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Rediscovering Fuller

Essays on Implicit Law and Institutional Design

Edited by Willem J. Witteveen and Wibren van der Burg

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Natural Law and the Cultivation of Legal Rhetoric

Francis J. Mootz III*

1. Introduction

Peter Goodrich describes the plight of contemporary legal theory with unnerving accuracy: cast adrift from natural-law moorings originally constructed in ecclesiastical venues, we have come to realize the futility of developing a secular legal language capable of transforming the management of social conflict into questions of technical rationality.¹ Retreat from our predicament is foreclosed, inasmuch as the multicultural fragmentation of society and the related "interpretive turn" in legal philosophy have rendered a return to traditional natural-law precepts implausible. Writing as a sympathetic critic of that tradition, Lloyd Weinreb recently concluded that, contemporary revivals notwithstanding, natural law remains "a curiosity outside the mainstream, regarded mostly as a side-show and not to be taken very seriously."² Condemned to inhabit a world in which universal and eternal principles have been replaced by hermeneutical fluidity and historical contingency, legal theorists face a pressing and daunting question: Does a direction for productive thinking remain open for those who eschew the often exciting but ultimately vacuous flirtations with the radical postmodern and deconstructive styles of theorizing that are symptomatic of our intellectual predicament?

I contend that Lon Fuller's conception of secular natural law, desig-

* I acknowledge the very helpful written comments that I received from Ken Winston, Jim Gardner, and Bruce Miller. I am grateful for the research stipend and sabbatical leave provided by Western New England College and Dean Donald Dunn during the time that this essay was written. I appreciated the opportunity to discuss an earlier draft with the participants at the working conference in Tilburg, September 12 and 13, 1997. I received numerous helpful suggestions and comments, for which I am grateful.

1 Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London/New York: Routledge, 1996), pp. 160-61.

2 Lloyd L. Weinreb, "The Moral Point of View," in *Natural Law, Liberalism and Morality*, ed. Robert P. George (Oxford: Clarendon Press, 1996), pp. 195-212, at p. 195.

nated as an “internal morality of law,” lends welcome assistance to the effort to articulate a new direction in legal philosophy, although it will be necessary to resituate his approach in light of the last twenty-five years of jurisprudential thinking. I defend Fuller’s natural-law approach from the common misinterpretations of his work as either a hollow echo of the natural-law tradition³ or an essentialist conception of law at odds with the legal-realist world that he helped to create with his doctrinal scholarship.⁴ My thesis is that Fuller’s natural-law approach is best understood as an attempt to outline the social framework in which acquiring legal knowledge – defined not as the technical mastery of doctrine or the rationalistic apprehension of conceptual verities, but rather as a rhetorical-hermeneutical event that is a social achievement – is possible. In what follows I hope to unravel and defend this rather densely worded claim.

My thesis can best be explained by framing my discussion with a concrete problem. For this purpose I will refer to one of Fuller’s most famous teaching problems, “The Case of the Speluncean Explorers.”⁵ Fuller’s fictional case account poses a challenging problem because, at first blush, the legal issue seems quite straightforward but the “correct” result is troubling. The case concerns the murder convictions of members of a group of trapped cave-explorers who kill and cannibalize one of their colleagues when it becomes obvious that they cannot be rescued before they all starve to death. The hapless Roger Whetmore originally agreed to a neutral method of choosing who would be sacrificed for the remaining members of the group, but he then balked shortly before the lots were drawn. Needless to say, he vigorously protested the group’s decision to kill and eat him after he came up short, but the group proceeded with its plan. The explorers appealed their convictions to the Supreme Court, arguing that they could not be sentenced to die under the murder statute in these dramatic circumstances.

I suspect that most people regard the explorers’ actions in this case with some degree of understanding, even though most also would agree

3 See, e.g., William S. Miller, Jr., “Book Review,” *American Journal of Jurisprudence* 30 (1985): 225-31, at p. 227 (criticizing Fuller’s efforts to “deodorize” natural law); Robert Henle, “Principles of Legality: Qualities of Law – Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville,” *American Journal of Jurisprudence* 39 (1994): 47-70.

4 See, e.g., James Boyle, “Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance,” *Cornell Law Review* 78 (1993): 371-400, at p. 373 (“Fuller, the early contracts theorist, apparently undermines the claims made by Fuller, the later jurisprude”).

5 Lon L. Fuller, “The Case of the Speluncean Explorers,” *Harvard Law Review* 62 (1949): 616-45 (hereafter referred to as CSE).

that the definition of murder, read in simple terms, was met. Fuller's case account consists of several judicial opinions that present different resolutions of these conflicting commitments. Each opinion is rooted in a different understanding of the nature and role of law, with the result that no justice is able to persuade even one other member of the court to join in his opinion. It is not immediately clear to the casual reader what lesson Fuller intends to teach with this fragmented case report: That there is a single right answer that is missed by all but one judge? That there can be no "right" answer, but only a majority decision by authorized officials? That legal judgment of the actions involved requires nothing less than full moral judgment? I will demonstrate that a careful reading of Fuller's natural-law philosophy reveals that "The Case of the Speluncean Explorers" artfully presents the nature of legal practice as a process of facilitating rhetorical knowledge. Because Fuller repeatedly stressed that natural law, properly regarded, is not an answer book for difficult legal problems, it is a mistake to approach the case by trying to decide which judicial opinion provides the uniquely correct answer. The case account does not provide alternative *answers* to the question of the best judicial method so much as it provides a *model* of the operation of legal rationality in the face of a stubbornly undecidable case that nevertheless must be adjudicated. This important lesson becomes clear only after rediscovering Fuller's nontraditional natural-law approach.

2. Natural law and social dynamics

Lon Fuller's role in the creation of contemporary legal philosophy is too easily devalued by adopting a caricature: objecting to the divorce of law and morals in legal positivism, Fuller retreated to a watered-down, perhaps even incoherent, version of natural law in an effort to sustain the legitimacy and aim of legal practice. In this unflattering light the Fuller-Hart debate becomes the whole story, with Fuller cast as a necessary, albeit unpersuasive, intellectual counterweight to the reigning orthodoxy of legal positivism. I believe that such an impoverished reading lacks any substantial textual support. Fuller articulated a sophisticated conception of natural law that anticipated recent jurisprudential developments, and so it is a profound mistake to picture him as desperately embracing a tired intellectual tradition.

2.1 Fuller and the natural-law method

Fuller unabashedly was a natural-law philosopher. When asked whether

his theory was a variant of natural-law philosophy, he responded with “an emphatic, though qualified, yes.”⁶ His natural-law approach is most generally summarized as the belief “that there is a possibility of discovery in human relations as in natural science.”⁷ He rejected the prevailing view of his day that values are not subject to reasoned elaboration, and he insisted that escape from the narrow confines of legal positivism required “some measure of sympathy for the essential aims of the school of natural law.”⁸

In a private note about natural law he [Fuller] asks: “Is there an objective basis for legal rules; ultimately this means [Is there an objective basis] for ethical judgments[?] . . . I say there is an objective basis in this sense: There is a chance for discovery, a pattern of order that will reconcile conflicting demands.”⁹

Fuller’s adherence to natural-law philosophy certainly evolved, and it was expressed differently to various audiences in a variety of venues, but it remained consistent during his scholarly career.¹⁰

Despite his expressed commitment to natural-law philosophy, Fuller also was a harbinger of the current intellectual scene in which traditional natural-law thinking no longer proved acceptable. Fuller repeatedly made clear that he did not embrace the traditional natural-law approach of identifying the substantive goods of human existence according to a transcendent standard,¹¹ and he coined the term “eunomics” primarily to dissociate himself from absolutist tendencies in the natural-law tradition.¹² As he later explained with reference to his early book, *The Law*

6 Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1969; hereafter referred to as *ML*), p. 96. See Robert S. Summers, *Lon L. Fuller* (Stanford, Calif.: Stanford University Press, 1984), p. 62 (“Fuller readily identified himself with that tradition”).

7 Lon L. Fuller, “Letter from Lon L. Fuller to Thomas Reed Powell,” in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston (Durham, N.C.: Duke University Press, 1981; hereafter referred to as *PSO*), pp. 293-303, at p. 303; L.L. Fuller, “The Philosophy of Codes of Ethics,” *Electrical Engineering* 74 (1955): 916-18.

