

# Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition

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## I. INTRODUCTION

Peter Goodrich describes the plight of contemporary legal theory with concise accuracy: We have abandoned natural law foundations originally constructed in ecclesiastical venues only to find that the project of developing a secular legal language capable of transforming the management of social conflict into questions of technical rationality is doomed to failure.<sup>1</sup> The ascendancy of analytic legal positivism has purchased conceptual rigor at the cost of separating the analysis of legal validity from moral acceptability, but retreat from this stale conceptualism and a return to traditional natural law precepts appears wildly implausible. As a sympathetic critic recently concluded, natural law remains “a curiosity outside the mainstream, regarded mostly as a side-show and not to be taken very seriously.”<sup>2</sup> The irrelevance of the natural law tradition in

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1. See PETER GOODRICH, *LAW IN THE COURTS OF LOVE: LITERATURE AND OTHER MINOR JURISPRUDENCES* 160-61 (1996).

2. Lloyd L. Weinreb, *The Moral Point of View*, in *NATURAL LAW, LIBERALISM AND MORALITY* 195, 195 (Robert P. George ed., 1996) [hereinafter Weinreb, *Moral Point*]; see also Philip Soper, *Some Natural Confusions About Natural Law*, 90 *MICH. L. REV.* 2393, 2394 (1992) (“*Natural law* seems to evoke a degree of skepticism in our society that forces any theory that goes by the name to confront a higher burden of proof than is placed on other, more familiar theories”) (emphasis in original). Weinreb remains optimistic that the natural law tradition merits renewed close study despite its continuing secondary status in

contemporary jurisprudential discourse would appear to be sealed by the “interpretive turn” in legal theory, which in its most general outline asserts that universal and eternal principles have been replaced by hermeneutical fluidity and historical contingency. In the wake of the interpretive turn it is reasonable to expect that legal theorists will turn not to the natural law tradition, but to radical postmodern and deconstructive styles of theorizing in their effort to move beyond legal positivism. The natural law tradition appears to be hopelessly confused and anachronistic in the brave new world of postmodern legal theory, in which law is constrained neither by an objective moral order of nature nor by the logical rigor of conceptual analysis and sociological description.<sup>3</sup>

My thesis is that the interpretive turn in legal theory works as a critique of legal positivism in at least one surprising way: by reinvigorating (even if in dramatically new form) the natural law tradition.<sup>4</sup> This thesis is grounded in three presuppositions. First, Hans-Georg Gadamer’s philosophical hermeneutics provides the most sophisticated and persuasive account of the “interpretive turn.” Second, Gadamer’s hermeneutics illuminates the activity of legal practice and correlatively that legal theorists provide important

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jurisprudential discourse. See Lloyd L. Weinreb, *The Case for Natural Law Reexamined—1993*, 38 AM. J. JURIS. 1, 1 (1993) [hereinafter Weinreb, *Case*].

3. Pierre Schlag has developed the most radical postmodern criticism of legal thought. Schlag attacks the normative character of legal thinking as an undesirable if not counterproductive aesthetic. See, e.g., Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991). Schlag also challenges the assumption buried deep within normative legal thinking that a coherent, rational subject exists as the addressee of normative legal thinking. See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991). Most recently, Schlag has reformulated his position by meditating on the law’s fixation with reason and the stultifying effects that this has on social life. See PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998).

4. As Chair of the Section on Law and Interpretation for the Association of American Law Schools (AALS), I conceived and organized a panel presentation to address the topic “Natural Law After the Interpretive Turn” at the 1997 AALS Annual Meeting. The papers delivered by Georgia Warnke and Kent Greenawalt frame the issue that I intend to address in this article: Can Gadamer’s invocation of Aristotle’s natural law be reconciled with his thoroughly historical conception of human understanding? See Georgia Warnke, *Law, Hermeneutics, and Public Debate*, 9 YALE J.L. & HUMAN. 395 (1997) [hereinafter Warnke, *Law*] (arguing that Gadamer’s attention to the identity of a common object such as a legal text and also to the changing situations that affect how this object is understood reflects an approach close to Aristotle’s conception of natural law); Kent Greenawalt, *Interpretation and Judgment*, 9 YALE J.L. & HUMAN. 415, 433 (1997) (questioning whether a natural law account is plausible if we adopt the premise that human understanding is substantially shaped by the cultural history and context, since a “view that transcultural elements are inextricable from culturally partial perspectives gravely compromises the likely utility of natural law”); and Georgia Warnke, *Reply to Greenawalt*, 9 YALE J.L. & HUMAN. 437, 440 (1997) [hereinafter Warnke, *Reply*] (responding by asserting that to “say some of our differences [in moral judgment] reflect legitimate differences in understanding [between two cultures] does not presume that all our differences are legitimate or that we cannot rationally discriminate between culturally based understandings”).

contextual work that reinforces Gadamer's philosophical themes. Third, the natural law tradition serves as a particularly productive point of contact between Gadamer's philosophy and legal theory. Because each of these points merits a book-length treatment, my discussion of these foundational questions necessarily will be schematic and suggestive. In this essay I plan only to adumbrate my general claim that natural law philosophy and philosophical hermeneutics have significant points of convergence that merit further study.

I anticipate an immediate objection that natural law philosophy is a tradition better left at the margins of discourse. Even if the current desuetude of natural law philosophy is mistaken as a matter of intellectual history, critics will properly ask what can be gained by pursuing reinvigoration. My answer is straightforward. Natural law, understood in terms of my hermeneutically-inspired reading of the tradition, is a feature of legal practice. I will demonstrate that Justice Souter's concurring opinion in the recent "right to die" cases before the Supreme Court is best understood as a performance within this living tradition. Moreover, by marginalizing avowed natural law scholars such as Lon Fuller and, more recently, Lloyd Weinreb, contemporary legal theorists have lost important voices that have contributed substantially (although not expressly) to the discourse of contemporary legal hermeneutics. Reinvigorating the natural law tradition is just reinvigorating contemporary legal philosophy.

I begin by describing Gadamer's hermeneutical philosophy and the special role that his analysis of legal understanding plays in his broader project. Using Chaim Perelman's emphasis on rhetorical philosophy as a complementary point of reference, I place particular emphasis on Gadamer's exploration of legal practice as a hermeneutical activity of argumentation. Legal practice is a reasonable activity, I argue, because it is structured to facilitate rhetorical knowledge. I then supplement the rhetorical-hermeneutical conception of legal practice that emerges from my discussion of Gadamer and Perelman by describing how each philosopher appropriates natural law concepts at important points in his analysis, and I outline the features of the classical natural law approach that they revive.

In Part III of the Article, I argue that my analysis of the rhetoric of legal argumentation illuminates the non-traditional natural law accounts offered by legal scholars Lon Fuller and Lloyd Weinreb, and that what appears at first to be paradoxical turns out to be quite reasonable: The classical natural law tradition proves to be a rich resource for developing a hermeneutical account of law and legal practice. I illustrate my discussion by demonstrating that Fuller's

famous hypothetical case, *The Speluncean Explorers*, and Weinreb's analysis of the justice of affirmative action reinforce Gadamer's themes. I conclude that the natural law philosophies developed by Fuller and Weinreb are best viewed as elaborating the implications of philosophical hermeneutics in the context of legal theory.

My interdisciplinary inquiry is not hierarchical, inasmuch as I intend both to confirm Gadamer's unquestioned significance for legal theory and to demonstrate how contemporary developments in legal theory can make important contributions to the project of developing Gadamer's insights. My working premise is one of Gadamer's hallmark themes: We must combine our study of the universality of the hermeneutic situation with the contextual study of particular life practices such as law if we are to facilitate human understanding. In the end, it is neither philosophical hermeneutics nor natural law philosophy that is instructive, but rather the unsettling and challenging dialogic encounter between the two.

## II. GADAMER ON THE RHETORIC OF LEGAL ARGUMENTATION

### A. *Philosophical Hermeneutics and the Rhetorical Model of 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.<sup>5</sup> This account poses a radical challenge to the Enlightenment model of a

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5. I have examined Gadamer's philosophical hermeneutics in the context of 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*, 72 N.C. L. REV. 977 (1994) [hereinafter Mootz, *Legal Classics*]; Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U. L. REV. 523 (1988); Francis J. Mootz, III, *Rethinking the Rule of Law: A Demonstration That the Obvious is Plausible*, 61 TENN. L. REV. 69 (1993) [hereinafter Mootz, *Rethinking*]; Francis J. Mootz, III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDISC. L.J. 491 (1998) [hereinafter Mootz, *Rhetorical Knowledge*]. Excellent assessments of the relevance of philosophical hermeneutics to legal philosophy include: LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661 (1991); Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679.

disinterested observer gathering data about an entirely distinct external world. Gadamer's phenomenological account of the hermeneutical experience draws upon the familiar experience of a conversation.<sup>6</sup> By this account, all understanding occurs as the product of the give-and-take experiences of the interpreter within a given historical and social situation. It is neither trite nor imprecise to conclude that Gadamer believes that human understanding is conversational in nature.

By using the experience of everyday conversation to explain his philosophy, Gadamer signals the tremendous importance of the rhetorical tradition to his approach, even though his explicit discussions of rhetoric might at first appear to be peripheral.<sup>7</sup> Gadamer begins *Truth and Method* by recalling Vico's development of the humanistic concept of *sensus communis* as a means of preserving the independent validity of moral-practical wisdom, as distinguished from the logical-empirical truths of science.<sup>8</sup> Gadamer

6. 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.

HANS-GEORG GADAMER, *TRUTH AND METHOD* 385, 388 (Joel Weinsheimer & Donald Marshall trans., Crossroad 2d rev. ed. 1989) (1960). Gadamer returns to the metaphor of conversation to explain all understanding:

[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.

*Id.*

7. Acknowledging that his guiding focus on the "event" of understanding is drawn from "an ancient truth that has been able to assert itself against modern scientific methodology," Gadamer concludes that the "*eikos*, the versimilar, the 'probable' . . . the 'evident,' belong in a series of things that defend their rightness against the truth and certainty of what is proved and known. Let us recall that we assigned a special importance [in developing our hermeneutical philosophy] to the *sensus communis*." *Id.* at 485. In his review of *Truth and Method*, Klaus Dockhorn suggests that Gadamer underestimates the extent to which the rhetorical tradition underwrites his project, yet nevertheless he declares that the "widespread depreciation or dismissal of rhetoric . . . should be effectively brought to an end by this book." Klaus Dockhorn, *Hans-Georg Gadamer's Truth and Method*, 13 *PHIL. & RHETORIC* 160, 160 (1980). Jean Grondin places particular emphasis on Gadamer's use of the rhetorical tradition to elucidate "a concept of truth that remains aware of its attachment to human finitude." Jean Grondin, *Hermeneutics and Relativism*, in *FESTIVALS OF INTERPRETATION: ESSAYS ON HANS-GEORG GADAMER'S WORK* 42, 49 (Kathleen Wright ed., 1990). Generally, however, the invocation of the rhetorical tradition in *Truth and Method* has been overlooked by commentators. A recent exception is found in Donald Phillip Verene, *Gadamer and Vico on Sensus Communis and the Tradition of Humane Knowledge*, in *THE PHILOSOPHY OF HANS-GEORG GADAMER* 137 (Lewis Edwin Hahn ed., 1997).

8. See GADAMER, *supra* note 6, at 19-24. John Schaeffer argues that if Gadamer had more explicitly adopted a rhetorical account in accord with Vico's model he could have successfully responded to Jürgen Habermas's challenges without surrendering critical theory. See JOHN D. SCHAEFFER, *SENSUS COMMUNIS: VICO, RHETORIC, AND THE LIMITS OF RELATIVISM* 117-22

aligns Vico with the substantive rhetorical goal of "saying the right thing well," and applauds his development of the "positive ambiguity of the rhetorical ideal."<sup>9</sup> He attributes Vico's importance to Vico's prescient challenge to the unitary Cartesian paradigm of knowledge by re-asserting "the independent rights of rhetoric . . . the art of finding arguments [which] serves to develop the sense of what is convincing, which works instinctively and *ex tempore*, and for that very reason cannot be replaced by science."<sup>10</sup> The rhetorical tradition preserved and advanced by Vico concerns a way of understanding no less legitimate or important than the methodological model of the natural sciences. Indeed, Gadamer asserts that rhetoric "is the universal form of human communication, which even today determines our social life in an incomparably more profound fashion than does science."<sup>11</sup> Consequently, at a key juncture in the conclusion of *Truth and Method*, Gadamer reminds us that his book principally has been concerned with recovering and rehabilitating this rhetorical model of knowledge.<sup>12</sup> As one commentator recently concluded, Gadamer is not advocating that we elevate rhetorical study over philosophy as much as insisting on the rhetorical nature of all humanistic inquiry, including philosophy.<sup>13</sup>

Gadamer relates ancient rhetoric to his inquiry into our pre-

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(1990).

9. GADAMER, *supra* note 6, at 21. Gadamer is principally concerned with overcoming the effects of 19th-century historicism and romanticism in German philosophy, but he begins his book by recalling that Vico was the last thinker to hold to the ancient truths of the rhetorical tradition:

Vico's return to the Roman concept of the *sensus communis*, and his defense of humanist rhetoric against modern science, is of special interest to us, for here we are introduced to an element of truth in the human sciences that was no longer recognizable when they conceptualized themselves in the nineteenth century. Vico lived in an unbroken tradition of rhetorical and humanist culture, and had only to reassert anew its ageless claim. Ultimately, it has always been known that the possibilities of rational proof and instruction do not fully exhaust the sphere of knowledge. Hence Vico's appeal to the *sensus communis* belongs, as we have seen, in a wider context that goes right back to antiquity and whose continued effect into the present day is our theme.

*Id.* at 23-24.

10. *Id.* at 19-20.

11. HANS-GEORG GADAMER, *THE RELEVANCE OF THE BEAUTIFUL AND OTHER ESSAYS* 17 (Robert Bernasconi ed. & Nicholas Walker trans., Cambridge Univ. Press 1986) (1977).

12. See GADAMER, *supra* note 6, at 485.

13. See G.B. MADISON, *THE HERMENEUTICS OF POSTMODERNITY: FIGURES AND THEMES* 164 (1990). Gadamer's topic is the independent significance of humanistic understanding and a critique of the illegitimate extensions of the scientific ideology of neo-Kantianism, and so he might be misinterpreted as advancing the claim that natural science and the humanities constitute two distinct cultures of inquiry. However, Gadamer makes clear in the revised edition of *Truth and Method* that the revolution in the philosophy of science in the years following publication of the book justifies the conclusion that scientific practice is a hermeneutical and rhetorical activity no less than philosophy, although natural science is a different kind of compartment within this hermeneutical arena. See GADAMER, *supra* note 6, at 283.

methodological, traditional complex of meanings, but he is careful to distinguish substantive rhetoric, as exemplified in Plato's *Phaedrus*, from the "idle speculations of the sophists."<sup>14</sup> Gadamer argues that genuine rhetoric concerns the "discovery and transmission of insight and knowledge," an event that he reminds us is exemplified in the "art of leading a conversation."<sup>15</sup> The ancient rhetoricians well understood that the cultural "common sense" serving as a background for all understanding is nourished not on methodologically secured truths, but rather on the "probable" as articulated in contingent and historically defined knowledge. The role that rhetoric played in nourishing the political society of the ancient Greek polis is paralleled today by the sustaining power of our hermeneutical experience. Gadamer sees his task as applying the rhetorical idea of political truth grounded on the probable to the hermeneutical experience of interpretive appropriation and understanding.<sup>16</sup>

Today, the legal system—which is premised on the production and interpretation of authoritative texts as sources of governing authority—is a prominent venue for this hermeneutical experience, since the performance and reception of speeches before all competent citizens of the polis no longer occurs. Every attempt to understand a legal text, Gadamer insists, is a function of applying the text to the case at hand; thus, he regards legal reasoning as a particularly vivid model of all hermeneutical understanding.<sup>17</sup> He rejects the scientific impulse to reduce law to a disciplined methodology of deductive application, regarding this as a project

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14. GADAMER, *supra* note 11, at 19. Gadamer links ancient rhetoric with the lived experience of the lifeworld in HANS-GEORG GADAMER, REASON IN THE AGE OF SCIENCE 119-22 (Frederick G. Lawrence trans., MIT Press 1992) (1979) [hereinafter GADAMER, REASON]; and Hans-Georg Gadamer, *The Expressive Power of Language*, 107 PMLA 348, 350 (1992) [hereinafter Gadamer, *Expressive Power*]. It is important not to misunderstand Gadamer's invocation of Plato as an attempt to invest rhetoric with the qualities of certain and unchanging truth. Gadamer places much greater emphasis on Plato's activity—writing the Socratic dialogues—than on Plato's philosophical self-understanding. See HANS-GEORG GADAMER, HANS-GEORG GADAMER ON EDUCATION, POETRY, AND HISTORY: APPLIED HERMENEUTICS 71 (Dieter Misgeld & Graeme Nicholson eds. & Lawrence Schmidt & Monica Reuss trans., SUNY Press 1992) ("It is more important to find the words which convince the other than those which can be demonstrated in their truth, once and for all. We can learn this from the Platonic dialogues."). See generally HANS-GEORG GADAMER, DIALOGUE AND DIALECTIC: EIGHT HERMENEUTICAL STUDIES ON PLATO (P. Christopher Smith ed. & trans., Yale Univ. Press 1980).

