal reasoning was a 1924 article in the *Cornell Law Quarterly*.³⁷ As one reviewer put it, that article did "not amount to a systematic treatment of law" but was instead a piece focused on general theory.³⁸ Portions of his book, *Logic: The Theory of Inquiry*, also touch on some reasoning skills and general theory applicable to legal reasoning.³⁹

Dewey's more detailed examination of inquiry is similar but sufficiently distinct from the isolated concept of suspended conclusion. Nonetheless, a basic introduction to it may help one understand why the suspended conclusion concept is an important and necessary precondition for any theory of logic or inquiry. At the very least, effective inquiry requires the intervention of deliberation or thinking prior to reaching conclusions:

In the other sort of case, action follows upon a decision, and the decision is the outcome of inquiry, comparison of alternatives, weighing of facts; deliberation or thinking has intervened. Considerations which have weight in reaching the conclusion as to what is to be done, or which are employed to justify it when it is questioned, are called "reasons." If they are stated in sufficiently general terms they are "principles." When the operation is formulated in a compact way, the decision is called a conclusion, and the considerations which led up to it are called the premises. Decisions of the first type may be reasonable: that is, they may be adapted to good results; those of the second type are reasoned or rational, increasingly so, in the degree of care and thoroughness with which inquiry has been

35. Mark Mendell, *Dewey and the Logic of Legal Reasoning*, 30 TRANSACTIONS CHARLES S. PEIRCE SOC'Y 575, 577 (1994) (criticizing Dewey's work on legal reasoning).

36. *Id.* ("[Dewey had] few extended forays into the philosophy of law.")

37. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924) [hereinafter Dewey, *Logical Method*]. The article was also published as John Dewey, *Logical Method and Law*, 33 PHIL. REV. 560 (1924).

38. Mendell, *supra* note 35, at 625 n.3.

39. *See generally* JOHN DEWEY, *LOGIC: THE THEORY OF INQUIRY* (1938).

conducted and the order in which connections have been established between the considerations dealt with.⁴⁰

The intervention of thinking—meaning here, deliberation—is necessary before reaching a conclusion no matter what method of inquiry is used, Dewey’s or others.

A few other speeches and publications relevant to legal theory are discussed and cited in articles addressing this area of Dewey’s thought.⁴¹ Yet, Dewey saw his examination of logic as related but distinct from his enterprise on the “thinking” concepts like suspended conclusion covered in *How We Think*.⁴²

Moreover, to the extent logic plays any role in the attitude of suspended conclusion, it is in the broader meaning of the term. In *How We Think*, Dewey posits that the “more vital and more practical” use of the word “logical” is used “to denote, namely, the systematic care, negative and positive, taken to safeguard reflection so that it may yield the best results under the given conditions.”⁴³ In that sense, any theory of logic must demand at least *some* type of thoughtful examination before reaching a conclusion. Dewey explains:

In this sense, the word *logical* is synonymous with wide-awake, thorough, and careful reflection—thought in its best sense. Reflection is turning a topic over in various aspects and in various lights so that nothing significant about it shall be overlooked—almost as one might turn a stone over to see what its hidden side is like or what is covered by it. *Thoughtfulness* means, practically, the same thing as careful attention; to give our mind to a subject is to give heed to it, to take pains with it. In speaking of reflection, we naturally use the words *weigh*, *ponder*, *deliberate*—terms implying a certain delicate and scrupulous balancing of things against one an-

40. Dewey, *Logical Method*, *supra* note 37, at 17.

41. See, e.g., Nathan Isaacs, *How Lawyers Think*, 23 COLUM. L. REV. 555, 556 (1923) (early thinking like a lawyer article focusing on Dewey’s then recent attention to that subject matter); Mendell, *supra* note 35, at 575.

42. For commentary and analysis, see, for example, Tanner, *supra* note 16, at 476 (discussing Dewey’s work on inquiry). Tanner observes that Dewey’s later works moved away from the term “thinking” as his focus of examination in part because of its seemingly wide berth:

Dewey’s concept of thinking as problem-solving was explained clearly in *How We Think* and in an enormous number of other works . . . [T]he term ‘thinking’ carried some heavy baggage; it was associated in the minds of most people with exclusively mental activity. This is probably why Dewey substituted the term ‘inquiry’ for ‘reflective thinking’ in his later work, *Logic: The Theory of Inquiry*.

Id.

43. DEWEY, *supra* note 1, at 56.

other. Closely related names are *scrutiny*, *examination*, *consideration*, *inspection*—terms which imply close and careful vision.⁴⁴

Under that broad conception of the term “logical,” the requirement that one suspend conclusion until after some form of thorough inquiry is not only within the definition but also a less than controversial application of the term, allowing this Article to bypass the debate on logic.

But this Article is not about logic or methods of inquiry, each with their own definitional baggage that elicits substantial debate. Logic need not be coterminous with thinking; only thinking is focused on in this Article. As Edward de Bono explains, “[T]hinking that is free from logical error is by no means necessarily good thinking. Bad logic makes for bad thinking, but good logic makes for good thinking *only* if the starting perceptions are themselves appropriate.”⁴⁵ If logic is about methodology, brain functions, or the like—about how one uses processes to reach an accurate or most effective conclusion—no particular theory must be endorsed to support the arguments in this Article. Here, we deal instead with what one must do before even beginning any logical process—start with an attitude of suspended conclusion. Only when a conclusion is suspended is room made for the application of any process at all, whatever its character. As one set of authors noted, “[M]ethod-centered issues, as important as they may be to research, become relevant only after more fundamental decisions about inquiry have been made.”⁴⁶

A suspended conclusion is a prerequisite to any thought process that deserves the name. Inquiry into or application of a logic theory cannot begin without suspending judgment, regardless of what method of inquiry or theory of logic one chooses to accept as superior. Thus, Dewey’s broader views on the proper methods of reasoning—legal or otherwise—need not be examined or judged against competing methods in order to accept the proposition that the suspended conclusion concept is a prerequisite to the application of any method.

With all that said, some of Dewey’s thoughts on logic and legal reasoning inform the interpretation and application of the attitude of suspended conclusion. Nonetheless, they are sufficiently distinct and thus do not require any further study herein. Where relevant, however, they will be later mentioned.

44. *Id.* at 57 (citation omitted).

45. Edward de Bono, *Thinking: How It Can Be Taught*, in *THE OXFORD COMPANION TO THE MIND* 774, 775 (Richard L. Gregory ed., 1987).

46. Stephen C. Yanchar et al., *Critical Thinking as Disciplinary Practice*, 12 *REV. GEN. PSYCHOL.* 265, 275 (2008).

IV. THE IMPORTANCE OF TRAINING AND INSTILLING DISCIPLINED THOUGHT

Humans are creatures of thought, and thinking has a powerful and pervasive influence on human affairs. Dewey opens *How We Think* by stating that “[n]o words are oftener on our lips than *thinking* and *thought*. So profuse and varied, indeed, is our use of these words that it is not easy to define just what we mean by them.”⁴⁷ We are all thinkers, and thinkers think. We cannot help but think, in its loose meaning, but that does not mean we are thinking well.

The research on the mind, brain, neuroscience, and thinking functions is extensive, complex, evolving, and constantly advancing.⁴⁸ Our understanding is regularly moving us away from the brain as “a dark mystery locked in a bony box.”⁴⁹ There is also a wide and rich body of literature on the learning enterprise generally and also for lawyers specifically. I have surveyed that literature elsewhere,⁵⁰ and I will not try to tackle the full extent of that subject here but instead will offer just a few simple observations.

The attitude of suspended conclusion can be universally and independently applied, no matter what learning theories are valid or em-

47. DEWEY, *supra* note 1, at 1; see also Kellen McClendon, *The Convergence of Thinking, Talking, and Writing: A Theory for Improving Writing*, 38 DUQ. L. REV. 21, 23, 27 nn.12, 13, 16, 28 n.20, 30 n.24, 32 (1999) (examining the meaning of thinking, language, talking, and writing to support the thesis “that by ‘talking-out’ what we write, we can improve our writing”) (citing ROBERT THOMSON, *THE PSYCHOLOGY OF THINKING* (1959); NEIL BOLTON, *THE PSYCHOLOGY OF THINKING* (1972); MARTIN HEIDEGGER, *WHAT IS CALLED THINKING?* (J. Glenn Gray trans., Harper & Row 1968) (1954); RICHARD E. MAYER, *THINKING, PROBLEM SOLVING, COGNITION* (1983); W. EDGAR VINACKE, *THE PSYCHOLOGY OF THINKING* (1952)).

48. For a fascinating introductory survey and review of brain research from the leading experts, see the thirteen-episode monthly telecast *Charlie Rose: The Brain Series* (PBS television broadcast Oct. 29, 2009–Jan. 27, 2011), available at <http://www.charlierose.com/view/collection/10702>. *The Brain Series* was a special of the *Charlie Rose Show* with guest cohost Dr. Eric Kandel, winner of the Nobel Prize in Physiology or Medicine “for his research into the biological mechanisms of learning and memory.” *Id.* Kandel’s 1,400-page text on neuroscience provides comprehensive material on the scientific understandings of human behavior and the workings of the neuron and brain. See ERIC KANDEL, *PRINCIPLES OF NEURAL SCIENCE* (4th ed. 2000). For another related comprehensive text, see MARGARET A. BODEN, *MIND AS MACHINE: A HISTORY OF COGNITIVE SCIENCE* (2006) (a two volume, 1,600-page text on cognitive science and related disciplines). For some recent collections of research on the brain and mind, see, for example, *BEST OF THE BRAIN FROM SCIENTIFIC AMERICAN: MIND, MATTER, AND TOMORROW’S BRAIN* (Floyd E. Bloom ed., 2007) (collecting short articles written between 1999 and 2006); DANA PRESS, *CEREBRUM 2010: EMERGING IDEAS IN BRAIN SCIENCE* (2010) (a collection of some of the latest articles on the brain); *HOW PEOPLE LEARN: BRIDGING RESEARCH AND PRACTICE* (M. Suzanne Donovan et al. eds., 1999) (“provid[ing] a broad overview of research on learners and learning”).

49. Patricia McBroom, *Thinking About How We Think*, 92 SCI. NEWS 544, 544 (1967) (“Despite all the pioneering work done over the past 20 years in brain research, the mind is still very much a dark mystery locked in a bony box.”).

50. Kochan, *supra* note 10, at 449.

ployed in legal education and lawyering. The attitude works in any learning or teaching category, and therefore, it is unnecessary to engage in the debates for this Article. This Article stands amid this intimidating array of thought and expertise that already exists, and examines and defends just one proposition: the training of good mental habits requires adopting the attitude of suspended conclusion and mastering the requisite methods of analysis that must be employed before reaching any resolution of a legal problem. Keeping in line with the philosophical approach of Dewey himself,⁵¹ this Article rests its claim for making a unique contribution on the raw simplicity and limited scope of its undertaking. This claim rests only on its attempt to remind thinkers to take constant cognizance of a rather uncontroversial and deceptively unremarkable concept or rule in the abstract⁵² that perplexingly faces regular opposition from a habitual and impulsive disregard in practice. That is the sum of this Article's purpose and role, carved out from the landscape of literature that has preceded this endeavor.

In this Part, I will speak of the educator's role in teaching and instilling a discipline of effective thinking, but the points made will be equally relevant outside the classroom and into the practice of law and the practice of thinking everywhere. Lawyers must seek out such teachings as a discipline of practice and for the continued enhancement of their skills.

To the extent our minds can understand how we think and harness the skills that maximize our potential to think more effectively, lessons on thinking should be consumed just as aggressively, if not more, so that we might consume doctrine in pursuit of becoming the foremost expert on a particular subject of law. Thinking skills are unique; they are different than knowledge-absorption skills and deserve distinct treatment.⁵³

51. "Dewey is essentially one of those philosophers who . . . impress the world with their profound simplicity." MORRIS RAPHAEL COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH* 367 (Felix S. Cohen ed., 1954). As R.H. Bode of the University of Illinois commented, *How We Think* is "that rare kind of book in which simplicity is the outcome of seasoned scholarship in diverse fields." Bode, *supra* note 17, at 642.

52. Ludwig Wittgenstein's words are relevant and supportive here:

The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—because it is always before one's eyes). The real foundations of his enquiry do not strike a man at all. Unless *that* fact has at some time struck him.—And this means: we fail to be struck by what, once seen, is most striking and most powerful.

LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* Pt. I, ¶ 129 (G.E.M. Anscombe trans., 1953). Or one can glean support from the curious mind of Sherlock Holmes: "There is nothing more deceptive than an obvious fact." 1 SIR ARTHUR CONAN DOYLE, *Adventures of Sherlock Holmes: The Boscombe Valley Mystery*, in *THE COMPLETE SHERLOCK HOLMES* 239, 241 (George Stade et al. eds., Barnes & Noble Classics 2003) (1891).

53. de Bono, *supra* note 45, at 774 ("It seems that the practical operating skills of thinking (decision, judgement, assessment of priorities, breadth of scan) are not the same as the knowledge-

The struggle to determine what we mean by the terms “thinking” and “thought”—and perhaps more importantly, the pursuit of understanding thinking itself—are inherent in the proper role of education and mindful exploration.⁵⁴

Aside from how things should be taught or how things are learned, thinking is a skill that is susceptible to improvement and a proper subject for lawyer development, even if only through self-education. The educator should embrace the training of thought and seek to instill disciplined adherence to certain obvious lessons.⁵⁵ The lawyer should exercise this discipline to maximize the effectiveness of thinking critical to the evaluation of the legal problems faced in practice.

Dewey introduces the 1933 edition of *How We Think* differently, with an important caution as to the purposes of the lessons in his text and consequently adds light to the purposes of this Article. Dewey states:

No one can tell another person in any definite way how he *should* think, any more than how he ought to breathe or have his blood circulate. But the various ways in which men *do* think can be told and can be described in their general features. Some of these ways are better than others; the reasons why they are better can be set forth. The person who understands what the better ways of thinking are and why they are better can, if he will, change his own personal ways until they become more effective⁵⁶

In the educative role, we can explore thinking in that light—to understand some basic realities and tendencies of undisciplined thought and ignite the human capacity and desire to improve in a manner that can alter thinking behaviors or address debilitating habits that hinder fulfillment of the possibilities of thought.

absorbing skills (perceiving relationships, attention skills, ordering information, memorizing.”). William O. Douglas’s counsel that critical judgment and disciplined learning endure as the permanent value of legal education is apt here:

The body of “knowledge” pounded into the heads of law students does not survive long after Bar examinations are passed. Law, like engineering, changes fast. The so-called “practical facts” soon become obsolete. The only knowledge of permanent value—in law as elsewhere—is theoretical knowledge. Theoretical knowledge, critical judgment, and the discipline of learning are the only enduring aspects of legal education which make the individual readily adaptable to changing situations and problems.

WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN* 169 (1974).

54. Tanner, *supra* note 16, at 476 (“Critical thinking as problem solving can and should function in any discipline or area of human experience.”).

55. William J. Pauli, *Confusion and Problem Solving*, 35 *CLEARING HOUSE* 79, 79 (1960) (“Everybody would agree that learning to think and learning to solve problems are the highest and most important objectives of education.”).

56. DEWEY 1933, *supra* note 1, at 3.

To “think” is defined as “conceive in or exercise the mind,” “meditate on, turn over in the mind, ponder,” and “exercise the mind, esp. the understanding, in a positive, active way; form connected ideas; meditate, cogitate.”⁵⁷ Think connotes action. Idle exercise is an oxymoron. Thinkers must think; if one does not think, then one is not a thinker at all but simply a vessel with an idle capacity. Identifying when we are thinking, understanding how we tend to think, and preparing ourselves for the workout involved based on that self-reflection can make the exercise more fulfilling and rewarding. In this sense, education and awareness of thinking can be a wellness program for the mind. We risk mental atrophy when we do not practice thought,⁵⁸ and just as stretching the muscles is required to maximize the effectiveness of exercising the legs before a good run, so too are educators needed to serve as trainers who prepare us for thought. Attention to the skills of thinking and its practice maximizes its development.⁵⁹

Regardless of whether one agrees with Dewey’s larger work on *how* to train minds to think, his basic premise that it is the business of education to train minds in some way—to instill positive habits of thought—seems incontestable:

[I]t is [the] business [of education] to cultivate deep-seated and effective habits of discriminating tested beliefs from mere assertions, guesses, and opinions; to develop a lively, sincere, and open-minded preference for conclusions that are properly grounded, and to ingrain into the individual’s working habits methods of inquiry and reasoning appropriate to the various problems that present themselves. No matter how much an individual knows as a matter of hearsay and information, if he has not attitudes and habits of this sort, he is not intellectually educated. He lacks the rudiments of mental discipline. And since these habits are not a gift of nature (no matter how strong the aptitude for acquiring them); since, moreover, the casual circumstances of the natural and social environment are not enough to compel their acquisition, the main office of education is to supply conditions that make for their cultivation.⁶⁰

Such educational training of thought is particularly necessary when one considers exogenous influences that impede the effectiveness of

57. 2 SHORTER OXFORD ENGLISH DICTIONARY 3243 (5th ed. 2003).

58. Cf. DANIEL G. AMEN, MAKING A GOOD BRAIN GREAT 115 (2005) (“Like muscles that don’t get used, idle nerve cells waste away.”).

59. *Id.* at 113 (“Your brain is like a muscle: the more you use it, the more you can continue using it No matter what your age, mental exercise has a global, positive effect on your brain.”); see also de Bono, *supra* note 45, at 775 (“It is not really surprising that skill can be developed by direct attention and practice.”).

60. DEWEY, *supra* note 1, at 27–28.

thought. Dewey contends, “The very importance of thought for life makes necessary its control by education because of its natural tendency to go astray, and because social influences exist that tend to form habits of thought leading to inadequate and erroneous beliefs.”⁶¹ This is not to say that an educator should dictate what to think, and if that were Dewey’s meaning, then I would surely disagree with him. But cultivating thinking skills that are content-neutral in outcomes and developing positive habits of thought should be encouraged.⁶²

According to some scholars, thinking is an independent skill that must be independently taught and practiced and does not emerge organically through mere subject-oriented discussions that require thought.⁶³ When developed as an independent discipline, a thinking skill can be flexible and adaptive to situations rather than confined to a particular content-based application. As de Bono explains,

In education we also assume that from an interested discussion on some subject, pupils will abstract certain habits and skills of thinking and transfer them to new situations. This does not seem to happen. Such discussions increase fluency but seem to provide little transferable skill. If, rather, we create, quite deliberately, various attention-directing tools, these tools can then be practiced on a rapidly changing variety of situations. This change is necessary so that attention stays on the tool and does not drift to the content—as it would if content remained constant.⁶⁴

In that light, the attitude of suspended conclusion could be categorized as such a directing tool—an independent discipline that can have wide application and is not subject- or vocation-dependent. The attitude also fits in with what some have termed a type of “enabling condition” that makes effective thinking possible.⁶⁵

61. *Id.* at 29.

