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## Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles

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If Flatlaw were a place, it would be where the vast majority of lawyers, and most law professors, have lived and worked for their entire professional lives. It would be the community law students are trained to join, most of them believing that to dwell there is an attorney's highest professional aspiration. It would probably be where you are now as you read this. This is not to say you should be ashamed, for Flatlaw is not an easy place to reach. But it is an even harder place to leave behind. This Article, then, while initially about Flatlaw itself—what it is, where it is, how to get there, and why it is important—also contemplates the meaning and legal significance of moving beyond it. As a consequence, the Article is about much more than just law.

Of course, Flatlaw is not a physical place at all, but a region of the mind, a region within the larger mental territory known as legal reasoning. Unfortunately, this fact creates at least one serious initial obstacle for the discussion to follow. Since the topic of legal reasoning is

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certainly a well-worn one,<sup>1</sup> a legitimate question would be whether there is anything new or interesting to be said about it, indeed whether there is any significant controversy about it at all. There is in fact considerable controversy about the nature of legal reasoning, some of it manifested in recent debates concerning methods of law teaching.<sup>2</sup> The contribution this Article hopes to make to these discussions is the creation of a model of legal reasoning that will give some necessary perspective to these and other disputes about the law. Moreover, this model may serve to put legal reasoning itself in perspective.

For some readers, the origin of the title of this Article and the foundation for the discussion to follow are now clear: This Article is a celebration, almost a centennial celebration, of a little book by Edwin Abbott entitled *Flatland*.<sup>3</sup> Although virtually unknown outside some circles of mathematicians and engineers, it explains in a charming Victorian manner the process of dimensional thinking to those who, like Abbott himself, were not scientists by trade or education. Flatland was an imaginary place of only two dimensions where one of the inhabitants—the narrator of the story—struggled to understand the concepts of one and three dimensions. As we shall see, Abbott's allegory serves well as a vehicle for describing and assessing the related mental exercise of legal reasoning.

Yet this allegory will not extend as far as we need it to go, for one of our goals will be to examine the relationship of dimensional reasoning to the actual substance of the law—that is, to the development of certain fundamental normative principles. We shall therefore have to

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1. Well-worn, perhaps, but by no means worn out. In the last two or three years a surprising number of articles have presented some theory or critique of legal reasoning. For example, five separate symposia have recently been published on topics involving or closely related to legal reasoning, two of which are mentioned *infra* at note 2. The other three are: *American Legal Theory*, 66 CORNELL L. REV. 861 (1981), assessing formalism and positivism in past and present American legal theory; *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982), scrutinizing the distinction between public (state) action and private action; and *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984), examining the Critical Legal Studies Movement.

See also Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982); Gross, *The Theory of Judicial Reasoning—Toward a Reconstruction*, 66 KY. L.J. 801 (1977-1978); Hermann, *A Structuralist Approach to Legal Reasoning*, 48 S. CAL. L. REV. 1131 (1975); Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981); Landau, *Logic for Lawyers*, 13 PAC. L.J. 59 (1981); McCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239 (1983); Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1982).

2. Law teaching has been the focus of two recent symposia. The first is a wide-ranging examination of its many facets and controversies: *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981). The second assesses the present and future place of the study of economics in law schools: *The Place of Economics in Legal Education*, 33 J. LEGAL EDUC. 183 (1983).

3. E. ABBOTT, *FLATLAND* (5th ed. 1963) (second edition with author's revisions and preface published in 1884).

carry the allegory a few steps further. While I know of no modern work on legal reasoning that moves along the path we shall follow,<sup>4</sup> at least one legal scholar has made a similar argument: Professor Laurence Tribe has argued, in an article often cited but rarely analyzed or followed,<sup>5</sup> that in resolving environmental issues we should go beyond the familiar, comfortable conclusions we reach by the style of reasoning which assumes the preeminent status of human beings in the physical world. However, to understand Tribe's alternative, and its inherent limitations, we must begin our description and analysis of legal reasoning with the Flatlaw allegory. By doing so, we shall see more clearly the importance, the difficulty, and ultimately the relative modesty of the mental leap Professor Tribe urges us to make.

The allegorical journey upon which we are about to embark will be useful for several reasons. Once completed, it can serve as a kind of developmental roadmap by which any student of the law can locate his or her own current position in analytic technique. This is not to say that everyone would characterize the mental journey beyond Flatlaw as "progress," but at least the challenge presented by those who have ventured onwards will encourage those who have not to examine and justify their decision to remain behind. The journey will also explain some of the tensions that plague the academic legal community as its members discuss the nature of the task they believe to be before them. It will lead to a more comprehensive understanding of the tensions inherent in the techniques used by courts and legislatures to find and make the law. And it will clarify the many substantive legal disputes about the nature, and limits, of legal reasoning itself.

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4. I should mention one work, however, with which the present article does have some important elements in common. In *Natural Law and Natural Rights*, Professor John Finnis explores the implications of theological concepts for legal and philosophical thought from a rather different perspective. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 371-413 (1980); see also *infra* notes 87, 98. Renewing the theological elements in philosophical analysis seems to be somewhat on the upswing. See REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY (S. Hauerwas and A. MacIntyre eds. 1983) [hereinafter cited as REVISIONS].

Of course, it is by no means rare for an author to explain a difficult philosophical concept by means of an analogy. See, e.g., Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243 (1970), in which to demonstrate the nature and importance of "rights," Professor Feinberg imagines a place called "Nowheresville" in which the concept of a right does not exist.

5. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974). As of the date of this writing, SHEPARD'S CITATIONS lists 54 law review articles and one judicial decision in which *Plastic Trees* is cited. But in all this literature, I find only two sources in which Professor Tribe's analysis is subjected to any careful scrutiny, both of which disagree with Tribe's conclusions. One detailed response is Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205 (1974), to which Professor Tribe replied in Tribe, *From Environmental Foundations to Constitutional Structures: Learning From Nature's Future*, 84 YALE L.J. 545 (1975) [hereinafter cited as Tribe, *From Environmental Foundations*]. The other, in which Tribe's article receives less attention, is Tarlock, *A Comment on Meyers' Introduction to Environmental Thought*, 50 IND. L.J. 454, 460-61 (1975).

A word of caution is in order, however. Since the journey to and beyond Flatlaw is allegorical—that is, an abstraction, an indirect representation—its relationship to the *precise* method by which we reach legal conclusions will be approximate. This unavoidable limitation is both a benefit and a detriment: beneficial in that it permits our analysis to develop at a quicker pace than a more descriptively methodical technique would allow, thus giving us the opportunity to reach useful comparative conclusions about the forest without being lost in the trees;<sup>6</sup> detrimental in that to an expert in any given area the approximation of the forest may seem to distort the color and nature of its constituent, more tangible, vegetation. But the following discussion may at least convince readers who find inaccuracies in Flatlaw to express them. If any given area of the law does not reflect the kind of dimensional reasoning that this Article describes, what then does it reflect?

## I

### ABBOTT'S FLATLAND

No summary can do justice to the wit and originality of Abbott's discussion in *Flatland* of the concept of dimensional thinking. However, since we will need an anchor for the legal analogy to come, the following brief description of the book will have to suffice.

In Abbott's allegory, Flatland was indeed a place, inhabited by two-dimensional creatures. Fully half his book is devoted to a detailed description of these creatures and their customs, obviously commenting on contemporary English society, much in the manner of Jonathan Swift's *Gulliver's Travels* and Lewis Carroll's *Alice in Wonderland*. For example, the relative social status of any individual in Flatland was established by the number of sides in the individual's figure.<sup>7</sup> Thus, soldiers and the lowest classes of workmen were isosceles triangles,<sup>8</sup> and among their group relative status was determined by the acuteness of the smallest angle in the triangle.<sup>9</sup> But women, according to Abbott (and the not so charming Victorian view), were simply straight lines, and hence had the sharpest, and most dangerous, "point" of all.<sup>10</sup> Professionals were four- and five-sided figures;<sup>11</sup> the narrator of the tale

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6. As Milner Ball has pointed out to me, Lakoff and Johnson argue that metaphor is a critical means by which members of different cultures can negotiate and establish common meanings to achieve communication. See G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* (1980). Persons engaged in different types of legal reasoning may also need to negotiate common meanings, and I hope that the metaphor this Article presents will lay the basis for such negotiation.

7. E. ABBOTT, *supra* note 3, at 8-12.

8. *Id.* at 8.

9. *Id.* at 9.

10. *Id.* at 8, 12.

11. *Id.* at 9.

was himself a square. Hexagons, septagons, and so on, represented increasingly important individuals,<sup>12</sup> with the pinnacle of the society being the figure in which the multisidedness of the individual gave way to one curved perimeter: a circle.<sup>13</sup> Priests were circles.<sup>14</sup> Not surprisingly, one common ambition of the members of this society was that their children have more sides than they had themselves.<sup>15</sup>

Two incidents occur in the book which give the narrating Square a unique perspective on his homeland and make the book more than a simple social commentary. The first is a dream in which the Square imagines an encounter with the inhabitants of Lineland, a region of only one dimension.<sup>16</sup> As he passes through their territory, the Square is perceived by these inhabitants as a mere series of lines. The Square endeavors to explain his difference to the King of Lineland, but fails because the King, like his subjects, has no ability to understand the concept of "width" because his own kingdom is constituted entirely of "length."<sup>17</sup>

The second incident is the Square's encounter with a three-dimensional creature.<sup>18</sup> It begins when the Square witnesses the sudden appearance of a single dot, which then inexplicably grows into a tiny circle, then into a larger circle, then reduces again to a small circle, then a dot, and finally disappears. As if this were not upsetting enough, the strange creature which caused this phenomenon speaks to the Square from a vantage point outside the Square's own two dimensions, and the Square can only perceive the sound as originating within his own mind.<sup>19</sup> Not surprisingly, he seriously doubts his sanity.<sup>20</sup> Of course, this new creature is a three-dimensional sphere (from Spaceland, naturally) which has passed through the plane of Flatland, and the Sphere's numerous attempts to explain the concepts of "up" and "down" to the Square are as unsuccessful as the Square's own conversations with the King of Lineland. In a fit of frustration the Sphere kicks the Square out of his two-dimensional plane. To the Square's amazement he floats above his world, looking down on its inhabitants.<sup>21</sup> He is able for the first time to see the angles formed by their sides, and he can look into their closed houses. After all, these structures have walls that block the

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12. *Id.*

13. *Id.*

14. *Id.* at 9, 45-48.

15. *Id.* at 9.

16. *Id.* at 57-62.

17. *Id.* at 62-68.

18. *Id.* at 70-84.

19. *Id.* at 77-78.

20. *Id.* at 82.

21. *Id.* at 83-84.

view only from within Flatland's two-dimensional plane.<sup>22</sup>

Upon his return to Flatland, the Square communicates his startling encounter to others only to be met with disbelieving hostility.<sup>23</sup> His attempts to explain the dimension of "up" into which he has traveled are taken as evidence of insanity. His descriptions of the inhabitants of Flatland as figures and his assertion of the ability to see into closed houses confirm their suspicions. Unable to convince even his intelligent young hexagonal grandson of the accuracy of his perception of another dimension,<sup>24</sup> the poor Square is ultimately confined to a mental institution where he languishes away the remainder of his life.<sup>25</sup>

What has this allegorical description of dimensional thinking to do with the special phenomenon of legal reasoning? The next two sections explore the possible connections, and attempt, in essence, to put perspective in perspective.

## II

### REASONING OUR WAY TO FLATLAW

Although the parallels are not precise, Abbott's *Flatland* suggests the following general description of some basic stages in the development of the ability to "think like a lawyer." In the beginning—before law school, that is—the "law" appears to us as mysterious, unconnected pronouncements by courts or legislatures. Even the Constitution seems to be nothing more than an elaborate list of discrete rules governing official behavior. To the uninitiated the law is like a dimensionless array of dots, and the popular term "a point of law"<sup>26</sup> is appropriate indeed. The layman consequently perceives the study of law as the discovery (in an archaeological sense<sup>27</sup>) of the various dots in the array, the bar examination as a test of how many dots the candidate has mem-

22. *Id.* at 84-86.

23. *Id.* at 105-06.

24. *Id.* at 102-03.

25. *Id.* at 106-08.

26. In fact there is a game on the market called "A Point of Law" which, much in the nature of the Multistate Bar Examination, describes a fact situation giving rise to a legal conflict and asks the player to choose one of four possible legal resolutions. The simplicity of the answers, however, generally insures that only a lay person could guess the correct answer.

27. Professor Edward Dauer offers the following anecdotal evidence on this point:

I opted for the Law some fifteen years ago. About eleven years ago I headed west for my first academic appointment—Assistant Professor of Law at a fair-sized university in Ohio. I was consumed with self-congratulation, poised to produce the greatest legal scholarship the world had ever seen. My brother-in-law, whom I saw just before I left, asked me a question: "What does an academic lawyer do besides teach classes a few hours a week?" I laid it all out for him, with a proud underscore beneath the phrase "We do legal research." "What in the world is legal research," he asked, "other than reading cases and statutes that someone else wrote. You look for undiscovered laws hiding under rocks?"

Dauer, *Law and the Life of the Mind*, 27 YALE L. REP., Winter 1980-1981, at 13.

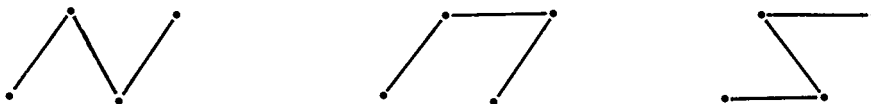
orized, and the practice of law as the identification and utilization of those dots most beneficial to the lawyer's clients.

Law school changes these perceptions, at least for most students. Tentatively at first, and then with more and more acumen, the student realizes that the more dots he discovers, the more patterned they seem to become, until at some point the first mental breakthrough is achieved: the dots suggest linear patterns.<sup>28</sup> Dimensional thinking has now begun, and the student approaches each new topic as an exercise in line or pattern discovery. The task now becomes not simply identification of bits of legal data, but identification of the *link* between various cases or statutes, or both, which ultimately provides a picture of the "path of the law"<sup>29</sup> in a given area.

At the beginning of the student's discovery of Linelaw, the exercise of forging the connective links is rudimentary and simplistic. The basis for the link is some common feature shared by each point, and this suggests that each point may be a complex molecule of many factors. Initially, however, the student ignores this mass of data and isolates the most obvious common feature which is uniquely legal in character: the actual pronouncement or "rule" about human behavior made by the decision or statute that constitutes the point. The common feature may be nothing more than, for example, a prohibition against injuring another person. In this case, the line the student develops may appear quite "straight." Later, the student may redraw the line to reflect further data: the common feature may become the imposition of a duty of due care to avoid harm to certain others, and the line may "curve" or change direction as a result of causation problems. However, to the extent the student perceives such directional movement, he or she has already begun to make tentative steps beyond Linelaw, for as the Square of Abbott's *Flatland* noted in his encounter with Lineland, reality in such a place is strictly unidimensional. That is, direction can consist of nothing more than "back and forth."

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28. To give some idea of what sorts of patterns might be discerned, note that the following configurations of four "points of law" could be linked in several different ways:



Precisely what these different patterns represent (for example, different notions of logical priority or necessity) is not critical to the idea that the student begins early in his or her training to establish simple links among rules of law.

29. While I play on Holmes' famous phrase, I do not mean to limit his description of the law to the rudimentary description of Flatlaw I give in the text. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in O.W. HOLMES, COLLECTED LEGAL PAPERS 173 (1920).

We shall not investigate here the question of how the student actually makes the jump to dimensional legal thinking. Nevertheless, an illustration is useful at this point to indicate what the nature of these "lines" of legal data might be. Consider an array of judicial decisions or statutes answering questions about ownership claims to wild animals: for instance, whether physical possession of the animal is necessary or sufficient,<sup>30</sup> whether inarking the animal makes a difference,<sup>31</sup> or whether the unusualness of the find is relevant.<sup>32</sup> These rules become a "line" when some connective tissue is discovered. At first the student may see nothing more than the fact that all the rules have to do with animals, but the first true bit of legal cartilage will appear when he or she makes the slightly more sophisticated observation that all the rules address the problem of owning something that does not remain stationary or respect boundaries. Moreover, the student may discover that link only by comparing one subject, like wild animals, to an apparently unrelated subject, like the ownership of oil, natural gas, and water, and by realizing that the patterns of the dots in the two areas are remarkably similar.

No matter how this initial observation is made, the student's objectives within Linelaw are first, to establish that in various areas of the law there are relationships among discrete rules of law, and second, to identify the "correct" relationships—correct not in the sense of being unique, but in the simple descriptive sense of being satisfactorily consistent and coherent.<sup>33</sup> A couple of potential dividends might come from this initial, somewhat superficial exercise. A linear pattern established by points of legal data could allow the student to predict where the next point in the sequence will or ought to be,<sup>34</sup> and also to identify aberrations within the pattern. For example, a progression like the following may indicate to the student that a particular decision or statute may have been a "mistake":

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30. See, e.g., *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

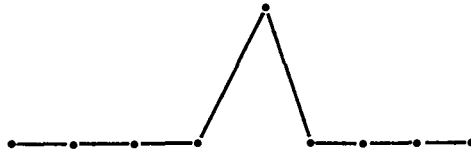
31. See, e.g., *E.A. Stephens & Co. v. Albers*, 81 Colo. 488, 256 P. 15 (1927).