15. Gadamer, *Expressive Power*, *supra* note 14, at 348.

16. See HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS 23-24 (David E. Linge ed. & trans., Univ. Cal. Press 1976) ("Convincing and persuading, without being able to prove—these are obviously as much the aim and measure of understanding and interpretation as they are the aim and measure of the art of oration and persuasion").

17. See GADAMER, *supra* note 6, at 324-41 ("The Exemplary Significance of Legal Hermeneutics").

destined to fail because of the impossibility of bridging the chasm between the presumed universal and timeless meaning of the text and the demands of individual cases. The model of conversation proves to be especially illuminating in this context: 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. The model of conversation also underscores the rhetorical nature of legal practice: An interpreter can understand a text best by allowing it to speak to the question posed by the case at hand, rather than by charting in advance the line of inquiry, just as a rhetorician must be attuned to her audience. The interpreter does not adopt a subjective attitude of dominance over the text, but rather suppresses her subjective aims and attends to “the saying” of the historically effective text as it is revealed in particular circumstances. Law holds authority, Gadamer believes, because it is the practice of hermeneutically appropriating governing texts to current disputes.

Gadamer’s understanding of authority is best understood by attending to one of his most challenging discussions—the role of “classical” texts in the Western intellectual tradition.<sup>18</sup> Gadamer clearly rejects the view that classical texts have achieved their preeminent status because they capture essential features of human nature and therefore embody invariable truths. Nevertheless, he argues that classical texts do bear the authority of tradition. Tradition holds authority, Gadamer argues, not because it locks us in a coercive ideological vise or because we choose to follow its dictates, but because it has weight in the manner that we conduct our lives.<sup>19</sup> The authority of tradition is not a self-contained power transmitted through a textual vessel and then passively absorbed by the reader; instead, the authority of tradition is generated anew with each reading of the text.<sup>20</sup> The authority—or truth—of tradition derives from its continuing critical appropriation, in which we distinguish the “legitimate prejudices” that enable understanding from the unproductive prejudices that warp understanding.<sup>21</sup> Contemporary readers always approach the classical text with a fore-structure of understanding that motivates their encounter with the

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18. For an extended discussion of Gadamer’s analysis of the classic and its application to legal theory, see Mootz, *Legal Classics*, *supra* note 5.

19. See GADAMER, *supra* note 6, at 277-85.

20. See *id.* at xxxvii (arguing that his critics fail to recognize that he never equates understanding with the naive appropriation of “customary opinions” or “what tradition has sanctified”). Gadamer emphasizes that he rejects the view “that the ‘classical work’ is accessible only in a hopelessly conventional way or that it encourages a reassuringly harmonious conception of the ‘universally human.’” *Id.* at 577.

21. *Id.* at 277, 298-99.

text, but the classical text can “break the spell of our own fore-meanings” (without eliminating them) by pulling us up short and initiating further dialogical questioning.<sup>22</sup> Although there is always a “multiplicity of what can be thought” about a text, Gadamer stresses that “not everything is possible” if the classical text is permitted to “present itself in all its otherness and thus assert its own truth against one’s own fore-meanings.”<sup>23</sup> The classics do not stand outside of history as supra-historical norms, then, but they do facilitate an experience of the truth of tradition by engaging contemporary readers and causing them to reassess their preunderstandings.<sup>24</sup>

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.”<sup>25</sup> 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.<sup>26</sup> It is important not to misread Warnke as conceding an “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 a hypothetical consensus of all rational persons.<sup>27</sup> The key hermeneutic insight is

22. *Id.* at 268.

23. *Id.* at 269.

24. Gadamer argues that the classics are classics in virtue of their conversational qualities, not the unimpeachable character of their message:

It is impossible to make ourselves aware of a prejudice while it is constantly operating unnoticed, but only when it is, so to speak, provoked. The encounter with a traditionary text can provide this provocation . . . [This event] has the logical structure of a *question*.

The essence of the *question* is to open up possibilities and keep them open. . . . In fact our own prejudice is properly brought into play by being put at risk.

*Id.* at 299. The traditionary texts that regularly provoke readers in this way become classics, not because they have been so designated, but because that is their cultural function.

25. HANS-GEORG GADAMER, *PHILOSOPHICAL APPRENTICESHIPS: ON THE ORIGINS OF PHILOSOPHICAL HERMENEUTICS* 189 (Robert K. Sullivan trans., MIT Press 1985) (1977).

26. GEORGIA WARNKE, *JUSTICE AND INTERPRETATION* at 12, viii (1992).

27. Warnke argues that this yields theoretical insight as well as pragmatic political guidance:

To say that some of our differences [in moral understanding] reflect legitimate

that the better interpretation is always contextual and historical, always is rhetorically advanced, and never achieves the status of a timeless logical truth.<sup>28</sup>

*B. Perelman's New Rhetoric and the Primacy of Argumentation*

Because he does not develop a pragmatic account of rhetorical exchange, Gadamer's phenomenology of understanding remains somewhat vague with respect to the activities by which people pursue justice and morality in the course of daily life. Chaim Perelman's efforts to reclaim the wisdom of ancient rhetoric proves to be a helpful supplement to Gadamer's hermeneutics for purposes of developing an account of rhetorical 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.<sup>29</sup>

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,"<sup>30</sup> whereas to reason with another person "is not merely to verify and demonstrate, but also to deliberate, to

differences in understanding does not presume that all our differences are legitimate or that we cannot rationally discriminate between culturally based understandings. Rather, there is an alternative to both the relativistic idea that any understanding of law or principle is legitimate and the dogmatic idea that only one is. Some different legitimate understandings of moral and legal principles remain possible and we might try to accommodate this pluralism both in our debates and, as far as possible, in our policies.

Warnke, *Reply*, *supra* note 4, at 440.

28. 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.

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... 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, *supra* note 26, at 132, 137.

29. See CHAIM PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES: ESSAYS ON RHETORIC AND ITS APPLICATIONS* 112 (William Kluback et al. trans., D. Reidel Publishing Co. 1979); see also Edgar Bodenheimer, *Perelman's Contribution to Legal Methodology*, 12 N. KY. L. REV. 392, 392-403 (1985).

30. PERELMAN, *supra* note 29, at 118.

criticize and to justify, to give reasons for and against—in a word, to argue.”<sup>31</sup> 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. 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.<sup>32</sup>

Rhetorical claims seek to persuade an audience with arguments that proceed from pre-understandings 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 cataloging the techniques for employing accepted *loci*, by which he means “topics” or “commonplaces,” as points of departure when seeking adherence through argumentation.<sup>33</sup> 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 in a manner that leads to different conceptions of “equality.”

Perelman argues that the ideal of justice is the quintessential commonplace of political dialogue. He insists that justice is a “confused notion” that cannot be clarified according to the test of absolute truth but can only be developed in the course of responding

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31. CHAIM PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 59 (John Petrie et al. trans., D. Reidel Publishing Co. 1980); cf. Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 463 (1987) (“The ideologue seeks an iron logic. Who says A, he thunders, must say B. But that is not the only way to act in accord with principle. There is a difference between the coherence of ideas, so dear to philosophers, and the coherence of our lives or the coherence of practical judgment.”).

32. See PERELMAN, *supra* note 31, at 129; see also Donald H.J. Hermann, *Legal Reasoning as Argumentation*, 12 N. KY. L. REV. 467 (1985).

33. CHAIM PERELMAN & LUCI OLBRECHTS-TYTECA PERELMAN, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 83-85 (John Wilkinson & Purcell Weaver trans., Univ. Notre Dame Press 1969) (1958) (defining *loci*).

to the practical demands of political action in a manner informed by reasonable belief.<sup>34</sup> Perelman stresses that he is making a broad epistemological claim rather than a pragmatic political one: What holds true for the topic of justice holds true for all philosophical inquiry. Philosophy is just thinking about confused notions; consequently, philosophers cannot reach definitive conclusions except in the most narrowly defined circumstances. The goal of the “new rhetoric” movement is not to produce a handbook of certain technical, forensic skills used in public speaking; it represents a philosophical claim about how we reason.<sup>35</sup> Perelman joins Gadamer in regarding legal argumentation as a model for philosophical inquiry—particularly moral philosophy—and therefore looks to the social practice of legal argumentation to derive important theoretical insights:

After having sought, for centuries, to model philosophy on the sciences, and having considered each of its particularities as a sign of inferiority, perhaps the moment has come to consider that philosophy has many traits in common with law. A confrontation with the latter would permit better understanding of the specificity of philosophy, a discipline which is elaborated under the aegis of reason, but a reason which is essentially practical, turned toward rational decision and action.<sup>36</sup>

By looking to the practical engagement in law rather than to the abstract model of theory as a guide, philosophers can recover the experience of moral argumentation:

[T]he diverse principles which the philosophers have presented as supreme norms in ethics are in reality only commonplaces, in the meaning of classical rhetoric, that they give reasons which are to be considered in each concrete situation rather than as axioms like those of geometry whose consequences can be drawn by simple deduction. Practical reasoning, applicable in morality, must not be inspired by the mathematical model, which is not applicable in changing circumstances, but by a knowledge characterized by reasonableness and by the taking into consideration diverse aspirations and multiple interests,

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34. PERELMAN, *supra* note 31, at vii (“As justice is, for me, the prime example of a ‘confused notion,’ of a notion which, like many philosophical concepts, cannot be reduced to clarity without being distorted, one cannot treat it without recourse to the methods of reasoning analyzed by the new rhetoric.”); *see generally id.* at 96-105; PERELMAN & PERELMAN, *supra* note 33, at 133-41.

35. *See generally* PERELMAN, *supra* note 29 (applying the New Rhetoric to philosophy, literary theory, history, morality, and scientific methodology to demonstrate the importance of the rehabilitation of the “reasonable” to the humanities).

36. PERELMAN, *supra* note 31, at 174.

defined by Aristotle as *phronesis* or prudence, and which is so brilliantly manifested in law, in Roman *jurisprudencia*.<sup>37</sup>

Perelman hearkens back to antiquity for good reason, since law has succumbed to scientism and rationalism no less than to philosophy:

If law has suffered much from being too influenced by the sciences, I believe the same reproach can be addressed to philosophy . . . . If the new concept of law spreads, which is basically a very old one, and which has been forgotten for centuries, philosophers will have much to learn from it. They will look to the techniques of the jurist to learn how to reason about values, how to realize an equilibrium, how to bring about a synthesis of values.<sup>38</sup>

Perelman's rhetorical philosophy clearly has affinities with Gadamer's hermeneutics and its similar attention to legal practice and the rhetorical tradition. Gadamer acknowledges at several points in his work that Perelman has made an important contribution to the project of rehabilitating the full-bodied scope of ancient rhetoric.<sup>39</sup>

### C. Reason as Rhetorical Knowledge

Read together, Gadamer and Perelman describe a social process and an epistemic goal that is most accurately termed "rhetorical knowledge." 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 that serve as the resources for intersubjective experience with the aim of motivating action of some kind. This activity is at once hermeneutical and rhetorical, for it involves both discernment and expression, both understanding and proposing, and both active listening and speaking.<sup>40</sup> Rhetorical knowledge is a practical achievement that

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37. *Id.* at 119.

38. *Id.* at 146. The collection of essays repeats this theme throughout. *See id.*; *see also* Alan H. Goldman, *Legal Reasoning as a Model for Moral Reasoning*, 8 LAW & PHIL. 131, 139 (1989) ("Moral reasoning, despite a difference in the data base, shares the structure of legal reasoning."); M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67 (1990) (denying the assumption that practicing lawyers ought to defer to philosophical claims about moral principle).

39. *See, e.g.*, GADAMER, REASON, *supra* note 14, at 93; Hans-Georg Gadamer, *Culture and Media*, in CULTURAL-POLITICAL INTERVENTIONS IN THE UNFINISHED PROJECT OF ENLIGHTENMENT 171, 179-81 (Alex Honneth et al. eds., 1992) (criticizing the dismissal of rhetoric as "ornate prattle" by scientific consciousness and recalling its central role in Greek democracy and Roman republicanism).

40. For a detailed defense of the utility of the concept of rhetorical knowledge, see Mootz, *Rhetorical Knowledge*, *supra* note 5, at 544-65. *See generally* BRUCE KRAJEWSKI, TRAVELING WITH HERMES: HERMENEUTICS AND RHETORIC (1992); RHETORIC AND HERMENEUTICS IN OUR TIME (Walter Jost & Michael J. Hyde eds., 1997).

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 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 emerges from arguments grounded in probabilities and uncertainties and is not produced by well-defined tools to secure pre-given ends. 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 continued 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 a substantial effect as these commonplaces are invoked in other contexts. Individual self-conscious efforts to manipulate social meanings (generally derided as “mere rhetoric”) always are predicated on wider, tacit rhetorical knowledge that is not subject to individual manipulation as a whole because it is constitutive of one’s very sense of individuality.

My description of rhetorical engagement producing knowledge is prone to the age-old critique that I can at most claim provisional communal belief rather than true knowledge. Robert Scott defends rhetorical knowledge against this charge in terms congenial to the philosophical projects undertaken by Gadamer and Perelman. Scott writes:

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 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 some particulars by participating rhetorically.<sup>41</sup>

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 with certain means at its disposal.

The reality of rhetorical knowledge is proved not because the participants can employ a rhetorical methodology to 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. Contrary to the understanding even of sophisticated commentators, then, continuing debate is not a sign of rhetoric’s impotence, it is a manifestation of the living power of rhetorical engagement. Argumentation does not leave everything as it was. Even if a timeless answer to the debate cannot be found, the debate continues on slightly different terms, responsive to ever-changing contexts. Without rhetorical engagement, communication would be nothing more than a directive issuing from a person who is insulated from those whom she is addressing. In a word, communication would be dead. 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.

The legal system is one of the most important fora for the development of rhetorical knowledge in contemporary American society. This is true at all levels of legal discourse, but it is shown in particularly sharp relief in the rights discourse of constitutional

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41. Robert L. Scott, *On Viewing Rhetoric as Epistemic: Ten Years Later*, 27 *CENT. STATES SPEECH J.* 258, 261 (1977).

decisionmaking.<sup>42</sup> In the recent “assisted suicide” case, Justice Souter acknowledged the rhetorical depth of the Court’s consideration of this controversial issue, and he rejected the pretense of legal decisionmaking as a dispassionate and orderly elaboration of pre-established principles.<sup>43</sup> Although ostensibly repudiated by a bare majority of the Court as a statement of governing principles,<sup>44</sup> Souter’s opinion persuasively describes the adjudication of fundamental rights as a hermeneutical-rhetorical project in terms that Gadamer and Perelman would endorse, even though Souter articulates his reasoning in the idiom of contemporary constitutional discourse.

In his concurring opinion, Justice Souter refused to follow the artificial strictures of the Court’s “substantive due process” fundamental rights analysis, which he characterized as a process of identifying “extratextual absolutes.”<sup>45</sup> Instead, he argued that Justice Harlan’s dissent in *Poe v. Ullman*<sup>46</sup> accurately characterized the long tradition of due process jurisprudence as a form of common law decisionmaking:

Although the *Poe* dissent disclaims the possibility of any general formula for due process analysis . . . Justice Harlan of course assumed that adjudication under the Due Process Clauses is like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse. . . . When identifying and assessing the competing interests of liberty and authority, for example, the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive. . . .

Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the

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42. It is a well-worn (but no less true) insight that legal philosophy fails to address the full scope of its object of study because it focuses almost exclusively on decision-making by appellate courts. I have argued that a hermeneutical-rhetorical account is equally illuminating with respect to the far more pervasive and important practice of lawyer-client deliberations. See Mootz, *Rhetorical Knowledge*, *supra* note 5, at 569-70. Nevertheless, appellate decisions provide good vehicles for crystallizing the hermeneutical reality that subtends not only all of legal practice, but all of life. Borrowing Gadamer’s terms, appellate decisionmaking has exemplary significance for legal hermeneutics.

43. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2274 (1997) (Souter, J., concurring).

44. See *Glucksberg*, 117 S. Ct. at 2268. Five Justices joined the Opinion of the Court, but five Justices writing separately (including Justice O’Connor, who joined in the majority opinion) embraced in varying degrees the kind of reasoning that Souter describes. Only Justice Breyer expressly referred to Souter’s analysis in favorable terms, *see id.* at 2311 (Breyer, J., concurring), but he did not join Justice Souter’s opinion.

45. *Id.* at 2281 (Souter, J., concurring).

46. 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples. The "tradition is a living thing," albeit one that moves by moderate steps carefully taken.<sup>47</sup>

Souter tracks the philosophical claims made by Gadamer and Perelman about the nature of human understanding and the acquisition of knowledge, lending support to their claim that the demands of legal practice may indeed highlight the hermeneutical-rhetorical features of all understanding. Lawyers know very well that argumentation is a bounded and rational enterprise that nevertheless cannot aspire to a process of deduction from principles, even though the rhetorical conventions of legal practice and judicial opinion-writing ironically work to conceal this (supposedly dangerous) fact: "[T]he *particular* rhetoric that law embraces is the rhetoric of foundations and logical deductions [and] is one that relies, above all else, upon the denial that it is rhetoric that is being done."<sup>48</sup> Because legal practice succeeds as a reasonable activity, and because the hermeneutical-rhetorical nature of this practice is apparent despite the scientific terminology of legal positivism, there are strong grounds for accepting the philosophical thesis that rhetorical knowledge is a form of human understanding that is exemplified in legal practice.

