MAPS OF LEGALITY: An Essay on the Hidden Role of Religious Beliefs in the Law of Contracts

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> Now when I was a little chap I had a passion for maps. I would look for hours at South America, or Africa, or Australia, and lose myself in all the glories of exploration. At that time there were many blank spaces on the earth, and when I saw one that looked particularly inviting on a map (but they all look that way) I would put my finger on it and say, "When I grow up I will go there."
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> — Joseph Conrad, Heart of Darkness 70-71 (1910)

I. INTRODUCTION

A. Crisis

There is a sense of crisis in the modern law of contracts arising from the chorus of attacks upon it from a variety of theoretical perspectives.[1] Modern contract law has been criticized as simple, dead, inadequate, contradictory, legitimating, inaccurate and inefficient. Among its critics are Charles Fried, Grant Gilmore, Ian Macneil, Stewart Macaulay, Richard Posner and Jay Feinman. Fried corrects the simplicity of classical contract theory: "Contract law is complex, and it is easy to lose sight of its essential unity."[2] Gilmore declares contract dead: "[W]hat is happening is that 'contract' is being reabsorbed into the mainstream of 'tort.' Until the general theory of contract was hurriedly run

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1. Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV 103, 104 (1988).

2. CHARLES FRIED, CONTRACT AS PROMISE 6 (1981).

up late in the nineteenth century, tort had always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again."[3] Macneil believes that modern contract law doesn't adequately deal with the relational nature of contracts. Macneil views all promise-centered theories as "inadequate to deal with complex contractual relations without distortion and omission."[4] Macaulay's empirical studies show that parties don't operate according to the rules of contract law. Business cultures define the conduct of the parties; businessmen do not resort to the letter of the law.[5] Feinman attacks contract theory because it espouses conflicting "patterns" — the individualist pattern with its emphasis on maximization of self-interest without regard for the interests of others and the collectivist pattern with its emphasis on the interdependence of individuals in modern society and the responsibilities and benefits of living in community.[6] Feinman also finds: "A powerful function of contract law is to present a system of belief which affirms the legitimacy of the existing social order while denying its true nature."[7] Richard Posner critiques modern contract theory based on its inattention to efficiency.[8]

The critical dialogue is full of worldview language. By worldview, I mean a vision *of* and *for* legal theorizing, as well as the rest of life. A worldview answers fundamental questions of meaning and purpose — the who, what, when and where of and for theorizing. Feinman describes the patterns of contract theory.[9] Fried describes a "shared theory of the world."[10] Macneil refers to his "universe of contracts."[11] Macaulay critiques the "classic images of the law."[12] Posner refers to "social visions."[13] Gilmore

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3. GRANT GILMORE, THE DEATH OF CONTRACT 87 (1974).

4. Ian R. Macneil, *Relational Contract: What We Do and Do Not Know,* 1985 WIS. L. REV. 483, 508 [hereinafter *Relational Contract*].

5. Stewart Macaulay, *An Empirical View of Contract,* 1985 WIS L. REV. 465, 467 [hereinafter *Empirical View*].

6. Jay M. Feinman, *Critical Approaches to Contract Law,* 30 UCLA L. REV. 829, 847 (1983) [hereinafter *Critical Approaches*].

7. *Id.* at 854.

8. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (3d ed. 1986) [hereinafter ECONOMIC ANALYSIS].

9. *Critical Approaches, supra* note 6, at 839-47.

10. FRIED, *supra* note 2, at 88.

11. Ian R. Macneil, *Values in Contract: Internal and External,* 78 NW. U. L. REV. 340, 341 (1983).

12. *Empirical View, supra* note 5, at 481.

13. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 148 (1990) [hereinafter PROBLEMS].

sets forth the classical "map" contract theory.[14] This language calls attention to the perspective, beliefs or point of view of the theorist and sets the context for a discussion of presuppositions underlying contract theories. It is the later analogy, the map, which we will use to approach the multiplicity of worldviews underlying theories of contract. These theories provide different cognitive maps of the legal terrain of contract law, different "maps of legality," if you will.

Maps have always been a part of my life. As a child, I often accompanied my mother to her classroom after school hours. The most fascinating things in the rooms were the maps, multi-layered maps of the world which could be pulled down across the blackboard. I was intrigued by maps. I had a globe which I would use to imagine trips to distant lands. I played games with place names like Kamchatka, Yakutsk and Siam. I searched the skies with my brother using astronomical charts. I learned about the routes taken by Columbus in search of the new world, Magellan circumnavigating the world, Ponce de Leon in search of the fountain of youth and Lewis and Clark charting the western territories. Maps are a valuable aid to orientation. They help us visualize spacial relationships; they transport us into new worlds. They help us see where things fit in time and space.

My first map of legality was drawn in contracts class — overlapping circles representing contract and tort with the area of their intersection constituting the realm of quasi-contract. In course after course, I ran into "landmark" cases which changed the map — the contours of legal decision making. I found that the legal landscape is always changing, as are the paths through it. Each theorist tries to "throw some light on the narrow path of legal doctrine" and points out the "pitfalls which ... lie perilously near to it."[15]

It is this background that makes the idea of mapping so appealing. The map analogy is not just an intellectual artifice; it speaks of the experience of the law; it speaks to my general experience. It provides an image which mirrors the point — just as our map strongly influences our route and final destination, our legal presuppositions move us in a direction which influences our definition of just results. The study of the law has had its own maps and mapmakers. My purpose in this article will be to lay several maps of contract law side by side to understand their

14. GILMORE, *supra* note 3, at 6.

15. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897).

strengths and weaknesses so that we may begin to draw a new map of legality based upon a biblical worldview. Before embarking on this survey, we will look at the process of mapmaking.

B. Cartography

Cartography is concerned with the design of maps. A map can be defined as a graphic representation of the milieu.[16] Maps provide a sense of the "whereness" of things and the relation between them; for example, the distance between "here and there." Maps come in a variety of shapes, sizes, and sophistication: large and small, flat and spherical, computer-generated virtual realities and scratchings on the backs of napkins. They range from the practical to the fanciful — from road maps, topographic maps, and ocean depth charts to imaginary maps of places like Narnia, Middle-Earth and Utopia. Some maps chart geographic features, while others focus on a single category of information as it varies from place to place, such as rainfall, population, airplane routes, income levels or types of vegetation. The value of the map is usually determined by its effectiveness in communicating the desired information, such as getting you where you want to go or making significant relationships clear. A map can be focused on one location, such as a treasure map or AAA trip-

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16. *See* ARTHUR H. ROBINSON & BARBARA BARTZ PETCHNIK, THE NATURE OF MAPS: ESSAYS TOWARD UNDERSTANDING MAPS AND MAPPING 15-16 (1976):

> [A] general definition of a map must be based on its being simply a representation of things in space; *representation* and *space* are the two critical elements.... [T]he space represented by a tangible map normally refers to the three-dimensional field of our experience; this is referred to in various ways using such terms as "area," "territory," "region," "section of the earth," and so on. These terms imply a limited extent of land, but often something more.... It is our view that the word "milieu" best connotes one's surroundings or environment in addition to its meaning of place, and thus involves the cartographer. Our definition of a map then would be "a representation of the milieu." This leaves only the meaning of "representation" to be clarified. To represent is to stand for, symbolize, depict, portray, present clearly to the mind, describe, and so on, and seems to occasion no problem in meaning; but what of the form that the representation takes? ... [I]t seems necessary for our purposes here to put forward the proposition that a map is a graphic thing made of marks of various kinds. Traditionally, a map itself is a space in which marks that have been assigned meanings are placed in positions relative to one another in such a way that not only the marks, but also the positions and the spatial relationships among the elements, have meaning. It is thus a graphic or visual construct, and it follows that one must be able to *see* a map.... Our definition of a map turns out to be deceptively simple. "A map is a graphic representation of the milieu."

tic. A map can also provide extensive information about a locality rather than direct one to a specific point within it, enabling the user to plan trips to an almost endless number of destinations. The maps that can be produced concerning a region are as numerous as the possible destinations within it. The potential kinds of information selected for mapping are likewise almost infinite. Almost anything can be mapped. If it can be spatially conceived, it can be mapped.

"All maps are abstractions and simplifications of the real world. Certain real-world phenomena are selected by the cartographer, represented by symbols on the map, and presented to the map reader who interprets the map and learns something about the selected phenomena in their geographic setting."[17] Once a cartographer selects a particular milieu, such as a building, neighborhood, city or state for mapping, the area is reduced according to a scale, projected onto a flat surface and described by symbols. Scale, projection and symbolization are the primary mechanisms utilized by mapmakers to convert reality into a cartographic image.

Maps are usually smaller than that which they represent. A map's scale tells us how much smaller. The choice of scale involves a decision about the level of detail. A large-scale map represents more detail. A small-scale map gives us the big picture. While the selection of scale can result in distortion, making the distant seem proximate, it can also facilitate the discovery of structure in the relations between objects. This clarification of relationships between objects or the recognition of structure is an impressive intellectual accomplishment. It leads to discovery, revealing what would otherwise have remained unknown.

The second mechanism used in mapmaking is projection. The projection of the curved surface of the earth onto a flat surface distorts area size, alters distance and modifies shape. Map projections adopt standard lines, such as the equator or a meridian as points of reference for shaping the graphic representation. Distortion increases with distance from these standard lines. Different projections result in different representations — the adoption of different points of reference shape different graphic representations. A humorous example of projection is Daniel Wallington's poster, A New Yorker's View of the United States, a distorted and hopelessly inaccurate map of America; Manhattan

17. DAVID J. CUFF & MARK T. MATTSON, THEMATIC MAPS: THEIR DESIGN AND PRODUCTION 2 (1982).

and Brooklyn take up most of New York state, Boston is somewhere to the east, Florida appears just south of Staten Island, California is nothing but San Francisco and Hollywood. It pokes fun at the New Yorker's view of his town as the center of the world, but it calls attention to the idea of mental cartography which we will address in the next section.

The final element of mapmaking is the use of symbols to represent features, places and other information. The mapmaker adopts symbols for points, lines and areas within the milieu. Attention to the size, shape and color of symbols can enhance the process of communication between mapmaker and map users. Likewise, inattention to the connotations and other impressions left by symbols can inhibit understanding, such as using the color green or brown to represent water. Not only the means of symbolization but the choice of which features will be symbolically represented has an impact on the map as well. The decision to include some features will mean that others are omitted. These decisions must be carefully considered in light of the intended use of the resulting map. The symbolization process can lead to both distortion and clarification. For instance, map markings can appear proportionally larger or thicker than that which they represent. This can lead to mistaken impressions of things like size, distance and relative position. But the appropriate use of symbols can also provide the map user with a valuable appreciation of orientation, position and direction.[18]

A good map requires the making of generalizations. The cartographer must filter out some aspects and call attention to other important aspects. Without selection, the map user would be buried in an avalanche of detail. A map which replicated reality would be too rich in detail, too multi-dimensional to be of value. The cartogragher's aim is to produce a useable map — a map that fits in your pocket or on your wall, a map that effectively communicates to the map reader. Scale, projection and symbolization are the cartographers tools toward that end.

It is important to understand the process of mapmaking because of the authority maps have in our lives. When I follow a map but fail to arrive at the expected destination, my first reaction is to question my physical surroundings, not the map. The map says I should have arrived: If "X" marks the spot, who moved the spot? Then, I think about the possibility of a wrong

18. STEPHEN TOULMIN, THE PHILOSOPHY OF SCIENCE 18-24 (1953).

turn, then possibly question the accuracy of the map. Maps have this degree of authority because of their visual nature: "One of the map's properties is that it can be taken in quickly by the eye, contributing to the potency of cartographic images."[19] Maps have an "extraordinary authority," even when they are in error.[20] Seeing is believing.

Sometimes maps are wrong because of changes in that which they depict. Changes in terrain can occur over the course of time or they can occur dramatically with some catastrophic event. Sometimes the discrepancy between the map and our experience of the dimension of reality portrayed is the result of a careless design, inadvertent mistakes or intentional misstatements by the mapmaker. Map blunders can be amusing, such as when AAA "lost Seattle" by accidently omitting it from their roadmap in the early 1960's, or absolutely deadly , such as when the United States used inaccurate and inconsistent tourist maps during its invasion of Grenada in 1983 which led to the injury and death of some of our own troops and the patients of a mental hospital.[21] Cartographers even engage in mischief. For example, map publishers have been known to include "trap streets" on their maps to deter misappropriation of their property by other publishers. The reproduction of trap streets provides a way to demonstrate copyright infringement in lawsuits.[22] Maps have served as the

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19. J.B. HARLEM & DAVID WOODWARD, 1 THE HISTORY OF CARTOGRAPHY 2 (1987); *see also* Arthur H. Robinson, *The Uniqueness of the Map, 5* AM. CARTOGRAPHER 6 (1978):

> It is generally accepted that spatial imagery is central to cognition. Although words, and even equations, can be used to represent the arrangement of things in space, they are highly inefficient for this because they lack the quality of image. Most of our thoughts deal with arranging ideas and objects in a conceptual space. This is true of everyone, and the image is probably prior to, and more basic, than words and thought. Because the map itself is space representing space, it inherently has all the attributes for image formation. It is, therefore, a powerful, highly efficient cognitive device.

20. KENNETH E. BOULDING, THE IMAGE 66-67 (1963):

> We learn our geography mostly in school, not through our own personal experience. I have never been to Australia. In my image of the world, however, it exists with 100 per cent certainty. If I sailed to the place where the map makers tell me it is and found nothing there but ocean I would be the most surprised man in the world. I hold to this part of my image with certainty, however, purely on authority. I have been to many other places which I have found on the map and I have almost always found them there. It is interesting to inquire what gives the map this extraordinary authority, an authority greater than that of the sacred books of all religions.

21. MARK MONMONIER, HOW TO LIE WITH MAPS 44-45 (1991).

22. *Id.* at 50.

tools of propagandists promoting their ideology and military strategists conducting disinformation campaigns. Cold war Soviet maps, for example, deliberately distorted the location of villages, buildings, railroads, coastlines and other features.[23] In short, maps can lie and mislead.

C. *Cognitive Mapping*

In addition to the tangible maps we have been discussing, we walk around with maps in our heads. Not just mental maps of geography, but cognitive maps of many aspects of our experience which manifest themselves as categories, images, models, stereotypes and the like. They help us to make sense of or map our world.

The map has been a prevalent metaphor used by theorists from many disciplines.[24] It has also been utilized in the field of

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23. *Id.* at 115-18.

24. Robinson and Petchnik note that "scholars in other fields tend to use *the* map as the fundamental analogy." ROBINSON & PETCHNIK, *supra* note 16, at 2. Philosopher Michael Polanyi used the map analogy to explain the difference between tacit and explicit knowledge. Polanyi's point is to show that the conveyance of knowledge is not a passive activity. Communication requires active involvement on the part of the receiver of information. Maps do not just convey information; they induce understanding. The recipient must combine the explicit knowledge of the map with his own tacit knowledge to understand the map's meaning. MICHAEL POLANYI, THE STUDY OF MAN 14-16 (1959). Polanyi is only one among many writers who have used the analogy. Linguist George Lakoff used the map analogy to explain the operation of metaphors which apply our knowledge of one thing to another, such as the "conduit" metaphor for communication which "maps our knowledge about conveying objects in containers onto an understanding of communication as conveying ideas in words." GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS 114 (1987). Sociologist Clifford Geertz described ideologies as "maps of problematic social reality and matrices for the creation of collective conscience." CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 220 (1973). Pop culture observers Quentin J. Schultze and his colleagues discussed the "maps of reality" conveyed to youth by movies and music. QUENTIN J. SCHULTZE, ET AL., DANCING IN THE DARK 99 (1991). Psychiatrist Scott Peck referred to the faulty maps of reality we use to navigate through life which undergo sometimes painful revision as we face the truth about ourselves and the world around us. SCOTT PECK, THE ROAD LESS TRAVELLED 45-46 (1978). The map metaphor was also used by Thomas Kuhn in his classic study of the history of science, where he uses the map analogy to explain a paradigm:

> [The paradigm] functions by telling the scientist about the entities that nature does and does not contain and about the ways in which those entities behave. That information provides a map whose details are elucidated by mature scientific research. And since nature is too complex and varied to be explored at random, that map is as essential as observation and experiment to science's continuing development. Through the theories they embody, paradigms prove to be constitutive of the research activity. They are also, however, constitutive of science in other respects, and that is now the point.

law.[25] The notion of mapping is implied by the reference to landmark cases, as it is in the analogy to "the path of the law."[26] Benjamin Cardozo used the map metaphor to describe the process by which the law is "mapped and charted" by the courts.[27] Cardozo says: "We like to picture to ourselves the field of the law as accurately mapped and plotted. We draw our little lines, and they are hardly down before we blur them."[28] As they are used "we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew."[29] Cardozo describes the "directive forces" of logic, history, custom and justice at work in the law:

> The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.[30]

Eventually, the judicial mind will be forced to choose among these directive forces in selection among precedents:

> We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling

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> In particular, our most recent examples show that paradigms provide scientists not only with a map but also with some of the directions essential for map-making. In learning a paradigm the scientist acquires theory, methods, and standards together, usually in an inextricable mixture. Therefore, when paradigms change, there are usually significant shifts in the criteria determining the legitimacy of problems and of proposed solutions.

THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 109 (2d ed. 1970); *see also* TOULMIN, *supra* note 18, at 116-17.

25. *See, e.g.*, Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1229 (1991) (reviewing RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)); JUSTINIAN'S INSTITUTES (Peter Birks and Grant McLeod, trans.) 7, 15 (1987); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 780 (1985); H.L.A. HART, THE CONCEPT OF LAW 13-14 (1961).

26. Levinson, *supra* note 25, at 1229.

27. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 76 (1921).

28. *Id.* at 161.

29. *Id.* at 178.

30. *Id.* at 30-31.

> sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go.[31]

A more recent, and more extended, use of the map analogy was made by Boaventura De Sousa Santos.[32] Santos looks at the relationship between law and society based upon maps and mapping. "In my view, the relations law entertains with social reality are much similar to those between maps and spatial reality. Indeed, laws are maps; written laws are cartographic maps; customary, informal laws are mental maps."[33] This suggests an analysis of the relations between law and society based upon a paradigm of scale, projection and symbolization. Santos observes that there is a tension between representation and orientation in mapmaking. The inclusion of description and detail increases the representational qualities of the map but hinders our perception of their orientation in relation to other things which enables us to move through space. While concentration on relative position and direction facilitates movement, it diminishes attention to accurate presentation of specific features.[34]

Analyzing the effect of scale on the structure and use of law, Santos locates three different legal spaces: local, national and world. Local law is a large-scale legality. National law is a medium-scale legality. World law is a small-scale legality. Each scale creates different legal realities. They focus our attention on different features of legal activity. She uses a labor dispute in a factory as an example of scale differences. A large-scale map focuses on the private justice of the workplace that determines the relations between management and labor and means of dispute resolution. On the medium-scale, national level, this particular labor dispute is only part of the wider realm of industrial relations that have an impact on things like political stability, economic conditions and the distribution of power between unions, business and government. Looking at the labor dispute in the context of world legality with a small-scale map, the particular dispute becomes a tiny detail in an international arena hardly worth mentioning.[35]

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31. *Id.* at 43.

32. *See generally* Boaventura De Sousa Santos, *Law: A Map of Misreading, Toward a Postmodern Conception of Law,* 14 J. L. & Soc'y 279 (1987).

33. *Id.* at 282.

34. *Id* at 283.

35. *Id.* at 287-88.

Recalling her discussion of the tension between representation and orientation, Santos says:

> [L]arge-scale legality is rich in details and features; describes behaviour and attitudes vividly; contextualises them in their immediate surroundings; is sensitive to distinctions (and complex relations) between inside and outside, high and low, just and unjust.... [S]mall-scale legality is poor in details and features, skeletonises behavior and attitudes, reducing them to general types of action. But, on the other hand, it determines with accuracy the relativity of positions (the angles between people and between people and things), provides sense of direction and schemes for short-cuts and, finally, it is sensitive to distinctions (and complex relations) between part and whole, past and present, functional and non-functional. In sum, this form of legality favours a pattern of regulation based on (and geared to) orientation and movement.[36]

Turning to projection, Santos states that different types of projections create different legal objects based upon the same social objects. "Each legal order stands on a grounding fact ... which determines the specific interpretive standpoint or perspective that characterises the adopted type of projection."[37] Each type of projection has a different center and periphery. The center is mapped with greater detail and absorbs a greater part of the available legal resources than the periphery. The principles and techniques of the center are applied to the legal peripheries with little attention to their unique needs. Thus, distortion increases as we move away from the center toward the periphery.[38]

Finally, Santos considers symbolization. She posits two typical modes of legal symbolization: the Homeric style of law and the biblical style of law. The Homeric style converts reality into a succession of separate events described in abstract and formal ways, in other words, an instrumental legality. The biblical style depicts reality as multilayered, in image based, figurative and informal terms; in other words, it "tries to integrate and even dissolve the legal representation into the social and political context in which it occurs...."[39] She observes the rise of the biblical style of law in the emerging world legality; for example,

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36. *Id.* at 289-90.
37. *Id.* at 291.
38. *Id.* at 292.
39. *Id.* at 297.

in the contracts drawn by multi-national corporations and international associations which use expressions like common interest, trustworthiness, co-operation and assistance, but has found in her case studies in the Cape Verde Islands, Recife and Portugal coalescent, complementary and contradictory relations between these styles of law.[40]

Santos' explanation of processes involved with mapmaking helps us to see the presence of similar processes in the law. Just as physical maps require the making of assumptions and use of a methodology, our cognitive maps include assumptions and methods. We adopt symbols, project a particular point of view upon the milieu based upon a central principle and select the appropriate scale or depth of analysis. These theoretical maps provide us with direction for our theorizing, a sense of what is important and what is not important, guidance to determine what are satisfactory and unsatisfactory answers. Our theories distinguish the valid from the invalid, the significant from the mundane, the heretical from the orthodox.

All theories start with some fundamental presuppositions which are not subject to verification. They are just there. Presuppositions lead to "tilt,"[41] a tendency toward a particular result. While accommodations may be made to competing principles, some presuppositions remain strong determinates of results. Within a particular theoretical regime, fictions will be used to reach a "just" result. For example, an implied promise within a neo-classical view of contract or the treating of corporations as persons within an individualist view of business associations. These fictions are required to do justice within a framework which is based upon the assumption that individuals are autonomous.

> It is not simply that in a court case a judge holding an individualist view would tend to lean toward favoring the rights of the individual, while a judge who is a collectivist would tend to lean toward favoring the welfare of society. Such a result, all by itself, would be important enough, and would cause significant differences in the way cases are decided. The significance of the two positions is even greater,

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40. *Id.* at 296-97.

41. Gary Pellar, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1176 (1985); *see also*, David S. Caudill, *Disclosing Tilt: A Partial Defense of Critical Legal Studies and a Comparative Introduction to the Philosophy of the Law-Idea*, 72 IOWA L. REV. 287, 288 (1987).

> however, in that each position *gives a particular slant to the very idea of justice which underlies the judicial procedures and laws which are adopted.*[42]

These presuppositions make up cognitive maps which have as much, if not more, authority than physical maps. While they are without the visual potency, their tacit acceptance makes them similarly authoritative. Therefore, we will alter our definition of a map for use in reference to cognitive maps as a tacit representation of the milieu.

We will use the map analogy as a vehicle to demonstrate that the direction in which our theories move impact our definition of a just result. Our initial focus will be on the presuppositions that constitute part of our cognitive maps. We are not usually cognizant of the map they draw. We go on our merry way until a problem arises which causes us to focus on them. But despite our lack of explicit attention to them, they are always tacitly there. We will point out the different projections evident in these maps which adopt different points of reference. We will also note some of the symbols they adopt which predispose them to certain results. Our scale will remain about the same as we look at these maps — a medium scale map of a particular field of law — the law of contracts. To find our way in the world of contracts without getting lost, we need a biblical map of legality, what I call a *radically biblical* map of legality. By radically biblical I mean that religious belief inevitably directs legal theorizing. To better understand the contours of such a biblical map, however, we need to look at the maps of other cognitive cartographers. But before we turn to these other maps of legality, we will look at the dominant, small-scale maps of reality upon which they are based.

II. MAPS OF REALITY

In his book *The Myth of Religious Neutrality*, Roy Clouser tries to dispel the myth of religious neutrality in theorizing. He argues that all theories are guided by presuppositions which include religious beliefs. He goes on to develop a theory of reality, society and state based upon a radically biblical view of the relationship between religion and theory. The short summary of portions of his book outlined below will serve as the orienting

42. ROY A. CLOUSER, THE MYTH OF RELIGIOUS NEUTRALITY 242 (1991).

basis for a critique of current contract theories in Part III, and a preliminary sketch of a new map of contract law in Part IV.

A. What is Religion?

Clouser proposes the following definition of religious belief: "any belief in something or other as divine,"[43] with divine meaning "the status of not depending on anything else."[44] It is not personality, goodness, worship or love that makes something divine; it is its non-dependence, its self-existence, its "just thereness." This definition of religious belief may seem peculiar, but in Clouser's estimation, it is the only definition that survives the inability of other definitions of religion (which have used an ethical code, worship, belief in a supreme being, ultimate concern or unrestricted value) to delineate the shared characteristics of all religion.[45] Clouser distinguishes between core beliefs and other beliefs or practices prompted by core beliefs. These secondary beliefs are those commonly thought of as religion. Therefore, Clouser expands his definition of religious belief to include "a belief concerning how humans come to stand in proper relation to the divine."[46] By according something divine status, Clouser is not saying that it is in fact divine — that all faiths are equally true. Faith can be misplaced and false: "Far from being different paths up the same mountain, they do not agree on which mountain to climb."[47]

Clouser discerns three dominant types of religious belief from among many variations: pagan, pantheistic and biblical. In pagan religions some part of creation is divine — some aspect, force or principle is at the center of the universe.[48] Clouser diagrams this relationship as follows:

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43. *Id.* at 21.
44. *Id.* at 22.
45. *Id.* at 11-16.
46. *Id.* at 23.
47. *Id.* at 34.
48. *Id.* at 36.

PAGAN

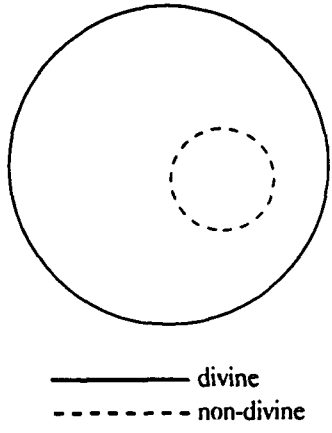

Figure 1

In pantheistic religions the non-divine is a subdivision of the divine. There is no distinction between the portion of reality which is divine and that which is not. The apparent distinction is an illusion from which we can be awakened through a mystical experience.[49] This relationship is diagramed by Clouser as follows:

PANTHEISTIC

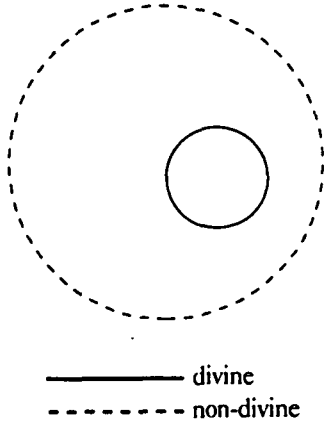

Figure 2

Finally, biblical religion denies that there is one continuous reality. The creator is distinct from the universe he brought forth

49. *Id.* at 41.

out of nothing. God is not the creation or any aspect of it, as in pagan religions, and the creation is not God as in pantheistic religions.[50] Clouser diagrams the relationship like this:

BIBLICAL

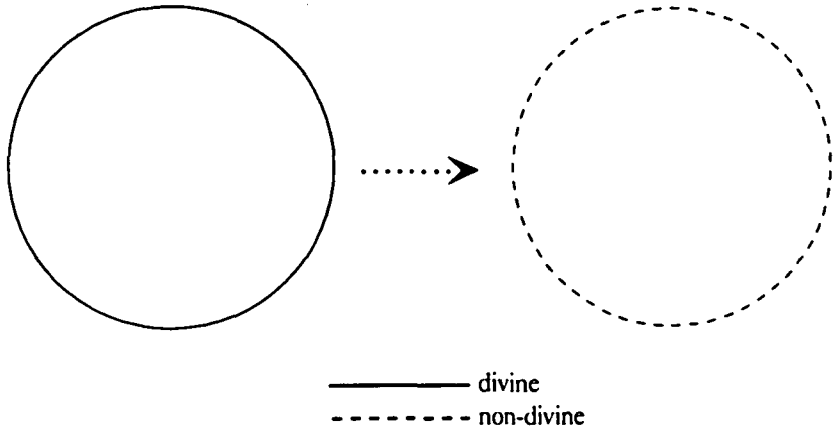

Figure 3

B. What is a theory?

Clouser then turns to the dramatic impact theories have upon our thinking. Once they are proven they become an authoritative standard for judging truth.[51] He defines a theory as an "explanatory guess."[52] Some theories are common sense theories, others are highly abstract. As highly abstract theories, scientific and philosophical theories are much more formal than common sense theories in their formulation of explanatory guesses.[53] Despite their similarities, scientific and philosophic theories have their differences. Among the differences between these kinds of theories are the breadth of analysis and the types of hypotheses proposed to solve the problems posited. Typically, scientists theorize about one or a few aspects of reality, while philosophers theorize about the connectedness of all the aspects of reality. Scientists usually utilize entity hypotheses which propose some new entity as the solution to a question (often evalu-

50. *Id.* at 43.
51. *Id.* at 51.
52. *Id.* at 52.
53. *Id.* at 53.

ated by experimentation), while philosophers employ perspectival hypotheses to explain the aspects of reality by viewing them in a certain way.[54] Perspectival theories often establish priorities among the aspects of reality; for example, that all aspects depend upon "X" for their existence or that all aspects collapse into "Y" which is viewed as the only genuine aspect. Entity theories seem easier to evaluate because they can usually be checked by experimentation, mathematical calculation or logical deduction. These methods do not seem to work for perspectival theories. However, they can be evaluated using tests of logical consistency and self-referential coherency.

Despite its narrow focus and methodology, science meets philosophy when it comes to theories of reality and knowledge. Theories of reality try to find the kinds of things that exist, while theories of knowledge try to discover the ways of knowing about things. The following aspects of reality are among those that have been identified and studied: fiduciary, ethical, juridical, aesthetic, economic, social, linguistic, historical, logical, sensory, biological, physical, kinematic, spatial and quantitative.[55] Theories of reality have proposed one or more of these aspects such as the physical, mathematical, sensory or biological as basic to the nature of everything else. Likewise, theories of knowledge have taken the approach of proposing one or more aspects as the key to knowing all the rest. These foundational theories are perspectival. They pervade the physical, as well as the social sciences. At this level, scientific theories are quite like philosophic theories.

C. What is the Relationship Between Religion and Theory?

Clouser identifies three general positions on the relation between religious belief and theory in the history of Western thought: (1) religious irrationalism, (2) religious rationalism and (3) the radically biblical position.

Religious irrationalism separates religion and theory. They have nothing to do with each other — faith and reason are mutually exclusive.[56] This relationship is diagramed by Clouser as follows:

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54. *Id.* at 65.
55. *Id.* at 56-57.
56. *Id.* at 74.

Religious Belief is:	Theoretical Reason is:
1. Optional	1. Religiously neutral and autonomous.
2. Isolated from reason.	2. Final court of appeal in its realm.

Religious rationalism judges all beliefs by reason, religious beliefs included.[57] This position agrees with religious "irrationalism about the neutrality of reason, but denies the same limits to reason's scope."[58] Clouser illustrates this relationship as follows:

Religious Belief is:
1. a theory or conclusion of reason.
2. optional

↕

Theoretical Reason is:
1. neutral respecting all matters
2. final court of appeal in all matters
3. able to decide all matters (?)

The radically biblical view holds that what God has revealed about himself is somehow the key to all knowledge and truth; not just our knowledge of God, but of all things.[59] This relationship is diagramed by Clouser as follows:

Theoretical Reason is:
1. Not neutral because controlled by religious belief
2. Not final court of appeal
3. Not able to decide all matters

↕

Religious Belief:
1. Guides and directs the use of reason in all of life

Clouser adopts the radically biblical position on the relationship between religious belief and theory. He maintains "that the exercise of theoretical reason is always regulated and directed by some religious belief so that reason is never autonomous nor theorizing religiously neutral. On this view, faith is not a faculty of the mind separate from the faculty of reason, but an integral part of reason; reason is essentially faith-oriented."[60] Clouser's

57. *Id.* at 76.
58. *Id.* at 77.
59. *Id.* at 79.
60. *Id.* at 82.

view of theorizing is similar to that of Kuhn which was discussed earlier. Kuhn speaks about the role of faith in paradigm shifts:

> The man who embraces a new paradigm at an early stage must often do so in defiance of the evidence provided by problem-solving. He must, that is, have faith that the new paradigm will succeed with the many large problems that confront it, knowing only that the older paradigm has failed with a few. A decision of that kind can only be made on faith.[61]

Clouser's view also sounds a lot like Richard Posner in his discussion of the role of intuition in decision-making by judges in difficult cases. Posner likens shifts in the social policy of judges to a conversion experience:

> We tend to think of it as a sudden, deeply emotional switch from one non-rational cluster of beliefs to another that is no more (often less) rational ..., and we tend to think of the fact of conversion as a significant point in favor of the winning faith. Although most lawyers tend to think of themselves as engaged in rational inquiry rather than religious affirmation, the religious impulse is well-nigh universal; it is particularly strong in the United States; and in many secular Americans trained in law the impulse gets channeled into veneration of the Constitution as a sacred text and a decision to attend one of the churches at which it is worshiped.[62]

The directive role of faith in theorizing cannot be avoided. Theories are not neutral. Religious beliefs are operative in them. They enter the theoretical process through presuppositions. A presupposition is a belief that is a necessary condition for another belief. The relation involved is that the presupposition is an informational requirement for holding the other belief. A presupposition may be consciously held or examined, but it may exercise an influence over other beliefs, even when unconsciously held. "[I]t is by acting as presuppositions that religious beliefs exercise their most important influence on scientific and philosophical theorizing."[63]

Clouser is careful to distinguish the radically biblical view from fundamentalism which makes too much of faith, as well as fideism which makes too little of reason. The Bible is not an encyclopedia covering every conceivable subject matter, as in fundamentalism, nor does faith demand blind adherence regardless of rational considerations, as in fideism. "Belief in God is

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61. KUHN, *supra* note 24, at 158.
62. PROBLEMS, *supra* note 13, at 150.
63. CLOUSER, *supra* note 42, at 104.

therefore neither blind nor is it walled off from rational understanding. On the contrary, it is religious belief that controls and directs the way people interpret the whole range of their experience, so that all truth does indeed depend upon on having the right God."[64] All our knowledge is somehow dependent upon having knowledge of God. How? Clouser's answer is that our religious presumptions exercise a pervasive directing influence over our theorizing rather than explicitly dictating every specific component of our theorizing.