62. McElroy & Coughlin, *supra* note 4, at 228 (“[P]rofessors should instruct [students] to address counter-analysis as a critical component of [thoughtful legal] analysis.”); Nelson P. Miller & Bradley J. Charles, *Meeting the Carnegie Report Challenge to Make Legal Analysis Explicit—Subsidiary Skills to the IRAC Format*, 59 J. LEGAL EDUC. 192, 194 (2009) (“It may seem too obvious to say that *thinking* is the most basic skill necessary to effectively use the IRAC framework. But law students, as much or more so than students of other professional studies, must learn to think with an energy and consistency that they probably have never before maintained. . . . Thus, students should learn some of the practices that promote effective thinking.”).

63. de Bono, *supra* note 45, at 774.

64. *Id.* at 775.

65. Yanchar et al., *supra* note 46, at 268 (Enabling conditions “describe the theoretical background that makes any understanding, including disciplined inquiry or critical thinking, possible . . . [T]hey provide an essential starting point that will guide critical analysis and permit one to produce judgments of one type or another.”).

Even if we are thinking well for purposes of a particular situation, that does not mean we are developing transferable thinking skills with adaptive application. “A skill that is built up by coping with the immediate situation may never develop beyond” a basic level of accomplishing the immediate task.⁶⁶

Many do claim that thinking must be nurtured by training and practice.⁶⁷ However, one can be perfectly skilled at something by practice—like being prejudiced in one’s affairs—but that skill may be inhibiting as action without reflection. Just because we practice something, and get good at it, does not mean that we are exercising a sound choice in what we have chosen to repeat.⁶⁸ Practice can be insufficient because we can develop bad habits. Like with learning the piano or typing on a keyboard, we are prone to develop bad habits through the practice of poor methods.⁶⁹

Dewey agrees that practice is important, but he believes it has limited value. True benefits come from the development of certain attitudes, of which suspended conclusion has primacy.⁷⁰ The term “attitude” is generally defined as “settled behavior, as representing feeling or opinion; (also *attitude of mind*) settled mode of thinking.”⁷¹ There are good habits or attitudes of how a specialist (like a lawyer) should think, but not all ways in which a specialist thinks are universally applicable habits of mind:

[I]t is highly questionable whether the practice of thinking in accordance with some logical formula results in creation of a general habit of thinking; namely one applicable over a wide range of subjects. It is a matter of common notice that men who are expert thinkers in their own special fields adopt views on other matters without doing the inquiring that they know to be necessary for substantiating simpler facts that fall within their own specialties What can be done, however, is to cultivate those *attitudes* that are favorable to the use of the best methods of inquiry and testing. Knowledge of the methods alone will not suffice; there must be the desire, the will, to employ them. This desire is an affair of personal disposition. But on the other hand the disposition alone will not suffice. There must also be an understanding of the forms and

66. de Bono, *supra* note 45, at 774.

67. *Id.* (describing the difference between thinking skills picked in ordinary situations and out of necessity and those that excel after training).

68. *Id.*

69. AMEN, *supra* note 58, at 119.

70. DEWEY, *supra* note 1.

71. 1 SHORTER OXFORD ENGLISH DICTIONARY 147 (5th ed. 2003).

techniques that are the channels through which these attitudes operate to the best advantage.⁷²

Thus, thinking attitudes play a pivotal role; educators can work to nurture them, and lawyers can seek them out.⁷³

For purposes of the legal educator, whether a lawyer thinks like a lawyer and whether that can or should be taught as a special skill is irrelevant to the subject discussed here. Most certainly *a lawyer at least thinks*, and at least part of the educator's role and the lawyer's obligation is to cultivate and inculcate the basics of effective *thought*.⁷⁴ It is a necessary and reasonable aspect of the educator's assignment and obligation, and a crucial discipline for the lawyer-thinker.

The application of the suspended conclusion concept to legal problem-solving therefore does not depend on whether the lawyer has any special or discrete thinking skills, or needs them in other parts of the legal occupation. In legal practice, adherence to an attitude of suspended conclusion is simply a situational application of a broader concept of thinking, and not thinking like a lawyer per se.

Thinking is vital to communication skills.⁷⁵ Consequently, understanding thought is particularly relevant to effective writing⁷⁶ and should therefore be of particular interest to lawyers who depend on writing skills in their profession and law students who depend on writing skills for their grades and preparation for practice. As court of appeals Judge Kenneth Ripple has counseled, "[A] good writing instructor ought to take the lead in convincing students that, in essence, the law school experience is an education in how to think."⁷⁷

Finally, legal educators and lawyers' attention is necessary because we may give regard to positive habits of the thinking task, commit ourselves to following them, and believe that we will follow them, only to

72. DEWEY 1933, *supra* note 1, at 29–30.

73. Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 749 (2003) ("[T]he principles of cognitive bias and its effects on rational judgment have clear implications for legal practice and theory, and should be incorporated into law school curricula.").

74. Barry K. Beyer, *Improving Thinking Skills: Defining the Problem*, 65 PHI DELTA KAPPAN 486 (1984) (citing Dewey's *How We Think* when stating that "[e]ver since the turn of the century, U.S. schools have considered mastery of thinking skills a major goal of instruction in almost all subject areas").

75. McClendon, *supra* note 47, at 24 ("Without question, the overall process of communicating (whether in the form of writing, talking, or sign language) begins with thinking. Thus to understand communication, and in particular writing, we must have some understanding of what thinking is.").

76. *Id.*

77. Kenneth F. Ripple, *Legal Writing in the New Millenium: Lessons from a Special Teacher and a Special "Classroom"*, 74 NOTRE DAME L. REV. 925, 928–29 (1999).

actually disregard them in everyday practice.⁷⁸ Psychologists have recognized a phenomenon known as the “bias blind spot.” Lilienfeld et al. explain:

[T]he term bias blind spot, more informally called the “not me fallacy,” refers to the belief that others are biased but that we are not. Research shows that people readily recognize confirmation bias and related biases in others, but not in themselves. The bias blind spot, which we can think of as a “meta-bias,” leads us to believe that only others, not ourselves, interpret evidence in a distorted fashion.⁷⁹

To overcome this bias blind spot, lawyers and aspiring thinkers of all types need to recognize such naturally occurring inhibiting tendencies and false beliefs. Only by reevaluating whether our actual thinking is synchronized with the obvious demands of *effective* thinking can we be sure that we have not fallen prey to this “not me” phenomenon that perpetuates bad thinking. It is, indeed, a substantial hurdle because individuals may be unreceptive to efforts to teach disciplined thinking “because of the bias blind spot (i.e., they do not perceive themselves as biased and therefore in need of remediation).”⁸⁰ As Parker states while referencing Dewey,

The teacher should encourage pupils to maintain an attitude of suspended conclusion or suspended judgment. This is necessary not only in order to provide for a thorough canvass of the problem but also in order to obviate bias which may interfere with the thinker’s selection and evaluation of data or evidence.⁸¹

The educator is particularly well-situated to exercise a role in stimulating thinking and to guard against what appears to some as a gradual regression in regular adherence to rigor in the act.⁸² And the lawyer-thinker is

78. Peter H. Martorella, *Reflective Thinking and the American Culture*, 45 PEABODY J. EDUC. 87, 87 (1967) (“Lip-service to the value of all varieties of thinking, of course, is almost a traditional American activity, but the way in which we approach and transact some of our more vital societal tasks reflects a pronounced disregard for thinking of the reflective variety.”).

79. Scott O. Lilienfeld et al., *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSP. PSYCHOL. SCI. 390, 392 (2009) (citing MARCUS FELSON, *CRIME AND EVERYDAY LIFE* (2002); Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781 (2004)).

80. Lilienfeld et al., *supra* 79, at 394.

81. PARKER, *METHODS OF TEACHING*, *supra* note 18, at 194.

82. For example, Martorella explains,

Hopefully, those individuals who are operating in the society to stimulate thinking in all facets of life among all individuals will assume a more effective and leading role and somehow will be able to reverse, or at least slow down appreciably, what appears to be a steadily developing trend away from thinking. At the risk of being banal, one is again led to echo Dewey in suggesting that the schools be among the vanguard in promoting such changes

in the constant position to self-evaluate and ensure that the rigor is employed in practice.

Dewey emphasized in the 1933 edition of *How We Think* that we wander the world thinking all the time and have some vague sense of thinking's importance but rarely take the time to evaluate how or why thinking is so important:

We all acknowledge, in words at least, that ability to think is highly important; it is regarded as the distinguishing power that marks man off from the lower animals. But since our ordinary notions of how and why thinking is important are vague, it is worth while to state explicitly the values possessed by reflective thought. In the first place, it emancipates us from the merely impulsive and merely routine activity By putting the consequences of different ways and lines of action before the mind, it enables us to *know what we are about* when we act. *It converts action that is merely appetitive, blind, and impulsive into intelligent action.*⁸³

The educator's role must include the teaching of positive habits, like an attitude of suspended conclusion. The thinkers' responsibility, including lawyers long graduated from the classroom, is to adopt those habits. Dewey further counseled, "[T]he work of teaching must not only transform natural tendencies into trained habits of thought, but must also fortify the mind against irrational tendencies current in the social environment, and help displace erroneous habits already produced."⁸⁴ The upcoming parts of this Article will explain those habits to be trained and the related tendencies against them to be displaced.

V. THE ATTITUDE OF SUSPENDED CONCLUSION EXPLAINED

To restate from the introduction, "[T]he most important factor in the training of good mental habits consists in acquiring the attitude of suspended conclusion"⁸⁵ Later in *How We Think*, Dewey restates this fundamental premise the following way:

The essence of critical thinking is suspended judgment; and the essence of this suspense is inquiry to determine the nature of the problem before proceeding to attempts at its solution. This, more than

Martorella, *supra* note 78, at 90; *see also* Rand, *supra* note 73, at 749 ("An understanding of how the human mind actually processes information has enormous implications for legal education and practice.").

83. DEWEY 1933, *supra* note 1, at 17.

84. DEWEY, *supra* note 1, at 26.

85. *Id.* at 13.

any other thing, transforms mere inference into tested inference, suggested conclusions into proof.⁸⁶

It is an attitude of pause and patience.⁸⁷ The attitude of suspended conclusion embraces doubt, accepts confusion and anxiety, examines alternative suggestions, overcomes impatience and habitual tendencies to rush toward an answer, and otherwise avoids the impulsive tendencies toward a premature conclusion before adequate reasoning.⁸⁸ Just as lawyers are often told that they should not be “conclusory” in their writing or oral advocacy,⁸⁹ so too should they avoid being conclusory in their thinking.

As stated previously, the utility of this attitude may seem obvious, but such things can seem so obvious that our failure to take the time to reflect on them leaves them ignored.⁹⁰ We must unpeel the obviousness of the attitude to understand its rich core and see the tendencies that rot its practice, allowing us to develop a valuable art and discipline in the thinking process.

The attitude of suspended conclusion is outcome-neutral. Dewey’s work explores how we think and, in that process, recognizes certain attitudes and habits of thinking. As stated earlier, even though part of Dewey’s ultimate project is to explain how to think, that is not the focus of this Article.⁹¹

This Part fully explains the attitude of suspended conclusion. It begins with an introduction about Dewey’s thoughts on attitude. Next is an analysis of the attitude of suspended conclusion according to the defini-

86. *Id.* at 74.

87. John Georgeoff, *Man or Automaton*, 44 PEABODY J. EDUC. 143, 143 (1966) (“When significant problems arise . . . a rational man pauses first to think and then to act.”).

88. DEWEY, *supra* note 1, at 14–15 (“Instead of being pushed into a mode of action by the sheer urgency of forces, whether instincts or habits, of which he is not aware, a reflective agent is drawn (to some extent at least) to action by some remoter object of which he is indirectly aware.”); *see also* Miller & Charles, *supra* note 62, at 202 (“The central aspect of critical reasoning is the commitment and ability to be persuaded by reasons rather than by personality, prejudice, power, chance, or other factors.”).

89. *See, e.g.*, BRADLEY G. CLARY & PAMELA LYSAGHT, *SUCCESSFUL LEGAL ANALYSIS AND WRITING: THE FUNDAMENTALS* 102 (2d ed. 2006) (“[A]void exaggeration through conclusory modifiers”); BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 226 (2d ed. 2006) (“[C]onclusory . . . describes a statement that puts forth a conclusion but not the reasoning behind it.”).

90. Green, *supra* note 15, at 85–86 (When dealing with the ordinary or obvious, “we are at risk of thinking [they are] mundane and uninteresting,” and “[t]he ordinary, that is, what is shared, is also commonly what is nearest at hand and therefore most likely to be overlooked. The ordinary ordinarily goes unnoticed.”).

91. *See supra* Parts II–III. *See also* John Baillie, *The Psychological Point of View*, 39 PHIL. REV. 258, 260–61 (1930) (recognizing that humans have “a desire to have our minds cleared up as to how we are in the habit of thinking,” while explaining the need to understand the difference between “how we think” and “how to think”).

tions of the terms. This Part then covers what Dewey calls “reflective thought,” which, most important to this Article, requires embracing doubt, perplexity, or confusion and also requires turning things over in one’s mind. It moves on to examine the requirement that alternative explanations be examined. Next, this Part explains that the attitude does not call for thought to an excessive degree, only to that which is necessary to fully think through a problem. Finally, it is noted that the attitude allows thinkers to free themselves from external influences that could lead to poor reflective thought.

To Dewey, the presage that care must be taken in the conduct of thought could not be overstated.⁹² Thinking is an action word. Thought is meant to exercise the mind. Reaching an immediate conclusion exercises *no* thought—reaching a conclusion without postponed judgment involves no action and therefore cannot be said to be thought at all. As Parker correctly summarizes, “The rule about suspending judgment defines the general spirit that should prevail in the class and in the mind of each inquirer.”⁹³ According to University of Michigan law professor James Boyd White, suspended conclusion puts “lead on your feet”⁹⁴ to avoid quick judgment and helps one tap into the whole mind’s capacity to reach “excellence of judgment.”⁹⁵

The attitude of suspended conclusion deserves concentrated and focused attention. Although Dewey does not set forth a specific thesis of suspended conclusion, he does introduce its primacy and proceeds to provide valuable guidance to understanding its meaning throughout certain portions of *How We Think*. In fact, in 1922, Dewey described the primary and practical pedagogic aim of *How We Think* as counseling against the “premature acceptance and assertion of suggested meanings,” favoring the attitude of suspended conclusion because “[o]ne of the marks of controlled thinking is postponement of such acceptance.”⁹⁶ This

92. DEWEY, *supra* note 1, at 19 (“If upon thought hang all deliberate activities and the uses we make of all of our other powers, Locke’s assertion that it is of the highest concernment that care should be taken of its conduct is a moderate statement.”) (citing JOHN LOCKE, OF THE CONDUCT OF THE UNDERSTANDING ¶ 1 (1881)).

93. Parker, *Problem-Solving IV*, *supra* note 18, at 265.

94. James Boyd White, *Meaning in the Life of the Lawyer*, 26 CUMB. L. REV. 763, 771 (1995–1996) (quoting 3 DANTE ALIGHIERI, THE DIVINE COMEDY: PARADISO 195 (John D. Sinclair trans., 1948) (“Whenever you are uncertain, put lead on your feet, to make you slow to reach either Yes or No: for a quick judgment often takes the wrong way; and then the feelings bind the intellect.”)).

95. *Id.* In the context of a lawyer’s professional responsibility and development through individual experience, “excellence of judgment is the work of the whole mind, including the affections, including the capacity to suspend conclusion.” *Id.*

96. Dewey, *Reflective Thought*, *supra* note 3, at 31. In describing his book, Dewey wrote, “[T]he text of *How We Think*, with its practical pedagogic aim, was especially concerned with enforcing the difference between un-critical and critical thinking. Now one of the most marked differences between poor thinking and good thinking is the former’s prema-

Article collects Dewey's thoughts related to the attitude in order to present it as an independent topic endorsed by Dewey and provides supplemental argument on what it should mean to adopt an attitude, and embrace a discipline of, suspended conclusion in one's approach to thinking.

Surprisingly, there are very few analyses of Dewey's attitude of suspended conclusion. In fact, during research conducted across disciplines for this Article, only a few articles were discovered that even mention it, let alone discuss it in any detail. Where possible, the existing literature that discusses the phrase will be incorporated in this Article's explication of the attitude.

Dewey's suspended conclusion concept is, of course, similar to various theories of critical thinking and heuristics explored across multiple disciplines. I will not examine the entire field of such research in this Article, but it is important to note how prominent critical thinking is in psychology, pedagogy, and law.⁹⁷ No single definition of critical thinking exists.⁹⁸ Nonetheless, there is utility in many disciplines falling within that large umbrella.⁹⁹

Dewey describes the attitude and its states of doubt, confusion, and perplexity as creating an "alert, cautious, and thorough inquiry."¹⁰⁰ In describing the meaning of "reflection" as used in *How We Think*, Parker identifies the principal aim as a "desire to produce *reflective* problem-solvers, not impulsive ones. To reflect means to turn the matter over in the mind, to view it from various angles, to consider carefully the various possibilities of solution."¹⁰¹ The attitude of suspended conclusion demands that thinkers approach problems without preordaining a conclu-

ture acceptance and assertion of suggested meanings. One of the marks of controlled thinking is postponement of such acceptance.

Id.

97. Yanchar et al., *supra* note 46, at 265 ("The prominence of critical thinking in psychology, from college curricula and pedagogy to basic and applied research, is difficult to overestimate.").

98. *Id.* at 266 ("It can hardly be doubted that critical thinking in psychology comes in many forms and that no single description could capture the variety and nuance with which it is exercised by instructors, researchers, and practitioners."). As Yanchar opines, "[T]he long history of debate surrounding the meaning of critical thinking suggests that no approach is likely to be universally accepted or to provide sufficient resources for critical analysis across all fields and under all circumstances." *Id.* at 269 (citation omitted). That recognition should not negate the utility of suspended conclusion, which stands as an effective thinking discipline whether within or apart from the larger field.

99. *Id.* at 268 ("[O]ur conclusion in this regard does not necessarily negate the usefulness or applicability of any particular form of critical thinking, or of critical thinking per se . . . [T]he theoretical background of any method, tool, or procedure is what makes it useful for a particular application . . .").

100. DEWEY, *supra* note 1, at 62.

101. Samuel Chester Parker, *Problem-Solving or Practice in Thinking I*, 21 *ELEMENTARY SCH. J.* 16, 25 (1920) (paraphrasing Dewey).

sion or impulsively reaching one. Only when conclusion is suspended is there space for the exploration of the subject at hand. Adopting suspended conclusion as an attitude—a habit of mind—can help one overcome tendencies that debilitate the mind.

Several alternative phrases capture the meaning and spirit of the term suspended conclusion, including “reserving judgment,” “postponing judgment,” or “suspending judgment.” A logical starting point is to understand the definitions of the primary predicate terms at issue in suspended conclusion.

In relevant part, *Black’s Law Dictionary* defines “conclusion” as “[t]he end; the termination; the act of finishing or bringing to a close.”¹⁰² And it defines “judgment” as “[t]he formation of an opinion or notion concerning some thing by exercising the mind upon it.”¹⁰³ The sense of finality is clear in the definitions of each. Therefore, an attitude of suspending conclusion must demand some resistance to ending a pursuit. A common definition of “conclusion” is further instructive because it anticipates the prerequisite existence of a process, setting its meaning as “[t]he end, finish or termination of a speech, writing, etc. . . .”; “[t]he issue, the final result, outcome”; and “[t]he result of a discussion or examination of an issue; final resolution, decision, agreement.”¹⁰⁴ If one must *come to* a conclusion, some movement prior to reaching must necessarily precede it.

