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David Luban

Georgetown University Law Center, luband@law.georgetown.edu

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Rediscovering Fuller's Legal Ethics

DAVID LUBAN*

INTRODUCTION

Lon Fuller is the greatest American philosopher to devote serious attention to the ethics of lawyers. Indeed, he is arguably the greatest philosopher since Plato to do so. I don't suggest that Fuller was a philosopher of Plato's magnitude, but it is not preposterous to mention Plato and Fuller in the same breath. Their unique affinity was that both were thinkers whose broader philosophical concerns may plausibly be said to arise from reflections on the craft of law. In Plato's case, the effort to understand forensic argument, and to analyze why opinions about justice might be persuasive without being true, drives the inquiry in the Gorgias, the Republic, and the Sophist, and weaves in and out of the Apology, Theaetetus, Phaedrus, Protagoras, and Laws. In a sense, lawyers and their discourse represent for Plato all that is false and fallen in human life. Plato's ideas about the true and the good take shape as a response to the institutions that condemned Socrates.

Fuller also had an interest in forensic argument, and a major focus of his writing on legal ethics concerns the adversary system and the role of partisan advocacy in a decent social order. But Fuller's true passion was the role of the lawyer as an "architect of social structure"1 — the transactional lawyer rather than the litigator, the solicitor rather than the barrister. To a striking degree, Fuller's philosophy of law and social thought arise from his contra-Platonic appreciation of the social usefulness of lawyers — lawyers comprehended under the aspect of Vishnu the preserver, not Shiva the destroyer. Fuller's ideas about social order systematically generalize his appreciation of what kind of work good lawyers do, and it is not at all clear whether his anti-positivism generates or (as I sometimes think) derives from his ideas about lawyers' work. Whether this central strand of Fuller's thought can be reconciled with his defense of the adversary system is a question I address later in this Article.

* Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center. I presented this paper at a conference entitled "Rediscovering Fuller," at Tilburg University, The Netherlands, September 12-13, 1997. Many thanks to the participants at this conference, and particularly to Wibren van der Burg, who offered incisive comments on the paper. I also wish to thank my colleagues at Georgetown, who discussed the paper at a faculty workshop. Particular thanks go to Heidi L. Feldman, who gave me extensive comments on an earlier draft.

I. FULLER'S PARTIAL ECLIPSE

In the past three decades, Fuller's writings have fallen into partial eclipse. Philosophy of law students will probably read nothing of Fuller's work beyond — at most — the Problem of the Grudge Informer,² the King Rex parable,³ and perhaps the discussion of legal interpretation excerpted from his debate with Hart. The Law In Quest of Itself⁴ and Anatomy of the Law⁵ are out of print; Fuller's name does not appear even in the index of George Fletcher's recent and admirable introductory textbook on jurisprudence. Yet, in many ways, Fuller is the most satisfying and suggestive twentieth century writer on jurisprudence — the only one, in my view, who successfully knits together the abstract and the concrete, in the sense that his philosophy emerges seamlessly from the practice of law. What accounts for his neglect among legal scholars and students?

In large part, Fuller fell victim to a number of accidents. One was the fact that his great attack on legal positivism, The Law In Quest of Itself, appeared twenty years before Hart's The Concept of Law,⁶ which philosophers quickly came to think had superseded all earlier forms of positivism. The Law In Quest of Itself takes as its target a group of writers that no philosophers of the 1960s read seriously, or, to tell the truth, read at all (who was Somló, anyway?).⁷ Moreover, Fuller indulges in speculations about the psychology of legal positivism, emphasizing its love-affair with statist coercion, that would be very cheap shots if applied to Hart's non-coercion based alternative. When I took my first philosophy of law course in graduate school in 1971, The Concept of Law was its centerpiece, and Fuller's name was never mentioned.

Nonetheless, the brilliant second lecture of The Law In Quest of Itself, in which Fuller turns the tables on positivists by demonstrating that it is they, not the natural lawyers, who rely on occult entities and metaphysical postulations, can readily be applied to Hart's theory.⁸ Had post-Hart legal philosophers done so, I suspect that The Law In Quest of Itself might have achieved the status I believe it deserves, as the most persuasive critique of legal positivism ever written.

In part, post-Hart legal philosophers ignored Fuller's 1940 book because, as Kenneth Winston observes, "the generation of scholars immediately succeeding him regarded his work as failing to meet the standards of argument set by the dominant mode of discourse in Anglo-American philosophy."⁹ Winston puts the

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3. Id. at 33-38.
4. Lon L. Fuller, The Law in Quest of Itself (1940) [hereinafter Fuller, The Law in Quest of Itself].
5. Lon L. Fuller, Anatomy of the Law (1968) [hereinafter Fuller, Anatomy of the Law].
7. Fuller, The Law in Quest of Itself, supra note 4, at 26-41(discussing writings of Somló).
8. Id. at 45-95; see discussion infra notes 77-82 and accompanying text (demonstrating the applicability of Fuller's critique to Hart's theory).
matter diplomatically. English-speaking philosophy of the 1960s was dominated by the Oxbridge schools of Austin and Wittgenstein, of which Hart seemed the jurisprudential incarnation. Those old enough to have been studying or practicing philosophy in those years well remember the sense that a revolution was on — an Oxford-centered revolution that would sweep so-called “traditional philosophy” into the trashcan.

The triumphalism of the linguistic philosophers, the utter contempt in which they held all other philosophers, and their exhilarating sense that the New Methods would at last bring philosophical liberation, all meant that Fuller didn’t stand a chance. Conspicuous among the New Methods was a kind of relentless anality in argumentative style that Fuller lacked. (A friend who was at Cornell University in those halcyon years when its philosophy department was a Wittgensteinian beehive recalled to me, “It was fabulous. Back then, whenever a visitor gave a paper, the main criticism was that we didn’t understand his argument — and when someone on the faculty said they didn’t understand his argument, they really didn’t understand his argument! He was finished!” Liberation through constipation may seem puzzling, but there you have it.) Hart himself was too fine and too catholic a spirit to indulge in the kind of trashing that was the spirit of the time, but it was obvious to every self-respecting linguistic philosopher that after Hart’s book, Fuller was not someone worth taking seriously.

