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The Good, the Law, and the Municipal Ideal - An Integrative Developmental View of The Case of the Speluncean Explorers and the Crisis of Meaning in Western Jurisprudence

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THE GOOD, THE LAW, AND THE MUNICIPAL IDEAL

An Integrative Developmental View of *The Case of the Speluncean Explorers* and the Crisis of Meaning in Western Jurisprudence

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ABSTRACT

For centuries, law had been understood as something sacred, transcendent, a set of righteous directives emanating from a divine authority. Less than three hundred years ago, something strange happened. A handful of humans began to think a new type of thought: they conceived the law as a self-contained system understandable on its own terms, its merit determined only by its consistency with "reason," the correctness and supremacy of which was self-evident. Less than one hundred years ago, something even stranger occurred: another handful of humans directed their attention to thought itself and began creating knowledge about knowledge, writing language about language, and seeing that they were, in fact, creating what they saw. The "reality" they found was that money, politics, tastes, ego, and identity were shaping reality, and they "realized" that laws were constructed and capricious things, just like them. What did this mean?

What happened? How could law and morality, and our understanding of them, change so radically, so rapidly? It is easy to forget that human beings had no formal concept of law for most of our history: we designate the time before law, the vast majority of our time on Earth, as "pre-historic." What changed? The answer: we did, as did our environment, as did our means of production. Law is a product of the way we view the world, the way we identify with each other, and the way we respond to our technological, economic, and productive capacities. Drawing from biogeography, developmental psychology, legal history, and using Lon Fuller's famous "legal fiction" as an illustrative device, I present an integrated way of understanding what law is, how it came to be, and where it might be going, against the backdrop of large-scale historical developments in human understanding and techno-economic structures.

Part I of the article introduces Fuller's *The Case of the Speluncean Explorers* and its philosophical themes. Parts II and III describe the evolution of social structures and modes of production, and the correlating developments in consciousness throughout human history. Part IV then integrates our understanding of legal history with this developmental perspective, and Part V elaborates on the diversity of our current
approaches to jurisprudence, presenting a coherent system through which these legal perspectives may be understood. Part VI then applies this "meta-perspective" in the form of a judgment to *The Case of the Speluncean Explorers*, demonstrating how an integrative developmental view enables us to make more flexible, rational, and ultimately, just decisions in law.
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THE GOOD, THE LAW, AND THE MUNICIPAL IDEAL

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INTRODUCTION

Human societies have undergone dramatic structural upheavals throughout history. This has resulted in profound changes across all domains of human knowledge in how reality itself may be understood. These "interior" psychological, cultural, and moral shifts, in turn, influence further "exterior" revolutions in technological, economic, and political structures, and these changes are reflected in the development of law and jurisprudence.

It seems that what is true, just, and legal from one perspective can easily be perceived as irrational, unjust, or illegal from another. Whereas in the days of Plato and Aristotle, a patriarchal society dependent on slave-labor was viewed as perfectly natural and good, it would now be repugnant to Western sensibilities. The very idea of a "Natural Law," taken for granted for centuries by scholars and philosophers, is today something of a quaint notion: how can we say that there exists a law set by nature, that there are universal standards for morality and being, given the variability of human societies and values across time and space? If, as Oliver Wendell Holmes found, the good is "a purely municipal ideal of no validity outside the jurisdiction," would it not be the height of presumption to claim that there is an absolute standard of goodness, a natural way to be, embedded in the universe which only some people recognize?

Recognizing that justice depends on context, and knowing how dramatically law and morality have changed over time, the question "naturally" arises: is a discussion of the good relevant to legal analysis at all? With the myriad of motivations and driving forces operating in the human psyche, is legal analysis itself even relevant to legal outcomes, or is it merely a gloss on political and economic interests?

These differences in perspective are not insignificant: they set the foundation from which legal practitioners reason, make decisions, and set policy. They are also not easily reconciled. In this article, I ask whether there is a way to view the law from a more inclusive vantage-point, or "meta-perspective," which would enable us to understand the origins and contributions of the various approaches to jurisprudence and integrate them into a coherent and applicable whole.

I believe that such a vantage-point exists. I attempt here to contextualize the law from a developmental perspective, one which views evolutions in jurisprudence and legal structures against the backdrop of historical revolutions in how humans organize themselves and perceive each other and the world. Law is understood very differently by societies at different levels of technological, economic, and political complexity, and this is reflected in their jurisprudence and legal practice.

I make four propositions:

1. That human societies, when they grow, develop organizational structures and techno-economic modes of production of increasing complexity.
2. This "exterior" structural development of human societies has a correlating and reciprocal "interior" aspect: concepts of morality, identity, causation, even thought itself evolve into more complex and comprehensive forms.
3. This exterior and interior development is reflected in the development of jurisprudence: law is a formal expression, exploration, and facilitation of moral and techno-economic needs.
4. Understanding this exterior and interior developmental continuum yields a form of "meta-contextual" reasoning capable of integrating conflicting perspectives into a coherent whole with practical application.

To demonstrate this form of reasoning, I ground the discussion in the context of a fictitious legal case, famous for its application to jurisprudence: Lon Fuller's The Case of the Speluncean Explorers.²

I. THE PROBLEM IN NEWGARTH

We begin our expedition at the cave discovered by "legal spelunker" Lon Fuller in early 1949. There, he found a group of companions, trapped, starving, with the knowledge they would not be rescued for at least ten days; they believed that the only thing to eat in that cave was one of their own. What was the right thing to do? Did they have any real choice in the matter? If they were rescued, how would they be judged? Was there a legal thing to do, and what was it? Were the right thing and the legal thing the same? Were they related or independent?

It is this dramatic and comprehensive exploration of some fundamental tensions in various approaches to law which makes The Case of the Speluncean Explorers a classic of jurisprudence. Fuller's article takes the form of a fictitious appellate court judgment in which five judges of the "Supreme Court of Newgarth" set out their reasons for upholding or overturning the murder convictions of four members of the "Speluncean Society." These four defendants were found by the trial court to have willfully killed and eaten a fifth companion, Roger Whetmore, while trapped in a cave.

Fuller included a rich set of facts inspired by two 19th century homicide-disaster cases, U.S. v. Holmes and R. v. Dudley and Stephens. In Holmes, the defendant tossed several people overboard to lighten an overloaded lifeboat, and in Dudley and Stephens the defendants killed a companion on a lifeboat and fed on his body for four days. Holmes was convicted of voluntary manslaughter, fined $20, and sentenced to six months in prison; he served his prison time but was spared the fine when pardoned by President John Tyler. Dudley and Stephens were convicted of murder and sentenced to hang; they were subsequently pardoned by Queen Victoria on the advice of the British home secretary, who had originally recommended their prosecution.

Fuller, however, did not simply borrow or re-arrange facts for his scenario; he changed the location, added a radio, gave the defendants reliable knowledge of their circumstances, and added case

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precedents, a Newgarthian history of social contract and civil war, the death of ten rescue workers, and
the "complex dance of Whetmore's consent." In so doing, he "fine-tuned the facts until they gave some
kinds of judges good grounds to acquit, and other kinds of judges good grounds to convict." This
allowed him to dramatically illustrate the legal philosophies of his day, where they agreed and disagreed,
and what concrete effect their application might have.

What, then, did the Supreme Court of Newgarth have to say about the ill-fated members of the
Speluncean Society? Chief Justice Truepenny's finding is simple and decisive:

It seems to me that in dealing with this extraordinary case the jury and the trial judge
followed a course that was not only fair and wise, but the only course that was open to
them under the law. The language of our statute is well known: "Whoever shall willfully
take the life of another shall be punished by death." … This statute permits of no
exception applicable to this case, however our sympathies may incline us to make
allowance for the tragic situation in which these men found themselves.

In his view, the law on murder is unambiguous: our sympathies are irrelevant to its application. The "fair
and wise" course would be to convict the defendants and sentence them to death. He understands,
however, that there is sometimes a need to "mitigate the rigors of the law" and for that he recommends, in
his capacity as Chief Justice, executive clemency: "If this is done, then justice will be accomplished
without impairing either the letter or spirit of our statutes and without offering any encouragement for the
disregard of law." He believes that convicting the defendants accords with both the letter and spirit of
the statute, and that justice would best be served by upholding the conviction if clemency is granted.

Foster J. takes a markedly different position. He would set the conviction aside on two grounds.
First, he finds that "the enacted or positive law of this Commonwealth, including all of its statutes and
precedents, is inapplicable to this case, and that the case is governed instead by what ancient writers
called 'the law of nature.'" In his view, the defendants reverted to a state of nature outside of Newgarth's
laws: when the "possibility of men's coexistence in society" becomes impossible, the force of "positive

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7 Ibid., 3.
8 Supra Fuller, para. 8.
9 Ibid., para. 9.
10 Ibid., para. 12.
11 Ibid., para. 13.
law" disappears. He cites the maxim *cessante ratione legis, cessat et ipsa lex*: "The reason for the law ceasing, the law also ceases." Secondly, he believes that even if Newgarth's laws apply, the defendants may have broken the "the letter of the law," but they did not break "the law itself." He distinguishes between the statute's words and its *purpose*:

> The statute before us for interpretation has never been applied literally. Centuries ago it was established that a killing in self-defense is excused. There is nothing in the wording of the statute that suggests this exception. Various attempts have been made to reconcile the legal treatment of self-defense with the words of the statute, but in my opinion these are all merely ingenious sophistries. The truth is that the exception in favor of self-defense cannot be reconciled with the *words* of the statute, but only with its *purpose.*

He concludes by emphasizing that this "purposive" method of interpretation raises no question of fidelity to enacted law, but is a form of intelligent fidelity which does not supplant the legislative will, but makes that will effective.

Neither the judgments of Truepenny C.J. nor Foster J. are enough to convince Tatting J. of the correctness of either side. He is divided both emotionally and legally:

> On the emotional side I find myself torn between sympathy for these men and a feeling of abhorrence and disgust at the monstrous act they committed. I had hoped that I would be able to put these contradictory emotions to one side as irrelevant, and to decide the case on the basis of a convincing and logical demonstration of the result demanded by our law. Unfortunately, this deliverance has not been vouchsafed me.

He finds Foster J.'s arguments to be "shot through with contradictions and fallacies": he is not convinced that the defendant's removed themselves from society, and asks that if they were so removed, where a Newgarthian court would find its authority to judge them. He finds Foster J.'s interpretation of the code of nature "odious" because, in his view, it places the law of contracts above the law of murder: it does not allow withdrawal from a contract, and it negates the doctrine of self-defense. With regard to purposive interpretation, Tatting J. finds this method too ambiguous. He states that criminal legislation has many

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17 He believes that under Foster J.'s reasoning, if Whetmore had killed one of his assailants, he would be a murderer, because his assailants were only exercising the rights conferred to them from their bargain.
purposes ascribed to it: deterrence, retribution, and rehabilitation. "Assuming that we must interpret a statute in the light of its purpose," he asks, "what are we to do when it has many purposes or when its purposes are disputed?" He finds, in addition, that in self-defense, there is no "willful" act, but rather a "response to an impulse deeply ingrained in human nature"; whereas in this case, the defendants certainly acted willfully with great deliberation and consideration. Finally, he wonders how far the scope of "exceptions" will extend if the court allows killing under certain circumstances. Tatting J. concludes that "almost every consideration that bears on the decision of the case is counterbalanced by an opposing consideration leading in the opposite direction." Beset with moral and legal paralysis, he withdraws from the case.

Keen J. begins by clarifying what, in his view, is not before the court. First, he states that it is not the court's function to comment on executive clemency, and that to do so is a "confusion of governmental functions." He does, however, recommend a full pardon for the defendants "as a private citizen." Secondly, he asserts that a judge's responsibility is to apply "the law of the land," not decide whether an act was "'right' or 'wrong,' 'wicked' or 'good.'" He believes that the difficulties surrounding the case arise from a failure to distinguish law from morality, and finds that Foster J. has put forth "a familiar line of argument according to which the court may disregard the express language of a statute when something not contained in the statute itself, called its 'purpose,' can be employed to justify the result the court considers proper." He then describes a time in the history of Newgarth when judges "did in fact legislate very freely," when the various ranks and functions of the state were not well-defined, the uncertainty of which resulted in civil war.

We all know the tragic issue of that uncertainty in the brief civil war that arose out of the conflict between the judiciary, on the one hand, and the executive and the legislature, on the other … in place of the uncertainty that then reigned we now have a clear-cut principle, which is the supremacy of the legislative branch of our government. From that
principle flows the obligation of the judiciary to enforce faithfully the written law, and to
interpret that law in accordance with its plain meaning without reference to our personal
desires or our individual conceptions of justice.  

Keen J. then describes Foster J.'s method of purposive interpretation as a "process of judicial reform.”
This process has three steps: first, "divine" some single purpose, (which "not one statute in a hundred
has”); second, "discover that a mythical being called 'the legislator,' in the pursuit of this imagined
'purpose,' overlooked something or left some gap or imperfection in his work”; and third, "to fill in the
blank thus created.” Because the purpose is not singular nor knowable, we cannot say that there is a
"gap" in the legislation which needs to be filled by a judge, and in doing so, Foster J. is "remaking" the
written law. Keen J. affirms the conviction and concludes on a moral note, which he admits is beyond
any duties he must discharge:

Hard cases may even have a certain moral value by bringing home to the people their
own responsibilities toward the law that is ultimately their creation, and by reminding
them that there is no principle of personal grace that can relieve the mistakes of their
representatives.

Handy J., the final member of the Court, is amazed at the "tortured ratiocinations to which this
simple case has given rise" and summarizes the tensions in his colleagues' decisions: "the distinction
between positive law and the law of nature, the language of the statute and the purpose of the statute,
judicial functions and executive functions, judicial legislation and legislative legislation.” Despite these
"learned disquisitions," he finds that they are not relevant to the case: “The problem before us is what we,
as officers of the government, ought to do with these defendants. That is a question of practical wisdom,
to be exercised in a context, not of abstract theory, but of human realities.” Outside of a few
"fundamental rules” or "abstract principles,” Handy J. believes that good judges should use their common
sense, take account of public opinion, and treat forms and abstract concepts as instruments, like "the good
administrator, who accommodates procedures and principles to the case at hand, selecting from among

24 Ibid., para. 54.
25 Ibid., para. 57.
26 Ibid., para. 63.
27 Ibid., para. 67.
28 Ibid., para. 68.
the available forms those most suited to reach the proper result."29 This preserves flexibility and keeps society stable by enabling judges and government officials to keep their actions in accord with those who are ruled. He acknowledges the criticism that taking mass opinion into consideration will harm the legal safeguards which insure truth, fairness, and rational consideration in a trial, but he finds that the "realities of the administration of our criminal law" already include considerations outside the rigid and formal framework of judicial rules; these include a prosecutor's decision to indict, a jury's decision to acquit, or a Chief Executive's decision to pardon, all of which may take public opinion into account.30

Handy J. also reveals that there is a "frightening likelihood" that the Chief Executive will refuse to pardon the defendants if the conviction is upheld. Given this likelihood, and considering public opinion and "common sense," he would set aside the conviction and sentence. He ends on a compassionate note, reminding the reader that the case is about "the life or death of four men who have already suffered more torment and humiliation than most of us would endure in a thousand years."31

With Truepenny C.J. and Keen J. upholding, Foster J. and Handy J. overturning, and Tatting J.'s withdrawal, the Supreme Court affirms, by default, the conviction and sentence of the Court of General Instances. Each ruling, however, arises from a different perspective on the nature of morality and law. Both judges who upheld the conviction affirmed the importance of the separation of law and morality and the executive and judicial branches of government. These are what we might consider objective or "positive" approaches to law: they distinguish between morality and law, and the functions of the legislature and the judiciary, and base their decisions on what they think the law is, not what it ought to be. Keen J.'s position is more "formal" than Truepenny C.J.'s, insisting, as he does, on a well-defined and pure separation between law and morality and branches of government. This is how he can recommend a full pardon "as a private citizen" but say nothing on the matter as a justice in his very judgment. Foster J.'s view is quite the opposite: he takes a more subjective or "natural" approach to law; while he accepts the distinctions outlined above, he also accepts that law is a social phenomenon, and that it arises in the

29 Ibid., para. 73.
30 Ibid., para. 78-79.
31 Ibid., para. 90.
context of social coexistence and morality. As such, there may be cases where it is inappropriate or unjust to apply the normal rules of society, and "purposive" interpretation, or interpretation which considers intent and asks why a law exists, may be required for its just and appropriate application. Handy J. takes a pragmatic or "realistic" view: he accepts that a judge's responsibility is to deal with the law as it is, and also that the law arises out of social coexistence; he thus finds that law is inseparable from political realities, and that he is not bound by what is written in statutes or precedents, nor by strict distinctions between branches of government or law and morality, but by the requirements of "practical wisdom" or "common sense." As a result, law is to him an "instrument," a tool with which to achieve social and political ends. Finally, Tatting J., in his considered withdrawal from the case, cannot find any firm moral or legal purchase from which to judge. He is beset by perfectly counterbalanced emotions and legal arguments, where every viewpoint is of equal relative value. The only judgment he can make is not to judge.