Clouser proposes a new beginning for our theorizing. This requires that we devise a theory of reality based upon "the presupposition that God has created everything other than himself, and ... that we employ that theory of reality as our guide for all other theorizing."[65] To do this we must avoid the traditional reductionist approaches — strong reductionism which selects only one aspect as the real one and weak reductionism which selects one aspect as the basic one upon which all the others depend.[66] Both reductionisms "are driven by the same presupposition, namely, that both the nature of, and the reason for, the existence of created things is to be found *within* those things."[67] Thus, both reductionisms are religious beliefs of the pagan type because they elevate the created to the status of the creator. Clouser sets down the following guiding principles for the construction of a theory of reality from the perspective that God, and God alone, is self-existent: 1) "*Everything other than God is his creation and nothing in creation, about creation, or true of creation is self-existent*";[68] *2) "no aspect of creation is to be regarded as either the only genuine aspect or as making the existence of any other possible*";[69] *3) "every aspect is an aspect of all creatures, since all creation exists and functions under all the aspectual laws simultaneously*";[70] *and 4) "aspects cannot be isolated from one another; their very intelligibility depends upon their connectedness."*[71]

D. A Theory of Reality

Clouser outlines a theory of reality based upon the aspects noted below.[72] These aspects have been distinguished because of

64. *Id.* at 81.
65. *Id.* at 167.
66. *Id.* at 169.
67. *Id.* at 170.
68. *Id.* at 202.
69. *Id.*
70. *Id.* at 215.
71. *Id.* at 217.
72. *See infra* note 73 and accompanying text. In my discussion of this portion of

the kind of properties and laws which things exhibit. The list does not purport to be an exhaustive representation of reality. Instead, it constitutes an approximation of reality arising from the domains of inquiry covered by the various theoretical disciplines. There is room for new aspects yet to be identified. The aspects recognized by Clouser at this time are repeated below along with a short description of their core meaning:

FIDUCIARY	-	the varying degrees of trustworthiness a person or thing may have
ETHICAL	-	the loving thing to do
JURIDICAL	-	the justness or fairness of things
AESTHETIC	-	the beauty of things
ECONOMIC	-	the stewardly administration of scarce resources
SOCIAL	-	social interactions
LINGUISTIC	-	the ability of things to represent or signify other things
HISTORICAL	-	the formation of human culture — the human ability to form new things from that which already exists
LOGICAL	-	the cognitive thought process
SENSORY	-	the perceptions (touch, taste, sight, smell, and sound) as well as the feelings elicited by them
BIOLOGICAL	-	the growth and development of living things
PHYSICAL	-	energy and force
KINEMATIC	-	the movement of things
SPATIAL	-	the whereness of things
QUANTITATIVE	-	how much of things[73]

Each aspect manifests itself in properties and laws. Properties involve the qualities of things, such as their squareness or roundness within the spatial aspect, or their taste, smell or sound within the sensory aspect. Laws determine the relations between properties. Laws within an aspect, such as the Pythagorean theorem as a law of geometry within the spatial aspect, express the orderliness built into the creation by which it is regulated.

Clouser's theory, I have intentionally tried to avoid the use of his technical philosophic language. This attempt at simplification necessarily sacrifices some precision, or in the language of mapping, sacrifices representational detail for orienting direction.

73. CLOUSER, *supra* note 42, at 205-08.

The orderliness of within and across the aspects is not intrinsic to things themselves. Nor are these aspects mere projections by observers. Rather, these aspects are approximations of the order built into the creation by God. Clouser puts it this way: "[N]othing in creation exists 'in itself,' so that there is nothing *in things* which causes them to be what they are. It is God who causes them to be what they are. The most basic characteristic of all created realities is that they depend on God in every respect."[74]

These aspects appear in the order of our experience of the properties associated with them — those aspects lower on the list seem to be preconditions to those higher on the list. For example, the idea of quantity is a necessary prerequisite to thinking about spatial relations — there must be a thing or number of things in space in order to talk about their position or relationship. This sequence is affirmed as we look at each aspect. We can't conceive of a biotic thing, such as a tree, without physical properties. A discussion of feelings presupposes the existence of a living thing with biotic properties. And, so on. It is not that higher aspects are more important than lower aspects; it is not that lower aspects cause the higher ones; lower aspects are simply preconditions conceptualizing higher aspects.

All things function across the full spectrum of aspects, however, they do so in two different ways. A thing may possess a property either actively — independent of other created things — or passively — dependent upon activation by other created things. For example, a tree's highest active aspect would be the biotic aspect. The remaining aspects would be passive until they are activated by something which actively functions within a higher aspect. Thus, a beaver may activate a passive social function in the tree by making it part of its home. We recognize it as something distinct from a fallen tree; its new social function in the life of the beaver now defines what it is.

After distinguishing between active and passive properties, Clouser focuses upon the aspect of a thing which more centrally characterizes its nature than any other aspect. What, for example, is distinctive about a tree that differentiates it from a rock? Both can be quantified, have their place, physical composition and kinematic attributes. What is distinctive about the tree is its biotic character. It is a living thing. It is not that this is the only property of a tree, nor that it is the basic or causal property of

74. *Id.* at 221.

a tree. Rather, the properties and laws of the biotic aspect play a more prominent role in defining or shaping a tree's character than the properties and laws of any other aspect.[75] We will refer this aspect of a thing as its leading aspect.[76]

As an illustration of Clouser's theory, let's consider a road map. The production of a map requires a number of steps which begin with trees growing in a forest. The biotic aspect is the leading aspect of a tree. It is a living thing which grows and renews itself. When cut, it is no longer a living thing. Its physical attributes are now central to its character. The physical aspect becomes the highest aspect in which the wood actively functions. To produce paper, the wood is chipped, heated and treated with chemicals to decrease its rigidity. This process breaks the wood down into its individual fibers to make pulp. The pulp is then mixed with water which is placed over a screen and drained. As the mixture dries, the fibers lock together to form a flexible sheet of paper. The papermaking process illustrates the role of the historic aspect as humans shape one thing into another as part of their cultural task. The laws of the linguistic aspect direct the subsequent process of mapmaking. The marks and lines on the map signify another thing — the milieu which it represents. Thus, the map functions actively in the linguistic aspect. It functions passively in the social, economic, aesthetic, juridical, ethical and fiduciary aspects, although these passive aspects could be activated; that is, a map may be a seating arrangement at a dinner party, treasure map, rare map of antiquity to be hung on the wall, evidence in property dispute, an object of passionate affection for a cartographer, even an item of worship.

Why does all this matter? It provides us with an explanation for the nature of things. We can look at a map and know what it is. It is more than its natural materials — wood fiber and chemicals. It has been transformed into something which ordinarily functions with the linguistic aspect as its leading aspect. However, if one of its passive aspects is activated, it would be transformed into something else. For instance, if a map is placed on the wall in an art museum, it would be transformed into a work of art to be enjoyed for its beauty. It would now be primarily characterized by the aesthetic. This explanation of the

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75. *Id.* at 218.

76. *Id.* at 219. I have used this term as shorthand for a number of technical terms such as "qualifying function," "foundation function" and "leading function" which Clouser uses to separate natural materials from artifacts, as well to make other distinctions.

nature of things helps us to see the connectedness of the aspects, as well as their distinctiveness. And as we shall see, it also provides a way to distinguish the proper function of social spheres from one another, such as the state, family, business, school and church. They also have leading aspects.

E. Society and the State

Clouser's theory of society draws from the aspects which make up created reality the existence of unique spheres of social life. Different leading aspects characterize various social institutions. The leading aspect governing the conduct of a business, for instance, is the economic aspect which calls for the exercise of stewardship in the managing of a business. The state is characterized by the juridical aspect while the logical aspect is central to the functioning of the school and the ethical aspect is central to the functioning of the family. Each social structure derives its authority directly from God and functions primarily in accordance with its distinctive leading aspect. Thus, Clouser provides us with this picture of society:

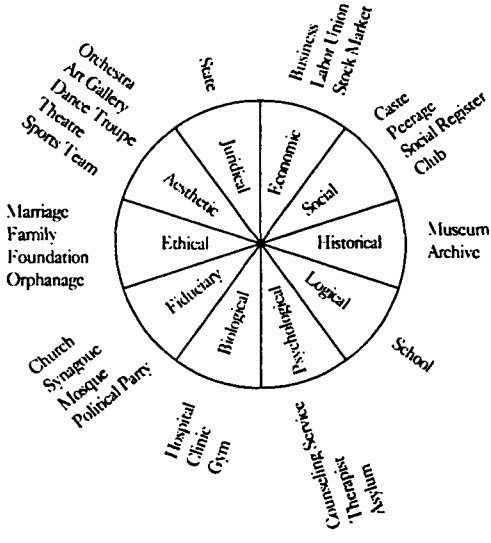

Figure 4

While a specific aspect of reality is predominant for each social institution, the leading aspect which directs each organization is not the exclusive aspect operative within the institution. A business, for example, takes up space. It involves social rela-

tionships. It can act justly or unjustly in the treatment of its employees, customers and suppliers. It exists in the context of its history, past, present and future. It can act ethically or unethically. But the norm of stewardship which characterizes the economic aspect qualifies these other aspects. Businesses exist primarily to administer scarce resources in a stewardly manner. They are called to act justly but their organization and activities are always economically qualified. Take the ethical norm of love for example. We do not expect the same behavior from a bank as we do from a parent when we fail to repay a loan. A parent may be much more likely to forgive the debt or extend the time for its repayment than a bank (but this is not to say there are not times that banks do or should forgive debts).

Each social structure has its own distinct status and function before the face of God. None of them is more basic or fundamental than the rest. Nor can these spheres be collapsed into one another or ordered in a hierarchical manner. Clouser, therefore, rejects views of society built upon individualism or collectivism.[77] Individualists view the individual person as the basic unit of society. The whole is the sum of the parts. Collectivists view the larger community as the basic social reality. The individual is but a part of the larger social whole. Both claims are implausible. Individuals can't exist without communities and communities can't exist without individuals. Individuals and communities exist in mutual correlation in which neither can exist without the other. "*Neither is 'basic' to the other in the sense required both by individualism and collectivism, because neither was ever the source of the other. Both were created by, and depend on, God.*"[78] The biblical view delivers us from having to choose between individualism and collectivism. They are both at odds with the biblical view that all authority has its source in God.

According to Clouser, the purpose of the state is the promotion and achievement of public justice. The state must safeguard the ability of the various social communities to make laws and rules to govern their own internal operation. Families, businesses, churches, hospitals, clubs, museums, and schools should be allowed to fulfill their callings in accordance with their leading aspects. The state should interfere in their operation only when necessary to establish public justice. Then, and only then, may it impose sanctions of confiscation of property, loss of liberty, or

77. *Id.* at 252.
78. *Id.* at 240.

even death, by means of physical force. But public justice is more than the negative task of restraining crime or other wrongdoing. In the positive direction, the task of the state is to facilitate peace and harmony among individuals and communities. It is government's calling to foster industrious businesses, vigorous scientific inquiry, healthy family life, strong academic communities, hardy farming concerns, and so on. The state is called to promote an environment in which these things occur. It is not called to do them itself.

III. MAPS OF LEGALITY

The theory of reality outlined in the last section reveals the reason that mapping is a fundamental metaphor in so many areas. It is near the bottom of the list of aspects. This is not to say that it is more or less important than any other aspect; it is just a precondition to so many aspects. They can't be conceptualized without the spatial relationship. This fundamental metaphor will be our guide in the following section, as we move from small scale maps of reality to medium scale maps of legality. The metaphor is a vehicle to explore the perspectival theories, paradigms, presuppositions or worldviews of various theorists. When I use the language of mapping, I am speaking about these fundamental beliefs. Our aim will be to examine the maps of legality held by representative theorists which enable them to find their way in the world of promises, agreements and contracts. As with any endeavor to map terrain, geographic or cognitive, generalization is inevitable, but my aim will be to highlight the differences between the maps without such oversimplification as to distort the maps beyond recognition. Each section will briefly sketch the map, identify the reference points of its projection and the images encoded by its symbols, as well as critique the map with a view toward its positive and negative contributions to a radically biblical map of legality.

A. Natural Law

Natural law theorists typically divide the law into two realms. There is the realm of positive law and the realm of natural law. Positive law is the command of the sovereign, the king, court, legislature or other government authority. It focuses upon what law *is* in fact, not what it *ought* to be. Natural law is the Law above, beyond or behind the law. It looks to enduring principles

which are standards for all men, in all societies, during all ages. Historically, the chorus of those singing the praises of natural law have included such notables as Sophocles, Cicero, Aquinas, Locke, Burke, Blackstone, Hamilton, Jefferson, Kent and Story.[79] Although natural law theories differ as to the source and content of the norms they include, they share the view that there is a set of immutable norms which are universally applicable and knowable which serve as the measure of positive law, resigning to the status of invalidity any human law which contradicts the law of nature.

Natural law theories look for the right values, the right content of justice. The chief concern is to do what is right, just and fair in light of the circumstances. However, natural law theories differ as to how its content is determined — by reason and/or revelation. Some theorists, such as Rousas John Rushdooney, have looked to the Bible alone, God's Word, as the absolute transcendent standard for justice in which all human laws must be grounded to be valid: "The Bible does not recognize any law as valid apart from the law of God, and this law is given by revelation to the patriarchs and Moses, and expounded by the prophets, Jesus Christ and the apostles."[80] Others have looked to both reason and revelation. James Kent, for example, defined natural law as "those fit and just rules of conduct which the Creator has prescribed to man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared by divine revelation." [81] There also have been theorists who affirm the existence of natural law, relying solely on reason as the infallible guide to discovery of universal laws manifested in nature. For instance, Hugo Grotius was of the opinion that natural law would exist even if God did not exist.[82] Armed with reason, such theorists look to the order of the cosmos,[83] human nature,[84] the commonalities between legal sys-

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79. *See generally* Edward F. Barrett, *The Natural Law and the Lawyer's Search for a Philosophy of Law*, 4 BUFF. L. REV. 1 (1954-55) (quoting each theorist).

80. ROUSAS JOHN RUSHDOONEY, THE INSTITUTES OF BIBLICAL LAW 679 (1973).

81. Wightman v. Wightman, 4 Johns Ch. 343, 349 (1820).

82. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 43 (1980) (quoting Hugo Grotius, *De Jure Belli ac Pacis*, Prolegomena, para. 11 (Kelsey trans. 1925)).

83. JAN DENGERINK, THE IDEA OF JUSTICE IN CHRISTIAN PERSPECTIVE 13 (1978) (discussing Stoic greek philosophers).

84. JACQUES MARITAIN, MAN AND THE STATE 85-86 (1951).

tems,[85] or the minimum social arrangements needed for continued existence.[86]

Natural law's view of the world of contracts is typically two-fold: the positive law of contracts and the natural law of contracts. Natural law supplements positive law with its countervailing or overriding principles. We can look at positive law as a base map with an overlapping transparency representing natural law. The base map appears to be correct, but the addition of the overlay shows as that its picture is incomplete. The transparency adds information or changes the appearance the map. The analogy illustrates the scholastic's freedom to theorize in the natural realm until it contradicted by the realm of faith.

Natural law thinking still exerts an influence over our jurisprudence in action.[87] Its influence has been detected in a number of modern contractual doctrines, such as promissory estoppel, privity, strict liability, UCC warranties, implied warranty of habitability and employment at will.[88] Natural law has served as the basis for the divergent theories of classicism, which focused on freedom of contract in a laissez-faire market,[89] and legal realism, which focused on fair and equitable market results.[90] Natural law has also served to bolster the status quo and as justification for radical change.[91]

As an example of a natural law perspective which draws upon revelation as the source of judicial principles, consider Lord Denning's treatment of contracts in his essay, "The Influence of Religion."[92] Denning starts his discussion of the influence of

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85. Margaret Mead, *Some Anthropological Considerations Concerning Natural Law*, 6 NAT. L. FORUM 51, 51-54 (1961).

86. HART, *supra* note 25, at 189-195.

87. Robert J. Henle, *St. Thomas Aquinas and American Law*, in THOMASITIC PAPERS II (Leonard A. Kennedy & Jack C. Marler, eds., 1986); Edward F. Barrett, *A Lawyer Looks at Natural Law Jurisprudence*, 23 AM. J. JURIS. 1 (1978); Brendan F. Brown, *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System*, 4 CATH. L. REV. 81 (1953-54).

88. Daniel J. Herron & Patricia Pattison, *Natural Law and Contracts: A Time for Redefinition?* 34 AM. J. JURIS. 199, 215-28 (1989).

89. *Id.* at 215, 229.

90. *Id.* at 229.

91. MAX WEBER ON ECONOMY AND SOCIETY 288 (Max Rheinstein, ed., 1954). For an example of natural law's use as a justification for radical change in this country as part of the civil rights movement, see MARTIN LUTHER KING, *LETTER FROM A BIRMINGTON JAIL*, in NON-VIOLENCE IN AMERICA: *A Documentary History* 467-470 (1966). For an example of natural law's use as a justification for the status quo, see Lochner v. New York, 198 U.S. 45, 54 (1905) (Supreme Court struck down a state law limiting the workday for bakers to ten hours based upon preservation of liberty of contract).

92. SIR ALFRED DENNING, THE CHANGING LAW 99 (1953).

religion on the fundamental principles of the contract law with a discussion of truth telling and oath taking:

> Just as you must tell the truth, so you must keep your promises. The just man in the Psalms is not only "he that hath used no deceit on his tongue," but also, "he that sweareth unto his neighbour and disappointeth him not: though it were to his own hinderance." [*Psalm* 24:3,5] This precept finds its place in the law also. Our law of contract has passed through many phases. At one time promises were not binding unless they were made in the form of a covenant under seal. Later on they were not binding unless there was consideration for them, that is, something given or done as the price for them. Nowadays nearly all formalities have been eliminated. If a man makes a promise which is intended to be binding and to be acted upon by the party to whom it is addressed, then once he has acted upon it, it is enforceable at law.[93]

Lord Denning goes on to criticize the strict interpretation of contracts — the literal interpretation of words in their grammatical and ordinary sense — as a departure from real truth, making words the masters of men instead of their servants. Citing Saint Paul, Denning reminds us that "the letter killeth but the spirit giveth life." Denning then turns from this Pharisaic perversion of the golden rule to its true application, finding that the essence of justice is the love command: "This precept — love towards God and love towards your neighbour — is a precept of religion, but nevertheless in many affairs of life, love can only find expression through justice."[94]

He then looks at an example of its application involving privity of contract, citing an opinion which refused to apply the doctrine in a products liability case.

> In a judgment of great importance in the law, Lord Atkin took the Christian precept as the underlying basis of the decision in these words: "The rule that you are to love your neighbour becomes in law you must not injure your neighbour: and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably

93. *Id.* at 104.
94. *Id.* at 105-07.