To suspend, therefore, must mean to embrace a process and temporarily delay finality in one’s approach. Indeed, a priori, it demands the existence of an approach. In relevant part, *Black’s Law Dictionary* defines “suspend” as “[t]o interrupt; to cause to cease for a time; to postpone; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption.”¹⁰⁵ A general usage dictionary tracks the same attributes of the term, defining “suspend” as “[p]ut to a stop, esp. temporarily; bring to a (temporary) stop; put in abeyance; make temporarily inactive . . .”; “Cease from the execution or performance of, esp. temporarily . . .”; “defer, postpone”; and “delay the accomplishment of.”¹⁰⁶ It does not mean to linger endlessly because the definition of “suspend” itself anticipates the sense of the temporary. It is not the *avoidance* of conclusion or rejection of ever reaching conclusions, just the temporary suspension of a final decision with an expecta-

102. BLACK’S LAW DICTIONARY 290 (6th ed. 1990).

103. *Id.* at 841. A common usage dictionary provides similar guidance by defining “judgment” as “[t]he formation of an opinion or notion concerning something by exercising the mind on it” 1 SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 71, at 1466.

104. 1 SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 71, at 477.

105. BLACK’S LAW DICTIONARY, *supra* note 102, at 1446.

106. 2 SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 57, at 3128.

tion of some process or act or event occurring prior to the anticipated end. By combining the meaning of suspend with conclusion, we reveal that the prerequisite act in question is, essentially, thinking. Oddly enough, the dictionary's approach to suspension itself directly ties the word "suspend" with its relevance to judgment or conclusion and with its connection to doubt, a concept of particular importance to Dewey's usage of the term. The definition of the independent term "suspend" includes "[k]eep (one's judgement) undetermined; refrain from forming (an opinion) or giving (assent) decisively"; "[s]uspend one's judgement; [and] be in doubt."¹⁰⁷ Without suspension, a conclusion is just an end with no preceding process and consequently no preceding justification for it.

One can basically understand the concept of suspended conclusion from these definitions. But to fully understand Dewey's attitude of suspended conclusion, one must understand his definition of reflective thought¹⁰⁸ as opposed to other uses of the "reflective" adjective elsewhere.¹⁰⁹ Reflective thought means that a belief is accepted only after

107. *Id.*

108. Dewey sometimes loosely uses the modifier "reflective" as his recognized habit was to be somewhat imprecise in terminology at times. Any reader of Dewey must be cognizant of the criticisms regarding Dewey's loose use of terms, lest one read too much into the various terms Dewey uses rather than focusing on what he means by them. Certain words, used by others as terms of art, were written by Dewey with no intention of fitting his language into some other commonly accepted expert definition of a term. Mendell explains:

If Dewey had an ethics of terminology, it did not inspire him to be vigilant about the use of terms. Whether he calls his method and theory pragmatic, instrumental, logical, empirical, experimental, historical, reflective intelligence, evolutionary, scientific, or experiential, depends on the period of his career we are looking at, and his contemporaneous mood. His tendency to use these terms interchangeably gets him into trouble with critics, who point to it as evidence of a looseness of thought So there was nothing sacred about any of his terms.

Mendell, *supra* note 35, at 625–26 n.3 (emphasis added). Thus, one should be cautious and not over-read Dewey's terminology choices. In this sense, Dewey faced criticisms that his work was sometimes too simple. See Eugene G. Bugg, Book Review, 46 AM. J. PSYCHOL. 528, 528 (1934) (finding the book pedagogically valuable but critical of Dewey's loose and imprecise use of terminology in *How We Think*). Dewey himself recognized that his terms, like inquiry and logic, did not fit well for purposes of comparison with others' uses of the same terms. John Dewey, *Logical Method*, *supra* note 37, at 17–18 ("This definition [of logical theory] would be questioned by many authorities, and it is only fair to say that it does not represent the orthodox or the prevailing view.").

109. Reflective thinking, as it will be discussed here and as used in Dewey's passages relied on here, is meant in its strictest and narrowest meaning. Reflective thinking, as used, is different from reflective methods, reflective learning or reflective practice, and other permutations of the "reflective" adjective. All uses in this Article relate only to the meaning of thinking itself, not to the learning or practice methods or experiential thinking matters that some other writers attach to the term. For an examination of the variety of ways that "reflective" is used in areas of learning and inquiry, see, for example, HANDBOOK OF REFLECTION AND REFLECTIVE INQUIRY: MAPPING A WAY OF KNOWING FOR PROFESSIONAL REFLECTIVE INQUIRY 2 (Nona Lyons ed., 2010) ("[T]his chapter presents . . . a linking of the major concepts of [Dewey, Schön, and Freire] on reflection and reflec-

“the ground or basis for a belief is deliberately sought and its adequacy to support the belief examined.”¹¹⁰ For the purposes of *How We Think*, Dewey states, “Thinking . . . is defined accordingly as *that operation in which present facts suggest other facts (or truths) in such a way as to induce belief in the latter upon the ground or warrant of the former.*”¹¹¹ The facts in a problem present suggested conclusions and provide the raw material for identifying and evaluating not just the first suggestion of a conclusion that comes to mind but also the alternatives to that first suggestion. Dewey calls suspended conclusion vital to reflective thinking.

When faced with a problem to be solved, thinkers must discipline themselves to mechanize and make operationally effective the attitude of suspended conclusion. Dewey proceeds to describe the necessary, “five logically distinct steps” in reflective thinking:

(i) a felt difficulty; (ii) its location and definition; (iii) suggestion of possible solution; (iv) development by reasoning of the bearings of the suggestion; (v) further observation and experiment leading to its acceptance or rejection; that is, the conclusion of belief or disbelief.¹¹²

These five steps form the framework within which the suspended conclusion concept operates.

Adopting an attitude of suspended conclusion is the first (and necessary) principle of reflective thinking without which true thinking could not exist.¹¹³ As to the first step, suspended conclusion itself is the state necessary to create the “felt difficulty.” The difficulty must exist in terms of doubt, confusion, or perplexity. And if these states do not exist, i.e., are not “felt,” one must alter the state of mind and induce those feelings. If one is immediately at ease with a problem and its solution, one is likely not engaging in any critical analysis. The second step involves locating where the difficulty lies within the problem. The third step involves identifying one suggestion of a conclusion—perhaps the first guess, the gut or intuitive feeling. One cannot proceed directly toward defending a conclusion based only on that first suggestion of a conclu-

tive inquiry to form a new interconnected whole.”); DONALD S. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

110. DEWEY, *supra* note 1, at 1–2. Dewey states it more concisely in the 1933 edition: [R]eflective thinking, in distinction from other operations to which we apply the name of thought, involves (1) a state of doubt, hesitation, perplexity, mental difficulty, in which thinking originates, and (2) an act of searching, hunting, inquiring, to find material that will resolve the doubt, settle and dispose of the perplexity.

DEWEY 1933, *supra* note 1, at 12.

111. DEWEY, *supra* note 1, at 8–9 (emphasis added).

112. *Id.* at 72.

113. *Id.* at 1–2.

sion. Instead, the thinker must proceed to steps four and five, which involve the relative validity of the suggestion that can be accomplished only through the identification and evaluation of rival (or alternative) suggestions—multiple candidates vying to be the winning conclusion.

When Dewey further breaks down these five steps in the reflective process, he describes two categories that emerge from an initial acceptance and adoption of the attitude:

Further consideration at once reveals certain subprocesses which are involved in every reflective operation. These are: (a) a state of perplexity, hesitation, doubt; and (b) an act of search or investigation directed toward bringing to light further facts which serve to corroborate or to nullify the suggested belief.¹¹⁴

Subprocess (a) correlates with steps one through three above, while subprocess (b) correlates with steps four and five from above. Suspended conclusion puts one in the situation described in (a)—the state of perplexity about the answer, hesitation before conclusion, and doubt or questioning that eliminates immediate confidence in the superiority of one conclusion over other possible alternatives. It is the initial non-acceptance of the first suggested conclusion. Doubt must be embraced to create a “controversy within the mind” that then requires alternatives analysis where “[d]ifferent sides compete for a conclusion in their favor.”¹¹⁵ By starting with doubt, perplexity, or confusion, an individual can search for understandings that connect possible answers to questions rather than presuming one already knows the answer.¹¹⁶ To reach a final conclusion then, one must engage in the activities described in (b)—a

114. *Id.* at 9.

115. DEWEY 1933, *supra* note 1, at 121. Dewey’s full statement in this regard is helpful: Unless there is something doubtful, the situation is read off at a glance; it is taken on in sight; *i.e.*, there is merely perception, recognition, not judgment. If the matter is wholly doubtful, if it is dark and obscure throughout, there is a blind mystery and again no judgment occurs. But if it suggests, however vaguely, different meanings, rival possible interpretations, there is some *point at issue*, some *matter at stake*. Doubt takes the form of discussion, of controversy within the mind. Different sides compete for a conclusion in their favor.

Id.

116. Pauli instructs on this utility of confusion: For any individual the key to successful problem solving lies in his attitude toward confusion The first step in overcoming confusion is to acquire a realistic attitude toward it. Part of this attitude is a skepticism of all approaches to problem solving which purport to be clear and simple Shortcuts through dense forests are sometimes necessary, but if the necessary is understanding of the forest, shortcuts will enable us to see the least. In learning, our objective is not merely to reach a specific goal, an answer which can be found in a book or which someone can tell us, but to attain understanding of the relationships which connect the answer to the question.

Pauli, *supra* note 55, at 82.

thorough and searching analysis of the data and alternatives to the first suggested conclusion.¹¹⁷

On the meaning of a felt difficulty and the importance of suggestion, Dewey explains that conclusions do not emerge out of spontaneous combustion from the data provided but instead must come from the analysis of the suggestions the data evokes:

We may recapitulate by saying that the origin of thinking is some perplexity, confusion, or doubt. Thinking is not a case of spontaneous combustion; it does not occur just on "general principles." There is something specific which occasions and evokes it Given a difficulty, the next step is suggestion of some way out—the formation of some tentative plan or project, the entertaining of some theory which will account for the peculiarities in question, the consideration of some solution for the problem. The data at hand cannot supply the solution; they can only suggest it.¹¹⁸

Within each true problem or question posed is the definition of an end to be achieved, but that problem or question presents a perplexity to be resolved through thought and is not meant to itself be the suggestion of an immediate conclusion.¹¹⁹ It is this perplexity that opens the mind.

Similarly, an attitude of suspended conclusion also requires that one embrace confusion. The confused mind is superior because it is open to alternative suggestions. If one is not confused at the outset of a problem or question, one must wonder whether the absence of confusion is the result of a closed mind. Where confusion does not exist immediately, it

117. Parker outlines the educator's approach to the attitude of suspended conclusion as follows, explaining that a teacher should

[e]ncourage pupils to evaluate suggestions carefully by getting them (a) to "maintain the state of doubt," i.e., to delay their final conclusion and to remain open-minded until the matter is finally proved; (b) to criticize thoroughly all suggestions, i.e., to anticipate mentally objections that might be made to them or consequences that might follow; (c) to verify suggestions and conclusions by reference to facts as revealed around them or in miniature experiments or in standard scientific treatises *Avoid pugnacious stubborn argument.*

Parker, *Problem-Solving IV*, *supra* note 18, at 265. These are the implementation steps necessary to execute suspended conclusion from the beginning of an analysis to an adopted alternative at the end.

118. DEWEY, *supra* note 1, at 12; DEWEY 1933, *supra* note 1, at 15 (making the same argument with only incidental differences).

119. Dewey explains:

Demand for the solution of a perplexity is the steadying and guiding factor in the entire process of reflection But a question to be answered, an ambiguity to be resolved, sets up an end and holds the current of ideas to a definite channel. Every suggested conclusion is tested by its reference to this regulating end, by its pertinence to the problem in hand. This need of straightening out a perplexity also controls the kind of inquiry undertaken The problem fixes the end of thought and the end controls the process of thinking.

DEWEY, *supra* note 1, at 11–12 (emphasis omitted).

should be artificially injected. William Pauli defines confusion as “the sense of a discomfiture of mind, a state of being disconcerted, of experiencing perplexity, doubt, and uncertainty.”¹²⁰ When used in that sense, confusion is synonymous with the initial thinking position—the state of suspended conclusion—proposed for adoption here and by Dewey. Pauli explains the ubiquitous nature of confusion in problem-solving: “The process of thinking, of solving problems, of discovering identical and related elements in seemingly unrelated and different situations is the process of overcoming confusion.”¹²¹ Accepting confusion is not easy, but problems are not typically susceptible to clear and simple processes or directly ascertainable solutions that can be gleaned from a book.

Dewey’s apt phrase for the action initiated by adopting an attitude of suspended conclusion is “turn[ing] the thing over in mind.”¹²² Anxiety and mental uneasiness can be easily but inappropriately quelled by impulsive and immediate conclusion. But instead of seeking comfort from these afflictions, they must be accepted, indeed embraced, if one is to engage in good thinking:

If the suggestion that occurs is at once accepted, we have uncritical thinking, the minimum of reflection. To turn the thing over in mind, to reflect, means to hunt for additional evidence, for new data, that will develop the suggestion, and will either, as we say, bear it out or else make obvious its absurdity and irrelevance. Given a genuine difficulty and a reasonable amount of analogous experience to draw upon, the difference, *par excellence*, between good and bad thinking is found at this point. The easiest way is to accept any suggestion that seems plausible and thereby bring to an end the condition of mental uneasiness.¹²³

In a 2009 article, U.S. District Court Judge Kravitz adds credibility to this view when citing Dewey’s philosophy on “turning things over” in his discipline as a judge during oral arguments—rejecting predisposition.¹²⁴ As Judge Kravitz states, “[R]eflection equates with consideration of reasoned discourse That is how I use oral argument—to turn a case, or an issue, upside down and over and over again, hoping to see its

120. Pauli, *supra* note 55, at 81.

121. *Id.*

122. DEWEY, *supra* note 1, at 13.

123. *Id.*; see also DEWEY 1933, *supra* note 1, at 3 (“[R]eflective thinking [is] thinking that consists in turning a subject over in the mind and giving it serious and consecutive consideration.”).

124. Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function and Future*, 10 J. APP. PRAC. & PROCESS 247, 271 (2009). “[I]n our headlong, and not altogether inappropriate, rush toward judicial efficiency, we should not—indeed, we must not—forget the value of reflection and the role that oral argument can play in that most critical of all judicial endeavors.” *Id.* (citing DEWEY, *supra* note 1).

hidden side, to ensure that I fully understand it and all of its implications.”¹²⁵

True judgment can occur only if preceded by holding an immediately available suggestion toward conclusion in suspense, viewing that suggestion as a perplexity for examination rather than accepting it as a conclusion for advancement. Dewey explains:

If this meaning is at once accepted, there is no reflective thinking, no genuine judging. Thought is cut short uncritically; dogmatic belief, with all its attending risks, takes place. But if the meaning suggested is held *in suspense*, pending examination and inquiry, there is true judgment. We stop and think, we *de-fer* conclusion in order to *in-fer* more thoroughly. In this process of being only conditionally accepted, accepted only for examination, *meanings become ideas. That is to say, an idea is a meaning that is tentatively entertained, formed, and used with reference to its fitness to decide a perplexing situation—a meaning used as a tool of judgment.*¹²⁶

A ground for belief in a conclusion must be established before it is accepted.¹²⁷

Dewey describes the reflective process like a “forked-road situation . . . which is ambiguous, which presents a dilemma, which proposes alternatives” when reached by the “perplexed wayfarer.”¹²⁸ The wayfarer cannot choose a path until after pausing for a moment to look down and survey from above the landscape surrounding any problem and the multiple elements moving, surrounding, and interacting within it.¹²⁹ Suspended conclusion, then, is like climbing a tree to take a look around and analyze the alternative paths—considering the options and opposition.¹³⁰

When perched over the surface of a problem within the attitude of suspended conclusion, confusion is a good thing—the ground below suggests many things, and it takes time to bring it into focus. It should be

125. *Id.*

126. DEWEY, *supra* note 1, at 108.

127. *Id.* at 8 (“Reflection thus implies that something is believed in (or disbelieved in), not on its own direct account, but through something else which stands as witness, evidence, proof, voucher, warrant; that is, as *ground of belief*.”).

128. *Id.* at 10–11 (emphasis omitted). As Patrick Wiseman describes it,

If there’s more than one rule applicable to a particular fact, you’ve reached a fork in the road. Take it, i.e., apply the one rule and follow where it leads you. Then apply the other rule and see if it leads you somewhere different. You are essentially constructing a decision tree with every branch made explicit.

Patrick Wiseman, “*When You Come to a Fork in the Road, Take It,*” and *Other Sage Advice for First-Time Law School Exam Takers*, 22 GA. ST. U. L. REV. 653, 662 (2006).

129. DEWEY, *supra* note 1, at 11 (“In the suspense of uncertainty, we metaphorically climb a tree; we try to find some standpoint from which we may survey additional facts and, getting a more commanding view of the situation, may decide how the facts stand related to one another.”).

130. *Id.*

embraced. One should begin the process of addressing a problem with at least an appearance of confusion and uncertainty as to its result. Otherwise, one is not suspending conclusion but instead observing the problem while leaning toward a predetermined result, and is thus likely to miss alternative conclusions or suggestions that must be explored before having any true confidence in the ultimate conclusion. As Patricia King and Karen Kitchener describe it, the reflective thinking involved in accepting uncertainty of a conclusion at the start and engaging in analysis thereafter leads to a situation of closure where “[t]he resulting judgments are offered as reasonable integrations or syntheses of opposing points of view.”¹³¹

Although he does not examine suspended conclusion in any detail, Richard Neumann has described the forked-road situation that Dewey uses to explain the perplexity of a problem as requiring a form of disciplined curiosity:

Diagnostic and predictive judgments both rest on the same habits of thought: recognizing what John Dewey called a “forked-road situation . . . that is ambiguous, that presents a dilemma, that proposes alternatives”; developing and testing the largest number of reasonable hypothesized alternatives in ways that efficiently link those alternatives to concrete, clarifying information while avoiding premature judgment; wondering—in light of what is already known—what else could also be true and then testing any relevant hypotheses so discovered; aggressively seeking information from the largest practical variety of sources; refusing to guess, assume, or be satisfied with appearances; recognizing patterns in events and interrelationships among ideas; and identifying the concept that explains a situation’s essence. Diagnosis and prediction thus depend on the paradox of disciplined curiosity. The curiosity arises from a kind of chaotic openness that Dewey called “the spirit of wonder,” and the

131. PATRICIA M. KING & KAREN STROHM KITCHENER, *DEVELOPING REFLECTIVE JUDGMENT: UNDERSTANDING AND PROMOTING INTELLECTUAL GROWTH AND CRITICAL THINKING IN ADOLESCENTS AND ADULTS* 7 (1994). King and Kitchener summarize Dewey’s concept as follows:

According to Dewey, a person makes a judgment, what he called a reflective judgment, to bring closure to situations that are uncertain. In such uncertain or problematic situations, there is no way to apply a formula to derive a correct solution and no way to prove definitively that a proposed solution is correct

. . . [T]he problem solver engaged in reflective thinking must evaluate the potential solutions to the problem in light of existing information, information that may be incomplete and unverifiable Reflective thinking requires the continual evaluation of beliefs, assumptions, and hypotheses against existing data and against other plausible interpretations of the data. The resulting judgments are offered as reasonable integrations or syntheses of opposing points of view.