Here, we begin to appreciate the significance of Fuller's work. We see, in his five justices, the embodiments of five legal/moral approaches: Truepenny the positivist, Keen the formalist, Foster the naturalist, Handy the realist, and Tatting the relativist. In his postscript, Fuller makes his intention clear:

The case was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government. These philosophies presented men with live questions of choice in the days of Plato and Aristotle. Perhaps they will continue to do so when our era has had its say about them. If there is any element of prediction in the case, it does not go beyond a suggestion that the questions involved are among the permanent problems of the human race.

His article provides an "illustration of the problems which arise when the court is presented with an issue which seems unlikely to have been within the contemplation of the legislature when it enacted the basic rule. The language is relatively clear, but the simplicity of that rule is confounded by an unanticipated event." To understand what the law is and resolve how it is to be properly applied, each judge must draw on his understanding of the nature of law and its relationship with morality. The judges' attempts to define these are, not coincidentally, representative of the debates in legal philosophy happening in Fuller's

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time between Legal Positivism (and the related Formalism), Legal Realism, Natural Law, and what we might call some form of incipient Critical Legal Studies, insofar as Tatting J.

To understand how these legal philosophies came to be, we must move deeper into the cave and examine jurisprudence in the context of historical developments up to, and beyond, 1949.

II. SOCIAL STRUCTURES AND TECHNO-ECONOMIC MODES OF PRODUCTION

Fundamental to a comprehensive understanding of jurisprudence is the recognition that human societies develop organizational structures and techno-economic modes of production of increasing complexity. The development of law is intimately linked with the evolution of society. Cultural anthropologists have classified the spectrum of human societies in numerous ways; I shall use a scheme based primarily on the systems presented by Jared Diamond and Ken Wilber. Diamond identifies four broad types of societies: bands, tribes, chiefdoms, and states. Wilber further classifies states into agrarian empires, industrial nation-states, and emerging informational state-federations.

A. Bands

Bands are the oldest and smallest of human societies, consisting of 5 to 80 people, most or all of them closely related by birth or marriage. A band is, in effect, "an extended family or several related extended families." Bands have no permanent single base of residence; their land is used jointly by the whole group instead of being partitioned among sub-groups or individuals. They have no regular economic specialization, and all able-bodied individuals forage for food. There are no formal institutions such as laws, police, or treaties to resolve conflicts within and between bands. There is no social stratification into upper and lower classes, no formal or hereditary leadership, and no monopolies of information and decision-making. Any band "leadership" is informal and acquired through qualities such

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33 Jared Diamond is an evolutionary biologist and biogeographer; Ken Wilber is a philosopher and psychologist. Their work draws on the research of numerous scholars in diverse fields.

as personality, strength, intelligence, and fighting skills. All humans presumably lived in bands until improved technology for extracting food allowed some hunter-gatherers to settle in permanent dwellings in resource-rich areas.

B. Tribes

The tribe differs from the band in that it is larger and consists of hundreds of people, usually having fixed settlements. Tribes are made up of more than one formally recognized kinship group, called a clan, which exchanges marriage partners. The number of people in a tribe is still low enough that everyone knows everyone else by name and relationships; the fact that almost everyone is related by blood, marriage, or both helps to diffuse potential conflicts. Those ties of relationships binding all tribal members make police, laws, and other conflict-resolving institutions of larger societies unnecessary, since any two villagers engaging in an argument will share many kin, who apply pressure on them to prevent violence. Like bands, information and decision-making are communal, and there are no ranked lineages or classes. Tribes lack a bureaucracy, police force, and taxes; their economy is based on reciprocal exchanges between individuals and families, and economic specialization is slight: there are no full-time craft specialists, and every able-bodied adult participates in growing, gathering, or hunting food. Because tribes lack economic specialists, they also lack slaves, as there are no specialized menial jobs for a slave to perform.

C. Chiefdoms

Chiefdoms are considerably larger than tribes, ranging from thousands to tens of thousands of people. The large population is supported by food production in most cases. This size creates serious potential for internal conflict because the majority of people in a chiefdom are neither related by blood or marriage, nor known by name. As a result, chiefdom members are required to learn how to encounter

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36 Ibid., 270-71.
strangers regularly without attempting to kill them. Part of the solution is for one person, the chief, to exercise a monopoly on the right to use force: instead of the decentralized anarchy of a village meeting, the chief constitutes a permanent centralized authority, makes all significant decisions, and has a monopoly on critical information. Like tribes, chiefdoms consist of multiple hereditary lineages living at one site; but whereas the lineages of tribal villages consist of equal-ranked clans, in a chiefdom all members of the chief's lineage have hereditary perquisites. In effect, the society is divided into hereditary chief and commoner classes, and since chiefs have need of menial servants as well as specialized craftspeople, chiefdoms have many jobs that can be filled by slaves, typically obtained by capture in raids.\(^{37}\)

The most distinctive economic feature of chiefdoms is their shift from reliance solely on reciprocal exchanges to that of a redistributive economy, where the chief receives tributes from producers and redistributes a portion of goods and labor back to the chiefdom.

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chiefdom not on the verge of statehood developed writing. The most fundamental distinction between chiefdoms and states is that states are organized on political and territorial lines, not on kinship lines that define bands, tribes, and simple chiefdoms. Also, bands and tribes always, and chiefdoms usually, consist of a single ethnic and linguistic group. States, especially "empires" formed by amalgamation or conquest of states, can be multiethnic and multilingual. In later states, including most today, the leadership is often nonhereditary, as many states abandoned the system of formal hereditary classes carried over from chiefdoms.\(^{38}\)

In describing types of states, Wilber's agrarian "empire" corresponds with Diamond's "early state." Empires require large food stores and engage in intensive agricultural production. In addition to having a powerful hereditary leader, large-scale tax-collection, and slavery, empires have rigid social hierarchies and very formalized laws and bureaucracies.\(^{39}\) Wilber's industrial "nation-states," or Diamond's "later states," have literate elites, and most have literate masses. Much of their production takes the form of large-scale industrialization, and they develop policies around objective material goals. Leadership is generally nonhereditary, and social hierarchies, laws, and bureaucracies are more flexible. Modern industrial states are the only societies which formally abolished slavery after its extended use; they are also responsible for institutionalizing women's suffrage, minority rights, and independent judiciaries capable of ruling against the government.\(^{40}\)

With the aid of technological advances which increase the efficiency of production and information transfer, transnational federations of states are beginning to emerge. Transnationalism is driven by the necessity to protect the environment, regulate the world financial system, limit disease, and maintain international peace and security. These concerns can no longer be effectively addressed on the national level, and new structures are forming to cope with increasingly complex threats to prosperity and

\(^{38}\) Ibid., 279-81.
stability. It may be that to secure environmental, economic, and physical safety in the long-run, nations will be required to surrender some of their sovereignty to transnational bodies for the global good.  

E. Why Societies Grow Larger and More Complex

The average trend over the past 13,000 years is that human societies have seen the replacement of smaller, less complex units by larger, more complex ones. Large or dense populations arise only under conditions of food production, or at least under exceptionally productive conditions for hunting-gathering. All states nourish their citizens by food production. Societal complexity and food production stimulate each other by "autocatalysis": population growth encourages societal complexity, and this in turn encourages intensified food production and population growth. Stored food surpluses permit economic specialization and social stratification, and sedentary living facilitates the accumulation of substantial possessions, the development of elaborate technology and crafts, and the construction of public works.

Food production, then, encourages population increase and acts to make features of complex societies possible. Why do these larger societies develop more complex features, and why do they not simply maintain band or tribal organization? There are at least four reasons. First, the amount of potential conflict between unrelated strangers in a large society grows exponentially. Where there is a large number of possible two-person interactions without kinship bonds, and where conflict resolution is left to all of the society's members, the vast potential for outbreaks of murder and counter-murder guarantees destabilization. This factor alone would explain why societies of thousands can exist only if they develop centralized authority to monopolize force and resolve conflicts.

Secondly, as population size increases, so does the impossibility of communal decision-making. In a tribal community it is possible for everyone who wishes to speak at a village meeting to do so, but

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41 Ibid., 204-05. An example of this would be the European Union.
42 Ibid., 285.
43 Ibid., 286.
this feature is unworkable in larger communities; as a result, a large society must be structured and centralized to facilitate effective decision-making.44

Thirdly, pair-wise economic transfers become extremely inefficient in large societies, such that large societies can function economically only if they have a redistributive mechanism in addition to a reciprocal economy. Goods in excess of an individual's needs can be transferred from the individual to a centralized authority, which then redistributes the goods to individuals with deficits.45

Finally, increased population densities in any given area would cause the territory of bands in that area to shrink, and more and more necessities would have to be obtained outside the territory. Self-sufficiency within small densely-packed territories would become impossible, given the number of truces, alliances, trades, and marriages which would have to be negotiated as a result of constant contact between the groups. A densely populated region would require a large organized society to maintain its density.46

We have now established that societies, when they grow, develop into larger and more complex structures, and that this growth is a result of resource availability, an environmental factor. We have examined "exterior" changes in technological, economic, and political structures; let us now consider the "interior" psychological and cultural developments experienced at these various stages. Humans adapted to environmental variables and created the social structures we have been discussing: what were we thinking and feeling as we developed these societies? How did we transcend kinship bonds and submit to an unrelated central authority? How did our identities and ways of creating meaning change as we hunted and gathered, then grew crops, then built trains, and then streamed electromagnetic wave-particles across the world?

44 Ibid., 286-87.
45 Ibid., 287.
46 Ibid., 288.
III. STRUCTURES OF CONSCIOUSNESS

We turn our attention, now, to the development of human consciousness.

We … discover the real cause for the disintegration of all our inherited religious formulae. The center of gravity, that is to say, of the realm of mystery and danger has definitely shifted. For the … hunting peoples of those remotest human millenniums when the … presences of the animal kingdom were the primary manifestations of what was alien - the source at once of danger, and of sustenance - the great human problem was to become linked psychologically to the task of sharing the wilderness with these beings. An unconscious identification took place, and this was finally rendered conscious in the half-human, half-animal, figures of the mythological totem ancestors. The animals became the tutors of humanity. Through acts of literal imitation … an effective annihilation of the human ego was accomplished and society achieved a cohesive organization. Similarly, the tribes supporting themselves on plant-food became cathected to the plant; the life-rituals of planting and reaping were identified with those of human procreation, birth, and progress to maturity. Both the plant and the animal worlds, however, were in the end brought under social control. Whereupon the great field of instructive wonder shifted - to the skies - and mankind enacted the great pantomime of the sacred moon-king, the sacred sun-king, the hieratic, planetary state, and the symbolic festivals of the world-regulating spheres.

Today all of these mysteries have lost their force; their symbols no longer interest our psyche …. The descent of the Occidental sciences from the heavens to the earth (from 17th century astronomy to 19th century biology) and their concentration today, at last, on man himself (in 20th century anthropology and psychology), mark the path of a prodigious transfer of the focal point of human wonder. Not the animal world, not the plant world, not the miracle of the spheres, but man himself is now the crucial mystery. Man is that alien presence with whom the forces of egoism must come to terms, through whom the ego is to be crucified and resurrected, and in whose image society is to be reformed.47

In this eloquent description of the development of mythology and the human psyche, Joseph Campbell introduces us to the evolution of consciousness and identity as it proceeds through foraging, horticultural, agricultural, industrial, and informational epochs. Each social structure corresponds with a techno-economic mode of production and a worldview, or structure of consciousness. Wilber identifies a series of these structures: archaic, archaic-magic, magic, magic-mythic, mythic, mythic-mental, mental-perspectival, mental-aperspectival, and integral-aperspectival.48

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48 *Supra* Wilber, SES, 169-97, 218-72. Technically, a structure of consciousness generates a worldview, but the terms are interchangeable for our purposes. Wilber's stages are drawn from the work of Swiss philosopher Jean Gebser. I have modified the later stages for clarity: I replace the term "rational" with "mental," as Wilber has done in other works, and I treat the entering phase of his "integral-aperspectival" structure as distinct, calling it "mental-aperspectival" (see note 80). Wilber suggests that each structure of consciousness generates "a different sense of space-time, law and morality, cognitive style, self-identity, mode of technology (or productive forces), drives or motivation, types of personal pathology (and defenses), types of social oppression/repression, degrees of death-seizure and death-denial, and types of religious experience" (125).
A. Archaic and Archaic-Magic

The archaic and archaic-magic structures of consciousness correspond with the social structure of the survival band.49 The self-sense here is material, in that it is embedded primarily in the physical world of objects and bodies. The physical self and physical other are differentiated, but the mind - mental images and symbols - is an emergent phenomenon, and these images and symbols are initially fused and confused with the external world. This generates "magical beliefs": aspects of nature, such as clouds and wind, notice and listen to us; the world is filled with intentions which are centered on our own. We develop beliefs in which we endow things with consciousness and life: we can command nature and objects, like the moon or the sky, and they acquiesce to us with conscious intent. This worldview is "egocentric," in that it has difficulty finding truth outside the self through the exchange of perspectives. This structure generates a type of thought in which truth is confused with desire: there is a belief in the obedience of external things, and that desire can influence objects.50 This is a stage concerned with basic survival: food, sex, and safety have priority. The distinct self is only beginning to emerge, and survival is dependent on habit and instinct. This worldview is evident in the first human societies, newborn infants, and the senile elderly.51

B. Magic

The magic stage corresponds with ethnic tribes. "Magical" beliefs continue to dominate throughout this period. Emerging images and symbols do not merely represent objects: they are thought to be concretely part of the things they represent. A human at this stage regards her gestures, thoughts, and the objects she handles as charged with efficacy, so a certain word acts on a certain thing, and a

49 Note that we are discussing bands, tribes, chiefdoms, and mythic empires as they first appeared, and not as they are today, where many have been subsumed into larger social structures, are in constant contact with them, and have access to their technology and information.
50 Supra Wilber, SES, 218-24.
51 Supra Wilber, TOE, 9. The same basic structures of consciousness can describe an individual as well as the dominant stage of development of a collective (Wilber, SES, 154).
particular gesture will protect one from a particular danger.\textsuperscript{52} This stage is called "magical" because the mind and body are still relatively undifferentiated, and thus mental images and symbols are often confused or identified with the events they represent. Consequently, mental intentions are believed to "magically" alter the physical world, and physical objects possess "life" with personal intentions. In these societies, collective identity is secured by the members' ability to trace their descent to the figure of a common ancestor, which assures them of a common origin; individual identity is linked with that of the tribe, its customs and beliefs, and the natural environment. Members perceive the group as part of a nature interpreted through magical categories; since social reality is not yet distinguished from natural reality, the boundaries of the social world merge into those of the world in general.\textsuperscript{53} This view generates beliefs in curses, blood oaths, ancient grudges, good-luck charms, family rituals, superstitions, and is evident today in gangs, athletic teams, \textsuperscript{54} and the developing world.\textsuperscript{55}

C. Magic-Mythic

The magic-mythic stage is associated with chiefdoms, also called feudal kingdoms, and horticultural production.\textsuperscript{56} Here, the belief in the omnipotent magic of the individual subject - that the subject can magically alter the object - diminishes. Continued interaction with the world leads the subject to realize that her thoughts do not egocentrically control, create, or govern nature. This magical power, however, is transferred to other subjects, such as divine or omnipotent leaders, spirits, and gods. As a result, the subject creates a pantheon of "power gods" who are capable of doing what she cannot do herself. The focus now is on performing the proper rituals which will make these powerful others intervene in nature and alter the world for the subject. It is from this structure where the world's classical

\textsuperscript{52} Supra Wilber, SES, 225.
\textsuperscript{53} Ibid., 171.
\textsuperscript{54} This is not to say that athletic teams behave like tribes in terms of everyday life and subsistence. The structure of consciousness is simply present and emphasized in the adversarial team context. Each subsequent stage, as we will see, "transcends" and includes the last, so individuals and groups which inhabit later stages still have access to the capacities of earlier ones.
\textsuperscript{55} Supra Wilber, TOE, 9.
\textsuperscript{56} As opposed to full-scale agrarian production.
mythologies seem in large part to originate. The rise of the first early states was marked by an explosion in codified mythologies, which provided cultural meaning and social integration. Due to population increase, tribal identities were no longer adequately integrative, and the construction of a more abstract identity was necessary: this first took place through identification with a ruler who claimed close connection and privileged access to the mythological originating powers. This represented the emergence of a self distinct from a tribal identity, where feudal lords protected commoners in exchange for obedience and labor. This worldview is evident in feudal societies and among mercenaries.