A small but significant point was that Fuller’s rhetoric was all wrong. To take just one example, his occasional use of the word “intelligent” instead of “rational” as a term of approbation was enough to make a linguistic philosopher’s skin crawl. It sounded all too reminiscent of John Dewey and William James, whom Gilbert Ryle once derided as “those Great American Bores.” More damning was Fuller’s conviction that oughts and ises can’t be separated — this at a time when linguistic philosophers were convinced that ethics consists in analyzing something called “the logic of moral language,” which is surely of a different kind from “the logic of” other languages. It is instructive to re-read Ronald Dworkin’s 1965 criticism of The Morality of Law, which asks rhetorically

10. J.L. Austin and Ludwig Wittgenstein were lumped together, perhaps unfairly, by the so-called “ordinary language philosophers” of the 1950s and 1960s, who believed that both of them had devised a method for showing that philosophical problems are all pseudo-problems. The method consisted of attending very closely to the ordinary meanings of words and the distinctions we draw in ordinary language. As Wittgenstein put it, “When philosophers use a word . . . one must always ask oneself: is the word ever actually used this way in the language-game which is its original home? What we do is to bring words back from their metaphysical to their everyday use.” LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 48e §116 (G.E.M. Anscombe trans., 3rd ed. 1958). See J.L. Austin, A Plea for Excuses, in J.L. AUSTIN, PHILOSOPHICAL PAPERS 181-82 (J.O. Urmson & G.J. Warnock eds., 2nd ed., 1970) (describing the method of ordinary language philosophy). Hart acknowledges the influence in his preface: “[A]t many points, I have raised questions which may well be said to be about the meanings of words . . . In this field of study it is particularly true that we may use, as Professor J.L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomena.' ” HART, supra note 6, at vii.

11. IGOR STRAVINSKY & ROBERT CRAFT, THEMES AND EPISODES 250 (1967) (Robert Craft is quoting from his diary, recollecting Ryle’s table talk).
what Fuller's instrumental arguments have to do with *morality*, as a period-piece (though it is not only a period-piece). In the 1960s, everyone just knew that the moral and extra-moral uses of "good" were logically distinct. Only recently are we able to treat Dworkin's question as anything but a rhetorical one — and, perforce, to answer it.

Nowadays it is hard even to remember, let alone comprehend, the passionate dogmatism of those days, which rested on unarticulated prejudices inherited from logical positivism. Today, virtually all the titillating post-positivist research programs that in the 1960s made Fuller's world-view seem silly and antiquated have themselves sunk into the tar pits with hardly a residual bubble to mark their passing. Even the term "linguistic philosophy" sounds dated, like "key punch operator." Perhaps now we can read Fuller seriously once again.

If we do not, that is partly because Dworkin has assumed the anti-positivist mantle that Fuller once held. Yet it is striking how Fullerian some of Dworkin's arguments now seem. To take a conspicuous example, *The Law In Quest of Itself* clearly anticipates Dworkin's well-known chain novel metaphor from *Law's Empire*. In order to show that the *is* and the *ought* are hard to separate in human affairs, Fuller illustrates with the analogy of a person trying to retell a joke he has heard. The retelling "will be the product of two forces: (1) the story as I heard it, the story *as it is* at the time of its first telling; (2) my conception of the point of the story, in other words, my notion of the story *as it ought to be." These correspond with Dworkin's idea that applying law to a new case is like continuing someone else's incomplete story, an effort that requires us to consider both how well our furthering of the story fits the story as it was handed to us, and how well it advances it. Like Fuller, Dworkin argues that there is no sharp distinction between the two, and, like Fuller, Dworkin insists that to continue the story we must (re)formulate its point.

I do not mean to deny that Dworkin's jurisprudence is more proficient than Fuller's, nor to assert that Fuller is as important a philosopher. Dworkin's range of interests is not only different than Fuller's, but considerably broader. I do mean to assert that Dworkin's range of interests is not only broader than Fuller's, but considerably different. In particular, Fuller had a lively interest in the work that

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14. RONALD DWORKIN, *LAW'S EMPIRE* 228-54 (1986) (comparing the common law written by a group of authors, each of whom adds a chapter and passes the manuscript on to the next, so that a judge should view previous decisions by other judges as "part of a long story he must interpret and continue ...."). *Id.* at 238-39.

15. FULLER, *THE LAW IN QUEST OF ITSELF*, supra note 4, at 8.


17. *Id.* at 228-32.
lawyers actually do, an interest that, so far as I can tell, Dworkin completely lacks. And that interest, of course, is my topic.

One substantive difference between Fuller and Dworkin — indeed, not only Dworkin but the larger Zeitgeist of post-1960 legal theory — may also help explain Fuller's partial eclipse. As Owen Fiss perceptively notes, Fuller was a contracts scholar who was not only more interested in private law than in public law, but who regarded private law as the template to which public law should mold itself. In Fiss's terms, that means that Fuller erroneously viewed adjudication as dispute resolution rather than structural reform, and argued against the legitimacy of the "public law judge" — the heroic judges of the civil rights era, who reformulated procedure to embrace the polycentric disputes Fuller believed were unsuited for adjudication.

But the difference runs deeper than the theory of adjudication. Apart from lawyer-economists, all the most prominent American legal theorists of the past three decades have been public law scholars through-and-through, in the same expanded sense that Fuller was a private law scholar though-and-through: not only are these theorists more interested in public law questions, but they mold private law issues to a public law template. Even theorists such as Duncan Kennedy or Patricia Williams, who share Fuller's origins as contract scholars, make private law look like public law. Fuller's thought runs so firmly against the public-law grain of contemporary scholarship that it would be astonishing if he were taken seriously.

A final explanation of Fuller's partial eclipse may lie in political reactions to his work. Fuller regarded bureaucratic reform from above with a great deal of suspicion, applauding Edmund Burke for placing more reliance in the organic institutions of society. Fuller claimed that he was probably brought to "this conservative philosophy by my experiences in Germany and France," both of them bureaucratic states in the 1920s and 1930s. Fuller's realist adversaries regarded The Law In Quest of Itself — perhaps correctly — as an oblique assault on New Deal bureaucratic statism, and Thomas Reed Powell accused him of

21. Letter from Lon L. Fuller to Thomas Reed Powell, in Principles of Social Order, supra note 1, at 297.
22. Id. at 298.
espousing views similar to those of Calvin Coolidge. 24 Anyone who has read Fuller’s reply to Hart, 25 or The Problem of the Grudge Informer, 26 knows that Fuller was preoccupied with Germany’s descent into fascism, and more generally with the rise of totalitarian regimes. In the 1960s, Fuller may have been regarded as something of a cold warrior, especially after he worked on Richard Nixon’s 1960 presidential campaign. Nor could readers have been entirely oblivious to his quick and silly a priori argument for the moral superiority of capitalism in The Morality of Law. 27 Political progressives surely found the undertones of Fuller’s work uncongenial.