> to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."
>
> It is, I suggest to you, a most significant thing that a great judge should draw his principles of law, or rather his principles of justice, from the Christian commandment of love. I do not know where else he is to find them. Some people speak of natural justice as though it was a thing well recognizable by anyone, whatever his training and upbringing. But I am quite sure that our conception of it is due entirely to our habits of thought through many generations. The common law of England has been moulded for centuries by judges who have been brought up in the Christian faith. The precepts of religion, consciously or unconsciously, have been their guide in the administration of justice. [95]

According to Denning, reason alone does not make the precepts of natural justice recognizable. In Denning's writing, we have the negation of the all-sufficiency of reason and the affirmation of the necessity of revelation as the source of principles of justice. Some faith must guide our theorizing. Denning's statement that "[t]he precepts of religion, consciously or unconsciously, have been [the English judge's] guide in the administration of justice" and Cardozo's statement about the "semi-intuitive apprehension of the pervading spirit of our law"[96] mesh with Clouser's view that "the influence of religious beliefs is much more a matter of presupposed perspective guiding the direction of theorizing than of Scripture providing specific truths for theories."[97]

What can natural law theory contribute to a radically biblical view of contracts? First, we must be aware of the dangers of natural law. The lure of some natural law theory is the apparent common ground it establishes between adherents of different religious persuasions based upon practical reason.[98] But reason is not neutral; it is directed by a faith, even if it is a faith in itself. When reason becomes the test of revelation, it assumes the self-existent, non-dependent place reserved for God. This view of the relationship between reason and faith amounts to what Clouser calls religious rationalism. A biblically radical view of law must be different from such natural law theories. It must draw of map of legality that doesn't make too much of reason or

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95. *Id.* at 108-09.

96. CARDOZO, *supra* note 27, at 43.

97. CLOUSER, *supra* note 42, at 104.

98. Donald A. Semich, *A Bridge,* THE CHRISTIAN LAWYER, Winter 1973, at 19, 23.

too much of special revelation. It cannot give reason the status of divine because it is an aspect of creation; elevating it to the position of arbiter of truth transforms it into a religious belief of the pagan type. Nor can our map limit us to a fundamentalist methodology of finding scripture quotations to support every aspect of our theorizing. Our map must look to God's special revelation as the guide to our mapmaking, not the map itself.

Second, our map must be more than an overlaying transparency which negates aspects of our theorizing. Much like a towering gothic cathedral which pointed medieval congregations heavenward, natural law theory directs its adherents to a higher law. We must beware of the temptation to adopt a two-story approach which depreciates the influence of a radically biblical view by substituting another religious viewpoint in the natural realm, relegating the role of biblical faith to some higher sphere. While the law's compass must point to something beyond its boundaries, the map itself must be firmly rooted in the milieu. Our map does not fall ready-made from heaven. The fundamental biblical norms of justice require positivization within a particular legal order. In other words, our base map must be different. But we must recognize that it is not the only possible base map. Many maps may be produced based upon our experience which properly orient us and provide an adequate representation of the milieu within a biblical framework. Within the structure of creation, we are given the freedom to construct a just ordering of our lives together.

Third, we must beware of isolating theory from context, allowing theory to become a cold abstraction unresponsive to changes in society. Applications of principles can harden into rules which become ineffective in facilitating just results as changes in society occur. We need a dynamic element in the law. We can't take Old Testament law as legislation for contemporary society. The principles that animate it are still our guides, but the particular application of those principles in an undifferentiated, theocratic and agrarian society can't be lifted out of context and plopped down in our highly complex, pluralistic and industrial society. Biblical law constitutes a paradigm or model of God's law in action. We must map our own course through the modern legal landscape guided by the Spirit.

From the radically biblical perspective, we affirm several things. First, all right law flows from God's Word as seen through the lens of the Bible but without neglecting its creational and incarnate manifestations — the world and God's gift to it, Jesus

Christ. God speaks and the world is created, sustained and moves towards its complete redemption. The origin of the law is outside of and distinct from the creation, but it is firmly rooted in it. Second, the fact that biblical norms such as justice, equity, mercy and love have been stripped from revelation and posited as natural law does not mean that they are other than the law of God revealed to His people.[99] Third, legal rules and decisions can and often do reflect God's norms. To be sure, they can also depart from them. But the fact that the specific promulgation of law constitutes a negative response to God's norms does not negate the existence of the norm. Conversely, the fact that some of them can be discovered does not legitimate reason as an infallible guide to further discoveries.

B. Classical / Neo-Classical

Classical and neo-classical theorists have rejected the natural law approach to contract theory for an approach firmly rooted in the transitory affairs of this world. Harold Berman has observed that a crucial difference between the nineteenth century jurists and those that preceded them was their effort to "cut the general law of contract loose form its moorings in a religious — more specifically, a Christian — belief system."[100] The classical map of contracts drawn in the nineteenth century looked not to the heavens but to the agreements among men as the basis of contract. While man's contractual obligations were his own creation, the product of his own promises, not even Oliver Wendell Holmes, one of the chief architects of classicism, could avoid the religious basis of theorizing. Holmes' formulation of Clouser's "just thereness" were his "I can't helps": "All I mean by truth is the road I can't help travelling. What the worth of that *can't help* may be I have no means of knowing. Perhaps the universe, if there is one, has no truth outside of the finiteness of man."[101]

The map Holmes travelled by has been revised by his successors, but it still has recognizable features, such as the centrality of personal autonomy. This foundation is built upon by

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99. Rex Downie, *Natural Law and God's Law: An Antithesis*, THE CHRISTIAN LAWYER, Winter 1973, at 11, 14.

100. Harold Berman, *The Religious Sources of the General Contract Law: An Historical Perspective*, 4 J. L. & RELIGION 103, 106 (1986).

101. 1 HOLMES-POLLOCK LETTERS 100 (Mark DeWolfe Howe, ed., 1942) (letter of October 27, 1901). *See also* 2 HOLMES-POLLOCK LETTERS 255-56 (Mark DeWolfe Howe, ed., 1942) (letter of October 26, 1929).

Charles Fried. Fried defends individual promise as the basis of contractual obligation. He starts with the basics of liberalism: "It is a first principle of liberal political morality that we be secure in what is ours — so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expend our powers in the world."[102] The motivation for moving beyond ourselves is enlightened self-interest:

> [I]t was a crucial moral discovery that free men may yet freely serve each other's purposes: the discovery that beyond the fear of reprisal or the hope of reciprocal favor, morality itself might be enlisted to assure not only that you respect me and mine but that you actively serve my purposes. When my confidence in your assistance derives from my conviction that you will do what is right (not just what is prudent), then I trust you, and trust becomes a powerful tool for our working our mutual wills in the world.[103]

In Fried's view, promise is the servant of trust. By promising we put new power into another's hands — the expectation of the help of another in that which he once sought to do alone. Fried considers several moral categories to support the obligation of the promise principle — benefit, detriment, communication of intention, but finds them all unsatisfactory. He also rejects self-interest alone and external sanction as the compelling justifications for the promise principle. Fried's basis for obligation is the general assumption that promises have force. In essence, the convention of promising. Thus, it is personal autonomy in conjunction with trust that support the obligation to keep a promise: "An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds — moral grounds — for another to expect the promised performance."[104]

We are now ready to embark upon a journey into Fried's complex world of contract. It is a world of offer and acceptance where promises are made and taken up: "A promise is made *to* someone; it gives the promisee a right to expect, to call for its performance; and so by implication a promise, to be complete, to count as a promise, must in some sense be taken up by its

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102. FRIED, *supra* note 2, at 7.
103. *Id.* at 8 (citation omitted).
104. *Id.* at 16.

beneficiary."[105] It is an either/or world: "Whether or not a person has promised is a yes or no question. If he has, he is judged by the regime of promise. If he has not, some other regime controls."[106] It is a world of transactions: "Promises — and therefore contracts — are fundamentally relational; one person must make the promise to another, and the second person must accept it."[107] It is a mechanical world of the application of rules to rejections, counteroffers, delays in transmission and crossed offers.

Fried's contractual world has it limits. However, contracts law need not have an answer for all disputes that might arise relating to a contract's subject matter. In certain cases the promissory principle does not apply, such as where there is coercion, a mistaken assumption, or an unexpected development. While contract principles have been forced into service in resolving these kinds of problems, Fried believes they should not be so employed. These cases should be resolved by other moral principles, such as the tort principle to compensate for harm done and the restitution principle to compensate for benefits conferred.[108]

Fried considers attacks upon the promise principle based upon consideration, reliance, benefit, good faith, unconscionability and duress. He finds the requirement of consideration for a contract to be binding so inconsistent that it does not pose a threat. He views benefit and reliance as effects of a prior commitment, not as the basis for obligation. The doctrines of good faith, unconscionability, and duress

> challenge the concept of contract as promise because in one way or another they deny that promise is sufficient to define the relations between contracting parties.... Since the application of these doctrines depends on a court's judgment of fairness, it seems as if contractual relations depend not on the will of the parties but on externally imposed substantive moral judgments of what the relations between the parties should be.[109]

Fried defends the promise principle against good faith by viewing good faith as conforming to the conventions that establish the background expectations of the parities. Dealing with good faith in the context of performance, Fried turns to background expec-

105. *Id.* at 40-41.
106. *Id.* at 113.
107. *Id.* at 45.
108. *Id.* at 69.
109. *Id.* at 75.

tations of the parties to ground good faith in the agreement, if only tacit agreement of the parties: "Promises, like every human expression, are made against an unexpressed background of shared purposes, experiences, and even a shared theory of the world."[110] For Fried, "good faith requires not loyalty to some undefined relationship but only loyalty to the promise itself – the faithful carrying out of the mutual promises that the parties, having come to understand their *separate* purposes, chose to exchange."[111] Good faith is not something normative, imposed from outside of the contractual relation; but is something that arises from the actions of the parties within their community. The bottom line is this: Nothing other than promise is needed to create a contractual obligation.

What is wrong with Fried's map of legality? First, we must object to his assumption of the autonomy of man. Fried's world of contract is a place where we chart our own course; we map our own territory. His map of contract law presupposes that men are autonomous individuals who may freely choose to travel alone or with others enroute to their destinations. Society results from the overlap of many individual travel itineraries; it is a product of multiple contractual calculations whereby we have determined it to be better for us to obligate ourselves to others and trust others to fulfill their obligations to us to achieve our own ends.

This is a distorted image of man. It is not an image without consequence. The image has a dramatic impact on legal decision-making. It tilts our apprehension and can even construct a new area of the law for us before we have entered it.[112] The impact of symbols on our public dialogue about legal rights is pointed out by Mary Ann Glendon. The image of the "lone rights bearer as a self-determining, unencumbered, individual, a being connected to others only by choice,"[113] rather than "a person situated within, and partially constituted by, her relationships with others"[114] polarizes our public debate, pushing the participants to make absolute claims and making any discussion of "duty talk" difficult, if not impossible, to begin. The image is part of the predominant map of American political discourse. Just as the symbol of the lone rights bearer over-magnifies the importance

110. *Id.* at 88.
111. *Id.*
112. Pellar, *supra* note 41, at 1176, 1213.
113. MARY ANN GLENDON, RIGHTS TALK 48 (1991).
114. *Id.* at 61.

of individual choice and distorts peripheral concerns of community, the promise principle over-states the importance of choice and under-states the importance of community. As one commentator remarked: "If one's view of the world is that of man as a high stakes gambler, a lonely Robinson Crusoe, or a later day Horatio Alger living in a minimalist state, then that would suggest a view of contract law not out of sorts with Professor Fried's world of promise."[115] This is not a biblical view of the world. Man was created in relationship. He was given responsibilities for the care of the creation. From a radically biblical perspective, each individual is called to navigate in community. The choice of destination and course enroute has consequences for fellow traveller's which should be taken into account in charting a course.

Fried views law itself instrumentally, like a sextant, a tool for navigation, through which men are guided toward their selfish, albeit enlightened, selfish ends. In Fried's world, law directs us along rigid pathways via a formal system. If certain conditions are satisfied, certain consequences follow which are not expected to follow without the satisfaction of the preconditions. A contract exists, for example, only after an offer is made which is accepted by another. According to Fried, these principles constitute the basis of freedom.[116] Fried conceives of freedom as the right to be secure in what is ours, the right to be left alone to pursue our own ends or join with others in common endeavors. Ideally, it is a freedom without limits rather than a freedom within limits. From a biblically radical perspective, however, law is more than an instrument to reach any of a thousand different destinations. It has a destination, as well as a course. In other words, law has substantive and procedural content.

Third, from the radically biblical point of view, the neoclassical map drawn by Fried is too simple. It projects the multidimensional aspects of reality onto a one dimensional map. Fried's theory reduces contract to the ethical aspect, sacrificing all aspects of experience to the promise principle. In doing so, the ethical aspect is distorted. It converts the Creator's good gift of love into a product of the creation. This is the non-dependent thing in Fried's world of contract. The created becomes the creator. This is the essence of idolatry. It stands at the center

115. Andrew W. McThenia, Jr., *Religion, Story and the Law of Contracts: Reply to Professor Berman*, 4 J. L. & RELIGION 125. 125-26 (1986).

116. FRIED, *supra* note 2, at 132.

his map of legality, the basis for a projection which distorts its peripheral issues such as good faith and reliance. The usual promising of the community becomes the standard. Good faith is swallowed by reasonable commercial standards. Good faith is limited to what a majority of the community considers appropriate conduct, rather than challenging the community to aspire to something more. This limiting principle cannot serve as the basis for a biblical map of legality. Promise is but one aspect relevant to the imposition of liability for breach of contract.

Finally, the world isn't just what we make it. It was made for us and given into our care. Our journey must take into account the various kinds of terrain and conditions we will encounter along the way. We live in a complex world of multiple aspects and interdependent relationships. We must take economic, ethical, social, historical, aesthetic and other factors into account depending upon the situation at hand. We must also acknowledge our interdependence with families and friends, businesses and bureaucracies, schools and social organizations, churches and clinics. Our map of contracts must recognize more of these landmarks. Unless our eyes are opened, we will remain lost. To find our way, we need a new map. But we have many more maps to look at before we get to drawing a new one. For now, we will turn to an even more limiting map of contracts.

C. Law and Economics

Economics is viewed by some theorists as a power tool for analyzing contracts, as well as other fields of law. We will consider the views of Richard Posner as a representative of this school of thought. Posner writes, "The basic assumption of economics that guides the version of economic analysis of law that I shall be presenting is that people are rational maximizers of their satisfactions — *all* people ... in *all* of their activities ... that involve choice."[117] Posner views the common law as promoting wealth maximization. Tort law promotes the protection of property rights. Contract law promotes the process of exchange. The key to both is wealth maximization.

Wealth maximization is more than a monetary measure; it includes non-pecuniary satisfactions. These satisfactions are the proper ends toward which judges should aim. Even if judges

117. PROBLEMS, *supra* note 13, at 353.

miss the mark they will be urged toward wealth maximization by the litigants' behavior after the rendering of a decision:

> [E]ven if judges have little commitment to efficiency, their inefficient decisions will, by definition, impose greater social costs than their efficient ones will. As a result, losers of cases decided mistakenly from an economic standpoint will have a greater incentive, on average, to press for correction through appeal, new litigation, or legislative action than losers of cases decided soundly from an economic standpoint — so there will be steady pressure for efficient results.[118]

Thus, "wealth maximization ... provides not only the key to an accurate description of what the judges are up to but also the right benchmark for criticism and reform."[119]

The economic approach to law looks to a few simple principles of economics as guides to predict or rectify the path of the law. Posner sets forth some of the these principles based upon the assumption that people respond to incentives. For example, the Law of Demand — as price increases demand declines, and vice versa. The following graph illustrates the relationship:

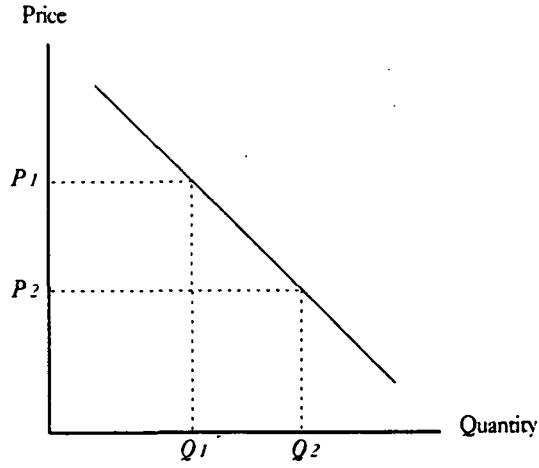

Figure 5

If this prediction of economic theory is applied to contracts law, say for instance to breach of contract, we see that an increase in either the severity of the sanction or the likelihood of successful litigation will raise the price of breach having a deterrent effect on its occurrence.

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118. *Id.* at 360.
119. *Id.* at 360-61.

Posner sets forth several economic functions of contract law: (1) to maintain appropriate incentives for value-maximizing conduct in the future in terms of legal sanctions; (2) to reduce the complexity and hence the cost of transactions by supplying a set of normal terms (filling the gaps); and (3) to assist parties in planning exchanges by providing information about the kinds of contingencies that may defeat an exchange.[120] The first principle is utilized over and over again as Posner reviews the economic basis of such standard contract doctrines as consideration, mistake, impossibility, fraud, incapacity, duress, unconscionability, consequential damages and specific performance. The recurring question is: "Will imposing liability create incentives for value-maximizing conduct in the future?"[121] Incentives are fashioned to allocate risk in the most efficient manner. Thus, for example, unilateral contracts, such as the offer of a reward, are enforced because enforcement promotes value-maximizing conduct — the social welfare of society is increased by the exchange of money for items returned more frequently than would be the case without a legally enforceable claim. And, as an additional example, consequential damages are allocated to the party with knowledge of the risk to take appropriate preventative steps or shift the risk to the other party by disclosure. Hence, the wisdom of *Hadley v. Baxensdale*,[122] from the economic perspective, which allocated the risk of loss for lost profits while the mill was idle to its proprietors, who could have taken alterative measures to avoid loss rather than the transporters of the broken crankshaft who had no reason to know of the special circumstances.

Wealth maximizing conduct increases satisfactions within a world of limited resources. Optimum allocation of resources occurs when we allow for time lag between promise and performance. Without enforcement, inefficiency would rise because investment would gravitate toward short time uses. For example,

> Suppose A wants to sell his cow. There are two bidders, B and C. The cow is worth $50 to B and $100 to C (and only $30 to A), so efficiency requires that the cow be sold to C rather than B. But B has $50 cash in hand while C cannot obtain any cash for a week. C promises to pay $75 to A in a week, and let us assume that this $25 premium would fully compensate A for the costs, in the event of default, of bringing

120. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 44 (1st ed., 1972).
121. ECONOMIC ANALYSIS, *supra* note 8, at 85.
122. *See generally* 156 Eng. Rep. 145 (1854).