Id. at 6–7.

discipline from a very practical and opposite tendency, which Dewey called “organization of the means required to realize an end.”¹³²

Neumann’s characterization of this disciplined curiosity, as one can see, generally captures some essentials of the attitude of suspended conclusion and is useful to our understanding of it.¹³³

Suggestions of a conclusion are introduced in thinking about a question or problem, and they must be tested before being accepted.¹³⁴ Therefore, a necessary part of the process that follows suspension of conclusion must be the search for and consideration of rival alternative arguments and suggested conclusions:

The suggested conclusion so far as it is not accepted but only tentatively entertained constitutes an idea Since suspended belief, or the postponement of a final conclusion pending further evidence, depends partly upon the presence of rival conjectures as to the best course to pursue or the probable explanation to favor, *cultivation of a variety of alternative suggestions* is an important factor in good thinking.¹³⁵

When individuals become fixated on finding the answer, they tune out the nuances—they fail to find the proper frequency.

The consideration of rival suggestions lies at the heart of the attitude of suspended conclusion. Without them, the attitude is empty in operation. As Dewey explains, one must examine alternative or rival hypotheses to “prevent[] [one] from dogmatically accepting the first suggestion” so that “[j]udgment is held in suspense and a positive conclusion postponed.”¹³⁶ The alternative-suggestions approach should be adopted by the prudent thinker. The effective implementation of the attitude of suspended conclusion demands that the thinker explore all sides of an argument, all positions of all interested parties, and all potentially applicable doctrines (e.g., majority and minority rules) in the scenario pre-

132. Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 746–47 (1989) [hereinafter Neumann, *Preliminary Inquiry*] (quoting DEWEY 1933, *supra* note 1).

133. Dewey is not the focus of Neumann’s article and where he does treat Dewey’s theories, Neumann is focused more on Dewey’s theories of logic, the means of critique, and experiential learning than on the subject of this Article.

134. DEWEY, *supra* note 1, at 30 (“Thinking involves (as we have seen) the suggestion of a conclusion for acceptance, and also, a search or inquiry to test the value of the suggestion before finally accepting it.”).

135. *Id.* at 75.

136. *Id.* at 82.

sented.¹³⁷ Whenever there are rival rules, theories, arguments, suggestions, or conclusions, a struggle must ensue before a conclusion is reached.

The thinker should proceed to compare *and* contrast the rivals or alternatives. Dewey explains the importance of that process:

Comparison, without *contrast*, does not amount to anything logically Unless, in short, the observer takes care to have the differences in the observed cases as extreme as conditions allow, and unless he notes unlikenesses as carefully as likenesses, he has no way of determining the evidential force of the data that confront him.

Another way of bringing out this importance of unlikeness is the emphasis put by the scientist upon *negative* cases—upon instances which it would seem ought to fall into line but which as matter of fact do not. Anomalies, exceptions, things which agree in most respects but disagree in some crucial point, are so important that many of the devices of scientific technique are designed purely to detect, record, and impress upon memory contrasting cases. Darwin remarked that so easy is it to pass over cases that oppose a favorite generalization, that he had made it a habit not merely to hunt for contrary instances, but also to write down any exception he noted or thought of—as otherwise it was almost sure to be forgotten.¹³⁸

Remember that one can never compare and contrast if one does not first identify alternative conclusions, again illustrating that the task of alternative analysis *ipso facto* cannot exist unless and until conclusion is suspended.

Kathryn Stanchi makes some similar observations when discussing two-sided analysis from the perspective of persuasion and the passionate and zealous advocate, along with the debate on the duties or utilities of disclosure of negative information in the adversarial process. As Stanchi states, “Confronting and defusing negative information is a critical aspect of the art of persuasion”¹³⁹ in part “because ‘[t]he weight of an argumentative position can be properly gauged only by reference to what can be set against it.’”¹⁴⁰ Stanchi concludes:

137. Dewey, *Reflective Thought*, *supra* note 3, at 36 (“If one hypothesis is good because it starts one train of deductive implications and initiates one set of experiments, several are better because they extend the operation. In any complicated case, it would be practically impossible to arrive at a sound conclusion save as various deductive systems were compared and the results of different experiments used to check one another.”).

138. DEWEY, *supra* note 1, at 89–90.

139. Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 381 (2008).

140. *Id.* at 388 (quoting Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate’s Duty and Opportunity*, 16 GA. L. REV. 821, 828 (1982)); *see also* McElroy & Coughlin, *supra* note 4, at 230

The data demonstrate that two-sided refutational messages consistently, and across a wide spectrum of variables, were more effective, in that they resulted in more sustained attitude-change that was less vulnerable to opposing arguments. This data . . . demonstrates that the power of a message is stronger if it confronts and refutes its weaknesses

In terms of message style, the studies show a distinct advantage for a message that directly and frankly deals with negative information.¹⁴¹

Stanchi focuses on persuasion as an advocate and does not focus on the importance of alternative analysis from the perspective of the dispassionate problem-solver, but her analysis on the importance of understanding and anticipating opposition arguments is equally applicable in that latter setting. After fully explaining the arguments available to all sides and the alternative conclusions through the process of comparing and contrasting those arguments and conclusions, lawyers should assess the strength and likelihood of success of each and be sure that they have fully developed the argument for the choice of one over the other.

Professors Lisa McElroy and Christine Coughlin make similar points regarding the importance of considering “counter” arguments or alternative conclusions in legal analysis.¹⁴² They find that

[s]ocial scientists have studied the theory of conceptual change, the corollary to counter-analysis in a non-legal context, and have recognized that this task involves the following steps: (1) thinking deeply about the alternative conception, (2) juxtaposing argument against the alternative, (3) explaining anomalous pieces of data, and (4) weighing issues and arguments. The process that allows a student to engage in effective counter-analysis involves “deep processing, elaborative strategy use and significant meta-cognitive reflection.”¹⁴³

(“[T]he logically strongest overall conclusion ‘[requires students] to critically evaluate arguments and counterarguments’ . . . Specifically, it ‘enhances the “the writer’s credibility as an intelligent source of information.”’) (quoting E. Michael Nussbaum, *Using Argumentation Ven Diagrams (AVDs) for Promoting Argument-Counterargument Integration in Reflective Writing*, 100 J. EDUC. PSYCHOL. 549, 550 (2008); MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 174 n.12 (2d ed. 2008)).

141. Stanchi, *supra* note 139, at 424 (citations omitted).

142. *See generally* McElroy & Coughlin, *supra* note 4.

143. *Id.* at 230–31 (quoting E. Michael Nussbaum & Gale M. Sinatra, *Argument and Conceptual Engagement*, 28 CONTEMP. EDUC. PSYCHOL. 384, 385 (2003)). McElroy and Coughlin rely on several other useful sources for their exploration on the importance of counteranalysis, including E. Michael Nussbaum & CarolAnne M. Kardash, *The Effects of Goal Instructions and Text on the Generation of Counterarguments During Writing*, 97 J. EDUC. PSYCHOL. 157 (2005); Nussbaum, *supra* note 140, at 550 (“Effective argumentation also involves metacognitive reflection, a ‘stepping

One limitation of the McElroy and Coughlin study is that it starts from the standpoint of “argument” and the means of “persuasion,” along with the utility of “counterargument” to make one’s position stronger, rather than seeking to suspend conclusion with a completely open mind as to the desired conclusion.

A theory very similar to suspended conclusion—at least in relation to its focus on alternatives analysis—is what has been termed “critical dialogue” or “dialogical reasoning.”¹⁴⁴ Yanchar described the benefits of such reasoning in a discussion regarding comparative assumptions between competing arguments:

This recommendation emphasizes the need to become aware of one’s own assumptions and those of others through a type of critical conversation with those whose work represents an alternative perspective and is informed by alternative assumptions. This dialogical activity can be particularly helpful in identifying and evaluating one’s own assumptions and values that are not explicitly recognized. As some have argued, those with different perspectives are often able to identify what an individual takes for granted and thus cannot easily discern about their own viewpoints and projects. Indeed, by virtue of what may be termed a “clash of divergent views”—or a form of dialogical comparison and contrast—the meaning and implications of an assumptive framework can become apparent, or at least a little clearer to those who hold it.¹⁴⁵

By engaging in dialogue, one is required to critically evaluate the chosen position, listen to opposing views, and reconsider the original position in that light. “Given the opacity of many theoretical assumptions, we view such dialogue [as] essential to adequate critical thinking.”¹⁴⁶ It requires one to accept the potential fallibility of the original position selected and remain open to criticism. It only works, however, if one is humble and in a position to listen and engage in the dialogue.¹⁴⁷ If

back’ that allows one to view and weigh the overall merits of different arguments and counterarguments.”) (citation omitted).

144. Yanchar et al., *supra* note 46, at 273 (citing RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983); HANS-GEORG GADAMER, *TRUTH AND METHOD* (2d ed. 1989); FRANK C. RICHARDSON ET AL., *RE-ENVISIONING PSYCHOLOGY: MORAL DIMENSIONS OF THEORY AND PRACTICE* (1999); Karl Hostetler, *Community and Neutrality in Critical Thought: A Nonobjectivist View on the Conduct and Teaching of Critical Thinking*, in *RE-THINKING REASON: NEW PERSPECTIVES IN CRITICAL THINKING* 135 (Kerry S. Walters ed., 1994); Brent Slife, *Testing the Limits of Henriques’ Proposal: Wittgensteinian Lessons and Hermeneutic Dialogue*, 61 *J. CLINICAL PSYCHOL.* 107 (2005)).

145. *Id.* at 273–74 (quoting Hostetler, *supra* note 144, at 143).

146. *Id.* at 274.

147. *Id.* (“[T]hrough this dialogical encounter, one can become more aware of another’s viewpoint and assumptions, which raises the possibility of attaining new understandings and engaging in new forms of practice that may prove beneficial over time.”).

one adopts “a type of humility about one’s own position,” it “increases the likelihood of engaging in a genuine dialogue about its strengths and weaknesses in comparison to those of others.”¹⁴⁸

Moreover, understanding the opposing argument has independent utility. As Yanchar posits, although individuals “may or may not revise their prior assumptions as a result of critical dialogical encounters marked by care, respect, and humility, they can better understand the strengths and weaknesses of their own positions and achieve new understandings that broaden their appreciation for others.”¹⁴⁹ The dialogue itself sets the stage for the type of comparing and contrasting between alternative positions that an attitude of suspended conclusion demands.¹⁵⁰

One cannot help but see, as Dewey himself did, the similarities between the attitude of suspended conclusion and the role of a trial court.¹⁵¹ The attitude of suspended conclusion indeed replicates the ideal that is sought after in a neutral system of justice and the concept of a “fair trial.” For example, Dewey discussed the judge’s appropriate temperament as including “a willingness to hold final selection in suspense,” where “[a]lertness, flexibility, curiosity are the essentials; dogmatism, rigidity, prejudice, caprice, arising from routine, passion, and flippancy are fatal.”¹⁵² After all, the condition and consideration of the judge are often the images most immediately evoked by use of the term judgment. Dewey explained:

[T]he course of inference goes on through a series of partial and tentative judgments. What are these units, these terms of inference when we examine them on their own account? Their significant

148. *Id.* (citation omitted).

149. *Id.*

150. [R]esearchers [should] seek to understand as thoroughly as possible the assumptions that inform their theories and methods and, moreover, those that inform alternatives. Such understanding can facilitate a type of comparison and contrast that clarifies the meaning of theories and methods and leaves researchers in a better position to adopt those most suitable for their purposes.

Id. at 270.

151. DEWEY, *supra* note 1, at 102 (“Cases brought to trial before a judge illustrate neatly and unambiguously this strife of alternative interpretations; but any case of trying to clear up intellectually a doubtful situation exemplifies the same traits.”); DEWEY 1933, *supra* note 1, at 121 (slightly changing his wording but making essentially the same assertion).

152. DEWEY, *supra* note 1, at 105–06; *see also* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513 (2004) [hereinafter Simon, *A Third View*] (“Judges and other fact finders may shun[] cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions.”); *cf.* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 104 (1998) [hereinafter Simon, *Psychological Model*] (“Dewey stated that decision making does not flow from premises to conclusions, but is rather a continuous process in which premises gradually emerge from analysis of the ‘total situation.’”) (quoting Dewey, *Logical Method*, *supra* note 37, at 23).

traits may be readily gathered from a consideration of the operations to which the word *judgment* was originally applied: namely, the authoritative decision of matters in legal controversy—the procedure of the *judge on the bench*. There are three such features: (1) a controversy, consisting of opposite claims regarding the same objective situation; (2) a process of defining and elaborating these claims and of sifting the facts adduced to support them; (3) a final decision, or sentence, closing the particular matter in dispute and also serving as a rule or principle for deciding future cases.¹⁵³

A trial requires all participants—judges, parties, and counsel—to sift through the facts and select the rules. Judgment in a trial then involves collecting relevant data, examining suggestions made from that data (facts and law), identifying what is or is not significant or relevant to the question at issue, and weighing alternative claims and suggestions.¹⁵⁴

The attitude of suspended conclusion, although similar to the mentality of a trial judge, need not be limited to that particular exercise. In many ways, judgment in a legal sense is not peculiar or unique. Consider Dewey's example of the attitude as it applies to a physician who "suspends—postpones—reaching a conclusion in order that he may not be led by superficial occurrences into a snap judgment":¹⁵⁵

Imagine a doctor called in to prescribe for a patient. The patient tells him some things that are wrong; his experienced eye, at a glance, takes in other signs of a certain disease. But if he permits the suggestion of this special disease to take possession prematurely of his mind, to become an accepted conclusion, his scientific thinking is by that much cut short. A large part of his technique, as a skilled practitioner, is to prevent the acceptance of the first suggestions that arise; even, indeed, to postpone the occurrence of any very definite suggestion till the trouble—the nature of the problem—has been thoroughly explored. In the case of a physician this proceeding is known as diagnosis, but *a similar inspection is required in every*

153. DEWEY, *supra* note 1, at 101–02.

154. Dewey describes these predicates to judgment in a trial in the following manner:

The hearing of the controversy, the trial, *i.e.* the weighing of alternative claims, divides into two branches, either of which, in a given case, may be more conspicuous than the other. In the consideration of a legal dispute, these two branches are sifting the evidence and selecting the rules that are applicable; they are "the facts" and "the law" of the case. In judgment they are (a) the determination of the data that are important in the given case . . . and (b) the elaboration of the conceptions or meanings suggested by the crude data . . . (a) What portions or aspects of the situation are significant in controlling the formation of the interpretation? (b) Just what is the full meaning and bearing of the conception that is used as a method of interpretation? These questions are strictly correlative; the answer to each depends upon the answer to the other.

Id. at 102–03.

155. *Id.* at 85.

*novel and complicated situation to prevent rushing to a conclusion.*¹⁵⁶

The utility and wisdom of suspended conclusion are universally applicable to assessing problems presented, regardless of the occupational task.

An understandable criticism of the suspended conclusion concept is that it can lead to decision-avoidance or be used to justify procrastination.¹⁵⁷ As properly understood, it should not. Complications may occur where the number of suggestions is too few and where the number is too many.¹⁵⁸ Thus, it is important to emphasize that an attitude of suspended conclusion must be tempered with the reality and necessity of reaching a conclusion at some reasonable point. For example, Professor David Super warns about a legal culture of procrastination in “[c]ontemporary legal thinking We obsess about avoiding decisions without all possible relevant information while ignoring the costs of postponing decisions until that information becomes available. We valorize procrastination and condemn investments of decisional resources in early decisions.”¹⁵⁹ Super is explaining governmental decision-making from institutional motivations and constituent demands, and describes the conflict between unduly decisive behavior and unduly delayed decision-making.¹⁶⁰ His article is enlightening in its description of unduly postponing decisions, tending toward decision-avoidance and delaying decisions while waiting for new or additional information.¹⁶¹ At some point, reality dictates an ending point to doubt. That is especially true when

156. *Id.* at 74 (emphasis added).

157. For an examination of varying theories of procrastination, see, e.g., Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 PSYCHOL. SCI. 219 (2002); Ted O’Donoghue & Matthew Rabin, *Choice and Procrastination*, 116 Q.J. ECON. 121 (2001); Dianne M. Tice & Roy F. Baumeister, *Logitudinal Study of Procrastination, Performance, Stress, and Health: The Costs and Benefits of Dawdling*, 8 PSYCHOL. SCI. 454 (1997).

158. Dewey explains these “flood” and “trickle” difficulties:

We speak truly, in some cases, of the flood of suggestions; in others, there is but a slender trickle

. . . .
A conclusion reached after consideration of a few alternatives may be formally correct, but it will not possess the fullness and richness of meaning of one arrived at after comparison of a greater variety of alternative suggestions. On the other hand, suggestions may be too numerous and too varied for the best interests of mental habit. So many suggestions may rise that the person is at a loss to select among them So much suggests itself *pro* and *con*, one thing leads on to another so naturally, that he finds it difficult to decide in practical affairs or to conclude in matters of theory.

DEWEY, *supra* note 1, at 35–36.

159. David A. Super, *Against Flexibility*, 96 CORNELL L. REV. __ (forthcoming Sept. 2011), available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1988&context=fac_pubs.

160. *Id.*

161. *See id.*

there is a need for the best conclusion possible within a time or other resource constraint.

The attitude of suspended conclusion anticipates action *toward* conclusion whereas avoidance, procrastination, and indecision anticipate inaction or action *away* from conclusion. Dewey explained in *How We Think* that “[t]he disciplined, or logically trained, mind—the aim of the educative process—is the mind able to judge how far each of these steps needs to be carried in any particular situation,” and is able to judge when to stop and reach a conclusion or when to continue with the reflective process.¹⁶² “What is important is that the mind should be sensitive to problems and skilled in methods of attack and solution.”¹⁶³ Elsewhere, Dewey responded to some criticisms of the attitude of suspended conclusion, explaining that it should not be seen as an endorsement for decision-avoidance or perpetual indecision: “It is far from being true . . . that conclusion is postponed till the problem is solved. We accept or adopt at every point. The difference is in the conditions and purpose of the acceptance”¹⁶⁴ It is perfectly acceptable to reach conclusions after reflection; it is only unacceptable to begin with conclusions and thereby subvert the processes of thought.

Thus, there is a necessity in the real world to, at some point, reach a conclusion—to end the suspension. As Dewey acknowledged, “There is such a thing as too much thinking, as when action is paralyzed by the multiplicity of views suggested by a situation The best mental habit involves a balance between paucity and redundancy of suggestions.”¹⁶⁵ Knowing when to do so is necessarily a matter of judgment, and the guidance on that judgment is outside the purview of this Article. From the foregoing, it can at least be contended that, though one may practice an attitude of suspended conclusion without being in perpetual doubt, *conclusion* cannot occupy the first position in the thinking process lest thinking itself be left out of the race.