#### *D. Rhetorical Hermeneutics and Natural Law Philosophy*

Although Gadamer fully embraces the antifoundationalist movement to radically situate all understanding in the hermeneutical-rhetorical experience of finite, historical beings, he makes a somewhat surprising turn at a crucial juncture of his *magnum opus* when he endorses Aristotle's classical account of

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47. *Glucksberg*, 117 S. Ct. at 2284 (Souter, J., concurring) (quoting *Poe*, 367 U.S. at 544 (Harlan, J., dissenting)). Justice Souter ultimately concurred with the Court that terminally ill patients competent to express their wishes do not have a constitutional right to physician-assisted suicide, but he did so because he believed that the state legislatures were making reasonable, if debatable, decisions that the strong interest in protecting terminally ill patients from involuntary suicide and euthanasia could be effected only by a complete ban on assisted suicide. *See id.* at 2290-93.

48. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1555 (1990).

natural law. Gadamer emphasizes that Aristotle's characterization of natural law as a changeable feature of human existence coincides with his hermeneutical philosophy and differs substantially from traditional, post-Thomistic natural law accounts:

For Aristotle, [the fact that natural law is not timeless and unchanging] is wholly compatible with the fact that it is "natural" law. . . . [Unlike, for example, 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].<sup>49</sup>

At first, the claim that "the nature of the thing still allows some room for play" appears to be a wholesale surrender of natural law principles to the interpretive turn, but Gadamer proves to be quite serious in his desire to recover the wisdom of classical natural law thinking.

Gadamer directly ties the classical conception of natural law to his critique of legal positivism. Commenting on the intellectual scene in Germany, Gadamer concludes that legal positivism "probably has no supporters today" because the "distance between the law and the individual case seems to be absolutely indissoluble."<sup>50</sup> To drive this point home, he returns to the classical conception of natural law in an extended discussion of the nature of legal regulation. Gadamer begins by emphasizing the necessity of free play in legal interpretation:

It is no mere unavoidable imperfection in the process of legal codification when it leaves free play for its application to concrete instances, as if this free play could, in principle, be reduced at will. To be "elastic" enough to leave this kind of free

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49. GADAMER, *supra* note 6, at 319-20.

50. *Id.* at 518.

play seems rather to be in the nature of legal regulation as such, indeed of legal order generally.<sup>51</sup>

He then draws the important, and surprising, link between Aristotle's conception of natural law and free play:

If I am not mistaken, Aristotle was quite clear about this when he ascribed an exclusively critical function to the idea of natural law rather than a positive, dogmatic one. It has always been felt to be shocking (when it was not denied outright, by misinterpreting Aristotle's text) that he distinguishes between conventional and natural law, yet goes on to claim that natural law can be changed.

Natural law and law established by statute are not "equally changeable." Rather, by considering comparable phenomena it is explained that even what is just by nature is changeable, without on that account ceasing to be different from that which is established by mere statute. Obviously traffic regulations, for example, are not changeable to the same but to a much higher degree than something naturally just. Aristotle seeks not to detract from this view but to explain how to distinguish what is naturally just in the unstable human world (in contrast to that of the gods). Thus he says that the distinction between what is naturally right and what is legal or conventional is evident—despite the changeability of both—as the distinction between the right hand and the left. There too by nature the right is the stronger, and yet this natural priority cannot be described as unchangeable, since, within limits, it can be removed by training the other hand.<sup>52</sup>

Gadamer then brings home the paradoxical point that natural law exists only by virtue of the bounded flexibility experienced in interpretive applications:

"Within limits," that is, within a certain area of free play. To leave this [free play in law], far from destroying the meaning of right order, belongs rather to the essential nature of the situation: "The law is universal and cannot therefore answer to every single case." The disposition of the case does not result from the codification of law but, on the contrary, the codification of laws is possible only because laws are, in themselves and by nature, universal.<sup>53</sup>

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51. *Id.* at 518-19.

52. *Id.* at 519.

53. *Id.* at 519-20 (quoting HELMUT KUHN, ZEITSCHRIFT FÜR POLITIK 289, 299 n.4 (1956)).

Aristotle's natural law philosophy thus serves as a critique of positivism as well as a critique of the Stoic and the "medieval form of natural law, to say nothing of that of the Enlightenment,"<sup>54</sup> a point made obvious by Gadamer's insistence that an indeterminate realm of "free play" is not merely a tolerated feature but an essential component of the natural law account.

Significantly, Gadamer extends the scope of his natural law analysis beyond legal and political questions and applies it to 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."<sup>55</sup> 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. Thus morality simultaneously is an "end" and a "means."<sup>56</sup>

[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.<sup>57</sup>

Notwithstanding the contextual and historical dimensions of the natural law—both in terms of moral knowledge and legal correctness—Gadamer insists that it is appropriate to regard it as "natural law," inasmuch as he rejects the idea that the interpreter can impose an interpretation or moral judgment as a manifestation solely of her subjective will.

Scholars have paid insufficient attention to the mutually reinforcing character of Gadamer's hermeneutics and Perelman's new rhetoric, and they have completely missed the fact that these two philosophers pursue similar avenues of inquiry into the natural law tradition. Perelman also insists that natural law philosophy contains important insights, even as he rejects the traditional claim that justice is achieved when the "natural law"—regarded as a universal and timeless set of directives—is instantiated through positive law. Perelman echoes Gadamer in arguing that Aquinas and

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54. *Id.* at 533.

55. *Id.* at 320-22.

56. *Id.* at 316-18.

57. *Id.* at 317.

Aristotle both invoked a more subtle conception of natural law that has been lost in the intervening centuries of commentary. Following this tradition, Perelman insists that the natural law tradition can embrace 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.<sup>58</sup>

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 with reasonable arguments about the proper course of action.

Both Gadamer and Perelman return to classical conceptions of natural law in the course of outlining their anti-foundationalist accounts of human understanding and communication. This curious move might be explained in part by the fact that they wrote at a time when natural law and legal positivism were the competing orientations in legal theory, with the result that their anti-positivist stance became a commitment to natural law by default. However, it seems clear that Gadamer and Perelman look back to the classical natural law tradition in order to demonstrate their opposition not only to legal positivism, but also to the natural law philosophy prevalent at the time.<sup>59</sup> Yet again, Vico’s return to classical rhetoric in the face of the Cartesian conception of reason anticipates

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58. PERELMAN, *supra* note 29, at 33-34. I read Perelman’s criticism of an “ontological” conception of natural law as a critique of the idea that moral rules for action are given and do not present problems in application, and not as a critique of the ontological approaches by Lon Fuller and Lloyd Weinreb that I discuss later.

59. Douglas Kries contends that Leo Strauss made a similar move against Thomistic orthodoxy and back to the classical conception. See Douglas Kries, *On Leo Strauss’s Understanding of the Natural Law Theory of Thomas Aquinas*, 57 THOMIST 215, 216 (1993). Gadamer lauds Strauss’s recovery of classical natural law, see GADAMER, *supra* note 6, at 532, although he does not embrace Strauss without substantial dissent, see *id.* at 540-41. For an extended discussion of the points of dispute between Gadamer and Strauss, see CATHERINE H. ZUCKERT, *POSTMODERN PLATOS: NIETZSCHE, HEIDEGGER, GADAMER, STRAUSS, DERRIDA* (1996).

Gadamer's philosophical insight. Vico rejected the efforts of Grotius and Pufendorf to advance Thomistic natural law by grounding "law in a nonhistorical reality," arguing instead that the natural conditions under which human reason flourishes can be investigated as the link between natural law and political action:

Donald P. Verene has summarized Vico's position as holding that the universal law is established by custom and is a reflection of the *sensus communis*. Universal law "emerges as the form of society itself and is the basis from which law is subsequently formed." The universal law emerges from the conditions of primordial existence, which elicit similar responses from all societies rather than from a formulation of some rational ideal.<sup>60</sup>

The idea of a historically contingent, yet deeply constitutive ground of law and morality is precisely what Gadamer advances in his hermeneutical philosophy.

Gadamer's reference to natural law in the course of his treatise on hermeneutics appears strange and misguided, then, only because "natural law" generally is presumed to require invariant moral truths. An excerpt from Anthony D'Amato's recently published jurisprudence text reflects the deeply ingrained bias that natural law must invoke universal and eternal principles of morality if it is to have any purchase at all:

If substantive natural law requires that the validity of law be checked by its congruence with principles of morality, it follows that these principles of morality must be fixed principles. If the principles of morality were to change from time to time or from place to place, then they could hardly serve as a reference point for the validity of law. Or, to put this matter more succinctly, substantive natural law rules out the notion of moral relativism.

The substantive natural law position holds that some things are right for all times and all places, that other things are always wrong no matter when and no matter where, and that two reasonable people cannot honestly differ about what is right and what is wrong because if they differed then one of them would not be reasonable.<sup>61</sup>

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60. SCHAEFFER, *supra* note 8, at 82 (quoting DONALD P. VERENE, *VICO'S SCIENCE OF IMAGINATION* 61 (1981)).

61. Anthony D'Amato, *Universal Morality*, in *ANALYTIC JURISPRUDENCE ANTHOLOGY* 97, 98 (Anthony D'Amato ed., 1996); see also RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987) (criticizing John Finnis, but supporting a strong version of natural law); PAULINE C. WESTERMAN, *THE DISINTEGRATION OF NATURAL LAW THEORY* 292 (1997) (arguing that Finnis's reduction of natural law philosophy to a rationalistic conception of the operation of practical reason has amounted to an abandonment of natural

D'Amato's extreme formulation reveals the tacit assumptions of most theorists: Natural law either provides indubitable answers or we are consigned to moral relativism. D'Amato does not explain why it must follow that changeable principles of morality cannot serve as a reference point for the validity of law, but one can infer that he equates "changeable" with "determined as a matter of subjective will" from the fact that he equates "changeable" with "relativism." This conflation is simply untenable, inasmuch as there is an important distinction between believing that an individual simply posits moral norms in accordance with her preferences and believing that individuals are subject to moral norms that are beyond individual subjective desire and yet still historically conditioned. In both cases the relevant norms are changeable, yet it does not follow that legal validity cannot rest on the norms that are changeable in the latter sense. D'Amato plays off a conceptual confusion that arranges the world either in terms of timeless and objective moral rules or in terms of untrammelled individual choice.<sup>62</sup> Gadamer's philosophy is intended to disrupt precisely this misguided bifurcated thinking that has undermined natural law thinking due to the absence of absolute foundations.

Gadamer breaks with the absolutist tradition of natural law to avoid the "gradual increase of insoluble problems"<sup>63</sup> natural law philosophers have experienced in their search for a firm foundation for moral decisionmaking once Aquinas's unconditional faith in God became problematic. Gadamer's solution is to locate the reality of moral action and deliberation in the rhetorical-hermeneutical

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law, which "was designed to pass a verdict on contingent matters from a fixed and universal point of view. . . . If a theory of natural law relegates the discussion of such topics to the realm of the 'contingent,' it has lost any practical significance").

62. Arthur Leff's classic essay on the fundamental tensions of contemporary jurisprudence artfully exposes the bipolar paradigm exemplified in traditional natural law philosophy as a deep-seated desire to be wholly constrained in accordance with the strongest versions of natural law and also to be wholly free and self-determining. "What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it," Leff notes, but our lack of faith in natural law ordained by God leaves us with only unconvincing pleas about objective morality and a deep, nagging skepticism. Arthur Leff, *Unnatural Law*, 1979 DUKE L.J. 1229, 1229. Leff responds to this situation in a somewhat curious manner: "All I can say is this: it looks as if we are all we have. . . . Only if ethics were something unspeakable by us, could law be unnatural, and therefore unchallengeable. As things now stand, everything is up for grabs." *Id.* at 1249. He concedes that he has no knock-down argument against skeptical rejoinders to assertions of moral truths, but he does link the "natural" law with "speakable ethics" that remain open to challenge and deliberation. What Gadamer wishes to accomplish by returning to Aristotelian natural law theory is to demonstrate that this understanding of natural law suffices to make sense of our experience of normativity. Although Leff appears confounded by the argument that a historical conception of a changeable natural law yields only relativism, Gadamer wants to make good on Leff's famous plea that we can state with justification that "napalming babies is bad," even in the face of the inevitable "Sez who?" *Id.*

63. WESTERMAN, *supra* note 61, at 6.

engagement of finite and historical beings. Natural law is rendered “natural” once again by attending to the ontological features of human nature instead of theorizing about the epistemological powers of human reason.<sup>64</sup> Jeremy Waldron has argued with justification that the existence of an objective moral order against which human conduct could be judged is, in the end, irrelevant to the practical concerns of a judge faced with a troubling case or a person faced with a moral dilemma. “That there is a right answer ‘out there’ (or wherever) certainly means that a judge is not making a fool of herself when she goes out ponderously in search of it. But its existence doesn’t drive her to pursue it, let alone determine that she will reach it.”<sup>65</sup> If natural law philosophy is construed as the elucidation of timeless truths, Waldron’s criticism is devastating. However, Gadamer argues that the classical approach to natural law is concerned with the reality of moral deliberation and the means by which social actors address practical problems. In short, Gadamer recuperates ontological inquiry into the human experience of normativity primarily by rejecting natural law accounts of independent moral truths in favor of the classical focus on the experience of normativity.

The return to a focus on human “nature” is not without problems. In her recent critique of the natural law tradition, Pauline Westerman discounts the plausibility of an ontological approach based on “nature,” arguing that such an approach ultimately either devolves into John Finnis’s unsatisfactory rationalistic approach or commits the naturalistic fallacy.<sup>66</sup> Because Gadamer’s project proceeds from an ontological account of human nature, it is important to understand how he avoids the naturalistic fallacy. Anthony Lisska’s recent effort to recuperate the natural law philosophy of Aquinas by emphasizing its Aristotelian character provides substantial guidance in this task. Lisska begins by emphasizing that eternal law for Aquinas is an “archetype” issuing

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64. Jeffrey Stout argues that natural law philosophy collapsed when ethical realism gave way to modern scientific consciousness, but he contends that the contemporary reevaluation of epistemology in the natural sciences may permit natural law philosophy to advance by simply recognizing that the realist/anti-realist debate in ethics is unproductive from the start. See Jeffrey Stout, *Truth, Natural Law, and Ethical Theory*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 71 (Robert P. George ed., 1992).

65. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY*, *supra* note 64, at 158, 183.

66. See WESTERMAN, *supra* note 61, at 288-89. G.E. Moore famously argued that moral language cannot be reduced to language that describes natural facts, and so moral discourse must be regarded as *sui generis*. See G.E. MOORE, *PRINCIPIA ETHICA* 10 (Cambridge Univ. Press 1980) (1903). The “fallacy” occurs when philosophers attempt to derive moral prescriptions from natural facts.

from God rather than a rulebook directed to man.<sup>67</sup> In contrast, “natural law” can be discovered independently of theology by analyzing the dispositional properties that define human nature.<sup>68</sup> Closely tracking Aristotle’s discussion of the ends attendant to human nature, Aquinas demonstrates how a naturalistic ethics can avoid the naturalistic fallacy. “There is no radical bifurcation between fact and value because the value—i.e. the ‘good’—is nothing more than the development of the process structured by the nature of the set of dispositions.”<sup>69</sup> Nevertheless, these dispositions do not translate directly to detailed ends that definitively specify appropriate moral conduct in concrete situations. Lisska emphasizes that Aquinas viewed Aristotelian practical reasoning (*prudentia*) as necessary for determining correct actions in light of the dispositional properties of human nature and the exigencies of the particular situation.<sup>70</sup>

Lisska rejects Finnis’s natural law philosophy for reinscribing an excessive rationalism as a solution to the naturalistic fallacy. Finnis

67. ANTHONY J. LISSKA, *AQUINAS’S THEORY OF NATURAL LAW: AN ANALYTIC RECONSTRUCTION* 95 (1996).

68. Lisska argues:

On this scheme of meta-ethical naturalism, it follows that an immoral action is the hindering of the natural developmental process based upon the dispositional properties common to human beings. Morality has its foundation in human nature. . . . An act is wrong, not on account of God’s command, but because the act hinders the development of the human dispositions.

*Id.* at 104. This is not to underemphasize the importance of God in Aquinas’s approach, but only to note that the existence of God is of only marginal relevance in working out his naturalistic ethics. “That God may have created the structure of human nature differently is not the issue. Of course that could have taken place. But once human nature had been established, certain moral rules follow from the divine archetype of human nature.” *Id.* at 115; see also *id.* at 116-38 (distinguishing the question of God’s existence and corresponding eternal law from the fact of human existence and corresponding natural law in Aquinas’s thought).

69. *Id.* at 199.

70. Lisska writes:

In rendering moral decisions, natural law moral theory always admits the radical contingency of the particular situation.

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There is a radical particularity in Aristotle and Aquinas involving moral situations that is opposed theoretically to the rule-bound directives of most post-Enlightenment moral theory. This is especially true of most rule deontological normative systems. Considering the particular action to be undertaken in a specific situation—what Aquinas often refers to as a “contingent situation”—both Aristotle and Aquinas sound like existentialists lamenting against the strict constructionalism of rule-based theory. This radical contingency of Aristotelian and Aquinian moral theory should not be forgotten in the process of developing a consistent theory of natural law.

*Id.* at 253.