Here, too, however, Fuller’s neglect is unjust. In fact, very few legal philosophers have less of a political agenda than Fuller, and his suspicion of what is today called “legal centralism” is fully compatible with progressive political ideas as well as conservative ones. Indeed, the critique of legal centralism figures prominently in Critical Legal Studies. In any case, political discourse in much of the world has recently shifted to an emphasis on civil society, that is, autonomous sub-state institutions of the sort that Fuller analyzed so sympathetically and astutely. Contemporary theorists of civil society would do well indeed to study Fuller. Perhaps today we can re-read Fuller without jumping to hasty conclusions about a hidden and possibly noxious political agenda.

II. FULLER AS A LEGAL ETHICIST

Fuller was not only an important philosopher of legal ethics, he was also, for a period of time, quite an influential one. During the 1950s, he co-chaired a legal ethics commission, the Joint Conference on Professional Responsibility, sponsored by the American Bar Association (ABA) and the Association of American Law Schools (AALS). In 1958, the Joint Conference published an influential report on professional responsibility authored by Fuller and his co-chair, a lawyer named John Randall. 28 Judging by both the style and the content, it seems clear that this Joint Conference Report was entirely, or almost entirely, Fuller’s handiwork. When the ABA rewrote its code of ethics in the 1960s, the resulting Model Code of Professional Responsibility 29 took over numerous ideas from the Joint Conference Report, and its footnotes quote directly from the Report eleven times, more than any other single source. 30 Moreover, the Model Code divided its rules into aspirational “Ethical Considerations” and mandatory “Disciplinary

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24. Id. at 293.
25. Lon L. Fuller, Positivism and Fidelity to Law — A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958).
27. Id. at 23-24.
30. Id. According to Professor John Sutton, the reporter who drafted the Model Code and who (along with one other member of the drafting committee) added the footnotes after the Model Code was complete, the upper
Rules." This structure was partly inspired by Fuller's distinction between the moralities of aspiration and duty in *The Morality of Law*. For that matter, even when the *Model Code* was replaced in 1983, the early drafts of the *Model Rules of Professional Conduct* that supplanted it followed one of Fuller's chief ideas in the *Joint Conference Report*, that of writing different rules depending on what role (advocate, counselor, public servant) the lawyer was playing. The structure was partly abandoned in the final version, and as John DiPippa argues, the jurisprudence of the *Model Rules* is largely hostile to Fuller's ideas.

One knows a priori, so to speak, how a Fullerian analysis of legal ethics should run. There should be an outer morality concerned with the content of legal representations, and perhaps with issues such as a lawyer's honesty. But the interesting part of the analysis would be an effort to discover an inner morality of the legal profession, that is, a morality that makes law practice possible. The inner morality, professional ethics in the proper sense of the term, would consist of functional virtues and duties. Such prominent features of legal ethics as the duties of zealous advocacy, confidentiality, and avoiding conflicts of interest, would be delineated and defended by examining their functional contribution to carrying out the work lawyers do. "So it is with all social institutions. We must ask of them what purposes they serve in society and then reason out what restraints must be observed if those purposes are to be achieved."

The procedure Fuller envisions is a familiar one. First, ascertain the nature of professionals' work ("the purposes they serve in society"). Second, devise an appropriate method for morally assessing its purposes and their necessities. Third, following that method, "reason out what restraints must be observed if those purposes are to be achieved." Fuller has illuminating ideas on all of these topics.

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32. Interview with John Sutton, *supra* note 30. Professor Sutton was appointed reporter of the committee that drafted the *Model Code* in 1964, and approached his task by reading voluminously on ethics and law. He recollects that Fuller's newly-published *The Morality of Law*, along with writings of Bishop James Pike, influenced him most strongly. According to Professor Sutton, he and Edward Wright (who chaired the committee that produced the *Model Code*) believed that one of their important tasks in replacing its predecessor was to eliminate its confusion between moral exhortation and enforceable obligation, and Sutton found Fuller's discussion useful in formulating his thinking on this issue. *Id.*
35. *Id.* The *Model Rules* eliminates all aspirational rules except the recommendation that lawyers do pro bono work.
37. *Id.*
38. *Id.* at 916.
39. *Id.* at 917.
III. THE DIALECTIC OF ENDS AND MEANS

Consider first his method for morally assessing the worth of professional activities and of the duties they entail. Fuller argues that professional duties should not be judged by "ethical standards . . . independent of time, place, and circumstance"; nor, however, should they be judged only from the internal standpoint of the profession. Instead, judging them "always involves a reciprocal adjustment between ends and means." Some professional ends may seem morally attractive until we discover how costly or odious the available means are, and some professional duties may seem unconscionable until we consider how much injury abandoning them would do to a worthwhile institution.

A good example (unfortunately, not one that Fuller analyzed) is the duty of confidentiality in the professions of law, medicine, and journalism. In all of them, the argument for confidentiality is the same: clients, patients, and news sources will hold back important information unless they can be sure it won't return to haunt them. Confidentiality, we may say, belongs to the role morality of these professions.

But what if the confidential information is that the wrong person is being executed for the client's crime? Or that one's HIV-positive patient is having unprotected sex with an unsuspecting partner? What if testimony by the news source could prevent an innocent person from going to prison, if only the reporter revealed the source's name? In cases like these, the professional role morality conflicts with common morality.

One plausible argument is that role morality wins if the role is sufficiently valuable and the duty of confidentiality is sufficiently indispensable to carrying it out. The first step of analysis, then, is to assess the goodness of the role. Strong reasons for the role justify role morality that deviates sharply from common morality; weak reasons for the role may be adequate to show that the role should exist, but they can justify only slight deviations from common morality.

I call this argument "plausible" in part because it is one that I have defended at considerable length in my own writing on legal ethics. Yet Fuller would have little patience with it. You cannot judge the goodness of the role in the abstract, he would say, without understanding what kind of actions its role morality would require; and you cannot condemn professional practices (such as keeping confidences in the three problem cases) merely because they "shock the conscience," without asking whether abandoning the practice would undermine social goals as central as providing legal and medical services or reporting the news. Instead, you bootstrap yourself into both judgments. I suspect that Fuller is right.

40. Id. at 916.
41. Id.
When Fuller speaks of a process of "reciprocal adjustment between ends and means," I take it that he has in mind a counterpart in practice to John Rawls's notion of reflective equilibrium in theory.\textsuperscript{43} Rawls asks us to adjust our principles and our considered moral judgments until they are in equilibrium with each other.\textsuperscript{44} Fuller asks us to modify our ends and means until they are both morally acceptable — more precisely, until the end, as modified, no longer requires means that are unconscionable.