32. See, e.g., *Mullett v. Bradley*, 24 Misc. 695, 53 N.Y.S. 781 (N.Y. App. Term 1898).

33. At this stage one would also try to formulate a pattern that conforms as closely as possible to any officially stated logic or rationale.

34. The pattern into which the points fall contains the rudiments of a deeper theory of the law. That is, any pattern must show a certain coherence or consistency in order to be a pattern and not a formless jumble, but this coherence or consistency cannot itself *justify* the pattern. We are forced to ask another "Why?". Why must we have coherence or consistency here? The answer to that question will necessarily be found outside the realm of Linelaw, and indeed outside the realm of Flatlaw as well.

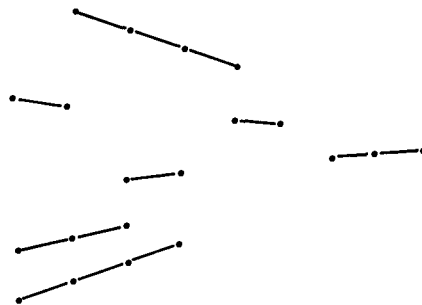




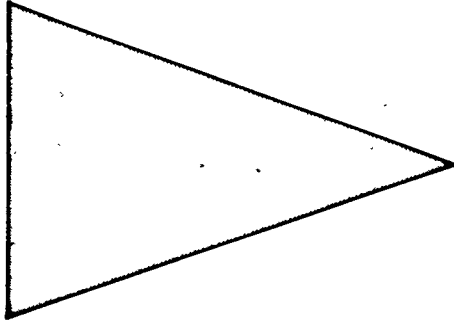
In short order the student becomes aware of more and more factors associated with any rule of law, and the complex of linkages that might be possible. This new awareness has two effects: first, it makes possible configurations far more complicated than simple continuous lines; second, it suggests that while points of law may be very "close" to one another in the array, they may be parts of quite distinct lines.

A chaos nearly as troubling as the original formless array of unconnected points now plagues the student. It is the law school's primary and quite unique function to give the student the ability to produce order and coherence from the mass of data that, as the student guessed or as others told him, contains connections and patterns of some kind. The question, of course, is *what* kind, and the teacher of law, depending upon his or her style, either answers it, gives the student the opportunity to discover answers, or devises some combination of the two educational techniques.

The teacher now gives the student a glimpse of Flatlaw by showing him or her the need for and the possibility of another dimension of legal reasoning. This analytic element might be introduced in two steps. The student, through diligent study, may have discovered a number of points of law that seem to represent only a series of lines:



The law professor, on the other hand, will reveal these dots and lines to be portions of a larger mental structure:



Thus, the single-dimensional nature of the student's reasoning is exposed. Thinking of the law only in terms of lines, the student was able to perceive the two-dimensional triangle only as a series of such lines. Further diligent study may have revealed more points, and hence more lines, but even the convergence of a number of lines at a single point would have been taken as only a curious and interesting pattern rather than as part of a complete figure. To move from dots and lines to figures is to move from one kind of reasoning to another—from Line-law to Flatlaw.

The example of wild animals used earlier is as good as any. The student may have perceived that the separate lines or rules associated with ownership claims to wild animals and oil and natural gas are not only similar but parallel or converging in some sense, and may have found this interesting and somewhat informative. But the professor sees this pattern as fundamental to the broader concept (the "triangle") of ownership itself or "property."

Flatlaw is, however, only an intermediate stop in our journey through legal reasoning because at this stage of analysis only a certain, rather limited, group of "factors" is identified by the student and professor as constituting potential connective elements between points. The number of factors considered has increased, but the factors are not nearly as numerous or as varied as the full panoply of argument heard in law school classrooms would suggest. Arguments in Flatlaw are about a particular subset of connections among rules of law—those within the institution of the law itself, which provide what Ronald Dworkin has called "institutional support" for a given rule or legal principle.<sup>35</sup> Flatlaw is therefore the realm of the legal positivist<sup>36</sup> (and

35. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 40-45, 64, 93, 101-23 (1978).

36. Although "legal positivism" is a somewhat ambiguous phrase, it connotes at a minimum the idea that the term "law" is reserved for "positive" or observable forms of social control. See generally Hart, *Legal Positivism*, in 4 *ENCYCLOPEDIA OF PHILOSOPHY* 418 (P. Edwards ed. 1967). Another more controversial description of the basic tenets of positivism appears in R. DWORKIN, *supra* note 35, at 17. See also J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 37-77 (1979).

some nonpositivists<sup>37</sup>), and discussions among Flatlawyers are about such things as precedential support and doctrinal "fit"<sup>38</sup> or, as Neil MacCormick describes them, the requirements of "consistency" and "coherence."<sup>39</sup> Flatlawyers might also consider the "consequences" of a rule in the real world, but only to the extent that such consequences have been declared by some law-creating authority to be relevant to the application of the rule.<sup>40</sup> The key to Flatlaw reasoning, then, is the recognition of relevance by an accepted legal source. It is what makes Flatlaw the special province of the law school and the practicing lawyer.

Linelaw and Flatlaw are therefore closely related, since both depend on this concept of institutional support to connect points and to form lines and figures, but they differ in analytic sophistication. To take another example: Where the student sees lines of cases dealing with offer, acceptance, consideration, and so forth, the teacher sees, and tries to communicate to the student, a geometric figure called "the law of contract" which contains these lines, but connects them through broader concepts (nevertheless quite "legal" in character) such as "agreement," "reliance," and "expectation."<sup>41</sup>

Inducing students to make the mental leap from Linelaw to Flatlaw is only possible if the teacher convinces them of two things: first, that each discrete point of law captures a complex of factors that make "broader," two-dimensional, rather than simply "linear," interconnections possible; and second, that specific interconnections do in fact exist—that is, that the "law" in any given area is more than just a tangle of lines of rules. This is not an easy task, for a number of reasons. For instance, the teacher may be convinced that the geometric figure that depicts an area of law breaks down into mere lines at certain places. This belief can induce a certain skepticism about the validity of the figure itself, suggesting that the links filling in the "gaps" between

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37. Although Ronald Dworkin separates himself from the positivists, much of his analysis of law and legal systems falls, along with that of the positivists, within the realm of Flatlaw. Unfortunately, a footnote in an already complicated article is not the proper place to establish this point fully. Suffice it to say that Dworkin believes "law" to consist of not only discrete, positive rules, but also more general "principles" of proper conduct which need not have been previously enunciated by an official source. See R. DWORKIN, *supra* note 35, at 22-39. These principles can be discovered by treating traditional positive legal sources, such as statutes and judicial decisions, as evidence of the guiding force of these principles. Thus, if you will, principles are the mortar between the bricks of specific rules, but the whole wall must be considered the "law." Dworkin's sense that these principles can be generated and identified almost entirely from existing material within the institution of the law makes this particular aspect of his legal theory lie within the first two of the dimensions of legal reasoning I shall develop in this Article.

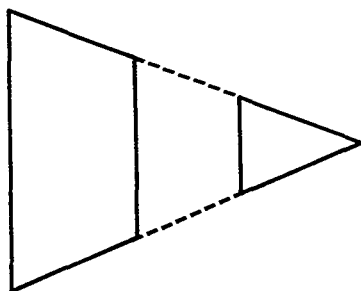
38. See Dworkin, *supra* note 1, at 170.

39. N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 106-07, 119-28, 152-228 (1978); see also MacCormick, *supra* note 1.

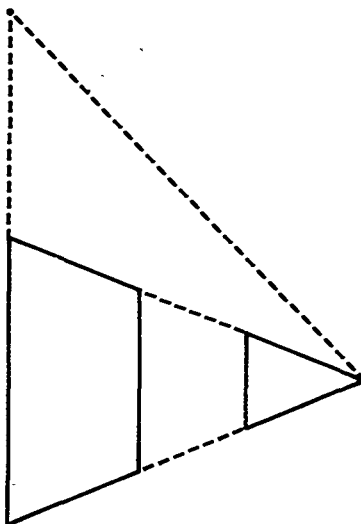
40. See N. MACCORMICK, *supra* note 39, at 105-06, 166, 196, 206 (1978).

41. See generally A. CORBIN, *CORBIN ON CONTRACTS* §§ 1-274 (1952).

various lines may be nothing more than a figment of the instructor's overactive legal imagination. There is also the problem of handling "mistakes"<sup>42</sup> identified by the teacher as being outside the figure and hence unworthy of serious consideration. Again, debate about these "mistakes" may call into question the validity of the attempt to gather lines into comprehensive forms. Related to these problems are the difficulties posed by the inevitable debates among academics over what kind of geometric figure is correct—some arguing that it must be a square, others that it must be a circle, and so on. Scholars also disagree about the size or inclusiveness of the figures involved. For example, where one scholar sees two shapes, another might see one:



Yet another may believe the vision of these scholars to be altogether too limited, or that the "direction" in which they have the law "pointing" is incorrect:



At times, the sum total of these debates may seem to call into question the entire analytic enterprise.

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42. See, e.g., R. DWORKIN, *supra* note 35, at 118-23.

Perhaps most telling of all is the problem of "change." Any observer will eventually notice that as a matter of historical fact particular rules, or whole sets of rules, disappear entirely, appear suddenly, or change their configuration in startling ways.<sup>43</sup> The only explanations a Flatlawyer could give for these phenomena would be that the world itself has changed and that decisionmakers have extrapolated from existing rules, in linear fashion, to cover new events, or perhaps that the real determining factor is arbitrary and unknowable: "what the judge had for breakfast."<sup>44</sup> A less cynical Flatlawyer might combine these two explanations to postulate some form of judicial behavioralism.<sup>45</sup>

As we shall see, the conflict, skepticism, and uncertainty that plague Flatlaw are largely a function of the limitations inherent in two-dimensional thinking. Hence we may be able to resolve, or at least explain, these difficulties by taking our allegory a step further.

### III

#### TRANSCENDING FLATLAW

We begin our journey beyond Flatlaw by noting the limitations of two-dimensional reasoning that point to the need to transcend it. We return first to the phenomenon of change. Since the law is not a static physical form but a dynamic social institution, change implies not only difference from time to time but development or progress in a certain direction. This in turn implies that no two-dimensional depiction of the law can ever be "final," no matter how accurate. But how would a resident of Flatlaw explain this lack of finality? Moreover, the traditional positive sources and statements of the law seem to "run out"<sup>46</sup> at certain points. If law is only what legal institutions say it is, how would

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43. There are countless scholarly explanations of historical development in the law. One of the more recent and more controversial is M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). Another is G. GILMORE, *THE AGES OF AMERICAN LAW* (1977).

The Flatlaw analogy, however, is *not* designed to depict developments in the law over time. Although one could describe the growth of sophistication in a given area of the law as progress from one dimension to another, what I am attempting to describe is the development of legal reasoning in any particular *individual*.

44. Flatlaw is, then, the realm of the legal realists as well as the legal positivists. See Rogat, *Legal Realism*, in 4 *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 36, at 420-21.

45. For an extensive compilation of articles primarily on the subject of judicial behavioralism, see *LEGAL REASONING: PROCEEDINGS OF THE WORLD CONGRESS FOR LEGAL AND SOCIAL PHILOSOPHY* (H. Hübner ed. 1971).

46. This, in a sense, is what Dworkin seems to mean by a "hard case": "Legal positivism provides a theory of hard cases. When a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance, then, the judge has, according to that theory, a 'discretion' to decide the case either way." R. DWORKIN, *supra* note 35, at 81. Dworkin, of course, argues that this theory of adjudication is inadequate, that this sense of "strong discretion" does not accurately characterize our system of law. For a somewhat fuller explanation of Dworkin's views, see *supra* note 37. See also *infra* notes 142-44, 148.

the Flatlawyer argue that the law can extend itself to capture new situations which appear beyond its boundaries? How could he presume to offer more than the simplistic conclusion that a court confronted with a new situation "does the best it can in the circumstances"?

Similarly, how could two residents of Flatlaw argue over which geometrical figure properly represents an area of law? If both are devoted to being as descriptively accurate as possible, and assuming that neither is depending upon faulty data, how could there be disagreement concerning the final product? How could there be disagreement about "mistakes"?

More fundamentally, note that Flatlawyers cannot "see" the figures they are discussing, just as the residents of Flatland could not perceive each other as actual figures, but merely as sets of lines receding from the observer at various angles. It was only when the Square was kicked into a third dimension that he could actually understand various figures *as* figures. So too, the characterization of legal debate as involving different two-dimensional figures suggests that there must be yet another dimension from which these figures may be perceived more clearly.

Assuming that some scholars believe that answers to the questions concerning change and form cannot be found within Flatlaw's context of announced, positive legal rules or doctrines, we must now identify the difference in perspective between these individuals and those who remain in Flatlaw. It is a difference that generates considerable friction, for the scholars who believe themselves operating beyond Flatlaw call into question the worthiness of much of the enterprise that brought us to Flatlaw in the first place.

The traveler to the lands beyond Flatlaw would find his or her experience aptly described by Plato's "Allegory of the Cave."<sup>47</sup> In this dialogue, Socrates proposes that most of the world can be compared to a cave in which the inhabitants are chained, unable to escape, unable to see direct sunlight, and unable to turn their heads to see one another. Their world is made up of the shadows of themselves and other objects in the cave created by the indirect light that manages to reach them. Reality, then, is entirely two dimensional, for all objects appear as only flat, shadowy forms. Socrates then speculates on what would happen if some of the prisoners were released and forced to face the true reality hitherto hidden from them. Rather than an experience of great joy, it is initially one of pain and hesitation:

Consider, then, what would . . . happen . . . . When one was

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47. PLATO, *Republic*, Book VII, in PLATO: THE COLLECTED DIALOGUES 747 (P. Shorey trans., E. Hamilton & H. Cairns eds. 1973).

freed from his fetters and compelled to stand up suddenly and turn his head around and walk and to lift up his eyes to the light, and in doing all this felt pain and, because of the dazzle and glitter of the light, was unable to discern the objects whose shadows he formerly saw, what do you suppose would be his answer if someone told him that what he had seen before was all a cheat and an illusion, but that now, being nearer to reality and turned toward more real things, he saw more truly? And if also one should point out to him each of the passing objects and constrain him by questions to say what it is, do you not think that he would be at a loss and that he would regard what he formerly saw as more real than the things now pointed out to him?

Far more real, he said.

And if he were compelled to look at the light itself, would not that pain his eyes, and would he not turn away and flee to those things which he is able to discern and regard them as in every deed more clear and exact than the objects pointed out?

It is so, he said.<sup>48</sup>

Moreover, when the prisoner reenters the darkness of the cave, to which his eyes are now unaccustomed, those who have never been out think he has lost his sense of reality. Therefore, ventures outside the cave are considered unhealthy and not worth the effort.<sup>49</sup> Yet, depressing as this image is, Plato concludes the allegory by arguing that those to whom the nature of sunlight has been revealed have a special responsibility to their fellow prisoners. They must return to the darkness and take on the burden of leadership of their unenlightened fellows as best they can, for they alone will know the true reality of the images perceived in the cave.<sup>50</sup>

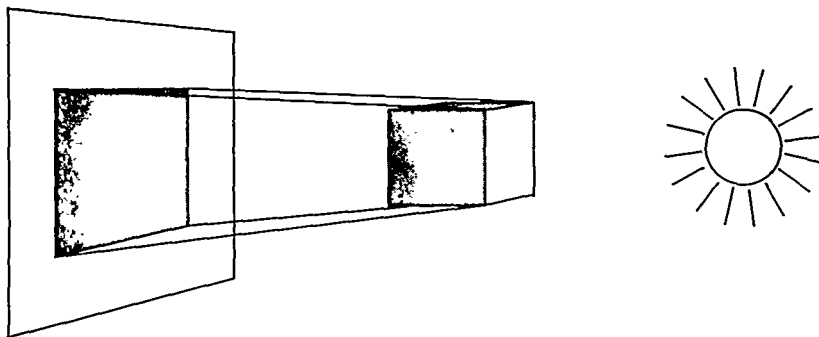
By the same token, the traveler who has departed Flatlaw will argue to the remaining residents that they see only the shadows of the true legal reality. To this traveler, law has another dimension giving it the depth of solid objects, rather than the flatness of geometric configurations. Thus, the resident of Flatlaw, he argues, is perceiving the law in a distorted, reduced form, either as the two-dimensional shadow of a three-dimensional object:

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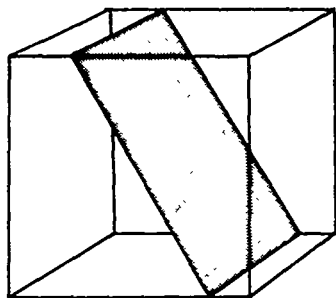
48. *Id.* at 748.

49. *Id.* at 749.