Finally, the attitude of suspended conclusion is, according to Dewey, about escape from arbitrary constraints on the freedom of the mind, such as impulsive tendencies and other undue internal and external influences against thought. The attitude of suspended conclusion relieves the thinker of the intolerable shackles of conclusion, where one is then set free to explore the “new materials to corroborate or to refute the first

162. DEWEY, *supra* note 1, at 78.

163. *Id.*

164. Dewey, *Reflective Thought*, *supra* note 3, at 37 n.4.

165. DEWEY, *supra* note 1, at 36.

suggestions that occur.”¹⁶⁶ As Dewey concluded, “Thought affords the sole method of escape from purely impulsive or purely routine action.”¹⁶⁷

Dewey described the attitude of suspended conclusion as a form of discipline¹⁶⁸ that must be inculcated and persistently adopted as a priori to thought.¹⁶⁹ But it is not a debilitating discipline that requires submission or strict adherence to orderly rules, and it is not designed to achieve a specific result (other than good thinking). To Dewey, the attitude of suspended conclusion is a matter of self-regulating the mind to a particular starting point for thought.¹⁷⁰

The training of the “disciplined mind” is, indeed, important.¹⁷¹ But “[w]hen discipline is conceived in intellectual terms (as the habitual power of effective mental attack), it is identified with freedom in its true sense.”¹⁷² It is our negative internal tendencies and external influences that are confining, not an adherence to a discipline of suspended conclusion.

Dewey highlighted the contrast between freedom of thought empowered by an attitude of suspended conclusion and the imprisonment of impulse:

Genuine freedom, in short, is intellectual; it rests in the trained *power of thought*, in ability to “turn things over,” to look at matters deliberately If a man’s actions are not guided by thoughtful conclusions, then they are guided by inconsiderate impulse, unbalanced appetite, caprice, or the circumstances of the moment. To cultivate unhindered, unreflective external activity is to foster enslavement, for it leaves the person at the mercy of appetite, sense, and circumstance.¹⁷³

Our internal tendencies and external influences—the “appetite, sense, and circumstance”—must be overcome before genuine thought is able to flourish. To accomplish that, self-control, self-restraint, and self-discipline are required. In that sense, the attitude of suspended conclu-

166. *Id.* at 13.

167. *Id.* at 14.

168. *Id.* at 20 (discussing importance of a “fundamental and persistent discipline” in matters of the necessities of life, including thinking).

169. *Id.* at 66 (“The only way to achieve traits of carefulness, thoroughness, and continuity (traits that are, as we have seen, the elements of the ‘logical’) is by exercising these traits from the beginning, and by seeing to it that conditions call for their exercise.”).

170. *Id.* at 21 (“Only systematic regulation of the conditions under which observations are made and severe discipline of the habits of entertaining suggestions can secure a decision that one type of belief is vicious and the other sound.”).

171. *Id.* at 63.

172. *Id.* at 64.

173. *Id.* at 66–67.

sion is a discipline but one that should be accepted as healthy because of its rewards.

Consider the discipline a type of marker on the mind, where a reminder or alarm is set off as soon as one is presented with a problem—a deliberative device for detecting both the approach of the necessity of thinking and the hazards that await should one adopt the wrong approach.¹⁷⁴ The intervention of deliberation, or thinking, is necessary prior to reaching any conclusion in order to yield an effective result.¹⁷⁵ It should also be noted that tolerating the seemingly intolerable labor of thought not only makes our arguments more effective but also protects our decisions from falling prey to the undesirable.¹⁷⁶

Just as our training, experience, and practice can be guided toward habits of good thinking, so too can bad thinking habits evolve over time and become embedded in our affairs.¹⁷⁷ The goal is to learn to adopt the good habits and replace the bad ones, especially where bad habits are directly competing against the effective adoption of good ones.

An attitude of suspended conclusion can keep the mind moving toward reasoned judgment and away from impulsive conclusion. The goal is to naturalize the attitude, to regularize the skepticism that the attitude entails, and, consequently, to equip the mind to start the thinking process in a manner that makes reflection more uniform. If one acknowledges the utility of the attitude of suspended conclusion and consumes these lessons on its importance to thought, then suspended conclusion can be me-

174. Consider Dewey's thoughts (in a different context) on the utility of monuments and memorials as similar devices of remembrance and discipline:

[L]est we forget; and deliberately institute, in advance of the happening of various contingencies and emergencies of life, devices for detecting their approach and registering their nature, for warding off what is unfavorable, or at least protecting ourselves from its full impact and for making more secure and extensive what is favorable. All forms of artificial apparatus are intentional modifications of natural things so designed that they may serve better than in their natural estate to indicate the hidden, the absent, and the remote.

DEWEY 1933, *supra* note 1, at 19. Where suspended conclusion may not be triggered naturally, we may find utility in its injection into the mind to guide future action.

175. Dewey, *Logical Method*, *supra* note 37, at 17.

176. A passage from Judge Learned Hand is illuminating here. In describing the allure of theories and philosophies as aided by the perpetual question marks regarding meaning in the Universe, Judge Hand stated:

The relief of finding something which will take the place of the "intolerable labor of thought"—with all its attendant sense of futility—makes us the prey of the most obscene and monstrous faiths, from which, if thinking were not itself such a perversion of our nature, thinking would protect us.

Letter from Learned Hand to Bernard Berenson, (Jan. 8, 1950), in GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 582 (1994). See also de Bono, *supra* note 45, at 774 (discussing the issue of practicing prejudice).

177. DEWEY 1933, *supra* note 1, at 22 (warning about developing bad habits and the wrong kind of thinking).

chanized in one's thinking affairs. Due to some natural tendencies against this thought process, one must first understand how people think, after which one can adjust and remove the blinders that come with the seeming obviousness or suppressed recognition of suspended conclusion, both of which can lead to it being ignored.

VI. COMPETING HABITS OF MIND: NATURAL TENDENCIES, THE SEDUCTIVE DESIRE FOR CLOSURE, AND PSYCHOLOGICAL RESISTANCE TO THE SUSPENDED CONCLUSION CONCEPT

The necessity of appreciating the suspended conclusion concept is amplified by the fact that many individuals develop tendencies against the attitude. This Part examines the competing habits that may impede the effective adoption of an attitude of suspended conclusion. It looks at anecdotal evidence of these habits, along with a selection of various psychological theories and biases that help explain their existence.

This discussion is not meant to imply that we should peg individuals into categories, teach to traits, or isolate individuals for differential treatment. Instead, the tendencies are sufficiently recognized by educators and psychologists as creating problems for some individuals (if not many) to justify the universal teaching of the attitude of suspended conclusion to law students and lawyers. Universal teaching will catch those most vulnerable to these debilitating tendencies while its universal utility will be beneficial to all, including those who will be reinforced and reminded and those who will be exposed to the attitude for the first time. Closing of the mind to self-evaluation of the faults in our own processes is partly due to the bias blind spot or the "not me" mentality discussed earlier.¹⁷⁸

Understanding—or "unwrapping"—habits and recognizing their existence can be a revealing and surprisingly instructive enterprise because we so often give them only lip service, even when we can already identify them generally.¹⁷⁹ This is partly because habits of mind are tricky things that can evade our attention. Robert Tremmel posited that

178. See Lilienfeld et al., *supra* note 79, at 394.

179. Green explains the utility of such an enterprise—what he calls "unwrapping the ordinary" of habits:

Habit is unwrapped; the concealed ethic, the ordinary, is revealed. And in this unwrapping, the ordinary may appear as a fresh discovery even though there is nothing in it we did not already know. The ordinary unwrapped can surprise us. The medium of our thought—these ordinary words—can become the object of our thought, and when that happens, then philosophy has entered, not as someone else's text, but as our own. Philosophy appears as the logic of our common life.

Green, *supra* note 15, at 86–87.

“[s]ometimes this habit of mind and the problems it causes [are] not so easy to see because we are so close to [them].”¹⁸⁰

“Habit of mind” is a term so loosely used that it lacks any specific definition and thus should not be seen as a term of art. The term denotes habitual, and perhaps unconscious, thinking and reasoning patterns.¹⁸¹ Poor habits of mind can be debilitating and destructive to good thinking and may inhibit progress; overcoming them can free us and allow us to advance.¹⁸² An attitude of suspended conclusion can be compared to what Thomas Kuhn described as a transformation of vision on the part of a scientist.¹⁸³ Kuhn used the example of a contour map, where training the eye to focus on a picture that might immediately appear as only lines on a page allows the observer to understand it for the significance of the lines—as a representation of scientific data, not just random lines.¹⁸⁴ The attitude of suspended conclusion, too, is a transformative lens for the mind’s approach to a problem, and unless it is employed, a person does not see the full picture of the problem faced.

180. Robert Tremmel, *A Habit of Mind*, 24 ENG. EDUC. 20, 21 (1992).

181. A general explanation of its meaning from Gail Jaquish, a psychologist, and James Ware, a federal district court judge for the Northern District of California, is instructive:

Fold your arms across your chest. Look down and notice which arm is on top. Now reverse your arms so that the opposite arm is on top. Probably feels odd, right? When instructed to fold your arms, without thinking about it, you usually place the same arm on top every time. This is a “habit of body.” We all develop these unconscious patterns of physical behavior. And, just like our habits of body, we also have “habits of mind,” unconscious patterns of thinking and reasoning. For example, if asked to imagine what it would be like to be in an operating room, surrounded by surgeons, you are perhaps unlikely to imagine yourself surrounded by African-American women in white smocks. Although such a situation could occur, a habit of mind might lead you to think of surgeons as aging white males. There are numerous examples of habitual thinking patterns we use every day. Many habits of mind are behaviorally adaptive, in that they afford us cognitive efficiencies in our daily problem-solving activities.

Gail A. Jaquish & James Ware, *Adopting an Educator Habit of Mind: Modifying What It Means to “Think Like a Lawyer,”* 45 STAN. L. REV. 1713, 1713 (1993).

182. See, e.g., HOWARD MARGOLIS, PARADIGMS & BARRIERS: HOW HABITS OF MIND GOVERN SCIENTIFIC BELIEFS 3 (1993) (arguing that entrenched habits of mind impede progress in science and that overcoming debilitating habits of mind is the reason for many scientific advances).

183. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111–12 (2d ed. 1970).

184. Kuhn observed:

Looking at a contour map, the student sees lines on paper, the cartographer a picture of a terrain. Looking at a bubble-chamber photograph, the student sees confused and broken lines, the physicist a record of familiar subnuclear events. Only after a number of such transformations of vision does the student become an inhabitant of the scientist’s world, seeing what the scientist sees and responding as the scientist does. The world that the student then enters is not, however, fixed once and for all by the nature of the environment, on the one hand, and of science, on the other. Rather, it is determined jointly by the environment and the particular normal-scientific tradition that the student has been trained to pursue.

Id.

We are all, according to Dewey, impulsive creatures. Dewey believed that people have natural tendencies that inhibit the attitude of suspended conclusion.¹⁸⁵ Dewey claimed that our tendencies against suspending conclusion are a matter of impulses that must be checked with a disciplined attitude against them.¹⁸⁶ The attitude of suspended conclusion must act as a type of counterhabit against these debilitating tendencies.

Several observers recognize that there is a tendency among many against suspending conclusion, although they posit different theories regarding the reasons. Although we need not know where or why the habit originates to recognize that it exists, it is instructive to consider some of the literature examining the causes.

A. Anecdotal Evidence

Peter Martorella has explained that our everyday experience observing everyday pursuits is revealing—people often tend *not* to engage in the type of reflective thinking that Dewey claimed is essential to good thinking.¹⁸⁷ People tend to engage in bad mental habits. We live in an instant gratification society, and external forces help engender a tendency against suspending conclusion.¹⁸⁸ In other works outside *How We Think*, Dewey explained that human beings sometimes exhibit tendencies against deliberation and in favor of the hunch-like conclusion, with admittedly varying results.¹⁸⁹

Observers from English composition courses note that students generally have problems suspending conclusion—they often tend to act

185. DEWEY, *supra* note 1, at 22–24 (discussing Locke and the flaws that inhibit full reasoning).

186. *Id.* at 64 (“Direct immediate discharge or expression of an impulsive tendency is fatal to thinking. Only when the impulse is to some extent checked and thrown back upon itself does reflection ensue.”).

187. Martorella, *supra* note 78, at 87–88 (“Some discursive and admittedly superficial representative examples from several selected areas of our culture may suggest how and why Americans tend to bypass reflective thinking in their everyday pursuits.”).

188. *Id.* at 88–90 (discussing formal education techniques, labor roles, news media, and entertainment as contributing barriers to effective learning processes and demands for instant gratification).

189. Dewey explained the tendency to act without foresight and the unpredictability of results (i.e., sometimes we guess right) as follows:

Sometimes human beings act with a minimum of foresight, without examination of what they are doing and of probable consequences. They act not upon deliberation but from routine, instinct, the direct pressure of appetite, or a blind “hunch.” It would be a mistake to suppose that such behavior is always inefficient or unsuccessful. When we do not like it, we condemn it as capricious, arbitrary, careless, negligent. But in other cases, we praise the marvelous rectitude of instinct or intuition; we are inclined to accept the off-hand appraisal of an expert in preference to elaborately calculated conclusions of a man who is ill-informed.

Dewey, *Logical Method*, *supra* note 37, at 17.

against it unless taught otherwise to adopt an attitude.¹⁹⁰ Authors like Eugene Garver and Mina Shaughnessy have noted that the point at which we reach closure is the distinctive mark among experienced and effective writers—those who adopt an attitude of suspended conclusion and reach closure at a later point—and the inexperienced or ineffective ones that reach closure quickly because they fail to pause and inject a suspension attitude into their process.¹⁹¹ Shaughnessy confirmed that when writing about basic writing, educators are regularly left wondering why students exhibit tendencies that favor instant closure when faced with a problem.¹⁹² Perhaps it is a matter of the anxiety of the state of doubt; perhaps it is something else. According to Shaughnessy, people rush to judgment to avoid the pains of deliberation that are required with an attitude of suspended conclusion.¹⁹³

190. Richard Coe and Kris Gutierrez explained that it is a problem seen in “basic writing” courses when students must engage in problem-solving:

Instructors who use this problem-definition assignment with basic writing students should be aware of a particular problem which often characterizes their writing. Typically less skilled at planning and overwhelmed by the multitude of decisions they need to make, these students tend to clutch onto the more linear, standard textbook approach and to concentrate so much attention on lower-level decisions that they can think of little else. For this reason, they generally reach closure too quickly: typically they use overly generalized, inadequately qualified thesis statements and appear to lack what John Dewey called that “attitude of suspended conclusion” which characterizes good academic writing.

Richard M. Coe & Kris Gutierrez, *Using Problem-Solving Procedures and Process Analysis to Help Students With Writing Problems*, 32 C. COMPOSITION & COMM. 262, 267 (1981). Unfortunately, it appears to also exist in advanced education and writing, such as we see in the field of legal education.

191. Eugene Garver, *The Arts of the Practical: Variations on a Theme of Prometheus*, 14 CURRICULUM INQUIRY 165, 170 (1984). Garver explained:

Shaughnessy, who claimed above that bad writers weren’t much good at moving between abstract and concrete, says that: “[O]ne of the most notable differences between experienced and inexperienced writers is the rate at which they reach closure upon a point. The experienced writer characteristically reveals a much greater tolerance for what Dewey called an ‘attitude of suspended conclusion’ than the inexperienced writer.”

Id. (quoting MINA P. SHAUGHNESSY, ERRORS AND EXPECTATIONS: A GUIDE FOR THE TEACHER OF BASIC WRITING 227 (1977)).

192. Shaughnessy posed the educator’s perplexity with student behavior in regards to closure as follows:

Should the teacher then turn from problems of error to his students’ difficulties with the paragraphs of academic essays, new complexities emerge. Why, he wonders, do they reach such instant closure on their ideas, seldom moving into even one subordinate level of qualification but either moving on to a new topic sentence or drifting off into reverie and anecdote until the point of the essay has been dissolved? Where is that attitude of ‘suspended conclusion’ that Dewey called thinking, and what can one infer about their intellectual competence from such behavior?

Mina P. Shaughnessy, *Diving In: An Introduction to Basic Writing*, 27 C. COMPOSITION & COMM. 234, 237 (1976).

193. People sometimes strategize to avoid deliberation:

Dewey recognized that the attitude of suspended conclusion must face the obstacle that a state of perplexity is disagreeable to many:

There may, however, be a state of perplexity and also previous experience out of which suggestions emerge, and yet thinking need not be reflective. For the person may not be sufficiently *critical* about the ideas that occur to him. He may jump at a conclusion without weighing the grounds on which it rests; he may forego or unduly shorten the act of hunting, inquiring; he may take the first “answer,” or solution, that comes to him because of mental sloth, torpor, impatience to get something settled. One can think reflectively only when one is willing to endure suspense and to undergo the trouble of searching.¹⁹⁴

Unfortunately, when one begins with a strong opinion on a matter, one is unlikely to maintain one’s attention on habits that are directed to avoid instant judgment, even though people will consistently claim they have not made a snap judgment based only on initial opinion. De Bono discussed the importance of devices “to prevent the instant judgment habit and to encourage exploration before decision rather than after it.”¹⁹⁵ He warned that while “[m]ost people would of course claim to carry out this simplistic procedure, and no doubt they do in doubtful situations,” the reality is that “very few people carry out the procedure if they have a firm opinion on the matter.”¹⁹⁶

Dewey argued that there is a tendency on the part of many with an entrenched “dogmatic habit of mind” to rush toward closure, and that this tendency must be overcome if good thinking is to occur:

To many persons both suspense of judgment and intellectual search are disagreeable; they want to get them ended as soon as possible. They cultivate an over-positive and dogmatic habit of mind, or feel perhaps that a condition of doubt will be regarded as evidence of mental inferiority. It is at the point where examination and test enter into investigation that the difference between reflective thought and bad thinking comes in. To be genuinely thoughtful, we must be

The pains associated with suspended conclusion lead people to avoid deliberation and seek a quicker substitute. Obstinacy, blind habit, blind obedience, the literal-minded legalisms of the Pharisee, are all strategies for avoiding deliberation, for living in a practical world without in fact acting practically on it. Hence people turn from the Prometheus myth, attracted instead to another, competing version of the relation of theory and practice: they seek, and find, an intellectual picture that encourages a rush to judgment, avoiding the pains of deliberation by providing an intellectual, “scientific,” justification for such behavior.

Garver, *supra* note 191, at 170.

194. DEWEY 1933, *supra* note 1, at 16.

195. de Bono, *supra* note 45, at 775.

196. *Id.*

willing to sustain and protract that state of doubt which is the stimulus to thorough inquiry, so as not to accept an idea or make positive assertion of a belief until justifying reasons have been found.¹⁹⁷

Others have similarly observed this “confidence” affliction—a danger that lies in avoidance of actual thinking based on a false reliance on one’s confidence in his or her own intelligence. Consider the following from de Bono:

At the other end of the extreme is the highly skilled, highly intelligent, highly articulate thinker. He makes up his mind instantly on an issue and then uses his skill of argument to support the position that he has taken up. The sheer brilliance of this supporting effort makes it unlikely that the thinker will ever feel the need to change his position. And yet at no time has he ever tried to *explore* the subject. Similarly we put a lot of emphasis on debating skills, with the assumption that if you can prove the other fellow wrong, somehow that proves you right. In terms of thinking skills, both these strategies are highly inefficient and indeed dangerously so.¹⁹⁸

Some psychologists have explained this tendency as an “immune system” that is particularly strong at repelling potentially intrusive alternative points of view.¹⁹⁹ Thus, the impulse toward conclusion seems capable of affecting the lazy person, the low-intelligence person, and the high-intelligence person alike.