In the confidentiality example, reciprocal adjustment might mean something like this: try experimenting with various exceptions to the duty of confidentiality, and see whether the modified confidentiality rule discourages so much essential communication that the job of a doctor, lawyer, or reporter becomes impossible. In the case of lawyers, different American states have adopted a staggering variety of confidentiality exceptions: permission to reveal confidences to prevent client crimes against life or limb;\textsuperscript{45} obligation to reveal confidences to prevent client crimes against life or limb;\textsuperscript{46} obligation to reveal confidences to save human life, regardless of whether a crime is involved;\textsuperscript{47} permission to reveal any crime whatsoever;\textsuperscript{48} permission (or obligation) to reveal crimes (or non-criminal frauds) against property;\textsuperscript{49} permission (or obligation) to reveal crimes or frauds in which the lawyer's services were unwittingly used;\textsuperscript{50} obligation to keep client confidences in any or all of these circumstances;\textsuperscript{51} and various combinations of these rules.

It may turn out (I believe that it has turned out) that none of these exceptions seriously hampers the practice of law by discouraging clients from telling lawyers what they need to know. In that case, there is no need to modify our intuitive judgment that keeping confidences in the problem cases is wrong. The

\begin{itemize}
  \item \textsuperscript{43} JOHN RAWLS, A THEORY OF JUSTICE 20 (1971).
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Summaries of and references to the specific rules are presented in tabular form in THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 134-39 (1998) [hereinafter MORGAN & ROTUNDA, SELECTED STANDARDS].
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Florida's Current Rules of Professional Conduct, Rule 4-1.6(b)(2) provides that a lawyer "shall reveal" information the lawyer believes "necessary . . . to prevent death or substantial bodily harm."
  \item \textsuperscript{48} MORGAN & ROTUNDA, SELECTED STANDARDS, supra note 45, at 134-39.
  \item \textsuperscript{50} Permission: Connecticut, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Dakota, Pennsylvania, South Dakota, Texas, Utah, Virginia, Wisconsin. Obligation: Georgia, Hawaii, Ohio. Id.
  \item \textsuperscript{51} Id. Most noteworthy for the stringency of its protection of client confidences is California, the only state to forbid lawyers from revealing client confidences under any circumstances, including those in which revelation is necessary to prevent the client from committing suicide.
\end{itemize}
blanket confidentiality rule is not essential to the practice of law. With other exceptions to confidentiality, the story may be different. American rules in most jurisdictions now require lawyers to reveal to the court that a client has committed perjury, and I believe that this rule has made the job of criminal defense more difficult. Lawyers know that defendants facing prison have an overwhelming temptation to perjure themselves. For that reason, lawyers take care not to learn too much for fear of having to reveal that a client's testimony is false. You can't reveal what you don't know. Sometimes this strategy backfires, when the lawyer fails to learn facts crucial to the defense. Here, the lawyer's role has been pared back to accommodate a rule that seems good.

A final class of cases is those in which we modify our judgment that keeping a client's confidence is wrong. On the face of it, keeping secret a client's confession that he has committed the crime he is accused of is wrong because it defeats the ends of justice. But if every defense lawyer revealed every confession, it is hard to imagine that defendants would trust lawyers enough to make use of their services at all, and then an institution essential to a decent society would collapse. Here, the conclusion is that keeping the client's guilty secrets is the morally right thing to do.

These examples suggest that Fuller's dialectic of ends and means represents a plausible process of moral deliberation. It sheds genuine light on the problem of role morality.

IV. THE WORK OF LAWYERS

According to Fuller, what do lawyers do? This is not an easy question. In the Joint Conference Report he cautions that in "developing fields[,] the precise contribution of the legal profession is as yet undefined"52 and that the bar's traditions "yield but an indirect guidance."53 He once wrote that "[t]he best definition I ever heard of a lawyer . . . is a man that helps people."54 Of course this is not a serious definition, since it fails to distinguish a lawyer from a dentist. Fuller goes on to explain his meaning through the metaphor of arranging "a complex of human beings and human institutions" in social space "so that they may work together"55 — "so arranging and ordering the pieces that they will least interfere with one another."56 A lawyer's help differs from a dentist's because "[w]e want every one to be as free as possible, and the task of the law is to discover the ways in which this can be accomplished."57
Notice that in this final sentence, Fuller shifts from talking about what lawyers do to talking about what the law does. This is characteristic of Fuller’s jurisprudence, which repeatedly insists that the practical point of any philosophy of law lies in what it implies about lawyers’ work. Time and again, Fuller criticizes jurisprudential theories by arguing that if the law is X (i.e., whatever the theory in question says the law is), it follows that a lawyer’s job is Y, where Y will subsequently be seen as both unrealistic (because lawyers don’t actually spend much time doing Y) and undesirable (because a lawyer who approaches clients’ problems as if the point of the effort is to Y will make a mess of things). Recall how Fuller begins The Law In Quest of Itself:

Yet if in these definitions the word “law” means the life work of the lawyer, it is apparent that something more vital than a verbal dispute hinges on the choice between them. Surely the man who conceives his task as that of reducing the relations of men to a reasoned harmony will be a different kind of lawyer from one who regards his task as that of charting the behavior sequences of certain elderly state officials. And if the lawyer shapes himself by his conception of the law, so also, to the extent of his influence, does he in turn shape the society in which he lives.58

In one of his essays, Fuller observes that a legal formalist considers the lawyer “to be an expert in the necessary implications of certain basic legal concepts.”59 It is precisely to attack this view that Holmes begins The Path of the Law by reminding us that the actual work of the lawyer is often representing a “bad man” who doesn’t give a damn about the implications of legal concepts, and who cares only about whether unpleasant material consequences will be visited on him by the state.60 Indeed, we may take a cue from Holmes’s remarkable opening paragraph and read The Path of the Law in Fuller’s manner — as an essay on the nature of legal practice that veers into jurisprudence principally because jurisprudence matters to law practice.61

Fuller is wholly in sympathy with Holmes’s realist complaint about how little the formalist definition of a lawyer has to do with the actual practice of law. But Fuller is equally unhappy with the realists’ alternative, the idea that a lawyer is...
“an expert in predicting and influencing the incidence of state force.” In his essay The Needs of American Legal Philosophy, he explains:

[The] most serious deficiency in the view that identifies the lawyer’s work with established state power ... lies in the fact that it distorts the services that lawyers are actually rendering in our society. It is essentially a litigational conception of the lawyer’s competence, and yet we know that the number of lawyers directly concerned with litigation is every day decreasing and constitutes today a minority of the profession as a whole.