50. *See id.* at 751-52.



or as a two-dimensional slice of that object:



In either event, he argues, distortion, misconstruction, and limited understanding are inevitable.<sup>51</sup>

Furthermore, this traveler would expect Flatlaw residents to be less than enthusiastic about his revelation because it calls their most fundamental assumptions into question. Flatlawyers' first reactions might be rejection and hostility. They might argue that the traveler's view is the one that is distorted and unreal since it questions whether the positive, objective legal sources are true embodiments, or *the* embodiment, of the law. To make matters worse, travelers beyond Flatlaw have the unfortunate tendency to look down, literally as well as figuratively, on their colleagues who have remained behind, and to assume that since only they possess truly profound and significant legal knowledge, they are uniquely entitled to prominent leadership positions in the academic community.<sup>52</sup>

What is this new perspective that permits the traveler to depart Flatlaw and enter another dimension of legal reasoning? Stated most generally, it is the recognition that legal rules and institutions are only "evidence" or "data" of larger social phenomena associated with the

51. See D. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 473-74 (1979); see also *infra* text accompanying notes 90, 92.

52. Judge Richard Posner has noted this phenomenon. See Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1117-19 (1981).



concepts of other disciplines. These phenomena include: community standards of morality and justice,<sup>53</sup> economic efficiency,<sup>54</sup> group behavior,<sup>55</sup> social and political forces,<sup>56</sup> primal or sociobiological urges or necessities,<sup>57</sup> and so on. From these new perspectives the "institutional" law may well appear as only an imperfect shadow or slice representation. To return once again to earlier examples, the rules associated with ownership of property could be viewed as data within a larger "economic" picture,<sup>58</sup> and the rules of contract could be seen as part of a deeper philosophical structure defining the normative implications of promising.<sup>59</sup>

One important characteristic of the third dimension in legal reasoning is that it does *not* include references to history or "changes over time." While attention to chronological development of rules and principles is certainly not irrelevant to legal analysis, it does not in itself permit the leap in perspective that the third dimension demands. Instead, historical analysis is a creature of Flatlaw; while it may seem to produce a three-dimensional picture of an area of law by adding the reference to "time," this picture is in fact made up of a series of planes or slices that remain two dimensional. The more detailed the historical inquiry, the more slices that may be revealed, and consequently the more "depth" the picture may appear to have. But the mental process involved does not look beyond the positive, institutional sources of law. While from this perspective law becomes more than a single or incidental shadow or slice of a larger social phenomenon, it nevertheless remains simply a series of such two-dimensional figures.

Of course, this criticism applies only to historical analysis at its worst—when it is divorced from analysis of other social forces that *generate* the "sweep of history." Such forces could be, for example, the struggle of various groups for economic advantage,<sup>60</sup> or the growing concern for efficient use of resources,<sup>61</sup> or the tensions generated within various forms of social structure.<sup>62</sup> Each of these analytic points of

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53. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971).

54. See, e.g., R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967).

55. See, e.g., R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976).

56. See, e.g., M. HORWITZ, *supra* note 43.

57. See, e.g., P. SINGER, *THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY* (1981); Singer, *Ethics and Sociobiology*, 11 PHIL. & PUB. AFF. 40 (1982).

58. See, e.g., R. POSNER, *supra* note 54, at 27-64.

59. See, e.g., C. FRIED, *CONTRACT AS PROMISE* (1981) (discussing moral principles underlying contract law).

60. See, e.g., M. HORWITZ, *supra* note 43.

61. See, e.g., R. POSNER, *THE ECONOMICS OF JUSTICE* 1-115 (1981).

62. See, e.g., R. UNGER, *supra* note 55.

view, and certainly any combination of them, places law and legal institutions in a more comprehensive context. (In fact they attempt to place *all* historical detail within this context.) In this expanded form, a historical analysis of any area of the law is in fact a search for data and evidence to support a larger theory, and thus qualifies as an exercise in third-dimensional reasoning.

To some readers, lumping together the wisdom and insight of various social science and liberal arts disciplines may seem a bit cavalier, but I hasten to remind these readers that the object of this exercise is not to produce a finely tuned model of all individual mental processes, but rather to give some sense of the levels of complexity and sophistication that may exist in legal reasoning in particular. Nevertheless, some may find especially disturbing the fact that my third dimension of legal reasoning lumps together in the "nonlegal discipline" category academic pursuits that are not only widely diverse in analytic method but entirely different in focus and purpose. Currently, careful scholars take great pains to differentiate between objective, descriptive, positive analyses of observable events and subjective, theoretical, normative assessments of those events.<sup>63</sup> While the first kind of analysis is about "facts," the second is about "values." The former attempts to depict what "is," while the latter seeks to justify a vision of what "ought" to be. The former might be said to be about "law," the latter about "justice." The former seems the province of the social sciences, while the latter is the subject of philosophy and ethics.<sup>64</sup> Yet in this Article's model of legal reasoning, these very distinct exercises are placed in the same category, with the obvious implication that in some way they have more in common than they have in conflict.

The amalgamation of these disciplines is justified if the vantage points they provide for viewing legal data are both sufficiently similar to make them a cohesive group, and also sufficiently distinct from our earlier perspectives to constitute a new perspective "at right angles" to that of the paradigmatic Flatlawyer. From the point of view of the student of law, these other disciplines do naturally tend to lump together as a group because they all treat legal material as bits of evidence in the search for a more fundamental reality. It is only the devotee of a particular discipline who would find this sort of forced association with other academic riff-raff uncomfortable.

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63. See, e.g., Terrell, *supra* note 1; Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

64. There have been attempts to "bridge" the "is-ought" gap, however. See A. GEWIRTH, REASON AND MORALITY 1-7 (1978) [hereinafter cited as A. GEWIRTH, REASON AND MORALITY]; Gewirth, *The "Is-Ought" Problem Resolved*, 47 PROC. & ADDRESSES AM. PHIL. A. 34 (1974), reprinted in A. GEWIRTH, HUMAN RIGHTS 100 (1982).

One possible but unfortunate implication of this discussion is that these nonlegal disciplines, affording perspectives which reduce law to evidence of a larger theory, are somehow of a "higher" order of analysis. Therefore "institutional" legal analysis is inherently inferior and must worship at the shrines of these nonlegal disciplines. We can expose the fallacy of this argument by returning to our starting point. We began with "points" of law and defined the first and second dimensions as the forms of reasoning which give some larger life to these bits of legal data. It follows that when we have exhausted purely "legal" analysis, we can give a larger life to legal concepts by reasoning about them from extralegal perspectives. By the same token, we could approach any other discipline through the same progressively expansive forms of reasoning. For example, the first dimension of economic analysis would be the rudimentary connection of bits of economic data in various simple lines of cause and effect; the second dimension would reveal more sophisticated geometric figures reflecting an understanding of more complex economic factors. To arrive at a third dimension the economist would have to view the economic data as part of some larger social whole. Inevitably the economist would have to move beyond economics; at the very least, he or she would have to turn to philosophy to justify his or her myopic dedication to economic data and economic analysis.<sup>65</sup>

Therefore, it would be a mistake to believe that we could shortcut our way to a full and accurate sense of legal reality by simply *starting* with the perspective provided by the conclusions of some other discipline. For an economist to analyze a complex legal concept without reference to the rules and "lines" of rules that form that concept would be in effect to treat it simplistically as a mere bit of economic data, or a dimensionless "point" to be connected with other economic "points." The economist would have fallen back into limited one-dimensional reasoning. Thus, it is a mistake for the practitioner of *any* discipline to suggest sophisticated or expansive conclusions without having first done the difficult groundwork that makes such leaps possible. Beginning an analysis at either end of the dimensional scale is necessarily a first, and quite rudimentary, step.

While our allegorical model may place these many disciplines together in the third dimension, it does not predict that the views of the law the disciplines generate will be the same or even similar. To the contrary, the debate about law in the third dimension will be even more intense than it is in Flatlaw. The conflict will now turn on two very different, but related issues. First, what three-dimensional object

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65. See, e.g., R. POSNER, *supra* note 61, at 48-115.

most completely represents the reality within which positive legal sources exist? Second, what two-dimensional figure ("slice" or "shadow") is the best reduction of the object for revealing ("is") or proposing ("ought") the correct connections among these Flatlaw data?

The shapes could be anything: pyramids, cubes, cylinders, multi-sided monstrosities, or spheres. Perhaps one could visualize the model of law proposed by each separate discipline as a particular and distinctive shape. Indeed, one might even attempt to rank the disciplines hierarchically, as Abbott ranked the inhabitants of his Flatland,<sup>66</sup> according to the number of sides or separate surfaces each discipline's model possesses. More sides would suggest more complexity, and hence a more accurate representation of three-dimensional reality. Or quite the opposite, all disciplines might aspire instead to explain as much data as possible with as few basic propositions, or sides, as possible, making the competition one of simplicity rather than complexity.<sup>67</sup>

Given the number of three-dimensional constructs proposed by various disciplines, a multitude of two-dimensional reductions—that is, translations into the "institutional" concepts of Flatlaw—will be possible. Different solid objects will of course produce very different slices and shadows. While such reduction inevitably involves a certain amount of distortion, it is necessary whenever the traveler beyond Flatlaw attempts to communicate with the Flatlawyers who remained behind. If the traveler wants them to understand his "larger" view of the law he must encourage them to accept its corresponding manifestation in Flatlaw.

Not only will there be debate over the "correct" two-dimensional representation of the law among various disciplines, but there will be considerable debate on this point even within a particular discipline in which everyone agrees upon one three-dimensional form of the larger

66. E. ABBOTT, *supra* note 3, at 8-12.

67. To the extent the goal of the dimensional analogy is the generation of a useful scientific, explanatory theory, it can be argued that simplicity is preferable. See, e.g., Friedman, *The Methodology of Positive Economics*, in PHILOSOPHY AND ECONOMIC THEORY 26 (F. Hahn & M. Hollis eds. 1979):

In so far as a theory can be said to have "assumptions" at all, and in so far as their "realism" can be judged independently of the validity of predictions, the relation between the significance of a theory and the "realism" of its "assumptions" is almost the opposite of that suggested by the view under criticism. Truly important and significant hypotheses will be found to have "assumptions" that are widely inaccurate descriptive representations of reality, and, in general, the more significant the theory, the more unrealistic the assumptions (in this sense). The reason is simple. A hypothesis is important if it "explains" much by little, that is, if it abstracts the common and crucial elements from the mass of complex and detailed circumstances surrounding the phenomena to be explained and permits valid predictions on the basis of them alone. To be important, therefore, a hypothesis must be descriptively false in its assumptions; it takes account of, and accounts for, none of the many other attendant circumstances, since its very success shows them to be irrelevant for the phenomena to be explained.

legal reality. This is because slices of a single object can be made at various points and at various angles, or because different shadows of the same object will be cast depending on the position of the light source. This is to say, for example, that different economists will draw different legal consequences from an economic model of law.

Although our model of legal reasoning might initially have seemed rather cursory, it in fact both depicts and predicts the great complexity of legal debate. Moreover, it suggests why the participants in these debates cannot understand why they arrive at different results: they simply fail to perceive that they see legal problems from fundamentally different perspectives.

At this stage, our sophisticated traveler beyond Flatlaw now understands law as a complex social phenomenon involving far more than the narrow institutional concerns explicitly recognized by courts and legislatures. But some nagging questions remain. Just as Flatlaw scholars arguing about what two-dimensional figure best represents some area of the law cannot actually "see" the figures for which they argue until they leave Flatlaw and look back, so too scholars arguing for various three-dimensional models cannot visualize their models fully until they have moved to a further dimension. It may be, of course, that these scholars do not claim to "see" the ultimate three-dimensional objects that they call reality. Instead, they may assert only that they "understand" these objects in the same sense that the Square in Flatland could "understand" others in his society to be triangles, pentagons, and so on, without actually being able to see them as complete geometric figures. But the question becomes whether the very existence of debates about various three-dimensional realities that capture the law within them necessarily implies a dimension beyond the familiar three. And if it does, what is the nature of this new perspective?

The existence of this new dimension is suggested by the following observation, which will be elaborated in the next section: All disciplines that occupy the third dimension share an inherent limitation which for convenience at this point we can call "homocentricity."<sup>68</sup> That is, each of the disciplines that take the traveler one, but only one,

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68. This term does not capture the full range of the argument to follow, for although Laurence Tribe has also used "homocentricity" to identify a current limitation on our approach to environmental issues, I shall criticize his narrower understanding of that limitation. Tribe is satisfied with an attack on our propensity to focus on satisfaction of immediate individual human desires; I shall make a more fundamental challenge to our logic-based reasoning process. Thus, our views of the problem of homocentricity vary according to our understandings of what it is to be human.

I shall not suggest, however, that every form of rational thought is by definition homocentric. See *infra* text accompanying notes 89-92; see also note 174.

step beyond the confines of Flatlaw makes the same assumption: each allows its scholarly proponents to analyze and pontificate on the law in the firm and quite reasonable belief that law is a purely human institution, with human origins and human manifestations, serving human purposes to accomplish human ends and satisfy human needs and desires. The difficult issue we now face is whether there is yet another dimension to reasoning, legal or otherwise, in which the assumption (and barrier) of homocentricity is challenged. I shall argue that there is.

The loyal resident of Flatlaw who remained skeptical of our travels into the third dimension must now believe that I not only occupy a very high ivory tower, but that I have jumped off. In a way, this skeptic is right. Yet taking such risks can yield something of value, even if it is only the discovery of gravity.

#### IV

##### THE TRAVELERS TRANSCEND THEMSELVES

Dimensions beyond the three familiar to us are certainly not unknown to mathematics and physics.<sup>69</sup> A leap beyond three dimensions is fundamental to Einstein's Theory of Relativity, in which the concepts of space and time are interwoven to give a new perspective on the nature of our physical world.<sup>70</sup> In mathematics, a fourth dimension

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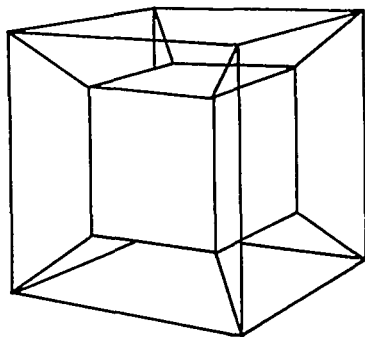
69. Certainly they were in Edwin Abbott's mind when he wrote *Flatland*, for in his dedication he anticipated the discovery of dimensions beyond the three he knew:

To  
The Inhabitants of SPACE IN GENERAL  
And H.C. in PARTICULAR  
This Work is Dedicated  
By a Humble Native of Flatland  
In the Hope that  
Even as he was Initiated into the Mysteries  
of THREE DIMENSIONS  
Having been previously conversant  
With ONLY TWO  
So the Citizens of that Celestial Region  
May aspire yet higher and higher  
To the Secrets of FOUR FIVE OR EVEN SIX Dimensions  
Thereby contributing  
To the Enlargement of THE IMAGINATION  
And the possible Development  
Of that most rare and excellent Gift of MODESTY  
Among the Superior Races  
Of SOLID HUMANITY

E. ABBOTT, *supra* note 3, at v.

70. See A. EINSTEIN, *RELATIVITY: THE SPECIAL AND THE GENERAL THEORY: A POPULAR EXPOSITION* (R.W. Lawson trans. 17th ed. 1961); see also Grünbaum, *Relativity Theory, Philosophical Significance of*, in 7 *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 36, at 133. The public television series *Cosmos* recently illustrated the concept of a fourth dimension, and I am indebted to the summary presentation made there and in the book form of the series for much of the introductory discussion in the text. See C. SAGAN, *COSMOS* 263-64 (1980).

would be one that is at right angles to each of the three dimensions we already perceive,<sup>71</sup> just as the third dimension of height is at right angles to the first two of length and width. Given the limits of our perception, however, only three dimensions can be accurately depicted. But since we can reduce a three-dimensional object to two dimensions by depicting its shadow, so, too, we might be able to depict in three dimensions the "shadow" of a four-dimensional object. In fact, such a shadow has a name—a tesseract or hypercube<sup>72</sup>—and looks like this:



The subject of this Article, however, is not some aspect of the physical universe, but a particular thought process known as legal reasoning. Describing the aspect of this process that goes beyond the comfort and familiarity of the three dimensions we have previously developed will be a difficult and controversial undertaking. I therefore intend to develop the concept of four-dimensional reasoning in a series of stages. The key to this discussion will be a concept of transcendence, and I introduce it in Section *A* with an example of transcendence in a theory of art. I then move to a more fundamental transcendence of human reason in Section *B*, using two examples: the first is religious faith, and the second is Laurence Tribe's incomplete attempt to transcend a homocentric legal perspective. In Section *C*, I describe the substantive normative principles that the existence of a fourth dimension of legal reasoning suggests to me. The final Section illustrates the process of four-dimensional legal analysis with an example drawn from environmental law.

#### *A. Art as Transcendence*

The nature of words and the structure of our language are central to our reasoning processes,<sup>73</sup> including our legal reasoning processes.

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71. See, e.g., C. SAGAN, *supra* note 70, at 263-64.

72. *Id.* at 264.