The action, however, is always in the context of developing the dispositional properties which make up the human essence. Hence, while similar to the subjectivity of the existentialists, none the less the content of human nature—the set of dispositional properties—determines the general boundaries of the actions to be undertaken.

*Id.* at 216-17.

separates the activity of developing moral judgment with practical reasoning from an ontological account of human nature, thereby importing theoretical reasoning into his approach under the guise of practical reasoning.<sup>71</sup> Lisska demonstrates that Aquinas develops a more satisfactory approach by returning to human nature as a guide for the exercise of a thoroughly contextual practical reasoning. Lisska's reading of Aquinas need not rest on essentialist assumptions about human nature in order to provide a persuasive rebuttal to the charge by critics that Gadamer falls victim to the naturalistic fallacy. Gadamer's ontology of human understanding represents a similar focus on the ontology of human experience, but it is guided by the contemporary recognition that dispositional properties are communally reinscribed in and emerge from a historical pattern of linguistically-mediated lived practices. By reconceiving dispositional properties as culturally and historically contingent, yet determinative of human agency in much deeper ways than mere habit, Gadamer articulates a natural law philosophy that at once avoids the naturalistic fallacy and does not run afoul of contemporary post-metaphysical philosophy.

Gadamer's recourse to deep social traditions avoids the absolutism of traditional natural law philosophy without committing the naturalistic fallacy, but he courts a different set of difficulties. Joseph Boyle, a prominent natural law philosopher aligned with Finnis, has delivered a sophisticated challenge to natural law accounts that are grounded only in the social practices and lived ethical experiences of a community.<sup>72</sup> Boyle's arguments prove to be helpful in sharpening Gadamer's conception of the classical natural law tradition, which is rooted in communal life. Boyle readily agrees that natural law discourse is tradition-dependent in the sense that it can occur only within the language and set of questions of a particular community, and that it is part of a developing intellectual tradition, but he denies that ethical inquiry can be rooted only in a shared way of life.<sup>73</sup> Arguing that there is no basis for moral criticism available to a person living within a thoroughly evil community such as Nazi Germany unless universal principles of practical reason are acknowledged, Boyle defends the traditional assumption that the natural law must be constitutive of all persons in an acontextual way against the communitarian philosophy of contextualized "virtues

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71. See *id.* at 156.

72. See Joseph Boyle, *Natural Law and the Ethics of Traditions*, in *NATURAL LAW THEORY*, *supra* note 64, at 3.

73. See *id.* at 4-9.

ethics.”<sup>74</sup>

Whatever the merits of Boyle’s argument against modern communitarians, it carries no weight when applied to Gadamer’s hermeneutical account. Gadamer does not return to classical natural law in order to substitute a univocal “common way of life” for the problematic assertions of a unitary capacity of practical reason to underwrite moral discourse. Quite the contrary, Gadamer contends that the ongoing contest of values in a divided, heterogeneous society indicates the existence of deeply constitutive commonplaces that permit such debate in the first place, and that it is through such debate that the “nature of the thing” can reveal itself. Gadamer lived under the terror of Nazi Germany as a philosophy professor, after all, and it is perfectly plausible that it was the lived resources of German life and intellectual history that he elaborated in his decision not to become complicit in the Nazi regime. The “nature of the thing” in moral deliberation is not equivalent to a widely adopted pattern of behavior (which may at times in the life of a community be regarded as profoundly immoral), but rather is the product of a deep, yet conflicted, tradition that can be invoked in criticism even of widespread, officially sanctioned practices. Far from being a crude conventionalist, Gadamer embraces classical natural law philosophy in part to explain why human understanding “certainly does not mean merely appropriating customary opinions or acknowledging what tradition has sanctified.”<sup>75</sup>

Gadamer’s philosophical hermeneutics, as supplemented by Perelman’s new rhetoric, provides a challenging account of human understanding and reason that holds special importance for legal theorists. At the same time, legal practice is a particularly instructive venue for rhetorical knowledge, and so legal theorists are well-positioned to provide important contextual development of these themes. The classical natural law tradition that Gadamer employs—as opposed to traditional, post-Thomistic accounts—provides a rich point of reference for bringing legal theorists into conversation with the “interpretive turn” in philosophy. In the next section, I demonstrate that Gadamer’s approach provides an opening to two legal theorists who employ a decidedly non-traditional natural law approach. Lon Fuller and Lloyd Weinreb are two of the most prominent natural law philosophers in this century. Their substantial contributions to legal theory come to light by acknowledging that they proceed in a manner that echoes Gadamer’s postmodern philosophical claims.

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74. *Id.* at 17-18.

75. GADAMER, *supra* note 6, at xxxvii.

## III. RECONSIDERING THE NATURAL LAW TRADITION

*A. Procedural Natural Law and Social Dynamics: Lon Fuller*

Today, natural law philosophy finds few advocates among legal theorists working outside the Roman Catholic tradition.<sup>76</sup> Ronald Dworkin famously acknowledged that his claim that legal decisionmaking involves recourse to substantive principles of morality probably falls within the natural law tradition, broadly defined, but he has not emphasized this reading of his legal philosophy.<sup>77</sup> Perhaps the most famous contemporary natural law thinker is Lon Fuller, who developed a procedural natural law—which he termed an “internal morality of law”—as a sharply defined alternative to the orthodoxy of legal positivists in the post-War years. Fuller’s natural law approach commonly is misinterpreted as either a hollow echo of the natural law tradition<sup>78</sup> or as an essentialist conception of law at odds with the legal realist world that he helped to create with his doctrinal scholarship,<sup>79</sup> but his approach is best understood as a serious effort to develop the classical natural law tradition.

Fuller was unabashedly a natural law philosopher. When asked whether his theory was a variant of natural law philosophy, he responded with “an emphatic, though qualified, yes.”<sup>80</sup> His natural law approach is most generally summarized as the belief “that there is a possibility of discovery in human relations as in natural

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76. In making this statement, I intend to distinguish natural law from natural rights jurisprudence, as the latter is plainly a fixture in American legal theory. See Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655 (1997). The eclipse of natural law by positivism is the crucial distinguishing demarcation between pre-Civil War jurisprudence in America and the modern jurisprudence of the postbellum years, although Stephen Feldman contends that both traditions were foundationalist in their own ways. See Stephen Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387 (1997). For a comprehensive bibliography of contemporary natural law scholarship, see James V. Schall, *The Natural Law Bibliography*, 40 AM. J. JURIS. 157 (1995).

77. See Ronald M. Dworkin, “Natural” Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982).

78. See, e.g., Robert Henle, *Principles of Legality: Qualities of Law, Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville*, 1994 AM. J. JURIS. 47; William S. Miller, Jr., Book Review, 1985 AM. J. JURIS. 225, 227 (reviewing ROBERT SUMMERS, LON FULLER (1984) & LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER (Kenneth Winston ed., 1981)) (criticizing Fuller’s efforts to “deodorize” natural law).

79. See, e.g., James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 373 (1993) (“Fuller, the early contracts theorist, apparently undermines the claims made by Fuller, the later jurisprude”).

80. LON L. FULLER, THE MORALITY OF LAW 96 (1969); see also LISSKA, *supra* note 67, at 21 (characterizing Fuller as “the principal exponent of natural law among legal scholars in the United States at mid-century”); ROBERT S. SUMMERS, LON L. FULLER 62 (1984) (“Fuller readily identified himself with that tradition”).

science.”<sup>81</sup> 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.”<sup>82</sup>

In a private note about natural law [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.”<sup>83</sup>

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.<sup>84</sup>

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 proves 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,<sup>85</sup> and he coined the term “eunomics” primarily to dissociate himself from absolutist tendencies in the natural law tradition.<sup>86</sup> As he later explained with reference to his early book, *The Law in Quest of Itself*, he advocated

81. LON L. FULLER, Letter from Lon L. Fuller to Thomas Reed Powell, in *THE PRINCIPLES OF SOCIAL ORDER* 294, 303 (Kenneth I. Winston ed., 1981) (n.d.); see also Lon L. Fuller, *The Philosophy of Codes of Ethics*, 74 *ELECTRICAL ENGINEERING* 916 (1955).

To escape from the sterile absolutes that are now generally offered to us we must return to a realization that there are natural laws of social order—laws that are “natural” in the sense that they are given, laws that we do not know instinctively but must use our minds and our powers of observation to discern and understand.

*Id.* at 916.

82. Lon L. Fuller, *Human Purpose and Natural Law*, 53 *J. PHIL.* 697, 705 (1956).

83. Kenneth I. Winston, *Is/Ought Redux: The Pragmatist Context of Lon Fuller’s Conception of Law*, 8 *OXFORD J. LEGAL STUD.* 329, 347 (1988).

84. See LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 276 (Kenneth I. Winston ed., 1981) (“the 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); see also SUMMERS, *supra* note 80, at 151 (characterizing Fuller as “unquestionably the leading secular natural lawyer of the twentieth century in the English-speaking world”). 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 famous debate between Fuller and H.L.A. Hart becomes the whole story, with Fuller cast as a necessary, albeit unpersuasive, intellectual foil for the triumph of legal positivism. Such an impoverished reading lacks 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.

85. See SUMMERS, *supra* note 80, at 64.

86. Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 *J. LEGAL EDUC.* 457, 477-80 (1954).

“not a *system* of natural law but the natural-law *method*.”<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

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*.<sup>91</sup> 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 nature of law.<sup>92</sup> Unfortunately, one of Fuller’s famous analogies lies at the root of this misreading,

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87. FULLER, *supra* note 81, at 294, 296; *see also* LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 103-04 (1940).

88. 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. *See* FULLER, *supra* note 80, at 101, 153.

89. *See* Fuller, *supra* note 81, at 916.

90. FULLER, *supra* note 80, at 241.

91. 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. *See id.* at 39.

92. *See* Ronald Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller’s Novel Claim*, 113 U. PA. L. REV. 668, 675 (1965); Martin P. Golding, *Book Review*, 76 ETHICS 225, 227 (1966); H.L.A. Hart, *Book Review*, 78 HARV. L. REV. 1281, 1284-85 (1965).

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.<sup>93</sup> 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 into concluding that Fuller is adopting a wholly instrumental conception of the internal morality of law.<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> 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.<sup>97</sup> Positivists contend

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93. FULLER, *supra* note 80, at 155-56.

94. See, e.g., SUMMERS, *supra* note 80, at 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., LON L. FULLER, *The Lawyer as an Architect of Social Structures*, in *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 84, at 264 (architect); Fuller, *supra* note 86, at 473 (gardener); Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 379 (1946) (pastry chef).

95. See Dworkin, *supra* note 92, at 676 (blackmail and genocide); Golding, *supra* note 92, at 227 (golf); Hart, *supra* note 92, at 1286 (poisoning).

96. FULLER, *supra* note 80, at 131-32, 239.

97. When challenged with the example of the apartheid regime of South Africa, which appeared to be a legally effective government pursuing evil ends, 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. See *id.* at 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.

FULLER, *supra* note 80, at 154.

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 position appears unconvincing on its face, inasmuch as he appears to justify the inner morality of law on the basis of a causal connection with substantive public morality,<sup>98</sup> but it is important to remember that Fuller regards the two moralities as 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. Fuller argues that 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.<sup>99</sup> 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 explain better their nuanced connections.

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.<sup>100</sup> 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.<sup>101</sup> In response to his critics, Fuller described law as a relational rather than as an anonymous institution, and declared that it is this reciprocal relationship that inspires and demands the citizen's fidelity to law. Morality is possible at all only

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98. 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 REDISCOVERING FULLER (Willem Witteveen & Wibren van der Berg eds., forthcoming 1999).

99. See FULLER, *supra* note 80, at 205-06; see also SUMMERS, *supra* note 80, at 30.

100. 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 by claiming an ontological continuity of institutional means and substantive ends. See FULLER, *supra* note 84, at 47-64; see also Fuller, *supra* note 82, at 700 (arguing that understanding is rooted in "our shared human nature, a nature that in both of us is at all times incomplete and in process of development").

101. See FULLER, *supra* note 80, at 139, 192-93, 210, 219; Jeremy Waldron, *Why Law—Efficacy, Freedom, or Fidelity?*, 13 LAW & PHIL. 259 (1994).

within certain social settings, and the 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.<sup>102</sup>

With this degree of complexity and nuance in his account, it is clear that Fuller cannot hope to maintain strict neutrality toward ends that extend beyond the procedural principles of legality. In his final reply to the persistent criticisms of *The Morality of Law*, Fuller unambiguously concedes 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.”<sup>103</sup> This substantive commitment embodies nothing more than an affirmation of the reality of morality, which of course 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. More interesting is Fuller’s claim that the inner morality of law is premised on man’s nature as a communicative being.<sup>104</sup> 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.<sup>105</sup>

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

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102. One of Fuller’s many helpful metaphors makes this point clearly. 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. See Fuller, *supra* note 86, at 473.

103. FULLER, *supra* note 80, at 162.

104. See *id.* at 184-85.

105. See *id.* at 184.

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 morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another.<sup>106</sup>

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,"<sup>107</sup> and best explains his sustained argument that law is deeply connected with the practices and conventions of the community in which it is situated.<sup>108</sup> 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.

Recognizing his commitment to a substantive principle of open communication illuminates Fuller's project of eunomics, the study of good and workable principles of institutional design. Legal institutions serve as conduits for purposive activity, Fuller argued, and should be designed and utilized accordingly:

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.<sup>109</sup>

Fuller's natural law development of an "internal morality of law" is premised on the unavoidable use of practical reasoning within various institutional settings to develop substantive goals, rather than on elucidating pre-given ends.

Fuller's natural law philosophy can be understood fully only by

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106. *Id.* at 186.

107. Fuller, *supra* note 82, at 703.

108. See Gerald Postema, *Implicit Law*, 13 *LAW & PHIL.* 361, 377 (1994) (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).

109. Fuller, *supra* note 86, at 480.

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 in particular provide the conceptual resources necessary to appreciate and extend Fuller's important insights. Before drawing these connections, however, I turn to the different approach to natural law philosophy adopted by Fuller's colleague at the Harvard Law School, Lloyd Weinreb. Weinreb's important work within the classical natural law tradition adds refinement to the issues that Fuller raised in an almost intuitive manner.

*B. Ontological Natural Law and Deep Nomos: Lloyd Weinreb*

Lloyd Weinreb offers a natural law account of substantive morality, directly addressing the issues that Fuller bracketed in the course of developing his idea of an internal morality of institutional design. Weinreb explicitly criticizes Fuller's focus on procedural matters as wholly insufficient, echoing Fuller's staunchest critics in their assessment that his internal morality of law is not a morality at all.<sup>110</sup> Openly confronting the failures of post-Thomistic natural law theorizing, Weinreb sets for himself no less a task than rediscovering the wisdom of classical natural law and appropriating it to the problems and demands of contemporary society. Simply put, Weinreb rejects the modern deontological conception of natural law as the capacity of human reason to deliver moral prescriptions in particular cases in favor of the classical ontological conception of natural law as the affirmation of the objective reality of morality in social life:

If natural law is thought to affirm the truth of specific, concrete moral principles, which resolve actual moral dilemmas, then [my approach] barely touches it. . . . Belief that natural law gives expression to a kind of revealed moral code unfortunately persists, both among a small and rather special group of defenders of natural law (who are spectacularly unsuccessful in convincing anyone else) and among a much larger group, for

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110. See Weinreb, *Moral Point*, *supra* note 2, at 102-03, 195. In recent correspondence Weinreb acknowledges Fuller's pathbreaking importance as a natural law thinker but suggests that it was Fuller's misunderstanding of the ontological depth of his arguments that necessitates an extension of Fuller's prescient insights. Letter from Lloyd L. Weinreb, Dane Professor of Law, Harvard Law School, to Francis J. Mootz, III (May 8, 1998) (on file with author).

whom that view of natural law is sufficient reason not only to reject it but to ignore it.

There is another view of natural law, more consistent with its long historical development and more compatible with current philosophic thought . . . . From its earliest appearances in classical Greek culture, at the very centre of natural law was an affirmation of the reality of our moral experience, not merely as subjective feelings or belief but as objectively real, an aspect of what there is.<sup>111</sup>

Weinreb strongly asserts that,

[I]t is no part of the case for natural law that it furnishes conclusive answers to our concrete moral dilemmas. It never was and it is not now. The endings of Sophocles's great tragedies, in which the Greek source of natural law is most visible, are not pronouncements of moral truths. They are an affirmation of the truth of morality . . . .<sup>112</sup>

Weinreb embraces substantive natural law philosophy, then, but only with a revised sense of the potential fruits of this labor: "Natural law doesn't provide moral truths, it just rebuts skepticism and existentialism."<sup>113</sup>

Weinreb anchors his argument in an intellectual history that attributes the collapse of natural law philosophy to the movement away from classical conceptions. Under Weinreb's account, natural law originated as an effort by the ancient Greeks to explain the paradox that humans have free will, and yet are part of a causal universe. The Greek solution was *kosmos*, the notion that the universe in all respects reflected "rational unity" and "good order." This ontological belief is wholly naturalistic: All that should happen does happen, and all that happens should happen.<sup>114</sup> In response to the multicultural challenges of the Sophists, Plato and Aristotle developed very different accounts that nevertheless served the same function in the newly destabilized social milieu—opposing crude conventionalism with the assertion that moral principles can be derived from the nature of reality itself.<sup>115</sup> The Greek ontological tradition reached its strongest voice in Cicero's battle against

111. Lloyd L. Weinreb, *Natural Law and Rights*, in *NATURAL LAW THEORY*, *supra* note 64, at 278, 297-98.

112. Weinreb, *Case*, *supra* note 2, at 7.

113. Weinreb, *Moral Point*, *supra* note 2, at 208-09.

114. See LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 19 (1987). Weinreb argues that "the idea of a normative natural order and all that it implies is one of the strongest and deepest currents of Greek thought. It is the current that fed the idea of natural law." *Id.* at 42.