Fuller is aware of the counter-argument that even office lawyers and business negotiators are “also ultimately concerned with litigation and state power, though in an indirect way. When a lawyer drafts a contract, for example, he has his eyes on possible future litigation ...” But Fuller views this as a simple-minded response. Seeing why takes us to the heart of Fuller’s conception of the lawyer as an architect of social structure.

Take a simple example that Fuller himself employs: “working out a contract for a two years’ supply of paper towels for the rest rooms of a chain of service stations.” The “conception that defines the lawyer’s lifework entirely in terms of state power” views the lawyer’s task as “battening down the hatches against possible future litigation.” Fuller acknowledges that this is one thing the draftsman does, but he insists that it is not the only thing, nor the important thing. The important thing, of course, is getting paper towels into service station rest rooms, and the lawyer’s job is to help the parties create a structure of interaction that will facilitate that task.

The structure of interaction comprises more than the terms of the contract. Fuller distinguishes carefully between the contract and the agreement. Lawyers write the contract, but if they, rather than the parties, create the agreement — well, don’t count on finding paper towels in your service station rest room! The agreement gets produced when

the parties, by being compelled to work out together the framework of their future relations, come to share an understanding of the problems each of them faces in the performance of his side of the undertaking. This understanding is often itself the source of a set of reciprocally adjusted expectations that

62. Fuller, Lawyer as Architect, supra note 1, at 269.
63. Lon L. Fuller, The Needs of American Legal Philosophy, in Fuller, Principles of Social Order, supra note 1, at 252 [hereinafter Fuller, American Legal Philosophy]. However, it is also instructive to note that Fuller praises what he calls the “ethical implication” of realism, namely that realism “treats law as something capable of being shaped to meet human needs and to increase human satisfactions, and there is conveyed the implication that it should be so shaped.” Id. at 251.
64. Id. at 253.
65. Fuller, Lawyer as Architect, supra note 1, at 265.
66. Fuller, American Legal Philosophy, supra note 63, at 250.
67. Id. at 253.
68. Fuller, Lawyer as Architect, supra note 1, at 265.
functions as a basis of order between the parties without reference to the written contract, and often better than the written contract would. 69

A good lawyer, realizing this, “sees to it that the parties have reached common ground as well as common language.” 70 When that happens the parties may never have to consult the contract. 71 Conversely, he warns, a bad lawyer “may fail to provide a workable arrangement capable of achieving the results intended even when it is completely 'litigation-proof.' ” 72 And the problem with the realist lawyer, who identifies law with state power and legal skill with litigation and litigation-proofing, is that his philosophy erases this distinction.

Remarkably, what we find in Fuller’s analysis of the paper towel contract is three ideas basic to his jurisprudence: the idea of implicit law, his non-positivist, or, as I shall say, pluralist, notion of law apart from the state, and the insistence that practical arrangements are subject to natural laws susceptible to reasoned understanding.

Implicit law. There is hardly a better definition of implicit law than Fuller’s language in the paper-towel example: “a set of reciprocally adjusted expectations that functions as a basis of order between the parties.” 73 If law is, in Fuller’s formula, “a system for subjecting human conduct to the governance of rules,” 74 we must realize that rules don’t have to be produced by the state, and that they may be unarticulated and implicit in coordinated human practices, without ceasing to be legal rules. 75 It may well be that the agreement, not the contract, between the service station chain and the paper towel distributor represents the law of this bargain. Yet only the contract will be the subject of litigation, and thus “[t]he conception of the lawyer as an expert in established state power cannot be stretched to include his special competence as an architect of social structures.” 76

Non-positivist law. Fuller’s conception of implicit law, including customary law and tacit patterns of cooperation and reliance, is connected with his critique of legal positivism in the second lecture of The Law In Quest of Itself. 77 There Fuller argues that the intricate division of authority in modern legal systems makes it impossible to specify a master criterion — what Hart would later call a “rule of recognition” — satisfied by all and only “the law that is.” 78 The claim that there is such a thing as a rule of recognition in a legal system turns out to be a

69. Id.
70. Id.
71. Id.
72. Id. at 266.
73. Id. at 265.
74. FULLER, THE MORALITY OF LAW, supra note 2 at 46.
76. Fuller, American Legal Philosophy, supra note 63, at 253.
77. FULLER, THE LAW IN QUEST OF ITSELF, supra note 4, at 45-95.
78. Id. at 27-28, 45-47, 69.
positivist article of faith, not an empirical fact. Thus, "the law that is" is not an empirical concept — ironically, it is just what the realists accused natural law of being: wish-law. Even the vague claim that some set or other of official performances makes law law turns out to beg questions, because the very notion of an official performance presupposes a system of law that authorizes some people as officials. Thus, the realist program of defining law in terms of official behavior requires that law first be defined in terms of lay behavior, in the reciprocal interaction by which some people come to acknowledge others as officials. But then, positivism in its realist form "approaches perilously close to the proposition that the law is the way everyone behaves."

These arguments undermine the three principal positivist themes: (1) that law is an empirical social fact, (2) that law is a creature of the state, and (3) that the law that is differs conceptually from the law that ought to be (a claim that is not so much false as vacuous, absent some concrete criterion for identifying "the law that is"). But, for Fuller, the point is not merely a polemic against positivism. The arguments I just sketched lead to Fuller's constructive account of law, with its legal-pluralist conclusions: that the kind of empirical fact law is is both empirical and normative; that made law cannot exist without implicit law; and that law has nothing essentially to do with the state because all sorts of groups and interactions make law.

The last of these points is the most important one for understanding the lawyer's work. In Fuller's pluralist conception of law, law appears wherever people interact on a regular basis, and the good lawyer is an expert in structuring these interactions so that the law they make works. Law, hence the work of lawyers, has to do with regulated interactions, not state power.

**Reason in social structure.** Fuller uses the metaphor of an "architect of social structure." Contemporary scholarship has its own metaphor for what lawyers do to facilitate deals: business lawyers, in Ronald Gilson's phrase, are "transaction cost engineers." It may seem, then, that Fuller's view converges with contemporary law-and-economics scholarship about the legal profession.