73. Some of the more important works on philosophy of language are: N. CHOMSKY,

In particular, an excellent example of the transition from two- to three-dimensional thinking is the shift of focus from the factual definition of a word to the normative theory which underlies it.<sup>74</sup> I shall simply assume here, rather than attempt to prove, that the definition/theory distinction exists in our language, and specifically in our legal language,<sup>75</sup> and I shall use it to construct a bridge to the concept of a fourth dimension in legal reasoning. I begin by propounding a definition and theory of the term "art."

If the assignment in a jurisprudence class were to define "art," there would be at least one levelheaded future lawyer who would not attempt to concoct on his or her own some set of criteria that captures the essence or myriad possibilities of this term; rather, he or she would go straight to a potentially authoritative source: a very thick dictionary. In it he or she would find the following definition of "art," which will serve as an excellent illustration of both the definitional technique we can apply to more traditional legal terminology, and the inevitable overlap of this technique with a more theoretical approach: "*art* . . . application of skill and taste to production according to aesthetic principles: the conscious use of skill, taste, and creative imagination in the practical definition or production of beauty . . . ."<sup>76</sup>

Note that this definition hinges on three variables, each of which refers the student to objective, observable data: "skill" could be demonstrated by measuring the artist's technical abilities against those of the rest of the population; "taste" could be manifested by the degree to which the general population values the artist's product; "creativity" could be tested by simply determining whether anyone else had previously come up with the artist's idea. If we use these criteria and ignore for present purposes the inherent difficulties of accurately measuring "uniqueness" or "acceptance," "art" seems to be a purely positive, factual phenomenon.<sup>77</sup>

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REFLECTIONS ON LANGUAGE (1975); D. COOPER, PHILOSOPHY AND THE NATURE OF LANGUAGE (1973); I. HACKING, WHY DOES LANGUAGE MATTER TO PHILOSOPHY? (1975); THE PHILOSOPHY OF LANGUAGE (J. Searle ed. 1971); W.V.O. QUINE, WORD AND OBJECT (1960); J. SEARLE, SPEECH ACTS (1969); L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans. 3d ed. 1968); L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D. Pears & B. McGuinness trans. 1974).

74. See sources cited *supra* note 63.

75. This is illustrated by the range of topics discussed in the two articles cited *supra* note 63.

76. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 122 (unabridged 1981). I do not at all mean to suggest that this is the "only" or "best" definition of art; it is simply very convenient for my purposes. For an example of a more elaborate listing of possible criteria for a complete definition of art, see P. ZIFF, PHILOSOPHIC TURNINGS: ESSAYS IN CONCEPTUAL APPRECIATION 21-26 (1966). See also *infra* note 77.

77. With these three variables of skill, taste, and creativity, we could use the standard definitional technique of establishing the "central case" or "focal meaning" of the term "art." All candidates for the label "work of art" could then be measured against the central case. (I have



But there is also the hint of theory here. Although this definition may accurately summarize the way in which we currently use the term "art" in our language, there must be some reason why we agree that these particular variables, and not others, capture the "proper" meaning of the word. Moreover, this definition of art has a cold and blood-

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described this technique in detail elsewhere using the terms "property" and "due process" as examples. *See* Terrell, *supra* note 1, at 865-74, 936-38.) In the central case all three variables are at a "maximum": the work of art is (a) totally unique and new; (b) created by the individual who alone in mankind has the ability to produce it; and (c) appreciated by everyone in present society.

Other "noncentral" instances of art are nevertheless recognized. Possible examples could be the following:

<i>Characteristics</i>	<i>Examples</i>
creativity and skill, but no taste	paintings or books that are rejected by the artist's contemporary society, only to be given acclaim later, when "taste" is established according to different standards
creativity and taste, but no skill	modern sculpture using ordinary materials that are arranged in such a way as to create a pleasing or interesting effect, but which arrangement many people could have done themselves had they thought of it
skill and taste, but no creativity	"folk art," such as pottery, which is not easy to create, is pleasing to many people, but has been done many times before

To establish the entire "set" of works to which the term "art" could properly be applied, we would obviously have to continue for some time this exercise of identifying *all* the noncentral works to which the term "art" will *in fact* be applied. Having done so, we would have established the outer boundary around the central case.

Professor Paul Ziff has made a similar analysis. After identifying seven criteria which characterize an indisputable example of art, he notes:

Although the above set of characteristics provides a set of sufficient conditions, it does not provide a set of necessary and sufficient conditions. No one of the characteristics listed is necessarily a characteristic of a work of art. But a definition in terms of necessary and sufficient conditions is merely one kind of definition, one way of describing the use of a word or phrase. Another kind of definition, and the kind we are here concerned with, is one in terms of various subsets of a set of characteristics, or, in less exotic language, in terms of similarities to what I have called a characteristic case, a case in which an entire set of characteristics is exemplified. . . .

. . . No rule can be given to determine what is or is not a sufficient degree of similarity to warrant . . . a claim [that an object is a work of art]. If for one reason or another the dissimilarities become impressive (and what impresses one need not impress another), one is then reluctant to call the object a work of art.

P. ZIFF, *supra* note 76, at 29-30.

By focusing on only the three elements of skill, taste, and creativity, I have, as I stated *supra* in note 76, left out many other possible definitional criteria. Some might be, for example, "the depiction of reality," or "the creation of emotional response in the beholder." I am comfortable in excluding these for two reasons: first, to a large degree each overlaps and can therefore be captured in the three criteria I have isolated; and second, whatever may be left over is probably a matter of justification of the definition of art—that is, a theory of art. *See supra* text accompanying note 74. On these additional definitional criteria, see, e.g., P. ZIFF, *supra* note 76, at 32-46; *Philosophy and Literature: Dialogue with Iris Murdoch*, in *MEN OF IDEAS* 269-72, 281 (B. Magee ed. 1978) [hereinafter cited as *MEN OF IDEAS*].

less quality. If this is all art is, why are our opinions about art so contradictory and so vehement?<sup>78</sup> Something is missing. That missing element could be supplied by some theory of art, some normative foundation for the very existence of the concept of art. And perhaps that theory could also explain why our definition of art revolves around the primary variables of skill, taste, and creativity.

Let me suggest the following rudimentary idea around which the nucleus of a theory of art could develop: "Art" conveys the concept of making things do more than they are ordinarily able to do, that is, making them extend beyond their apparent limits to become "beautiful."<sup>79</sup> The painter turns inert colored oils into a breathtaking land-

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78. For example, on what authority can someone tell me that the simple drawings of my daughter are not "art"? Monet she is not, but so what? Are not her earnest efforts at depicting her world entitled to hang in my own private Louvre even though as a matter of dictionary definition others might not label them "art"? Perhaps there is a kind of "public-private" dichotomy at work here in which the term "art" takes on two different meanings, meanings that the standard definition does not adequately capture. Or perhaps this possible dichotomy and other aspects of the complex uses given the term are to be explained at the level of theory rather than of definition. See *infra* note 79 and accompanying text.

79. Although I know of no work in the vast literature of philosophies or theories of art that makes precisely the point I assert here, there are many which say something very similar, and very often in the context of the connection I will make in a moment between art and religion. See *infra* note 85 and accompanying text. One example of a theory of art based on a concept of secular transcendence as I have described it at this point in the text would be that of Martin Heidegger in his essay *The Origin of the Work of Art*, which appears in M. HEIDEGGER, *POETRY, LANGUAGE, THOUGHT* (A. Hofstadter trans. 1971). There Heidegger argues that art is the revelation of the essential truth of the depicted object, which we could not ordinarily perceive:

In the work of art the truth of an entity has set itself to work . . . .

The work, therefore, is not the reproduction of some particular entity that happens to be present at any given time; it is, on the contrary, the reproduction of the thing's general essence . . . .

. . . .

Thus in the work it is truth, not only something true, that is at work. The picture that shows the peasant shoes, the poem that says the Rome fountain, do not just make manifest what this isolated being as such is—if indeed they manifest anything at all; rather, they make unconcealedness as such happen in regard to what is as a whole. The more simply and authentically the shoes are engrossed in their nature, the more plainly and purely the fountain is engrossed in its nature—the more directly and engagingly do all beings attain to a greater degree of being along with them. That is how self-concealing being is illuminated. Light of this kind joins its shining to and into the work. This shining, joined in the work, is the beautiful. *Beauty is one way in which truth occurs as unconcealedness.*

. . . .

. . . It is due to art's poetic nature that, in the midst of what is, art breaks open an open place, in whose openness everything is other than usual. By virtue of the projected sketch set into the work of the unconcealedness of what is, which casts itself toward us, everything ordinary and hitherto existing becomes an unbeing. This unbeing has lost the capacity to give and keep being as measure. The curious fact here is that the work in no way affects hitherto existing entities by causal connections. The working of the work does not consist in the taking effect of a cause. It lies in a change, happening from out of the work, of the unconcealedness of what is, and this means, of Being.

*Id.* at 36-37, 56, 72 (emphasis in original).

Arthur Schopenhauer expressed similar ideas, summarized well by Iris Murdoch: "Schopenhauer says that art removes the veil or mist of subjectivity and arrests the flux of life and

scape, an enchantingly detailed still life, or an emotionally powerful abstract composition.<sup>80</sup> Similarly, the sculptor transforms stone into new shapes that communicate something to us in some special way. Poetry exists whenever words are made to extend beyond their apparent limits—hence our penchant for labeling as “poetry” those unusual passages in a prose work that conjure up particularly startling, vivid, or moving images.<sup>81</sup> Music is the arrangement of sounds so that they convey more than they would if they had occurred randomly. Dance is bodily movement that makes the human body seem to transcend its ordinary expressive limits.<sup>82</sup>

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makes us see the real world and this shock is the experience of beauty.” *MEN OF IDEAS*, *supra* note 77, at 273. For excerpts of the relevant works of Schopenhauer, see *PHILOSOPHIES OF ART AND BEAUTY* 446 (A. Hofstadter & R. Kuhns eds. 1964). This volume as a whole is a convenient starting place for investigation of the issue of the nature of art.

Iris Murdoch seems to share this notion that art and the true nature of the world have some connection, but she recognizes the difficulty of expressing this point adequately:

[A]ny serious artist has a sense of distance between himself and something quite other in relation to which he feels humility since he knows that it is far more detailed and wonderful and awful and amazing than anything which he can ever express. This “other” is most readily called “reality” or “nature” or “the world” and this is a way of talking that one must not give up.

*MEN OF IDEAS*, *supra* note 77, at 281. Perhaps this is because, as she also notes, “[a]rt is cognition in another mode.” *Id.* at 269. As I would put it, the difficulty of expressing the concept of art lies in the difficulty of expressing in normal, logic-based language the nature of nonlogical transcendence. See *infra* text accompanying notes 79-85.

Robert Nozick has recently gone in the opposite direction by discussing not a philosophy of art, but “philosophy as an art form.” See R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 645-47 (1981). He also examines at length the philosophical meaning of life and concludes in part that “the nature of meaning [lies in] . . . a transcending of limits, a connecting with something external.” *Id.* at 610. His sense of transcendence, *id.* at 594-619, however, is rather different from that developed in this Article.

80. Thus, to return to the point raised in note 78, even the efforts of my daughter could qualify for the label “art” in the theoretical sense that she intends them to convey, and they do convey to me, images that the crayons could not produce if merely applied to the paper randomly or thoughtlessly or by someone who was not attempting to communicate something special to me. In a *relative* sense, then, using different comparative paradigms, I can find sufficient skill, taste, and creativity in both the painter and my daughter to label their products “art,” for both have made ordinary objects extend beyond themselves. It is my *theory* of art that permits me to alter its objective criteria to accommodate my reactions to these disparate artists. More importantly, however, it is also this theory which establishes why I assess both of them on the basis of *some* sense of skill, taste, and creativity, for these are the factors which will transform ordinary things into extraordinary forms.

81. See, e.g., Heidegger, *The Origin of a Work of Art*, in *PHILOSOPHIES OF ART AND BEAUTY*, *supra* note 79, at 695.

82. One of the difficulties with Professor Ziff’s analysis of art is the lack of any unifying theme or theory which would give his definitional exercise the cohesion it needs. This difficulty is best exemplified by his discussion of the various art forms which are related, rather precariously he believes, by the phrase “work of art”:

[N]either a poem, nor a novel, nor a musical composition can be said to be a work of art in the same sense of the phrase in which a painting or a statue or a vase can be said to be a work of art. Such things as poems, novels, musical compositions, possess none of the characteristics listed in our set of characteristics [for paintings, etc.]; . . . . If one wished to describe a use of the phrase “work of art” in which there is such a systematic shift in

This "transcendence" theory of art is reflected in our earlier definition of art in its reference to the production of "beauty."<sup>83</sup> Beauty can be considered, then, the "content" or manifestation of transcendence, the guarantee that transcendence has occurred. But this particular transcendence does not occur spontaneously or accidentally, as its definitional background indicates. That is, although any sign painter may be said to have made ordinary objects extend beyond their normal characteristics, our language and culture include paintings in the category of "art" only if the painter has consciously employed enough skill, taste, and creativity to make them beautiful. Skill, taste, and creativity are the "facts" determining which ordinary things take on extraordinary forms.

Thus, the full sense of "art" embodies both definition and theory, each a function of the other. Any given painting, sculpture, verse, song, or *pas de deux* will rise to the level of transcendence necessary to claim the label of its art form only if it satisfies some complicated formula of skill, taste, and creativity in which each requirement is set by the conventions of the time.<sup>84</sup> Yet each of these requirements is demanded by the fundamental requirement of transcendence. This relationship helps explain why over time and across cultures there is unanimous agreement that works of "art" exist, for the element of transcendence is universal, but why there is also constant disagreement about precisely which works deserve the label, for the consensus that constitutes the definitional criteria is forever changing.

Art and legal reasoning have more in common than the fact that both can be analyzed from the separate perspectives of definition and theory. The important bridge between the two is the theory of transcendence, or extension beyond apparent limits. We began with the term "art" in order to introduce this difficult concept in a somewhat more familiar context. The next step is to the fourth dimension in our allegorical journey—if you will, to the tesseract or hypercube of legal

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sense, one could do so in terms of several sets of characteristics. One would take a clear-cut case of a novel and obtain another set, and so forth. Then something would be a work of art, in this use of the phrase, if it possessed some subset of the set of characteristics pertaining to paintings, or some subset of the set of characteristics pertaining to poems, and so forth. This may seem an extremely complex way of using the phrase "work of art," but it is actually often used in somewhat this way by critics who speak of the "art of painting," the "art of poetry," and so forth. Such a "blanket" use of the phrase may be warranted by the fact, if it is a fact, that each set of characteristics is analogous in composition to every other set; the analogue of contemplating a painting is reading a poem, the analogue of a good painting is a good poem, the analogue of display is publish, and so forth.

P. ZIFF, *supra* note 76, at 31-32. I would argue that the "analogues" Ziff postulates are functions of the underlying theory of art I have proposed.

83. See *supra* text accompanying note 76.

84. See *supra* note 77.

reasoning. As we shall see, transcending three dimensions entails transcending reason itself. This is a formidable endeavor, but fortunately we have another concept which can serve as an analogue to help us through this transition. That concept is "religion," or "theology." It is the perfect bridge for our discussion: it shares with "art" an objective definitional exterior supported by an underlying theory of transcendence, while it shares with legal reasoning an inevitable reference to the limits of human reason and logic.<sup>85</sup> Our next step, then, is to examine this analogue and its potential relevance to law.

### B. Religion and the Transcending of Logic

For us to call a particular social phenomenon a "religion," it would have to meet certain objective criteria; for example, the members of the community would have to believe in a "supreme being" or use certain rituals.<sup>86</sup> Yet it is neither the ritual nor the dogma that provides

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85. Authors ranging from Plato to Kant to Heidegger, and beyond, have recognized the philosophical and metaphysical connections between the concepts of art and religion. See PHILOSOPHIES OF ART AND BEAUTY, *supra* note 79. A rather secularized summary of this idea appears in the introduction to this anthology:

Beyond our natural desire to understand the human activity of the making and enjoyment of art, there is a profound motive and primitive need behind philosophies of art. A powerful analogy immediately comes to men when they think about themselves and the universe they inhabit: the maker of the universe and the object he makes are like the human maker and his artifact. The order and harmony of the cosmos are like the beauty of art. Somehow man participates in the ordering of the universe in his power to make and to respond to art objects. Thus, early philosophies of art and beauty are intermixed with cosmological inquiries and it is only relatively late in the development of philosophy that the philosophy of art can be thought of as distinct from ontology and theology. The greatest philosophies of art, then, are part of broader inquiries into man and nature.

*Id.* at xiii. And to return to the connection between art and truth discussed earlier at note 79, the editors also note that:

[I]n the West we have well learned the answer Aquinas worked out: all that man creates as art is valuable so long as it symbolizes truth, but truth can be gained through what pleases in sight because the beautiful inspires love and the aspiration of love is, if guided by faith, toward the truth. While the concept of faith has changed since Aquinas wrote, the assumption that art and truth are intimately related has remained.

*Id.* at xv.