> suit for damages or for return of the cow, discounted by the risk of default — if the law made C's promise to A enforceable. But if the law does not enforce such promises, A may decide that, since C may fail to raise the money and B in the interim lose interest in the transaction, he is better off selling the cow to B now. If he does, it means that the failure of the law to provide a remedy if C breaks his promise will have induced a misallocation of resources, by discouraging an exchange in which the performance of one party is deferred. B might of course resell the cow to C later, but this would involve additional transaction cost.[123]

Thus, one of the chief purposes of contract law is to encourage optimal timing of economic activity by deterring people from taking opportunistic advantage of the situation created by delays between their respective performance under the contract. Posner finds economic insight in Holmes' dictum: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else." [124] In Posner's words, "it is not the policy of the law to compel adherence to contracts but only to require each party to choose between performing in accordance with the contract and compensating the other party for any injury resulting from a failure to perform."[125] Since performance and breach are based only upon economic incentives, there are times when the law should promote efficient breaches of contract to avoid waste of resources. Posner provides this example:

> I sign a contract to deliver 100,000 custom-ground widgets at 10 ¢ a piece to A, for use in his boiler factory. After I have delivered 10,000, B comes to me, explains that he desperately needs 25,000 custom-ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers me 15 ¢ a piece for 25,000 widgets. I sell him the widgets and as a result do not complete timely delivery to A, causing him to lose $1,000 in profits. Having obtained as additional $1,250 on the sale to B, I am better off even after reimbursing A for his loss, and B is no worse off.[126]

The lack of the use of economic language by judges does not negate the explanitive power of the theory for any "structure

123. ECONOMIC ANALYSIS, *supra* note 8, at 80.
124. Holmes, *supra* note 15, at 462.
125. ECONOMIC ANALYSIS, *supra* note 8, at 106.
126. *Id.* at 107.

possessed by judicial opinions will be a deep structure, not one that is at once apparent on the face of the text."[127] Like a diviner of water, Posner finds those deep springs, and they are economic. For Posner they are part of "the body of our bedrock beliefs: the beliefs that lie so deep that we do not know how to question them; the propositions that we cannot help believing and that therefore supply the premises for reasoning."[128] Posner sees economic theory as the "right place to start"[129] and as the "guiding light"[130] because of its ability to arrange a jumble of common law rules into a coherent system[131] and because of its ability to predict results.

Posner responds to criticism of economics' basic assumption — that people are rational maximizers — based upon its reductionism by pointing out the existence of similar problems with all sciences, social as well as natural. Reductionism is a precondition to theory: "A theory that sought faithfully to reproduce the complexity of the empirical world in its assumptions would not be a theory — an explanation — but a description."[132] All theorizing requires abstraction which focuses our attention on various aspects of reality. "We do not describe this process as reductionism; we reserve, or should reserve, that word for unsuccessful efforts to explain one thing in terms of another . . . ."[133] What works? What predicts results? This is a theory worthy of our attention and application, according to Posner.

Posner's critique of the predominant map of contract law is rooted in its inefficiency. There is a shorter way to get to our destination — maximum allocation of resources. Posner's perspective does contribute a valuable insight to our map of contracts — legal decisions do have economic consequences. Economic considerations should be factored into legal decision-making process. However, we can't give the economic aspect equal weight across the spectrum of our experience. Depending upon the sphere of activity, such as a business, church, family or social club, and the activity in which it is engaged, the economic consequences will take on different gradients of importance.

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127. PROBLEMS, *supra* note 13, at 373 (quoting A.W.B. Simpson, *Legal Reasoning Anatomized: On Steiner's Moral Argument & Social Vision in the Courts,"* 13 LAW & SOCIAL INQUIRY 637, 638 (1988)).

128. *Id.* at 73.

129. *Id.* at 374.

130. *Id.* at 390.

131. *Id.* at 373.

132. ECONOMIC ANALYSIS, *supra* note 8, at 16.

133. PROBLEMS, *supra* note 13, at 366.

What critique of law and economics must a radically biblical view bring to bear upon this understanding of contract law? First, despite Posner's attempt to dodge the charge of reductionism, it must still be viewed as such. While it is true that all theorizing requires abstraction, thus limiting the phenomena observed and explanation given, the reductionism evident in Posner's theorizing follows from his collapsing of the legal aspect into the economic aspect. He explains one kind of thing in terms of another. Posner's approach is like applying principles of physics to the law. Abstraction is a necessary requirement of theorizing, but reductionism is not. Posner's map of contracts is one dimensional. He reduces concepts like fairness, reasonableness and justice to wealth maximization,[134] mitigation of damages to waste of resources[135] and good faith to not taking "advantage of the vulnerabilities created by the sequential character of performance under a contract . . . ."[136] There are times when the uneconomic choice is the right choice. Second, if law follows economics, it may only show the pervasive idolatry of our culture, not the proper place of economic considerations in the analysis of legal problems. Defining justice in terms of economic incentives is a confession of what is sacred to a materialistic culture. Justice is more than dollars and cents. We must serve God and not mammon. Third, Posner's theory adopts the same individualist assumptions as classical and neo-classical theory — the individual as rational maximizer of satisfactions. Organizations are mere conduits for individuals. A biblical view sees individuals-in-community as the appropriate starting point for theorizing. Individuals and organizations are real entities, the building blocks of society. Neither is constitutive of the other. Fourth, while choice matters, it is not the only determinate of behavior. The irrational, emotive, social and ethical aspects of our experience also influence, and even determine our behavior. Fifth, even if we did act as rational maximizers, what is rational is determined by the context — the map of legality — by which we navigate. What is plausible, what is reasonable, is determined by the faith which guides our theorizing.

D. Death of Contract

Many have criticized the neo-classical map of contract. Some have even questioned its existence. Grant Gilmore believes that

134. *Id.* at 360, 391.
135. ECONOMIC ANALYSIS, *supra* note 8, at 106.
136. *Id.* at 81.

the map of contract law drawn by the neo-classicist is an illusion. "We are told that Contract, like God, is dead. And so it is. Indeed the point is hardly worth arguing anymore."[137] So begins Gilmore's portrait of the end of contract.[138] Gilmore charts the birth, growth and death of the law of contract — its discovery by Christopher Columbus Langdell in the nineteenth century, its development by Oliver Wendell Holmes and Samuel Williston, and its disintegration in the mid-twentieth century at the hands of Arthur Corbin and Benjamin Cardozo.

Gilmore credits Langdell with the discovery of contract as "an 'abstraction' — a remote, impersonal, bloodless abstraction."[139] It was a theory unconcerned with who was involved or what was involved; its rules had universal application to all disputes between all parties. While classical theory has its genesis in Langdell, Holmes oversaw its broad philosophical development. "The theory seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything. Since the ideal was not attainable, the compromise solution was to restrict liability within the narrowest possible limits. Within those limits, however, liability was to be absolute ...."[140] The "balance-wheel"[141] of the theory was consideration. Consideration was something bargained for in exchange for the promise — "reciprocal conventional inducement."[142] "With the Holmesian formulation, consideration became a tool for narrowing the range of contractual liability. 'The whole doctrine of contract,' [Holmes] noted in this connection, 'is formal and external.' Unless the formalities were accomplished, there could be no contract and, consequently, no liability."[143] "The law moved from 'subjective' to 'objective,' from 'internal' to 'external,' from 'informal' to 'formal.'"[144] The "metaphysical solvent" was the objective test.[145] The subjective test of a meeting of the minds was replaced by the objective test of what the reasonable man would conclude from the external actions of the parties. Thus, the "*external* manifestation of mutual assent"[146] became for Williston the test

137. GILMORE, *supra* note 3, at 3.
138. *Id.*
139. *Id.* at 13.
140. *Id.* at 14.
141. *Id.* at 42.
142. OLIVER WENDALL HOLMES, THE COMMON LAW 230 (Howe ed., 1963).
143. GILMORE, *supra* note 3, at 21 (quoting HOLMES, *supra* note 142, at 230).
144. *Id.* at 41.
145. *Id.* at 42-43.
146. *Id.* at 43 (quoting 13 WILLISTON, CONTRACTS § 153 (b)).

of contractual agreement. "The effect of the application of the objective theory to such areas of the law as mistake was of course to narrow the range within which mistake could be successfully pleaded as a defense.... With the narrowing of the range of availability of such excuses as mistake, we move toward the ideal of absolute liability...." [147] "The absolute liability idea was put forth in double harness with the idea that contract damages were to be kept low ...."[148] Parties had the right to breach their contract. According to Holmes:

> [T]he contract-breaker's motivation ... makes no legal difference whatever and indeed every man has a right 'to break his contract if he chooses' — that is, a right to elect to pay damages instead of performing his contractual obligation. Therefore, the wicked contract-breaker should pay no more in damages than the innocent and the pure in heart.[149]

Hadley v. Baxensdale[150] allowed recovery of expectation damages where there were special circumstances within the tacit contemplation of the parties. To Holmes, foreseeability was not enough; there must be a deliberate and conscious assumption of risk by the contract-breaker. Consequential damages must be explicitly assumed by the promisor at the time of contracting.

Gilmore attributes the demise of the Holmes-Williston construct to Corbin and Cardozo.[151] Cardozo wrote a number of opinions which adopted an expansive theory of contract, finding contracts wherever possible rather than vice versa. Consideration became so broad as to become meaningless. Gilmore notes the influence Cardozo had on Corbin. Corbin was the principle assistant to Williston, the Chief Reporter for the *Restatement (First) of Contracts*. Gilmore states that Williston and Corbin disagreed on just about every issue. While Corbin failed to have the Restaters adopt a broad Cardozean definition of consideration, his persistence resulted in the addition of a section incorporating the idea of promissory estoppel. Gilmore characterizes the *Restatement (First) of Contracts* as a schizophrenic document. Section 75 defines consideration: "Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return

147. *Id.* at 44.
148. *Id.* at 48.
149. *Id.* at 14-15 (quoting HOLMES, *supra* note 142, at 236).
150. *See generally* 156 Eng. Rep. 145 (1854).
151. GILMORE, *supra* note 3, at 57.

promise, bargained for and given in exchange for the promise."[152] Section 90 on promissory estoppel states: "A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance [sic] is binding if injustice can be avoided only by enforcement of the promise."[153] Gilmore states: "Perhaps what we have here is Restatement and anti-Restatement or Contract and anti-Contract."[154]

However, Corbin ultimately prevailed. As the Reporter for the *Restatement (Second) of Contracts,* he diluted the effect of Section 75 through the Comment and greatly expanded Section 90 from one page, including its text, to seventeen pages of text and comment.

> Thus, the unwanted stepchild of *Restatement (First)* has become "a basic principle" of *Restatement (Second)* which, the comment seems to suggest, prevails, in case of need, over the competing "bargain theory" of § 75.... Clearly enough the unresolved ambiguity in the relationship between § 75 and § 90 in the *Restatement (First)* has now been resolved in favor of the promissory estoppel principle of § 90 which has, in effect, swallowed up the bargain principle of § 75. [155]

Gilmore goes on to describe the process of the law's movement away from the bargain principle toward principles of promissory estoppel in cases of detrimental reliance and unjust enrichment in cases of benefit conferred. Gilmore sees the continuation of this line of cases as possibly providing "the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation."[156] Gilmore attributes the demise of classical theory at the hand of these twin concepts to the rise of collectivism and the fall of individualism in the twentieth century: "We are now all cogs in a machine, each dependent on the other."[157] The theory was caught up in the transition from "nineteenth century individualism to the welfare state and beyond."[158] In short, Gilmore believes that the world of contracts is shrinking. The erosion of its empire is the result of the rise of promissory

152. *Id.* at 60-61.
153. *Id.* at 61.
154. *Id.*
155. *Id.* at 72.
156. *Id.* at 90.
157. *Id.* at 95.
158. *Id.* at 96.

estoppel and unjust enrichment as alternative basis for liability. This shift is attributable to a broadened conception of social duty.

What do we make of the death of contract thesis? Gilmore's book has been criticized for its neglect of economic and legal history,[159] its neglect of thirteenth century theories of contract [160] and for its erroneous doctrinal and empirical portrait of history.[161] Some commentators have tried to get beyond these peripheral deficiencies in Gilmore's thesis to get to its heart, such as contract as an abstraction[162] or the integrity of contract as a distinct area of law.[163] It is on this level that we will critically discuss Gilmore's death of contract thesis.

Looking at Gilmore's thesis from the biblical radical view, we notice several things. First, we agree with Gilmore's critique of the extreme abstractness of the classical map which was blind to persons and subject matter — its lack of care for who contracted or for what. The classical map was revised by legal realists like Cardozo and Corbin to include considerations of public policy, fairness and reasonableness which address themselves to the results of judicial decision-making in the particular case at hand. Second, Gilmore's map presents an over-generalized picture of its subject. His exclusive focus on doctrine reduces contract to the logical aspect; he is looking for a readjustment in our conceptual system. Gilmore confesses his own lack of interest in the empirical approach to contract.[164] He sees the nineteenth century classical model of contracts as a magnificent achievement[165] and looks forward to the time we will build something else.[166] Third, the chalkboard map of legality, consisting of overlapping circles representing tort and contract, with the area of intersection representing quasi-contract, has been erased by Gilmore. While the aim of a radically biblical approach would be to develop a cohesive map — a unified theory of social obligation — we can't agree that promises can be collapsed into some other principle such as reliance or benefit. There is something about

159. Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161, 1167-71 (1975).

160. Berman, *supra* note 100, at 105-06.

161. Gary L. Milhollin, *More on the Death of Contract*, 24 CATH. U. L. REV. 29, 39-49 (1974).

162. Berman, *supra* note 100, at 103-104.

163. Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1291-92, 1294 (1990) [hereinafter *Significance*].

164. GILMORE, *supra* note 3, at 3.

165. *Id.* at 101-02.

166. *Id.* at 102-03.

promising which distinguishes it from other obligations. Gilmore's image of death overstates the case. Contract still has a pervasive influence on our thinking. Fourth, Gilmore has torn up one map of contract without providing a new map in its place. Without a point of reference, we are left to wander the wasteland with just the hope that a new map will materialize someday. Mourning the loss of something is often the first step in new life, but it can also be the first step toward nihilism without a new vision to fill the void. Finally, Gilmore's thesis reminds us that our categories are tentative — how we divide the law is not unchangeable. A biblically radical map of legality must maintain a tentative attitude about the accuracy of its own representation of legality.

E. Empirical

While Gilmore called Stewart Macaulay the "Lord High Executioner" of "Contract is Dead,"[167] Macaulay distinguishes himself from Gilmore. For Macaulay, contract is not dead but very much alive in the activities of people, organizations, courts and legal scholars.[168] It is, however, a much different thing than what is conceived of in the academy:

> People and organizations bargain, they write documents, and they avoid, suppress, and resolve disputes little influenced by academic contract law. Some cases are taken to court and the formal process begun, although lawyers settle most of them before courts reach final decisions. There are even opinions by judges relying on traditional contract law, but they are relatively rare.[169]

While contract is still alive in the academy, it "is not now and never was a descriptively accurate reflection of the institution in operation."[170]

In 1963, Macaulay wrote an article describing the relationship between contract law and exchanges between manufacturing businesses based upon interviews varying in length from thirty minutes to six hours with sixty-six businessmen and lawyers representing forty-three companies and six law firms almost all of whom had plants in Wisconsin.[171] The study tried to determine

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167. *Id.* at 105 n.1.

168. *Empirical View*, *supra* note 5, at 466.

169. *Id.* at 465.

170. *Id.* at 466.

171. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55-56 (1963) [hereinafter *Non-Contractual Relations*].

the use and non-use of contract in this business environment. Macaulay's study found that "[w]hile businessmen can and often do carefully and completely plan, it is clear that not all exchanges are neatly rationalized.... Businessmen often prefer to rely on 'a man's word' in a brief letter, a handshake or 'common honesty and decency' — even when the transaction involves exposure to serious risks."[172] Planning is sometimes deliberate and explicit, particularly in cases of transactions outside the ordinary course of business, but more routine transactions are generally handled using standardized terms on the backs of purchase orders. Macaulay cites a study by one manufacturer during the mid-1950's which showed that the percentages of orders where no contract was formed ranged from 59.5% to 75% to demonstrate that this mechanism of contract formation breaks down. While it is likely that businessmen will be concerned about planning their transactions, planning for contingencies and defective performance is less likely, and planning for legal sanctions is even more remote. Thus, regarding planning, Macaulay concludes that: "(1) many business exchanges reflect a high degree of planning about the four categories — description, contingencies, defective performances and legal sanction — but (2) many, if not most, exchanges reflect no planning, or only a minimal amount of it, especially concerning legal sanctions and the effect of defective performances."[173]

Macaulay attributes the lack of contractual behavior to a lack of need for it. Problems are resolved without planning based upon industry custom. He notes that internal sanctions, such as honoring commitments, maintaining business reputation and producing good products are much more effective than legal sanctions in resolving disputes. "Not only are contract and contract law not needed in many situations, their use may have, or may be thought to have, undesirable consequences."[174] Careful planning may create undesirable exchange relationships lacking trust, cooperation and flexibility. The costs of litigation involved with adjusting exchange relationships in monetary, as well as non-monetary terms, may outweigh the benefits. Legal fees, diversion of management's time and attention, termination of relationships, and inadequate contract damages are among the costs. Legal sanctions tend to be threatened or used only as a last resort

172. *Id.* at 58.
173. *Id.* at 60.
174. *Id.* at 64.

when other devices will not work or the benefits are thought to outweigh the costs.

In 1985, Macaulay reviewed his earlier article[175] which he viewed as challenging some of the assumptions underlying contract theory: (1) that men carefully plan their relationships in light of legal requirements or possibilities; (2) that contract law is a body of clear rules that facilitate planning; and (3) that litigation is the primary means of deterring breach and resolving disputes. Litigation itself is seldom undertaken, and when undertaken, only where the expected recovery is relatively high or there is not much interest in continuing the relationship. It is most often employed as a tactical maneuver in the settlement process.