8 Lon L. Fuller, “Human Purpose and Natural Law,” *Journal of Philosophy* 53 (1956): 697-705, at p. 705.

9 Kenneth I. Winston, “Is/Ought Redux: The Pragmatist Context of Lon Fuller’s Conception of Law,” *Oxford Journal of Legal Studies* 8 (1988): 329-49, at p. 347.

10 *PSO*, at p. 276 (“[T]he intervening years, if anything, have strengthened this conviction” that the general abandonment of the natural-law approach by positivist theorists was a mistake requiring correction); Summers, *Lon L. Fuller*, p. 151.

11 Summers, *Lon L. Fuller*, p. 64.

12 Lon L. Fuller, “American Legal Philosophy at Mid-Century,” *Journal of Legal Education* 6 (1954): 457-85, at pp. 477-80.

in Quest of Itself, he advocated “not a *system* of natural law but the natural-law *method*.”¹³ Fuller argued that reasoned discovery was possible in the moral realm, but he was equally adamant that traditionalist thinkers were wrong to believe that reason could elaborate the full detail of moral obligations.¹⁴ Fuller’s natural-law method, then, amounted to steering a course between the extreme skepticism of positivist cultural relativism and the imperious dictates of moral absolutism traditionally associated with natural law.¹⁵ This “emphatic, though qualified” adoption of natural law is best captured in his assessment of the shifting intellectual tide in the late 1960s:

In the reorientation that seems to be taking place, one hopes that there will develop a little more tolerance for, and interest in, the great tradition embodied in the literature of natural law. One will find in this literature much foolishness and much that is unacceptable to modern intellectual tastes; one will also find in it practical wisdom applied to problems that may broadly be called those of social architecture.¹⁶

Fuller’s relevance for contemporary jurisprudence principally lies in his attempt to articulate a scholarly program for investigating the natural laws of social dynamics without relapsing to the comforting but misguided quest to develop a comprehensive natural-law system of substantive moral principles.

Some commentators have equated Fuller’s conception of natural law with his famously argued claim that eight procedural desiderata must be met before legislation can be considered *legal*.¹⁷ If natural law is nothing more than proper procedure, they conclude, Fuller merely offers a morally neutral description of the effective means for exercising governmental authority rather than elucidating moral principles that constitute the

13 Fuller, “Letter from Lon L. Fuller to Thomas Reed Powell,” *PSO*, p. 296. See Lon L. Fuller, *The Law in Quest of Itself* (Boston, Mass.: Beacon Press, 1940), pp. 103-4.

14 For example, Fuller distinguished between an appeal to nature in asserting that laws should be clearly expressed and an appeal to nature to address the merits of specific moral questions such as contraception or the legitimacy of governmental taxation. *ML*, pp. 101, 153.

15 Fuller, “Philosophy of Codes of Ethics,” p. 916.

16 *ML*, p. 241.

17 These well-known desiderata can be summarized briefly as requiring that laws be: general rules, promulgated, prospective, clearly stated, consistent, able to be followed, stable, and enforced. *ML*, p. 39.

nature of law.¹⁸ Unfortunately, one of Fuller's famous analogies lies at the root of this misreading, uncharacteristically serving to obfuscate his analysis and misdirect readers. At an important juncture of *The Morality of Law*, Fuller compares lawmaking and carpentry as activities both having "internal rules" of production that are divorced from the substantive moral value of the finished product.¹⁹ A lawmaker can observe the internal morality of law in passing a substantively unjust law, he suggests, just as a carpenter can observe the inner morality of carpentry in constructing a hideout for thieves. This vivid comparison misleads readers to conclude that Fuller is adopting a wholly instrumental conception of the internal morality of law.²⁰ Responding to the distinction between law's "inner morality" and substantive "external morality" that Fuller emphasizes with the carpentry metaphor, critics chided him by asking whether there also is an internal morality of golf, blackmail, poisoning, or even genocide.²¹

A review of Fuller's writings makes clear that his natural-law approach cannot fairly be read solely as an account of efficacious governmental action. Fuller stressed that his distinction between the "internal morality of law" and "external morality" was conceptual rather than ontological, and that the dividing line between the morality of duty and the morality of aspiration is a matter of ongoing practical judgment.²² Additionally, even if a sharp demarcation between procedural means and substantive ends can be established in defining the two moralities, Fuller consistently emphasized that the two moralities coincide as a practical matter. When challenged with the example of the apartheid regime of South Africa, which appeared to be a legally effective government pursuing evil ends,

18 Martin P. Golding, "Book Review," *Ethics* 76 (1966): 225-28, at p. 227; H.L.A. Hart, "Book Review," *Harvard Law Review* 78 (1965): 1281-96, at pp. 1284-85; Ronald Dworkin, "Philosophy, Morality, and Law - Observations Prompted by Professor Fuller's Novel Claim," *University of Pennsylvania Law Review* 113 (1965): 668-90, at p. 675.

19 *ML*, pp. 155-56.

20 See, e.g., Summers, *Lon L. Fuller*, pp. 35-39. The carpentry metaphor is not an isolated reference in Fuller's work, but instead is an example of Fuller's repeated invocation of images of skilled artisans to explain his understanding of the knowledge about social structures that can be derived and implemented by means of a natural-law inquiry. See, e.g., "Reason and Fiat in Case Law," *Harvard Law Review* 59 (1946): 376-95, at p. 379 (pastry chef); "The Lawyer as an Architect of Social Structures," in *PSO*, pp. 264-70 (architect); "American Legal Philosophy," p. 473 (gardener).

21 Golding, "Book Review," p. 227 (golf); Hart, "Book Review," p. 1286 (poisoning); Dworkin, "Philosophy, Morality, and Law," p. 676 (blackmail and genocide).

22 *ML*, pp. 131-32, 239.

Fuller insisted that the inner morality of law was regularly violated by the South African government and that the substantive immorality of apartheid was, as a practical matter, linked to the breakdown in the principles of legality experienced in that society.²³ Positivists contend that law and morals constitute separate spheres, but Fuller argues that the weight of historical experience puts the burden on them to demonstrate the usefulness of sharply separating the inner morality of lawmaking from substantive principles of morality.

Fuller's response to Hart is unconvincing on its face, since he appears to justify the inner morality of law on the basis of a causal connection with substantive public morality.²⁴ It is important to recognize, however, that Fuller regards the two moralities as being connected by more than mere coincidence in history. He insists that there exists a natural affinity, or continuity of moral status, between the two moralities, despite the conceptual usefulness of distinguishing them. In its simplest form, Fuller's argument proceeds as follows: to be in a position to pursue morally praiseworthy goals, citizens require a stable, institutionalized social framework within which to act; consequently, providing such a framework for moral behavior – which is precisely the work of legislators, judges, and lawyers – is itself a moral undertaking.²⁵ The inner morality of law is not just a means of distinguishing law from non-law, it also represents the institutional form of law that enables citizens to participate in the external morality of aspiration and excellence. Fuller adopts a conceptual distinction between the two moralities, then, only to better explain their nuanced connections.

2.2 *The substantive dimension of Fuller's natural-law method*

The natural-law account propounded by Fuller appears poised in no-man's land at this juncture: there is a real connection between principles of

23 *ML*, p. 160. In a stiff, pragmatist rebuke to Hart for insisting that the coincidence of the two moralities did not overcome Hart's conceptual critique, Fuller challenged the otherworldly emphasis of his critics: "Does Hart mean to assert that history does in fact afford significant examples of regimes that have combined a faithful adherence to the internal morality of law with a brutal indifference to justice and human welfare? If so, one would have been grateful for examples about which some meaningful discussion might turn." (*ML*, p. 154)

24 This is the basis for Fred Schauer's erroneous claim that Fuller can be read within the positivist tradition as being concerned not with the ontology of law but simply with the most efficient instrumental means for achieving a moral society. See Frederick Schauer, "Fuller on the Ontological Status of Law," in this volume.