D. Mythic

In the magical structure, personal identity is natural or body-based, and collective identity is blood-bound and established through kinship, particularly through a common ancestor. With the intensification of food production and the corresponding increase in population density, there was no tribal way to socially integrate conflicting interests, as people lacked a common ancestor or kinship lineage. With the rise of the mythological structure, personal identity switched to a role identity in a society of a common political ruler, and this ruler was given legitimacy not because of genetic relation but because of his or her special relation to mythological gods and goddesses: "mythic membership" in a holy empire. Under this arrangement, an enormous number of genetically unrelated tribes could be unified, something which the magical structure could not accomplish. A role identity supplanted a natural or bodily identity, and the subject learned her role and those of others in society, developing the capacity to understand the role of the other and mentally reconstruct that perspective. The locus of self-identity thus switched from being egocentric, or bodily, to sociocentric, or rule/role-oriented. This sociocentricity created "ethnocentricity": we are only "in" a culture, or a member of a culture, if we accept the prevailing mythology, and we are excommunicated if we do not embrace the dominant belief system. In this

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57 Supra Wilber, SES, 227-28.
58 Ibid., 176.
59 Supra Wilber, TOE, 9. Fully independent chiefdoms had disappeared by the early 20th century because they tended to occupy prime land coveted by states (Diamond 273).
60 Supra Wilber, SES, 176-77.
structure, there is no way a global culture can be conceived unless it involves imposing our particular mythology on all peoples. Members of the empire have meaning, direction, and purpose determined by an all-powerful Order, which enforces a code of conduct based on absolute principles of right and wrong. Violating this code has severe and perhaps permanent repercussions. This worldview is strongly conformist, paternalistic, and creates rigid social hierarchies. It is evident in Puritan America, Confucian China, Dickensian England, totalitarianism, codes of chivalry and honor, religious fundamentalism, and "moral majority" patriotism.

E. Mythic-Mental

The mythic-mental phase is significant: it introduces what we understand as the beginning of modern rationality. "Rationality" is difficult to define; cognitive psychologists and anthropologists have used the term to mean "formal operational cognition": the capacity not just to think, but to think about thinking. With this ability, we can reflect upon our own thought processes, and are to some degree "free" of them: we can transcend them, take different perspectives, entertain hypothetical possibilities, and become highly introspective. As a result of this ability to reflect, we seek to justify our thoughts and actions, based not simply on our roles in society or what we are taught, but rather, on a review of the reasons and the evidence, empirical or logical, for such thoughts and actions. Because we can reflect on

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61 Ibid., 233-35. Note that the current "liberal" political climate in academia and coastal urban centers abhors ethnocentricity, as it results in what we understand as racism, nationalism, fundamentalism, and sexism. Some scholars maintain that this mindset dehumanizes non-members of the cultural mythology and creates an "Other." What they may not appreciate, however, is that this stage actually creates a more inclusive "Self" than what came before, in that it supports peaceful dense populations of unrelated people, something the magic tribal structure could not do. The dehumanization of "Others" existed prior to the mythic worldview; in fact, the social structure with the highest number of "Others" is the band, because it supports the fewest number of co-existing people. We can view consciousness development as a progressive "Selfing" of more and more objects, or "Others." The mythic structure is an inclusive step that looks exclusive and damaging now because Western societies have moved into relativistic, "aperspectival" stages.

62 Supra Wilber, TOE, 9-10.

63 As opposed to "concrete operational cognition," where thought operates upon physical objects, or rules operate upon symbols and concepts. Here, "meta-thoughts" and "meta-rules" arise. I am using the terminology of Jean Piaget, an influential psychologist and philosopher, in his stage theory of cognitive development.
our own thoughts, and remove ourselves from them to some degree, our imaginative capabilities increase dramatically, and we are able to envision new possibilities and perspectives.\textsuperscript{64}

This capacity for critical reflection and hypothesis-creation is why rationality or "reasonableness" tends to be universal in character and highly integrative.\textsuperscript{65} If we wish to test the validity of some belief, we would want to know whether it holds true for people outside our cultural context. This, however, does not happen quickly: when reason begins to emerge from mythic thinking, the traditional mythological structures are first "rationalized," or propped up with what appear to be rational justifications. This mythic-mental space has several features: 1) rationality's universalizing tendency is first expressed in an attempt to extend a particular mythology to world dimensions, justifying military and economic conquest; 2) once conquered, people are usually given access to citizenship, including women, children, and slaves, but they cannot be "global" citizens unless the empire conquers the globe; and 3) conquered peoples who embrace the ruling mythology become citizens of the faith, but the non-faithful are still damned in the eyes of the dominant believers. Historically, this was an unstable position, because the collective identity was being secured by doctrines with a "rationally-supported" universal claim, and the political order had to be in accord with this claim, but the reality of other empires was incompatible with these supposedly universal claims. This created the conditions for the emergence of a true universal rationality which could secure mutual understanding between all peoples regardless of race, nationality, religion, or sex.\textsuperscript{66}

\textbf{F. Mental-Perspectival}

As rationality developed and spread, empires gave way to modern nation-states which formally recognized each others' sovereignty, establishing what we now refer to as international relations and

\textsuperscript{64} \textit{Supra} Wilber, SES, 179.

\textsuperscript{65} Note how a "reasonable standard" in law is considered "objective." This is a misnomer, as it is in fact "inter-subjective," that is, something agreed-upon between subjects. An objective standard would be measurable and definable: a speed, a weight, or some other "hard" classification. The reasonableness standard is what the judge, as a member of society, thinks is an acceptable standard of conduct, awareness, knowledge, belief, or intelligence in that society, under a particular set of circumstances, for the individual in question. This subjectivity is evident in the high degree of interpretation a reasonableness standard requires: the more objective an event or standard is, the less we need to interpret it. The more subjective the event, as in motive, values, or an act of communication, the more subjects are required to interpret other subjects.

\textsuperscript{66} \textit{Ibid.}, 183.
transnational law. The modern state rose from its mythological embeddedness and established the crucial separation of church and state, as well as the emergence of a global market economy. The development of the modern sciences resulted in industrialization, and religious and theoretical attitudes became reflective. An individual identity replaced a role identity: individuals were no longer identified by the simple and inflexible roles that they played in society, but rather, by their free choices, as free subjects, within the broad constraints of the law.  

Reason and reflection also facilitated the differentiation of mind from body and yielded a high level of abstraction. The mental structure recognized a realm of mind, or thought, and enabled the development of "modern" philosophy, modern art, scientific method, logic and mathematics, moral reasoning, political science, and corporate business structures. This occurred because modernity recognized and differentiated three irreducible domains of discourse: morality, truth, and aesthetics. Each required a different mode of inquiry to assess its validity: inter-subjective moral examination, objective scientific inquiry, and subjective aesthetic expression and apprehension. Each domain could pursue its own truths and aspirations, and as a result, the mental structure was able to generate liberal democracy, feminism, impressionism, the abolition of slavery, the ecological sciences, modern physics, and unprecedented medical advances.

67 Ibid., 183-85.
69 Note that feminism arose with industrialization. I believe feminist legal studies would benefit from a developmental perspective, as it would enable scholars to recognize the relationship between a society’s mode of production and its degree of gender equality. Agrarian societies were almost always patriarchal, since women could not participate equally in agricultural labor for fear of increased rates of miscarriage. This participative imbalance was then interpreted through a pre-rational, mythic perspective, which could only assume that this state of affairs was natural, eternal, universal, and just. This was not the case in foraging and horticultural societies, where women could participate in food production equally with men; with the advent of machine production, physical differences between the sexes were once again rendered insignificant, facilitating the potential for equal participation in the workforce. Understanding that these social structures developed in the face of harsh biogeographical pressures provides us with a more generous interpretation of gender history, such that we may cease viewing men as universal oppressors and women as universal victims.
Modernity also placed intense focus on objectivity and material efficiency. Objective truth, by virtue of its measurability and ease of universal confirmation, began to "colonize" the other domains of discourse.\textsuperscript{70} Morality and aesthetics were often reduced to efficiency, as productivity became society's primary and measurable concern.\textsuperscript{71} This worldview is evident in colonialism, materialism, liberal self-interest, and emerging middle classes around the world.\textsuperscript{72}

Rational modernist philosophy is "representational": it tries to form a correct representation of reality. The rationalist's goal is to picture this universal reality correctly.\textsuperscript{73} The assertion of a purely objective reality which could simply be described by an autonomous subject would be challenged, however, by the next development in consciousness and reason.

\textit{G. Mental-Aperspectival}

The aperspectival structure is associated with the rise of a strong "worldcentric" perspective facilitated by access to information and exposure to diverse cultural and linguistic contexts. It gave rise to the "postmodern movement" which in itself has multiple meanings. The term generally refers to a set of ideas defined largely by what its proponents reject: essentialism, hierarchy, rationality, representational knowledge, realism, metanarratives, and big pictures in general. Most of these rejections arise from three core assumptions: 1) reality is not in all ways pre-given, but is significantly constructed or interpreted ("constructivism"); 2) meaning is context-dependent ("contextualism"); 3) there is therefore no single correct perspective ("aperspectival").\textsuperscript{74}

Postmodernism finds that subjectivity is unavoidable. Everything which can be known can only be known by a knower; the knower perceives the known through a cultural and conceptual apparatus which constructs meaning. This can be something as simple as recognizing an object, to something as

\textsuperscript{70} Critical theorist Jürgen Habermas calls this the colonization of the lifeworld by the instrumental rationality of bureaucracies and market forces. Habermas, Jürgen. \textit{The Theory of Communicative Action}. Trans. McCarthy, Thomas (Cambridge: Polity, 1987).
\textsuperscript{71} \textit{Supra} Wilber, \textit{MSS}, 132-33.
\textsuperscript{72} \textit{Supra} Wilber, \textit{TOE}, 10.
\textsuperscript{73} \textit{Supra} Wilber, \textit{MSS}, 120-21.
\textsuperscript{74} \textit{Ibid.}, 186. Note that this is its own perspective, but it is a meta-perspective.
complex as understanding language. All knowledge, therefore, has an interpretive element. Whereas mental-perspectivism and modernity place great emphasis on objectivity and autonomy, mental-aperspectivism and postmodernity emphasize subjectivity and context: truth exists relative to the perceiver and the social order, and is affected by power.

In its extreme form, postmodernism found that knowledge itself is a social construct, that nothing has intrinsic meaning, that nothing is universal, and that no belief or value is truer or better than any other belief or value. It is at this point that the theory, or structure of consciousness, contradicts itself, as its own assertion would be purely a social construct, meaningless, relative, and no better or truer than any other. The structure becomes "aperspectival" without any unifying or integrating force. This "performative contradiction" results in philosophical paralysis, which leads to arbitrariness and inefficiency in social and political applications. It will, for example, suppress speech it perceives to be judgmental or hierarchical, but that very suppression is itself a form of judgment and hierarchical ranking. As such, the extreme postmodernist cannot justify her own moral or truth position because she cannot examine her own hidden absolute value rankings; she may therefore suppress or attack positions which do not align with her own personal tastes, losing credibility and fragmenting the social and consciousness structure. This worldview is found, in extreme and moderate forms, in animal rights activism, ecofeminism, post-colonialism, political correctness and diversity movements, human rights advocacy, Greenpeace, and Foucault/Derrida.

It is worth noting that the structures mentioned so far tend to view themselves as being exclusively correct: each believes it holds the best, truest perspective, reacts aggressively if challenged, and will move to eradicate the other worldviews if they come into conflict. It is easy to see how a mythic fundamentalist, a self-interested capitalist, and an aperspectival egalitarian may not become friends over lunch, if they will even sit down at the same table.

75 Ibid., 185.
76 Her "metanarrative against metanarrative."
77 Supra Wilber, TOE, 11.
78 Ibid., 12.
There is evidence, however, that an *integrative* aperspectival structure is beginning to emerge, and that consciousness need not be confined to a single perspective, even one as open as "rationality"; an individual at this stage is able to coherently negotiate multiple perspectives, acknowledging that any event can be understood in many ways, and that different methods of inquiry disclose different truths. At the same time, this structure recognizes that some absolute beliefs, value judgments, and hierarchies are unavoidable, and would seek to understand varying perspectives such that they form an integrated whole. This approach is systemic and respects the legitimacy of all social and consciousness structures: it understands that each is a crucial stage in human development and recognizes that technological, economic, and environmental contexts shape the consciousness and social rules which develop therein: tribalism, ethnocentricity, rational self-interest, and egalitarianism are all legitimate in their proper contexts, and each arises under different physical, psychological, and communicative conditions.

IV. THE DEVELOPMENT OF COMMON LAW JURISPRUDENCE

With this understanding of structural developments in consciousness and society, we have now set the foundation for our examination of the Common Law. What we recognize today as law requires written formulation, systematization, formality, and enforcement by a recognized authority. Modern courts and jurisprudence struggle to find law in pre-nation-state cultures because these hallmarks are almost entirely absent. In the case of bands and tribes, for example, power was not monopolized by a central authority, dispute resolution was informal and based on kinship bonds, and in all cases, writing

79 The "integral-aperspectival," structure in Wilber's terminology. He considers the structure I have called "mental-aperspectival" to be its entering phase. For example, I come to the realization that many of my judgments about the world may not be valid in other cultural contexts. I am transitioning here from a "perspectival" view to an "aperspectival" view. I find, then, that I am no longer able to confidently form judgments in general, since no one view is universally correct. I can no longer convincingly rank values or decide on the substantive function and content of any given process. I might conclude that the only "truth" that exists is that position which is supported by power. In my eyes, the law's main function could just as easily be the oppression of women, minorities, and the poor rather than the upholding of justice or order. I might eventually realize, however, that the decision not to judge, to rank values and functions equally, is in itself a strong judgment and value ranking, at which point I would ask why I have *exempted* myself from my position. Why is the legitimacy of my position not simply based on power working through me? My entire perspective would fall apart if this were the case. I would then seek empirical, logical, moral, and experiential evidence to justify the existence of certain hierarchies, value positions, judgments, and conclusions in an effort to integrate my aperspectival views into a more coherent and stable whole. This article is one such attempt.
systems did not exist.\textsuperscript{80} As Thomas Aquinas proposed in the 13\textsuperscript{th} century, "Law is nought else than an ordinance of reason for the common good made by the authority who has care of the community and promulgated."\textsuperscript{81}

Aquinas made this statement in an attempt to rationally reflect on religion, government, and law. In England, the development of law correlated with the development of the English medieval realm. Political thinking was stimulated by clashes between kings and the Church over their relative authority: these conflicts took the form of polemic resting heavily on law and legal argument, stimulating the ideological thinking which underlay the development of abstract notions of the state. The study of Roman law and the church's canon law from the late 11\textsuperscript{th} century provided much of the language and many of the ideas for thinking about the state. As we have seen, state authorities have a monopoly on legitimate violence; in the middle ages, law was only one method of resolving disputes. An alternative was to resort to violence. Rulers sought to limit or prevent such direct action and channel disputes through royal law. Law was also important in establishing a relationship between the king and his people as a whole, rather than merely the great men of the realm. This extended legal protection to the commoner classes and contributed to the erosion of the hierarchical application of the law.\textsuperscript{82}

This tension between hierarchy and equality is reflected in the text of the Magna Carta, issued by King John in 1215. Citizens were protesting abuses of royal law, for example the delaying or selling of justice, and demanded that law be applied to all free men in similar fashion. As such, while some clauses of the Magna Carta refer to lords and tenants, others refer to free men generally. Two competing, and

\textsuperscript{80} This is not to say that we cannot identify behavioral patterns, customs, and traditions, but that these methods of dispute resolution were less formal and systematized compared to those found in later states (Diamond 270-71). I believe that Aboriginal legal studies would greatly benefit by understanding Aboriginal traditions using a developmental perspective in addition to a post-colonial one. This would enable scholars and activists to recognize universal patterns in how environmental and economic factors affect consciousness, and re-contextualize politically and emotionally-charged debates: instead of debating "Aboriginal vs. Western" thinking, we might examine "horticultural vs. informational" structures and their needs and limitations. Given that a society's beliefs correlate with its mode of production, which in turn depends on resource availability, we can discard essentialist arguments which describe "Native" vs. "White" thinking and being, and understand them in a universally contextualized manner: that any human could develop like any other human, depending on circumstances.


probably unconscious, models underlie the charter, one viewing the realm as based on a hierarchy of lordship, the other as consisting of the king and all his free subjects.\textsuperscript{83} This is early evidence of legal reasoning beginning to differentiate itself from hierarchical and absolute notions of class, divinity, and authority, a process which would not reach fruition for centuries.