To an extent this is true. However, the two metaphors carry radically different implications. Take the transaction cost engineer, a phrase I assume most educated readers would find unintelligible. That is because "transaction cost" is a technical term in a theory. Specifically, it is a technical term in Coasean economic

79. Fuller compliments Hans Kelsen for his forthrightness in acknowledging that the "basic norm" is a postulate, not a fact. *Id.* at 70, note 27.
80. *Id.* at 54-55.
81. *Id.* at 55.
82. *Id.*
Coase’s Theorem tells us that absent transaction costs, goods will move via bargaining to their most efficient use regardless of initial entitlement. Viewed through Coasean lenses, efficient bargains happen more or less on their own, once the impediment posed by transaction costs is removed. The business lawyer’s job, according to Gilson, is to add value to deals by reducing transaction costs — specifically, costs associated with imperfect information, and inconsistent time horizons and risk assumptions among the contracting parties. Remove the impediment and deals happen. The term “transaction cost engineer” sounds analogous to “electrical engineer.” Like the electrical engineer, the transaction cost engineer reduces impedance and gets the current flowing and the circuitry complete.

On Fuller’s understanding, this is a Cloud Cuckooland version of commerce — a fantastic world in which, once the engineer gets those nasty old transaction costs out of the way, paper towels fly on their own into service station rest rooms. Fuller wants us to realize that commerce confronts parties with an endless variety of stubborn realities, ranging from genuine transaction costs, such as the cost of faxing documents to and fro, to inconvenient physical properties of paper towel dispensers. The latter can be regarded as transaction costs only by broadening the category of transaction costs to the point of vacuity (if a transaction cost is anything that impedes efficient outcomes, then Coase’s Theorem becomes a tautology). People can and should deal in a reasoned way with stubborn realities — in fact, reasoning through stubborn realities is pretty much what Fuller means by “natural law thinking,” a term that for him carries overtones of natural science rather than religion — and the lawyer’s role is to design an interactive framework that helps them do so. But describing the application of reason to stubborn realities as transaction cost engineering flattens the landscape beyond recognition.

The “architect of social structure” metaphor is a better one. An architect

86. Gilson, supra note 84.
87. Avery Katz has pointed out in conversation that the “engineer” part of “transaction cost engineer” has the virtue of describing lawyers’ activities in humble and down-to-earth terms, avoiding some of the extravagances of views that put lawyers on a pedestal as servants of justice. While I dislike the metaphor of “transaction cost engineering,” I agree that this is one of its virtues.
88. In one paper, Fuller observes that “for many the term ‘natural law’ still has about it a rich, deep odor of the witches’ cauldron.” Lon L. Fuller, Reason and Fiat in Case Law, 59 Harv. L. Rev. 377, 379 (1946). But all it really means is that there are external criteria, found in the conditions required for successful group living, that furnish some standard against which the rightness of . . . decisions should be measured . . . . Certainly it would never occur to [an imaginary judge] to describe the natural law he sought to discover, and felt bound to respect, as a “brooding omnipresence in the skies.” Rather for him it would be a hard and earthy reality that challenged his best intellectual efforts to capture it. The emotional attitude . . . would not be that of one doing obeisance before an altar, but more like that of a cook trying to find the secret of a flaky pie crust . . . . Id.
familiarizes herself with the generic activities a building's inhabitants will engage in, but living in the building is up to the inhabitants. The architect likewise has to understand the practical problems of construction, even though her role is quite different from that of the builder. By analogy, a business lawyer designs a framework of interaction — grievance and reporting procedures, clear lines of authority, arbitration clauses, requirements for regularly-scheduled conferences. Someone analogous to the builder will proceed to implement the structure, and the parties can then get on with the business at hand. The lawyer's job is to help all parties understand the obstacles their counterparts face, so that they can accommodate each other and get the job done. The lawyer's objectives "include, for example, . . . anticipating possible sources of trouble and devising procedures that will put out the fire of controversy while it is still manageable, and generally constructing a satisfactory framework for the parties' future dealings."89

One might object that this really is "transaction cost engineering" by a different name. The parties begin in relative ignorance of the problems they face, and the lawyer helps them remove their ignorance, minimize their risks, and bargain with more information. But this objection misses the mark. The point of transaction cost engineering is to remove obstacles to striking an efficient bargain: the transaction cost engineer does not look further ahead than consuming the deal. She views imperfect information as a kind of noise that prevents the parties from establishing accurate valuations and prices; better information facilitates the deal. Human interactions and conversations get classified as "costs."90 The architect of social structure, by contrast, regards them as benefits, and views the deal as the beginning, not the endpoint, of her client's interest. The information she aims to elicit for her client is only partly information needed for asset pricing. Far more important is information about how to get paper towels into service stations after the contract is signed.

In part, the difference might arise from focusing on different kinds of business. The theory of transaction cost engineering originated in the roaring eighties, and focuses on corporate finance and corporate acquisitions.91 In the specialized markets for venture capital and corporate control, the point is to make money by making deals.92 From a corporate finance standpoint, the deal is the point. But from Fuller's standpoint — and, I suspect, from a saner economic standpoint — the point of deals is to establish productive relationships, which involves knowledge of a great many things besides how much an asset is worth.

89. Fuller, American Legal Philosophy, supra note 63, at 254.
90. I owe this observation to Wendy Perdue.
91. Gilson, supra note 84, examines the theory entirely within these contexts.
92. In 1990, partners from New York City's premier mergers-and-acquisitions law firm performed a skit at a firm gathering. "The loudest applause for the Not Ready for Prime Time Partners came as they sang 'There Is Nothing Like a Deal!' knocked off from South Pacific. 'What ain't we got?' the punch line asked: 'We ain't got deals!' " LINCOLN CAPLAN, SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE 236 (1993).
The similarities, as well as the important differences, between Fuller’s “architect of social structure” and Gilson’s “transaction cost engineer” provide another example of Fuller’s partial eclipse. In a foreword to a 1995 symposium on business lawyering, Gilson and his co-author Professor Mnookin reminisced, “Ten years ago, when one of us first wrote about what business lawyers really do, no one had devoted much attention to this part of the profession.”93 (Fuller who?) Now, however, it has become clear “that lawyers can often create value, not just as business lawyers who serve as transaction cost engineers, but also as litigators who cooperate to facilitate efficient dispute resolution, and as process architects who design efficient systems to resolve conflict outside of court at low cost.”94

The authors’ pleasure that scholars now take business lawyers seriously is justified, but — in view of the fact that Fuller explored all these themes decades ago — their claim to novelty is not (notice that Gilson and Mnookin have reinvented Fuller’s metaphor of lawyers as “process architects”).