25 *ML*, pp. 205-6. See also Summers, *Lon L. Fuller*, p. 30.

legality and substantive morality, even though the two are not reducible to a single moral calculus. This effort to delineate a “middle way” drew a similar rebuke from both sides in the ongoing debate between positivism and natural-law philosophy: If the inner morality of law is properly considered to be a set of moral principles because of its relationship to external morality, why shouldn’t the theorist of legal morality elaborate the dictates of justice directly rather than taking the lengthy detour of analyzing the procedural requirements of legality? In his review of *The Morality of Law*, Ronald Dworkin adopted this line of attack, contending that Fuller did not appreciate and sufficiently develop the deep connection between law and substantive justice. Dworkin argued that legal and moral reasoning share epistemological as well as substantive features, and so he concluded that legal theory should move beyond Fuller’s preoccupation with bare procedural principles.²⁶ Challenged by Fuller to address his claim about the natural affinity of law’s inner morality and substantive morality, Dworkin characterized this “watered-down interpretation” as “a point I can conceive of no one disputing.”²⁷ The effort to avoid a “watered-down” approach to morality is equally evident in H.L.A. Hart’s positivist critique. Hart argues that Fuller’s attempt to blur the distinction between law and morality threatens to weaken the ability to offer a substantive moral critique of an existing legal system.²⁸ Hart’s perspective is the flip side of Dworkin’s coin: fearful that Fuller’s approach will disable moral critique, he urges that morality be distinguished from law and preserved

26 Dworkin, “Philosophy, Morality, and Law,” pp. 686-87. Dworkin’s subsequent writings have been devoted substantially to arguing that legal decision-making involves recourse to substantive principles of morality, a position that he acknowledges probably falls within the natural-law tradition (broadly defined). Ronald A. Dworkin, “‘Natural’ Law Revisited,” *University of Florida Law Review* 34 (1982): 165-88, at p. 165. More traditional natural-law thinkers have lodged the same complaint against Fuller: he is correct as far as he goes, but by seeming to divorce procedural regularities from a direct inquiry into justice he fails to answer positivism effectively. See Miller, “Book Review”; Paul A. LeBel, “Blame this Messenger: Summers on Fuller,” *Michigan Law Review* 83 (1985): 717-31, at p. 731; Henle, “Principles of Legality.”

27 Ronald M. Dworkin, “The Elusive Morality of Law,” *Villanova Law Review* 10 (1965): 631-39, at p. 639.

28 H.L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958): 593-629, at p. 618 (responding to natural-law proponent Gustav Radbruch: “Law is not morality; do not let it supplant morality.”). See Frederick Schauer, “Fuller’s Internal Point of View,” *Law and Philosophy* 13 (1994): 285-312 (arguing that the Fuller-Hart debate is best understood as a clash between Fuller’s “internal” point of view as a legal actor and Hart’s “external” point of view as a potential critic of a legal system that is defined in nonmoralistic terms but subject to moral critique).

as an external check on the legal duties imposed by a functioning legal system.

Surely, Dworkin and Hart provide different expressions of a very persuasive critique. If the inner morality of law is a morality solely because it facilitates and has an affinity with substantive moral principles, it seems relatively unimportant to devote substantial attention to the principles of legality rather than theorizing (as Hart and Dworkin both do in their own ways) about the most effective means for preserving and advancing substantive morality within the community. However, this critique misses the extent to which Fuller means "interpenetration" when he refers to the natural affinity of law's inner morality and substantive moral principles. Fuller's longstanding argument against the positivist dogma of the inviolable separation of *is* and *ought*, of *means* and *ends*, girds his assertion that the inner morality of law has moral standing. One of the central features of eunomics – Fuller's investigation of the principles of good social order – is his claim that a deep reciprocal relationship exists between institutional means and substantive ends.²⁹ As a form of natural-law philosophy, eunomics rejects ethical relativism, but it also rejects an attempt to delineate ultimate human goods apart from a concrete social context. It is artificial and misleading to separate the procedures and patterns of institutional structures from the ends that they purportedly serve, since ends are understood and articulated only within the limitations imposed by living within certain social structures.

We should not conceive of an institution as a kind of conduit directing human energies toward some single destination. . . . Instead we have to see an institution as an active thing, projecting itself into a field of interacting forces, reshaping those forces in diverse ways and in varying degrees. A social institution makes of human life itself something that it would not otherwise have been. We cannot therefore ask of it simply, Is its end good and does it serve that end well? Instead we have to ask a question at once more vague and more complicated – something like this: Does this institution, in a context of other institutions, create a pattern of living that is satisfying and worthy of man's capacities?³⁰

Some people feel great discomfort in the presence of a view that asserts, on the one hand, that there are objective principles for constructing a good society and, on the other, that those principles are themselves modified by the existing institutions of the society to which they are applied. But it is suggested this discomfort is really the discomfort of being alive.³¹

29 *PSO*, pp. 47-64.

30 *PSO*, p. 54.

31 Fuller, "Philosophy of Codes of Ethics," p. 917.

The inner morality of law consists of principles that promote the participation of institutional forms in the pursuit of substantive ends, not simply as neutral means but in the very act of discerning and elucidating those ends.

The dynamic relationship between institutional forms and moral principles is presented as an *ontological* claim, by which I take Fuller to mean that the interpenetration of ends and means reflects part of man's nature as a social animal.³² Commentators now emphasize a point repeatedly made by Fuller but overlooked by his critics: law is not a managerial exercise of authority directing another's behavior, it is a cooperative effort that is founded on a tacit reciprocity between lawmaker and citizen.³³ In response to his critics, Fuller described law as a relational rather than anonymous institution, and declared that it is this very reciprocal relationship that inspires and demands the citizen's fidelity to law.

I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law. . . . The fundamental postulate of positivism – that law must be strictly severed from morality – seems to deny the possibility of any bridge between the obligation to obey law and other moral obligations.³⁴

I suggest that all we need do to accept the idea of an internal morality of the law is to see the law, not as a one-way projection of power downward, but as lying in an interaction between law-giver and law-subject, in which each has responsibilities toward the other.

Finally, I would remind you that psychoanalysis is the only therapeutic technique directed toward psychological and "moral" ills that involves a real interaction between healer and patient. . . . If I am right in placing the emphasis I do on interaction in law and in morals, then psychoanalysis presents a close analogue to law and morals. Indeed, it depends upon a contract between analyst and patient to which both must be faithful.³⁵

Morality is possible at all only within certain social settings, and the

32 Fuller, "Human Purpose and Natural Law," pp. 697, 700.

33 *ML*, pp. 139, 192-93, 210, 219; Jeremy Waldron, "Why Law – Efficacy, Freedom, or Fidelity?," *Law and Philosophy* 13 (1994): 259-84.

34 Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630-72, at p. 656. See generally Waldron, "Why Law" (detailing Fuller's claim that law commands fidelity because it formalizes a reciprocal relationship which leaves citizens freedom within which to pursue their different ends).

35 Lon L. Fuller, "A Reply to Professors Cohen and Dworkin," *Villanova Law Review* 10 (1965): 655-66, at pp. 661, 666.

morality of law inheres precisely in its valuable contributions to shaping these settings, giving rise to correlative moral obligations of legislators, judges, and lawyers to maximize this state of affairs.³⁶

With his account reaching this degree of complexity and nuance, it is clear that Fuller cannot hope to maintain strict neutrality toward ends that extend beyond the principles of legality. In his final reply to the persistent criticisms of *The Morality of Law*, Fuller unambiguously conceded that there is a substantive core to his natural-law philosophy, although this admission often is lost amidst his overwhelming focus on the inner morality of law and the principles of economics. Fuller argues that the inner morality of law reflects two substantive commitments that simultaneously are constitutive of and predicated on law. First, the inner morality of law is committed to an underlying view “that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.”³⁷ This substantive commitment lies at the root of Fuller’s rejection of the behavioral-modification/coercion theory of law and his adoption of a model of tacit reciprocity in lawmaking. Second, the inner morality of law is premised on man’s nature as a communicative being.³⁸ In contrast to Hart’s concession that a core natural-law principle might be located in man’s struggle to survive conditions of scarcity and violence, Fuller argues that the moral commitments generated in communicative exchange extend beyond, and sometimes override, the biologically driven struggle to survive.³⁹

Communication is something more than a means of staying alive. It is a way of being alive . . . In the words of Wittgenstein, “The limits of my language are the limits of my world.”