115. See *id.* at 29-34.

conventionalism—a seemingly inevitable byproduct of Rome’s far-flung empire-building—by joining reason, nature, and God to defend the idea that law is “of universal application, unchanging and everlasting[, and] valid for all nations and all times.”<sup>116</sup>

Weinreb credits Aquinas with transforming natural law by bringing it into direct relation with practical questions of morality and positive law. Aquinas sought to “reconcile divine providence with human freedom,” acknowledging that the moral order of eternal law does not determine appropriate human conduct in the particulars.<sup>117</sup> Against received wisdom, Weinreb argues that Aquinas was not proposing that natural law can serve as a guide for behavior or as a fixed standard of morality, but instead was intent on upholding “the divine origin and order of the universe without eliminating or contradicting our experience of rational freedom and without discarding the actual institutions of a human community.”<sup>118</sup> In Pauline Westerman’s terminology, Aquinas regarded eternal law as God’s “style” rather than a detailed list of rules, a “style” that rational beings could recognize and freely adapt to their own affairs.<sup>119</sup> Aquinas regards natural law as a non-inferential grasp of the divine style: Determinant moral rules do not follow logically from this understanding, but are the (always potentially fallible) result of conscientious reflection and prudential deliberation with others about the practical implications of the principles of the divine style.<sup>120</sup> Far from the dogmatic believer who used natural law to justify religious prescriptions, Weinreb argues that Aquinas remained firmly within the ontological tradition of natural law by seeking to account for the reality of moral action by human agents operating in a causal universe.

Weinreb argues that contemporary natural law theorizing has abandoned its ontological roots in favor of deontological theories about how we may specify rights and moral responsibilities through the use of reason. John Finnis is the most prominent example of this development, inasmuch as he reinterprets Aquinas as claiming that basic human goods are self-evident to reason,<sup>121</sup> and that practical

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116. *Id.* at 40-41 (quoting MARCUS TULLIUS CICERO, DE RE PUBLICA 3.22.33).

117. *Id.* at 56.

118. *Id.* at 62; see also Weinreb, *Moral Point*, *supra* note 2, at 195, 201 (explicating Aquinas’s argument).

119. WESTERMAN, *supra* note 61, at 31.

120. See *id.* at 72-73.

121. Finnis uses “self-evident” in a very strong sense that probably is better expressed by saying that certain human goods are *presupposed* in the very exercise of reason, for without these basic goods there could be no intentionality. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 64-69 (1980) (demonstrating by example that knowledge is a basic form of human good).

reason can work from these incommensurable goods to defensible resolutions of moral dilemmas.<sup>122</sup> Weinreb insists that Finnis's "natural law without nature" amounts to an empty promise that the power of reason can deliver moral prescriptions. Weinreb concludes that the natural law tradition finally stalls with the recognition of the indeterminacy of practical reasoning in a world rent with competing claims of right:

[T]o suggest that all that is involved [in moral decisionmaking] is being "simply reasonable" (rather than what will appear to many people as an exercise in casuistry to support a conclusion reached on other, undisclosed grounds) will convince only the already committed. Unless the basic goods and methodological requirements are kept at a suitable level of abstraction, from which conflicting concrete propositions can be derived, they are themselves not self-evident. They amount to wise but quite general moral counsel which is neither absolute nor, applied concretely, certain. To suppose that conclusions so grounded are themselves certain or that anyone who believes otherwise is simply mistaken, despite the disagreement of so many morally serious people, betrays a staggering confidence in one's own moral judgment and, at the deepest level, confusion about the nature of moral reasoning itself.<sup>123</sup>

Natural law thinking ceases to be philosophy under these conditions, Weinreb claims, and instead becomes a shallow rhetorical affirmation "in which one asserts the truth of one's moral premises on the basis of some authoritative source or simply because one is certain."<sup>124</sup>

Weinreb acknowledges that both the Greek belief in a unified normative order in nature and Finnis's rationalistic attempt to secure moral knowledge by reason alone are implausible accounts of our

122. See WEINREB, *supra* note 114, at 108-17.

123. Weinreb, *Moral Point*, *supra* note 2, at 199.

124. *Id.* at 200. Weinreb is properly criticized by Robert George for misreading Finnis as claiming that specific moral decisions are self-evident, when it is only the basic human goods that are self-evident. See Robert P. George, *Recent Criticisms of Natural Law Theory*, 55 U. CHI. L. REV. 1371, 1387 (1988). Finnis makes clear, following Aquinas, that there inevitably will be reasonable disagreements about numerous moral questions, especially in the context of legal decisionmaking. See John Finnis, *Natural Law and Legal Reasoning*, in NATURAL LAW THEORY, *supra* note 64, at 134, 151-52 (criticizing Dworkin's "one right answer" thesis); see also WESTERMAN, *supra* note 61, at 246-47 (arguing that Finnis must accept arbitrary choices between competing basic goods). However, Weinreb's more general argument is that Finnis obviously presumes that practical reason will resolve many more moral issues than it can in fact resolve. Weinreb's point is that to argue against someone by claiming that they are being "unreasonable" in persisting in a belief (such as that abortion or homosexual relationships are morally wrong) does nothing more than posit one's own beliefs in a particularly clumsy manner.

experience of normativity. "One as much as the other can only be assumed. [However, i]t does not follow that natural law is mistaken. For, whether we explain it or not, the experience of freedom remains."<sup>125</sup> He responds not by attempting to provide a new grounding for natural law philosophizing about moral and legal truths, but by returning to the ontological conception that natural law just is an expression of the human condition. Although conceding that a reductionist account of complete causality is logically possible, Weinreb argues that completely eliminating moral agency from our picture of the world would amount to embracing a fundamentally different conceptual paradigm that amounts to a change in a structural fact of our existence.<sup>126</sup> He views natural law philosophy, then, as an elaboration of the conceptual paradigm and pattern of social practices that order human experience and thinking as normatively laden activities.

One critic has charged that Weinreb "presents a sophisticated philosophical argument that, if valid, makes philosophy a largely meaningless exercise."<sup>127</sup> Weinreb admits as much, if one equates meaningful philosophy with divining answers from outside the practice in question.<sup>128</sup> However, Weinreb provides lengthy justification for continued development of the natural law tradition as an ontological inquiry that can inform our understanding of the human condition and facilitate ongoing practices, even if it cannot judge these practices from the heavens. In particular, Weinreb argues that our continuing political discourse about the values of liberty and equality—and the overarching discourse about the requirements of justice—provides access to the ontological experience of morality in modern life.<sup>129</sup> Seemingly antithetical claims about the scope of liberty and equality as necessary components of a just society do not evidence the absence of a natural law grounding for political and legal theory, Weinreb emphasizes, but instead are indicative of the deep *nomos* of contemporary social life that continues to attribute responsibility and desert.

Complete liberty is as impossible as complete equality, Weinreb argues, since both cases would amount to a renunciation of human freedom and our lived experience of responsibility and desert.

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125. WEINREB, *supra* note 114, at 126.

126. *See id.* at 265; *see also* LLOYD L. WEINREB, OEDIPUS AT FENWAY PARK: WHAT RIGHTS ARE AND WHY THERE ARE ANY 45 (1994).

127. George, *supra* note 124, at 1372.

128. *See* Weinreb, *supra* note 111, at 301 ("Natural law may not matter a great deal 'functionally'; it is not likely to affect how one's obligations are established, the weight one gives them, or the consequences of meeting or failing to meet them").

129. *See* WEINREB, *supra* note 114, at 224.

Justice can become a concrete feature of social life, then, only if the “unlimited extension of liberty and equality as abstract normative ideas” is contained.<sup>130</sup> Weinreb stresses that the power of reason cannot contain either as a principle—hence the long stalemate in political philosophy culminating in the dead-end of the Rawls-Nozick debate<sup>131</sup>—since the normative force of these principles emerges from lived social practices rather than as a matter of logical deduction from indubitable first principles. Weinreb argues forcefully that this social experience provides all the objective foundation that is necessary to gird moral reflection and deliberation when the social practices become problematic and engender debate:

It is important to emphasize that now as heretofore the case for natural law must be cast in ontological terms; it must affirm the actuality of morality, not merely as an attitude or belief, however widely shared, but as something objectively real or true. Such a case . . . is made by grounding responsibility on the deep conventions that constitute a human community[:] the fixed, established ways of the community that [are] themselves a ground of moral judgment [and that] are a matter of fact and contestable, although they have normative significance.<sup>132</sup>

Weinreb disputes the possibility of a purely procedural or transcendental conception of justice:

Without reference to the conventions of a community, in the deep sense of the Greek *nomos*, the idea of justice has no specific content. It expresses the abstract, antinomic requirements of desert according to freedom and freedom according to desert. If a community is on the whole stable and there is a high degree of coherence between professed principles of social order and actual practices, the shared, settled understandings of its members may sustain a general sense of what is just, which in turn supports the prevailing principles and practices. People will then perceive the community as adhering to an independent standard of justice, which does not merely

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130. *Id.* at 230.

131. Weinreb writes:

The theories of Rawls and Nozick are as convincing as they are because each of them elaborates one aspect of the complete idea of justice and excludes the other. . . . Nevertheless, the failure of each theory as a general theory of justice becomes evident when they are placed side by side. Both play the same game; and one does not succeed more than the other.

*Id.* at 240.

132. Weinreb, *Case*, *supra* note 2, at 10.

describe its practices but validates them.<sup>133</sup>

This experience is not a form of false consciousness, a desperate confusion of “is” and “ought,” but rather an objective reality that stands apart from subjective wishes:

Justice is conventional, as Protagoras said. It is variable from one community to another and within the same community over time, according to *nomos*. But it is not only that. It would be a mistake to conclude that, after all, justice is nothing more than a description of a community’s strongly held beliefs. For the experience of freedom is not open to question. . . . [T]he idea of justice itself is both descriptive and normative. The separation between what is and what ought to be fails us here, because the notion of a person [as a moral agent] inescapably unites them. The normative natural order is brought to its narrowest focus. Perhaps it ought not surprise us that the *kosmos* lies within ourselves.<sup>134</sup>

Deep practices and understandings bridge the is/ought distinction, for they are facts subject to description yet they also exert normative force sufficient to call particular practices into question. And so, when Weinreb writes that, left “to our own devices, we have no other guidance than the understandings and practices that inform the experience of freedom itself,”<sup>135</sup> he should not be misinterpreted as offering a crude conventionalist account of morality, but rather a natural law account of the objective nature of our historically-contingent normative experience.

Informed by this ontological account, Weinreb believes that philosophers should abandon the quest to provide a unifying justification, or even a complete account, of normativity, which just is a brute given of our experience.<sup>136</sup> Normativity does not represent a conceptual problem to be resolved, Weinreb insists, but rather a social experience to be fostered. Natural law philosophy has benefited from the progressive realization that certain questions that in the past were resolved by metaphysical assumptions about the unity of nature or a benevolent God must simply remain unanswered today. This acknowledgment, however, does not disable us from

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133. WEINREB, *supra* note 114, at 248. Weinreb argues that this holds not just for relatively stable societies, but for all societies to some degree. *See id.* at 232. In a subsequent essay, Weinreb makes this same analysis in connection with the problem of rights generally. *See* Weinreb, *supra* note 111, at 278.

134. WEINREB, *supra* note 114, at 249.

135. *Id.* at 241.

136. *See id.* at 263.

getting along “as a practical matter, as our predecessors did also.”<sup>137</sup> Today, political and legal resolutions of the competing values of liberty and equality serve as one of the important sites where the normativity of social practices and understandings is elaborated and continued. The role of the natural law philosopher is to reveal this dimension of our social experience and thereby to assist in this unavoidably pragmatic enterprise.

### *C. Fuller, Weinreb, and the Interpretive Turn*

Fuller and Weinreb both have developed sophisticated natural law philosophies that claim only limited cash value with regard to providing answers to specific questions, although both thinkers supply theoretical backing for the effort to maximize rhetorical knowledge within the ongoing practices of a given society. Fuller’s efforts to define a secular natural law theory are best read as addressing precisely this question with respect to the design and operation of 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. Similarly, Weinreb’s broader defense of man’s moral nature as a starting point for moral reflection and deliberation accords with the ontological commitments that subtend the contemporary “interpretive turn.”

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 “interpretive turn.” 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 that permit and promote rhetorical knowledge, and Weinreb’s natural law philosophy as an effort to acknowledge the real constraining force of a deep-seated, yet historically emergent, experience of morality. Viewed through this contemporary lens, Fuller and Weinreb are directly relevant to pressing questions in postmodern legal theory. Interdisciplinary synergy is not a one-way street, of course, and so I also argue that Fuller’s eunomics and Weinreb’s deep *nomos* lend pragmatic strength to the concept of rhetorical knowledge by serving as productive applications of contemporary hermeneutical and rhetorical philosophy to questions of legal theory and practice. By reintegrating the classical natural law tradition into contemporary

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137. *Id.*

discourse we can mitigate the forgetfulness that plagues all “new” philosophical movements.

It should be apparent that philosophical hermeneutics and the New Rhetoric share substantial common ground with Fuller’s eunomics, even if they employ the foreign vocabulary of contemporary continental philosophy.<sup>138</sup> 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 that demands a practical judgment. In these situations a person’s judgments both reflect her moral sense and also define it. Fuller’s eunomics is best reconceived as an attempt to outline the social framework in which rhetorical knowledge is possible.<sup>139</sup>

Fuller’s stubborn refusal to accept the conventional bifurcation of ends and means is properly linked to his pragmatist epistemology,<sup>140</sup> but this important precept is even better supported by drawing linkages to contemporary hermeneutical and rhetorical philosophy.<sup>141</sup> Gadamer invokes 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

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138. American pragmatism could serve as a useful intellectual bridge, given its affinities with Fuller’s philosophy, *see generally* Winston, *supra* note 83, as well as with the philosophies of Gadamer and Perelman, *see* Richard E. Palmer, *What Hermeneutics Can Offer Rhetoric*, in *RHETORIC AND HERMENEUTICS IN OUR TIME*, *supra* note 40, at 108, 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.

139. *Cf.* Kenneth I. Winston, *Legislators and Liberty*, 13 *LAW & PHIL.* 389, 400-03 (1994) (arguing that freedom is crucial for Fuller’s philosophy, in the sense of the freedom to participate effectively in civic processes that dialogically generate substantive values).

140. *See* Winston, *supra* note 83, at 329.

141. 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. *See* Winston, *supra* note 139, at 414; Kenneth I. Winston, *Introduction*, 13 *LAW & PHIL.* 253, 258 (1994). 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. *See* Peter Read Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 *MINN. L. REV.* 1073, 1140 (1986). 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.

available acceptable resolutions even if it does not determine final answers for all specific questions.<sup>142</sup> 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 a single 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 decisionmaking algorithm, but points of argumentation that respect the nature of man's social condition.<sup>143</sup> 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.<sup>144</sup>

Gadamer and Perelman emphasize that this is not a "skeptical extreme" at all, but instead an accurate picture of the operation of rhetorical knowledge that 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 on a pluralism of reasonable legal arguments matches the same demand for open and honest communication found in Gadamer's hermeneutics.

It should be even more apparent that Weinreb's natural law philosophy shares substantial common ground with Gadamer's hermeneutics and Perelman's rhetoric. The deep *nomos* that amounts to a lived experience of normativity in Weinreb's account is functionally equivalent to Gadamer's notion of traditionary prejudices and Perelman's notion of commonplaces. Moreover, Weinreb clearly aligns himself with Gadamer's claim that these foundational prejudices are changeable because they are subject to rhetorical elaboration and hermeneutical appropriation in response to specific problems that require practical resolution. Weinreb's assessment of the conflict between competing indeterminate

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142. GADAMER, *supra* note 6, at 319.

143. See FULLER, *supra* note 80, at 93-94 (citing Aristotle's *Nicomachean Ethics* regarding the inevitability of judgment rooted in contextual understanding).

144. Winston, *supra* note 139, at 412.

conceptions of liberty and equality in contemporary political life evidences this shared understanding:

Their descriptive content, referring to the actual pattern of liberties and equalities within a community, may acquire normative significance simply by the reformulation of conventional principles and practices and normative principles of social order. Reflecting on what is actually the case, as they do, such principles are regarded as unexceptional and objectively valid, or “absolute.” In that commonplace habit of thought is found the true modern analogue of earlier efforts to perceive a permanent, self-justifying reality in the actual course of natural and human events. So long as the transference from the actual to the normative is carried out inexplicitly, by means of ambiguities within the political vocabulary itself, it passes unnoticed. One may say that we confuse the familiar with the necessary. But we have no other choice.<sup>145</sup>

Just as Gadamer rescues truth from method, Weinreb rescues objective norms from rationalism.