> Contract planning and contract law, at best, stand at the margin of important long-term continuing business relations. Business people often do not plan, exhibit great care in drafting contracts, pay much attention to those that lawyers carefully draft, or honor a legal approach to business relationships. There are business cultures defining the risks assumed in bargains and what should be done when things go wrong.[176]

Macaulay then updates the picture he painted in the 1963 article, taking into account the economic changes of the 1970's and 1980's which have exposed the limits of the relational sanctions he described in the earlier article. Those disadvantaged by collapsing relationships have often turned to contract law and legal sanctions for help. Macaulay discusses cases involving nuclear power, workforce reduction and franchises. While the number of contract cases has increased, Macaulay still views contract as an ineffective mechanism for remedying wrongs. "Usually, contract litigation becomes an elaborate, drawn out morality play affecting only back stage negotiations."[177]

In 1989, Macaulay and other professors at Wisconsin Law School began the Wisconsin Disputes Group Project which was prompted by at least two observations: (1) the increase in business disputes over the past twenty years and (2) the increase in in-house counsel and the size of law firms serving corporate cli-

175. *Empirical View, supra* note 5, at 471-77.
176. *Id.* at 467.
177. *Id.* at 475.

ents.[178] The Project observes that the increase in use of the law coincides with a period of fundamental change in the American business environment, such as rapid internalization, declining rates of growth, profitability and productivity, increased utilization of debt, changes in government regulation and increased instability in the labor market. [179] The reactions of businesses to these changes, such as outsourcing, joint ventures, mergers, and other strategies to spread risk, have resulted in relationships in which business people are more accountable to third parties. These factors have affected the volume of business disputes and the use of litigation.[180] Competition, specialization, spatial and cultural dispersion, and rapid economic change all contribute to the increase in litigation. The increased role of in-house counsel may also increase the number of suits which might previously have been ignored or evaded. The large losses caused by drastic economic changes have also prompted litigation.[181] But Macaulay's depreciated view of the role of contracts law continues:

> Finally, we must distinguish filing law suits from litigating cases to a final conclusion. Often filing a complaint or pretrial motions is but a way to facilitate or coerce settlement. These steps may serve to focus the issues and clarify facts and bargaining power. Judges attempt to prompt settlement in various ways before they try a case. Pressures ... may prompt settlement even after a trial has begun or a verdict rendered. Often the parties do not want to invest what would be necessary to start over.[182]

In his 1985 article, Macaulay characterized classical contract law as "Wizard of Oz" jurisprudence[183] — a magnificent facade. Why does it persist? Perhaps it is a coping mechanism, a denial of reality rather than a facing of it? Perhaps it is the lure of its appearance of neutrality? Perhaps it is an engaging intellectual game to occupy minds of professors and law students? Perhaps it is a comforting image of what it is that typical lawyers do?[184] Whatever the reason, it is still with us.

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178. *See generally* STEWART MACAULAY, LONG-TERM CONTINUING RELATIONS: THE AMERICAN EXPERIENCE REGULATING DEALERSHIPS AND FRANCHISES, DISPUTES PROCESSING RESEARCH PROGRAM 18-20 (Institute for Legal Studies Working Paper No. 10-1, 1990).

179. *Id.* at 18.

180. *Id.* at 18-19.

181. *Id.* at 20.

182. *Id.* at 21.

183. *Empirical View*, *supra* note 5, at 478.

184. *Id.* at 479.

This is pretty pessimistic stuff. I think Macaulay's response to this gloomy picture is similar to the Great Oz's response to Dorothy when he was exposed as a fraud:

> Dorothy: You're a bad man, Oz.
> Oz: Oh no, I'm a good man; I'm just a bad wizard.

Faced with prospect of only hired guns, Macaulay makes a plea for a few good men:

> There is enough truth in the image of law as rationality above politics and power so that a few lawyers representing a few clients can make their society a little less hostile place. I think visions of a better future are important, but in the here and now lawyers can make a contribution to smoothing rough edges from the society. I would rather teach my students some ideal of law than leave the impression that practice can be no more than just selling advocacy to the highest bidder.[185]

What do we make of Macaulay's criticism of the classical model of contracts from a biblically radical point of view? First, Macaulay's empirical method appears man centered; man is the reference point. What man discovers with his method is the truth. Thus, man's powers of observation, his perceptions, become the non-dependent, self-existent thing with the status of divinity in Macaulay's theoretical framework. But we must remind ourselves of our earlier discussion of the role of faith in theorizing. It must be brought to bear upon Macaulay's empirical method. The facts presented by empirical studies are interpreted facts. Our map of reality affects our research from start to finish. It determines our approach, defines our concepts, selects which facts are worthy of observation and colors our interpretations. We can't neatly divide the facts from our beliefs. As Michael Polanyi states, in discussing some of the great scientific controversies, "The two sides do not accept the same 'facts' as facts, and still less the same 'evidence' as evidence ....Within two different conceptual frameworks the same range of experience takes the shape of different facts and different evidence."[186] We can't assume a neutral observer as our reference point. In Macaulay's 1963 article, the facts were selected because they were considered economically important, commonly thought to include a high degree of planning and easily obtainable data. This kind

185. *Id.* at 480.

186. LESLIE NEWBIGIN, THE GOSPEL IN A PLURALIST SOCIETY 21 (1989) (quoting MICHAEL POLANYI, PERSONAL KNOWLEDGE (1962)).

of selection process highlights the role of the observer. What the observer sees and how he sees it are influenced by his cognitive map. Macaulay's observations of contract behavior in the 1970's and 1980's reveal a less cooperative and more litigious environment. The changing social facts caution us against making the data normative. They may just illustrate positive and negative responses to norms.

On the positive side, Macaulay's perspective makes several contributions. First, we need to revise our map. It is too small. The empire has convinced us that its map is a true picture of our environment; that everything is all right. We can't imagine things to be any other way. We need to open up our view of the world. Second, we must acknowledge that the "Law" has much less to do with how people and institutions behave than we imagine. Society is a living institution made up of many parts which engage in significant private governance. Business cultures, and not legal technicalities, largely determine contract behavior. The map of contracts drawn by classical theorists is much too narrow. It doesn't adequately account for the reality of the many norms to which people respond in positive and negative fashion. Our map of contracts must include consideration of the ethical, economic, social, historical and even aesthetic factors which together constitute a cultural milieu. Third, we must check the map against the road — against reality — to verify its authority. We need an empirical approach without empiricism. Fourth, most transactions are not isolated exchanges between autonomous individuals as is assumed by the academic model. The individualistic assumptions underlying the academic model must be abandoned for a model of the individual-in-community. We will look at a model which emphasizes the relational aspects of contracting in the following section.

F. Relational Contract

Students of Stewart Macaulay may believe that he invented relational contract theory, but students of Ian Macneil would also attribute its invention to their teacher.[187] Before examining the structure of Macneil's relational contract theory, we will look at Macneil's underlying view of man, law and society. Through this preliminary inquiry we will see that where Macneil starts determines in large part where he ends up. According to Macneil,

187. *Relational Contract, supra* note 4, at 483.

> Relational contract theory rejects as unrealistic the examination in fractions of either people or their institutions. It considers humans only as wholes; indeed, it goes farther, as it rejects the very idea of man-outside-society and insists that the smallest unit of social analysis has to be man-in-a-society. On the other hand, relational contract theory also rejects perfectionism, any idea that man can become a totally self-sacrificing animal; hence, it rejects any possibility of total submergence of man-the-individual into man-the-community. Instead, it focuses on and accepts the eternal human schizophrena in being inconsistently selfish and self-sacrificing at the same time.[188]

Macneil defines man as a schizophrenic creature, both selfish and social at the same time. The two principles of behavior essential to the survival of such a creature are solidarity and reciprocity.[189] The tension created by these inconsistent behaviors is relieved by exchange: "Getting something back for something given neatly releases, or at least reduces, the tension in a creature desiring to be both selfish and social at the same time; and solidarity — a belief in being able to depend on another — permits the projection of reciprocity through time."[190]

Understanding Macneil's universe of contract requires that we consider at least two of its dimensions. First, the contract dimension which involves "relations among people who have exchanged, are exchanging, or expect to be exchanging in the future."[191] Macneil sees exchange as an inevitable product of the specialization of labor. All exchange occurs in relations, but some contracts are more discrete while others are more intertwined. Discrete contracts are characterized by self-maximization, short duration, non-personal relations and precision measurement of quantities, while intertwined[192] contracts are characterized by cooperative behavior, significant duration, personal relations and lack of easy measurement of quantities. Macneil argues that

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188. Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 409 (1983) (footnotes omitted) [hereinafter *Values*].

189. *Id.* at 348.

190. *Id.* at 348-49 (footnotes omitted).

191. Ian R. Macneil, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos*, 143 J. INT'L & THEORETICAL ECON. 272, 274 (1987) [hereinafter *Sociology*]. This article contains a concise statement of Macneil's theory. *Id.* at 274-78.

192. *Id.* at 276. Macneil explains that his change in terminology from the word "relational" to "intertwined" is because of confusion arising from the use of the term in two senses: (1) as the opposite of discrete and (2) as globally referring to all relations in which exchange occurs.

discrete exchanges constitute a very small part of the mechanisms for the production and distribution of goods and services in our society.[193] Exchange occurs more commonly within relations that involve more elements and are of longer duration. It takes a great deal of theoretical imagination to produce examples of discrete exchanges. Even the purest discrete exchange involves a social matrix providing a means of communication, a system of order, a medium of exchange and mechanism to enforce promises if they are involved.[194]

The second dimension of Macneil's universe of contract is that of value-arenas. These value-arenas include values reflected in: (1) the goals and means of people engaged in contractual behavior; (2) internal principles and rules governed by contract behavior; and (3) external social responses to contract behavior.[195] In this dimension, Macneil focuses on the minimum behavioral patterns necessary for relations to exist, maintaining reciprocity and solidarity being the first among equals. These behavior patterns are an example of an "is" creating an "ought."[196] He sets out three classes of contract norms: common contract norms, the discrete norm and intertwined norms. These norms constitute "an abstract summary of the varied and specific norms in myriad varieties of contracts."[197]

Macneil outlines the ten common contract norms as follows:

> (1) role integrity (requiring consistency, involving internal conflict, and being inherently complex); (2) reciprocity (simply stated as the principle of getting something back for something given); (3) implementation of planning; (4) effectuation of consent; (5) flexibility; (6) contractual solidarity; (7) the restitution, reliance, and expectation interests (the "linking norms"); (8) creation and restraint of power (the "power norm"); (9) propriety of means, and (10) harmonization within the social matrix.[198]

All contract norms are present in all contracts. Seemingly discrete contracts exhibit elements of intertwined transactions, while

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193. *Relational Contract, supra* note 4, at 485-88.

194. *Values, supra* note 188, at 344.

195. *Id.* at 342.

196. *Id.* at 346 n.16 and accompanying text; *Sociology, supra* note 185, at 274 n.7 and accompanying text.

197. IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 39 (1980).

198. *Values, supra* note 188, at 347 (footnotes omitted).

intertwined contracts exhibit elements of discreteness. While all contract norms are present, they do not necessarily blossom fully in all contractual relations at all times, nor do they have the same prominence in the various types of contractual relations.

Contractual relations fall along a spectrum between discrete and intertwined. Some norms assume special importance in discrete contracts and others assume special importance in intertwined contracts.[199] Contractual relations respond to those norms wherever they fall on the spectrum between discrete and intertwined — they exhibit a "success spectrum." "Those contractual relations operating effectively will reveal the common contract norms in robust condition, while those in varying degrees of trouble will reveal the common contract norms in varying degrees of disarray ...."[200]

Three "external"[201] social responses to contract behavior are discussed by Macneil — prohibition, non-intervention and imposition. The state may prohibit particular contractual relations from existing, such as the Nazi prohibition on Jewish-Aryan marriages. The state may totally respect the autonomy of individuals and not intervene, such as results from the doctrine of *pari delicto* when applied to illegal contracts — the state will not enforce an illegal contract. The state may impose norms upon a contractual relation.[202] "Sovereign imposition of norms on contract, in contrast to their generation within the contract, results in a transformation of the contract's values. That is, the values of imposing contract norms — whether common, discrete or [intertwined] — are not identical to the values reflected by their internal generation."[203]

In sum, these common contract norms are essential to the processes of past, present and future exchange. No exchange activity can continue if any are absent. Nevertheless, some of these norms may become exaggerated relative to others, as occurs inevitably in discrete transactions and very often in intertwined transactions.[204]

Macneil's theory takes us only so far. This appears to be intentional. Macneil states that his theory is not ideological in the sense of being individualistic or communitarian. It is not the

199. *Id.* at 349.
200. *Values, supra* note 188, at 351-52.
201. *Id.* at 368-72.
202. *Id.* at 367-82.
203. *Id.* at 370 (footnotes omitted).
204. *Id.* at 366.

pre-determined interests of the parties or of society that dictate its results. This demonstrates that where one starts determines where one ends up. Macneil's presuppositions about man-in-community results in a theory that doesn't gravitate toward individualism or communitarianism. Macneil confesses his own communitarian tendency as he would apply the theory[205] but he asserts that the theory itself is not predisposed to any results orientation. Some of his critics characterize relational contract theory as communitarian, particularly those writing from the viewpoint of the individualist pole because from that extreme, any admission of communitarian interests appears ideological. But despite Macneil's lack of ideology, his theory is still based upon religious presuppositions, which Macneil recognizes in part by his comments on knowing — i.e., Fried knows relational contract theory is of the "Devil."[206]

What is Macneil's contribution to a radically biblical view of contracts? First, we must agree with his critique of the inadequacy of the neo-classical map of contracts. Macneil is correct in his criticism of neo-classical contract theory as too narrow. Fried's world of contract-as-promise with its single focus assures the sacrifice of other values which should be taken into account. It projects the characteristics of relatively discrete transactions into the reality of intertwined contracts.[207] Second, a biblical map of contracts must recognize the essentially relational nature of all contracts and accept the multi-dimensionality of the world of contracts. God placed man in a multi-dimensional world, as a creature in relation to God, man, nature and himself. These are relationships that can be moulded by choice but are not created by man himself.

But we must part company with Macneil on a number of issues. First, Macneil's view of all aspects of creation as self-existent or non-dependent, the two chief among equals being solidarity and reciprocity, cannot be accepted from a radically biblical point of view. This elevation of two, if not all, aspects of creation to the status of the divine is idolatry. It amounts to a pagan religious belief. From the radically biblical perspective, God alone is self-existent and non-dependent — divine. He alone is the source of legitimate norms. Second, Macneil's map is too detailed and complicated to be of much use. It is so representa-

205. *Sociology, supra* note 191, at 273.
206. *Relational Contract, supra* note 4, at 483.
207. *Values, supra* note 188, at 392.

tional that it is hard to see the big picture. It is difficult to find your way with Macneil's map of legality. The route is uncertain. There are no directions through the maze of landmarks. It is a theory without priorities for the resolution of disputes, which makes decision-making impossible. Third, we must disagree with Macneil's view of behavior generating norms — a case of an "is" creating an "ought." Behavior may be a positive or negative response to God's norms for the creation, but behavior does not ultimately generate norms. Within Macneil's theory it is possible to construct a system of norms totally antithetical to God's law and stamp them with imprimatur. In particular, this came out in Macneil's discussion of good faith — a person has acted in good faith if they have acted in accordance with the contract norms within a particular historic social context. There is no room for a transcendent basis for good faith in Macneil's system. A radically biblical map of legality cannot accept this result.

G. Critical Legal Studies

Jay Feinman can't accept much of the current legal environment. As we noted at the outset of this essay,[208] he finds neoclassical contract law to be inconsistent and legitimating. Feinman aligns himself with the Conference on Critical Legal Studies (CLS). The distinctives of this school of thought are hard to identify. Roberto Unger sees two main tendencies: (1) legal doctrine as an expression of a vision of society which is contradictory and manipulatable; and (2) the confirming function of law in regard to the existing social structures.[209] A precise description of the essence of CLS may well be impossible because of its diversity. Indeed some commentators see it only as a convenient label for group of theorists whose work lacks substantive similarity.[210] However, echoing Unger's first tendency, Feinman makes the following assessment: "If critical legal studies can be said to have a core assertion, it is this: The conventional understanding of law is that it is presumed to be true, valid, and useful in an essentially non-ideological way, while law actually is a constructed

208. *See supra* text accompanying notes 6 and 7.

209. Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 563 n.1 (1983).

210. Mark Tushnet, *Rights: An Essay in Informal Political Theory*, 17 POL. & SOC'Y 403, 439 n.1 (1989) (referring to Duncan Kennedy's view of CLS).

reality, the form, substance, and method of which conceals its problematic, controversial and ideological nature." [211]

Feinman describes four defects in the classical image of contract which the modern law of contracts tries to correct: (1) its disregard of social considerations, viewing contract as a matter of private ordering; (2) its focus on a moment of contract formation; (3) the impossibility of its construction of a truly formal, rule-based system; and (4) its tendency toward abstract theorizing detached from social reality. [212] The attempt of modern contract law to address these deficiencies has resulted in a contradictory body of law in Feinman's opinion:

> Modern contract law ... embodies two general, contradictory patterns of analysis which organize the multiple of principles, policies, and arguments. One pattern is the heir to the individualist tradition of the classical image. It proposes a world of autonomous, freedom-seeking beings and a body of contract law which aids them in their search. The other pattern is its collectivist opposite. This pattern envisions a world of interdependent, cooperating actors and a body of contract law which encourages their cooperation.[213]

Modern contract law has not solved the problems posited by the classical image of contract law. It has produced two incomplete, contradictory images which fail to provide a reliable basis for the law of contracts.

Feinman also considers the merits of other approaches to contract theory, such as neo-classical, death of contract, law and economics and empirical studies. As Feinman assesses the significance of the various schools of thought, he sees neo-classical contract theory as an ineffective vehicle for radical change — it is associated with theorists of mainstream political and professional orientation. Death of contract theory could be useful because it would look outside contract law to resolve controversies. Law and economics might also suggest different ways of looking at a problem but its narrow focus is too limiting. Relational contract seems to be a powerful tool for multi-faceted issues. Empirical contract recognizes non-legal factors and non-legal consequences. Critical theory reveals the power structures underlying controversies and provides some ways to resolve issues.[214]

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211. *Significance, supra* note 163, at 1309 (footnote omitted).
212. *Critical Approaches, supra* note 6, at 834-36.
213. *Id.* at 838.
214. *Significance, supra* note 163, at 1309-10.