If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law – Natural Law with capital letters – I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire. In this matter the morality of aspiration offers more than good counsel and the challenge of excellence. It here speaks with the imperious voice we are accustomed to hear from the morality of duty. And if men will listen, that voice, unlike that of the

36 One of Fuller’s many helpful metaphors brings this point home well. A tree has natural growing habits, but by carefully studying this nature a gardener can prune the tree to better reveal this nature, even as the pruning serves to alter the nature to some degree. Fuller, “American Legal Philosophy,” p. 473.

37 *ML*, p. 162.

38 *ML*, pp. 184-85.

39 *ML*, p. 184.

morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another.⁴⁰

This invocation of communication resonates with Fuller's earlier comparison of the common-law system with a "discussion of two friends sharing a problem together,"⁴¹ and best explains his sustained argument that law is deeply connected with the practices and conventions of the community in which it is situated.⁴² With the principle of open communication as a normative underpinning, it is best to view Fuller's "tacit cooperation" thesis not as a formal condition that must exist at the creation of a law, but rather as a practical condition of social life that is essential to the ongoing practices of a good and workable legal system.

Fuller's recognition of these two principles of substantive morality is far more important to his argument than would appear from the attention that he gives them. William Miller challenged Fuller's natural-law credentials by arguing that he was unable to connect legal morality to nature because he maintained a "sharp separation of the natural law of the legal order from the substantive objectives that nature may demand of the system,"⁴³ but this connection is precisely what Fuller accomplishes with his reference to man's communicative nature. Of course, it is important not to pursue this line of Fuller's thought with reckless expansion, or Fuller's ambitious project will degenerate into a variant of the traditional natural-law approach. John Murray reported that Fuller's oral defense of *The Morality of Law* at a symposium signaled to him that Fuller was saying much more about substantive morality than he revealed in the book, leading Murray to ask whether Fuller's oblique comments about facilitating communication obscure the potentially more significant claim that we can judge all laws by assessing whether they accord with man's rational and responsible nature that girds the inner morality of law.⁴⁴ This

40 *ML*, p. 186.

41 Fuller, "Human Purpose and Natural Law," p. 703.

42 See Gerald Postema, "Implicit Law," *Law and Philosophy* 13 (1994): 361-87 (reprinted in this volume), at p. 377 (arguing that Fuller links the "effective interaction and cooperation between citizens and lawmaking and law-applying officials" to the congruence of law and implicit social practices).

43 Miller, "Book Review," p. 229. Miller concludes that Fuller's "unwillingness in economics to place the institutions under study within the context of the natural order instead of finding natural orders only in the institutions themselves marks his limitations as a theorist and his failure to penetrate the practical wisdom that is the core of the older Natural Law tradition." See also p.231.

44 John E. Murray, Jr., "Observations on the Morality of Law," *Villanova Law Review* 10 (1965): 667-70, at p. 667.

urge to cash out natural-law theory and derive detailed normative judgments about positive law represents precisely the intellectual slippage that Fuller feared, motivating him to suppress the substantive principles of his natural-law approach.

Fuller's natural-law philosophy can be understood fully only by teasing out his largely implicit commitments to substantive principles of justice that have for the most part been overlooked. Whereas Fuller labored within the confines of a dying debate between traditional natural-law philosophy and analytical legal positivism, contemporary theorists can draw on sophisticated accounts of the connections between man's nature as a communicative social being and the operation of legal institutions. Philosophical hermeneutics and rhetorical theory provide the conceptual resources necessary to appreciate and extend Fuller's important insights. Through these contemporary orientations we can rediscover the challenging contributions made by Fuller, though underappreciated by his peers.

3. Rhetorical knowledge as a product of good order

Fuller caps his natural-law inquiry by acknowledging man's nature as a communicative being, but this is only the starting point for contemporary continental philosophers participating in the "linguistic turn." To meet the pressing challenges in legal theory it is helpful to extend and refashion Fuller's analysis by looking to current philosophical accounts of man's linguistic nature. In what follows, I argue that Hans-Georg Gadamer's philosophical hermeneutics and Chaim Perelman's New Rhetoric provide important supplements to Fuller's effort to articulate a secular natural-law theory. Drawing from the complementary philosophical projects undertaken by Gadamer and Perelman to locate the reasonableness of legal practice in the social activity of producing rhetorical knowledge, I construe Fuller's natural-law philosophy as an effort to articulate the principles of good social order which permit and promote rhetorical knowledge. Interdisciplinary synergy is not a one-way street, of course, and so I also argue that Fuller's eunomics lends pragmatic strength to the concept of rhetorical knowledge by providing productive applications of contemporary hermeneutical and rhetorical philosophy to questions of legal theory and practice.

3.1 Philosophical hermeneutics: Natural law and conversation

Hermeneutics traditionally involved the study of reliable methods for interpreting opaque texts. Gadamer's hermeneutics is philosophical

because it abandons the focus on methodological rules and instead analyzes the unitary hermeneutical situation that subtends all human knowledge, including the methodologically secured empirical knowledge of positive science. Philosophical hermeneutics rests on the ontological claim that all understanding results from a decentering “fusion of horizons” in which a “prejudiced” individual confronts a text or other person in an “experience” that disrupts her presumed insularity.⁴⁵ This account poses a radical challenge to the Enlightenment model of a disinterested observer gathering data about an entirely distinct external world. Gadamer provides a phenomenology of the hermeneutical experience by drawing upon the familiar experience of a conversation.⁴⁶ Under this account, all understanding occurs as the product of give-and-take experiences of the interpreter within a given historical and social situation.

Legal practice proves particularly significant in Gadamer’s account. He rejects the scientific impulse to reduce law to a disciplined methodology of deductive application, regarding this as a project doomed to fail due to the impossibility of bridging the chasm between the presumed universal and timeless meaning of the text and the demands of the individual case. Gadamer regards every attempt to understand a legal text as a function of

45 I have examined Gadamer’s philosophical hermeneutics and its relevance to legal theory in some detail in prior articles, and so I will not repeat that analysis here. See Francis J. Mootz, III, “Legal Classics: After Deconstructing the Legal Canon,” *North Carolina Law Review* 72 (1994): 977-1038; “Rethinking the Rule of Law: A Demonstration that the Obvious Is Plausible,” *Tennessee Law Review* 61 (1993): 69-195; and “The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur,” *Boston University Law Review* 68 (1988): 523-617. See also Gregory Leyh, ed., *Legal Hermeneutics: History, Theory, and Practice* (Berkeley, Calif.: University of California Press, 1992); William N. Eskridge, Jr., “Gadamer/Statutory Interpretation,” *Columbia Law Review* 90 (1990): 609-81; Stephen M. Feldman, “Republican Revival/Interpretive Turn,” *Wisconsin Law Review* 1992 (1992): 679-732 and “The New Metaphysics: The Interpretive Turn in Jurisprudence,” *Iowa Law Review* 76 (1991): 661-99.

46 Gadamer writes: “Conversation is a process of coming to an understanding. Thus it belongs to every true conversation that each person opens himself to the other, truly accepts his point of view as valid and transposes himself into the other to such an extent that he understands not the particular individual but what he says. . . . [When interpreting a text] the interpreter’s own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one’s own what the text says. . . . We can now see that this is what takes place in conversation, in which something is expressed that is not only mine or my author’s, but common.” (Hans-Georg Gadamer, *Truth and Method*, 2d rev. ed., tr. Joel Weinsheimer and Donald Marshall, New York: Crossroad, 1989, pp. 385, 388)

applying the text to the case at hand; thus, legal reasoning is seen as a particularly vivid model of all hermeneutical understanding.⁴⁷ Here the model of conversation proves to be especially illuminating: an interpreter understands what a legal text is saying by suppressing her subjective designs and allowing the text to speak to the question posed by the case at hand. Gadamer concludes that “putting at risk” is the guiding normative implication of his philosophy, emphasizing that “hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in a conversation.”⁴⁸ Georgia Warnke argues that this normative implication of Gadamer’s philosophy underwrites a new account of justice. Abandoning the fiction of a consensual social contract as the source of political legitimation, she promotes a hermeneutical account of justice as a “fair and equal hermeneutic discussion” that accepts the reality of “disagreements between equally well-justified interpretations” of the substantive requirements of a just society.⁴⁹

Although Gadamer embraces the antifoundationalist movement to radically situate all understanding in the experience of finite, historical beings, he makes a somewhat surprising turn at a crucial juncture of his *magnum opus* when he endorses Aristotle’s (admittedly nontraditional) account of natural law. Aristotle regards immutable and universal laws as

47 Gadamer, *Truth and Method*, pp. 324-41 (“The Exemplary Significance of Legal Hermeneutics”).

48 Hans-Georg Gadamer, *Philosophical Apprenticeships: On the Origins of Philosophical Hermeneutics*, tr. Robert K. Sullivan (Cambridge, Mass.: MIT Press, 1985), p. 189.