A. \textit{Natural Law and the Mythic/Mythic-Mental Structure}

We see a clear example of this early attempt at legal reasoning in the 13\textsuperscript{th} century writings of Aquinas, the foremost classical proponent of Natural Law. Early farming and increased food production facilitated sedentary living, social stratification, and the rise of kings, priests, and a literate class across Europe. Inspired by Aristotle's method of logical inquiry, Aquinas uses reflection, dialectic, categorization, and empirical observations to examine law.\textsuperscript{84} He finds that there is an Eternal Law proclaimed by God's utterance; a natural law revealed by the natural use of reason (which constitutes humanity's participation in the Eternal Law); a human, or temporal law, which consists of rules, measures, and particular enactments; and a divine law, or scripture, which lifts humanity up to divinity and heightens our sharing in the Eternal Law. Aquinas' reason compels him to justify his beliefs based not simply on obedience or blind faith, but on logical and empirical evidence; he succeeds in rationalizing the mythological structures of his environment by affirming the divinity of God, the superiority of man, the legitimacy of scripture, and the imperfection and changeability of human creations. His law is still based on a divine hierarchy of moral and religious absolutes, but his work is nonetheless significant, as it takes the first steps toward a reasoned understanding of law, morality, religion, and the state.

We would have to wait another five centuries, as Europe experienced a Renaissance, an Age of Reason, and an Enlightenment (soon to be followed by an Industrial Revolution) before William Blackstone released his historical and analytical treatise on the Common Law. In Blackstone we find the strong presence of liberal rationalism still married to a mythic belief in the supremacy of a Christian God.

\textsuperscript{83} \textit{Ibid.} <http://www.bbc.co.uk/history/british/middle_ages/henryii_law_04.shtml>.
\textsuperscript{84} For example, he acknowledges the possibility of development in Temporal law and the theoretic sciences.
and the superiority of Britain. Since he believes in a divine law and a law of nature emanating from God, he wishes to draw a broad analogy between laws enacted by governments and scientific laws, describing them all as being "prescribed by some superior, and which the inferior is bound to obey." He proposes that God, being omnipotent, omniscient, and infinitely benevolent, has gifted humanity with a "universal principle of action": rational self-interest, the pursuit of which results in happiness and ethical behavior, and forms the foundation of Natural Law. Here, we see the liberal notion of individual autonomy and rights starting to take hold in legal discourse.

Blackstone also demonstrates some understanding of biological and social evolution. He refers to a sequence of "mere inactive matter to vegetable and animal life," as well as the role of agriculture, sedentary living, and population growth in the formation of laws and government. We also see in his work the acknowledgement of an international orientation: the law of nations, which permits nation-states to co-exist through compacts, treaties, and transnational leagues. This is evidence of a "rational" global perspective, one which recognizes other social perspectives and nation-states, forming the basis of an international community and market economy. Blackstone's reason, however, did not go so far as to advocate for the explicit separation of religion and morality from government and law.

B. Positivism, Realism, and the Mental-Perspectival Structure

This task was taken up by John Austin, widely regarded as the founder of analytical jurisprudence, or "Legal Positivism." He approached the law as an object of scientific study distinct from moral evaluation, finding that "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." He felt that a law was a command issued by a habitually-obeyed sovereign backed by a sanction. This entirely objective position is in marked contrast to those of Aquinas and Blackstone, who justified

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law on moral and religious grounds; Austin's position differentiated law and morality as two separate fields of inquiry and marked the beginning of an understanding of law consciously generated by reason.

This focus on objective measurement found an application in the utilitarianism of Jeremy Bentham. He felt that humanity was governed by "two sovereign masters, pain and pleasure," and that a correct act, policy, or law would facilitate the greatest happiness for the greatest number. This could best be attained in a legal system which encouraged individuals to act in their own self-interest to maximize pleasure. The utility of an action was the degree to which it augmented or diminished a party's happiness, and the function of law and government was to maximize efficiency in utility. Bentham suggested that morality could be quantified and calculated; though some of his suggestions may seem naïve or even harmful today, the application of his utilitarian position and its drive to minimize suffering caused him to advocate in favor of many modern rights and structures: the separation of church and state, freedom of expression, equal rights for women, animal welfare, the abolition of slavery, the abolition of physical punishment, the right to divorce, the right to trade freely and charge interest, and the decriminalization of homosexuality.

By the time of Bentham and Austin, the Industrial Revolution had begun, and the productive power of reason and scientific method was evident across Europe. We see here an increasing emphasis on rationality through the various attempts to develop a scientific framework from which to view the law. Working from the analytic jurisprudence set by Austin and Bentham, H.L.A. Hart refined positivism and heavily criticized Austin's particular notion of law - a command backed by a sanction - but supported the fundamental idea that we must distinguish between "the law that is from the law that ought to be": that something legal was not necessarily moral, and something moral was not necessarily the law. He agreed that a purely analytical study of legal concepts was as vital to our understanding of the law as historical or sociological studies.

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Carrying this "functional" focus further, Oliver Wendell Holmes exhorted legal practitioners not to concern themselves with morality, but simply function, or "prophecy." He "often [doubted] whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law." Holmes stated that if we wish to know the law and nothing else, we "must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."\(^8^9\)

He believed, in addition, that

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.\(^9^0\)

We see in Holmes the seed of Legal Realism, which posits that the law is indeterminate and influenced by extralegal considerations. This would also have some influence on Law and Economics and Critical Legal Studies.

When the mental-perspectival structure of consciousness first emerged on a large scale, it brought with it the assumption that there was a world of independent objective givens which could be analyzed by the autonomous subject and manipulated for measurable gains in efficiency. In a very short time, however, modes of reasoning and legal analysis grew significantly more complex and diverse, and an emphasis was placed on subjectivity and the observation that many pre-given absolutes were in fact socio-political constructions.

\(^8^9\) Holmes, Oliver Wendell, "The Path of the Law" (1897) 10 Harvard Law Review 457 [TPL].
C. Critical Legal Studies and the Mental-Aperspectival Structure

As reason matured and science and technology made extraordinary advancements, people began to understand the world in contextual, rather than absolute terms. Western nations engaged in intense self-reflection and turned reason and language in on themselves, finding that knowledge and reality had a subjectively constructed component which called previously unassailable truths into question. They discovered "the myth of the given," that we construct social reality, and that what was considered proper, inevitable, or absolute seemed far less certain. With the rise of the aperspectival structure of consciousness, law and the social sciences saw an explosion in "non-majority" criticisms: legal reasoning as a perpetuator of hierarchies, and law as a tool of social oppression.

Critical legal theorists asserted four principles that allegedly reflected the reality of the law: indeterminacy, antiformalism, contradiction, and marginality. They viewed legal reasoning and argument as a disguised form of politics which legitimized hierarchical relations, causing them to appear natural or inevitable. They found 1) that legal doctrine is indeterminate, in that interpretation is an act of social choice, and legal reasoning changes over time; 2) that there is no purely objective, autonomous, or neutral mode of legal reasoning, and that decisions reflect a choice in political values; 3) that law deals regularly with contradictory ideals such as individual autonomy and communal unity, and again, makes decisions based on political values; and 4) that law marginalizes itself from the private sphere in a false public-private dichotomy, perpetuating domination and hierarchy, mostly by corporations.

This led to the conclusion that law, and more generally, truth, was an interpretation imposed by those with political and economic power. As in the case of the general postmodern movement, the critical legal scholars excelled at analyzing and deconstructing existing structures, but lacked the conceptual tools, in my opinion, to propose viable alternatives, or in many cases, defend the legitimacy of their own positions. This deficiency, combined with the moral and intellectual fragmentation facilitated by the

91 Supra Wilber, MSS, 186.
92 All hallmarks of the postmodern movement.
94 Ibid.
aperspectival consciousness and mass-information availability, led to moral uncertainty and a backlash against unifying conceptual models, particularly those which acknowledge values, for fear that they are mythic, exclusive, and oppressive.

The significant accomplishments of postmodernity and the critical theorists must not, however, be underestimated. They succeeded in making society sensitive to the needs of minorities, pointed out the inadequacies of the legal order, and demonstrated that making objective legal and regulatory changes cannot solve social problems by themselves: social change also requires a transformation in consciousness.

D. An Integrative Developmental View and the Integral-Aperspectival Structure

Those who have grappled with the deficiencies of the critical postmodern movement often find themselves lost, isolated, and returning to mental-perspectival or even mythic belief structures because they can see no viable alternative. I believe that there is a way beyond the postmodern fragmentation and deconstruction, and that is to follow its reasoning through its own contradictions. If we are able to construct a "higher" conceptual vista from which we may examine contradictory viewpoints, honor their basic truths, and negate their claims to being exclusively correct, then these viewpoints would no longer contradict, but complement each other in a greater whole. American jurist Harold Berman, in his advocacy for an integrative jurisprudence, believed that

In situations where [the schools] appear to conflict with each other, the right solution can only be reached by prudentially weighing the particular virtues of each …. Indeed, all that needs to be subtracted from each of the three major schools of jurisprudence, in order to integrate them, is its assertion of its own supremacy. All that needs to be added is a recognition of their mutual interdependence.95

When we encounter a contradiction, we ought to work with it and use it to broaden our understanding. This is Fichte's dialectic of thesis, antithesis, and synthesis: reconciling the truths of opposing viewpoints and forming a new proposition.

The critical theorists found that legal doctrine (and knowledge in general) was indeterminate and subject to interpretation, historical contingency, and political values. What about the legitimacy of this view itself? Is it not a result of interpretation, historical contingency, and political values? The critical view found that the law perpetuated hierarchies of domination, something that was morally reprehensible.

Notice that this position has its own implicit form of hierarchy: it places an anti-hierarchical position above a hierarchical one. Critical theorists found that power constructed social reality, which meant that no one could lay claim to an objective, absolute truth. How, then, could they justify their own? How could they be trusted? Were they not also proposing a constructed social reality with no objective or absolute grounding? *Was the "purely municipal ideal of no validity outside the jurisdiction" not a cross-jurisdictional claim?*

Rather than abandoning hierarchy and objective truth claims altogether, which as we have just seen, is impossible, it would be more productive to examine whether all hierarchies are oppressive and immoral. By taking a developmental view, we are able to recognize that law changes as techno-economic and consciousness structures develop; individuals and societies come to identify with more and more beings as they grow: first, with their own bodies, then their families, then their extended families and peoples, then all peoples and even non-humans. We notice a tendency toward greater inclusion and complexity, whether that is in identity, reason, or social and legal structures, resulting in a greater, more inclusive justice. This is a hierarchy of development, and it is doubtful, when viewed in this light, that many would consider the later or "higher" structures to be wholly oppressive.

In pre-empire societies, bonds were established through kinship, and violence toward outsiders of the tribe was a common occurrence. In agrarian empires, law was formal, categorical, with harsh penalties, little flexibility, and fused with the national myth. Those who did not or could not participate in the myth were inferiors, heathens who deserved to be dominated. In industrialized nations, consciousness detached itself from myth and looked to objective reason, eroding divine authority, fundamentalism, and social and intellectual rigidity. A move away from pure morality toward measurable efficiency was viewed as being more "moral." Ideas of the just and the legal had to be reasoned through and "justified."
As reason matured and technology improved, a global consciousness structure arose, facilitating the recognition of context. Absolute categories and hierarchies began to break down, and a premium was placed on subjective interpretation, contextualism and minority perspectives. Morality "returned" but was difficult to define, given social and intellectual fragmentation.

At every stage, there is an increased sophistication in reasoning and wider interior and exterior inclusion. Jurisprudence can benefit by acknowledging this development: we should adopt an explicit "meta-perspective" and develop criteria by which judges, lawyers, and scholars can determine when certain perspectives and modes of interpretation are more or less appropriate. This clarification would be achieved by studying the origins and nature of different forms of reasoning, interpretation, and law, and situating them in a developmental context. As the law grows, its embrace widens, encompassing more perspectives and more complex forms of reasoning: we ought to make room for all of them, while acknowledging that they may not be equal in sophistication or universal in application.

We may now take a more nuanced view of tribalism, ethnocentricity, rationalism, and deconstruction. We need not view any of these perspectives as false or immoral, but as legitimate worldviews which disclose a portion of reality, some in a more inclusive fashion than others, with the anticipation that our own social and consciousness structures might one day be taken up into ones yet more encompassing. As we move into an age of mass-information and transnationalism, we are beginning to develop an integral-aperspectival consciousness on a mass scale. Legal structures are evolving to keep up, and only a comprehensive, inclusive perspective which accounts for history, biogeography, psycho-social mechanisms, and morality will be able to address the challenges to come. With this in mind, we return, now, to the mouth of Fuller's cave in early May of 4299 (Newgarthian calendar).
V. THE FIFTH NEWGARTHIAN DEFENDANT

The development of Natural Law and Positivism resulted in what we might refer to as "Classical Legal Thought." Between 1886 and the American Constitutional Revolution of 1937, "the elite members of the American bar . . . embraced an ideology that integrated their visions of society, the economy, law, and the courts . . . Classical legal thought was an integrated system of beliefs about human destiny, liberty, republican government, and the nature of law." 96 It assumed that law was apolitical, determinate, objective, and neutral, and was predicated on an "unshaken assurance in the existence of universal principles of right human behavior," 97 which included "a selective paternalism" and "hyper-individualism in the judicial mind." It was characterized by a rhetoric that viewed the law as coming from a transcendent source, as if it existed apart from the courts and legislatures that formulate its rules. This rhetoric described private legal rights and obligations as self-defining and self-executing: courts had only to apply a body of determinate rules to a private legal dispute, much as an engineer might determine the load that a bridge could bear, or a paleobotanist might determine the age of a tree. In the resolution of a private legal dispute, such as a contract case or a disagreement about ownership of property, the state was regarded not as "policy maker" but only as arbitrator of pre-existing rights. 98

The Classical lawyer thought of liberty in terms of property and contractual relations and "emphasized the centrality of individual will in economic and social relationships." 99 Because the Classical mind believed it was possible to know the objective truth with certainty, it had none of the "epistemological doubts of later generations or the corrosive skepticism . . . introduced into later modes of thought." 100

With a basic understanding of the tenets of Natural Law and Positivism, we can see how Classical Legal Thought came to be; with an understanding of the weaknesses in early Natural Law and Positivism, we can also see how Classical thought would be dismantled. In the wake of the Great Depression, the New Deal, and World War II, Western jurisprudence was facing something of a crisis. It appeared that

97 Ibid., 14.
99 Supra Wiecek, 21.
100 Ibid., 22.
Classical Legal Thought, or "Classical Liberalism," did not work as well as jurists had hoped: it had legitimized deep inequalities in gender, class, and race, threatening social and economic stability. With the rise of equality values, trade unions, increased government regulation, and the federal welfare state, the legal community was forced to reconceptualize what it was actually doing when it enacted and applied the law:

Whether consciously attending to the issue or not, judges must function within a structure of beliefs about the nature of law, the judicial function, and law's place in society. Without some such structure running in the background, as it were, judges do their work in a state of intellectual anarchy, deciding ad hoc with nothing to guide them but their ideological and political preferences, swayed unpredictably by the emotional distractions presented by particular cases …. So the postwar [U.S. Supreme] Court could not carry on much longer without some attention to the problem of finding a replacement for classicism … [it] carried on its work without the benefit of an underlying theory or ideology that justified its authority, that explained the basis of law's obligation, and that offered assurance that judges could be trusted because they judged objectively.101

The postwar jurisprudential agenda was

set by two issues that emerged in the previous decade. First was the problem of objectivity: was objective justice possible in the post-Realist world - "objective" in the sense of producing a result that is not determined by the judges' preferred political outcomes? … Second was a reaction against Realist-endorsed positivism. To some critics, Realism and positivism 'violated a basic sense of legal integrity which needed to be restored.'102

Jurists wished to demonstrate "that law had an authentic moral foundation, yet was wholly compatible with democracy."103 It is this legal, political, and philosophical climate in which Fuller wrote The Case of the Speluncean Explorers.