B. Psychological Studies

As shown above, many observers generalize the discussion of the tendency against an attitude of suspended conclusion. To gain insights on thinking and problem-solving skills, we can inform and enhance our understanding by looking beyond our anecdotal evidence and toward psychology.²⁰⁰ Those of us outside the field of psychology cannot be psychologists, but we can certainly learn from them. Psychology and other

197. DEWEY 1933, *supra* note 1, at 16.

198. de Bono, *supra* note 45, at 775.

199. Lilienfeld et al., *supra* note 79, at 392 (discussing “ideological immune systems” that contribute to confirmation bias). Lilienfeld et al. explained that this immune system may be particularly strong in the most intelligent. *Id.* (“Some authors have conjectured that highly intelligent people possess especially effective ideological immune systems because they are adept at generating plausible counterarguments against competing claims, although this possibility has yet to be tested systematically.”) (citations omitted).

200. See Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 257–59 (2004) (“[T]he field of psychology . . . offers insights into how people think, learn, communicate, solve problems, and interact with one another [L]egal scholars have evaluated how cognitive psychology and composition theory can inform and enhance legal pedagogy in general and legal writing pedagogy in particular.”) (citations omitted).

social-science research dovetail with common experience. If nothing else, it supports our anecdotal observations that some people exhibit a tendency against suspended conclusion.

Psychology research on “cognitive fallibilities,” a proper characterization for disregarding the suspended conclusion concept, has been called “[u]ndeniably, one of the crowning achievements of modern psychological science.”²⁰¹ Lilienfeld et al. explained, “[T]here is growing consensus that such research demonstrates that human thinking is not nearly as rational as once commonly believed. Our judgment and decision making, although often reasonably accurate, are frequently clouded by a plethora of biases and heuristics.”²⁰²

In one example of the application of psychology to similar analyses of thought, McElroy and Coughlin drew on cognitive dissonance theory to conclude that individuals must be educated about their tendencies for dissonance and tactics for disagreeing with themselves and their own conclusions, and must also be made to realize that discomfort with conducting a strong counteranalysis is “actually a signal that their analytical process is strong and capable.”²⁰³ In what they termed “heavy cognitive lifting,” McElroy and Coughlin pointed to social scientists who explained that students often have an aversion to thinking about competing arguments because of a “[l]ack of interest, motivation, or unwillingness to extend sufficient cognitive effort.”²⁰⁴ Discussing lawyers and students who are in a situation in which they are charged with the task of persuasion (such as an adversarial proceeding), McElroy and Coughlin contended that “beginning law students and lawyers become invested in their conclusions to the point of having difficulty making effective counterconclusions.”²⁰⁵ McElroy and Coughlin noted that writing may be partic-

201. Lilienfeld et al., *supra* note 79, at 390.

202. *Id.* at 390–91 (citations omitted). *See also* Rand, *supra* note 73, at 749 (“The cognitive and behavioral science involved is well-established and empirically documented . . .”).

203. McElroy & Coughlin, *supra* note 4, at 232. They further elaborate on this theory:

[C]ognitive dissonance theory . . . explains that [w]hen a person with a strong belief is challenged by contradictory evidence, he is less likely to discard the belief than to show a new fervor about convincing and converting other people to his view. Thus, according to one scholar, if the pedagogic goal is to increase dissonance and thereby to increase learning, it is important that students . . . feel the psychological discomfort created by the inconsistencies.

Id. (quoting Julie A. Seaman, *Cognitive Dissonance in the Classroom: Rationale and Rationalization in the Law of Evidence*, 50 ST. LOUIS U. L.J. 1097, 1112–13 (2006)) (internal quotation marks omitted).

204. *Id.* at 231 (quoting Nussbaum & Sinatra, *supra* note 143, at 385).

205. *Id.* They explain further:

[C]oherence-based reasoning may help to explain why beginning law students and lawyers become invested in their conclusions to the point of having difficulty making effective counterconclusions . . . [I]n order to make a supportable and defensible decision, a

ularly affected with one-sided argument because, unlike oral argument and its adversarial setting, students may not see “cues” to consider counterarguments and responses to counterarguments when engaging in the exercise of writing, and they may need to generate such cues on their own.²⁰⁶

1. Confirmation and Other Biases

Another area of psychological study relevant to a tendency against suspending conclusion is what is called “confirmation bias.” Confirmation bias is “the tendency to seek out evidence consistent with one’s views, and to ignore, dismiss, or selectively reinterpret evidence that contradicts them.”²⁰⁷ Given the lawyer’s role as zealous advocate with an occupational commitment to a client’s position, the risk of confirmation bias seems high—we want to win for our clients; we are required to zealously defend their position; and we begin our task searching for the ways to win for that predetermined position. “Confirmation bias can lead us to draw distorted conclusions regarding evidence that runs counter to our views (a process often termed biased assimilation)”²⁰⁸ The lawyer, already entrenched on one side, may fail to fully think through alternatives because of a strong desire and need to support that position. Lilienfeld et al. further described this phenomenon associated with such entrenchment, sometimes called “Myside Bias”:

The protean phenomenon of confirmation bias appears in a host of incarnations in the literature. *Myside bias* refers to the tendency to more readily generate arguments for one’s side of an argument and to evaluate those arguments as superior to those on the other side. [J.S.] Snelson referred to the “ideological immune system” as our coordinated system of psychological defenses against evidence that contradicts our entrenched views.²⁰⁹

This bias is particularly disabling because it is self-perpetuating and proliferates the further we get along in an inquiry. “Confirmation bias predisposes us not merely to interpret evidence in a self-fulfilling man-

legal decision-maker will transform “[a]mbiguous, equivocal, and conflicting variables . . . into coherent models”

Id. at 231–32 (quoting Simon, *A Third View*, *supra* note 152, at 545).

206. *Id.* at 233.

207. Lilienfeld et al., *supra* note 79, at 391 (citations omitted). *See also* Rand, *supra* note 73, at 748 (“Overconfidence also leads to a ‘confirmation bias’ that restricts our very ability to seek out information that might open our eyes. The confirmation bias is our tendency to seek out evidence that will confirm, not challenge, our current view of a situation or frame of a problem.”).

208. Lilienfeld et al., *supra* note 79, at 392 (emphasis omitted).

209. *Id.* at 391–92 (citations omitted).

ner, but to seek out evidence supporting only one side of a polarized issue.”²¹⁰

Similarly, psychologists have recognized another bias called the “anchoring heuristic” that is particularly antagonistic to an attitude of suspended conclusion.²¹¹ Anchoring occurs where individuals fail to move beyond an initial position or conclusion.²¹² These individuals instead anchor themselves to that first position in a manner that forecloses the possibility of considering alternative docking points.

In addition to these biases, several other theories in psychology have explored the types of tendencies that hinder an attitude similar to that of suspended conclusion. Some of the explanations for why individuals have a tendency to rush to conclusions include both individual differences—including individual desire for predictability,²¹³ preference for order and structure in one’s affairs,²¹⁴ discomfort or intolerance with ambiguity,²¹⁵ decisiveness, and close-mindedness²¹⁶—and situational forces, including external influences that are disruptive, like time, pressure, noise, and fatigue.²¹⁷ Both categories include influences that drive individuals to exhibit what some psychologists have termed a need for cogni-

210. *Id.* at 392. Also consider the following:

Part of this is the natural and understandable inclination to seek out information that would prove a hypothesis—indeed, in numerous studies participants manifested a strong tendency to test hypotheses by only looking for confirmatory proof rather than disconfirming information, even where the solution could only be achieved by more skeptical analysis.

Rand, *supra* note 73, at 748.

211. Rand, *supra* note 73, at 746 (“The anchoring heuristic causes us to become irrationally wedded to an initial starting point and fail to sufficiently adjust from that ‘anchor’ upon subsequent consideration.”) (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3, 14 (Daniel Kahneman et al. eds., 1982)).

212. *Id.*

213. See, e.g., Sebastien Grenier et al., *Intolerance of Uncertainty and Intolerance of Ambiguity: Similarities and Differences*, 39 *PERSONALITY & INDIVIDUAL DIFFERENCES* 593, 594 (2005).

214. See, e.g., Donna M. Webster & Arie W. Kruglanski, *Individual Differences in Need for Cognitive Closure*, 67 *J. PERSONALITY & SOC. PSYCHOL.* 1049, 1050 (1994) [hereinafter Webster & Kruglanski, *Individual Differences*].

215. See, e.g., Stanley Budner, *Intolerance of Ambiguity as a Personality Variable*, 30 *J. PERSONALITY* 29 (1962); Else Frenkel-Brunswik, *Intolerance of Ambiguity as an Emotional and Perceptual Personality Variable*, 18 *J. PERSONALITY* 108, 120 (1949); Grenier et al., *supra* note 213, at 596.

216. Licht, *supra* note 9, at 668; Webster & Kruglanski, *Individual Differences*, *supra* note 214, at 1049.

217. See, e.g., John T. Cacioppo et al., *Dispositional Differences in Cognitive Motivation: The Life and Times of Individuals Varying in Need for Cognition*, 119 *PSYCHOL. BULL.* 197, 239 (1996) [hereinafter Cacioppo et al., *Dispositional Differences*]; Arie W. Kruglanski & Donna M. Webster, *Motivated Closing of the Mind: “Seizing” and “Freezing.”* 103 *PSYCHOL. REV.* 263, 280 n.1 (1996) [hereinafter Kruglanski & Webster, *Motivated Closing*] (discussing situational influences like time, pressure, and noise).

tive closure,²¹⁸ a low or high need for cognition,²¹⁹ or a low or high personal need for structure.²²⁰ Furthermore, there are a number of possibilities for why people experience dissatisfaction if there is no clear answer for a problem, exhibit a high intolerance for uncertainty,²²¹ or suffer from anxiety that is relieved by closure.²²²

2. Need for Cognitive Closure

One of the more interesting areas related to the attitude of suspended conclusion is known as the need for cognitive closure (NFC),²²³ which “refers to individuals’ desire for a firm answer to a question and an aversion toward ambiguity.”²²⁴ NFC is believed to represent a “dimension of individual differences as well as a situationally inducible state.”²²⁵ Theorists like psychologists Arie Kruglanski and Donna Webster assume that desire for closure varies along a continuum, with individuals at the NFC end of the continuum showing cognitive impatience or impulsivity.²²⁶ Strong NFC individuals “may ‘leap’ to judgment on the basis of inconclusive evidence and exhibit rigidity of thought and reluctance to entertain views different from their own”²²⁷ whereas individuals

218. See, e.g., Neal R. Feigenson, *Accidents as Melodrama*, 43 N.Y.L. SCH. L. REV. 741, 753 n.55 (1999–2000) (“[The] need [for closure] is assumed to inhibit the formulation of alternatives to a given hypothesis, as these introduce confusion and hence undermine existing closure.”); Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 170–71 (2007) (“In a world that consists of astronomical bits of data, humans are ‘cognitive misers’ who save their effortful processing for only a few tasks.”) (citation omitted); Arne Roets et al., *Determinants of Task Performance and Invested Effort: A Need for Closure by Relative Cognitive Capacity Interaction Analysis*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 779, 780 (2008).

219. See, e.g., John T. Cacioppo & Richard E. Petty, *The Need for Cognition*, 42 J. PERSONALITY & SOC. PSYCHOL. 116, 117 (1982); Cacioppo et al., *Dispositional Differences*, *supra* note 217, at 247. For a discussion of the work of Cacioppo and Petty, see Jennifer L. Lambe, *The Structure of Censorship Attitudes*, 13 COMM. L. & POL’Y 485, 499 (2008).

220. Steven L. Neuberg & Jason T. Newsom, *Personal Need for Structure: Individual Differences in the Desire for Simple Structure*, 65 J. PERSONALITY & SOC. PSYCHOL. 113, 125–26 (1993).

221. Richard M. Sorrentino et al., *Uncertainty Orientation: Implications for Affective and Cognitive Views of Achievement Behavior*, 46 J. PERSONALITY & SOC. PSYCHOL. 189, 203 (1984); Michel J. Dugas et al., *Intolerance of Uncertainty and Information Processing: Evidence of Biased Recall and Interpretations*, 29 COGNITIVE THERAPY & RES. 57, 58 (2005).

222. Luca Bensi & Fiorella Giusberti, *Trait Anxiety and Reasoning Under Uncertainty*, 43 PERSONALITY & INDIVIDUAL DIFFERENCES 827, 827 (2007); Dugas et al., *supra* note 221, at 67; Marjorie Roth Leon & William Revelle, *Effects of Anxiety on Analogical Reasoning: A Test of Three Theoretical Models*, 49 J. PERSONALITY & SOC. PSYCHOL. 1302, 1302 (1985).

223. Kruglanski & Webster, *Motivated Closing*, *supra* note 217, at 264; see also ARIE W. KRUGLANSKI, *THE PSYCHOLOGY OF CLOSED MINDEDNESS* (2004).

224. Kruglanski & Webster, *Motivated Closing*, *supra* note 217, at 264. The analysis of cognitive closure here should not be seen or confused as an endorsement of “cognitive learning theory”—a recognized term for a learning discipline that has its own independent meaning and approach.

225. *Id.* at 278.

226. Webster & Kruglanski, *Individual Differences*, *supra* note 214, at 1049.

227. Kruglanski & Webster, *Motivated Closing*, *supra* note 217, at 264.

at the opposite end of the continuum, with a strong need to avoid closure, may “savor uncertainty and be reluctant to commit to a definite opinion.”²²⁸ Under a heightened NFC, individuals might engage in closure-promoting activities, like generating fewer competing hypotheses or suppressing attention to information that is inconsistent with their hypotheses.²²⁹ Alternatively, when individuals are not concerned with closure, they might perform thorough and extensive information searches and generate many alternative explanations for the facts.²³⁰ The need to avoid closure may arise “when the judgmental task is intrinsically enjoyable and interesting.”²³¹ Moreover, individuals might exhibit personal differences in the need for closure, arising from “cultural norms or personal socialization histories.”²³²

Theorists propose that the need for closure instills two general tendencies: “the urgency tendency and the permanence tendency.”²³³ Under the urgency tendency, individuals are inclined “to ‘seize’ on closure quickly.”²³⁴ The permanence tendency refers to the desire to perpetuate closure to “‘freeze’ on[] past knowledge and to safeguard future knowledge.”²³⁵ When people under a heightened need for closure have a tendency to seize on early information and immediately freeze, they “may process less information before committing to a judgment and generate fewer competing hypotheses to account for the available data.”²³⁶ In general, “individuals under a high (vs. low) need for closure . . . consider less evidence before forming a judgment.”²³⁷

Ultimately, it is a matter of competing habits—good versus bad. Some of our tendencies work against the good. Dewey juxtaposed the good habits that can be formed by training the critical thinker with the bad habits of the uncritical one: “[H]abits of suspending judgment till inferences have been tested by the examination of evidence, [as opposed to habits of thinking that] alternat[e] with flippant incredulity, belief or unbelief being based, in either case, upon whim, emotion, or accidental circumstances.”²³⁸ The struggle facing the thinking like thinkers approach is finding ways in which the good habits prevail.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 265 (citation omitted).

233. *Id.* (emphasis omitted).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 268.

238. DEWEY, *supra* note 1, at 66.

VII. OVERCOMING HABITS AND THE CONCEPT OF DEBIASING

If we understand the tendencies against suspended conclusion, we can attempt to combat them. The first step is to understand the process of suspended conclusion and its utility to the thinking exercise. The second step is to recognize the tendency against it. And the third step is intervention—by oneself or through the assistance of the education process—to combat the debilitating tendencies and biases against its effective adoption. Part III largely set forth the case for education on disciplined thought and justified it as an important goal for the learning enterprise inside and outside of the classroom. Educators should increase attention on the attitude of suspended conclusion in legal education, and lawyers should constantly self-reflect on the use of the attitude in their practice.²³⁹ Part III also demonstrated the possibilities inherent in that learning process. Learning is difficult enough, however, even when there are not biases competing against it. As Part VI explained, substantial biases and bad habits exist that impede effective adoption of an attitude of suspended conclusion. This Part examines the literature on whether these biases and habits can be overcome.

As explained in Part III, Dewey was quite confident in the ability of education to fight the antisuspension tendencies.²⁴⁰ Research from psychology also reinforces the idea that certain cognitive biases can be overcome. A few representative studies will be discussed in this part. The literature is far more extensive than the examples provided here, but these studies generally reflect the discussion of debiasing mechanisms today.

Substantial research has been conducted regarding “debiasing methods, [meaning] not only techniques that eliminate biases but also those that diminish their intensity or frequency.”²⁴¹ Although the success of debiasing techniques is the subject of much debate in the psychology literature, there is evidence of some rather substantial positive advances.²⁴² Again, this Article’s proposal is not meant to encourage instruction on what to think.²⁴³

239. See, e.g., Neumann, *Preliminary Inquiry*, *supra* note 132, at 747 n.67 (bemoaning the paucity of “any significant material on the architecture of a proof of a conclusion of law” in law school texts); Rand, *supra* note 73, at 733 (“[W]hat most clinical programs under-emphasize is the decision-making skill itself: the study of the cognitive strategies needed to properly identify and prioritize goals, to process information free of psychological biases that undermine objectivity, and to creatively generate potential solutions to a problem.”).

240. See *supra* Part III.

241. Lilienfeld et al., *supra* note 79, at 391.

242. When examining the literature on debiasing techniques against confirmation bias, one is struck by three glaring facts: the paucity of research on the topic, the lack of theoretical coherence

In particular, debiasing against confirmation bias has seen some success, as documented in the psychology literature. For example, Lilienfeld et al. explained that several studies have “found that ‘consider-the-opposite’ or ‘consider-an-alternative’ strategies can be at least somewhat effective in combating confirmation bias and related biases.”²⁴⁴ Although the research is not clear how well debiasing techniques can apply in all situations, Lilienfeld et al. concluded, “In some but not all studies, basic education about specific cognitive biases (e.g., brief and nontechnical tutorials on confirmation bias) also decreases participants’ tendency to fall prey to certain errors, including confirmation bias.”²⁴⁵

Lilienfeld et al. cautioned, “Nevertheless, the question of whether instruction alone is sufficient to disabuse people of confirmation bias and related errors is controversial.”²⁴⁶ They described the state of the literature—from the harshest critics of such debiasing to, in contrast, “others [who] believe that psychoeducational programs may often be efficacious.”²⁴⁷ One example provided was the work of a psychologist who “argued that although critical-thinking programs are, at best, modestly effective, the most successful methods teach participants ‘metacognitive rules,’ such as reminding them to consider alternative points of view in pertinent situations.”²⁴⁸ Such reminders are precisely what are advocated in and accomplished by this Article.