49 Georgia Warnke, *Justice and Interpretation* (Cambridge, Mass.: MIT Press, 1992), pp. 12, viii. It is important not to read Warnke’s reference to “equally well-justified” as conceding a kind of “anything goes” relativism. Warnke emphasizes that even if many interpretations can be equally justified on *formal* grounds, we should not discount the idea of coming to an understanding in social discourse that one interpretation is better than the others for present purposes, even if that judgment cannot be compelled under formal logic or attributed to hypothetical consensus of all rational persons. The hermeneutic insight is that any belief in a “better” interpretation is contextual and historical, and never achieves the status of a timeless logical truth. Warnke elaborates: “The important question, then, is no longer which interpretation of our history and experience is correct because none is exhaustively correct. The important question is, rather, how or why our interpretations differ and what new insights into the meaning of our traditions we might glean from the attempt to understand the cogency of interpretations different from our own. . . . Both diversity and dialogue, then, are necessary, not because we could be wrong, but because we can never be wholly correct or rather because the issue is no longer as much one of rightness or wrongness as one of continuing revision and reform.” (Warnke, *Justice and Interpretation*, pp. 132, 137)

belonging only to the gods, and so he characterizes natural law as a changeable feature of human life.

For Aristotle, [the fact that natural law is not fixed] is wholly compatible with the fact that it is “natural law. . . . [Unlike, e.g., traffic regulations, there are] things that do not admit of regulation by mere human convention because the “nature of the thing” constantly asserts itself. Thus it is quite legitimate to call such things “natural law.” In that the nature of the thing still allows some room for play, natural law is still changeable. . . . [Aristotle] quite clearly explains that the best state “is everywhere one and the same,” but it is the same in a different way than “fire burns everywhere in the same way, whether in Greece or in Persia.” . . . [Aristotle’s natural laws] are not norms to be found in the stars, nor do they have an unchanging place in a natural moral universe, so that all that would be necessary would be to perceive them. Nor are they mere conventions, but really do correspond to the nature of the thing – except that the latter is always itself determined in each case [contextually].⁵⁰

Significantly, Gadamer extends this natural-law analysis to the problem of all moral knowledge. He rejects the idea that moral knowledge exists independently of contextual efforts to live correctly, that moral “ends” can be discovered and then pursued as predetermined goals with appropriate “means.”⁵¹ Gadamer emphasizes this point by careful attention to Aristotle’s terminology: morality is never a matter of *techne* – a learned skill such as carpentry that pursues predetermined ends – but rather is a matter of *praxis* that exhibits *phronesis* – a practical judgment rendered within a given situation concerning the appropriate course of action – and thus morality simultaneously is an “end” and a “means.”⁵² “[W]e do not possess moral knowledge in such a way that we already have it and then apply it to specific situations. . . . What is right, for example, cannot be fully determined independently of the situation that requires a right action from me, whereas the *eidos* of what a craftsman wants to make is fully determined by the use for which it is intended.”⁵³

3.2 *The new rhetoric: Natural law and argumentation*

Gadamer’s phenomenology of understanding remains somewhat vague with respect to the activities by which people pursue justice and morality in the course of day-to-day living. Chaim Perelman’s efforts to reclaim the wisdom of ancient rhetoric proves to be a necessary supplement to Gadamer’s hermeneutics for purposes of developing an account of rhetorical

50 Gadamer, *Truth and Method*, pp. 319-20.

51 Gadamer, *Truth and Method*, pp. 320-22.

52 Gadamer, *Truth and Method*, pp. 316-18.

53 Gadamer, *Truth and Method*, p. 317.

knowledge in law. Perelman demonstrated in his first book that arguments about the dictates of justice could not be rational since they did not accord with formal logic. Confronted by this bizarre yet inescapable conclusion, Perelman rejected the Cartesian philosophical tradition from which it issued and set for himself the task of identifying the means by which it is possible to secure adherence to *reasonable* claims regarding the requirements of justice.⁵⁴

Working from Aristotle's rhetorical philosophy, Perelman argues that it is necessary to distinguish *rational truths* from *reasonable arguments*. The concept of the rational "is associated with self-evident truths and compelling reasoning" and therefore "is valid only in a theoretical domain,"⁵⁵ whereas to reason with another person "is not merely to verify and demonstrate, but also to deliberate, to criticize and to justify, to give reasons for and against – in a word, to argue."⁵⁶ The existence of competing arguments does not necessarily mean that at least one of the participants has engaged in defective thinking or that the matter admits only of irrational adherence, for Perelman demonstrates that argumentation has its own logic that can foster reasonable action even in the face of a case that is undecidable under Cartesian strictures of rationality. As a prime example, Perelman points to the operation of the legal system in which arguments are made and action is taken despite the inevitable lack of indubitable knowledge about the questions raised by the case at hand.⁵⁷

Rhetorical claims are defined by their goal of persuading an audience with arguments that proceed from prior agreements shared by the rhetor and her audience. Presupposed agreement among the parties is a necessary feature of every act of persuasion because there can be no recourse to justifications that exist outside the unfolding historical situation in which both speaker and listener are enmeshed. Because the historical context alone provides grounds for deciding between two reasonable alternatives, Perelman spends the better part of his treatise cataloguing the techniques for employing accepted "topics" or "commonplaces" as points of departure

54 Chaim Perelman, *The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications*, tr. William Kluback et al. (Dordrecht: D. Reidel Publishing Company, 1979), p. 112; Edgar Bodenheimer, "Perelman's Contribution to Legal Methodology," *Northern Kentucky Law Review* 12 (1985): 392-417, at pp. 392-403.

55 Perelman, *New Rhetoric and the Humanities*, p. 118.

56 Chaim Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*, tr. John Petrie et al. (Dordrecht: D. Reidel Publishing Company, 1980), p. 59.

57 Perelman, *Justice, Law, and Argument*, p. 129. See Donald H.J. Hermann, "Legal Reasoning as Argumentation," *Northern Kentucky Law Review* 12 (1985): 467-509.

when seeking adherence through argumentation. These topics have presumptive authority because they are unavoidable, but they remain subject to revision and development in the course of reasoned elaboration with respect to particular problems. For example, making an appeal to “equality” in political discourse is successful only because there is a deeply shared agreement that equality is a worthy goal, but articulating the requirements of equality in a given case varies with changing social and economic settings.

Perelman rejects the claim that justice is achieved when the natural law is embodied within positive legal institutions if “natural law” is meant to refer to traditional conceptions of a universal and timeless set of directives, but he does insist that natural-law philosophy contains important insights. Perelman argues that Aquinas and Aristotle both invoked a more subtle conception of natural law that accepts the ontological pluralism of legal argumentation without degenerating into relativism.

The idea of natural law is also misconceived when it is posed in ontological terms . . . Natural law is better considered as a body of general principles or loci, consisting of ideas such as “the nature of things,” “the rule of law,” and of rules such as “No one is expected to perform impossibilities,” “Both sides should be heard,” – all of which are capable of being applied in different ways. It is the task of the legislator or judge to decide which of the not unreasonable solutions should become a rule of positive law. Such a view, according to Michel Villey, corresponds to the idea of natural law found in Aristotle and St. Thomas Aquinas – what he calls the classical natural law.⁵⁸

Although legal practice can never be reduced to formal logic, there is a nature of law in the sense that all legal argumentation works from presumed agreement embodied in rhetorical commonplaces and toward persuading others about the proper course of action.