A. The "Identity Crisis" in Western Jurisprudence

Western jurisprudence was experiencing something of an "identity crisis." Humans engage in a constant process of meaning-organization: making sense of the self, the world, and the relationship between them. Psychological development is marked by a series of "crises" where an individual meets

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101 Ibid., 440.
103 Ibid., 443.
with a contradiction, an incomprehensibility, which threatens or challenges the individual's self-sense and worldview. "The nature of their 'crisis' is structural; the crisis is not the seemingly unresolvable problem, but the way [the problem is] suited to informing the [psychological] balance that something is fundamentally wrong about the way one is being in the world. Any real resolution of the crisis must ultimately involve a new way of being in the world."\(^{104}\) The subject may reject, ignore, or integrate the contradiction, reorganizing the self-sense and worldview to a higher order of sophistication and appreciation. Fuller's good friend and fellow jurist Harold Berman recognized this "profound integrity crisis,"\(^{105}\) observing that

Today [the beliefs and postulates that have formed the support for the Western legal tradition] -- such as the structural integrity of the law, its ongoingness, its religious roots, its transcendent qualities -- are rapidly disappearing, not only from the minds of philosophers, not only from the minds of lawmakers, judges, lawyers, law teachers, and other members of the legal profession, but from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from law itself. The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity.\(^{106}\)

Fuller's article, indeed, much of his legal work, was a part of the struggle of Western jurisprudence to find a new way of "being in the world," one which could account for the Positivist understanding that law and morality were separate, the Realist observation that subjectivity and extralegal considerations had a significant impact on law, and the Naturalist need to find a moral foundation that was compatible with democracy, science, and emerging ideas of equality, multiculturalism, and moral relativism.

\(^{104}\) Kegan, Robert. *The Evolving Self* (Cambridge: Harvard University Press, 1982) 41. Examples of crises which precipitate self-reorganization might be a young child's realization that Mr. Rogers is saying "You are my special friend" to everyone watching the television and not just to her; a religious person's realization that she cannot justify her exclusive faith in a world filled with many gods; and of course, a Classical lawyer's realization that subjectivity in one's perceptions is unavoidable.


B. Lon Fuller and Legal Process Thought

The Case of the Speluncean Explorers did not provide a new way to understand law, but served as a starting point for exploration, an intellectual spelunking expedition into the depths of jurisprudence. In Fuller's other works, however, he attempted to develop a theory of jurisprudence which could account for moral, legal, and political realities. It has been variously described as "legal naturalism," anti-positivist," a "limited form of natural law," and "Legal Process thought." Fuller called for the creation of a secularized natural law that placed law in the service of a moral and democratic order. He strove to identify a moral basis for democracy and to establish the primacy of reason in legal discourse. The unnatural separation of fact and value in positivism caused by an overemphasis on empiricism (the error of the Realists) or on theory (the error of analytical positivism) led to the contemporary disjunction of values and purposes from law. By discovering 'the natural principles underlying group life' through reasoned debate, Fuller hoped, people would be able to reconstruct a humane social order based on reason rather than the sovereign's power.

Fuller and his Harvard colleagues emphasized the importance of process in law rather than its substantive content and outcomes. He believed that a "statute or decision is not a segment of being but … a process of becoming. By being reinterpreted it becomes, by imperceptible degrees, something that it was not originally." At the heart of Legal Process was the idea of "institutional competence": that an interdependent human society evolved institutions which reflected and manifested its members' desires and interests. Focusing on process rather than substance allowed lawyers to work without having to choose between the conflicting values of a heterogeneous society: it was a move "toward legality and away from purpose." As such, Legal Process developed a doctrine of "neutral principles" by placing the highest moral value in the process itself, on the premise that society's institutions and processes had evolved to be inherently good and just. Because of this, what seemed to be a progressive movement

108 Supra Suber, 4. Fuller is perhaps best known outside of the Speluncean Explorers for his debates with H.L.A. Hart, the consummate analytical Positivist, about the "inner morality" of law.
109 Ibid.
110 Supra Wiecek, 450.
111 Ibid. Wiecek cites Fuller, The Law in Quest of Itself at 139 and "Reason and Fiat in Case Law" 378.
112 Witteveen, Willem J. "Rediscovering Fuller: An Introduction" in Witteveen, supra, 25.
113 Supra Wiecek, 454.
actually "confirmed the values of its time … leading to the stultifying result that what is, is good."\textsuperscript{115} Legal Process, a philosophy which was to be explicitly normative, and which acknowledged the inherent worth of discovering good laws and good policies, "proved incapable of choosing among substantive values, or even of identifying them, when it had to do so."\textsuperscript{116} As a result, it could not be reconciled with the rising values of the time which sought to address structural inequality. This was evident in its failure to find a rational, moral, and legal justification for the equality principle expressed in \textit{Brown v. Board of Education I}.\textsuperscript{117} Given its faith in process and the inherent legitimacy of institutions, the "principle of equal treatment before the law asserted by the black petitioners did not have any more compelling authority than the countervailing principle of freedom from unwanted association claimed by the segregationists."\textsuperscript{118} “Legal Process stood mute in the face of the emerging social conflicts that defined the 1960s. Above all, it had nothing to say about the value of equality and the moral authority of the civil rights movement.”\textsuperscript{119} By locating its moral grounding solely in existing processes and institutions, it failed to integrate rising equality values and had no way of addressing structural discrimination. Equality proved to be the undoing of Legal Process.

This recognition that processes, institutions, and indeed, an entire socio-political system could be unjust ushered in massive changes across all domains of social knowledge. As we have seen, conscious, reflective rationality first perceived the world as composed of independent objects which could be analyzed by the autonomous subject and manipulated for measurable gains which were inherently just. This was in marked contrast to later, more self-reflective modes of reasoning, which emphasized subjectivity and recognized that pre-given absolutes could in fact be socio-political constructions.

\textsuperscript{115} Ibid., 462
\textsuperscript{116} Ibid., 461.
\textsuperscript{118} Supra Wieck, 459.
\textsuperscript{119} Ibid., 461.
C. Fragmentation -- Nine New Opinions

New approaches to law were developed, and old ones were refined. *The Case of the Speluncean Explorers* itself would be re-examined on multiple occasions from these new and refined perspectives.\(^{120}\) One of the most significant recent examinations is Peter Suber's *Nine New Opinions*,\(^{121}\) in which the Newgarthian Supreme Court tries a heretofore unknown fifth defendant. The decisions are written fifty years after the original article and shed light on new developments in jurisprudence in that time. Here, very briefly, is a summary of those opinions.

Chief Justice Burnham takes the position that the case is simple both legally and morally, but that their conclusions are contradictory.\(^ {122}\) The defendant is morally not guilty but legally guilty, and in cases of contradiction, the judge's role is to follow the law. The meaning of the statute is plain, and there is no necessity defense. There are three primary reasons not to involve morality: 1) the court is insulated from public opinion, so they should make the "hard legal decisions"; 2) judicial activism caused a civil war in the past; and 3) living in a pluralistic society means that "we have reached a meta-level agreement that no one contending view is privileged over the others for the purposes of law … no view may for any official purpose be regarded as morally superior to any other."\(^ {123}\) Finally, the law itself contains a solution to its potential for harshness: executive clemency.

Justice Springham would overturn the conviction under positive law and agrees that the court has no discretion to "change" the law, nor can it use extralegal considerations.\(^ {124}\) He finds that the defendant lacked the ill-will component of *mens rea* to find true willfulness. The necessity of the act negates the *mens rea* as a result, and therefore the killing of Whetmore is not legally murder. Because the statute involves a death penalty, constitutional considerations as well as fundamental fairness require that the court consider necessity as a mitigating factor.


\(^{121}\) *Supra* Suber.

\(^{122}\) *Ibid.*, 35-44.

\(^{123}\) *Ibid.*, 43.

Justice Tally would also overturn the conviction. He finds illumination in the ancient self-defense precedent, which explains the legitimacy of necessity: in self-defense he sees a case of "preventive killing" where someone must die, and it is better for it to be the aggressor than the innocent victim. Because Newgarthian society values life, the killing in the cave was properly preventive and is supported by the reasoning behind the self-defense principle. Self-defense does not require consent: it is its own defense. He feels, in addition, that necessity is not an excuse, as Springham used it, but a justification: it is a general defense which acknowledges that the defendant chose the lesser evil, even if he was "willful." He also finds that not waiting for anyone's death or targeting the weakest member was also reasonable and just. He believes that relying on necessity is superior to relying on clemency for three reasons: 1) it is within the reach of judges and juries; 2) it is a just defense; and 3) it is law.

Clemency, on the other hand, is open to capriciousness, the criteria are subjective to the executive, and ultimately, it is a form of leniency beyond desert. It does not eliminate the injustice of the rules which would convict the defendant in the first place. To acquit is to truly mitigate the rigors of law, and to pardon because the law is too harsh is a gratuitous mercy.

Justice Hellen would overturn the conviction and draws an analogy to rape. The defendant's decision to kill was not willful, and rape proves that humans can intend an act that is against their will, as in the case of a woman who is coerced to have sexual intercourse on the threat of violence or death. If deliberate intent is "willful," then women would be "unrapable" and people would be "unrobbable." She believes that Burnham C.J. entrenches injustice in his approach when the law is shaped by interest, wealth, and power. As a result of the unjust domination of certain views, appeals to justice beyond the positive law are the only hope of bringing justice and law into alignment.

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125 Ibid., 55-61.
126 Ibid., 56-61.
127 Ibid., 62-70.
Justice Trumpet would affirm the conviction and have the trial court re-sentence the defendant. He finds that the case is about equality. The killers valued their lives more than victim's, but each life is infinitely valuable in the eyes of law and cannot be quantified. The defendant had no right to kill non-volunteers, and the lottery the men used enforced "ultimate inequality." He believes that it is better to suffer an injustice than to do an injustice, and that there was no "bargain" of lives saved. Because he feels that killing in self-defense violates the principle of natural law, he finds that the legislators excluded it from the murder statute deliberately. In addition, he finds that the ancient precedent of self-defense is plainly wrong and should be overturned. At the same time, the principle of the sanctity of life nullifies the death penalty, so the defendant should have a new sentence.

Justice Goad would affirm the conviction for three reasons: 1) the spelunkers must take some responsibility for being in their unfortunate position; 2) Whetmore had a right to defend himself; and 3) "no means no." She emphasizes her philosophical differences with Justice Hellen, and is skeptical about the rape analogy; even if it were appropriate, she finds that the defendants would be the rapists, in that they objectified Whetmore and violently subordinated him to their will to sate their own appetites.

Justice Frank, in perhaps the most candid and unorthodox decision of the nine, would overturn the conviction simply because he would have joined the lottery had he been in the defendant's place. He admits that he offers no legal argument and can only speak for what he would have done himself: his morality does not allow him to condemn others for doing what he would have done. He finds the "exercise of imagination" or "autobiographical report" to be relevant to adjudication and an ethical life, and he states explicitly that he does not wish to "dress up" his argument in legal garb. He deliberately "throws[s] off the mask of judicial objectivity and rest[s] on naked autobiography."

Justice Reckon would affirm the conviction and finds that Trumpet J. correctly concluded that necessity is irrelevant, because it would still be rational to punish those who did the deed. He takes an

\[128\] Ibid., 71-76.
\[129\] Ibid., 77-86.
\[130\] Ibid., 87-88.
\[131\] Ibid., 89-96.
objective systemic view and asserts that we should recognize no mental or volitional excuses or justifications for three reasons: 1) to remove dangerous people from our streets; 2) to shorten trials and make punishments more swift and certain; and 3) to strongly deter others from committing the same acts. He acknowledges that deterrence is not the only goal of punishment, but it is the default objective against which others must be weighed in terms of social advantage. For him, given that the primary social objective of criminal law is to protect citizens from criminal harm, allowing mental and volitional excuses would result in an entire "industry" growing up around these defenses, making prosecutions extraordinarily expensive, uncertain, and ineffective in deterring crime. He acknowledges that the punishment of, for example, children or the insane is not in itself a good thing, but it is good when we place it in a wider context where the benefits to society outweigh the costs.

Finally, Justice Bond recuses himself from the case because he had a professional connection forty-five years ago to the makers of the batteries in the defendant's radio. He feels he is justified in his withdrawal, despite what his colleagues might consider a very tenuous connection, because judges "may properly recuse themselves if in conscience they sense real or apparent conflict of interest, even if other sensitive and informed people do not perceive it." He finds, in addition, that his colleagues are arguing about policy, not words, around the idea of "willfulness." He believes, especially given the judicial debate surrounding the word, that "willful" has a large area of open texture and can be used in ways supporting both conviction and acquittal. This is therefore a "hard case" to him because the Newgarthian murder statute depends on willfulness, and the only way to resolve its meaning is to find a standard external to law. He believes that this type of judicial discretion is inevitable and will arise in any hard case, because it is impossible to apply law mechanically. Discretion "does not 'change' the law so much as render its indeterminate fringes determinate." He believes that Keen J.'s desire to "wake people up" and change the law by executing defendants is tantamount to bringing about legal change through human

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132 Ibid., 97-105.
sacrifice. He finds, instead, that the spelunkers performed a "peaceful revolution" inside the cave and effectively formed a new social contract\textsuperscript{134}, but he issues no legal judgment on the matter.

Fuller's judgments, as philosophically rich as they were, were relatively straightforward compared to Suber's: in Fuller, all the justices who issued decisions agreed that the defendants were not morally culpable, and that a "positive" approach yielded a guilty verdict. Here, we find new combinations of positions as well as new types. For example, Trumpet J.'s Natural Law approach finds the defendants absolutely guilty on a moral level, but prevents him from condoning the death sentence. Justice Springham takes a Positive approach, yet he overturns the conviction because he feels that the \textit{mens rea} requirements for murder have not been fulfilled. Burnham C.J.'s essentially Positivist position finds that we, in a pluralistic society, cannot make moral judgments without violating pluralistic ideals.\textsuperscript{135} Tally J., in his limited Natural Law approach, finds that he must choose between the legal options of clemency and necessity. He bases his choice on the moral legitimacy of each option and finds that only through an acquittal via the necessity defense will justice be served. Goad J. emphasizes moral responsibility and legal consent, while Reckon J. takes the ultimate objective or "strict liability" approach: culpability, or \textit{mens rea}, becomes irrelevant. If the defendant committed the act, he should be convicted regardless of intent or even knowledge, as it would serve a broader social purpose which outweighs the inevitable harsh outcomes for individuals who may be morally guiltless. Bond J. believes that the entire debate is one of policy, and therefore values, because interpreting "willful," and indeed choosing any philosophical approach, Natural, Positivist, Realist, or otherwise, requires a value judgment, but his own values require him to recuse himself regardless of the opinion of his peers. Hellen J. takes a Feminist approach, discussing will and intent in the context of rape, and she explicitly acknowledges the need to align the law with equality values which may not be contained in the legal system. There is a possibility, for her, that the system itself is unjust: to correct this, she must reach for ideals from outside of it. Finally, Frank J.

\textsuperscript{134} Like Foster J., he believes that the spelunkers, by virtue of their circumstances, found themselves outside of the Newgarthian social and legal order. Unlike Foster J., he does not believe that they reverted to a "natural" state, but rather, formed a social contract different and separate from that of Newgarthian society.

\textsuperscript{135} This does not, however, explain the legitimacy of his own moral judgment, that of pluralistic non-judgment.
takes what he considers to be an "autobiographical" approach. In contrast to Reckon J.'s position, this is the ultimate subjective stance: it is the whole insertion of the self into the judgment. He explicitly discards objectivity which, for him, cannot exist in this case. This could be considered a "postmodern" position.\textsuperscript{136}

Rather than discovering some unifying system of thought as early 20th century jurists had sought, jurisprudence has grown more complex and been subjected to far more competing views and modes of understanding than Fuller could have conceived in his day. At the same time, the way the law is presently thought to function, and the way it is taught in schools, has taken a distinctly Positivist tone: we speak of values as "policy considerations" and we focus on the "reasons" of decisions without asking very often about the history, experiences, motivations, and morals of the person issuing those reasons and the society in which she was raised. It has become almost indecorous to speak of "justice" in certain intellectual and professional circles. It is not unfair to say that, given the great philosophical and social developments of the last few decades, the "identity crisis" which afflicted jurisprudence in the mid-20th century has yet to be satisfactorily resolved. This resolution, if it is to happen, must, be able to integrate the moral grounding of Natural Law, the empiricism of Positivism and Realism, and the pluralism of the Critical schools.