See also L. TOLSTOI, WHAT IS ART? (A. Maude trans. 1959); MEN OF IDEAS, *supra* note 77, at 276 (where Iris Murdoch comments: "One might say that the best art can somehow explain the concept of religion to each generation.").

The possible connections between the concept of transcendence and philosophical investigation of a topic like "justice" are explored in the text accompanying notes 139-59. At this point, however, I shall note one remarkable article in which the topics of theological argument, legal argument, and aesthetic argument are all tied together by a general theme of reality lying beyond the "facts" involved. Wisdom, *Gods*, 45 PROC. ARISTOTELIAN SOC'Y 185 (1944), reprinted in THE LOGIC OF GOD 158 (M. Diamond & T. Litzenberg eds. 1975).

86. Legislatures and courts use this method of analysis to define religious beliefs in contexts where such beliefs are the focus of a legal controversy. *E.g.*, *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Davis v. Beason*, 133 U.S. 333 (1890); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 692-93, 315 P.2d 394, 406

an underlying theory of religion, but rather, the transcendence of our own human reason, the extension of our logical capabilities beyond their ordinary limits.<sup>87</sup> But what does it mean to confront the edge of our reason, and then go beyond it?<sup>88</sup>

### 1. Paradox, Faith, and Perspective

I must begin with some cautionary remarks. First, my discussion

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(1957); see also *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

87. See generally *THE LOGIC OF GOD*, *supra* note 85, especially at 151-77, 299-329; H.R. NIEBUHR, *RADICAL MONOTHEISM AND WESTERN CULTURE* (1960). In addition, Aldous Huxley's "Perennial Philosophy," or what we might call his "central case" of religion, is well worth noting. One of its "four fundamental doctrines" is that "human beings are capable not merely of knowing about the Divine Ground by inference; they can also realize its existence by a direct intuition, superior to discursive reasoning." Huxley, *Introduction to BHAGAVAD-GITA* 5, 7 (S. Prabhavananda & C. Isherwood trans. 1944) (emphasis in original).

I should also note that there are some similarities between the four dimensions of legal reasoning I have developed and H.D. Aiken's four levels of moral discourse. H.D. AIKEN, *The Four Levels of Moral Discourse*, in *REASON AND CONDUCT* 65 (1962).

88. I have chosen not to address some important issues in basic epistemology which this question might raise. Instead, I will refer the interested reader to a few primary sources, particularly the summary of the issue provided by the eminent contemporary philosopher and social critic, W. Allen:

In formulating any philosophy, the first consideration must always be: What can we know? That is, what can we be sure we know, or sure that we know we knew it, if indeed it is at all knowable. Or have we simply forgotten it and are too embarrassed to say anything? Descartes hinted at the problem when he wrote, "My mind can never know my body, although it has become quite friendly with my legs." By "knowable," incidentally, I do not mean that which can be known by perception of the senses, or that which can be grasped by the mind, but more that which can be said to be Known or to possess a Knownness or Knowability, or at least something you can mention to a friend.

Can we actually "know" the universe? My God, it's hard enough finding your way around in Chinatown. The point, however, is: Is there anything out there? And why? And must they be so noisy? Finally, there can be no doubt that the one characteristic of "reality" is that it lacks essence. That is not to say it has no essence, but merely lacks it. (The reality I speak of here is the same one Hobbes described, but a little smaller.) Therefore the Cartesian dictum "I think, therefore I am" might better be expressed "Hey, there goes Edna with a saxophone!" So, then, to know a substance or an idea we must doubt it, and thus, doubting it, come to perceive the qualities it possesses in its finite state, which are truly "in the thing itself," or "of the thing itself," or of something or nothing. If this is clear, we can leave epistemology for the moment.

W. ALLEN, *My Philosophy*, in *GETTING EVEN* 28-29 (1971). However, see also R. NOZICK, *supra* note 79, at 167-288.

I shall also note that scholars in other disciplines have made attempts to incorporate into their analyses certain alogical, fourth-dimensional assumptions. One notable example is the historian Eric Voegelin. See E. VOEGELIN, *ANAMNESIS* (1966); E. VOEGELIN, *THE NEW SCIENCE OF POLITICS* (1952); E. VOEGELIN, *4 ORDER AND HISTORY: THE ECUMENIC AGE* (1974); see also ERIC VOEGELIN'S *THOUGHT, A CRITICAL APPRAISAL* (E. Sandoz ed. 1982).

Another difficult topic I do not take up in this Article is the nature of the act or experience itself of transcending our logical limitations. What would it be like, exactly? How would the alogic of the fourth dimension enter into the other logic-based dimensions? One way, of course, could be in the nature of revelation, that is, an unexpected breaking in, a self-disclosure that must be accepted on its own terms rather than evaluated by the reasoning processes of any other dimension. See, e.g., E. BRUNNER, *REVELATION AND REASON* (1946); H.R. NIEBUHR, *THE MEANING OF REVELATION* (1941).

of the transcendence of logic does not pretend to be definitive; it only aspires to establish a conceptual model of reasoning that includes a fourth, transcendental dimension and reveals some of that dimension's basic characteristics. Second, although I shall put "logic" and "reason" in the same category, I shall hold to an important distinction—that between "logic" and "rationality." Logic is that method which draws valid inferences from necessary and sufficient conditions,<sup>89</sup> but logic is only part of problem analysis in general, or legal reasoning in particular. It is a tool available for the larger mental activity of rational thought.<sup>90</sup> If we were using our earlier approach to define "thought," we could make logic a definitional element, since it describes a significant part of our thought processes that we can observe and verify. Rationality would be the underlying theory of thought, justifying our use of logic. Rationality implies "good judgment": we necessarily subject our logical inferences to the further scrutiny of our full rational capacities. Therefore, transcending logic does not mean transcending rationality; we may quite rationally attempt to move beyond logical conclusions, or to act in the absence of such conclusions. With these clarifications, we can now proceed along the thin ice that leads beyond logic.

Our logic is surrounded by a wall of paradox. Inside this boundary, logic resolves informational conflicts to our satisfaction; outside, it does not, leaving contradictions and absurdities. The difference seems to be between sense and nonsense, between logic and illogic. But perhaps this dichotomy is a bit too stark. Perhaps there exists another category between, on the one hand, those phenomena we happily accept because they can be explained by our logic and, on the other, those we comfortably reject because they are in direct conflict with logic. We would arrive at this remarkable middle category, then, by opening our minds to phenomena logic cannot explain. For convenience, I will call this nonlogical mental process "faith."

This is not the kind of "faith," however, that we have in our national leaders to do the right thing, since we accept their leadership because we have assessed their past performance and predicted their responses to probable future events; all our calculations are very firmly rooted in the standard forms of reason and logic.<sup>91</sup> Instead, we are here concerned with the "faith" that convinces us that all the data we perceive with our senses, or even with the most sophisticated of computers, is not all the data there is. Faith tells us that our perceptions are neces-

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89. See *DICTIONARY OF PHILOSOPHY AND RELIGION* 309 (W. Reese ed. 1980).

90. This point is also made in J. FINNIS, *supra* note 4, at 68, 371, 385, 387; see also D. HOFSTADTER, *supra* note 51, at 575-77.

91. See, e.g., Baier, *Secular Faith*, 10 CAN. J. OF PHIL. 131 (1980).

sarily incomplete and distorted because from our three-dimensional perspective, we can see only a portion, an imperfect representation, of a phenomenon with more than three dimensions.<sup>92</sup> Faith suggests that there is something more than the reality we perceive. Since our logic is trapped within three dimensions, the conclusion that logic cannot answer all our questions is necessarily alogical (not *illogical*); it is fourth dimensional.

The most obvious example of this sort of mental process is religious belief, a faith in one or more gods that are beyond human ken. Such beliefs readily breed, and perhaps thrive upon, paradox: believing that a God of love rules over a world of hate and suffering; believing that we are both mortal and immortal; believing, as in Christian theology, that a form of God was both human and not human, both died and did not die.<sup>93</sup> Even the process of believing is contradictory: Dietrich Bonhoeffer argued that Christians obey the call of Christ even before they believe; they make a conscious, individual decision to believe, and yet do not themselves so decide since God is fundamentally in control.<sup>94</sup> Of course, one reason religions abound in paradox is that they are in the business, at least in part, of explaining fundamental gaps in our information about and our understanding of our worldly circumstances.<sup>95</sup> To take but the most obvious single example: we are

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92. Another way to state this sense of perceptual incompleteness is to argue that our logical capabilities as a whole are a kind of tautology—that is, a system of rules with internal consistency that nevertheless cannot produce a verification or justification of itself. The best and most basic example of a tautological system is mathematics, which is a subject of our logic. Its lack of an internal verification is captured in Gödel's Theorem, which has recently been explained at something approaching the layman's level in a lengthy and interesting fashion in D. HOFSTADTER, *supra* note 51. Professor Hofstadter also recognizes and discusses in many places in the book the inevitable link between this tautological limit and the existence of logical paradox. But he rejects the notion that we, unlike computers, can ever "jump out of ourselves." *Id.* at 477. Instead, we can achieve only a "lesser ambition": "[O]ne can certainly jump from a subsystem of one's brain into a wider subsystem." *Id.*; see also *id.* at 478-79.

The religious implications of the tautologous character of much of our reasoning processes is an important theme in the work of Paul Tillich. See, e.g., P. TILICH, *BIBLICAL RELIGION AND THE SEARCH FOR ULTIMATE REALITY* (1955).

93. See, e.g., C.S. LEWIS, *MERE CHRISTIANITY* 56-61 (1960).

94. See, e.g., D. BONHOEFFER, *THE COST OF DISCIPLESHIP* 68-69, 73-74, 90-91, 93-94, 99, 105 (R. Fuller & I. Booth trans. 1949).

95. The concept that faith goes beyond mere ordinary thought is central to the work of Søren Kierkegaard. In S. KIERKEGAARD, *FEAR AND TREMBLING* (W. Lowrie trans. 1941), he notes that "faith begins precisely there where thinking leaves off." *Id.* at 78. He develops this idea into what he terms the "teleological suspension of the ethical." *Id.* at 79-101. Also, on the need for myths and symbols to express the paradoxes of reality, see H.R. NIEBUHR, *BEYOND TRAGEDY* 3-24 (1938).

Of course, such paradoxes have prevented other philosophers from experiencing religious faith. See, e.g., W. ALLEN, *supra* note 88, at 31 ("Not only is there no God, but try getting a plumber on weekends."); and W. ALLEN, *Selections from the Allen Notebook*, in *WITHOUT FEATHERS* 7, 10 (1976):

And how can I believe in God when just last week I got my tongue caught in the roller of



composed of matter that has no discoverable origin of its own.

Some would assert that such beliefs represent attempts to avoid rather than confront, understand, and perhaps come to terms with the harsh realities of life by abandoning logical principles and retreating into a piety that guarantees mental peace in a chaotic and confusing world. No wonder the disputes between "believers" and "nonbelievers" are so bitter: each group contests the other's very perception of "reality," and the "believers" decline to support their position with factual data or recognized forms of logical argument.<sup>96</sup> Moreover, within this latter "faith" camp there are disputes even more bitter over the "true" nature of the land beyond logic. Having abandoned the common language of reason and proof, the believers seem to babble among themselves in endless, irreconcilable diatribe.<sup>97</sup>

But what have faith and law to do with one another?<sup>98</sup> What does belief in a fourth dimension beyond the three of our own logic mean to legal reasoning? Ultimately, it means we must recognize and accept a fundamental paradox: in certain instances, basic principles of justice, or visions of what the law "ought" to be, should not be based on what we human beings *are*, but on what we are *not*. That is, the normative focus should shift from characteristics we all *share* to characteristics

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an electric typewriter? I am plagued by doubts. What if everything is an illusion and nothing exists? In that case, I definitely overpaid for my carpet. If only God would give me some clear sign! Like making a large deposit in my name at a Swiss bank.

96. C.S. Lewis' position is rather different—that careful observation of how human beings behave in society is indeed a necessary first step in religious belief. C.S. LEWIS, *supra* note 93, at 17-39.

97. These arguments concerning the transition from three to four dimensions in reasoning are—not surprisingly—similar to those noted in our earlier discussion of the transition from two to three. Recall that the travelers beyond Flatlaw condemn Flatlawyers for their limited, distorted perception of legal reality, while Flatlawyers remain suspicious and skeptical of the array of competing theories that seem at times to demand conformity by the law rather than the other way around.

98. One convenient place for a reader to start on this general topic is H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974). In addition, several recent symposia have examined issues within the general topic of the connections, or lack of them, between law and theology. See *Symposium: Religion and Law*, 8 CAP. U.L. REV. 345 (1979); *Symposium on Religion and the Law*, 29 HASTINGS L.J. 1257 (1978); *Symposium: The Secularization of the Law*, 31 MERCER L. REV. 401 (1980). The relationship of law and Christianity has been considered in *A Symposium on Law and Christianity*, 12 OKLA. L. REV. 45 (1959), and *A Symposium on Law and Christianity*, 10 VAND. L. REV. 879 (1957); see also *supra* note 85.

The self-titled Critical Legal Studies Movement offers a good current example of the link between law and the more general sense of "faith" used here. Adherents of this movement claim that contemporary legal scholars and analysts are handicapped by a bias in favor of the instrumental use of the law by the privileged to maintain their position. The purpose of the Movement is to expose this bias and, to some extent, to suggest alternatives to it. But it is in this latter aspect that the Movement in fact turns out to have little of substance and interest to say. What recommendations they do make depend, as Professor Phillip Johnson has so well described in Johnson, *Do You Sincerely Want to Be a Radical?*, 36 STAN. L. REV. 247 (1984), on a leap of faith that they have yet to fully acknowledge.

that we, along with everything else in nature, *lack*.<sup>99</sup> At first glance this conclusion seems remarkably counterintuitive, and we must therefore approach it cautiously. Perhaps the best way to do so is to compare our approach to the fourth dimension with a recent analysis of legal reasoning that seems to reach very similar conclusions.

## 2. *Tribe's Analysis of Homocentricity*

Laurence Tribe and Nicolaus Copernicus have something in common. Copernicus, the sixteenth century Polish clergyman, physician, and astronomer, was the first scientist to argue forcefully the heretical view that the earth was not the center of the universe, but rather, that it revolved around the sun like the other known planets.<sup>100</sup> His discoveries badly rocked standard theological dogma which had always preached that our planet's central position proved mankind's supremacy in the natural order and our special relationship with God. After Copernicus, it was clear that either new proof was needed or that faith alone would have to suffice.

Similarly, Professor Tribe's article, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*,<sup>101</sup> is a forceful argument against the current "religiously" accepted view that the immediate needs and desires of the human race are the correct and only justification for the rules regulating exploitation of the earth's natural resources. Like our venture into the fourth dimension, Professor Tribe's project may face stubborn resistance. As he notes, "The widely held view that law exists for the purpose of ordering human societies, and for that purpose alone, may well prove an unassailable article of faith."<sup>102</sup> But assault it he does in an essay of great range and imagination, one that, like Abbott's *Flatland*, loses much in any attempt to

99. This point is developed later in Section I of Part C of the text, but one clarification is necessary here. The propositions concerning the foundations of justice summarized there are stated in the negative because for us, looking "out" from the third dimension to a dimension beyond, this is the form they must necessarily take. The same propositions I shall develop in Section I of Part C could be stated in the positive from the perspective of the fourth dimension looking "back." That is, although on the one (negative) hand we all lack the capacity to transcend in any complete sense the three dimensions developed in this essay, on the other (positive) hand, to focus on the Judeo-Christian theological element in my depiction of the fourth dimension, we all do share the characteristic of being loved by God.

100. See 5 ENCYCLOPEDIA BRITANICA 145 (1981).

101. Tribe, *supra* note 5. The title of the article comes from Professor Tribe's reaction to: the recent decision by Los Angeles County officials to install more than 900 plastic trees and shrubs in concrete planters along the median strip of a major boulevard. The construction of a new box culvert, it seemed, had left only 12 to 18 inches of dirt on the strip, insufficient to sustain natural trees. County officials decided to experiment with artificial plants constructed of factory-made leaves and branches wired to plumbing pipes, covered with plastic and "planted" in aggregate rock coated with epoxy.

*Id.* at 1315.

102. *Id.* at 1329.

summarize or condense. Nevertheless, a description of the central themes of the article can show the differences between Tribe's analysis of legal reasoning about the environment and our four-dimensional model of legal reasoning in general.

At first glance there seem to be many similarities. Not only does Tribe suggest in several places that problems in environmental regulation are the result of a lack of perspective,<sup>103</sup> but he also hints that the missing perspective may lie beyond our own logic. Indeed, he uses a logic-confounding paradox to introduce his new rationale for environmental policy: "What has been omitted [from present rationales] is, at base, an appreciation of an ancient and inescapable paradox: We can be truly free to pursue our ends only if we act out of obligation, the seeming antithesis of freedom."<sup>104</sup> As it turns out, Tribe resolves the paradox and therefore never finds it necessary to seek a resolution by abandoning or looking beyond logic.<sup>105</sup> He does not journey into what we have called the fourth dimension of legal reasoning. Yet because he comes so close, careful attention to the development of his argument illustrates not only the great range of thought possible within three dimensions of reasoning, but also the difficulty of leaping into a fourth.