3.3 *The concept of rhetorical knowledge*

Read together, Gadamer and Perelman describe a social process and an epistemic goal that is most accurately termed “rhetorical knowledge.” This concept is crucial to rediscovering Fuller inasmuch as it is an implicit core of his innovative natural-law approach. Before rereading Fuller’s work in this light, though, it is necessary to explore the concept of rhetorical knowledge in greater detail. Rhetorical knowledge can be defined as the effort of two or more persons working together creatively to refashion the linguistically structured symbols of social cohesion which serve as the resources for intersubjective experience, with the aim of motivating action

⁵⁸ Perelman, *New Rhetoric and the Humanities*, p. 33.

of some kind. This activity is at once hermeneutical and rhetorical, for it involves both discernment and expression, both understanding and proposing, both active listening and active speaking.⁵⁹ Rhetorical knowledge is a practical achievement that neither achieves apodictic certitude nor collapses into a relativistic irrationalism; rhetorical knowledge therefore sustains legal practice as a reasonable – even if not thoroughly rationalized – social activity.

It is perhaps misleading for me to characterize rhetorical knowledge as the result of a “refashioning” to the extent that it calls to mind an image of a skilled technician adjusting the rhetorical bonds of society as one might adjust a carburetor to maximize engine performance. The distinctiveness of rhetorical knowledge is that it is not a tool to secure pre-given ends, but rather consists of arguments grounded in probabilities and uncertainties. As an expression of *phronesis* rather than *techne*, rhetorical knowledge is at once a social accomplishment and an elaboration of the criteria for assessing such accomplishments. Surveying accepted topics, norms, and opinions as resources for confronting the demands of the case at hand, rhetorical actors continually conjoin these constitutive features of themselves and their society in unique ways that serve to recreate the argumentative resources available for social discourse. When the ongoing public debate over the legal status of assisted suicide in America brings forth vigorous argumentation about the meaning of the “inherent value of human life” and the “overriding value of individual self-determination,” it is clear that this debate will reshape these familiar rhetorical commonplaces and therefore have an impact as these commonplaces are invoked in other contexts. Individual, self-conscious efforts to manipulate social meanings (generally derided as “just rhetoric”) always are predicated on a wider, tacit practice of rhetorical knowledge that is not subject to individual manipulation as a whole because it is constitutive of one’s very sense of individuality.

This description of rhetorical engagement is prone to the age-old critique that it can at most amount to provisional communal belief rather than true knowledge. Robert Scott defends rhetorical knowledge against

⁵⁹ See Francis J. Mootz, III, “Rhetorical Knowledge in Legal Practice and Theory,” *Southern California Interdisciplinary Law Journal* 6 (1998): 491-610. See generally Walter Jost and Michael J. Hyde, eds., *Rhetoric and Hermeneutics in Our Time: A Reader* (New Haven, Conn.: Yale University Press, 1997); Bruce Krajewski, *Traveling with Hermes: Hermeneutics and Rhetoric* (Amherst: University of Massachusetts Press, 1992).

this charge in terms congenial to the philosophical projects undertaken by Gadamer and Perelman.

Seeing in a situation possibilities that are possibilities for us and deciding to act upon some of these possibilities but not others must be an important constituent of what we mean by human knowledge. The plural pronoun in the foregoing sentence is vital. As social beings, our possibilities and choices must often, perhaps almost always, be joint . . . The opacity of living is what bids forth rhetoric. A remark in passing by Hans-Georg Gadamer seems to me to be an important insight: the "concept of clarity belongs to the tradition of rhetoric." But few terms are more relative than that one nor call forth more strongly a human element. Nothing is clear in and of itself but in some context for some persons.

Rhetoric may be clarifying in these senses; understanding that one's traditions are one's own, that is, are co-substantial with one's own being and that these traditions are formative in one's own living; understanding that these traditions are malleable and that one with one's fellows may act decisively in ways that continue, extend, or truncate the values inherent in one's culture; and understanding that in acting decisively that one participates in fixing forces that will continue after the purposes for which they have been immediately instrumental and will, to some extent, bind others who will inherit the modified traditions. Such understanding is genuinely knowing and is knowing that becomes filled out in ourselves – that the world begins to open up and achieve order in all the domains of experience.⁶⁰

Rhetorical activity, thus conceived, is not a technical skill employed in the pursuit of independently selected ends but rather is a means of discerning and evaluating the ends available to a given community.

The reality of rhetorical knowledge is proved not because the participants can uncover the definitive "answer" to the question posed, but because they continue to develop a public discussion along new lines of argumentation that motivate action. Without rhetorical engagement communication would be nothing more than a directive issuing from a person insulated from those whom she was addressing. The central question, then, is not whether rhetoric is a good or bad basis for public life, but rather how to invigorate ongoing rhetorical practices. Fuller's efforts to define a secular natural-law theory are best read as addressing precisely this question with respect to legal institutions. Fuller's natural-law philosophy is not a curiosity hearkening back to a bygone intellectual era, it is an innovative approach that anticipates contemporary hermeneutical and rhetorical insights.

⁶⁰ Robert L. Scott, "On Viewing Rhetoric as Epistemic: Ten Years Later," *Central States Speech Journal* 27 (1977): 258-66, at p. 261.

3.4 *Rediscovering Fuller: Economics and maximizing rhetorical knowledge*

It should be apparent that philosophical hermeneutics and the New Rhetoric share substantial common ground with Fuller's economics, even if they employ the foreign vocabulary of contemporary continental philosophy.⁶¹ Fuller's carpentry metaphor is ill chosen precisely because it goes against the hermeneutical-rhetorical orientation of his work. Designing institutional structures and processes is not a technical project guided by a firm idea of a desired social state, but instead is an inquiry into the broad frameworks within which citizens may jointly define and create desired social states. Legal actors are not like carpenters who pursue defined ends by exercising a learned skill; they are more like a person confronted with an ethical dilemma which demands a practical judgment. In these situations a person's judgments both reflect her moral sense and also define it. Fuller's economics is best reconceived as an attempt to outline the social framework in which rhetorical knowledge is possible.⁶²

Fuller's stubborn refusal to accept the conventional bifurcation of ends and means is properly linked to his pragmatist epistemology,⁶³ but this important precept is even better supported by drawing linkages to contemporary hermeneutical and rhetorical philosophy.⁶⁴ Gadamer invokes

61 American pragmatism could serve as a useful intellectual bridge, given its affinities with Fuller's philosophy (Winston, "Is/Ought Redux") as well as with the philosophies of Gadamer and Perelman (Richard E. Palmer, "What Hermeneutics Can Offer Rhetoric," in *Rhetoric and Hermeneutics*, ed. Jost and Hyde, pp. 126-27). Of course, the root of all three approaches is located in Aristotle's ethical philosophy, which proves to be the radical point of connection.

62 Cf. Kenneth I. Winston, "Legislators and Liberty," *Law and Philosophy* 13 (1994): 389-418, at pp. 400-3 (arguing that freedom is crucial for Fuller's philosophy, in the sense of the freedom to participate effectively in civic processes which dialogically generate substantive values).

63 Winston, "Is/Ought Redux."

64 Two of Fuller's most attuned commentators describe his work in terms that point toward this hermeneutical-rhetorical model. Kenneth Winston brings together Fuller's substantive principles of human agency and open communication as related aspects of the social engagements that subtend law and produce what I have been calling rhetorical knowledge; Winston, "Legislators and Liberty," p. 414; Kenneth I. Winston, "Introduction," *Law and Philosophy* 13 (1994): 253-58, at p. 258. Similarly, Peter Teachout emphasizes that Fuller's refusal to accept false polarities and to develop a reasonable mean is especially evident in Fuller's approach to adjudication, which I would characterize as an institutional structure oriented toward securing rhetorical knowledge; Peter Read Teachout, "The Soul of the Fugue: An Essay on Reading Fuller," *Minnesota Law Review* 70 (1986): 1073-148, at p. 1140. Winston and Teachout reach beyond Fuller's specific arguments to capture a style and epistemological disposition that I believe can best be developed as an analysis of the limits and forms of a particular (legal) site of rhetorical knowledge.