Weinreb’s inquiries clearly are buttressed by Gadamer’s more ambitious analysis of all understanding. At times, Weinreb’s ontological account of normativity appears to be a kind of special pleading for a unique status that is wholly distinguished from the capacity for technical reason. However, Gadamer demonstrates that all understanding, including the methodological self-understanding of the human and natural sciences, is rooted in this same “hermeneutical situation,” and so normativity is neither more objectively real nor less objectively real than scientific consciousness. By situating Weinreb’s account in this broader project, we are in the best position to dispel the aura of mystery inevitably linked with invocations of natural law. Moreover, Fuller’s attention to procedural qualities that resonate with the hermeneutical situation and Perelman’s attention to the specific rhetorical practices by which justice is constituted and apprehended point the way to pragmatic inquiries that follow from Weinreb’s ontological claims. In this respect, Weinreb is similar to Gadamer, who also tends to focus on ontological claims at the expense of drawing pragmatic implications about desirable social forms of organization.<sup>146</sup> By joining Weinreb to

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145. WEINREB, *supra* note 114, at 231.

146. At one point, Weinreb acknowledges that his inquiry can be broadened, although he does not seek to work out these implications himself:

How a community’s *nomos* develops and changes, how it is communicated to individuals within it, how they acquire it and incorporate it within their own experience or reject it are the subjects of the human sciences—anthropology, sociology, psychology—and lie

the full breadth of the interpretive turn in philosophical understanding, his project would take on additional practical significance for scholars interested in questions of institutional design and competence.

If Gadamer and Perelman provide detailed and sophisticated accounts that gird the unconventional natural law approaches taken by Fuller and Weinreb, it is equally true that these legal scholars provide an important supplement to the interpretive turn by virtue of their more specific 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 knowledge in action. Like the rhetorical handbooks of antiquity, his essays provide needed general guidance for social practices that cannot be scripted in advance.<sup>147</sup> Fuller's analogies to craftsmen are obfuscating only because the socio-legal 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

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beyond our immediate interest. All that needs to be stressed is that a community's *nomos* provides specific content for the structural fact of human responsibility.

WEINREB, *supra* note 126, at 152. Of course, the point of the interpretive turn is to place less confidence in the social sciences and to attend more carefully to the character of the rhetorical practices that shape the *nomos*. As I argue below, Weinreb comes closest to pursuing this project in his analysis of rights discourse.

147. 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. See EUGENE GARVER, *ARISTOTLE'S RHETORIC: AN ART OF CHARACTER* (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 *ethos*, and so between *techne* and *phronesis*.

*Id.* at 35, 41, 77.

(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.<sup>148</sup>

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 practical scholarly activity is no less significant than their philosophical thinking.

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 of human reason. 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

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148. Lon L. Fuller, *A Rejoinder to Professor Nagel*, 3 NAT. LAW FORUM 83, 84 (1958).

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 can be 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.

It is no less true that Weinreb's philosophical inquiries can be viewed as a productive development of the themes of philosophical hermeneutics. In his most recent book, Weinreb demonstrates how his natural law philosophy clarifies the vexing problem of human and civil rights, and therefore brings a gripping, contextual focus to the broad themes of philosophical hermeneutics.<sup>149</sup> Weinreb regards rights "as the *normative constituents* of persons" located "in the deep, established ways of a community, its actual practices as well as its patterns of normative judgment."<sup>150</sup> Rights "are not what a person *ought to have*, but what a person *has*, or *is*, simply and entirely as a person"<sup>151</sup> by virtue of having been socialized into a set of practices.<sup>152</sup> The key to Weinreb's ontological analysis of rights is that he suggests how this philosophical insight translates into a pragmatic program to facilitate the deep conventions at work in the experience of normativity by avoiding conceptual misunderstandings. Specifically, he argues that his approach brings rights down to earth and avoids the all-or-nothing character of rationalistic inquiry by making clear that principles reflect the factual circumstances giving rise to rights in experience, and also that a "useful discussion about specific rights proceeds not by deductive reasoning but by analogy, not by proof but persuasion."<sup>153</sup> In other words, Weinreb claims that there are general contours for productively engaging in rights discourse that can be derived from his ontological understanding of rights.

Beginning with the understanding that there can be no formal structure for rights discourse since there "are no general principles,

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149. See WEINREB, *supra* note 126.

150. *Id.* at 6, 9.

151. *Id.* at 7.

152. See *id.* at 142-48.

153. *Id.* at 157-60.

factual or normative, which can themselves be demonstrated and from which conclusions about specific rights follow," Weinreb nevertheless reaffirms that "it is possible to reason about rights and, sometimes, to state confidently a conclusion about what rights there are."<sup>154</sup> Although Weinreb's discussion would benefit from the philosophical analysis of the function and practice of rhetoric developed by Gadamer and Perelman, his considerations of specific legal disputes concerning the rights of handicapped citizens and the rights of homosexuals lends a quality of reality to these philosophical theses. Weinreb's conclusion, that "with respect to rights of the handicapped and gay rights... the *nomos* of the community presently supports a range of specific rights,"<sup>155</sup> is less important than the form that his inquiry takes. Weinreb uncovers the lived experiences that lie behind the debate over abstract principles, attempting to foreground how the arguments over rights reflect commitments far deeper than a concern with logical consistency and compelling force. Although it is not expressly presented as a hermeneutical analysis, it is likely that Gadamer would find satisfaction in Weinreb's approach to rights.

#### *D. The Case of the Speluncean Explorers and the Problem of Affirmative Action*

My thesis that the natural law philosophies of Fuller and Weinreb are complementary to Gadamer's hermeneutical philosophy in important ways is demonstrated by discussing a concrete problem that each scholar employs to highlight his approach. First, I will refer to one of Fuller's most famous teaching problems, *The Case of the Speluncean Explorers*.<sup>156</sup> 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

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154. *Id.* at 169-70.

155. *Id.* at 194.

156. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

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 that the definition of murder, read in simple terms, was met. Fuller's case account consists of several judicial opinions each of which presents a different resolution 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.<sup>157</sup> 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 believe 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 beauty and enduring worth of Fuller's story 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 de-centering hermeneutical experience in which competing rhetorical claims all resonate with the reader's prejudices and aspirations to some degree, and none quite captures the reader's allegiance to a degree of absolute certitude.<sup>158</sup> The case

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157. Justice Foster contends, in part, that the dire circumstances facing the explorers amounted to a breakdown in the presuppositions that gird society, resulting in a suspension of legality itself until the explorers could be rescued. *See id.* at 621. 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. *See id.* at 619, 632. 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 decisionmaking. *See id.* at 643.

158. 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 decisionmaking that would not be acceptable to many scholars. In his jurisprudence casebook,

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.

When thrown into a hermeneutical-rhetorical event as compelling as Fuller's hypothetical, it is tempting to suspend judgment until decisionmaking 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."<sup>159</sup> Of course, Fuller's story brilliantly undermines the legitimacy of surrendering to such an intellectual and emotional paralysis. 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."<sup>160</sup> 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 enterprise of articulating the implications of shared purposes," and the activity of reasoned argument inevitably draws upon and helps to define a "community

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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* 1 (1949). This is precisely the scholarly approach that signals Fuller's commitment to rhetorical knowledge rather than to dialectical demonstration.

159. Fuller, *supra* note 156, at 631.

160. FULLER, *supra* note 84, at 93-94.

of shared purpose.”<sup>161</sup> 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. 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, and he insists that adjudication alone cannot accommodate the full range of rhetorical activity necessary in a complex and diverse society.<sup>162</sup> 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 pre-existing convention, as one traditional natural law theorist has alleged;<sup>163</sup> instead, the study of eunomics represents a detailed (even if unintended) meditation on the implications for legal process inherent in the substantive morality that defines law and gives it an institutional inner morality. Holding oneself open to conversation and the force of the better argument is

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161. *Id.* at 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.” *Id.*

162. Despite his understandable attention to adjudicative processes, Fuller does not even claim that adjudication is the quintessential hermeneutical-rhetorical forum. “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.

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 rules about contracting, but when it attempts to write contracts.

*Id.* at 120-21; *see also id.* at 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. FULLER, *supra* note 84, at 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. 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 356-73 (Thomas McCarthy trans., Beacon Press 1989) (1981). One need not endorse Habermas’s theoretical commitments to agree with this critical insight and to appreciate Fuller’s grasp of the incipient problem.

163. *See* Miller, *supra* note 78, at 231.

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.

Weinreb provides an equally compelling practical application of his natural law philosophy that reinforces the connections between his approach and the hermeneutical-rhetorical tenets of the interpretive turn. In his analysis of rights, Weinreb poses what appears to be a frivolous question but which turns out to be quite challenging: If a hard-working and dedicated young man with a deep desire to pitch for the Boston Red Sox tries out for the team but is turned away because he lacks talent, why do we not take seriously his claim that he deserves a spot in the pitching rotation? As Weinreb notes, "we simply conclude that he is 'responsible' for his lack of physical capacities and deny what he wishes; he has no claim to the job" in our estimation, whereas we readily conclude that the members of the team have a *right* to their positions.<sup>164</sup> What is the ground for this attribution of responsibility for the physical characteristics that life has dealt the young man, especially in light of his unmatched devotion and desire to be a pitcher for the Red Sox? Weinreb immediately defuses the first line of defense: that we are not talking of anything so grand as "rights" and "responsibilities," but instead just the application of criteria that arise within the narrow confines of a rule-bound game:

It may seem odd to look beyond the conventional way of choosing players because the status of baseball as a game, a limited practice governed by conventional rules, is unusually clear. But "life" is in large measure a composite of just such practices, not something different and separate from them. Nor is it self-evident what is and is not a game, governed by special rules. . . . [C]hange the venue only a little, from Fenway Park to Harvard Yard across the river. Is who is admitted to the university also just a matter of entitlement, governed entirely by whatever conventional admissions policies are in place? If so, then any practice at all may elude the demands of justice, provided only that it conform to its own well-established rules. But if not, why do we regard the carefree career of an undergraduate as "life" and the hard schedule of a professional

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164. WEINREB, *supra* note 126, at 72.

baseball player as only a game?<sup>165</sup>

The answer, of course, is that decisions are being made about the justice of the Red Sox tryouts no less than they are being made about the justice of the Harvard admissions process. Weinreb adds complexity to the mix to reinforce this point, noting that a Red Sox pitcher does not have an unlimited entitlement to the fruits of his physical capacities since we may find it just to tax his income to provide student loans to individuals such as the young man turned away from spring practice tryouts. The complex social practices that adjudicate the desert and entitlements of these persons go to the heart of Weinreb's natural law philosophy. Later in the book he addresses these complexities by providing an extended discussion of the problem of affirmative action, "if only to defend the national pastime," he notes with only partial irony.<sup>166</sup>

The question of affirmative action challenges our sense of justice quite unlike other public policy questions, Weinreb contends, because it brings sharply into relief the antinomic commonplaces of liberty and equality that are the mainsprings of our *nomos*, equally implicating our social acknowledgment of responsibility for one's situation as just desert and an entitlement to assistance as a matter of right:

We should not expect that disagreement and confusion about affirmative action will be resolved even over a long period of time. The community may come to regard long-standing practices as an acceptable political solution or simply as "the law." But no solution will be incorporated within the community's *nomos* as just, because the terms of the controversy preclude a consistent understanding of responsibility and rights.<sup>167</sup>

Defenders of affirmative action argue that members of groups that have suffered and continue to suffer discrimination do not deserve their situation, which bears the marks of this discrimination in untold ways, whereas opponents argue that they are not responsible for actions of others in the past. "Both make precise claims that leave us right in the paradox of the human condition."<sup>168</sup> Weinreb believes that there can be no definitive resolution of a debate framed in this manner, for it replicates the internal tensions of the lived ideal of justice itself.

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165. *Id.*

166. *Id.* at 73.

167. *Id.* at 191.

168. *Id.* at 190.

The example of affirmative action is provocative. Weinreb argues that natural law cannot deliver an answer to the dilemma because the social practices that are the ground of natural law are locked in irreconcilable opposition. Natural law provides easy answers to most questions of desert and responsibility just because these answers are implemented in the course of everyday life with little or no reflection, often within a relatively simple descriptive account of the matter in question, such as “that young man couldn’t strike out my grandmother.”<sup>169</sup> But it is precisely this concrete quality of natural law that necessarily opens the possibility that some problems cannot be resolved because they are framed in a manner that replicates “the antinomy of reason that gives rise to rights as the foundation of justice” in our society.<sup>170</sup> This is an important and easily missed insight, and represents the obverse of one of Gadamer’s most repeated points about hermeneutical understanding: A prejudiced forestructure of meanings is not a regrettable limitation on understanding, but rather provides the ground for our ability to understand at all.<sup>171</sup> The cost of knowledge is the inability to secure complete, absolute knowledge; the cost of objective moral experience is to be situated in a practical context and denied the God’s-eye view from nowhere.

What can a legal scholar say about the question of affirmative action, if indeed it represents the unresolvable tension of liberty and equality in modern life? Weinreb’s response is unclear. On one hand, he suggests that the stalemate in the natural law discourse over desert and responsibility means that the issue must be dealt with in terms of ongoing political compromise, preferably by legislative action rather than adjudication.<sup>172</sup> This appears eminently sensible and accords with Fuller’s conception of the role of adjudication as unfit for certain social issues, but it is not clear that so easy an answer is available. At the beginning of his discussion, Weinreb argues that the question of affirmative action cannot be resolved solely at the level of social policy because the questions involved are so deeply connected to the constitutive features of our *nomos*.<sup>173</sup> The most coherent reading of these seemingly contradictory statements is that Weinreb argues that we cannot *contain* the question at the level of social policy, but that upon deep reflection we must be content to

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169. *Id.* at 60, 64.

170. *Id.* at 194.

171. See GADAMER, *supra* note 6, at 361 (“To be situated within a tradition does not limit the freedom of knowledge but makes it possible”).

172. See WEINREB, *supra* note 126, at 192.

173. See *id.* at 189.

*resolve* it at that level.

However, in concluding his discussion, Weinreb does more than relegate the issue to crude political horse-trading. Reflection and further elaboration of the principles of justice that are operative in society are still possible if we devise a means of steering social processes away from these troubling dead-ends of practical reason:

Substantively, affirmative action programs should shift as much as is practicable from measures that are directly and overtly competitive to ones that are not. Instead of preferential selection of applicants for a limited number of places, [completely distinct social] programs should be designed to enhance the capabilities of members of groups that suffered the effects of past discrimination, who should then compete without preference for the available places.<sup>174</sup>

Weinreb does not claim that there is an easy solution that has gone unnoticed, but that reframing the question will be more productive:

Enhancement programs are not without cost, which must be met by the diversion of public funds from elsewhere or by increased taxation of private funds. The increase of power of those who benefit is matched by reduced power of those who are obliged to support the programs. But the right to keep one's property free from taxation is not widely asserted anymore; and the tradeoff of rights of those who benefit from taxation and those who are burdened is much less keenly felt. There are not specific winners and losers, as there are if persons compete directly for positions.<sup>175</sup>

The broader scope of Gadamer's philosophical inquiries into the hermeneutical-rhetorical nature of human understanding underwrites this move by Weinreb as something more than mere political compromise. The manner in which the debate over affirmative action is framed admits of no just resolution because constitutive elements of our lived experience of justice are thrown into fundamental opposition to each other, but this does not mean that it is impossible to deliberate about the justice of affirmative action. Weinreb demonstrates that a reconceptualization of the problem, which requires a high degree of hermeneutical sensitivity and rhetorical competence as described by Gadamer, can move a localized debate about justice to a more productive plane.

Weinreb has brilliantly shown the power of natural law thinking by

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174. *Id.* at 193.

175. *Id.*

presenting an insoluble case that requires a refashioning of the commonplaces of justice to frame better the problem and open fresh avenues of inquiry and deliberation. Natural law is not the guarantor of correct moral and legal judgment, it is the ground from which moral and legal judgment issues and against which such judgment is assessed. Weinreb exemplifies the situation not only of the legal philosopher, but of all persons facing moral decisions, when he merges his descriptive account of the practices that generate the debate over affirmative action with his prescription for easing the conflict. Weinreb, joining Fuller, contends that the rigorous bifurcation of “is” and “ought” cripples moral theorizing because it contradicts the experience of moral decisionmaking. We are the practices that we assess according to the criteria of the practices. In this paradox lies the wisdom of the classical natural law.

#### IV. NATURAL LAW AFTER THE INTERPRETIVE TURN: A GADAMERIAN ACCOUNT OF LAW IN FLUX

We have thus made a problem for ourselves by confusing the intelligible with the fixed. We think that making sense out of life is impossible unless the flow of events can somehow be fitted into a framework of rigid forms. To be meaningful, life must be understandable in terms of fixed ideas and laws, and these in turn must correspond to unchanging and eternal realities behind the shifting scene. But if this is what “making sense out of life” means, we have set ourselves the impossible task of making fixity out of flux.

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Struggle as one may, “fixing” will never make sense out of change. The only way to make sense out of change is to plunge into it, move with it, and join the dance.

—Alan Watts<sup>176</sup>

Developing the connections between Gadamer’s philosophical hermeneutics (as informed by Perelman’s rhetoric) and the natural law philosophies espoused by Fuller and Weinreb has been a complicated endeavor. Because there is no neat intellectual history to be traced in summary fashion, the project might appear at times to be provocative reporting rather than reasoned elaboration. But drawing these connections proves important and illuminating. We gain an increased understanding of the task of legal theory after the

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176. ALAN WATTS, *THE WISDOM OF INSECURITY* 43-44 (1951).

interpretive turn and also a more sophisticated understanding of the contours of the interpretive turn in light of our legal practices. It remains my task to underscore these gains in a practical manner.