103. See, e.g., *id.* at 1317, 1321, 1326. Professor Tribe also makes several references to "dimensions" of analysis in his piece, but his use of the term conveys a rather different meaning from that employed here. See *id.* at 1318, 1319, 1322.

104. *Id.* at 1326. Part of the paradoxical nature of Professor Tribe's observation is created by the way in which he states it. "Freedom" and "act[ing] out of obligation" seem to be logical opposites, but *freedom* and *acting within the limits imposed by obligation* are not necessarily antithetical. Indeed, Professor Tribe later resolves the paradox by arguing that we will experience "true" human freedom when we feel a certain "coherence over time and community with others" based on "shared commitments to principles outside ourselves . . . principles that are capable of evolution as we change in the process of pursuing them." *Id.* at 1338 (footnotes omitted). That is, we are still free even when acting within the prescribed limits of obligations imposed from beyond our own immediate, homocentric perspective. See *infra* text accompanying notes 125-30.

Arthur Leff wrestled with a paradox very similar to that described by Professor Tribe. In Leff, *Unspeakeable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, he opened with the following thoughts:

I want to believe—and so do you—in a complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously. I also want to believe—and so do you—in no such thing, but rather that we are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be. What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it.

I mention the matter here only because I think that the two contradictory impulses which together form that paradox do not exist only on some high abstract level of arcane *angst*. In fact, it is my central thesis that much that is mysterious about much that is written about law today is understandable only in the context of this tension between the ideas of found law and made law: a tension particularly evident in the growing, though desperately resisted, awareness that there may be, in fact, nothing more attractive, or more final, than ourselves.

*Id.* at 1229.

105. See *supra* note 104.

We can begin our assessment of Tribe's article with the flaw he identifies in present patterns of reasoning about environmental policy: Our reasoning lacks a perspective which is located somewhere outside the individual human will. In essence, the problem is that we humans think we are entitled to mold the world to suit our purposes. All environmental principles have become human centered, or "homocentric":

The translation of all values into homocentric terms thus creates two distortions: First, an inchoate sense of obligation toward natural objects is flattened into an aspect of self-interest; second, value discontinuities tend to be foreshortened. . . .

The distortion occurs . . . because the process of interest identification . . . takes place in the context of a system of attitudes and assumptions which treat human want satisfaction as the only legitimate referent of policy analysis and choice. These assumptions, and the desire for analytic clarity which accompanies them, together exert an enormous reductionist pressure on all values which would otherwise seem incommensurable with a calculus of individual human wants. Thus the distortion results not from a logical flaw in the techniques of policy analysis but rather from . . . the ideological bias of the system in which such analysis is imbedded, a system that has come to treat the human will and its wants as the center around which reason as calculation must revolve.<sup>106</sup>

Professor Tribe's recommendation for removing the distortion of homocentricity is to place a more sophisticated and enlightened form of human reason at this allegorical "center." Thus, human desires would become only one of several relevant, orbiting factors.<sup>107</sup>

But the form of reasoning Tribe chooses shows the crucial distinction between his analysis and that of this Article. In his ultimate dependence upon human reason (no matter how much his suggestions may improve upon it), Professor Tribe demonstrates his commitment to only the first three dimensions of our model. As we shall see, he in fact specifically rejects the kind of alogical approach that would be demanded by a move beyond our own reason.

In the most complex and challenging portion of his article, Tribe argues that the bias and distortion of homocentricity "lie deep within the Western philosophical and theological tradition."<sup>108</sup> He identifies two basic branches of "religious consciousness" as the source of our present difficulties: "transcendence" and "immanence."<sup>109</sup>

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106. Tribe, *supra* note 5, at 1332.

107. *Id.* at 1338-39.

108. *Id.* at 1332.

109. *Id.* at 1332-38. For another discussion of the theological concepts of transcendence and immanence and their possible relationship to law and legal systems, see R. UNGER, *supra* note 55, at 76-86. For a further discussion of Unger's thoughts, see *infra* note 146.

According to Tribe, the "consciousness of transcendence," which "characteristically perceives God as an other-worldly entity—one standing apart from, and above, the world,"<sup>110</sup> suggests three approaches to environmental issues. The first would "regard natural and social phenomena as entirely appropriate objects of human manipulation and will, at least insofar as humanity is viewed . . . as uniquely participating in the divine."<sup>111</sup> A second, less libertarian view of man's role as the agent for the transcendental God would posit "a divinely inspired stewardship"<sup>112</sup> upon us. A third approach would simply end the dichotomy between God and humanity by "herald[ing] the death of God." A "secularization of transcendence"<sup>113</sup> would result, in which the individual would replace God: "[W]hen God is absent, the 'grand manipulator' must move the world not according to values divinely revealed but in accord with ends ultimately private to each person and empty of intrinsic significance because not derived through any dialogue beyond the self."<sup>114</sup>

Since some current manipulations of our environment—for example, using plastic instead of real trees to beautify our highways<sup>115</sup>—demonstrate serious flaws in our reasoning, Tribe seems to conclude that either the first or the third of these approaches is at least partially to blame. The first, however, has had little serious academic support in recent years. In contrast, the third, "secularized" approach has been widely acclaimed and much discussed. Tribe points to John Rawls<sup>116</sup> as a proponent of this approach, and we could add from among the multitude of more recent contributors Alan Gewirth<sup>117</sup> and David Richards.<sup>118</sup> The third approach, then, most accurately reflects current attitudes toward religious consciousness. Having rejected divine guidance, Rawls and others seem to be attempting to perfect instrumentalism,<sup>119</sup> or the use of law as a means to a (human) end.

Professor Tribe, however, sets aside the second, "stewardship" approach to transcendence without further comment. He does not explore the possibility that this approach could be a potential solution to environmental problems, perhaps because he considers it too vague or too weak a foundation for a *legal* pronouncement on environmental

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110. Tribe, *supra* note 5, at 1333.

111. *Id.*

112. *Id.* at 1334.

113. *Id.*

114. *Id.*

115. *See supra* note 101.

116. Tribe, *supra* note 5, at 1335 (citing J. RAWLS, *supra* note 53).

117. *See, e.g.*, A. GEWIRTH, REASON AND MORALITY, *supra* note 64.

118. *See e.g.*, D. RICHARDS, SEX, DRUGS, DEATH AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION (1982).

119. Tribe, *supra* note 5, at 1335-36.

issues. But the stewardship approach appears vague and weak only because it depends upon a leap into the fourth dimension of reasoning—if you will, a leap of faith. For the moment, we shall follow Professor Tribe's lead and bypass this issue<sup>120</sup> as we continue to examine the path of his reasoning.

HAVING despaired of transcendence as a foundation for environmental law, since in its prevalent individualized, secularized form it leads to choices made "without commitment to principle,"<sup>121</sup> Tribe then explores the opposite religious consciousness of "immanence."<sup>122</sup> This concept posits that the divinity we should worship is not other-worldly, but immanent in all that is. In other words, all things have their own holiness which demands respect. However, as Tribe notes, the unfortunate result of this approach is a worship of the status quo:<sup>123</sup> The "immanence" approach does not permit human beings to change the environment—in the name of progress or apparently for any other reason—when the existence of other creatures or entities is thereby threatened. As Tribe puts it, immanence "freez[es] the social evolution of humanity into its contemporary mold. . . . Unless evolving human consciousness and will are recognized as legitimate and indeed vital parts of the natural order, there can exist only sterility and paralysis, negating all possibility of critique and progress."<sup>124</sup> Thus, we encounter a new problem: while secularized transcendence makes the varying whims of mankind the foundation for environmental exploitation, immanence preserves the environment at our expense—in effect, it exploits *us*—by failing to take account of mankind's changing and evolving nature.

What we need, then, according to Tribe, is some synthesis of transcendence and immanence in which neither individuality nor the status quo is sanctified.<sup>125</sup> However, Tribe does not believe that a synthesis of transcendence and immanence will produce any particular result; to the

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120. See *infra* text accompanying notes 172-76. The existence of environmental problems does not, of course, necessarily mean that we have in fact failed to take a stewardship approach in the past. It could be that we *have* taken this approach but administered it badly, so as to create, not solve, these problems. Although this is a possibility, it is not particularly consistent with the history of our use of our environment as I understand it.

121. Tribe, *supra* note 5, at 1338.

122. *Id.* at 1336-38. For another discussion of this concept in addition to those cited by Professor Tribe, see C.S. LEWIS, *supra* note 93, at 44-45.

123. Tribe, *supra* note 5, at 1337-38.

124. *Id.* at 1338.

125. *Id.* His solution, oddly enough, bears a striking resemblance to the concept of utopia developed by Robert Nozick, R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974), a philosopher with whom Tribe probably has little else in common. Nozick rejected any unitary view of utopia, since no individual's conception of the ideal society could ever be shared by all members of any society. Instead, he argued that utopia must be a mass of individual utopias, a situation in which each person has the opportunity to pursue and develop his or her own version of the perfect life.

contrary, such a synthesis will demand that *no* particular scheme or set of principles gain permanent ascendance. Instead, "a synthesis requires the sanctification . . . of *evolving processes of interaction and change*";<sup>126</sup> that is, we must worship flexibility itself, but with a permeating sense of principle:

To be free, it seems, is to choose what we shall value; to feel coherence over time and community with others while experiencing freedom is to choose in terms of shared commitments to principles outside ourselves; but to make commitments without destroying freedom is to live by principles that are capable of evolution as we change in the process of pursuing them. . . . One might think of the evolving framework as a multidimensional spiral along which the society moves by successive stages, according to laws of motion which themselves undergo gradual transformation as the society's position on the spiral, and hence its character, changes.<sup>127</sup>

But if Tribe's recommended synthesis is to be something more than simply an improved three-dimensional analysis, it must be based on, as he put it, "commitments to principles outside ourselves."<sup>128</sup> The critical question is: What does Tribe mean by "outside"? Unfortunately, his article gives no clear answer. The origin, nature and basis of these principles remain strikingly vague. While he notes at one point that "[t]he 'way of acting' to which we commit ourselves" following a successful synthesis of transcendence and immanence "must therefore be a process valued in large part for its intrinsic qualities rather than for its likely results,"<sup>129</sup> he only hints at the nature of these intrinsic qualities. At the synthesis of transcendence and immanence, "conceptions like harmony, rootedness in history, connectedness with the future, all seem more pertinent than the ultimately conventional concept of 'the natural.'"<sup>130</sup>

This conclusion, if a conclusion it is meant to be, prompts a number of comments. First, Tribe's conception of an improved rationale for environmental regulation is purely procedural, and not at all substantive. That is, the actual content of our environmental policies does not matter so much as the *process* which produces them and which can change them in the future.<sup>131</sup> So long as the principles at work in the environmental arena convey a sense of timelessness, these principles are by his definition "outside ourselves"—meaning outside our

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*Id.* at 309-34. John Mackie once quipped that this meant that to Nozick, all the world should be California. Lecture by John Mackie at Oxford University (Fall 1979).

126. Tribe, *supra* note 5, at 1338 (emphasis in original).

127. *Id.* at 1338-39 (footnotes omitted).

128. *Id.* at 1338.

129. *Id.* at 1339.

130. *Id.* at 1340.

131. As Professor Dan Tarlock has expressed it, "Tribe's . . . ultimate proposal is not a re-

present, individual selves—and thus justify our decisions, even though these decisions might in fact lead to significant destruction of the environment. Yet Tribe indeed exhibits here a kind of “faith”—not the transcendental faith of our fourth dimension, but the general faith in mankind relied upon by the economist who believes that the “invisible hand” of enlightened self-interest will inevitably lead individuals and whole societies in the right (that is, efficient) direction.<sup>132</sup> Similarly, Tribe seems to believe that commitment to a process of evolutionary development based on nonhomocentric guiding principles will inevitably “improve” the world. But we can only hope for this result, because Tribe arms us with no specific immutable principles to challenge decisions that, although generated and justified by Tribe’s nonhomocentric process, may destroy the environment. In other words, there is nothing in Tribe’s process-oriented rationale that would support the condemnation of particular environmental policies such as selling federal lands for development or permitting offshore drilling. Officials who implement these policies are safe if they claim to be seeking a balance or “harmony” between our interests and those of our neighbors, ancestors, or descendants.

A second comment: Though the hazy guiding principles of “harmony, rootedness in history . . .” and so on may be “outside ourselves” in the sense of requiring consideration of things outside our individual selves, they are not transcendental in the sense of requiring consideration of factors beyond our humanness—things beyond the ken of our five senses and the capabilities of our logic.<sup>133</sup> Thus, at the most fundamental level, Tribe’s analysis and conclusions remain within the realm of three dimensions. This result is dictated by his decision, as noted earlier, to limit the concept of transcendence to its secularized form and to neglect the less secular and more fourth-dimensional forms of transcendence. But must we assume the death of

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turn to a simple set of first principles but a dynamic, noninstrumental process of choice.” Tarlock, *supra* note 5, at 460-61.

Professor Tribe has reemphasized his primary focus on the “good” of process in a number of subsequent articles. See Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 18-19; Tribe, *From Environmental Foundations*, *supra* note 5; Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); see also Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972).

132. See, e.g., R. POSNER, *supra* note 61, at 48-115.

133. At least one commentator, however, has suspicions that Tribe does propose to transcend logic: “I do not fully understand Tribe’s analysis, but in many ways it seems to be a reaffirmance of transcendentalism and a kind of instrumental pantheism. Just as Daphne fled Apollo, the god of reason, by having her father transform her into a laurel, Tribe seems to flee reason.” Tarlock, *supra* note 5, at 460.

Professor Tarlock finds fault with Tribe for wishing, like Goethe’s Faust, to be “freed from knowledge and its pain.” *Id.* In light of my earlier analysis of art as transcendence, I find it ironic that Tarlock chooses a line of poetry to criticize transcendence in another form of human activity.



God? Must we be satisfied with a process-oriented rationale for environmental law that Tribe ultimately develops? Where might we be led instead if we explored these fourth-dimensional forms?

*C. The Substantive Content of a Transcendent Perspective*

Perhaps we shall never be able to comprehend in full measure that which is by definition beyond our logical capacities. In other words, it may be inevitable that the best understanding of the fourth dimension we can achieve—the best picture of the elusive tesseract or hypercube of legal reasoning we can make—is one without substantive content. But this conclusion cannot simply be assumed. Instead, we must ask these fundamental questions: What *is* the best approximation of multidimensional reality that we can make in our three-dimensional world? And what effect does the debate about this approximation have on *legal* argument?

Professor Tribe's nonsubstantive, process-oriented rationale for legal decisionmaking is an example of the concessions we are so readily willing to make when debate turns to arguments that cannot be "proved" by standard scientific methods.<sup>134</sup> These concessions have a name—"moral relativism"<sup>135</sup>—and they permit us to avoid contention in areas of fundamental significance. For example, since we espouse the view that, with few exceptions, no one's religious beliefs are "superior" or "inferior" to those of others, a debate about the nature and implications of some transcendental reality will get nowhere since no one could "win" the argument. Thus, rather than placing any value on the *outcome* of the debate, we feel satisfied if the debate can even occur. Moreover, we believe that if we have enough of these debates—if we continue to honor the procedures that permit them to take place—then whatever beneficial accuracy any of these views of "deeper" reality may contain concerning the nature of our earthly circumstances will rise to the surface in an evolutionary manner.<sup>136</sup> Consistent with this belief is the fact that the catalogue of freedoms in the Constitution's Bill of Rights is primarily procedural in nature<sup>137</sup>—ensuring the debate itself—and not substantive in the sense of specifying any favored or prohibited ends of the political process.

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134. Properly speaking, science does not "prove"; it "disproves." See, e.g., K. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 33-41 (1963).

135. See, e.g., Brandt, *Ethical Relativism*, in 3 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 36, at 75.

136. Such was the theory of freedom of speech espoused by Alexander Meiklejohn. See A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Similar thinking is also of central importance to economic theory. See, e.g., Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950).

137. See J. ELY, DEMOCRACY AND DISTRUST 88-101 (1980).

Some may reasonably conclude, then, that Professor Tribe's procedural model is the best "shadow" of any larger, more complex reality. It is the "best" shadow not because it will tell us what that reality is, but first, because it will improve legal debate by making us more sensitive to our homocentric bias and more eager to reduce it; and second, because it will encourage us to focus on this improved debate itself and to abandon the endless and victorless controversies over substantive ends. Although this may seem ironic, it may well be that we can approach the reality that transcends our logic only by *relying* on our logic to reduce the effect on policymaking of our overemphasized and quite variable human desires.

Such a timid conclusion, however, is unsatisfactory. There is, after all, no guarantee (Richard Posner's arguments to the contrary<sup>138</sup> notwithstanding) that principles of "justice" or "rightness" in the deepest philosophical or theological sense will emerge triumphant in the nasty struggles within three dimensions. My conclusion is different: there are at least a few substantive normative principles<sup>139</sup> that can be generated just from our acceptance of fourth-dimensional analysis. The remainder of this section will make some preliminary suggestions for what those principles might be and how they might relate to "justice" and "law." The discussion will be preliminary in the sense that I do not pretend to have explored all the avenues that the dimensional analogue suggests.