Aristotelian natural law as part of his radical challenge to Cartesian subjectivity, arguing that there is a “nature of the thing” for many legal and ethical problems that shapes the available acceptable resolutions even if it does not determine final answers for all specific questions. In a similar vein, Perelman invokes Aristotelian natural law to explain the status of commonplaces that shape the resolution of legal and moral argumentation without compelling adherence to only one answer. This is the same message that Fuller delivers with his analysis of the inner morality of law: his eight desiderata are not features of a decision-making algorithm, but points of argumentation that respect the nature of man’s social condition.⁶⁵ In the end, Fuller’s work is an attempt to specify different institutionalized forms of discourse that contribute to the free and open dialogue from which meaningful substantive aims emerge.

Indeed, at the skeptical extreme, Fuller’s view is that the only adequate idea of the common good is that legislators should enhance the effective agency of citizens, that is, provide opportunities for them to collaborate with one another by means of other mechanisms. In the absence of shared ends, officials must respect the integrity of emergent efforts at cooperation in local settings.⁶⁶

Gadamer and Perelman emphasize that this is not a “skeptical extreme” at all, but instead an accurate picture of the operation of rhetorical knowledge which calls for ongoing theoretical and empirical research. It should be no surprise that Perelman lists several legal commonplaces by way of example that match Fuller’s desiderata, or that Fuller’s insistence upon a pluralism of reasonable legal arguments matches the same demand for open and honest communication heard in Gadamer’s hermeneutics.

If Gadamer and Perelman provide detailed and sophisticated accounts that gird Fuller’s unconventional natural-law approach, it is equally true that Fuller’s scholarship provides an important supplement to their work by virtue of his practical focus. Fuller champions the inner morality of law not as a natural-law rulebook carved into a timeless stone, but as part of an effort to uncover principles of institutional structure that accord with man’s hermeneutical-rhetorical nature. To some degree, this second-order scholarly inquiry *is* an artistic endeavor grounded in *techne*, similar to the undertakings of a pastry chef or master carpenter. Fuller’s innovative and valuable studies in eunomics are scholarly inquiries into rhetorical knowl-

65 *ML*, pp. 93-94 (citing Aristotle’s *Nicomachean Ethics* regarding the inevitability of judgment rooted in contextual understanding).

66 Winston, “Legislators and Liberty,” p. 412.

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edge in action; like the rhetorical handbooks of antiquity, his essays provide needed guidance for social practices that cannot be scripted in advance.⁶⁷ Fuller's analogies to craftsmen are obfuscating only because the sociolegal architect does not *construct a product* according to a *plan*; instead she *uncovers* baseline organizing *norms* that respect, are responsive to, and facilitate man's social nature as a communicative being.

Although the legal scholar may be like a craftsman in some respects, it is a fundamental mistake to ignore Fuller's attention to the intersubjective activity of citizens pursuing rhetorical knowledge. Fuller's eunomics does not purport to provide the answers to problems of social life, but instead attempts to identify and describe the structures within which questions of social life can be resolved by the affected parties. In his confrontation with Ernest Nagel over his (qualified) endorsement of the natural-law method, Fuller emphasizes this distinction.

On the affirmative side, I discern, and share, one central aim common to all the schools of natural law, that of discovering those principles of social order which will enable men to attain a satisfactory life in common. It is an acceptance of the possibility of "discovery" in the moral realm that seems to me to distinguish all the theories of natural law from opposing views. In varying measure, it is assumed in all theories of natural law that the process of moral discovery is a social one, and that there is something akin to a "collaborative articulation of shared purposes" by which men come to understand better their own ends and to discern more clearly the means for achieving them.⁶⁸

Fuller would be the last person to accord greater significance to the scholarly activity of outlining basic features of the institutional structures of democracy than to the unpredictable, hermeneutical-rhetorical activity of democracy itself. Fuller is an important thinker, though, because he reminds Gadamer and Perelman that his scholarly activity is no less significant than their philosophical thinking.

67 Along these lines, Eugene Garver describes Aristotle's *Rhetoric* as an examination of the "art of character," a project that is at once a philosophical inquiry into the nature of civic life and also an articulation of the parameters within which speakers seek the available means of persuasion; Eugene Garver, *Aristotle's Rhetoric: An Art of Character* (Chicago/London: University of Chicago Press, 1994). Garver describes this curious status of Aristotle's rhetoric in much the same manner that I would describe Fuller's eunomics: "A civic art of rhetoric will explicate persuasion as something that happens *in* a speech, not simply *by means of* the speech. . . . Rhetoric is a method for dealing with a domain apparently beyond method. . . . Ultimately, the project of the *Rhetoric* is to construct a civic relation between argument and *ēthos*, and so between *technē* and *phronēsis*." See also pp. 35, 41, 77.

68 L. Fuller, "A Rejoinder to Professor Nagel," *Natural Law Forum* 3 (1958): 83-104, at p. 84.

Adopting a hermeneutical-rhetorical orientation leads us to a more finely calibrated understanding of what Fuller meant by the internal morality of law, and also yields a deeper understanding of how the internal morality of law relates to substantive morality. Fuller advocated a natural-law philosophy in the classical (ontological) sense, rather than as a deontological project. It would be a grave error to read Fuller as specifying certain “rules” for good law that are wholly distinct from (even if usually coincident with) certain “rules” for leading a good life. Law’s internal morality, the morality that makes law possible, derives from human nature. Principles of appropriate (good and workable) social organization are not a matter of raw choice for social planners, nor are they blueprints fortuitously dropped from the rationalist heavens; instead, these principles are responsive to our communicative nature as finite, historical, and socially interpretive beings. Morality inheres in the project of designing social institutions precisely because human nature is not infinitely malleable. As Fuller described in detail, legislation must have certain qualities, not as a formal matter, but so as to operate as a means of social organization that comports with human nature. There is a deep and inherent connection between the internal morality of law and the substantive morality of aspiration, then, because the internal morality of law is responsive to human nature and the morality of aspiration issues from this same hermeneutical-rhetorical nature in a manner that is facilitated by law. The morality that makes law possible represents a baseline drawn from human nature; in turn, this law serves to make morality possible by providing the arena in which citizens can best articulate their aspirations collaboratively. Fuller is quite correct to keep these two dimensions conceptually distinct as a methodological strategy for pursuing his eunomics project, but it remains clear that both moralities are rooted in man’s hermeneutical-rhetorical nature and therefore remain ontologically joined.

4. Newgarth and the pluralism of rhetorical knowledge

I conclude by reconsidering “The Case of the Speluncean Explorers”⁶⁹ in light of my conception of Fuller’s natural-law approach. This famous case is well known to most American law-school graduates, but probably for reasons that Fuller would abhor. The sharply divided court appears to

⁶⁹ CSE.

represent the reigning jurisprudential perspectives locked in a fruitless attempt to determine the correct judgment. Justice Foster contends, in part, that the dire circumstances facing the explorers amount to a breakdown in the presuppositions that gird society, resulting in a suspension of legality itself until the explorers can be rescued.⁷⁰ Chief Justice Truepenny and Justice Keene contend that the law is the law, and it must be enforced by the judiciary even in the face of facts evoking sympathy for the defendants.⁷¹ Justice Handy contends that respect for law flows from its concretization of the common sense of the community, which serves as the true guide for decision-making.⁷² To an untutored reader, Fuller appears to be saying: "Here are the available legal philosophies, take your pick." A number of commentators apparently adopt this reading and (implicitly) criticize or historicize Fuller for providing an inadequate selection by offering their own fictional opinions championing previously neglected judicial philosophies that prove more acceptable to current tastes.⁷³

I think that this reception of Fuller's artful hypothetical could not be more mistaken. The beauty and worth of Fuller's story, it seems to me, is to provide a dramatic example of his understanding of adjudication and the rule of law, an understanding that is rooted in his conception of the natural-law principles attendant to the pursuit of what I have been calling rhetorical knowledge. No Justice in his account can be written off out of hand as thinking or acting unreasonably, nor does Fuller stack the rhetorical deck overwhelmingly in favor of one of the judges, although it is plain that Justice Foster most closely articulates Fuller's own views. Instead, the reader is treated to a decentering hermeneutical experience in which competing rhetorical claims all resonate with the reader's prejudices and