Oliver Wendell Holmes said that

\textsuperscript{136} This approach, incidentally, does not fit with any of the six modes of legal interpretation identified by legal scholar Philip Bobbitt: historical, textual, doctrinal, prudential, ethical, and structural. There is an interesting parallel here between legal and literary interpretation. Literary interpretation is, according to Wilber, an attempt to decide where we can locate the meaning of a text. Five out of Bobbitt's six interpretive forms have literary equivalents. "Historical" is paralleled by original or conscious intent in literature; "textual" by textualism or the "New Criticism"; "doctrinal" by the similar literary practice of citing previous analyses; and "ethical" and "structural" by various forms of hermeneutics and structuralism, i.e. the search for racist, sexist, classist, logocentric, etc. contexts, as well as unconscious, hidden, or unstated values, and fundamental thematic principles derived from grasping the entire network of meaning. In each discipline, there is one significant mode of interpretation that does not have an equivalent in the other. In legal interpretation, it is "prudential." Literary interpretation, by its very nature, does not have a cost/benefit or practical application. We do not worry about the social costs of a misinterpretation of Hamlet. In literary interpretation, it is "affect-response" or "reader-criticism" theory, which maintains that because meaning is generated in reading, then the meaning of the text is actually found in the response of the reader. Related to this is extreme deconstructionism, which says that meaning is determined by context, contexts are boundless, and therefore meaning is totally subjective. There is no equivalent in legal analysis because total subjectivity would render law inconsistent and meaningless, as it does for Frank J.
The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.\footnote{Holmes, \textit{TPL}, 1.}

\textbf{D. Harold Berman and Integrative Jurisprudence}

Professor Berman shared Holmes' recognition that law was not merely a body of rules and logic, but an experience, a living process.\footnote{Supra Witte, 105.} Long inspired by Fuller's studies on the morality of law,\footnote{Ibid., 101.} Berman became gravely concerned about the "integrity crisis" besetting the Western legal tradition. He felt that the legal order was under attack: judges, lawyers, and scholars had grown skeptical of the law's moral content; they observed that it changed with time and politics, upheld systems of oppression, and promoted the interests of the propertied and powerful at the expense of those less privileged. This assault, "devoid as it [was] of a positive agenda of reconstruction -- reflect[ed] a cynical contempt for law and government, a deep loss of confidence in its integrity and efficacy."\footnote{Ibid., 110.} Rapid social and economic changes -- and the new customs, modes of thought, and social forms which accompanied them -- had fragmented Western thinking to the point where it seemed there was no firm ground on which a unifying philosophical foundation could be built. This shift in consciousness was not limited to the legal community, but affected society at large: for Berman, the present disillusionment and distrust of the law was a direct consequence of this fragmentation.

In response, he developed what came to be known as his "integrative vision."\footnote{Teachout, Peter. "Complete Achievement," \textit{supra} Hunter, 81.} This was the "great cohering idea" in Berman's jurisprudence:

At the level of individual experience, it is reflected in his repeated insistence that we respond to experience not just with our rational or analytical faculties, but with passion.
and moral vision and intuition and faith as well -- in short, that we respond with the whole person. At the broader cultural level, it is reflected in his opposition to the compartmentalization of knowledge and his insistence that our institutions adopt an integrated approach to experience. It is reflected, as well, in the special attention he gives as a historian to the great moments of integration in the life of the culture. At yet another level, the integrative vision is reflected in Berman's concern that there be a correspondence between our public and private lives -- that there be that kind of integration too.142

In working toward this all-encompassing integration, Berman developed a perspective which was vastly inclusive, in terms of both history and ideas: he took a long-term view of the law, and a generous view of its contents. His approach had three powerful characteristics: it was dialectical, historical, and methodological.

Berman employed dialectic as a means of organizing historical experience: "He characteristically begins by identifying a fundamental opposition, and then, by applying the dialectical method, works a reconciliation between the opposed elements or forces."143 In his essay "Toward an Integrative Jurisprudence," he begins by describing the opposition between Natural Law and Positivism: the former treating law "as the embodiment … of moral principles," and the latter as a "political instrument."144 With this seemingly irreconcilable opposition in place, he then introduces a third school of jurisprudence, the historical.145 Developed largely through the writings of Friedrich Karl von Savigny, historical jurisprudence recognized historical continuity, emphasizing the role historical facts, traditions, and customs played in the development of legal systems. Law was viewed as being intimately interwoven with the national life, and therefore could not be arbitrarily imposed on a society irrespective of its state of civilization and past history. Berman explains that while each school represented "a single important dimension of law,"146 each was just that: a dimension, a measure of one side of a vast body, requiring other measures to ascertain the shape of the whole. By removing each school's assertion of supremacy, or claim to exclusive truth, and viewing them interdependently, law could be understood as an expression of

142 Ibid., 81-82.
143 Ibid., 80.
144 Supra Berman, TII, 780.
145 Supra Teachout, 83.
146 Supra Berman, TII, 779.
both political will and fundamental morality, since it was a reflection of evolving cultural customs and traditions.

This appreciation of law's historicity also led Berman to recognize "a special time sense that is associated with the coexistence of contradictories."147 An individual able to understand herself and her society as being products and participants in history is able to see "through" her present circumstances; she is aware that she is not entirely defined by the present and is able to take a wide perspective on events, seeing things from past, alternate, and possible future perspectives. In assessing Berman's contributions to legal history, Peter Teachout explains that

A similar process, he continues, "happens at the cultural level. When we learn to see the divisive tensions that seem to be tearing the culture apart in the context of historical perspective, which is to say, in the context of the evolving traditions of the culture, something does happen."149 These tensions are transcended, harmonized, taken up into a more comprehensive and mature vision. When there is little or no historical sense, the opposite occurs: the culture fragments, and in the case of contemporary Western jurisprudence, has done so via the proliferation of theory as the primary mode of organizing language and experience. Berman, however, resists the theory-centered approach in favor of one which focuses on method.150 When discussing theories of justice, for example, he does not seek a universally applicable definition: he instead situates our understanding in a universally applicable historical framework. He begins by establishing that the contemporary debate around the nature of justice

148 Supra Teachout, 89.
149 Ibid.
150 Ibid., 82, 86.
rests on individualistic vs. communitarian ideals: whether justice is produced by rational, individual choice, or whether it must exist for public ends.

Having established this basic dichotomy, Berman goes on to argue that in a sense it is a false one. But that can only be perceived by bringing to bear on the debate that crucial third perspective supplied by the historical approach. History shows that the question of "What is justice?" does not have a universal answer. The question has to be placed in a specific cultural and temporal context -- in the context of the particular traditions of a culture at a particular point in its development.  

It is this "developmental" view -- one which is dialectical, historical, and methodological -- which is essential to creating a viable integrative jurisprudence.

E. Integration

Ultimately, any position we take in law is grounded in some type of morality, or subjective judgment of worth. In Natural Law, this is obvious: we rely on the existence of "God" or some universal moral order. With regard to the internal morality of Positivism, the situation is summarized by "Professor Wun" in Anthony D'Amato's "Advisory Opinions" of the Special Commission of Newgarth: "Without repeating familiar arguments about this positivistic stance, it may suffice to ask what morality compels Justice Keen to insist upon a separation between law and morality."  

It is one thing to say that law and morality are different and can be considered on their own merits; it is another to say that we ought not consider how they relate when we seek to understand the law, which is in itself an implicit moral position.

Legal Positivism purports to be essentially descriptive. It is "amoral" insofar as it deals with what the law is and what it does. However, there exist different schools of Legal Positivism which see the nature and function of law differently. This means that different positivists have different interpretations of law: "the evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or..."  

\footnotesize{\textsuperscript{151} Ibid., 86-87. \textsuperscript{152} D'Amato, Anthony. Jurisprudence: a Descriptive and Normative Analysis of Law (Boston: Martinus Nijhoff Publishers, 1984) 309.}
legal order."¹⁵³ For us to even describe something, we have to pick what we think is worth describing: "there is no escaping the theoretical requirement that a judgment of significance and importance must be made if theory is to be more than a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies."¹⁵⁴ Not only are there competing positivistic interpretations of law, but there are competing interpretations of Legal Positivism itself.¹⁵⁵ That is a great deal of subjectivity in a supposedly objective description. In taking any position, descriptive or otherwise, we put forth a point of view with an intrinsic subjective component: we interpret the world through our thoughts, feelings, experiences, and values.

The recognition of objective truth is therefore a subjective experience, and the choice to use objective or descriptive reasoning to determine that truth is a value-laden choice.¹⁵⁶ We might call this a non-rational reliance on reason: if I continue to ask a reasonable person why I should be reasonable, she will eventually have to respond that it is simply the best way to be: it has its own intrinsic worth and requires no further justification. Ultimately, "Why should I be reasonable?" can be rephrased as "Why should I value reason?" Being reasonable, or being amoral in the name of reason, is therefore a moral position. Reason, like goodness, has to be experienced subjectively and understood from the "inside." Aristotle, a founder of Western philosophy and reason itself, was "acutely aware of the fact that reasoning can always be traced back to a starting point that is not itself justified by further reasoning. Neither good theoretical reasoning nor good practical reasoning moves in a circle; true thinking always presupposes and progresses in linear fashion from proper starting points."¹⁵⁷ Ignoring those starting points or dismissing them as irrelevant to legal reasoning undermines the goal of producing an accurate understanding of the law, to say nothing of a just society.

¹⁵⁴ Ibid., 127.
¹⁵⁶ I am not saying that objective truth does not exist, but rather, we have to recognize that it exists.
Positivism alone cannot offer a comprehensive view of why the law changes; it can speak of legal responses to "social fact" but it cannot address why we are driven to morally respond to such changes. To claim that the law's existence and content depend only on social fact, and not on the "interior" value-shifts which cause or correspond with those facts, imposes an unnecessary and artificial barrier on our understanding of the forces which shape law. Why did we abolish trial by combat and ordeal? Why did we lose our property rights up to heaven and down to hell? Why did we find fault where there was no privity of contract? The answers to all of these questions lead back to the non-rational starting value of justice.

We can see, even from this very simple overview, that some absolute moral position is unavoidable in any approach to law, whether that approach purports to be subjective, objective, or some hybrid. Positivism has provided crucial insights into the nature of law, but it cannot make exclusive claim to the whole reality of law. What we need to move forward, then, is a way to integrate the Natural Law assertion that there exists a universal moral order, or way of being, with the Critical observation that values and social structures vary across time and space, with the Positivist requirement that we ground our description in empirical, objective fact.

An "integrative developmental view" gives us such a beginning. Developmental psychology recognizes a universal ordering of morality, as there is convincing empirical evidence of an invariant moral hierarchy along which all humans develop. In acknowledging this empirically-grounded moral order, we can understand that humanity does have an intrinsic capacity to recognize "justice" and "injustice," but that people recognize different forms as they inhabit different structures in the sequence. We may now examine good and evil through a framework which explicitly acknowledges that the form of

158 With regard to pluralistic amorality, we can apply a variation of Professor Wun's criticism to Burnham C.J.'s "meta-level agreement" that no one view can be morally superior to another: in saying so, he takes the implicit position that his meta-level view is superior to all others, and we might ask what morality compels him to insist on that superiority.

159 As I see it, the only way beyond a self-refuting relativistic position is the acceptance of a universal moral sequence, empirically grounded in self-reflective cross-cultural study. We identify objective, observable patterns in inter-subjective structures (morals). There is no other convincing way to approach morality objectively and universally.
these values changes at every stage. Take, for example, evil: its pre-mythic form consists of offending the totemic ancestors, the spirits and intentions of nature, and being disloyal to the tribe; mythic evil consists of offending the supreme sky-god and the state and failing to conform to inflexible social norms; mental-perspectival evil consists of inefficiency, incoherence, and failing to be sufficiently reflective, such that evil becomes unmoored from evil intent; mental-aperspectival evil consists of propagating absolute values, hierarchies, and systems which are constructed by power; and at the "integral-aperspectival" stage, evil consists of failing to respect, organize, and thus integrate the truths posited from any perspective at any stage, preventing the entire sequence from flourishing.

This subjective moral and psycho-social development is correlated with objective technological and economic movements. As we have seen, a culture's subsistence technology limits the type of social organization that is possible, which enables one to predict features of a society's political, economic, and religious structures based on its technological means of production. Wilber refers to Alastair Taylor's "sociocultural nonequilibrium systems model," a social approach based on dynamic systems theory, where

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\text{each succeeding social [structure] 'builds upon the properties and societal experiences of the level(s) below and in turn contributes its own 'emergent qualities,' which take the form of new technologies and societal structures, accompanied by new apperceptions of the human-environment relationship. We can discern progressive developments in complexity and heterogeneity.'}
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By accepting a developmental view, we also accept that later stages in the hierarchy are capable of producing a more balanced, or integrative, moral response, which is capable of understanding and respecting more, and more nuanced, perspectives. We therefore accept that views generated at later stages can be "more just." Because this is a moral valuation, it is rationally unjustifiable by definition but easily understood by individuals who accept that a society which generates "aperspectival" views of pluralism -- the mutual recognition of human dignity and worth between races, sexes, classes, etc., -- has

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160 i.e. industrial or "administrative" evil, such as coordinating rail traffic for the Holocaust.
161 As Wilber says, "no one is smart enough to be wrong all the time."
162 Gerhard Lenski, a macrosociologist, studied these correlations in developing his ecological-evolutionary social theory.
163 Supra Wilber, SES, 107-08. Taylor was a geo-political systems theorist.
the capacity to be "more just" than a society which believes that patriarchy, slavery, or human sacrifice are natural and proper.

The fundamental feature of integrative thinking is that it is marked by a *generosity of consideration*: a willingness to consider the legitimacy of all viewpoints in good faith, while remaining skeptical to any claim of supremacy or exclusive truth. Given that conflicting perspectives can each hold some truth, the integrative method organizes these truths such that they no longer conflict, but complement. This panoramic logic perceives networks of ideas and has an enormous capacity for both differentiation and integration: how contrasting ideas may be distinguished, how they influence and relate to each other, and how they may be synthesized.

What specific features, then, might integrative thinking have in the legal context? From the historical and philosophical overview we have just seen, I believe that it must have, at minimum, the following characteristics:

1. **Systemic**

   Our understanding of any phenomenon -- an individual, object, event, process, field of knowledge, etc. -- cannot derive solely from viewing it in isolation. This includes our understanding of law itself: our perspective must be cross-disciplinary, and we are obligated to view it in the context of social, political, economic, technological, biological, and geographic, etc. systems.

2. **Historical**

   Our understanding of any phenomenon cannot be isolated to the present; it must be viewed across time. This long-term perspective includes not just the past, but also considers how the current state affairs may be viewed from future perspectives. Law must be regarded as being part of a historical, evolutionary process.

3. **Dialectical**

   Conflicting perspectives are reconciled via a continuous process of differentiation and integration: understanding opposing theses, finding a context in which they can be synthesized, and repeating this process when new theses arise. This also includes the recognition that knowledge likely has no end-state,
as it is contextual, and new contexts constantly arise and evolve. Therefore no complete or perfect understanding is achievable; the integrative process itself is constantly perfecting, but never perfected.

4. Subject/object correlative

Our perspective of any phenomenon cannot be limited to one side of the "subject/object divide." Both subjective and objective modes of knowledge must be included in our understanding; integrative thinking recognizes that subjective phenomena, such as values and culture, have objective correlates, such as techno-economic mode of production and social structure. The interpretation of law must consider both culture and environment, how they balance and affect each other, and what is required to both maintain stability and encourage change.

5. Individual/collective balancing

Though integrative thinking is systemic, it does not necessarily prioritize systemic, or collective, concerns over those of the individual. It recognizes that communities are made of individuals, and that individual/communitarian needs must be balanced: "History reveals that our legal tradition is linked organically with the coexistence of competing individualistic and communitarian theories of law." Our culture, Berman notes, requires that "excessive protection of the community against the individual should be corrected, and that excessive protection of the individual against the community should be corrected." Berman finds that our legal culture "seeks a symbiosis of individual and community interests." The extent of any such correction depends on the particular circumstances of the society.