### 1. *Negative Equality*

Through various techniques, recent philosophical writings have consistently postulated the necessity of some sense of human equality to a meaningful theory of justice. John Rawls imposed equality on the parties in his "original position" by using his famous "veil of ignorance" to strip away their extraneous, egocentric human characteristics.<sup>140</sup> Alan Gewirth identified certain elements of action as "generic" to all conscious activity, and from that commonality has developed a

138. See R. POSNER, *supra* note 61, at 60-87.

139. Arthur Leff's poetic statement of dismay over the prevailing notion that no principle of rightness or justice can be adequately justified is now famous. Leff, *supra* note 104, at 1249; see also Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981). The skeptics and cynics still prevail, of course. See, e.g., Hazard, *Commentary on the "Fundamental Values" Controversy*, 90 YALE L.J. 1110, 1110 (1981):

But natural law is not self-defining . . . For who is the authoritative expounder of natural law in any of its formulations? It used to be God, but He is now dead, or perhaps living in the Sun Belt. In any case He speaks in many tongues—as the Ayatollah has recently demonstrated. "Natural law," "fundamental values," "neutral principles," "preferred positions"—all are formulations that exclude while they include, and so imply alternatives, and so are not peremptory in any ultimate sense.

140. J. RAWLS, *supra* note 53, at 11-22.

complex concept of morality and justice.<sup>141</sup> Ronald Dworkin identified his guiding normative principles as "equal concern and respect"<sup>142</sup> and "treatment as an equal,"<sup>143</sup> and illustrated a way of ensuring equality by means of a hypothetical "auction" taking place in a setting much like Rawls' original position.<sup>144</sup>

Equality of a somewhat different sort is a fundamental tenet of our four-dimensional analogue. Although to make this distinction may sound like arguing over whether the cup is half full or half empty, my approach stresses the equality among human beings in what they are *not*, rather than in what they are.<sup>145</sup> The characteristic we share is the universal inability to escape the confines of our logical, three-dimensional analyses in anything like the way the Square briefly escaped Flatland. We are doomed to understand any "higher" sense of reality beyond our logic only in the imperfect terms and images of three dimensions. We are all equal, then, in what we cannot do or achieve.<sup>146</sup>

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141. A. GEWIRTH, *REASON AND MORALITY*, *supra* note 64.

142. R. DWORKIN, *supra* note 35, at 273.

143. *Id.*

144. Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 285-90 (1981).

145. An interesting comparison may be made with the kind of negative equality that H.L.A. Hart had in mind when he developed a "minimum content" of natural law. Hart identifies five common characteristics of human beings that demonstrate that legal and moral systems with certain minimal substantive rules against killing, theft, etc., will "naturally"—i.e., as a matter of natural fact—develop. Interestingly, four of the five characteristics are labeled in negative form, or in terms of what humans "lack" one way or another: "human vulnerability," "limited altruism," "limited resources," and "limited understanding and strength of will." H.L.A. HART, *THE CONCEPT OF LAW* 189-93 (1961). The one that is stated in more positive form is, however, equality, which he refers to as "approximate equality." *Id.* at 190. But Hart's descriptive exercise is rather different from mine, for I also call into question the completeness of the very logical capabilities that produced these conclusions (circles within circles?), a matter Hart does not, of course, take up.

146. What I have termed "negative equality" is, on this analysis, very roughly equivalent to what theologians would call "original sin." The "orthodox interpretation" of this concept holds "that in original sin man lost an original gift of divine grace which 'stains' his present natural endowment of rationality and freedom of will." *DICTIONARY OF PHILOSOPHY AND RELIGION*, *supra* note 89, at 530. For a more thorough description of this concept from the Catholic perspective, see 4 *SACRAMENTUM MUNDI* 328-33 (K. Rahner ed. 1975). Concerning the negative form of this element of equality, see also *supra* note 99.

Roberto Unger has argued that natural law theories based on "transcendental religion" generate more potential substance and controversy for the concept of equality than I develop here:

Transcendent religion also contributes to the extraordinary significance the ideal of generality has for a legal system. Because natural laws are believed to apply to all countries and periods, the precepts they dictate must be addressed to very broadly defined categories of persons and acts. Therefore, generality in stating the rules of positive law and uniformity in applying them serve as a testimonial of fidelity to the higher law rather than as mere administrative convenience. . . .

Unless the theology of the salvation religions draws distinctions between the elect and the damned, it will tend to assert that all individuals have an equality of essential worth derived from the universal fatherhood of God. This theological doctrine under-

This negative sense of equality has some important implications. By focusing on a characteristic we all lack, we can avoid the egocentric and homocentric nature of other concepts of equality to some extent. As a result we can also avoid the misplaced emphasis and undue reliance on the concept of equality found in all current liberal theories of justice. This imbalance has generated a number of difficulties. For example, the requirements for inclusion in the category of equals can be so general and so vague that very different substantive conclusions concerning specific issues can be generated from virtually identical starting points;<sup>147</sup> or the idea of equality is taken to be self-evident and not in need of further explication;<sup>148</sup> or equality is imposed artificially in order to generate certain attractive conclusions.<sup>149</sup> Indeed at least one

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mines the legitimacy of every system of rules that determines an individual's entitlements and duties on the basis of membership in a social rank. In this sense, it places an extraordinary emphasis on the generality of the laws. Nevertheless, the political and the legal meaning of the religious notion of equal worth is irremediably ambiguous. Its ambiguity brings out the double-edged character of the commitment to generality in law.

On one interpretation, an abstract generality satisfies the ideal of equal worth. The fewer the distinctions the law makes among categories of persons or acts, the greater the respect shown for the ideal of equal worth. Men with similar duties and entitlements under the same rules have been recognized as equals even though their actual social experiences and their degrees of access to power and wealth may differ sharply. Thus, equal worth turns into formal equality.

On another interpretation, however, the moral equality of individuals requires an equalization of their actual social circumstances. To achieve substantive equality, one may have to treat people who are in different situations differently; to give, for example, prerogatives to disfavored groups. Differential treatment of this kind represents a departure from the ideal of formal equality, and it goes against the conception of generality which this ideal implies.

R. UNGER, *supra* note 55, at 80-81.

147. For example, one could compare the pro-welfare state conclusions reached by Alan Gewirth in *Reason and Morality*, *supra* note 64, or in a condensed version in *The Basis and Content of Human Rights*, 13 GA. L. REV. 1143 (1979), with the opposite, very libertarian/conservative conclusions reached by one of his former students in Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979), and Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245 (1979). Both authors accept as a starting point Professor Gewirth's belief that all substantive rights flow from the concept of purposive action according to his modified form of the Golden Rule—what he calls the Principle of Generic Consistency. Gewirth and Pilon disagree on everything else, however, and most fundamentally on what counts as "action."

148. This assumption characterizes much of Ronald Dworkin's earlier work. See, e.g., R. DWORKIN, *supra* note 35, at 150-83, 266-78; see also Posner, *Lawyers as Philosophers: Ackerman and Others*, 1981 AM. BAR FOUND. RESEARCH J. 231, 246-47. I remain unconvinced that Dworkin has established any deeper justification for the principle of equality in his more recent work. See Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Dworkin, *supra* note 144; Dworkin, *What Liberalism Isn't*, N.Y. Rev. of Books, Jan. 20, 1983, at 47; Dworkin, *Why Liberals Should Believe in Equality*, N.Y. Rev. of Books, Feb. 3, 1983, at 32.

Similarly, Robert Nozick sees no need to justify the opening assertions in *Anarchy, State, and Utopia*, *supra* note 125, that everyone is equal in the sense of possessing certain basic rights. See *id.* at ix, 10.

149. John Rawls seems to me to do just this when he imagines a "veil of ignorance" equalizing the parties in the "original position." See J. RAWLS, *supra* note 53, at 11-22.

scholar, having despaired of being able to give the concept of equality any independent content, has been led to conclude that the term is worthless and harmful.<sup>150</sup>

"Negative equality," on the other hand, seems at first to be a much more limited and much less ambitious idea. As the next three sections will show, the universal absence of fourth-dimensional perception should generate only two normative principles and two critical observations concerning normative conclusions. The principles are: the tolerance of others' efforts to achieve, or at least explore, that perception (implying a public right to freedom from interference with these efforts); and the good of knowledge founded on observation and logical inference. The critical observations are the necessity of skepticism concerning three-dimensional normative conclusions, and in relation thereto, the appreciation of paradox itself as a potential source of normative meaning.

Before I discuss these separate implications of negative equality in more detail, however, a more inclusive point needs to be made. Beyond the principles to be developed below, the lack of fourth-dimensional perception does not demand that we give protection to any characteristic that humans *do* possess, or that we accord to human beings in and of themselves any particular respect or freedom that can be translated into specific public policies. This is not to say that such policies can never be generated, but we must recognize that those policies are based on our limited three-dimensional perspective. Negative equality, then, seems to require no more than an "equality of tolerance," or an official "neutrality," as opposed to something like Ronald Dworkin's "equal concern and respect."<sup>151</sup>

On the other hand, a four-dimensional analysis is in some ways *more* ambitious than its three-dimensional counterpart. That is, even if one accepts Dworkin's propositions that concern and respect are required because of, or are based upon "equality," then *negative* equality demands concern and respect for not only human beings, but for *all* entities trapped within a limited and imperfect perspective of three or

150. He has been led to say it several times, however. See, Westen, *To Lure the Tarantula from Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983); Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 605 (1983); Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982); Westen, *supra* note 63, at 537. As one can tell from these titles, most of this series is prompted by the criticism of his thesis by other scholars. See Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); D'Amato, *Comment: Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983); Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983).

151. See R. DWORKIN, *supra* note 35, at 272-74. On the limited, and insufficient, substance Dworkin ascribes to the concept of neutrality, see Dworkin, *What Liberalism Isn't*, *supra* note 148.

fewer dimensions.<sup>152</sup> This broadening of the category of equals may seem to stretch the terms "concern" and "respect" (and the related notion of "autonomy") beyond anything we could properly understand or meaningfully implement. Despair on this point, however, is premature. In the final section I will explore the possible impact this expansion could have on a legal issue.

## 2. *Tolerance and Fourth-Dimensional Experience*

In our dimensional model, the first three dimensions by definition capture all the "facts" about the world that our powers of logic and reasoning can discover. By contrast, and also by definition, whatever we cannot perceive in these three dimensions of analysis is potentially within the realm of the fourth, transcendent dimension. Even if we accept the existence of this fourth dimension only for the sake of argument, we must concede that as human beings, trapped within three dimensions as the Square of Flatland was trapped within two, we cannot "know" reality in its fullest, most complete sense.

But there are many who profess to have such visionary knowledge, or to have methods of reaching it, or at least to be in pursuit of it. What attitude should we take toward such individuals and their followers? If we consider our shared condition of limited perception and relative ignorance, our attitude could only be one of tolerance, not just because one of these visionaries may be right, but because within three dimensions we have no convincing way of determining which one is right and to what extent.<sup>153</sup> Thus, no one of us should be able to impose his or her personal version of full moral reality on others. Aggregating this individual conclusion across society means, then, that public (that is, officially imposed) morality within three dimensions must reflect our incomplete human perception in the form of "official" tolerance—a liberty granted and guaranteed to all to explore and express the reality that may lie beyond our logic.<sup>154</sup> One clear substantive right

152. I do not mean that all those entities would be equivalent to one another or would have "equal rights," but only that all would be entitled to consideration in ways they may not be now. See *infra* text accompanying notes 174-76.

153. Taking Iris Murdoch only slightly out of context: "Tolerance is connected with being able to imagine centres of reality which are remote from oneself." *MEN OF IDEAS*, *supra* note 77, at 284. Also note that Edwin Abbott thought that "modesty" might follow from the realization of the existence of more than three dimensions. See *supra* note 69.

One might attempt to argue precisely the opposite—that some people's visions of a higher dimension of reality could justify their *intolerance* of those who refuse to believe their visions. This intolerance could only be justified by people claiming to have discovered the *actual substance* of fourth-dimensional reality. But I argue the contrary: that we can *not* in any complete sense comprehend the nature of reality in its non-three-dimensional levels. What we can perceive is the *existence* of a dimension beyond the normal three, and tolerance follows from our knowledge that we cannot perceive more.

154. A recent example of a theory that incorporates a fourth-dimensional perspective to reach

that follows from our dimensional analogue, then, is a right to experiences and pursuits that transcend three-dimensional reality.

In contrast to the great bulk of current literature,<sup>155</sup> my claim for tolerance is not dependent upon or the byproduct of some philosophical theory based on "personhood," or something like it, in which respect for others and individual autonomy are the fundamental principles. Instead, the relationship between tolerance and these other concepts seems to be quite the opposite. Tolerance of fourth-dimensional experience is the antecedent requirement, for it is based on the more fundamental recognition of the *limits* of our understanding. Respect, autonomy, and other aspects of three-dimensional justice can then be established upon a more secure foundation, even though their detail is not specified by the existence of the fourth dimension.

### 3. *The Good of Knowledge*

The principle of tolerance and the right to transcendent experience, and any ensuing propositions of respect and autonomy for all entities in three dimensions, are all limited by yet another principle: the good of the pursuit and acquisition of three-dimensional knowledge.<sup>156</sup>

One of the lessons of the analogy between levels of reasoning and physical dimensions is that one level or dimension necessarily builds upon, and is understood in relation to, other levels or dimensions. That is, just as one cannot understand height and depth without first understanding length and width, neither can one assign some conceptual phenomenon to the logic of the fourth dimension without first knowing what is contained in the first three. One cannot know what is meant by "faith" until one knows what the limits of one's logic really are.<sup>157</sup> Thus, even the fervent believer in a reality beyond our three-dimensional grasp should be forced to the conclusion that the true nature of that extended analysis can only be understood and appreciated in relation to a full understanding and appreciation of three-dimen-

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conclusions concerning equality and tolerance slightly narrower than my own is D. GERMINO, *POLITICAL PHILOSOPHY AND THE OPEN SOCIETY* (1982). Professor Germino takes as axiomatic that there is a transcendental level of reality, and that human beings feel its pull. He recommends that society become an "open society" whose symbols and benchmarks are human dignity and equality. These represent the affirmation that all humans have the potential for fellowship with the transcendental reality of human existence. *See id.* at 25.

155. *See, e.g.,* the works cited *infra* in notes 140-41, 144, 147-49.

156. For a somewhat similar, but much more thorough, treatment of this subject, see J. FINNIS, *supra* note 4, at 59-80.

157. That is why there are so many agnostics in the world: as modern science explains more and more of the nature of our existence, less and less seems within the province traditionally reserved to God, and many await the final outcome of these scientific explorations to see if *anything* lies beyond our logical capabilities.

sional inquiry. The pursuit of knowledge is therefore a fundamental human good, for it puts the fourth dimension itself in perspective.<sup>158</sup>

There seems, then, to be an inherent tension between the previous principle of the good of fourth-dimensional experience and the present principle of the good of three-dimensional knowledge. Indeed there is, but it is a necessary, healthy, and instructive tension. Faith helps keep our knowledge from becoming too sanctimonious, while knowledge helps keep our faith from devolving into dogmatism. Yet where direct conflicts between faith and knowledge arise, we must have a way of resolving the conflict. What result, for example, if some religious group seeks to replace, rather than merely supplement, the theory of evolution with the Biblical version of creation in public school classes, or if some scientific group seeks to have religious training for children prohibited? At the most general level, these two "goods," faith and knowledge, should be permitted to prevail within their own dimensions. This means that the requirement for tolerance need extend only to those fourth-dimensional experiences which are not so directly inconsistent with basic three-dimensional knowledge that they create a threat to the moral and public order based on that knowledge. We need not, for instance, permit religious worship which uses human sacrifice as a method for altering weather patterns, changing the tides, or guaranteeing a good harvest. Correspondingly, the pursuit of knowledge should only be curtailed in the name of transcendental values in those situa-

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158. My colleague Frank Alexander has argued to me that from a theological perspective, knowledge can hardly be labeled a "good." See, e.g., *Genesis* 2:16-3:24, in which mankind eternally loses favor with God by eating of the fruit of the tree of knowledge in direct disobedience to His command. Instead, Professor Alexander suggests that my argument is simply about the three-dimensional "utility" of knowledge—that is, its usefulness in the instrumental sense of helping us achieve various worldly goals. I believe his point of view to be too limited. His comment assesses knowledge solely from the perspective of a fourth-dimensional belief in a transcendent reality beyond our knowledge. From that perspective, there is nothing particularly "good" about three-dimensional knowledge in and of itself. I, on the other hand, assess knowledge from all four of my allegorical dimensions, and conclude that an understanding of the fourth dimension will necessarily depend, at least in part, on our understanding of the first three. That is, my concern in this part of the Article is with those aspects of full four-dimensional reality that can be translated back into and understood in our ordinary world of three dimensions. As John Finnis puts it, the focus here is on "the evaluative substratum of all moral judgments." J. FINNIS, *supra* note 4, at 59. Viewed from that perspective, knowledge is a substantive, fundamental moral "good" in and of itself, regardless of the actual direction within three dimensions in which it takes us. To again defer to Professor Finnis, we must:

distinguish knowledge as sought for its own sake from knowledge as sought only instrumentally, i.e. as useful in the pursuit of some other objective, such as survival, power, popularity, or a money-saving cup of coffee. . . . Any proposition, whatever its subject-matter, can be inquired into (with a view to affirming or denying it) in either of the two distinct ways, (i) instrumentally or (ii) out of curiosity, the pure desire to know, to find out the truth about it simply out of an interest in or concern for truth and a desire to avoid ignorance or error as such.