One might respond that contemporary scholarship has gone far beyond Fuller, because it utilizes “theoretical advances from the social sciences” such as “[t]ransaction cost economics, the economics of information, the positive theory of agency, and the theoretical basis of negotiation.”95 Furthermore, today’s legal scholar can “switch to cognitive psychology or sociology to fully close the jaws of our analytic vice.”96

Now Fuller himself understood that problems of institutional design “transcend the boundaries of any particular ‘social discipline,’ ”97 and he anticipated that organizational sociology, social psychology, and especially the still-nascent discipline of organizational economics would all contribute to their solution.98 In one sense, then, the economics-based interdisciplinary approach that Gilson and Mnookin embrace may be the “economics” — the science of institutional design — that Fuller thought natural-law thinking would bring to birth.

However, I fear that rumors of its nativity are exaggerated. Unfortunately, the present state of the sciences of institutional design calls to mind not Gilson and Mnookin’s “fully close[d] jaws of our analytic vice” but Oliver Wendell Holmes’s description of one of his fellow Supreme Court Justices, whose mind was “a powerful vise the jaws of which couldn’t be got nearer than two inches to each other.”99

94. Id. at 7-8.
95. Id. at 6-7.
96. Id. at 14.
97. Fuller, Lawyer as Architect, supra note 1, at 266.
98. Id. at 267-68.
Take, for example, a problem dear to Fuller’s own heart and central to institutional design: the question of whether a business firm should coordinate production among divisions by the use of price information or by managerial directives — in Fuller’s terms, whether the firm should be organized by reciprocity or by common ends and managerial control. Beginning with the debate about socialist economies between Oskar Lange and Friederich Hayek in the 1930s, economists have come to realize that the question turns in large measure on which system is better at communicating information; or, putting the problem the other way around, the question turns on which system imposes fewer informational demands. Contemporary economists typically use the so-called “Hurwicz criterion,” which measures a system’s informational demands by asking how many numbers must be communicated to make a decision: the system that requires the fewest numbers is informationally efficient.\(^\text{100}\) Using this criterion, Hurwicz proved that under certain restrictions, price mechanisms place the lightest informational demands on systems, thereby verifying Hayek’s intuition about the superiority of market mechanisms in comparison to centrally planned economies.\(^\text{101}\)

Unfortunately, Hurwicz’s restrictions eliminate the entire class of problems that most interested Fuller because they are most typical of the business environment: problems in which producers are not uniquely well situated to know their own productive capabilities, because that knowledge depends on similar information about other producers; or in which, for the same reason, consumers aren’t uniquely well situated to know their own preferences; or in which the decisions have so-called “design attributes” — “problems in which there is a great deal of \textit{a priori} information about the form of the optimal solution, that is, about how the variables should be related . . .”\(^\text{102}\) In other words, the informational efficiency theorem does not apply to situations where interaction among producers and among consumers might be necessary for them to discover their own capabilities and preferences, or where reasoned analysis might provide information to simplify the problem. When a decision has design attributes, the principal theorem is “that the informationally efficient way to handle such a problem is to announce the design attributes”\(^\text{103}\) — hardly a startling conclusion, nor one requiring sophisticated economic theory. Moreover, the Hurwicz criterion itself is quite crude, because “it does not account for how quickly different systems find an efficient allocation or for how much information they communicate in the process . . . So far, however, the Hurwicz criterion is the only measure of communication requirements which has been extensively and success-


\(^{101}\) \textit{Id.}

\(^{102}\) \textit{Id.} at 91.

\(^{103}\) \textit{Id.} at 121.
fully analyzed."  

In that case, the conclusion seems to be that even if theorists can derive mind-boggling mathematical results about information spaces, the theory does little to advance practical understanding of the problem of institutional design. Of course I do not mean to suggest that economic theory has nothing to contribute to institutional design; my point is that — as this example suggests — the current state of the theory does not support the suspicion that Fuller's ideas have been left in the dust by "theoretical advances from the social sciences."

V. THE ADVERSARY SYSTEM

Thus far, I have been presenting Fuller's ideas about the work of lawyers sympathetically. But there are plenty of points where doubts arise. For example, Fuller's argument connecting the definition of law to the nature of lawyers' work seems a little too pat to be plausible. It cannot really be that a turn-of-the-century legal formalist did nothing to advise clients except explain the logic of legal concepts to them, nor that realists routinely drafted contracts giving no thought to how the contracts might be executed successfully. It is often said that good psychotherapists of different "schools" resemble each other more than they resemble mediocre therapists of the same school. It seems more than likely that good lawyers are like that as well.

Second, even if positivism is "overprimed with power" and overly statist, Fuller seems vulnerable to the converse charge that he is too sympathetic to customary orderings that the state ought to police. The obvious examples are racist and sexist institutions, but the problem is more pervasive than that. An interesting example in legal ethics is the American bar's understanding of confidentiality, which places it at the pinnacle of professional obligations and draws its boundaries much more expansively than legal doctrine actually warrants. In practice, an absolute norm of confidentiality serves little purpose beyond facilitating cover-ups by crooked clients, and courts should not tolerate (but frequently do tolerate) a lawyer's defiance of requests to produce unprivileged information. The bar's "law" of confidentiality is inferior to the state's law, yet Fuller has no strong argument for state supremacy. Like Burke, Fuller may over-romanticize the organic harmony of "autonomous orderings."

Both these criticisms deserve further discussion, but I propose to drop them and turn to a third. What seems conspicuously absent from Fuller's "architect of

104. Id. at 102.
105. Fuller, On Legal Education, in PRINCIPLES OF SOCIAL ORDER, supra note 1, at 277.
106. Susan Koniak, one of the most interesting contemporary anti-positivists in legal ethics, has extensively analyzed the clash between the bar's "law" of confidentiality and that of the state. Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. REV. 1389 (1992).
107. Id.
social structure" is what most people probably regard as the most salient fact about lawyers: that they are partisans for their clients. Contrary to Fuller’s simile, lawyers drawing up a contract are not drafting “a kind of constitution,”108 for that implies treating all parties with equal concern. They are supposed to be getting the best deal for their clients. Sometimes that means the best deal for all the parties, but sometimes it doesn’t — and when it doesn’t, lawyers are supposed to take sides.

Fuller and Randall preface the *Joint Conference Report* by acknowledging that “the chief obstacle” to “understanding the nature of the lawyer’s professional responsibilities” lies in the adversary system.109 Even law students are uneasy about the adversary system, “some thinking of it as an unwholesome compromise with the combativeness of human nature, others vaguely approving of it but disturbed by their inability to articulate its proper limits.”110 Again and again, in the *Joint Conference Report*, in *The Adversary System*,111 in *The Philosophy of Codes of Ethics*, in *Philosophy for the Practicing Lawyer*, Fuller returns to the adversary system and its defense. He moves from one argument to another, suggesting that he may not have been entirely happy with any of them. Nor should he have been.