Integrative thinking also recognizes the reality of inter-objective and inter-subjective modes of knowledge; examples of the former include the systems sciences, such as social systems theory and system dynamics; examples of the latter include morality and reasonableness standards. There exists, for example, a subjective/objective continuum of interpretive requirements which aligns with our understanding of liability. For absolute liability, we assess whether the event occurred: was the car going

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164 Supra Teachout, 87.
166 Ibid. See Teachout, 87, for further discussion.
over 60 km/h? We interpret only the objective event. For strict liability, we assess whether the subject caused the event: were you driving the car over 60 km/h? We interpret the subject's actions. To determine reasonableness (or negligence), we assess whether the subject's thoughts or actions were appropriate: were you going too fast? We interpret the subject's thoughts or feelings against a social standard (that of a group of subjects). To find a "guilty mind," we assess the subject's intentions: did you think you were going too fast? This is the most difficult standard to meet because it requires the highest degree of interpretation: what do I think you were thinking? On the other hand, an inter-objective or systems analysis might examine whether there is a statistically anomalous number of speed infractions at that location and look for a systemic cause, such as geography or infrastructure, and diminishing individual liability or assigning it to a different party altogether.

There are therefore three standards for truth: what is true for me, what is true for us, and what is true (for all). This may seem an abstract or "nit-picky" distinction, but it is useful for legal analysis: it is, for example, a key distinction in the context of harms and the degree to which interpretation is required to acknowledge the existence of a harm: physical (e.g. stab wound), physical-mental (e.g. coerced sexual assault), mental (e.g. generalized anxiety disorder).

6. Hierarchical

Integrative thinking acknowledges the existence of "nested hierarchical development," a crucial and empirically demonstrable concept in physical and psychological development. It is easily observed in physical evolution: atoms comprise molecules, which comprise cells, which comprise organs, which comprise organisms. This is a simple nested hierarchy; each higher stage transcends and includes those below. In psychology, this concept of "higher stage" is central to developmental studies. For example, a young child may be classified as morally "preconventional," in that her thinking is narcissistic, largely concerned with her own point of view; as she matures and develops, she will likely reach the next stage, "conventional," in which she still has her own individual point of view, but develops the added capacity

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167 Technically there are four, but objective and inter-objective truth may both be considered "true (for all)."
168 A term used by psychologist Lawrence Kohlberg in describing moral development.
to take the views of others into account, an emergent quality. Nothing fundamental is lost, and something new is added; the essential capacity for self-interest is retained, but its exclusivity is negated, and that capacity is "taken up" into a wider whole. This is integration: the ability to reconcile multiple or contradictory viewpoints into a higher, comprehensive synthesis. In plain language, we might say that the mature adult contains all the fundamental capacities of the self-centered child, but rejects her self-indulgence; and the self-centered child, having no interest in "higher" pursuits, seeking sensual pleasure without regard for the good of the community or the contemplation of a better world, does not contain the capacity to see the same horizon of possibility, fulfillment, or motivation as the mature adult. In this developmental sense, successive stages are "higher," meaning they are more valuable and useful for a wider range of interactions. "Conventional thought is more valuable than preconventional thought in establishing a balanced moral response." Most people would, I believe, agree that the more mature someone is, the more she is able to understand, and the more virtuous she can be. Maturity is a hierarchical measure.

Given that integrative thinking acknowledges a hierarchy of values as they relate to human development, I will briefly address the following Critical postmodern critiques: 1) that I subscribe to a notion of "progress" which is a social construct; 2) that I am "elitist"; and 3) that I am using a disguised form of politics which legitimizes hierarchical relations, causing them to appear natural or inevitable.

First, I do not subscribe to a traditional notion of "progress." There is no inevitability in a developmental model, and only limited predictability: I am using a "reconstructive science" which empirically studies the development process and allows us to rationally explain or reconstruct it. If we do this correctly, we can make limited predictions about the "deep structures" of societies and individuals who are developing through earlier known phases. We know, for example, that as a country modernizes, the adoption of democratic structures and liberal values is not inevitable, but is probable in the long-term, as economic development tends to result in an increasing emphasis on individual autonomy and self-

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169 But contains the potential to develop that capacity if she is not mentally-impaired.
170 Supra Wilber, SES, 29.
expression values.\textsuperscript{171} We also know, for example, that one must understand and appreciate "formal equality" before "substantive equality," since substantive equality is a more complex idea: treating everyone the same is easier to understand than treating everyone differently to achieve equal results; the latter requires the recognition of systemic imbalance. Psychologically, one must be able to reflect on the "concrete" world of form before reflecting on reflection, or thought, itself. As a society, we are comfortable understanding childhood development in this way, but we refrain from evaluating adults in the same manner.\textsuperscript{172} We have traditionally assumed that adults are equally autonomous "rational" beings, which is empirically not the case, regardless of our standard of rationality. I do acknowledge that "developmentalism" is a social construct, in the broad sense that everything is a social construct, or rather, contains an element of social construction,\textsuperscript{173} but that there can be "truer" or "more just" social constructs to which we should aspire.

Secondly, I am not "elitist" in the sense that I posit a hierarchy of morals, place myself at the top, and believe myself superior to those beneath. I emphasize that there is no pre-given end-point to development, and that the developmental perspective itself is the product of one phase in what may be an endless process of growth; there could be more comprehensive, "more just" perspectives around the corner.\textsuperscript{174} I also appreciate that I have had the great privilege to develop in a society which is capable of generating such a perspective, a privilege few in this world share. I therefore acknowledge both the essential incompleteness and the context-dependence of integrative thinking. Additionally, I would emphasize that I am the very opposite of "elitist" insofar as I appreciate and respect the truths inherent in all worldviews. This integrative "meta-perspective" seeks to include all of them, and it is not my

\textsuperscript{172} Witness our use of "grades," and the expectation that a child will "progress" through the grading system to "higher grades," gaining additional capacities as she moves from one grade to the next.
\textsuperscript{173} For if everything were purely a social construct, the very theory that said so would be one as well, rendering it meaningless. Some type of explicit absolute, objective, empirical grounding is essential to intellectual and moral legitimacy.
\textsuperscript{174} Some developmentalists posit "transrational" or "transpersonal" modes of being, for which reason alone, while necessary, is not sufficient to comprehend. Authors of "transrational" works include Ralph Waldo Emerson, Mother Teresa, Meister Eckhart, Sri Ramana Maharshi, and Nagarjuna.
objective to undermine any perspective which came before; I simply find certain views appropriate or just in certain social and techno-economic contexts, and I posit an "absolute meta-context." As I see it, the only way that I could be elitist is that I admit to finding certain modes of reasoning capable of being "more just" than others, but this is no different from the morality posited by anti-elitists themselves: at a bare minimum, they posit a hierarchy of values in which being "anti-hierarchical" is more just or enlightened than being hierarchical, and in which recognizing the socially-constructed nature of knowledge is more just or enlightened than assuming it is absolute and objective. In the very act of expressing these critiques, they place themselves at the top of their own hierarchies because they believe they have the correct and better view. To the extent that I may be elitist, I posit an elitism in which all are invited to participate: an “egalitarian elitism,” where we are all given the choice and opportunity to develop. This is not dissimilar to the reasoning behind encouraging the growth of a literate and educated populace through public education in a democracy.

Finally, as discussed above, nested hierarchies are empirically demonstrable. While I acknowledge that I may be "imposing a metanarrative" on individuals and cultures who do not agree with my interpretation of their morality and beliefs, I first point out that taking a position against metanarratives is its own metanarrative. Again, there is always an absolute grounding for any position: the question is whether we have the courage to make it explicit, and the knowledge and reason to justify it. This developmental model is designed to include and honor all perspectives, such that it does not ascribe to the "Other" anything significant that the "Other" would not ascribe to itself. For example, if someone told me that she believed in God, and that non-believers were damned, I would take that statement, compare it to other people's statements within and outside that culture, and identify similar patterns in thought across space and time. This perspective is therefore not a dominating or truth-violating metanarrative: it simply recognizes that certain views develop over time within and between cultures and identifies these "deep structures." An example of a deep structure might be the "mythic" tendency to believe in an abstract divinity and ascribe notions of evil or primitivity to non-believers. This can occur in many cultures, and I make no comment about the cultural "surface" characteristics through which the
deep structures manifest. This self-reflective, culturally sensitive approach minimizes the possibility that I am legitimizing some power-based hierarchy of domination.

7. Methodological

Integrative thinking does not seek to establish substantive universal definitions, but rather, takes such definitions, which vary across space, time, and field of knowledge, and situates them in a unifying framework. These include such concepts as justice, law, love, identity, even reason itself. It is important to emphasize that an integrative perspective is reconstructive: it acknowledges that it is very difficult to reason from or generate reliable underlying principles in novel situations. Such principles are often discovered after examining a history of development. In novel circumstances, underlying principles can be posited but may be subject to radical change or abandonment.

Also, note that a hierarchical understanding of morality -- which acknowledges that there are many types which vary across time and space -- actually honors pluralism because it views morality in the context of an ordered series and does not imbue it with absolute substantive content. The importance of this idea cannot be overstated: in cases where there exist a group of ordered types involving hierarchical gradations, it is impossible and indeed absurd to demand an absolute definition which encompasses all possible grades and types.175

8. Multi-Dimensional

Moral valuation has at least two dimensions in integrative thinking: "depth" (hierarchical stage) and "span" (stage appropriateness). So far, our discussion has mainly considered depth: how inclusive is a given worldview? How flexible? How reflective? What we have not yet asked is, given a choice, what worldview, or what techno-economic structures, are appropriate for a given individual or society? This cannot be answered with a substantive absolute; integrative thinking recognizes that "ideal" structures are deeply contextual. Colonialism, 20th century history, and the recent Iraq war have demonstrated the disastrous consequences of imposing ideological absolutes in thought and socio-economic organization.

We must not only judge whether a worldview or political structure is "better," but we must also determine whether it is stage-appropriate. An ancient and classic example was put forth by Aristotle, who recognized that the goodness of a thing or activity is related not just to hierarchical rank, but to its appropriateness to the circumstances. He finds that

superfluities are better than necessities, and are sometimes more desirable as well: for the good life is better than mere life, and good life is a superfluity, whereas mere life itself is a necessity. Sometimes, though, what is better is not also more desirable … at least to be a philosopher is better than to make money, but it is not more desirable for a man who lacks the necessities of life. The expression 'superfluity' applies whenever a man possesses the necessities of life and sets to work to secure as well other noble acquisitions. Roughly speaking, perhaps, necessities are more desirable, while superfluities are better.176

Aristotle identifies a form of goodness, "desirability," relative to local circumstances: being a bandit might be more desirable if one lacks food and money, while being a philosopher might be better. Wilber uses the terms "fundamental" and "significant"; in Abraham Maslow's hierarchy of needs, for example, securing food would be more fundamental ("desirable") and realizing creative potential would be more significant ("better"). This idea of desirability, or appropriateness, is implicit in Aristotle's discussion of non-ideal "second-best" constitutions: the best which an actual political group is capable of supporting; the closest approximation to full political justice which the lawgiver can attain under the circumstances. Professors Ronald Inglehart and Christian Welzel, in discussing development in the context of Modernization Theory, state that

Iraq, of course, provides a cautionary lesson. Contrary to the appealing view that democracy can be readily established almost anywhere, modernization theory holds that democracy is much more likely to flourish under certain conditions than others. A number of factors made it unrealistic to expect that democracy would be easy to establish in Iraq, including deep ethnic cleavages that had been exacerbated by Saddam Hussein's regime. And after Saddam's defeat, allowing physical security to deteriorate was a particularly serious mistake. Interpersonal trust and tolerance flourish when people feel secure. Democracy is unlikely to survive in a society torn by distrust and intolerance, and Iraq currently manifests the highest level of xenophobia of any society for which data are available …. In keeping with these conditions, Iraq (along with Pakistan and Zimbabwe) shows very low levels of both self-expression values and effective democracy.177

177 Supra Inglehart.
Applying democratic ideals such as free speech, gender equality, and sexual freedom to an agrarian society with strong ethnocentric beliefs and lacking adequate infrastructure may not be stage-appropriate, and may result in severe social destabilization. Likewise, as we have seen in Africa and the Middle East, providing industrial-stage artifacts, such as guns, explosives, and chemical weapons to tribally-organized societies can easily result in horrific violence and genocide. Inglehart and Welzel point out that effective democracy is a considerably more demanding standard than electoral democracy. One can establish electoral democracy almost anywhere, but it will probably not last long if it does not transfer power from the elites to the people. Effective democracy is most likely to exist alongside a relatively developed infrastructure that includes not only economic resources but also widespread participatory habits and an emphasis on autonomy.

It is therefore incumbent on the integrative thinker to consider "second-best" stage-appropriate solutions in an increasing complex political, economic, technological, and legal world. Wilber refers to this integrative morality as promoting the most developed good for the greatest number: "we must make pragmatic judgments about differences in intrinsic worth, about the degree of depth that we need to destroy in an attempt to meet our own vital needs." If we are to truly say that every worldview has something to contribute to truth and morality, then we must seriously consider the legitimacy of pre-modern structures and include them in our political and legal decisions.

Integrative developmental thinking enables us to understand the intimate relationship between law and historical development, morality and social structure, and how the local and the universal can be reconciled. We may now synthesize Natural Law's position that law rests on a universal moral order, Positivism's requirement that we ground our views on law, society, and morality empirically, and Relativism's observation that values and laws vary across time and space, and that much of what we deem to be natural or inevitable is socially-constructed. We can now recognize that law is not solely derived from a moral order, or a creator deity, or reason, or the hegemony: it is a response to technological,

\[178\] Ibid.
\[179\] His exact words are "the greatest depth for the greatest span." Wilber, Ken. *A Brief History of Everything.* (Boston: Shambhala, 2007), 511.
\[180\] Ibid.
economic, biological, psychological, and historical conditions, and it, in turn, refines itself and re-shapes those conditions.

This integrative developmental perspective does not guarantee absolute answers to difficult moral and legal questions, especially since today's legal and ethical problems are deeply contextual, but it does provide a solid framework from which to build. With this approach, we may discuss our values in the legal context in a structured and explicit way, commensurate with our reason.

VI. JUDGMENT

Niels Bohr said that "A triviality is a statement whose opposite is false. However, a great truth is a statement whose opposite may well be another great truth." Are we not, in our quest to understand the law, searching for great truth? Have we not, in these vast caves of intuitions and ideas, been graced with the light of several great and contradictory truths? "How wonderful that we have met with a paradox," Bohr once said, "Now we have some hope of making progress!" We have been given an opportunity to work with a contradiction and find a greater context in which the positions are harmonized, and perhaps discover a richer, more nuanced, and more just world.

It is in this spirit that I offer an analysis and judgment of The Case of the Speluncean Explorers through an integrative developmental lens. First, I will satisfy Natural Law's explicit requirement that we make a determination of the morality of the act in itself. Does contemporary law or morality place an absolute premium on the value of human life? Taking a systemic view, I observe that the "ideal" level of wrongful convictions in a society is not zero. If we wished to be 100% certain of the correctness of a guilty verdict in every case, the resources spent on each case would cause the justice system to collapse. It would simply be unworkable; having some small percentage of wrongful convictions serves a just purpose by permitting the system to function at all. Even in systems without the death penalty, we admit that having a working legal order involves mistakenly ruining a small number of lives. The immorality of an individual event may be viewed as serving a moral purpose in a systemic context; anyone who believes in upholding any society governed by the rule of law must accept this. We therefore do not place an
absolute premium or "infinite" worth on freedom or living a meaningful life. Do we place such a premium on life itself? It does not appear that we do. For example, we have laws which authorize police aggression and violence against citizens; we provide law enforcement officers with training and weapons which have a significant likelihood of killing their targets. We do this because we acknowledge that the judicious application of violence and power is required to enforce the law and maintain a just society, even if it is a statistical certainty that people will die at the hands of the police.

The point here is that, even in systems without death penalties, we do not believe in the absolute sanctity of life, in terms of biological function or freedom. This is not to say that we absolutely value the collective over the individual, but that our society must make judgments that balance the interests of the whole and its parts; in the integrative context, we are also required to balance the needs of actors inhabiting different consciousness and environmental structures in the same society. It is easy to say that it is better to suffer injustice than to do injustice, but there are, as we have discussed, contexts in which we accept the limited doing of injustices to serve a "greater" justice.

When viewed at a structural level, we see that the spelunkers had been placed in a social, economic, technological, biological, and geographic system which would inherently generate behaviour that would be regarded as "unjust" in regular society\textsuperscript{181}; while we might regard this behavior as "aberrant" under normal social conditions, we recognize that many humans would likely act in such a manner in such a system, because if they did not, they would cease to exist. We have seen that producing food by hunting and gathering limited and defined morality and legality to that which could be exercised in a band; how much more limited would these have been for a small group trapped in a cave with no food at all?