*Id.* at 59-60. It is in the latter sense that I too label knowledge a "good."



tions in which "four-dimensional order" would be threatened. But while we can identify the public order of three dimensions, we cannot "know," within our three dimensions, the nature of a full four-dimensional order. Therefore, there could be no public (governmental) prohibitions on the pursuit of knowledge in the name of religion.

Marginal cases in which the tension between faith and knowledge will be troubling are of course inevitable. For example, a religious group might wish to introduce the Biblical version of creation in school texts along with, rather than as a replacement of, scientific theories regarding the origins and development of matter, the universe, and life on this planet. The "creationist" example is not a clear case of direct conflict between faith and knowledge only because these scientific theories cannot be "proved" to the satisfaction of the ordinary person in quite the way that the causes of weather and tides can be studied and demonstrated. Thus, a fourth-dimensional perspective is offered, it could be argued, not so much to challenge existing scientific data, but to explain, if not fill in, the gaps in scientific knowledge. This seemingly unobjectionable compromise is questionable, however. Teaching the Biblical version of creation suggests that pursuit of additional three-dimensional knowledge concerning the evolution of our species is not a worthy enterprise for an inquiring mind. I would argue precisely the opposite—that to move closer to a true sense of the potential content of fourth-dimensional reality requires just this sort of scientific investigation.

Of course, the members of any particular religious group should be free *privately* to reject any scientific conclusions, and condemn any scientific pursuits, that are in conflict with their faith-based beliefs, as long as they create no threat to public order. But such groups should not be able to translate their concerns into public prohibitions. Instead, any restrictions on the pursuit of three-dimensional knowledge should be based only on three-dimensional concerns.<sup>159</sup>

#### 4. *Skepticism and Paradox*

One of the more worrisome implications of our dimensional analogue is that we must view principles of justice derived from only the first three dimensions of problem analysis with a measure of skepticism. We must understand them as the limited products that they are, and recognize that when three-dimensional data are scarce, these prin-

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159. For example, we might curtail research in nuclear physics because such work might make possible nuclear weapons whose deterrent benefit we determine to be less than their destructive cost, or we might regulate genetic engineering in order to avoid the potentially catastrophic environmental impact of someone's miscalculation. But neither of these decisions could be justified simply by the assertion of someone's view of the "will of God."

ciples may be legitimately (that is, rationally) rejected as premature. Professor Tribe's article is an excellent illustration. He recognized that the coexistence of freedom and responsibility presented a paradox,<sup>160</sup> but he then resolved that paradox with a compromise that emphasized procedure rather than the substance of either.<sup>161</sup> In contrast, while the fourth-dimensional perspective suggests at least some content to the concepts of freedom and responsibility, even more fundamentally, it suggests that we could *retain* the paradox as a more accurate reflection of analytic reality. It may not be possible to resolve the paradox within three dimensions, at least with the data at hand; perhaps we should then accept the paradox as the limit of our logical powers. This does not mean that the fourth-dimensional perspective provides *the* answer to the paradox, or *no* answer. Rather, it suggests that an answer exists outside our logic, that the existence of paradox can itself be a central source of meaning.

I do not argue, however, that the fourth dimension is the "true" or only source of values or meaning—that is, the only source of normative propositions of right and wrong. If it were, then moral relativism would be inevitable: since we could not "know" four-dimensional reality in the three-dimensional sense of observation and proof, each of us would adhere to his or her own private transcendent principles. Instead, I must reemphasize that we cannot understand the fourth dimension apart from the other three. These three can themselves lead us to conclusions about right and wrong, and to a belief in a dimension of reasoning beyond the limits of traditional logical processes that does not require us to reject conclusions reached by these processes. For example, practical issues like the workability or comprehensibility of some legal rule, or moral issues such as the fairness of a rule are relevant even in a debate which considers the substantive demands of transcendent principles. The point is that these third-dimensional issues are not necessarily the *only* ones that are relevant; therefore, they should not necessarily determine the outcome of the debate.

This is a hazy and troublesome point. When or how should the practical and moral concerns generated by three-dimensional logic *not* determine the outcome of a controversy? I shall argue here only a limited proposition: that transcendent principles are relevant at the highest levels of abstraction in moral and legal argument. The concept of transcendence may have little impact on the issue of whether it is fair or practical to require that wills be witnessed by two rather than three people, but the concept does raise serious questions about the substance of "fairness" and perhaps even of "practicality." It challenges the prev-

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160. See *supra* text accompanying note 104.

161. See *supra* text accompanying notes 125-30.

alent tenet of classical liberalism that all individual desires are morally arbitrary, and that therefore what is fair and practical is what is best for society or desired by most of its members. The fourth-dimensional perspective discredits this modern "pragmatic instrumentalism."<sup>162</sup> It proposes that human actions can be judged by values that transcend the conventional wisdom of the day.<sup>163</sup> This is, of course, a very, very old

162. The phrase "pragmatic instrumentalism" was coined by Professor Robert Summers to describe the view that the law is a collection of tools which we use to achieve external goals determined by democratic processes or by the social sciences. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 863 (1981); see also R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982). Other authors however, have taken on the task of pointing out the questionable moral basis upon which this worship of rationalism is founded. Professor Tribe's *Plastic Trees* article, *supra* note 5, is of course one example, see *id.* at 1325-26, 1329-30, and two very recent articles are also of considerable importance. See Johnson, *supra* note 98; MacIntyre, *Moral Philosophy: What Next?*, in REVISIONS, *supra* note 4, at 1. As Professor MacIntyre states the problem:

It is characteristic of most modern morality that it does not presuppose—or at least its theorists tend to unite in denying that it presupposes—any agreement on what constitutes the good life for human beings.

. . . [T]he kind of philosophical theory according to which underlying each moral judgment there is a choice in which the individual is at the most fundamental level unconstrained by good reasons, precisely because his or her choice expresses a decision as to what is to count as a good reason for him or her—provides at once a rationale for what many ordinary moral agents take to be their situation and the latest, most radical version of a thesis about morality that has its origins in the eighteenth century divorce of moral philosophy from philosophical psychology.

. . . . .  
The self's capacity for choice thus emerged as its salient moral characteristic; and later writers have so focused upon that characteristic that it has sometimes appeared as though it were the self's only, or almost its only, moral characteristic. The consequence has been a deeply impoverished view of the relevant dimensions of character and agency.

*Id.* at 8-10.

163. This Article is therefore a small salvo in the attack on the problems identified by Alisdair MacIntyre:

It is not, so to speak, that we are able to weigh the rival claims on some moral set of scales and that they turn out to be of equal weight; it is rather that there are no scales. And lacking such, all talk of "the balance of moral considerations" is bound to be vacuous. But what does it mean to say that there are no scales?

The problem is not that we lack abundant means for justifying the claims to authority of particular moral rules. The problem is perhaps that we have all too many such means and that they provide quite disparate and incommensurable forms of justification. . . .

. . . [W]e do not lack rational justifications of particular rules; but we do not know how to organize these into a hierarchy whose form would exhibit some overarching unity in our moral lives. We are, so it appears, rationally impotent in the face of genuine dilemmas, where rival rules embody considerations whose authority competes for our allegiance.

. . . . .  
. . . A part of moral philosophy and moral psychology must therefore be concerned with how we do come to see things as they are, the variety of ways in which we may fail, the variety of causes of failure, and the kind of discipline that can overcome these obstacles. How do we learn to see differently?

MacIntyre, *supra* note 162, in REVISIONS, *supra* note 4, at 5, 6, 13; see also *infra* text accompanying note 168.

proposition for which I am simply presenting a somewhat new argument.

#### *D. The Nature of a Four-Dimensional Analysis*

As a final step in this investigation of legal and moral reasoning, I must attempt to describe the nature and significance of a four-dimensional analysis of a legal issue. I have chosen an environmental issue to illustrate the differences between Professor Tribe's approach and my own.

Assume that the issue is whether publicly owned lands can and should be sold for private commercial development. The inquiry into "can" would of course begin at the first dimension. We would gather the data of positive pronouncements of law<sup>164</sup> supplied by the traditional sources: statutes, cases, EPA regulations, and so forth. It would progress quickly to Flatlaw where we would investigate the interrelationships among these bits of data and discover the pattern of environmental law as a whole, or at least those portions that appear at this stage to be relevant.<sup>165</sup> We could find our answer in an existing statute or previous judicial decision, in the strength of the analogy between our fact situation and situations covered by existing statutes or cases,<sup>166</sup> or in a principle we can identify as basic to these positive pronouncements of environmental law.<sup>167</sup>

However, to explain and justify our reliance on analogy or principle, we will have to look to the third dimension. Since law is not a purely independent, autonomous social phenomenon, we will have to judge the legitimacy of the analogy or principle by interpreting our legal data from the external perspective of some other discipline concerned with the accurate depiction of our earthly circumstances. For example, economic analysis might reveal a previously unrecognized pattern into which a decision to sell public lands would or would not fit. We may also look at our issue from a philosophical perspective, developing basic normative principles through logic and applying them to our legal data. These perspectives will not only help us to find an answer; they will also help us find and support a *new* answer when we are dissatisfied with one clearly given by an existing statute or binding precedent. That is, if we seek to change the law, we will almost inevitably need justification from extralegal sources.

The function of the fourth dimension is to put these third-dimensional arguments into perspective as well. It does so by calling into

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164. On the nature of "positive" data and "positivism," see *supra* note 36.

165. See *supra* text accompanying notes 30-41.

166. See H.L.A. HART, *supra* note 145, at 138-44.

167. See *supra* notes 35, 37.

question the completeness of our sense of what the law is or ought to be even after all these legal and extralegal exercises have been performed. As a first step, we will have to reexamine those values, based on immediate human concerns, somewhat as Professor Tribe suggests. But the distortions of homocentricity are only the most obvious manifestations of our steadfast belief (in matters of *public* moment, at least) in the centrality of logic to the resolution of our difficulties. A second step dictated by the four-dimensional analysis, then, will be to examine all the facts, values, and assumptions involved in the controversy from the perspective of an allogical "faith" in certain immutable, fundamental principles, the most general of which were developed in the previous section. To investigate and identify these principles, this analysis would, as I noted earlier, reject the assumption that the limit of the legal and moral inquiry is to be found in the moral arbitrariness—the incommensurability—of human desires.<sup>168</sup>

To grasp how we could apply fourth-dimensional analysis to the sale of public lands, we should contrast the conclusions it suggests with those reached by Professor Tribe. Tribe rejects the religious perspectives of both "transcendence" and "immanence,"<sup>169</sup> on the grounds that they only reinforce the current homocentric bias of environmental law. Instead, he favors a synthesis of these perspectives that rejects immutable principles and instead endorses "evolving processes of interaction and change."<sup>170</sup> He believes that such processes would at least produce principles that are "outside" our immediate individual desires and therefore of some lasting, substantial value.<sup>171</sup> Perhaps those principles would argue one way or the other on the issue of land sales, but it is of course difficult to tell.

In contrast, however, the fourth, "transcendent" dimension suggests that Professor Tribe may have been too hasty in abandoning substance in favor of procedure. A legitimate fourth-dimensional argument might be based on the "divinely inspired stewardship"<sup>172</sup> that Professor Tribe did not discuss. We might argue that all objects—animal, vegetable, and mineral—have something akin to "rights,"<sup>173</sup> and would be entitled to the expanded forms of respect and autonomy

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168. See *supra* notes 162, 163 and accompanying text. Our persistent dissatisfaction with this "arbitrariness" conclusion may be in itself evidence of the existence of a dimension of analysis beyond our logic.

169. See *supra* text accompanying notes 101-07.

170. See Tribe, *supra* note 5, at 1338, and text accompanying note 126.

171. See *id.* and text accompanying note 128.

172. See *id.* at 1334, and text accompanying notes 112, 120.

173. Note that economic analysis seems particularly appropriate to environmental issues since in easy cases where there is no clear or direct conflict *between humans* over use of some resource, there does not seem to be any clash of "rights" at all, but only a question of efficiency. This way of thinking is, of course, in part what Professor Tribe was attacking in *Plastic Trees*, *supra* note 5.

we identified earlier. According to our stewardship approach, the purpose of environmental regulation would not be to protect the earth's resources for *our* immediate benefit, or for the benefit of future generations of human beings; rather, our goal would be a static and exploitative environmental balance to which *all* entities, including human beings, would be entitled.<sup>174</sup> We would have to make the quite remarkable and perhaps alogical leap to the conclusion that environmental regulation should protect the "rights" of frogs, trees, and rocks.<sup>175</sup> Although this stewardship argument might also fail to resolve the question of land sales,<sup>176</sup> at least the attempt to articulate arguments based on substantive immutable principles would not be abandoned before it begins.

Our conclusion is oddly reminiscent then of Professor Tribe's procedural model, for the primary significance of fourth-dimensional analysis is not in the actual substance of the transcendent principles it reveals. After all, the substance we see will be only an imperfect and distorted "shadow" or "slice" representation of "true" four-dimensional reality. What counts at this stage is the explicit, honest articulation of these principles in policymaking contexts and the focused debate on them that would result. In essence, this Article, like Tribe's, makes a procedural rather than a substantive proposal: We should take our beliefs and values based on "faith" out of the closet. We should grant the same legitimacy to debates about law among the proponents of fourth-dimensional, transcendental principles as we do to the debates about law that rage among the disciplines in the third dimension. In doing so we will not suddenly acquire and be able to implement a nonhomocentric perspective, for we are after all largely confined to our three dimensions of logical reasoning. Instead, we will gain a new understanding of what it is to be human. That is, we must examine the perspective in which faith puts all other perspectives.

In characteristic academic fashion, we seem to end up here with more questions than answers. But I take comfort in the observations

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174. I must note that in recent years other scholars have been attempting to develop a nonhomocentric basis for environmental law and ethics that is distinct from the perspective offered in this article. See Lombardi, *Inherent Worth, Respect, and Rights*, 5 ENVTL. ETHICS 257 (1983); Spitzer, *Justifying a Respect for Nature*, 4 ENVTL. ETHICS 255 (1982); Taylor, *In Defense of Biocentrism*, 5 ENVTL. ETHICS 237 (1983); Taylor, *The Ethics of Respect for Nature*, 3 ENVTL. ETHICS 197 (1981). For a fictionalized (indeed, science-fictionalized) account of such an alternative, see I. ASIMOV, FOUNDATION'S EDGE (1982).

175. See Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

176. For example, even someone who adopts the stewardship approach will nevertheless have to go through the costly and difficult process of gathering information and choosing among alternative courses of action. Belief in transcendent principles will not make the lessons of other disciplines go away. It will simply put them in perspective.

provided by earlier stages in our allegorical journey through legal reasoning. Advancing to a second and then a third dimension of legal reasoning did not end the debate over what the law "is" or "ought" to be; instead, these steps further focused the issues and hence intensified the debates. So it is with the fourth dimension. We should expect the debate about transcendental values to be at least as lively as controversies within other dimensions of legal reasoning.<sup>177</sup> But instead of suggesting what tone we should take or what conclusions we should reach, I am simply proposing that we begin the discussion.

### CONCLUSION

Some readers may have found the final sections of this Article so much like a sermon that they expect it to end with a benediction. It won't. Instead, I will conclude with a warning—the same one that accompanied the move into three-dimensional legal reasoning. Just as distortion and incomplete understanding of the law can occur when we attempt to develop theories of law from the third-dimensional perspective of an academic discipline without fully analyzing the legal rules and concepts of the other two dimensions, so too there is a danger of too much "faith" where the social institution of the law is concerned. Fourth-dimensional reasoning may have its uses, but to begin and end with transcendent principles would be as limited an exercise as the myopic stringing together of legal rules in the first dimension. I do not seek to replace the first three dimensions of legal reasoning with a new one; rather, I seek to supplement and complement these other dimensions with one that attempts to reach beyond, and hence make more humble, our powers of logic and reason.

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177. Perhaps they will be even more lively, since the foundation for each position taken in the debate will be outside the realm of logic, which usually sets the boundaries for any argument of policy. With the range of propositions remarkably expanded, the possibility for any consensus or resolution at this esoteric level may seem remote or even hopeless. However, while I have never asserted that the introduction of fourth-dimensional arguments would make policymaking easier, I also do not accept the idea that such arguments would make the task impossible. Fourth-dimensional propositions about justice, like third-dimensional ones, must take account of and be constrained by our understanding of the substantive parameters of the preceding dimensions. Transcendence does not require the total abandonment of logic and reasoning. To the contrary, as I have argued, it requires meticulous attention to those powers so that their limits may be appreciated.