The legal system is now a central feature of social organization, intervening substantially in matters of politics, relations of economic exchange, and even family relations.<sup>177</sup> Seemingly no aspect of contemporary life remains immune to the juridification of interpersonal relations.<sup>178</sup> The agora is now only faintly replicated in shopping malls and CNN-produced “town meetings,” and the power of medieval religious consciousness and the organizing functions of church bureaucracy are now only faintly replicated in the administrative secular state. In these circumstances, the rhetorical contests in courtrooms and legislative chambers across the country shape our public space as much as any other set of practices. Legal argumentation need not deal explicitly with matters of grave public import to effectuate its public function, since even the most simple dispute concerning alleged contractual obligations implicates basic questions of socially defined rights and duties.

Acknowledging the character of modern law, Gadamer and Perelman both look to the legal system as a manifestation of the cultural dynamics that they explore in their philosophies. The central problem of jurisprudence—accounting for the experience of stability within the tumultuous flux that is human existence—is the central

177. The pervasiveness of legal authority is reflected in the good-natured opinion by a federal district court judge who dismissed a suit brought by an individual seeking redress for a deprivation of his civil rights by “Satan and his staff.” *United States ex. rel. Mayo v. Satan and His Staff*, 54 F.R.D. 282 (W.D. Pa. 1971). Is it really surprising that a citizen who believes that “Satan has on numerous occasions caused plaintiff misery and . . . has placed deliberate obstacles in his path and has caused plaintiff’s downfall,” *id.* at 282, would demand legal redress? Is it really surprising that the judge could write a traditional (even if tongue-in-cheek) legal analysis of the procedural bars to suit? America is a nation of lawyers, we are told, but this is due to the fact that America is profoundly shaped by law and legal consciousness.

178. Jürgen Habermas characterizes the juridification of social life as a colonization of the hermeneutically-secured lifeworld by the system imperatives of modern legal institutions, and he refers to the increased regulation of family life and educational relationships as examples of this potentially dysfunctional development:

The formalization of relationships in family and school means, for those concerned, an objectivization and *removal from the lifeworld* of (now) formally regulated social interaction in family and school. As legal subjects they encounter one another in an objectivizing, success-oriented attitude. . . . If . . . the structure of juridification requires administrative and judicial controls that do not merely *supplement* socially integrated contexts with legal institutions, but *convert* them over to the medium of law, then functional disturbances arise.

HABERMAS, *supra* note 162, at 369. The importance of the legal system to modern political theory and sociological understanding is perhaps most dramatically confirmed by Habermas’s recent sustained effort to reconcile legal theory and democratic theory in a manner that is informed by his philosophical elaboration of a discourse ethics. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992).

problem of post-Enlightenment philosophical inquiry as well. But the problem can be more provocatively posed by confronting legal practice with contemporary philosophical critique and asking: How is it possible to account for law if we cannot escape our character as historical, finite beings buffeted by the flux of existence? It is this question that leads postmodern and deconstructionist legal theorists to shrug their shoulders without regret. Whether natural law thinking is relevant after the interpretive turn appears beside the point. The real question is whether *law* can survive the interpretive turn.

I will marshal the insights of Gadamer, Perelman, Fuller, and Weinreb to address this question, but I begin my discussion by returning to Justice Souter's opinion in the assisted suicide cases in order to ground my theoretical discussion in a pragmatic context. Souter issued his opinion in response to litigation challenging the constitutionality of criminal laws enacted by the states of Washington and New York that prohibited assisting another person to commit suicide. These cases attracted a great deal of attention and spurred controversy. For one thing, the cases present the dilemma of judicial review in sharp relief: The nearly universal practice of prohibiting assisted suicide was challenged on behalf of individuals who claimed that this democratic legislative action was an unwarranted infringement on their individual rights. Moreover, the breathtaking advances in medical diagnosis and technology during the past century that have extended life spans without conquering mortality have transformed the question of assisted suicide by terminally ill persons into a matter of passionate debate and pressing urgency. Justice Souter confronted this troubling issue with the firm conviction that judicial review demands the exercise of reasonable judgment,<sup>179</sup> a conception that provides an excellent touchstone for reflecting on the paradox of law within flux.

Souter begins his opinion by explaining the persistence of substantive due process analysis despite the widely perceived deficiencies of some of the most prominent cases to advance the doctrine.<sup>180</sup> Following Justice Harlan's famous dissent in *Poe v. Ullman*, Souter concludes that substantive due process analysis has endured because it is "nothing more than what is required by the

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179. Of course, the paradox of law within flux lies at the root of the problem in defining the rule of law as something distinct from the rule of men and women. See Mootz, *Rethinking*, supra note 5, at 149-64 (describing the experience of constrained innovation as the ground of the rule of law).

180. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2277-81 (1997) (Souter, J., concurring) (discussing a doctrinal legacy that includes widely criticized cases such as *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), and *Lochner v. New York*, 198 U.S. 45 (1905)).

judicial authority and obligation to construe constitutional text and review legislation for conformity to that text.”<sup>181</sup> Souter emphasizes that Harlan eschewed an ideological approach and paid judicious attention to detail and nuance in cases involving substantive due process challenges to state statutes.<sup>182</sup> Souter congratulates Harlan for openly accepting the unavoidable task of balancing individual liberty and state authority. According to Souter, substantive due process challenges require the Court first to identify individual interests “worthy of constitutional protection” and the opposing social interests, and then to assess whether the legislation in question falls within a reasonable range of legitimate resolutions of the conflict between the two interests or instead amounts to an arbitrary and purposeless restraint on the individual.<sup>183</sup> Souter emphatically rejects the Court’s pretense of identifying “fundamental” constitutional rights that exist as “extratextual absolutes,”<sup>184</sup> and he argues that Harlan’s common-law style balancing is the core of the substantive due process tradition. Souter explains that the *Lochner*-era economic due process cases are “deviant” precisely because they pursued “absolutist implementation” of abstract rights rather than attending to the details of the case before the Court.<sup>185</sup>

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181. *Id.* at 2281 (Souter, J., concurring).

182. It is difficult to pigeonhole Justice Harlan in the customary conservative-liberal matrix. A leading legal theorist and former clerk to Justice Harlan claims that he was “a true conservative—a judicial conservative and a conservative in social philosophy.” Kent Greenawalt, *Justice Harlan’s Conservatism and Alternative Possibilities*, 36 N.Y.L. SCH. L. REV. 53, 65 (1991). Justice Harlan’s biographer describes him as “not only open-minded” but “cosmopolitan in taste and outlook” and impatient “with provincialism and intolerance.” Tinsley E. Yarbrough, *Mr. Justice Harlan: Reflections of a Biographer*, 36 N.Y.L. SCH. L. REV. 223, 239-40 (1991). Harlan was known as the “great dissenter” in the liberal Warren Court era, see TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992), but liberal legal theorists have credited him with articulating some of the more enduring rationales for rights-based advances in constitutional law during this period, see, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 76-79 (1991) (praising the *Poe* dissent); Gerald Gunther, *Another View of Justice Harlan—A Comment on Fried and Ackerman*, 36 N.Y.L. SCH. L. REV. 67, 70 (1991) (“I have always thought it ironic, but not surprising, that the best part of the free speech legacy of the Warren Court, the part that has proved most lasting, came not from the pens of that Court’s liberals, but rather, repeatedly, from Justice Harlan.”); Nadine Strossen, *Justice Harlan and the Bill of Rights: A Model for How a Classic Conservative Court Would Enforce the Bill of Rights*, 36 N.Y.L. SCH. L. REV. 133 (1991) (praising Harlan’s respect for civil rights). My discussion is focused strictly on a single opinion by Justice Souter, but my reading may very well help to cast light on Harlan’s notoriously curious “natural law” approach to substantive due process adjudication.

183. *Glucksberg*, 117 S. Ct. at 2283 (Souter, J., concurring).

184. *Id.* at 2281, 2283 n.10 (Souter, J., concurring). Souter does acknowledge that the characterization of some rights as “fundamental” is helpful if what is meant is that the legislative action will be assessed more strictly, or in other words that the range of reasonableness within which the legislature may act will be drawn more narrowly. *Id.* at 2283 n.9 (Souter, J., concurring).

185. *Id.* at 2279 (Souter, J., concurring).

Chief Justice Rehnquist, writing for the majority of the Court, rejects Souter's reading of the legal tradition and argues that substantive due process adjudication can rise above the subjective value preferences of the judge only if constitutional protection is limited to individual fundamental rights that are objectively rooted deep in the nation's history, tradition, and practices.<sup>186</sup> Wary of repeating the *Lochner* mistake, the Court traditionally limits constitutional protection to fundamental rights, and then further attempts to constrain judicial discretion by limiting fundamental rights to those principles and practices deeply rooted in history. Following this methodology, Rehnquist rejects arguments in favor of recognizing a constitutional right to assisted suicide by reciting the long history of legal opposition to suicide and the continuing near-universal ban in "civilized" countries on assisting another person to commit suicide.<sup>187</sup> Rehnquist's deference to a supposed objective reality of history raises profound problems,<sup>188</sup> but he issues a legitimate pragmatic challenge to Souter: What is to serve as the scale for balancing interests in the absence of "objective" history? Souter's response to this challenge is somewhat opaque, but drawing out his argument moves us to the crux of the jurisprudential question.

Justice Souter's understanding of the nature and practice of argumentative reason, as it is exercised in substantive due process cases, provides a concrete example of the themes in this article. Abandoning hope of developing a formal methodology for determining substantive rights, Souter nevertheless insists that adjudication is constrained by the ordinary strictures of critical discourse. "The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts

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186. *See id.* at 2268.

187. *Id.* at 2263. Rehnquist summarizes his position quite effectively: "To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every state." *Id.* at 2269.

188. Even if it were possible to avoid the radical historicist critique of objective history, *see, e.g.*, JOSEPH MARGOLIS, *THE FLUX OF HISTORY AND THE FLUX OF SCIENCE* (1993) [hereinafter, MARGOLIS, *FLUX OF HISTORY*]; JOSEPH MARGOLIS, *INTERPRETATION RADICAL BUT NOT UNRULY: THE NEW PUZZLE OF THE ARTS AND HISTORY* (1995) [hereinafter MARGOLIS, *INTERPRETATION RADICAL*], Rehnquist's formulation appears to extend constitutional protection only when the legal and social traditions have clearly established the existence of the right being asserted, and so his view of constitutional liberties amounts to protection against a rogue legislature that suddenly "takes back" freedoms openly acknowledged in the past. Justice Souter characterizes this narrow view as "equating reasonableness with past practice described at a very specific level." *Glucksberg*, 117 S. Ct. at 2281 (Souter, J., concurring).

always have exercised: reasoned judgment.”<sup>189</sup> Souter emphasizes that Harlan championed the tradition of substantive due process jurisprudence not as a vehicle for courts to make policy decisions, but as a principled assessment of whether legislative policy decisions fall within the zone of reasonableness.

First and foremost, the persuasiveness of a litigant’s claim is strongly influenced by how broadly she expresses the competing interests, and the result in a case often is determined by how broadly the Court chooses to characterize the interests at stake. The assisted suicide cases demonstrate this feature of critical discourse quite distinctly. Chief Justice Rehnquist characterized the question before the Court as whether individuals have a constitutional right to “aid another person to commit suicide,”<sup>190</sup> whereas Justice Souter characterized the claimed interest as being much more narrow in scope: “[W]e are faced with an individual claim not to a right on the part of just anyone to help anyone else commit suicide under any circumstances, but to the right of a narrow class to help others also in a narrow class under a set of limited circumstances.”<sup>191</sup> It is no exaggeration to conclude that these different formulations explain much of the substantial differences in the resulting analyses.

It may not be clear what constraint inheres in the seemingly destabilizing acknowledgment that framing a question is an important factor in analyzing the question, but it is at this point that Souter would insist upon close attention to the factual circumstances surrounding the claimed right. Courts are not competent to issue advisory opinions that declare broad constitutional rights in advance of disputes because the rights in question emerge only from the details of practical confrontations rather than as deductions from guiding principles. Therefore, the Court must assess the “good reasons” offered by the parties to justify the desired result—good reasons that are rooted in the constitutional tradition but are not

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189. *Glucksberg*, 117 S. Ct. at 2284 (Souter, J., concurring) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992)). Souter’s opinion in *Glucksberg* provides the detailed backing for the plurality opinion in *Casey*, which similarly invoked Justice Harlan’s dissent in *Poe*. See *Casey*, 505 U.S. at 849-50.

190. *Glucksberg*, 117 S. Ct. at 2269 (quoting the language of the state criminal statute under attack).

191. *Id.* at 2286 (Souter, J., concurring). At the outset, Souter emphasizes that plaintiffs appealing from summary judgment are entitled to a judicial presumption that all contested factual disputes will be resolved in their favor at trial. Moreover, Souter is careful to note that the plaintiffs are challenging the statutes only as applied to mentally competent, terminally ill patients who have made a knowing and voluntary decision to end their life with a physician’s assistance. The plaintiffs sought relief only from an absolute ban on this practice by the state and readily conceded the state’s constitutional authority to impose reasonable regulations to ensure that assistance is rendered only to those persons making a free and informed decision to commit suicide. See *id.* at 2276.

necessarily equivalent to historically recognized rights:

Common-law method tends to pay respect . . . to detail, seeking to understand old principles afresh by new examples and new counterexamples. The “tradition is a living thing,” albeit one that moves by moderate steps carefully taken. “The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take its place in relation to what went before and further [cut] a channel for what is to come.” Exact analysis and characterization of any due process claim is critical to the method and to the result.<sup>192</sup>

Souter insists that the refusal to criminalize suicide in America reflects part of the long legal tradition respecting a person’s bodily integrity, a tradition that is demonstrated with greatest pertinence by the Court’s holding in the abortion cases that a woman has the right to secure medical assistance to terminate her pregnancy.<sup>193</sup> This general feature of American legal and social traditions does not provide the answer to the dispute, since it must be translated to the complex social, psychological, economic, and bureaucratic settings in which the practice of assisted suicide would take place,<sup>194</sup> but there is a necessary interplay between contextual analysis and recourse to generalized principles that extend beyond traditionary understandings.

Justice Souter concurs with the result reached by the majority because he finds that the state ban on assisted suicide does not interfere with the humane care of terminally ill patients and represents a reasonable approach to the problem of involuntary euthanasia. He rests his decision on the pragmatic realities attendant

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192. *Id.* at 2284 (Souter, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 542, 544 (1961) (Harlan, J., dissenting)) (citations omitted).

193. *See id.* at 2288 (Souter, J., concurring). The most telling feature of the majority opinion authored by Chief Justice Rehnquist is the point at which he demonstrates that the abortion cases do not *compel* the conclusion that there is a constitutional right to assistance in committing suicide, coupled with absolute silence about whether these cases lend any *persuasive* force to the plaintiff’s claim. *See id.* at 2270-71. Rehnquist invokes history only selectively—the abortion cases clearly are deemed outside the legitimate history of due process clause jurisprudence, with the result that they are read as narrowly as possible—providing an object lesson in why history cannot provide the objective ground of decisionmaking that he purportedly desires. The Court’s generalized rhetoric about judicial deference to deeply rooted features of our social and legal history carries tremendous persuasive force. However, the analysis of the facts of the case before the court is facially manipulative and dismissive of the full history of due process jurisprudence and the actual practices surrounding the care of terminally ill people.

194. Of course, Justice Souter does not pretend that he has provided such a detailed and nuanced contextual analysis in a judicial opinion. In large part, his decision to concur in the result reached by the majority is motivated by his belief that legislatures are more competent to make such assessments at this point in time. *See id.* at 2293 (Souter, J., concurring).

to recognizing the right in question rather than on a concern with ensuring the conceptual rigor of a deferential substantive due process jurisprudence. Souter agrees with the majority that a “case for the slippery slope is fairly made out” in the case, but it is the slippery slope of unforeseen and unwelcome expansion of the practice of assisted suicide that might follow from overturning the criminal laws rather than a slippery slope of unprincipled decisionmaking.<sup>195</sup> Souter concurs in the result only; his reasoning and method of justification is markedly different from the majority approach. In what follows I argue that Souter’s hermeneutic attitude in deciding this case represents a realistic portrayal of natural law decisionmaking after the interpretive turn in a manner that illuminates Gadamer’s philosophy. More succinctly characterized, Souter demonstrates how there can be law in flux.

One might expect that conservatives and liberals alike would fear that Souter is embracing a mysterious natural law account of rights, untethered from objective criteria and ultimately a matter of the subjective preference of the judge.<sup>196</sup> The natural law philosophies developed by Lon Fuller and Lloyd Weinreb help to assuage this fear. Fuller’s conception of natural law as a *method* is closely linked to Deweyan pragmatism, and he forcefully rejects the traditional natural law effort to deduce substantive principles of morality. Fuller’s approach underwrites Souter’s rejection of extra-textual absolutes as grounds for constitutional rights in favor of a rich, contextual analysis of the details of the situation in light of evolving principles and traditions. Clearly, the statutes banning assisted

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195. *Id.* at 2791 (Souter, J., concurring).

196. Souter’s concurring opinion was joined expressly by no other Justice. Similarly, the plurality opinion in *Casey*, generally understood to have been authored by Justice Souter, did not gain a majority.