Most observers believe that humans are not hardwired with immutable cognitive fallibilities. These faults can be overcome. For example, when reviewing the research in psychology, Licht noted, “The need for

among differing debiasing techniques, and the decidedly mixed research evidence concerning their efficacy. Still, there have been a few promising advances. *Id.* at 393 (citation omitted).

243. *Id.* (“[T]he goal of debiasing techniques should be to help people grasp and appreciate alternative points of view, not necessarily to accept them as equally valid or moral.”).

244. *Id.* (citations omitted). Lilienfeld et al. proceeded to describe some of the studies:

Using these approaches, researchers instruct participants to generate rival points of view or imagine counterfactual outcomes for a set of events. In many respects, all of the aforementioned techniques bear similarities to Sternberg’s program to inculcate wisdom in children by helping them understand and appreciate others’ points of view and to Baron’s goal of teaching “active open-mindedness”; that is, the capacity to thoughtfully consider arguments on multiple sides of an issue.

Still other researchers have found that delayed decision making decreases confirmation bias among clinicians asked to make diagnostic judgments. Encouraging practitioners to slow down and reflect on their decisions may permit them to consider and evaluate alternative viewpoints.

Id. (citations omitted).

245. *Id.* (citations omitted).

246. *Id.*

247. *Id.*

248. *Id.* (citing Daniel T. Willingham, *Critical Thinking: Why Is It So Hard To Teach?*, 31 AM. EDUCATOR 8–19 (2007)).

cognitive closure is primarily motivational. That is, ‘need’ denotes a motivational tendency or proclivity rather than a tissue deficit.”²⁴⁹ Thus, the tendency to seek closure prematurely is capable of alteration once it is recognized. Others, like Gregory Mitchell, have explained that there is evidence that teaching open-mindedness can allow individuals to “transcend” the debilitating tendencies and biases against suspended conclusion.²⁵⁰

Whether or how these debiasing mechanisms can work in law, according to Mitchell, are questions that need further research, but “[t]he balance of evidence that exists strongly suggests that a disposition to engage in more effortful and open-minded thinking is associated with the commission of fewer errors on tests of rational thinking.”²⁵¹ Mitchell contended, “[T]o the extent that critical thinking dispositions may be learned, teaching law students to engage in actively open-minded thinking may be an important goal of law schools.”²⁵²

Confirmation bias in lawyers and debiasing countermeasures have been discussed elsewhere in legal literature, especially regarding prosecutors and postconviction reviews.²⁵³ For example, Keith Findley and Michael Scott proposed that prosecutors adopt “[a] host of interlocking measures [that] can reduce the distorting effects of tunnel vision, even if they cannot eliminate it altogether.”²⁵⁴ They claimed that the first step to

249. Licht, *supra* note 9, at 668.

250. Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67, 146–47 (2002). Mitchell summarized:

People who score higher on cognitive disposition measures such as Stanovich and West’s actively open-minded thinking scale and Petty and Cacioppo’s need for cognition scale appear to be better “in tune” with their cognitions, recognize the value of objective data processing, and allocate processing resources accordingly. Consequently, these individuals may transcend their personal theories about a given topic and monitor their thought processes carefully. The result is relatively objective reasoning.

Id. (citation omitted). Mitchell recognizes, however, that further work remains to develop debiasing techniques that assist in accomplishing these results. *Id.*

251. *Id.*

252. *Id.* (citation omitted).

253. See, e.g., Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007) [hereinafter Burke, *Neutralizing Cognitive Bias*] (“Prosecutorial tunnel vision can be viewed as the culmination of confirmation bias and selective information processing”); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 396 (2006) (“Cognitive distortions such as confirmation bias, hindsight bias, outcome bias, and a host of other psychological phenomena make some degree of tunnel vision inevitable. Institutional pressures on police, prosecutors, defense lawyers and courts amplify those natural tendencies.”); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979) (discussing confirmation bias); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

254. Findley & Scott, *supra* note 253, at 396.

overcoming the bias is to admit it exists. Recognition of the existence of the cognitive bias can temper its manifestation.²⁵⁵ They then proposed a number of “measures [that] can then be taken to overcome tunnel vision,” including “[e]ducation and training.”²⁵⁶

Alafair Burke offered some suggestions to mitigate confirmation biases in prosecutors as well. First, she explained, “Some empirical evidence suggests that education can potentially mitigate bias, [but] cognitive bias is stubborn, [so] education is an unlikely panacea.”²⁵⁷ She also reported that “[s]ocial scientists have found that both induced counterargument and exposure to opposing views can reverse the effects of cognitive bias.”²⁵⁸ Furthermore, when people are forced to “switch sides”²⁵⁹ and are required to discover and argue the case against their preferred “side,”²⁶⁰ effective mitigation of cognitive bias occurs. The technique of rebutting your own case was also proposed as an effective debiasing mechanism by Richard Birke.²⁶¹

255. *Id.*

256. *Id.* at 397. Ultimately, however, they believe that “perhaps the most important factor toward that end is . . . creating and sustaining an ethical organizational and professional culture.” *Id.*

257. Burke, *Neutralizing Cognitive Bias*, *supra* note 253, at 522–23 (citations omitted).

258. *Id.* at 523 (citing Craig A. Anderson & Elizabeth S. Sechler, *Effects of Explanation and Counterexplanation on the Development and Use of Social Theories*, 50 J. PERSONALITY & SOC. PSYCHOL. 24, 27–29 (1986); Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1231 (1984)).

259. *Id.* at 524 (“[I]ndividual prosecutors could attempt to neutralize their decision making by regularly ‘switching sides’ on their files and reviewing cases from the perspective of defense counsel.”) (citing Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1618 (2006)).

260. *Id.* (“Empirical evidence suggests that cognitive bias can be mitigated when people are forced to articulate arguments that contradict their existing beliefs.”) (citing Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 691 (2000); Charles G. Lord et al., *supra* note 258, at 1239; Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 188 (1998)).

261. Richard Birke, *Settlement Psychology: When Decision-Making Processes Fail*, 18 ALTERNATIVES TO HIGH COST LITIG. 203 (2000). Birke explained confirmation bias and other biases in both discovery and case processing, concluding that putting one in the shoes of the opponent is an effective way to avoid confirmation bias—a technique that could fairly be called a technique for promoting the attitude of suspended conclusion:

In order to reduce the negative effects of these biases, it may make some sense to think about the “anti-thesis” before doing research. Ask yourself what the case looks like to the other client, and consider doing a little bit of research into their case-in-chief before starting your own. If you think about your research as rebutting their case (as opposed to building yours), you may retain a view of the case closer to the one that a neutral judge or juror might hold. If you can have such a neutral view, you will be more likely to settle earlier for an amount that would approximate an average verdict.

Id. at 214–15.

Some believe cognitive biases can be controlled by teaching students based on case studies in which cognitive biases, tendencies, or errors had deleterious effects.²⁶² Others, like Mitchell, explain that instruction to consider opposing arguments has also proven effective at debiasing. “The research showing positive effects of open-mindedness accords with research into perhaps the most successful debiasing mechanism: encouraging subjects to consider opposing arguments or alternative solutions to problems.”²⁶³

With that realistic, optimist conclusion about the need and ability to ameliorate the negative effects of disregarding the suspended conclusion concept, this Article may be in line with what Lilienfeld et al. called the “meliorists”:

[N]amely those who believe that human thinking often departs from rational standards and that such departures may be rectifiable by intervention efforts. At the same time, we acknowledge that the ultimate success of these efforts remains to be seen. Indeed, it is possible that given the formidable barriers against debiasing we have outlined, even the most efficacious of intervention efforts may meet with only partial success.²⁶⁴

Even if the success is unknown, it is prudent for lawyers to acknowledge the utility of the attitude of suspended conclusion, recognize the tendencies against it, and at least try to adjust their thinking accordingly.

Conscious adherence to an attitude of suspended conclusion can independently improve thinking. If the thinker recognizes it, has a desire to do it, and uses willpower, one can personally remove the biases without the need for further intervention. Mitchell concluded, “[I]t appears that individuals disposed to examine both sides of an issue and consider new arguments ‘self-debias.’”²⁶⁵ As Paul Brest and Linda Krieger contended, one can learn to avoid confirmation bias by reflecting on experience.²⁶⁶

This Article does not endorse any particular debiasing techniques or fully evaluate the current research. It is enough to understand that some evidence exists that such techniques have successfully been used. At the very least, if we recognize the existence of the biases against suspended conclusion, then we can begin to give attention to the need for further research and other efforts to learn how these debilitating biases can be

262. See, e.g., Rand, *supra* note 73, at 749 (arguing for using case studies to teach cognitive bias in legal decision-making).

263. Mitchell, *supra* note 250, at 144.

264. Lilienfeld et al., *supra* note 79, at 395.

265. Mitchell, *supra* note 250, at 144–47.

266. Paul Brest & Linda Hamilton Krieger, *Lawyers As Problem Solvers*, 72 TEMP. L. REV. 811, 826 (1999) (arguing that avoiding confirmation bias can be learned from experience).

overcome and therefore how our thinking can be improved.²⁶⁷ “Given the positive effects that an active, open mind may have on rational behavior, further research into the development and maintenance of this disposition would seem particularly important.”²⁶⁸ In the meantime, examining and recognizing the importance of the attitude of suspended conclusion, as well as the need to replace bad tendencies against the attitude with good tendencies that reinforce adherence to the attitude, improves the chances that individuals will engage in effective thinking.

The power of recognizing the attitude of suspended conclusion seems to be, in part, what Dewey intended with his work. Dewey believed that the tendency to rush to judgment is nearly inevitable if not regulated.²⁶⁹ At the very least, the internal and external influences on the mind that create a tendency against suspending conclusion demonstrate, according to Dewey, the necessity of understanding when bad thinking habits occur in order to lessen their occurrences and engrain the attitude to increase the probability that good thinking will prevail:

But the process of reaching the absent from the present is peculiarly exposed to error; it is liable to be influenced by almost any number of unseen and unconsidered causes—past experience, received dogmas, the stirring of self-interest, the arousing of passion, sheer mental laziness, a social environment steeped in biased traditions or animated by false expectations, and so on *The very inevitableness of the jump, the leap, to something unknown, only emphasizes the necessity of attention to the conditions under which it occurs so that the danger of a false step may be lessened and the probability of a right landing increased.*²⁷⁰

There is enough evidence of the resistance to the attitude of suspended conclusion when it is not cultivated to warrant attempts to increase the probability that students and other thinkers can and will overcome the strong tendencies working against it.

A negative habit of mind can be a barrier to good thinking, while a positive one can free the mind to conduct thorough and reasoned analy-

267. Lilienfeld et al., *supra* note 79, at 395. Lilienfeld et al. called for increased attention and focused research:

Although scientific psychology has a long way to go before it can argue for giving debiasing away to the general public, there is a pressing need for additional research on concerted efforts to combat confirmation bias and related biases. In particular, more research is required to develop effective debiasing methods, ascertain their crucial effective ingredients, and examine the extent to which their efficacy generalizes to real-world behaviours and over time.

Id.

268. Mitchell, *supra* note 250, at 144.

269. DEWEY, *supra* note 1, at 26.

270. *Id.* (emphasis added).

sis. The recognition of the tendencies against suspended conclusion should motivate thinkers of all types to take steps to internalize the positive habit of mind associated with the suspended conclusion concept. To the extent that educators can assist in that process, it should be considered a primary goal. To the extent that lawyers can begin to recognize the value of the suspended conclusion concept and adopt it as an attitude when approaching their affairs, there will be a greater likelihood of realizing its benefits and a better chance that lawyers will think like thinkers.

VIII. CAN LAWYERS THINK LIKE THINKERS?

Whether the law is susceptible and adaptable to the thinking like thinkers concept is an open question because of the general tendencies and biases previously identified, as well as the unique nature of both advocacy and the adversarial process inherent in much of the lawyering task. There is also a question of whether the architecture of the American legal system is constructed to accommodate lawyers suspending conclusion. This Part introduces some of the difficulties uniquely applicable to lawyers and ultimately concludes that adopting an attitude of suspended conclusion in the practice of law is still advisable.

Parts of the suspended conclusion concept have been institutionalized in areas of the American legal system. Some lawyers are forced to adopt an attitude of suspended conclusion by nature of their position and attendant ethical duties. For example, it is imperative that some members of the legal system exercise an attitude of suspended conclusion—they are duty bound to do so as neutral arbiters in disputes between competing conclusions. Being subject to cognitive fallibilities themselves, there is of course the risk that they will not be so disciplined. Nonetheless, the law embeds that requirement in judges and jurors and charges them to be neutral arbiters and open-minded deliberators. Evidentiary rules, as well as the realities of the process, of course, may limit the information available for evaluation. But, at the very least, judges and jurors are required to suspend conclusion until the completion of a trial.

Prosecutors, too, have the suspended conclusion concept partially embedded in the definition of their role. For example, a prosecutor is generally under a duty to weigh evidence to a greater degree than the typical litigator, exercise power and discretion in a controlled manner, refrain from prosecuting unless the evidence provides confidence in the guilt of a defendant, and share or reveal evidence to the opposition, including evidence that may tend to be exculpatory and therefore contrary

to the prosecutor's interests.²⁷¹ Again, these requirements are not a full embrace of the suspended conclusion concept, and there is the possibility that tendencies and biases may impede their actual adoption at times. This Article does not attempt to examine patterns of adherence to these duties or otherwise enter the vast debates on prosecutorial conduct. Instead, it is at least useful to see the codification of some of the suspended conclusion principles in the ethical codes.

Some areas of law require the same type of adherence to suspended conclusion from certain other institutional actors. For example, administrative agencies are required to give reasons for their actions and consider alternatives under a variety of statutory commands.²⁷² The Administrative Procedure Act (APA)²⁷³ requires that an agency adequately consider the information available to it before making a decision, and it will invalidate an agency action as arbitrary and capricious if the agency had a "predetermined conclusion" or operated with a "closed mind" when making its decision.²⁷⁴ The requirements exist to ensure that agency decisions are meaningful.²⁷⁵ The National Environmental Policy Act (NEPA) is another good example.²⁷⁶ At its heart, NEPA's environmental impact review requires that a federal agency adequately consider viable alternatives to its action.²⁷⁷ The consideration of alternatives is designed to en-

271. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8 (2007); Burke, *Neutralizing Cognitive Bias*, *supra* note 253, at 524 ("To neutralize confirmation bias, a prosecutor reviewing a file should not only look for evidence supporting the defendant's guilt, but also scrutinize the case with the eye of a defense attorney searching for reasonable doubt.").

272. See, e.g., Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 972 (2007) (APA reason for notice and comment requirements, in effect, requires that an agency consider alternatives and explain why it has rejected them.).

273. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

274. See, e.g., *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1154 (D.C. Cir. 1979).

275. *Id.* at 1170 ("The 'unalterably closed mind' test is necessary to permit rulemakers to carry out their proper policy-based functions while disqualifying those unable to consider meaningfully [a decision].") (citing *Carolina Env'tl. Study Grp. v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975) ("Agencies are required to consider in good faith, and to objectively evaluate, arguments presented to them; agency officials, however, need not be subjectively impartial."); see also *FTC v. Cement Inst.*, 333 U.S. 683, 700-03 (1948) (suggesting improper agency conduct if commission members' "minds . . . were irrevocably closed on the subject" for decision).

276. National Environmental Policy Act of 1929, 42 U.S.C. §§ 4321, 4331-35, 4341-47 (2006).

277. See 40 C.F.R. § 1502.14 (2010). The Council on Environmental Quality (CEQ) called the alternatives analysis "the heart of the environmental impact statement." *Id.* Under the CEQ regulations governing NEPA compliance:

[A]gencies shall: (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. (c) Include reasonable alternatives not within the jurisdiction of

sure that an agency reaches an “informed decision,”²⁷⁸ and the failure to evaluate alternatives to action, including the alternative of “no action,” can make an agency’s decision invalid.

This Article does not examine the effectiveness of these suspended-conclusion-like commands to institutional actors or determine whether they actually facilitate the attitude in practice. Again, these commands demonstrate that certain places at least attempt to institutionalize this general suspended conclusion concept into parts of the legal system and require the lawyers involved therein to engage in some form of the discipline.

The very nature of a lawyer’s professional obligations serves as a unique impediment to a successful adoption and application of the attitude of suspended conclusion. Most lawyers start in a position precommitted to a client and therefore precommitted to a conclusion. Lawyers as fiduciaries must act in the best interests of their client²⁷⁹ and are ethically bound to zealously advocate on behalf of the client’s position.²⁸⁰ Lawyers as advocates become concerned with making the best case and, as zealous advocates, become invested in one conclusion.²⁸¹ The majority of lawyers’ roles are not designed to achieve the “best” conclusion at all. In fact, because a lawyer is typically committed to the client’s position, in most situations the lawyer will be unable to *choose* an alternative. Lawyers are self-interested and invested in their starting positions. Lawyers do not generally have the luxury of truly objective inquiry. But that does not mean that they should not seek to appreciate and understand the alternatives and the utility of operating under suspended conclusion.

the lead agency. (d) Include the alternative of no action. (e) Identify the agency’s preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference. (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

Id.

278. *See, e.g.,* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–51 (1989) (explaining that NEPA’s alternatives provisions seek to prohibit “uninformed” agency action). Also consider:

Allowing the public to submit comments to an agency that has already made its decision is no different from prohibiting comments altogether. Indeed, if the public perceives that the agency will disregard its comments, there may be a chilling effect that causes the public to refrain from submitting comments as an initial matter.

Nehemiah Corp. v. Jackson, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008).

279. *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000).

280. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2007) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

281. *See, e.g.,* Rand, *supra* note 73, at 749 (“[A] lawyer committed to proving her client’s case would be inclined to prioritize opposition document review that hunts for ‘smoking guns’ rather than probe for weaknesses in her own case.”).

Lawyers are particularly prone to the closure tendencies discussed in Part VI,²⁸² and because they must “prove the client’s case,” lawyers are particularly susceptible to confirmation bias. As previously explained, “Confirmation bias is perhaps the best known and most widely accepted notion of inferential error to come out of the literature on human reasoning.”²⁸³ A host of applications of confirmation bias theories abound in the literature of law and lawyering. Lawyers with a zeal to win and already entrenched in one side are more likely to be confident in their case largely because they have little room to deviate away from it. The lawyer is more likely to seize and freeze into the conclusion that “wins” the client’s case.

One of the obstacles to overcome is the reality that “many individuals may be unreceptive to debiasing efforts because they do not perceive these efforts as relevant to their personal welfare.”²⁸⁴ Lilienfeld et al. explained, “[S]ome debiasing efforts may succeed only if participants can be persuaded that their biases result in poor decisions of real-world consequence to them.”²⁸⁵ Thus, it is fundamental that we convince lawyers and law students of the benefits of adopting an attitude of suspended conclusion, open their eyes to the possibility of cognitive errors, and persuade them to challenge themselves to think like thinkers. An appeal to the instrumental benefits of adopting an attitude of suspended conclusion may be the only way to convince lawyers that the attitude can somehow be harmonized with these seemingly inconsistent “winning” goals.