70 CSE, p. 621.

71 CSE, pp. 619, 632.

72 CSE, p. 643.

73 See, e.g., Naomi R. Cahn, "The Case of the Speluncean Explorers: Contemporary Proceedings," *The George Washington Law Review* 61 (1993): 1755-63; John O. Calmore, "The Case of the Speluncean Explorers: Contemporary Proceedings," *The George Washington Law Review* 61 (1993): 1764-85; Mary I. Coombs, "The Case of the Speluncean Explorers: Contemporary Proceedings," *The George Washington Law Review* 61 (1993): 1785-90; Dwight L. Greene, "The Case of the Speluncean Explorers: Contemporary Proceedings," *The George Washington Law Review* 61 (1993): 1790-98; Geoffrey C. Miller, "The Case of the Speluncean Explorers: Contemporary Proceedings," *The George Washington Law Review* 61 (1993): 1798-801; Jeremy Paul, "The Case of the Speluncean Explorers: Contemporary Proceedings," *The George Washington Law Review* 61 (1993): 1801-7; Laura W. Stein, "The Case of the Speluncean Explorers: Contemporary Proceedings," *The George Washington Law Review* 61 (1993): 1807-11.

aspirations to some degree, and none quite capture the reader's allegiance to a degree of absolute certitude.⁷⁴

When thrown into a hermeneutical-rhetorical event as compelling as Fuller's hypothetical, it is tempting to suspend judgment until decision-making criteria more stable than the probabilities involved in rhetorical knowledge can be utilized. This is the posture adopted by Justice Tatting, who finds that his "mind becomes entangled in the meshes of the very nets I throw out for my own rescue," leaving him "unable to resolve the doubts that beset me about the law of this case."⁷⁵ Of course, Fuller's story brilliantly undermines the legitimacy of this intellectual and emotional paralysis, for Justice Tatting's abstention leaves the court evenly divided, resulting in the execution of the explorers pursuant to their conviction below. Refusing to accept the challenge of seeking rhetorical knowledge is no less a life-and-death matter than addressing the demands of the question directly. Acknowledging that there is more than one reasonable legal solution to a social problem does not entail that all solutions are reasonable, nor that all reasonable solutions are equally desirable.

The manner of deliberation and argumentative persuasion undertaken by the Justices provides a model of Fuller's understanding of adjudication as a form of social ordering that facilitates and participates in the substantive requirement of open communication. Fuller contends that adjudication is "an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments" about claimed rights and alleged injuries, and thus by its very institutional nature it respects the "influence of reasoned argument in human affairs."⁷⁶ Adjudication is not neutral with respect to desired ends – it cannot be reduced to a formalistic process of applying predetermined values to a set of facts – because the court is "an active participant in the

74 For example, Justice Handy effectively taunts Justice Foster (Fuller's alter ego) with stinging barbs, even though Handy endorses a rather crude legal-realist model of decision-making that would not be acceptable to many scholars. In his jurisprudence casebook, Fuller emphasizes that the reader should not write Justice Handy off as a caricature in order to avoid having to deal with his challenges. "If there is an element of truth in his point of view, we need to consider how that element of truth may be embraced within a philosophy of law and government that does not have the implications which his personal philosophy seems at times to have." Lon L. Fuller, *The Problems of Jurisprudence*, temp. ed. (Brooklyn, N.Y.: Foundation Press, 1949), p. 1. This is precisely the scholarly approach that signals Fuller's commitment to rhetorical knowledge rather than to dialectical demonstration.

75 CSE, p. 631.

76 PSO, pp. 93-94.

enterprise of articulating the implications of shared purposes,” and the activity of reasoned argument inevitably draws upon and helps to define a “community of shared purpose.”⁷⁷ In contemporary terminology, Fuller describes adjudication as an institutional arrangement designed to facilitate the hermeneutical recognition of issues presented by a given conflict and to promote the rhetorical elaboration of a reasonable course of action through reasoned argumentation. This is not to say that adjudication is the quintessential hermeneutical-rhetorical forum for all social issues. “Polycentric” problems that involve complex balancing and nuanced and responsive judgments (Fuller’s metaphor is the day-to-day strategic decisions made by a baseball coach), cannot be fully adjudicated to complete satisfaction. Fuller is convinced that the form of adjudication is well suited only to establish the background rules of social intercourse, and that more specific decision-making should be left to the participants in such a well-ordered social sphere.⁷⁸ It is quite clear in Fuller’s account that there is no theoretical method to short-circuit rhetorical engagement in adjudication, politics, or social intercourse, nor can adjudication bear

77 *PSO*, p. 102. This explains the difficulty of securing the rule of law in international relations despite the presence of adjudicative institutional mechanisms. “Where the only shared objective is the negative one of preventing a holocaust, there is nothing that can make meaningful a process of decision that depends upon proofs and reasoned argument.” (*PSO*, p. 102)

78 Not surprisingly, this was Fuller’s analysis of the market economy. Although he well recognized the inevitability and desirability of government intervention into exchange relationships, Fuller maintained that microeconomic decisions are best left to the ongoing practices and decisions of members of society. “The working out of our common law of contracts case by case has proceeded through adjudication, yet the basic principle underlying the rules thus developed is that they should promote the free exchange of goods in a polycentric market. The court gets into difficulty, not when it lays down rule about contracting, but when it attempts to write contracts.” (*PSO*, pp. 120-21; see also pp. 211-46). In a prescient line of argument, Fuller expresses grave misgivings about the “creeping legalism” that reduces every rhetorical sphere to an adjudicative model (*PSO*, pp. 78-85). This anticipates Jürgen Habermas’s more recent detailed arguments that the juridification of family relations and educational relationships supplants communicative reason and participates in the pervasive colonization of the lifeworld by instrumental reason. Jürgen Habermas, *The Theory of Communicative Action – Lifeworld and System: A Critique of Functionalist Reason*, tr. Thomas McCarthy (Boston, Mass.: Beacon Press, 1987), pp. 356-73. One need not endorse Habermas’s theoretical commitments to agree with this critical insight, and to appreciate Fuller’s grasp of the incipient problem.

the full range of rhetorical activity necessary in a complex and diverse society.⁷⁹

This, then, is the lesson of "The Case of the Speluncean Explorers." Adjudication provides the rhetorical arena in which some difficult social problems with multiple reasonable solutions can be assessed and resolved by articulating the (provisionally) best solution. The forms of good social order within the adjudicative sphere identified by Fuller are not simply a matter of preexisting convention, as one traditional natural-law theorist has alleged;⁸⁰ instead, the study of eunomics represents a detailed (even if unintended) meditation on the implications for legal process that follow from acknowledging that the aspirational activity of defining substantive morality is rooted in the hermeneutical-rhetorical nature of human existence, recognizing that this human nature also defines law and gives it an institutional inner morality. Holding oneself open to conversation and the force of the better argument is the ethical principle at the root of Gadamer's hermeneutics and Perelman's rhetoric; Fuller's inquiries take account of this principle of social interaction in the context of legal scholarship. Rather than seeking definitive answers in legal theory, Fuller demonstrates that we are best counseled to examine the legal structures within which pressing problems can best be presented and resolved as part of ongoing social practices that always are hermeneutically grounded and rhetorically accomplished.

79 "In attempting to define a branch of social study that might be called eunomics, I stated that an acceptance of this subject as worthy of pursuit implies no commitment to 'ultimate ends.' I was careful not to say that eunomics is indifferent to ends. In view of the interaction of means and ends any sharp distinction between a science of means and an ethics of ends is impossible. In leaving the problem of 'ultimates' unresolved I meant merely to acknowledge that after careful study of the interaction of means and ends with respect to a particular problem, men may still differ as to what ought to be done and that eunomics cannot promise to resolve all such differences." (Fuller, "American Legal Philosophy," p. 480)

80 Miller, "Book Review," p. 231.