Feinman also considers the political consequences of the different theories: neoclassical contract is status quo; law and economics is of the right; relational, empirical and death of contract threaten the center; critical theory is of the left. "Seen that way, politics, broadly understood, is an important basis for the choice among contract theories."[215]

David Caudill is particularly helpful in his analysis of the CLS movement.[216] He also points out its similarities to the philosophy of Herman Dooyeweerd and his students, among whom is Roy Clouser.[217] In particular, Caudill points out the theme of plastisicity which runs throughout CLS literature:

> A firmly entrenched system of shared beliefs in any culture makes it difficult for its members to imagine that life could be different. The law and its institutions may comprise one such cluster of beliefs, or shared interpretations, or "cultural codes," which tend to be accepted as givens. One of the fundamental themes in CLS literature asserts that social reality, in fact constructed by its members, too often is externalized and placed above human choice, thus manufacturing an imagined necessity where none exists.
>
> As a primary goal, CLS seeks to expose such ideological presuppositions, to unfreeze the world and show that the perceived necessity is merely a result of people acting. Legal rules can be shown to be historically contingent; legal categories can be shown to be arbitrary; legal necessity can be empirically disproven....
>
> The perceived necessity, or false consciousness, identified by CLS is not overt, but operates at a level where options are dismissed as unthinkable, or never even conceived. The resulting tacit value system must be recreated first for the sake of awareness, then to permit a deeper criticism of the system itself — not just particular theorists, legislators, or judges. Borrowing from new historians and philosophers of science, the CLS critique discloses an ideological system that is not seen as closed or deterministic because there is room for breakthroughs, paradigm shifts, and revolutions.[218]

Caudill goes on to distinguish between two types of CLS critique, the normative and methodological critique, finding himself sympathetic to the latter:

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215. *Id.* at 1318.
216. Caudill, *supra* note 41, at 287.
217. *See supra* notes 42-78 and accompanying text.
218. Caudill, *supra* note 41, at 309 (footnotes omitted).

> Two vaguely distinct versions of the critique of ideology of law emerge from the CLS canon. The first, which may be called the *normative critique,* assumes that the critical enterprise leads to a true consciousness, justice and a better world. The second, which may be called the *methodological critique,* assumes the simpler goals of awareness, communication, and perhaps a better world if aware/communicating people can create one.
>
> The normative critique intends first to disclose the ideological assumption in the legal system that are inconsistent and therefore wrong. Additionally, legal ideology is here seen as a "cloak" hiding and maintaining tensions, contradictions, and most importantly, oppression of a powerless class or classes by a powerful ruling class. Some scholars say that CLS is linked to a radical political agenda because of the normative critique, in which the disclosure of tilt is a call to revolution.
>
> The methodological critique, on the other hand, emphasizes disclosure of ideological tilt for the purposes of awareness, discussion and criticism .... The ultimate goal seems to be open communication; the emancipation seems to take place on the level of thought. That is, people should be free to choose or recreate their legal system. The revolution is one of paradigms, and thus the violent overtones are absent.[219]

Caudill views the methodological critique as the most valuable contribution of CLS. He moves on to show the affinity between the methodological critique and the Philosophy of the Law-Idea. Caudill appreciates this strain of the CLS movement for its critique of the status quo and disclosure of fundamental faiths that direct a culture while maintaining humility about one's own presuppositions and solutions. While Caudill advances the Law-Idea, he observes a persistent commonality between CLS and his own tradition in their belief-disclosing methods and their goals of open communication regarding worldviews. The methodological critique's identification of ideology is another way of saying that theories contain hidden religious beliefs.

What can CLS add to a radically biblical map of legality? First, it can open up our view of the world by making us aware of the legal map-making process. We can agree with the CLS attack on the perceived necessity of our legal order. We don't have to believe, "[t]hat's just the way it is."[220] While we agree

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219. *Id.* at 331.

220. BRUCE HORNSBY AND THE RANGE, THE WAY IT IS, (Zappo Music 1986) (*quoted in* Caudill, *supra* note 40, at 316 n.240 ("That's just the way it is / Some things will never change / That's just the way it is / But don't you believe them").

with the critique of false constructions of legality, we can't agree that there is no legitimate reference point from which to reconstruct legality. We can imagine a better map of legality from a radically biblical perspective. Second, we can agree that maps of legality can be ideological tools of oppression, but we do not find it necessarily so. The normative critique paints just as closed a picture of the world as the image it critiques. It creates a world of socio-economic domination of class by another, calling for the overthrow of the haves by the have-nots. We need to get beyond economics, social class and politics; what is at stake is directive power of religious beliefs across all aspects of our experience.

H. Travel Log

As we review our travels so far, we might well ask whether we are lost. The variety of maps of legality drawn by the theorists we have discussed makes it clear that we are unsure of our bearings in this area of the law. The map of contracts drawn by classical and neo-classical theorists has been attacked. The challengers' perspectives have failed to catch our imagination. This questioning of the status quo without a new vision to inform our theorizing has created a situation in which we are no longer certain how to find our way in the world of promises, agreements and contracts. We need a new map to find our way. Our experience keeps bringing us to the realization that we have been sold counterfeit maps. We are on treasure island, we may have seen some of the landmarks, but can't find the treasure. Our directions and paces are wrong; we are digging in all the wrong places. Can we construct a new map of legality to guide us? I believe so.

Let us begin by recalling some of the prominent sites we encountered on our journey so far. First, in Kuhn's discussion of the role of faith in paradigm shifts[221] and in Clouser's discussion of religious beliefs entering theorizing at the level of presuppositions,[222] we saw that faith plays a prominent role in directing our theorizing. In Cardozo's acknowledgement of the "pervading spirit of our law,"[223] and in Denning's reference to the "precepts

221. *See* KUHN, *supra* notes 24 and 61 and accompanying text.
222. *See supra* note 63 and accompanying text.
223. *See supra* note 31 and accompanying text.

of religion [as] the guide to the administration of justice,"[224] we saw the influence of faith on the path of the law. Whether it is faith in the God of Israel or faith in other gods, the radically biblical view of the relation between religious belief and theorizing is one in which reason is directed by religious belief. The role of faith is infrequently discussed but not unacknowledged by those involved in the recent dialogue concerning the law of contracts. Posner writes about "conversion."[225] Macaulay writes about the faith of the legal realists.[226] Macneil acknowledges some spiritual dimension to the theoretical debate with his reference to the "Devil."[227] Gilmore anticipates "[s]ome new Langdell ... waiting in the wings to summon us back to the paths of righteousness...."[228] Our map of legality has been and must be religious.

Second, our brief survey of contract law identified various principles which were given the status of the divine as unquestioned presuppositions to theorizing. We saw theorists adopt one aspect of experience as the basic or central aspect and project it onto other aspects, creating a distinct map of legality. From a radically biblical perspective, each projection is an idolatrous oversimplification which locates the divine within creation. Fried's contract as promise thesis deifies the ethical aspect. Posner worships at the alter of economism. Macaulay, Gilmore and Macneil deify the sensory, logical and social aspects, respectively. Feinman either joins with the Greeks in Saint Paul's day by building a temple to the unknown god, or perhaps bows down to the historical aspect. Each projection is undergirded by a religious belief of the pagan type. Each view shifts our focus and provides a different map. But each is just as constricting as the other; each reduces our world. Can these maps make a contribution to a multi-dimensional understanding of the cosmos dependent upon God alone for its existence? I think so, provided that the aspects upon which they focus are not given paramount or equal weight but weigh in the balance. There is some truth in these idolatrous projections — their maps make sense of some parts of life's experiences. Indeed, the idolatrous exaltation of the aspect must have some basis in reality in order to hold its

224. *See supra* note 95 and accompanying text.
225. *See supra* note 62 and accompanying text.
226. *Empirical View*, *supra* note 5, at 522.
227. *See supra* note 206 and accompanying text.
228. GILMORE, *supra* note 3, at 103.

powerful grip. But we must be free of the power idols hold over us, without forgetting the proper place of the aspect with God's creation. God alone is properly given the status of divine in our theorizing. Our map of legality must begin with God.

Third, our survey of contract law brought out the uniqueness and connectedness of the aspects of our experience. Each aspect has its own irreducible properties and laws. But it is only through our understanding of the various aspects of our experience in relation to each other that the core meaning of each single aspect is understandable. The theories of Macaulay and Macneil accentuate the connectedness of the aspects of our experience through their attention to the social and relational realities of contract behavior. Other theorists, such as Fried and Posner, focus on one aspect of experience. The variety of contractual theories themselves highlights the multiple facets of contractual behavior. Rather than restrict the scope of our inquiry to a single aspect, the radically biblical perspective has emphasized the need to consider all aspects in developing a theory of contracts. The economic, social, ethical, historical and other aspects must be taken into account. Theoretical strategies which reduce our world to a single aspect, or even a few aspects, inhibit our understanding of God's world. All high abstraction must be viewed as temporary and partial rather than as permanent and complete. Our map of legality must be multi-dimensional.

Fourth, we have contended that law is embedded in the creation. It is not dropped from heaven ready-made, as in some natural law theories, but a living reality brought forth out of the creation by human beings in positive and negative response to the norms God has placed in it. God's norms require positivization to become law. These norms can mold a society. And they can be ignored, although never abrogated. The law changes as we open up the potentialities inherit in the creation. It responds to the process of cultural formation. While its norms are fixed, its application in different cultures or the same culture over time may be different, as is its application to particular disputes. Our map of legality must be dynamic.

Fifth, man and woman were created in the image of God in relationship to God, other men the creation and himself. Man was never alone in some state of nature. He is never alone. Man is, and always will be, an individual constitutive of and constituted by their relationships, such as citizen, parent, spouse, employee, patient and student. Neither the individual or community is prior to the other. Both are real entities created by God. Because we

are neither autonomous individuals nor cogs in a machine, we must think relationally about contractual dealings among men. Written contracts are but one part of the larger context in which the agreement of the parties must be interpreted. Our map of legality must start with man-in-community.

Sixth, law is more than an instrument, more than a means to an end. It is more than a tool of the trade, a technique to be applied to any end, evaluated only by its effectiveness in reaching the desired goal. Law has purposeful ends, as well as legitimate means. Law has an aim — to do justice. Justice is more than the will of the majority, more than the will of the individual. It is more than the sum of our various overlapping travel itineraries. There are norms that chart a number of courses to the intended destination. Our map of legality must include biblical standards like uprightness and impartiality in judgment, proportionality of sanction and restitution to those wronged, social responsiveness to oppression of the poor, concern for following proper procedures such as corroborating witnesses, confrontation of accusers and prohibiting bribery. Our map of legality must look to the Bible as a prophetic guide to our legal cartography.

Finally, the theories of Gilmore, Macaulay and Feinman wake us up from our slumber. Gilmore challenges our conceptual categories, questioning the uniqueness of contracts as a distinct area of legal inquiry. Macaulay unveils the facade of academic model of contracts, exposing us to the living institution of contract as it is experienced in business organizations and other spheres of private governance. Feinman unfreezes our world, releasing us from the perceived necessity of the existing legal order. We need to be revived from the effects of Llewellyn's ether, the "sense of justice" and other "woozy thinking" that was knocked out of us in the first year of law school.[229] We must regain our senses, shake off the numbness that has immobilized our minds, preventing us from seeking after justice. Our map of legality must keep us awake.

The idea of imagining a new world of contract is a humbling thought. The variety of approaches to contracts law demonstrate the richness of this field of inquiry. The world of contract is so big, so complex. How can we hope to know anything about it? Can we really break free of the grip of the idols we have created? By the Spirit's power, we can. And here, I must sound a cau-

229. KARL N. LLEWELLYN, THE BRAMBLE BUSH 116, 119 (1951).

tionary note. There is a danger in claiming the ability to discern the leading of the Spirit, but discern we must. Sin has crept into every corner of the creation. Its pervasive influence is seen in the idolatrous maps of legality reviewed above which elevate an aspect of creation to the status of the divine and project its properties across the aspects, recreating them in its image. We must test the theories we formulate against the Scriptures, the lessons of history and the insights of the biblical community. In this context, I believe that we can speak a genuine prophetic word about the legal aspect of creation to our generation. Perhaps it will appear foolish in the eyes of the world, but then that may be the best test of its validity. It is on this note of the hopefulness about the prospects for newness, qualified by a humble tentativeness about theorizing, that I wish to turn to a biblical map of legality.

IV. TOWARD A NEW MAP

A. Endings and Beginnings

Can we really hope for anything new under the sun? Not if we are content to rearrange the same old pieces of reality with a pagan view of religious belief. For newness, we must adopt a radically biblical view of reality. Biblical faith knows the openness of a God outside of our reality who brought it forth out of nothing and continues to create something out of nothing: beauty for ashes, dancing out of mourning, life out of death. In our endings, God can bring forth new beginnings. And that is where we find ourselves. We are at the end of something. The sense of crisis within the law of contracts signals the end of the dominance of the neo-classical approach to this area of the law. The results of the crisis are yet uncertain. What is clear from our limited discussion is that the neo-classical map of legality has become obsolete. It no longer gets us where we want to go. We don't even know what constitutes a contract anymore. In short, we are lost!

The map I propose is not a definitive map. It feels more like a rough sketch drawn on the back of a napkin than a computer-generated virtual reality. The map of legality which I propose as a guide is based upon the uniqueness of each aspect of our experience. This means we will respect the multi-dimensionality of our experience even when focused upon one dimension

of it. It also means that we will respect the spheres of authority within society based upon their leading aspects.

B. Restorative Justice

The juridical aspect is one among the many aspects of our experience. Its core concern of justice cannot be reduced to another aspect. It cannot be reduced to logic or intuition, money or power, tradition or taste.

> Justice refers, first of all, not to persons or acts but to the fact that there can be a just ordering of things according to God's will. God maintains a just order . . . and we are to judge all things and actions in terms of this order. When we say that something is just or unjust we are measuring it in terms of God's requirement for justice. [230]

Justice is primarily about right relationships between God, people and things. This rightness is more than proper procedures; it has substantive content based upon God's revelation. Justice gives every aspect of creation its rightful place; it allows each creature to fulfill its calling. In a fallen world where sin has broken our relationships, justice brings wholeness. It restores right relations between persons and things according to God's revealed norms, such as impartiality in judgment, proportionality of sanction, social responsiveness and procedural fairness.

Perhaps we can catch a glimpse of the meaning of justice through one of God's interactions with the Prophet Amos:

> This is what he showed me: The Lord was standing by a wall that had been built true to plumb, with a plumb line in hand. And the Lord asked me, "What do you see Amos?" "A plumb line," I replied. Then the Lord said, "Look, I am setting a plumb line among my people Israel; I will spare them no longer."[231]

God is going to measure his people for their uprightness, uprightness being conduct consistent with His character and His ordinances. Just as a wall that is out of plumb will collapse, so a society that is unjust will crumble. The crookedness of a people is revealed by the straightness of the standard. Justice is what brings the relationship back into line with God's standard. And yet, there is room for variation in our positivization of the norm.

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230. PAUL MARSHALL, THINE IS THE KINGDOM 53 (1984).
231. *Amos* 7:7,8 (NIV).

Martin Luther tries to capture the flexibility of the standard. Using the plumblines as an illustration of justice, he analogizes that a plumbline "reveals the fact that a tall building or wall may be perpendicular from top to bottom even though individual stones here and there protrude beyond the plumb line...."[232] In this world, there are deviations from the straight which may still be true to the standard.

The idea of a plumbline as the standard for justice is enriched by the very terms used for justice in the Bible — the Hebrew word *tsaddiq* which literally means straight, and the Greek word *dikaios*, meaning upright. [233] The basic biblical word for law also embodies the directional character of our response to God's norms. The noun *torah* is related to the verb *hora* which means "to direct, to teach, to instruct in."[234] The law is an expression of God's word that gives direction to life: "Your word is a lamp to my feet and a light for my path."[235] Over and over again the ideas of straightness and direction appear in the Scriptures — in crooked and straight paths, in plumblines set in the midst of God's people and in paralysis and mobility. These words convey a picture quite different from that of the traditional image of the scales, balancing factors to reach a just result where the factors are interchangeable, the weights tenuously assigned. The scales call us to allocate weight to interests based upon our own wisdom. But God's word calls us to look at justice directionally, not as a balancing act.

C. Multi-dimensionality

To gain a better understanding of the juridical aspect, we will explore its relationship to other aspects. Indeed, it is incomprehensible without such reference to the other dimensions of our experience. Its connectedness to the other aspects is expressed in anticipatory analogies which point forward to subsequent aspects and retrocipatory analogies which point back to earlier aspects. There is a dynamic relationship among the aspects — as one reaches forward, the next reaches back, presupposing the preceding aspect. Those above it call it to something more;

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232. H.G. Haile, *Algorithm and Epikeia: Martin Luther's Experience With Law*, 61 SOUNDINGS *500, 509* (1987) (quoting Martin Luther).

233. J. Oliver Buswell, 1 A SYSTEMATIC THEOLOGY OF THE CHRISTIAN RELIGION 67 (1962).

234. THE NEW BIBLE DICTIONARY 718 (J.D. Douglas, ed. 1962).

235. *Psalm* 119:105 (NIV).

they are regulative. Those below it create the possibility of something more; they are constitutive.[236] We will turn first to the regulative; the fiduciary and ethical aspects that reside above the juridical aspect within the range of aspects.

The ethical aspect calls forth legal-ethical principles such as good faith, equity, fairness, guilt, fault and reasonableness out of the juridical aspect. For example, the requirement of good faith in contractual dealings calls the parties to honesty, truthfulness, avoidance of trickery and deceit. Good faith is more than commercial reasonableness — the social mores of the business world — as in Fried's neo-classical map of contracts or Macneil's relational map of contracts. Good faith is more than refraining from the taking of opportunistic advantage of the economic vulnerabilities created by delays between promise and performance, as in Posner's map of contracts. Yet the legal-ethical analogy of good faith is not the same as the love of the ethical aspect which calls it forth. The ethical norm of love is qualified by the juridical aspect. Thus, the love of a parent in response to a son's failure to repay a debt to him is not the love of a bank in seeking repayment of its note from the same individual. These anticipatory analogies do not appear in primitive legal systems, but only in advanced ones. Strict formalism characterizes primitive legal systems. But recalling the words of Lord Denning:

> Our law of contract has passed through many phases. At one time promises were not binding unless they were made in the form of a covenant under seal. Later on they were not binding unless there was consideration for them, that is, something given or done as the price for them. Nowadays nearly all formalities have been eliminated. If a man makes a promise which is intended to be binding and to be acted upon by the party to whom it is addressed, then once he has acted upon it, it is enforceable at law.[237]

Yet the primitive or advanced character of the law should not be equated with one's own time or the passage of time. The simplicity of strict formalism has its adherents even today. For instance, Judge Easterbrook's decision in *Kham & Nate Shoes* limited the agreement of the parties to the four corners of the loan agreement:

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236. H.J. VAN EIKEMA HOMMES, MAJOR TRENDS IN THE HISTORY OF LEGAL PHILOSOPHY 374-76 (1979).