Had the explorers acted in the manner they did without such harsh and limiting pressures, I would say with certainty that their actions were unjust. Given the totality of their circumstances, however, I am comfortable in finding that, at the very least, their actions were not unjust. This is premised on the notion

\textsuperscript{181} I acknowledge that they chose to go into a cave with scant provisions, and so have some "responsibility" for their predicament, but this is not a case of the explorers deliberately placing themselves in a situation where they saw a reasonable risk of having to eat each other, and consciously accepting that risk, thereby assuming greater moral culpability for the consequences.
that we ought to promote the most developed good for the greatest number. At every stage of
development, morality evolves to promote social cohesion and stability; if there is a disjunction between
the interior values and the exterior structure of a society -- for example, promoting tribal values in a
nation-state, or liberal-democratic values in a feudal environment -- then the society risks collapse. A
group’s morality must be stage-appropriate: here, a taboo against killing and cannibalism would have
guaranteed social collapse and resulted in the death of everyone in the cave. I would choose lesser good
for some over greater good for none.

Next, I will satisfy the Positivist requirement for a grounding in facts and law. We recognize now
that language does not merely describe an objective world or have objective meaning, but that it also has
a hand in "creating reality" because we interpret much of the world through language, and that any
communicative action is an interpretive event. Any piece of language is ultimately context-dependent
and derives its meaning from a network of interrelated meanings. H.L.A. Hart recognized that as a result
of the inherent interpretive requirements of language and the complexity of real fact situations, judges do
in fact legislate in the "indeterminate penumbra" of meaning surrounding words and laws.

Many would consider the facts we are faced with in this case to be exceptional, in that they
fundamentally change the social, economic, technological, biological, and geographic conditions in which
our laws normally operate. Given their exceptionality, and given that some degree of interpretation is
always necessary, I believe that a "purposive" interpretation would be appropriate for the murder statute
here, and a "contextual" interpretation would be appropriate for the word "willful."

I acknowledge that it is impossible to precisely define a law's "purpose," given the ambiguity of
language and human motivation, but in my view it is still possible and reasonable to discuss a statute's
purpose if we are able to identify the significant reasons behind its development: the enactment of a law
has historical causes, and those causes can be understood. As far as I can see, there are four significant
factors which could inform the murder statute's purpose: the protection of society, retribution,
rehabilitation, and deterrence. In my view, none of these purposes would be served by convicting the
defendants. These men killed for survival under conditions far removed from "normal" society, and I find
it highly unlikely that we would need to be protected from them. Given their circumstances and the suffering they have already endured, exacting retribution would also be inappropriate, and I doubt that many Newgarthians would wish to see some imbalance in suffering or morality restored here.¹⁸² I also find that there is no need for rehabilitation because it was not a defect in their psychology which caused them to kill.

With regard to deterrence, any deterring effect of the statute would be ineffective under extreme survival conditions: if another disaster should befall a group of Newgarthians, they would likely do what is necessary to survive under their environmental constraints regardless of this judgment; indeed, a developmental understanding of human psychology would predict such an outcome. With regard to deterrence under "normal" conditions, I acknowledge that convicting killers regardless of their circumstances, or even motivation, might have a deterring effect, but this justification bears too close a resemblance to a strict liability, which discards any attempt to find an individual/collective or subjective/objective balance. It is therefore morally repugnant, unless I accept that it is just to treat people like commodities. Such an approach was, in any case, intended to be avoided through the insertion of the word "willful."¹⁸³

How strong, however, is the actual deterrent effect? The idea of deterrence has its roots in the Classical liberal notion of "choice" and "will": if the consequences of an act are harsh enough, they should deter people from choosing to commit that act. Yet the social and systems sciences are presently telling us that people may not be deterred from committing heinous acts with harsh legal consequences, and that environmental circumstances play a large part in determining the choices that people make.

¹⁸² The possibility of civil unrest is therefore remote. In any case, if civil unrest were truly a risk, the causes would be systemic, with a single legal decision acting, at worst, as a trigger. A legal decision ought to consider morality, but not public perception.
¹⁸³ I realize that I am taking a "purposive approach" to interpreting why "willful" was included, and I believe that it is appropriate, given that the word's presence could serve no other purpose. A purposive approach, conducted in good faith, ultimately respects the will and authority of the legislature, because it presumes that there are reasons why laws are worded a certain way and attempts to understand those reasons to better enact the legislature's will. Here, the word "willful" creates a subjective requirement, in contrast with strict liability, indicating that the charge has a moral component: a person ought not be guilty of murder if she did not intend to do it. We, therefore, ought to acknowledge that moral component and ensure that our interpretation of the law is consistent with it. In this way we achieve justice and not mere functionality.
For example, psychologist Philip Zimbardo, who conducted the now-famous "Stanford prison experiment" in which students posing as prisoners and guards began behaving like real ones, studied the 2003 Abu Ghraib prison abuses and stressed the importance of understanding situational influences, positing the idea of "evil-generating situations." He stated, in the case of murder, that "if the killing can be shown to be a product of the influence of a powerful situation within a powerful system, then it's as if [the individuals who killed] are experiencing diminished capacity and have lost their free will or their full reasoning capacity."\(^{184}\)

We must therefore understand "will" in a developmental context. The notion of "will" or "free will" arises in our attempt to locate causality and therefore assign moral culpability. In tribal cultures, there was not a sharp differentiation between the self and the natural world. Causality was located in nature: the intentions of humans were projected onto natural phenomena, so the "intentions" of spirits and totems were thought to work through people, giving guidance to, and even possessing them. This is the source for the development of beliefs involving totemic magic, exorcism, and curses. Once humans "subdued" the natural world via agriculture and domestication and began to form early nation-states, the perceived causes of human and natural action shifted skyward, to more abstract and all-encompassing deities. In the case of the Western world, spirit-possession evolved into the idea of God (or His agents) moving through humanity. This worldview generated dispute resolution systems such as trial by ordeal and trial by combat: given that God or something that God created moved you, God would judge you.\(^{185}\)

With the rise of reflective reason and an emphasis on empirical study, this was no longer a satisfactory explanation: if God was good, and God created and moved the world, how could there be such evil and suffering in it? And, perhaps more disturbingly, why could no empirical evidence be found of a creator God? This could only be explained by assigning the responsibility for human action to

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\(^{185}\) While we might view trial by combat as a test of a person's killing expertise, the "mythic" worldview of early empires believed that God or gods could favor you in battle.
people. Thus the locus of causation for human action moved from God into human beings: the free will of the autonomous individual enabled us to assign complete moral responsibility to that individual. Essentially, the Classical liberal said, "You make choices, and it's all on you."

As the social and systems sciences currently rise in prominence (including new interdisciplinary studies such as Jared Diamond's "biogeography") we are beginning to understand that individual subjects are not wholly autonomous or "free" but are very much influenced and shaped by social, economic, technological, biological, and geographic factors. Responsibility evolved from "you make choices, and it's all on you" to "your choices are influenced by your circumstances, and it's on all of us." In underprivileged neighbourhoods such as American ghettos, for example, the introduction of drugs has tended to destroy, among other things, the local economies, such that the only viable economic engine left in some of these areas is the drug trade. Is it any wonder that so many children and young adults participate in it, despite the clear dangers and evils involved? Is it any wonder that murder rates are higher and literacy rates are lower in poor, drug-ridden communities? Would it not be unjust to pin all of the blame of a particular crime on one individual, when so many causal factors are at play? We also recognize that our current socio-economic system privileges middle-class, heterosexual, able-bodied white males, and that they cannot take "all the credit" for their achievements; would it be fair, then, to make someone who has not had access to such privilege take "all the blame" for his failures? Some legal systems have begun to accept this type of comprehensive, systemic thinking, and it has been reflected, for example, in discretionary sentencing for abused women and underprivileged minorities, such as Aboriginals. This mode of thinking is essentially what desegregated schools in the U.S.

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186 And viewing events in nature impartially, separating facts from morality, such that an earthquake or volcanic eruption could be explained through scientifically-verifiable facts, as opposed to the displeasure of an angry spirit. 187 This is not to trivialize the existence and importance of personal responsibility, but simply to understand that different sets of threats and opportunities produce different types of actors, as well as different probabilities and definitions of success and failure. Critical disability theory, for example, recognizes society's role in disabling the individual: early disability policy was based on the equation of disability with a disadvantage. The individual was considered liable for the disadvantage(s), while the society sought to occasionally mediate the effect of this disadvantage through charitable services. This essentialist understanding of disability prevailed until the late twentieth century, when the conceived locus of responsibility for disability began to shift away from the individual and toward society at large .... Modern disability policy seeks a balance between the extremes of individual or social responsibility for disability." Baker, Dana Lee. "Autism as Public Policy." Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law in Dianne Pothier and Richard Devlin, ed. (UBC Press, 2006) 177.
brought law into alignment with rising equality values. It is evident that environmental conditions have a constraining and directional effect on will.

Given the very unfortunate circumstances of the defendants, and given the human drive to live, how free were they? "Will" does not seem to be a binary phenomenon. How much "will" did they exercise in their decision? I cannot say that they exercised "no will," but I certainly cannot say that they exercised their "whole will." There is a difference between doing something deliberately but unwillingly ("I had to") as opposed to doing something deliberately and willingly ("I wanted to"). This distinction is of the utmost importance in sexual assault via coercion: the law's understanding of "unwillingness" in these cases mirrors my understanding here. I also find it admirable that the defendants chose a lottery system as opposed to targeting the weakest member, either explicitly or waiting for him to die.\textsuperscript{188}

As a result of these observations on "choice" and "will," I am skeptical about the deterring effect of harsh sentences for murder under adverse environmental conditions, and I also find that the system in this case exerted such pressure on the defendants that their decision to kill Roger Whetmore was much closer to "not willful" than "willful."\textsuperscript{189}

I believe, given the interpretive requirements of language, social and systems science findings, and using contextual reasoning, that the defendants did not have the mens rea requirement of willfulness, and thus I cannot convict them under the positive law, nor can I condemn them morally. Even if I am incorrect, however, and this justice is not presently contained in the positive law,\textsuperscript{190} then I say explicitly that our concept of justice has developed beyond our current institutions and processes, and it is our moral responsibility to develop those institutions and processes accordingly. While I am confident that my understanding of "willful" accords with the current legal understanding in the context of coercion, if this

\textsuperscript{188} With regard to the option of amputating limbs, given the necessity of amputating enough mass for significant nutritional gain, along with the risk of death by blood loss or infection, I do not consider that option to be any more reasonable or humane than drawing lots for one person to die.

\textsuperscript{189} I see, at present, two immediate ways that a recognition of limited will could affect the results of criminal trials: discretionary sentencing, and possibly the reconceptualization of guilt (and willfulness) into a spectrum with thresholds as opposed to a binary system. I also see no meaningful difference between using a "necessity defence" and saying that someone's actions were "not willful." Both can be distilled to "I had no choice."

\textsuperscript{190} That is, their mental state meets the current "willful threshold."
is not the case, then I propose that the definition of "willful" must be expanded to include "environmental coercion," at least in obvious, extreme life-or-death cases such as this.

Subjective morality and objective social, political, and legal structures are reciprocally related: they co-arise and "co-enact" one another. Law, we have seen, develops with morality and techno-economic needs: it is a formal expression, exploration, and facilitation of these needs. What we usually view as a "just" state of affairs is the outcome which stabilizes society at whatever stage it is at. Sometimes, however, one side of the objective/subjective relationship can "move ahead," or "develop beyond," as in techno-economic revolutions\(^\text{191}\), and the two sides must find an equilibrium, or else the new structure will not hold, and society risks collapse. With each leap in techno-economic development, for example, we must reconceptualize justice to keep up with changes in population density, wealth generation and distribution, forms of ownership, and systemic complexity.\(^\text{192}\) Novel relationships and exterior structures require novel thinking and morality. When morality evolves, we must adjust our institutions and processes to keep pace. A perfect example of this is the rise of equality values in the U.S. in the mid-20\(^{\text{th}}\) century and their integration into law via the courts, something which existing theories of jurisprudence had great difficulty in explaining. The justification was simple: equality values were morally superior to the morality that was then entrenched in American institutions and laws, because it was based on a universal, cross-cultural understanding which found that racial inclusion was ultimately more just than racial segregation. If we believe that our legal system presently does not include some type of "more comprehensive" or "more inclusive" justice, then we \textit{ought} to include it and expand our legal understanding of causation, will, and statutory interpretation.

The law, in fact, already makes “exceptions” for how it treats individuals operating in "earlier" developmental contexts. With regard to our present case, the explorers found themselves behaving in the social, environmental, and moral context of a survival band under desperate circumstances. Certain

\(^{191}\) Agricultural, industrial, and informational, all of which require a new way of "being in the world" and relating to one another, the result of changes in production, transportation, and communication technology.

\(^{192}\) Examples include limiting ownership of the space above land due to airplanes flying overhead, and developing the law of negligence in response to railroad accidents.
aspects of band-behavior are actually well-understood by legal scholars and practitioners, though they would not phrase their understanding using these terms: there are innumerable special rules across all legal fields for the treatment of individuals operating in bands, also known as families.

Humans created what we recognize today as law to integrate unrelated kinship groups, and to facilitate the treatment of individuals as citizens of a state. Social and biological reality, however, guaranteed that kinship-style behavior would arise when certain conditions were present, and these relationships and behavioral tendencies could subvert the law or have deleterious legal and social consequences. As such, the law had to treat people operating under these conditions differently.

In contract law, for example, in the case of family, domestic or social agreements, there is a presumption that the parties do not intend to create legal relations in the arrangements made between them. Tax law is filled with requirements for arm’s length transactions, fair market value pricing, and special rules for income-splitting and distribution among family members. Estate law treats the disposition of property between relations as distinct from that between citizens generally. Then there is family law itself, which considers how power relationships between spouses, children, and extended family affect, and are affected by, contracts, estates, tax, and criminality.

We have an intuitive understanding of how important it is to acknowledge developmental structures to preserve legal, moral, and social integrity. As the law already accounts for alternate moral, social, and environmental contexts, it is our responsibility to explicitly acknowledge that we adapt to those contexts. As in the cave of our ill-fated explorers, it is sometimes a matter of life or death.

In summary, I find, given an integrative developmental perspective on law and morality supported by empirical research, that the actions of the defendants were not illegal. They had no alternative but to commit an action which was not unjust in a harsh, constrained moral, social, and environmental context. Our law, which evolves with our moral, social, and environmental needs and abilities, recognizes the legitimacy of contextual interpretation; it is, or ought to be, flexible enough to recognize the legitimacy of the defendants’ actions. Punishing them would be cruel, irrational, and unjust in light of the suffering and humiliation they have already endured. I would overturn the conviction.
CONCLUSION

Holmes said that our "business as lawyers is to see the relation between your particular fact and the whole frame of the universe." All legal practitioners, judges or not, conscious of their assumptions or not, must function within a structure of beliefs about the nature of law, its place in society, and the role of lawyers, the courts, and the legislature. Structures of belief, of morality, of identity have evolved over time, growing in complexity and scope. We are at a point in history where we must be thoroughly self-conscious: it is our great privilege and responsibility to understand, on an unprecedented scale, where we have been, what we have become, and what we might yet be.

If we fail in this endeavor, then diversity -- social, intellectual, political -- disintegrates into fragmentation, and fragmentation into alienation. The law is, and must be, more than mere power and political influence, nobler than ideology and technical strategy. It has an authentic moral core, one which responds to and shapes our needs and ways of being, and which evolves as we evolve.

For decades, we have tried to reconceptualize what we have actually been doing when we enact and apply the law. Our “being in the world” has been in crisis: we have had great difficulty in determining where legal power comes from, how legal authority is to be exercised, and why the law changes. If we are to build a finer world, then we must see it clearly, and to do that, we must first look closely at ourselves. We have seen that human societies develop organizations and modes of production of increasing complexity; that this exterior development has a correlating and reciprocal "interior" moral aspect; that this development is reflected in jurisprudence; and that understanding it yields a form of reasoning capable of integrating conflicting perspectives into a coherent whole. It honors the contributions of Natural Law, Positivism, and the Critical schools, as it enables us to work from a moral foundation, emphasizes the importance of rational empirical study, and acknowledges the variability of moral and political preferences over time.

193 Quoted in Berman, LR, vii.
We as legal practitioners, as human beings, are obligated to exert the utmost effort in understanding what is good, what is legal, what is true, and indeed, what is possible; the best way to do so is to honor and integrate the contributions of all who have come before and create something better. If we do not, then we are stuck pretending, playing a solemn game of make-believe with the utmost seriousness, but practicing neither law, nor justice, nor reason.