No doubt it is difficult for many lawyers and law students to overcome the habits against suspending conclusion. In part, lawyers must be reminded that seldom is an outcome clear in a legal dispute, and as such, there is almost always a rival proposition to ponder. McElroy and Coughlin have concluded, “[T]he vast majority of [law] students have been educated in environments where there is a right and wrong answer [They] may tend automatically to return to the mindset that there must be a ‘correct’ response to the legal question presented.”²⁸⁶ But a student’s chief concern when approaching problems should *not* be get-

282. See, e.g., Hollander-Blumoff, *supra* note 218, at 175 (“Research on lawyer personality suggests that lawyers generally tend to score high on personality measures that correlate with a desire for ‘structure, schedules, closure on decisions, planning, follow through, and a ‘cut-to-the-chase’ approach.”) (citation omitted).

283. Nickerson, *supra* note 260, at 175 (quoting JONATHAN ST. B.T. EVANS, BIAS IN HUMAN REASONING: CAUSES AND CONSEQUENCES 41 (1989)). Nickerson describes confirmation bias as a ubiquitous psychological phenomenon that causes “the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.” *Id.*

284. Lilienfeld et al., *supra* note 79, at 394.

285. *Id.*

286. McElroy & Coughlin, *supra* note 4, at 233.

ting the “right” answer.²⁸⁷ Lawyers and law students must remember what Edward Levi counseled: “In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible.”²⁸⁸ The lawyer must also recognize that seldom is an argument bulletproof. There is almost always an opposing side and some risk of losing a case to a contrary argument.

This Article has already provided support for the proposition that one can improve one’s own arguments by starting from suspended conclusion and understanding all rival propositions and conclusions.²⁸⁹ Good lawyering requires operating under some form of suspended conclusion, even when one is constrained to work on behalf of a client’s position, because advocacy is improved by questioning its foundations from all opposing sides.²⁹⁰ Lawyers must be able to anticipate opposing arguments and be able to present effective responses. Thus, adopting suspended conclusion can allow lawyers to “moot” themselves and their client’s arguments. If a lawyer discovers the strength of the opposition arguments as they would most zealously be presented, a better response can be prepared. Or the lawyer can better counsel the client on the strength of the case and can honestly assess possible options and changes in position (such as settlement or not filing).

In fact, under the “best interest” requirement, lawyers arguably must initially adopt an attitude of suspended conclusion when evaluating and preparing a case in order to satisfy their ethical duties to diligently and effectively represent their clients. Adopting an attitude of suspended conclusion can, indeed, make individual attorneys better thinkers and consequently better lawyers—which is “best” for the client as well. An attitude of suspended conclusion can lead to a heightened capability for thought and a capacity to make better arguments and achieve beneficial outcomes in a variety of lawyering settings. Lawyers should aspire to inculcate it as a discipline in their thought processes, despite the limitations. Lawyers may not be free to choose a different conclusion, but that should not relieve them from the thinker’s obligation to utilize the suspended conclusion process.

I am optimistic that this thinking like thinkers, suspended conclusion concept can coincide with legal practice. This Article should also spark a number of questions for further thought and research: When we

287. DEWEY, *supra* note 1, at 49–50 (discussing the risks of starting from the position of finding a “right” answer).

288. EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1 (1949).

289. *See supra* Part VI.

290. *See* Burke, *Neutralizing Cognitive Bias*, *supra* note 253, at 524 (“Applied to lawyers, the practice of counterargument not only serves as a debiasing strategy, but also amounts to the good lawyering skill of acting as one’s own Devil’s Advocate.”).

teach or engage in advocacy, are we embedding an attitude against suspended conclusion or entrenching the lawyer into a belief of the superiority of locked positions? Does a lawyer have an ethical responsibility to consider alternative arguments in counseling clients? Does a prosecutor have a different ethical responsibility to suspend conclusion than defense counsel or civil litigators? Does the Socratic Method demand a quick, on-the-feet conclusion rather than encourage the suspension of conclusion? Do our teaching techniques and case-study method inculcate a belief that there is one right decision? Does a reliance on precedent diminish or enhance the suspended conclusion concept? Does streamlined litigation or expedited review hinder our ability to suspend conclusion? Does the determination of probable success in preliminary injunctions interfere with the ability to suspend conclusion on permanent injunctions? Does law school education actually encourage impulsive decisions? Is the adversarial system itself too game-oriented to leave room for universal adoption of suspended conclusion in the American system? These and many more questions are provoked by this Article, and I encourage discussion in that regard.

For now, however, we can focus on recognition and understanding of the concept independent and divorced from some of these concerns. We can acknowledge the fact that the lawyer can move from confusion to a greater sense of clarity in thinking but only if starting with the humble recognition of the realities discussed in this Article and the utility of approaching problems with suspended conclusion. By occupational disposition, there are obstacles to using the attitude of suspended conclusion in everyday lawyering. Thus, vigilance in understanding and adhering to a discipline is all the more important.

Finally, and at the very least, suspended conclusion approaches should be taught in law school, when the aspiring lawyer is not yet tethered by clients and should have the opportunity to embrace the suspended conclusion and realize its effects. Teaching suspended conclusion will help develop the best methods for understanding the law as a whole and the full array of argumentation law students will face in practice. Whether a self-interested lawyer or law student, one should adopt an attitude of suspended conclusion for instrumental reasons; if nothing else, it will result in better analysis.

IX. CONCLUSION

Dewey wrote that “[t]he method that is employed in discovery, in reflective inquiry, cannot possibly be identified with the method that

emerges *after* the discovery is made.”²⁹¹ The attitude of suspended conclusion must be acquired and employed if effective thought is to flourish. “In the genuine operation of inference, the mind is in the attitude of *search, of hunting, of projection, of trying this and that*; when the conclusion is reached, the search is at an end.”²⁹² Only when conclusion is suspended is there space for the exploration and search.

Aspiring thinkers should read the original, classic works like Dewey’s *How We Think*, not just commentary or analysis (like this Article) about them.²⁹³ I hope that this Article will inspire readers to read (or re-read) *How We Think*, in its entirety, along with other related works from the rich and diverse interdisciplinary research on thinking, and to form their own opinions from the original material. Until then, feel free to suspend conclusion on the merits of this exposition.

In the end, this Article’s goals have been to awaken our discipline and advance an art of adopting and implementing an attitude of suspended conclusion and to recognize the importance of its practice by making explicit the tendency against it.²⁹⁴ The failure to adopt the attitude of suspended conclusion can have far-reaching implications that should not be overlooked.²⁹⁵ We should not presume something is *ob-*

291. DEWEY, *supra* note 1, at 112.

292. *Id.*

293. Maurice Moffatt and Stephen Rich provided the following advice:

The wise educator does not necessarily limit his reading to the newest books—but he does make sure that these are among the sources to which he goes for aid. Many older ones contain a wealth of valuable guides and directly useful information for the educator.

The alert educator, for example, will not be content with recent books interpreting John Dewey’s ideas. In order to cancel out what the interpreters themselves have added, and, thus, use Dewey’s contributions with the slant of his own personality and approach, the educator cannot avoid reading carefully, if for the third or tenth time, *Democracy and Education* or *How We Think*, the two most influential of Dewey’s works.

Maurice P. Moffatt & Stephen G. Rich, *The Educator’s Professional Reading*, 29 J. EDUC. SOC. 69, 71 (1955).

294. As Professor Thomas Green opined in an article generally praising Dewey’s *How We Think*, we should embrace the unwrapping of what seems ordinary to find the lessons that hide beneath:

To unwrap the ordinary requires a certain naiveté, a capacity to simply take notice of what we know already, but persist in overlooking. To do so is to attain a difficult and hard-won kind of naiveté, a kind of simplicity in which the simplest matters near at hand are neither overlooked nor in need of justification. Taking note of the ordinary is to philosophy what parsimony is to science, a principal mark of its elegance.

Green, *supra* note 15, at 103. See also ICHHEISER, *supra* note 4, at 8 (“[T]he social scientist should never be more satisfied with his achievements and more proud of his insight than when he succeeds in perceiving, in making explicit, and in incorporating into his theory of social reality certain obvious but perhaps for that very reason overlooked significant facts.”).

295. ICHHEISER, *supra* note 4, at 10 (“Psychologists and sociologists sometimes neglect obvious facts because they fail to realize their far-reaching implications.”).

served—in a vacuum or in practice—simply on the basis that it is obvious.²⁹⁶ That lesson should apply when one examines the utility of observing the attitude of suspended conclusion and the merits of the concept. It should not be taken for granted that individuals recognize and honor these seemingly obvious lessons.²⁹⁷ “The fact . . . that something is obvious need not mean that it is explicitly noticed, registered, and scientifically taken into account. Instead, something of the opposite is true. Obvious facts tend to remain invisible.”²⁹⁸ If we can overcome our confidence and seriously question our approaches to thinking, we can see the utility in examining the suspended conclusion concept and begin to adopt it in our own thinking affairs.

296. *Id.* at 7–8 (“The psychology . . . of personality [is] vitiated by . . . the tendency to neglect, or even to ignore, certain very important facts and problems because those facts and problems appear to be quite obvious.”). To quote the indefatigable Sherlock Holmes, “The world is full of obvious things which nobody by any chance ever observes.” 1 SIR ARTHUR CONAN DOYLE, *The Hound of the Baskervilles*, in THE COMPLETE SHERLOCK HOLMES, *supra* note 52, at 571, 592.

297. ALDOUS HUXLEY, THEMES AND VARIATIONS 69 (Harper & Row 1970) (1950) (“Most human beings have an almost infinite capacity for taking things for granted.”).

298. ICHHEISER, *supra* note 4, at 8; *see also* Green, *supra* note 15, at 85 (“Philosophy starts when we seek to unearth the principle buried in the ordinary, when we seek to reveal the practice already present in the affairs of daily life.”).

APPENDIX A

UNRELATED PORTIONS OF *HOW WE THINK* THAT ARE DEVOTED TO SUBJECTS OTHER THAN THE ATTITUDE OF SUSPENDED CONCLUSION

How We Think is divided into three parts and sixteen chapters.²⁹⁹ This Article concurs in part and abstains in part with the opinions and analyses in *How We Think*. Just as in the analysis of a concurring opinion from the Supreme Court, it is necessary to diagram this Article vis-à-vis the book. This appendix differentiates the points of agreement and engagement with Dewey's work conducted in this Article from the points of abstention or where this Article expresses no opinion on certain theories in *How We Think*.

Part I³⁰⁰ of *How We Think* is titled "The Problem of Training Thought." The core material relevant to this Article is contained in Chapters I, II, and V—titled, respectively, "What is Thought?"; "The Need for Training Thought"; and "The Means and End of Mental Training: The Psychological and the Logical." Chapter III, "Natural Resources in the Training of Thought," and Chapter IV, "School Conditions and the Training of Thought," discuss individual capacities and environmental conditions for learning that are beyond the subject matter of this Article.³⁰¹ Chapters III and IV focus on theories of learning, which are disclaimed and excluded from this Article.

Part II³⁰² of *How We Think* is titled "Logical Considerations." Within it, Chapter VI, "The Analysis of a Complete Act of Thought," and Chapter VIII, "Judgment: The Interpretation of Facts," are relevant to the limited extent where they do, in fact, help illuminate or expand on the fundamentals of the suspended conclusion concept.³⁰³ Not relevant in Part II is Chapter VII, "Systematic Inference: Induction and Deduction," as it is a chapter discussing methods of analysis that are outside the scope of this Article's discussion.³⁰⁴ The other remaining chapters of Part II—Chapters IX–XI (titled, respectively, "Meaning: Or Conceptions and Understanding," "Concrete and Abstract Thinking," and "Empirical and Scientific Thinking")—relate to learning processes and are not relevant to this Article's discussion.³⁰⁵

299. DEWEY, *supra* note 1, at v–vi.

300. *Id.* at 1–67.

301. *Id.* at 29–55.

302. *Id.* at 68–156.

303. *Id.* at 68–78, 101–15.

304. *Id.* at 79–100.

305. *Id.* at 116–56.

Part III³⁰⁶ of *How We Think* is titled “The Training of Thought” and is wholly unrelated to this Article, as Dewey further delved into learning methods and processes and thus more controversial ground.³⁰⁷ Part III is concerned with learning and teaching theories that are not a matter of concern here. It holds Chapters XII–XVI, which are titled “Activity and the Training of Thought,” “Language and the Training of Thought,” “Observation and Information in the Training of Mind,” “The Recitation and the Training of Thought,” and “Some General Conclusions,” respectively. These chapter titles are self-explanatory; they cover subjects upon which this Article will express no opinion.

The 1933 edition follows the same general organization. It is divided into three parts with identical titles to the original but subdivides the parts into nineteen chapters.³⁰⁸ The same exclusions from this Article’s scope discussed above apply equally to the corresponding sections in the 1933 edition. The next appendix further discusses the differences between the 1910 and 1933 editions.

306. *Id.* at 157–224.

307. See, e.g., Bugg, *supra* note 108, at 528 (describing the differences between the three parts in *How We Think*); Max Eastman, *Review*, 8 J. PHIL., PSYCHOL. & SCI. METHODS 244, 244 (1911) (differentiating his criticism of Parts II and III from Part I, which “is the presentation and definition of the problem of training thought”).

308. DEWEY 1933, *supra* note 1, at vii–x.

APPENDIX B

DIFFERENCES BETWEEN THE 1910 AND 1933 EDITIONS
OF *HOW WE THINK*

Among some Dewey scholars, there is a debate over whether changes in the text of *How We Think* between its original publication in 1910 and the revised publication in 1933 should be read as marking a change in Dewey's thoughts, influences, or ideology.³⁰⁹ This "continuity" debate, however, focuses on those sections of *How We Think* that discuss learning or teaching processes, methods, and skills. As those sections are beyond the scope of this Article, that debate, while interesting, is irrelevant to the issues herein discussed. Thus, even if there were some changes, they are not of consequence here.

Many claim that there was no substantial change in the texts at all,³¹⁰ even if there is evidence of a change in Dewey's general philosophies during the lag between editions. And most at least agree that there was essentially no change in the substance and conclusions in portions of the text discussing the suspended conclusion concept—even if some changes in the latter parts of the book may have some consequence to

309. The debate is essentially between Richard Prawat, who argues that differences in the 1910 and 1933 versions of *How We Think* provide evidence of discontinuity in Dewey's thought, and others who argue that there is no such evidence from the comparison of editions. George Stanic and Dee Russell, rejecting Prawat's claims, summarized the main points in the continuity debate as follows:

Prawat claims that a major discontinuity appeared in John Dewey's thinking in 1915, when Dewey moved away from the thinking of William James to that of Charles Peirce. The change is described as a "dramatic" and "stunning about face" in Dewey's views. We look at one crucial part of Prawat's evidence of discontinuity, the 1910 and 1933 versions of *How We Think*. Prawat cites passages from the 1933 version to make his case for discontinuity[, but] we conclude that Prawat's hypothesis of discontinuity cannot be sustained.

George M.A. Stanic & Dee Russell, *Continuity in How We Think*, 104 TCHRS. C. REC. 1229 (2002) (citations omitted). To fully understand the debate on the continuity of Dewey's philosophy using the two editions of *How We Think* as the point of reference for a purported change, it is best to read the principal articles and responses in sequence. See Richard S. Prawat, *Dewey, Peirce, and the Learning Paradox*, 36 AM. EDUC. RES. J. 47 (1999); Richard S. Prawat, *The Two Faces of Deweyan Pragmatism: Inductionism Versus Social Constructivism*, 102 TCHRS. C. REC. 805 (2000); Richard S. Prawat, *Dewey and Peirce, the Philosopher's Philosopher*, 103 TCHRS. C. REC. 667 (2001); James Garrison, *Dewey and Eros: A Response to Prawat*, 103 TCHRS. C. REC. 722 (2001); Richard S. Prawat, *Evidence for the Dewey Discontinuity Hypothesis: A Rejoinder to Garrison*, 104 TCHRS. C. REC. 867 (2002); Stanic & Russell, *supra*; Richard S. Prawat, *The Debate Continues: Further Evidence of Discontinuity in Dewey's Philosophy*, 105 TCHRS. C. REC. 893 (2003).

310. See, e.g., Bode, *supra* note 1, at 210 (basics of 1910 edition retained in 1933 revision); Sven Nilson, Book Review, 44 PHIL. REV. 75, 75 (1935) (finding the primary character of the original substance was retained in the 1933 edition).

Dewey's other theories.³¹¹ So even if one takes a side on the debate over whether the 1933 edition is evidence of a shift in Dewey's larger philosophies, the side chosen is immaterial for purposes of this Article and one's analysis of its subject.

The characterization by reviewers that there was essentially no change is a bit of an overstatement. After comparing the 1910 and 1933 edition, I agree that the principal subjects, conclusions, and theories—particularly in Part I—were unchanged in the 1933 edition. Nonetheless, the 1933 edition was, as Dewey claimed in the Preface,³¹² a true “restatement” as the title indicates and was not simply a second edition. It was a “revision” in the order of an “extensive rewriting.”³¹³ The phraseology and terminology were changed rather extensively in parts, even when the general sentiments did not. Part I, where most of the material relevant to this Article appears, underwent, according to Dewey, changes in “matters of phrasing, where a multitude of minor alterations have been made in the interests of greater sureness of comprehension.”³¹⁴ Consequently, this Article sometimes quotes the 1933 edition where its alternative language explaining the suspended conclusion concept is instructive. Dewey stated in the Preface that changes in the “development of major ideas” are “most numerous and complete in Part II.”³¹⁵ None of those changes are relevant to this Article. The “evident” changes or new material in Part III of the 1933 edition that Dewey explained in its Preface are also not of consequence to this Article, nor are the additions of “illustrative material” or the “rearrangement of the position of [some] entire chapters.”³¹⁶ Again, I leave aside whether any such changes reflect a change in Dewey's broader philosophies. Finally, as to the entire book,

311. Eugene Bugg's review of the 1933 edition explained that Part I, where the suspended conclusion concept is concentrated in the book, was largely untouched in the revision:

The present book retains the basic ideas set forth in the first edition . . . Part I, which is devoted to the problem of training thought, remains essentially unchanged. The most extensive revisions occur in Part II, which aims to give a theoretical account of the operations of the mental processes as they actually take place in the acquisition of knowledge, in contrast to the older formalistic conceptions. Part III, which deals with the practical problem of training thought, has received a somewhat fuller treatment than in the former edition, although no changes of fundamental importance occur in this section.

Bugg, *supra* note 108, at 528; *see also* Nilson, *supra* note 310, at 75–76 (criticizing Dewey's experiential learning approach but explaining that “most of the changes occur in the second” and third parts); DEWEY 1933, *supra* note 1, at iii–iv (preface characterizing the differences between editions and highlighting Parts II and III as being the most significantly changed while Part I was largely just alternative language for clarified comprehension purposes).

312. DEWEY 1933, *supra* note 1, at iii.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

Dewey wrote in the Preface to the 1933 edition that “the basic ideas, those that gave the original work its distinctive character, have not only been retained but have also been enriched and developed further.”³¹⁷

Thus, the reader of this Article should not infer any intended meaning or implication from the choice of citation to the 1910 or 1933 article in the remaining portions of this Article. In relation to this Article’s thesis and the areas of Dewey’s thought covered herein, the 1910 and 1933 editions complement each other.

317. *Id.*