237. DENNING, *supra* note 92, at 104.

> Unless pacts are enforced according to their terms, the institution of contract, with all the advantages private negotiation and agreement brings, is jeopardized.... Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of "good faith."[238]

The fiduciary aspect deepens the juridical aspect by adding concerns of the meaningfulness and worth of the law. Rituals of judicial proceedings, such as standing when a judge enters the room, call attention to this aspect. The act of standing has greater significance than the position of our bodies. It points to something else. The conclusion of the trial scene in the movie *To Kill a Mockingbird* is a good example of the pregnant meaning which can attach to ceremony. The protagonist is Atticus Finch, a small town southern lawyer appointed to defend a black man accused of the rape of a white woman. Despite the clear evidence that his client did not commit the crime of rape, he is convicted by the all-white male jury. In the face of the law's failure to do justice in this instance, the black community which has watched this miscarriage of justice from the balcony, rises to its feet to pay respect to a man of the law as he exits the courtroom. They still believe in the law-man. Belief is essential for the law's effective operation. The law is directed by legal faith. As Harold Berman points out: "Law has to be believed in, or it will not work."[239] But it is evident that we believe less and less in the law. The rituals have become more and more meaningless as people have lost faith in the law. It has lost its internal compulsion. The law itself is in jeopardy.

We turn now to the constitutive aspects below the juridical aspect in our list of aspects, the first of which is the quantitative aspect. It expresses itself in the unity and diversity of the law. This aspect is evident in phrases which refer to the law's oneness and in the multiplicity of the law's many subject areas — contracts, torts, criminal, civil, constitutional and administrative. Challenges to our categories, such as that mounted by Gilmore's death of contract thesis, involve a legal-quantitative analogy. Observations on the fragmentation of the law, such as Harold Berman's, reflect this aspect as well: "Law in the twentieth century, both in theory and in practice, has been treated less

238. Kham & Nates Shoes No. 2 Inc. v. First Bank of Whiting, 908 F. 2d 1351, 1357 (7th Cir. 1990).

239. HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 14 (1974).

and less as a coherent whole, a body, a *corpus juris*, and more and more as a hodgepodge, a fragmented mass of ad hoc decisions and conflicting rules, united only by common "techniques."[240]

The spatial aspect is reflected in concepts of jurisdiction and territory — an area of legal validity where law holds for relationships, such as geographical areas like city, state and country. There are also societal areas such as church, family, university and business, each possessing their own legal orders. These realms have been recognized by the courts in their protection of parental rights, constitutional freedoms of religion, speech, press and assembly, personal realms of reputation and privacy, public forums at universities, business judgements of boards of directors and ecclesiastical polity. This plurality of systems of private and legal governance is emphasized by Macaulay in his critique of modern contract law based upon empirical investigation of business practice. These spheres each have their own law-making processes, laws and means of enforcement. The processes, laws and sanctions evoked derive their character from the nature of the social arenas in which they function. God establishes norms which call for our response in all these areas. All law — a parent's law, a congregation's law, a teacher's law, a corporation's law, a judge's law — is a response to God's law. Following it is the way to health, peace, wisdom and life itself. Forsaking God's law leads to failure, frustration, folly, even death. When God's law is faithfully mediated through family, church, school, business and courts, the result is shalom.

The other retrocipatory analogies add to our understanding of the juridical aspect. The physical aspect deals with force and causality, such as issues of anticipatory breach, substantial performance and foreseeability of damages in the law of contracts. The kinematic aspect reflects the constancy and change in the law, in the balance between predictability and change, static and dynamic, rigid and flexible. The biological aspect shows itself in references to the life of the law, such as Holmes famous dictum: "The life of the law has not been logic; but it has been experience."[241] The sensory aspect is expressed in our perceptions of state of mind or legal will, such as the imputation of intention from external action. The logical aspect is revealed in congruence and contradiction of decisions. The historical aspect is reflected in the tension between our formation of cultural artifacts and

240. HAROLD J. BERMAN, LAW AND REVOLUTION 38 (1983).
241. HOLMES, *supra* note 142, at 5.

the similar activities of our predecessors. Judge Cardozo expressed the tension: "Somewhere between worship of the past and exaltation of the present the path of safety will be found."[242] The linguistic aspect provides metaphors and symbols by which we construct maps of legality. The words we use encode an image of persons and relationships through which we interpret reality. The social aspect is expressed in coordination of legal relationships. It surfaces in relationships among the brethren at the bar, as well as in our means of dispute resolution, such as self help or utilization of legal process. The economic aspect is revealed in concepts of judicial economy like *res judicata* and collateral estoppel. It shows itself in the requirement that parties mitigate damages in contract cases. The aesthetic aspect shows itself in legal harmony and proportionality, in what Macaulay calls "elegant" theories of contract law.[243]

These analogies demonstrate the coherence of the aspects, while their inability to fully circumscribe the juridical aspect demonstrates it irreducibility. Each aspect has its own unique character. The law is not morality; it is not economics; it is not history; it is not social convention; it is not words; it is not rules and concepts; it is not any one of them. It is something else, and yet it is illuminated by analogy to these aspects.

Our experience of these aspects is two-sided but whole. The aspects have both a law side and a property side. On the law side, we uncover the fundamental norms built into the framework of creation. Some of these norms are immediate, such as the law of gravity, which operate without human intervention. Other norms are mediate, such as the laws of the juridical aspect. They are not laws in and of themselves. They require the exercise of human responsibility for their positivization. These norms, immediate and mediate, are not objective metaphysical entities above or beyond our experience. They are not subjective phenomena defined from our particular point of reference. Rather, they are structures built into the creation itself whereby we experience the world. On the property side, we see the manifestations of juridical aspect in its application to particular cases. We look for the place of legal subjects within the areas of legal validity. We analyze the facts which would support or deny a

242. CARDOZO, *supra* note 27, at 160.

243. Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y 507, 515 (1977).

finding of liability. We determine how the actions of the parties fit within the norms of the law side.

The possibility of positive or negative responses to God's norms exists across the aspects which structure the creation. Pagan religious beliefs elevate one aspect over the others, giving it the status of divine. In a distorted sense, redemption depends upon seeing the world through this single aspect. But the radically biblical view sees all aspects of existence as a part of God's creation which can be directed toward or away from God, toward the kingdom of darkness or the kingdom of light.[244] Redemption depends upon God alone. The entire creation yearns for full redemption from sin which began in Christ. In this time between Christ's sacrificial death and triumphant return, the battle rages. We can respond in positive and negative ways to these fundamental norms. The diagram of the aspects appearing below indicates the struggle between faithfulness and idolatry in each of the aspects.

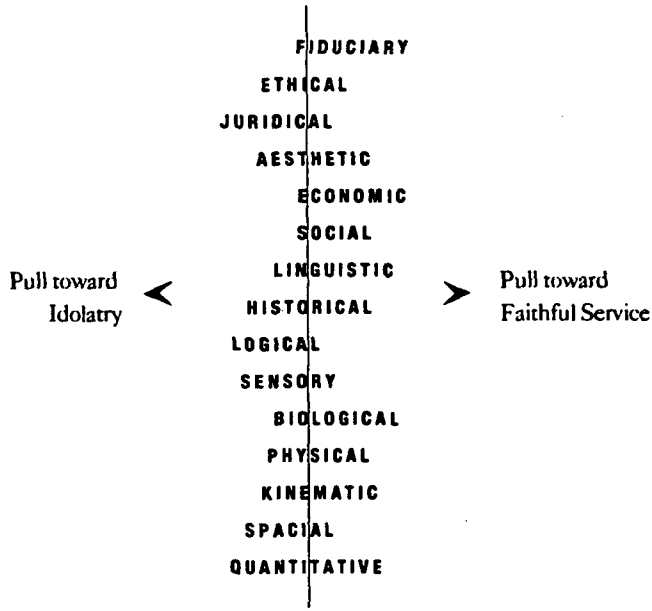

Figure 6

The biblically radical perspective provides a transcendent source for temporal realities in the context of their positivization within a particular culture at a particular time in its development. The entire range of laws operative within the aspects are de-

244. ALBERT M. WOLTERS, CREATION REGAINED 67-69 (1985).

pendent upon God who posits, sustains and completes them. They derive their existence from being the command of God. They provide normative ways of being and becoming, a means for human relationships to develop and flourish in just directions. At the same time the radically biblical perspective is realistic; it recognizes the propensity of humans to distort and obscure. To be sure, our vision is dim, but God's creation norms are knowable. The radically biblical view is stubborn in its insistence on criticism and hope of renewal.

D. Social Spheres

In order the evaluate a dispute, we must identify the social sphere in which the parties were acting, or failing to act, at the time the dispute arose. The identification of the appropriate sphere will determine how the norms operate across the spectrum of aspects apply to the dispute. For example, the church, synagogue and mosque are guided by the fiduciary concerns amounting to ultimate trustworthiness — the attribution of worthship, or worship to that which is acknowledged as divine. The activities of artistic organizations such as the theater, orchestra and dance troupe are qualified by their aesthetic calling. The norm of love governs the activities of families, friends and charitable organizations like the soup kitchen, orphanage and foundation. Economic principles of stewardship rise to prominence if a business is involved in a dispute.

The difference between the leading aspects operative in these spheres is evident in the different way we treat promises. For example, the promise of a friend to attend a social gathering and those of the paid entertainer for the same event are treated differently. The failure of our guest to arrive might require an excuse or even an apology. We might even decline to extend future invitations to them by way of a sanction. The entertainer, on the other hand, will not be compensated and might be sued for damages as a result of their non-appearance. The difference is accounted for by the norms that govern the relationship. Business activity is an economic relationship governed by the norm of stewardship. Friendship is an ethical relationship directed by the norm of love.

The difference in the relationship between the parties makes a difference not only in the kind of norms, processes and sanctions in force, but also in the enforcement of legal rights. The relationship of the parties may call for the enforcement or surrender

of rights. As the very summation of the law,[245] the norm of love is operative across the aspects but it is qualified in different ways within the various aspects. The failure of debtor to pay a debt does not give rise to a legal obligation of the creditor to make a gift. An ethical obligation arising from an internal law of love should not be externally imposed by the law. The love of a father may call for the forgiveness of a debt owed to him by his son, while the love of an unrelated creditor for a debtor may call for collection of the debt. The father may have an ethical obligation to be loving and the son an ethical right to be loved, but an ethical obligation to be loved doesn't create a judicial right to be loved. Not all promises are enforceable by the coercive power of the state.

After determining the proper social sphere, we then consider the range of aspects as they apply to the dispute in light of the leading aspect governing the actors in the dispute at hand. Focusing upon a business, we see that the norms of stewardship call a business to manage its limited resources in a profitable manner. Profit is a is vital part of the business' legitimate pursuit, but it is not its only goal. The idea of maximization of profit is an idolatrous distortion of a business' proper calling. But we must beware of collapsing the economic aspect into the ethical aspect, distorting a business' proper calling to one of altruism rather than stewardship. A business is not a charitable organization. The ethical aspect which animates such institutions, while operative in the realm of business, is qualified by the norm of stewardship. But we must also beware of collapsing the economic aspect into the juridical aspect. The state is not competent to do justice in all situations. The state is not called to determine things like a child's allowance or a pastor's salary. There are some things the law should stay out of; however, the state is called to intervene in some disputes. We find a good deal of activity governed by the law of contracts to be within the state's jurisdiction to adjudicate. Contract cases often involve broken relationships between persons or between persons and institutions which call for state involvement to restore right relations between the parties.

Once we have concluded that the dispute is properly a subject for judicial consideration, we must determine whether the power of the state will be wielded to aid one of the parties

245. *Matthew* 22:35-40 (NIV).

to the dispute. Recalling the chalkboard drawing of torts and contracts, but drawing more circles which represent several of the aspects of our experience, we can map the area of legal liability as follows:

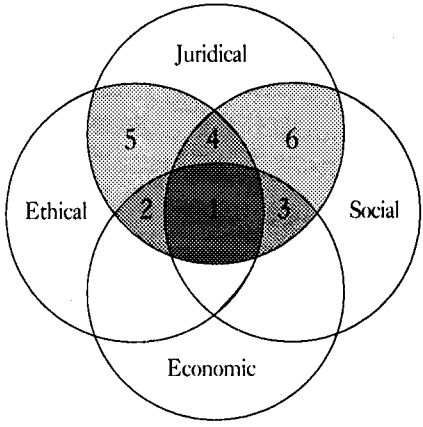

Figure 7

The circles represent several aspects which recur in cases dealing with contracts and quasi-contracts — the economic aspect which is concerned with restitution, the social aspect which is concerned with reliance and the ethical aspect which is concerned with promise. These aspects are often factors in our judicial decision-making because of the strength of the analogies opening up our conception of the juridical aspect. However, cases can involve other aspects. For example, surrogate mother cases involve the biological aspect; the interpretation of contracts can turn on what was meant by words in a document, which involves the linguistic aspect; the historical aspect may enter the judicial equation in determining the length and nature of a contractual relationship; a legal malpractice suit can turn on the degree of trustworthiness expected in the relationship between the parties, which is associated with the fiduciary aspect. But other than the juridical aspect itself, the ethical, economic and social aspects are the dominant aspects when dealing with enforcement of contracts. The shaded area (area 1) represents the realm of definite legal liability. In this area, the juridical, economic, social and ethical components support a finding of liability. But a contract can exist not only in the shaded area but also in proximity to this central area of intersection; therefore, the medium-shaded area represents an added realm in which legal liability may exist (areas 2, 3 and 4). In this area, we find cases of unjust enrichment (area 2), promissory estoppel (area 3) and promise for benefit received

(area 4). In other cases, only two of the dimensions may be present – the juridical and one of the others (areas 5 and 6). In this case, resolution of the dispute would be led by the leading aspect of the organization or activity involved. This would be a matter outside the state's proper jurisdiction. The inclusion of this realm in the diagram illustrates the competence of other social spheres to resolve disputes in accordance with their unique qualification of the norm of justice. In order to have the circles represent all the permutations, they would need to rotate, allowing each aspect to overlap with the juridical aspect without a simultaneous overlap by one of the other aspects. The diagram below illustrates another configuration allowing this possibility for the social aspect which did not appear in Figure 7.

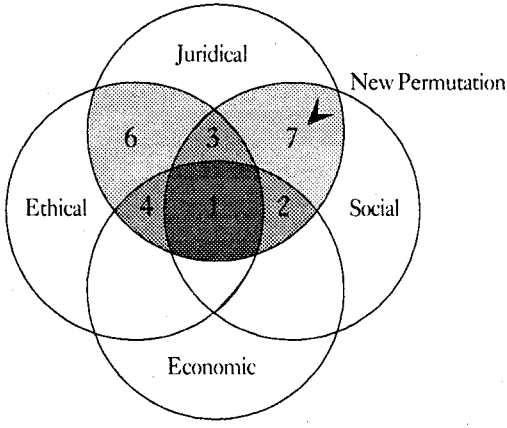

Figure 8

While this rotation adds flexibility to our visual map of legality, the circles don't capture the essence of justice completely. If they did we would have a reduction to the spatial aspect. However, they do give us an approximation of the realm of legal liability.

This type of analysis moves us away from the formulation of a general rule from which to carve out exceptions for different kinds of relationships. Instead, we determine the proper sphere of activity and look for the norms for that sphere. In part, I believe that the division of the law into the realms such as family law, business law, sports law, health law and environmental law is an attempt to do this. This analysis also moves us away from claiming too much for the law. The promulgation of law is not the exclusive province of the state, the people, the church, the rich and powerful, or our forefathers. Yet each one of these parts

of our past, present and future society constitute an essential influence on the pluralistic law structures which govern our lives. Each has its sphere of authority. Each depends upon the other to respect its sovereignty.

E. At the Crossroads

I would like to conclude by looking at a 2,700 year old legal transaction involving the prophet Jeremiah. The story begins with the end for Jerusalem. The city is under siege by the Babylonians. Jeremiah finds himself in prison falsely accused of corroborating with the enemy. He had warned the people of impending judgment but they had not listened. He attacked their form of religion without substance. He mocked their assurances of peace when there was none; their self-assured words about their closeness to God. The people had experienced a revival under the kingship of Josiah. The discovery of the book of Deuteronomy in the temple, just three years before Jeremiah commenced his prophetic ministry, led to sweeping reforms. But the reforms only changed outward appearances. Although the people were in the right place and said the right words, their hearts were still hardened. Jeremiah tried to break through the hardness of hearts, their illusions and delusions. Now, with the fulfillment of his prophecies over the city walls, he does a strange thing, the modern equivalent of buying the Brooklyn Bridge. A cousin comes to him asking him to fulfill his family obligation of redemption, saying, "Jeremiah buy my field." The Babylonian army was encamped on the very field offered for sale. Jeremiah was in prison with few hopes of ever seeing the property. What did he do? He paid the price. The deed was signed and sealed in the presence of witnesses and placed in a pottery jar to preserve the deed for a long time. Why did he buy it? Hope. In the midst of judgment Jeremiah entered into a legal transaction, undertaking the normative in the face of its foolishness as a sign of hope. In this ending, Jeremiah found hope of a new beginning.

In the midst of a crisis in which we don't know what a contract is, we are called to enter into contracts. They are a sign of hope, expressing faith and trust between contracting parties. Our map provides a new perspective on this dimension of our experience. It does not discard everything to start anew, but reforms and revitalizes the positivization of God's creation norms within our culture. There is much territory yet to be explored, mapped and charted. I find myself excited by the prospect of

venturing into these blank spaces. The question that confronts us as we embark is not whether faith should guide us or not, but by which faith we will navigate. Perhaps our generation will heed the exhortation which Jeremiah's generation failed to take seriously: "Stand at the crossroads and look; ask for the ancient paths, ask where the good way is, and walk in it, and you will find rest for your souls."[246]

246. *Jeremiah* 6:16 (NIV).