Justice Scalia has challenged Souter’s approach, arguing in his *Casey* opinion that an invocation of “reasoned judgment” ultimately reaches toward “nothing but philosophical predilection and moral intuition.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in part and dissenting in part). Moreover, he insisted that the uncertainty and instability that has plagued *Roe v. Wade* and its progeny demonstrates the “emptiness” of the concept of reasoned judgment. *Id.* at 982.

More recently, Justice Scalia reacted with alarm to Justice Souter’s opinion in *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), a case holding that a police officer did not deprive a motorcycle passenger of his substantive due process right to life by engaging in a high-speed chase at close distance. Although Scalia concurred in the judgment, he equated Justice Souter’s “shocks the conscience test” with the “atavistic methodology” that the Court had specifically rejected in *Glucksberg*. *Id.* at 1724. Scalia derided the apparently boundless subjectivity in Souter’s approach and refused to consider whether his “unelected conscience” had been shocked. *Id.*

In his concurring opinion, Justice Kennedy (joined by Justice O’Connor) emphasized that the “shocks the conscience” test must be understood as an objective test that is informed by tradition, precedent, and historical understandings. *See id.* at 1721-22 (Kennedy, J., concurring).

suicide meet Fuller's criteria of law and cannot be disregarded as null acts. But Fuller's natural law method reaches beyond this bare procedural lesson and provides a model of adjudicating troubling issues that present a conflict between deeply rooted moral beliefs within a tradition. Legal institutions can foster practical reasoning about desirable moral ends and appropriate means of achieving them, Fuller stressed, and "social architects" should honor one substantive directive above all: Open up communication for the kind of deliberation and decisionmaking undertaken by Souter. Moreover, Fuller's close analysis of the various modes of lawmaking available to foster such communication lends support to Souter's conclusion that the question of assisted suicide is better addressed by legislative bodies, at least at the present time.

Weinreb's natural law account of moral commitments as lived experiences rather than as the dictates of reason also serves to clarify Souter's substantive due process jurisprudence. Weinreb explains that morality is a structural feature of our existence, defined by deeply constitutive conventions even as it works at times to challenge conventional behavior. He provides a sophisticated account that underwrites the intuitions that lead Souter to embrace Justice Harlan's seemingly curious commitment to tradition and contextual decisionmaking as the appropriate grounds from which to criticize certain conventions. When the debate over affirmative action deadlocks in the antinomy of liberty and equality, Weinreb counsels a rhetorical reconfiguration that can foster reasonable action and a further development of social traditions. In similar fashion, Souter is wary of becoming trapped in a battle of abstract ideals and he holds open the possibility that further constitutional review will be appropriate as contexts and background assumptions about assisted suicide continue to change.<sup>197</sup>

Souter's opinion represents the kind of adjudication that is anticipated in the non-traditional natural law orientations developed by Fuller and Weinreb. Reconceived as the effort to develop a heterogeneous and dynamic natural law approach to the adjudication of constitutional rights, Souter's analysis acquires greater depth while still preserving its pragmatic qualities. Souter's description of legal reasoning is perhaps best captured in Philip Selznick's description of the "community of reason" that girds moral

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197. Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 464 n.677 (1998) (citing with approval Justice Souter's "intriguing suggestion" that the Court need not declare that a state practice either is constitutional or unconstitutional, but instead can permit continued "democratic experimentalism" by the states, subject to further judicial review).

reflection.<sup>198</sup> In a manner that is congenial to Fuller and Weinreb's work, Selznick contends that moral reason is anchored in an objective conventional order that is developed through practical reasoning, and that this practical reasoning at times presses beyond conventions by reconstructing elements of received tradition. Selznick's understanding of the dynamics of moral knowledge matches Justice Souter's similarly worded depiction of the critical component embedded in common law decisionmaking:

Critical morality is not made up out of whole cloth; it is not a rootless figment of the moral imagination. Rather, it is grounded in the experience and ethos of a particular culture and, at the same time, reaches within and beyond that experience for objectively warranted principles of criticism. We have no real choice. The *pre-judgments* that form our minds are necessary starting points for moral reflection. Indeed they are more than starting points. They are necessary to reflection because they are, in varying degrees, vehicles of congealed meaning and tacit understanding.<sup>199</sup>

Like Souter, Selznick insists that the grounds for objective experience also contain the motivation for critical reflection:

From the standpoint of critical morality . . . parochial experience may not be taken as final or treated as an unqualified end in itself. There must be a corollary commitment to press the particular into the service of the general, that is, to draw from one's special history a universal message. To do so is, inevitably, to create a basis for criticizing one's own heritage, not only from within but also from the standpoint of others' experiences and more comprehensive interests.<sup>200</sup>

Moral reflection proves to be a suitable model for legal reasoning (and *vice versa*), even though it is important to distinguish the different contexts in which moral judgment and legal judgment take place and the different purposes each serves. Souter does not expressly adopt a natural law position, but his approach to constitutional adjudication of due process rights makes the most

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198. Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445 (1987). Selznick develops his ideas at length in PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* (1992). Selznick's adoption of Dewey's pragmatic naturalism provides strong links to Fuller, whom he cites with approval, and his contention that we need to move beyond a purely procedural reading of Fuller's internal morality of law matches my reading of Weinreb's contribution to the non-traditional reading of natural law philosophy.

199. Selznick, *supra* note 198, at 460-61.

200. *Id.* at 461.

sense when it is characterized in terms of the pragmatic and ontological accounts offered by Fuller and Weinreb.

This natural law reading of Souter's due process jurisprudence aligns his practical activity with Gadamer's philosophical hermeneutics. Using the natural law philosophies of Fuller and Weinreb as helpful bridges, Souter's jurisprudence and Gadamer's philosophy represent expressions of the same experience, although these expressions fall on opposite ends of the practice-theory continuum. Gadamer does not regard legal practice as a technical discipline removed from the intellectual rigor of philosophical inquiry, but instead looks to legal practice as a compelling manifestation of the hermeneutical situation that is the focus of his philosophy. As Gadamer insists, legal practice provides a model of the relationship between past and present that is the cornerstone of human understanding.<sup>201</sup> Souter's effort to adjudicate with integrity the claims made by terminally ill patients and their physicians represents a conscious effort to hold himself open to the complexities of the case before the Court while remaining true to broader guiding principles that emerge from a developing tradition. This is precisely the activity that Gadamer analyzes in his discussion of the application of a traditional text to the present concerns of the reader. Like Souter, Gadamer argues that application "does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. [Application] is the very understanding of the universal—the text—*itself*."<sup>202</sup>

Souter's legal pragmatics also illuminates the importance of the tradition of rhetoric to Gadamer's philosophical hermeneutics. Applying a governing text to a contemporary dispute involves the interpenetration of the universal and the contextual, an event that is captured not only in the classical natural law tradition but also in the classical rhetorical tradition espoused by Vico and transformed by Perelman. The significance that Gadamer places on argumentation as a refashioning of pre-judgments is matched by Souter's description of the adjudicative task. Souter's practice affirms that rhetorical knowledge is possible and that human understanding is dialogical by establishing that substantive due process is not mere whim or an arbitrary assertion of power. The classical conception of rhetoric as

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201. Gadamer writes:

The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means merely for that reason an arbitrary revision. Here again, to understand and to interpret means to discover and recognize a valid meaning.

GADAMER, *supra* note 6, at 328.

202. *Id.* at 341.

*logos*, which I have termed “rhetorical knowledge,” is the core of Gadamer’s philosophy and Souter’s practice.

It may not yet be clear what comfort is gained by acknowledging that Souter’s judicial opinion meshes quite nicely with Gadamer’s philosophical hermeneutics. Can Gadamer’s philosophical writings provide a deeper theoretical understanding that reaffirms the legitimacy of—or even provide guidelines for improving—Souter’s judicial practice? Gadamer famously argues that the principal cause of the modernist intellectual predicament has been the illegitimate extension of the methodology of the natural sciences to humanistic inquiry, leading most commentators to conclude that Gadamer rejects the idea of developing a methodology of interpretation. In fact, this conclusion is directly at odds with Gadamer’s philosophy. As Gary Madison emphasizes, Gadamer rejects the expansion of formal methodology—a technique that delivers exact knowledge—to the humanities, but he does not foreclose the development of rhetorical principles to serve as aids in exercising good judgment when choosing between competing interpretations.<sup>203</sup>

There can be no *science* of interpretation. This however, does not mean that interpretation cannot be a rigorous (if not an exact) discipline, an art in the proper sense of the term, and that one cannot rationally *evaluate* interpretations.

... It becomes perfectly reasonable to say that while no interpretation can ever be shown to be the “correct” one, some interpretations are, nonetheless, clearly better than others.<sup>204</sup>

Gadamer’s hermeneutical ontology implies a rhetorically based epistemology, a set of guiding principles by which legal practice can be assessed and criticized, even if without scientific precision and determinacy. Gadamer provides the theoretical backing for the practices that constitute law within flux; not in the sense of authorizing those practices from a privileged perch of reason, but in the sense of drawing general conclusions about the contours of those practices and describing how those practices may be fostered.

Gadamer develops what can be fairly termed a “methodology of rhetorical knowledge” in his recovery of the concept of human “experience” from the ahistorical attitude of methodological science.<sup>205</sup> Recalling Aristotle’s famous metaphor of disparate

203. See MADISON, *supra* note 13, at 28.

204. *Id.* at 31, 34-35. This is the same point made by Georgia Warnke in the course of developing Gadamer’s insight that all understanding involves an “anticipation of completeness” by the interpreter. See Warnke, *Law*, *supra* note 4, at 409-12; see also Warnke, *Reply*, *supra* note 4, at 440.

205. See GADAMER, *supra* note 6, at 346-62; JAMES RISSER, HERMENEUTICS AND THE

observations coalescing into knowledge like a fleeing army that suddenly, one by one, turns and stands fast in a unified manner to meet the enemy, Gadamer argues that the flux of human experience does yield provisional stability.<sup>206</sup> He radicalizes Aristotle's analysis, though, by rejecting the presumption that the army originally stood fast before being thrown into only temporary disarray. Gadamer insists that the flux of experience is primordial and that "everything is co-ordinated in a way that is ultimately incomprehensible" through a never ending series of experiences.<sup>207</sup> Gadamer concludes that, notwithstanding the lack of fixed and eternal grounds, experience educates principally because it conditions us to remain open to new experiences:

The truth of experience always implies an orientation toward new experience. [The experienced person proves to be] someone who is radically undogmatic; who, because of the many experiences he has had and the knowledge he has drawn from them, is particularly well equipped to have new experiences and to learn from them. The dialectic of experience has its proper fulfillment not in definitive knowledge but in the openness to experience that is made possible by experience itself. . . . Thus, experience is experience of human finitude.<sup>208</sup>

The methodology of acquiring rhetorical knowledge, then, is to cultivate an openness to further experience.

Gadamer distinguishes genuine hermeneutical experience from two modes of inauthentic experience. On the one hand, an interpreter might objectify her experience by subjecting it to the methodology of the natural sciences and seeking universal patterns.<sup>209</sup> In legal theory this attitude is exemplified by dominant approaches in the law and economics movement. Although this objectifying attitude can be productive in certain contexts, by distancing the interpreter from the experience it thereby sharply limits what can be gained. On the other hand, an interpreter might co-opt an experience by presuming to understand it in its full historical significance as a closed event.<sup>210</sup> In legal understanding this attitude is exemplified in the ideology of originalism. Although this attitude also can be enlightening to some degree, it ignores the effect of the interpreter's own historical situatedness as a dimension of the

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206. See GADAMER, *supra* note 6, at 352.

207. *Id.*

208. *Id.* at 355, 359.

209. See *id.* at 358-59.

210. See *id.* at 359-61.

experience. Against these two inauthentic comportments, Gadamer describes “the openness to tradition characteristic of historically effected consciousness” as the mode of experience that best facilitates humanistic understanding.<sup>211</sup>

In authentic hermeneutic experience an interpreter acknowledges that the tradition is not something to be examined from a distance but is a lived source of understanding. “I must allow tradition’s claim to validity, not in the sense of simply acknowledging the past in its otherness, but in such a way that it has something to say to me.”<sup>212</sup> Genuine experience requires the actor to relinquish control over the event. The methodology of hermeneutical appropriation is no more and no less than remaining open to truths that are not the product of one’s own manipulative techniques. “The hermeneutical consciousness culminates not in methodological sureness of itself, but in the same readiness for experience that distinguishes the experienced man from the man captivated by dogma.”<sup>213</sup> Gadamer’s critique of the methodological consciousness of the natural sciences leads him to articulate a broader conception of method appropriate to hermeneutical understanding: *holding oneself open and remaining ready for experience*.

Methodological openness to hermeneutical experience is not exhausted by consciously subsuming one’s subjective interests. An experience has a continuing effect on the individual because it is the subject of rhetorical articulation and evaluation. For example, an individual who first lives and interacts with a member of a racial minority in a college dormitory might have an authentic hermeneutic experience by holding herself open and remaining ready for experience. But this kind of experience is not a discrete event that “ends.” Years later, this experience plays a role in the individual’s dialogue with herself about affirmative action in higher education by serving as a point of reference for rhetorical invention. Moreover, it is accurate to say that the experience *changes* as a result of ongoing rhetorical appropriation, since it is not a closed historical event in physical time but a meaning-laden experience affecting the present.<sup>214</sup> This “history of effects” is felt most strongly in the application of

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211. *Id.* at 361.

212. *Id.*

213. *Id.* at 362.

214. Joseph Margolis develops this argument in defense of what he terms a “radical historicism.” See MARGOLIS, INTERPRETATION RADICAL, *supra* note 188; MARGOLIS, FLUX OF HISTORY, *supra* note 188. Margolis contends that “*sometimes*, an interpretation of the past alters the past without reversing time, without undoing the physical past,” and that “*history (and the historical past) need not be ‘finished’ or ‘closed’—in the sense in which the physical past is closed.*” MARGOLIS, FLUX OF HISTORY, *supra* note 188, at 157-58 (emphasis in original).

legal precedents and traditional narratives to present legal disputes, an activity that Justice Souter characterizes as the “common law method.” Gadamer’s methodology for obtaining rhetorical knowledge is not just a matter of having genuine experiences, then, but also requires an integration of these experiences into rhetorical deliberations with others.

We are now in a position to appreciate the full depth and complexity of Gadamer’s use of “conversation” as a metaphor of understanding. A conversation places heavy demands on the participants to the extent that they are oriented toward mutual understanding rather than seeking to manipulate the other for strategic purposes. The colloquial phrase “we fell into conversation” is revealing, since conversation is an unsettling experience that disrupts each subject’s pretense of control by bringing them outside of their aims and prejudices. Because it is an experience, conversation demands more than an attitude of polite listening. In stressing that the requirements of a true conversation are not easily met, Gadamer insists 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 conversation. But this means: Always recognize in advance the possible correctness, even the superiority of the conversation partner’s position. Is this too little? Indeed, this seems to me to be the kind of integrity that one can demand only of a professor of philosophy. And one should demand as much.<sup>215</sup>

Justice Souter approaches his judicial task in the spirit of hermeneutical conversation. Far from idle chatter, this mode of conversational understanding acknowledges the natural law groundings of legal practice while simultaneously rendering the law current by means of application and judgment.

Although a true conversation cannot be methodologically scripted in advance, it would be a mistake to assume that conversations cannot be facilitated and fostered. Gadamer’s hermeneutical-rhetorical philosophy and Justice Souter’s substantive due process jurisprudence represent different attempts to develop pragmatic aids for cultivating the art of conversational understanding. Gadamer claims that legal practice has exemplary significance for hermeneutical philosophy for just this reason: The rules of thumb for

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215. HANS-GEORG GADAMER, *On the Origins of Philosophical Hermeneutics*, in *PHILOSOPHICAL APPRENTICESHIPS* 177, 189 (Robert K. Sullivan trans., MIT Press 1985) (1977).

good judicial decisionmaking represent an important variation of a more general postmodern hermeneutical methodology of interpretation. Attentive to the factual singularity of the case at hand while remaining cognizant of the tradition against which questions arise, Justice Souter embodies the conversational character of understanding.

Gadamer's philosophical hermeneutics presents paradoxical challenges to conventional legal theory. On the one hand he is a postmodern thinker indebted to Heidegger's later philosophy, while on the other hand he remains a philosopher in the classical sense. He proposes a radical account of a universal hermeneutical situation, yet he revives the classical natural law tradition. The concept of tradition is central to his work, but he insists that understanding occurs only in the unceasing dynamic of application. These paradoxes all reflect the paradoxical experience of stability within flux, which is provisionally secured through hermeneutical understanding and rhetorical reasoning. Justice Souter confirms this insight from within legal practice, providing a point of contact between Gadamer's philosophy and social life. Although much work remains to be done to develop in greater detail the connections that Gadamer makes between philosophical hermeneutics, rhetorical philosophy, classical natural law, and legal practice, simply acknowledging that the connections exist is an important first step for legal theorists. In the end, there may be no better acknowledgment within legal practice of these connections than Justice Harlan's succinct wisdom concerning the nature of legal decisionmaking that Justice Souter found to be so persuasive. Hewing to tradition is essential to overcoming individual hubris, Harlan believed, but it is also important never to forget that the tradition is a living thing. Exploring this experience of law in flux, which is the mainspring of Gadamer's philosophical hermeneutics, is the task of contemporary legal theory.