In the “narrow sense,” Fuller tells us, the adversary system is “a certain philosophy of adjudication,” one that sharply separates the role of judge from that of advocate.112 The advocate presents his party’s case with partisan zeal; he has “dedicated all the powers of his mind to its formulation.”113 The judge listens and renders an impartial decision. The principal questions that any defender of the adversary system must answer are why we should deliberately set highly trained, intelligent lawyers to work zealously advancing their clients’ ends, regardless of the morality or even minimal decency of those ends; why we should praise lawyers for utilizing means that can inflict substantial trauma on perfectly innocent people (on honest witnesses, for example, whose competence or grip on reality a cross-examiner publicly assails); why, finally, should we ask lawyers to disregard entirely the legitimate interests of their adversaries — to refrain, for example, from correcting an opposing lawyer’s blunder that loses a case the opponent should rightfully win.

In the *Joint Conference Report*, Fuller argues that even though the adversary system, *seems* to require lawyers to obscure the truth on behalf of their clients, the system is actually more likely to arrive at the truth than an inquisitorial

110. *Id*.
111. Lon L. Fuller, *The Adversary System,* in TALKS ON AMERICAN LAW 30 (Harold J. Berman ed., 1961) [hereinafter Fuller, *The Adversary System*].
112. *Id* at 30.
113. *Id* at 31.
alternative where the judge rather than the lawyer conducts the inquiry. He bases the argument on the psychological impossibility of a single mind formulating the strongest version of two contradictory positions:

Any arbiter who attempts to decide a dispute without the aid of partisan advocacy . . . must undertake not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of his case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving . . . . When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts . . . . If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

This argument, plausible though it appears on the surface, should set off an alarm in the minds of readers, because it leads to the startling conclusion that the various judge-driven systems of continental Europe and South America must be worse fact-finders than their common law counterparts. There is no evidence that this is so, and Fuller was a good enough comparativist to have known better. What Fuller claims is psychologically impossible turns out to be daily practice in civil law systems. Sybille Bedford, who observed trials in several countries, wrote this about a German criminal trial:

It was a strange experience to hear this presentation of a case by both sides, as it were, in one; not a prosecution case followed by a defense case, but an attempt to build the whole case . . . as it went. A strange experience . . . to hear all questions, probing questions and soothing questions, accusatory and absolving questions, questions throwing a favourable light and questions having the opposite effect, flow from one and the same source, the bench . . . .

What Bedford found "strange" she nevertheless found extremely effective as well. Perhaps a trained judge can play all parts at once. If so, then where's the error in Fuller's argument?

114. Fuller & Randall, Joint Conference Report, supra note 28, at 1160.
115. Id.
116. Fuller's colleagues Benjamin Kaplan and Arthur von Mehren published pioneering articles on German civil procedure in the Harvard Law Review the same year that the Hart-Fuller debate appeared, and there can be little doubt that Fuller, who had a strong interest in German legal thought, knew their work. Benjamin Kaplan, et al., Phases of German Civil Procedure I, 71 HARV. L. REV. 1193 (1958); Benjamin Kaplan, et al., Phases of German Civil Procedure II, 71 HARV. L. REV. 1443 (1958). There is, however, reason to believe that Fuller was in fact deeply suspicious of Continental procedure. See Fuller, The Adversary System, supra note 111, at 36 (criticizing Continental criminal procedure).
118. Of course, one might respond that Continental systems are adversarial. Judges don't proceed in a vacuum; rather, they work from written, partisan, submissions by the litigants' attorneys.
One problem is that it begs the question. When Fuller writes, "Each of these [representative] roles must be played to the full without being muted by qualifications derived from the others," he is presupposing that the inquiry proceeds best by unmuted adversary presentation, in which case, of course, an inquisitorial investigation becomes by definition a mere copy of the real thing. In _The Adversary System_, Fuller likewise insists that decision-makers must be able to hear each side's position stated in its strongest form, which only partisan advocacy provides. But is it not equally possible that a decision-maker can form a more reliable picture if the opposed positions are muted by qualifications derived from each other? After all, the strongest form of each side's case may be strongest because it is exaggerated and misleading — "to use a harsher expression, biased." The opponent may be able to smoke out the exaggeration, but there will inevitably be cases in which the decision-maker simply cannot sort through the exaggerations, strategic omissions, and false implications, and as a result decides wrongly.

In addition, Fuller's argument proves far too much: it proves the impossibility not merely of reliable inquisitorial investigation, but of partisan advocacy as well. Any skilled lawyer preparing a case tries to anticipate the strongest arguments available to the adversary, preferably in their most devastating form. When she sizes up her witnesses, she puts herself in her opponent's shoes and probes for weaknesses in the witness's story; she digs for damaging information the opponent might unearth about the witness. Then she tries to construct counterarguments to the opponent's best arguments and to anticipate counterarguments to her counterarguments. In short, she employs precisely the mental progression — from sympathetic identification with her own position, to detachment from it, to distrust of it, and then back again — that Fuller claims is psychologically impossible for the inquisitorial judge.

The _Joint Conference Report_ employs two additional psychological arguments against inquisitorial tribunals. The first is that the adversary system will "hold the case ... in suspension between two opposing interpretations of it," so the finder of fact won't jump to hasty conclusions. The inquisitorial judge, by contrast, inevitably forms preliminary conceptions of the case, and will quite naturally become so invested in these working hypotheses that he may hang on to

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This response is unconvincing. The judges still take the active role in questioning witnesses and eliciting further submissions and further evidence, and the lawyers assume a role considerably more passive than their American counterparts. To offer one telling example, German ethics rules discourage lawyers from interviewing witnesses and forbid lawyers from preparing them, whereas an American lawyer who does not prepare witnesses for trial has done an inadequate job. The German judge takes the written submissions as a beginning point, but need not confine the inquiry to those submissions. If Fuller's argument was sound, it would apply to the half-inquisitorial-half-adversarial systems of Continental procedure.

120. Fuller, _The Adversary System_, supra note 111, at 31.
121. Fuller, _Codes of Ethics_, supra note 36, at 918.
them even after they turn out to be false leads. Fuller offers essentially the same objection to the inquisitorial method in *Forms and Limits of Adjudication*, and in *The Adversary System*, Fuller quotes the Joint Conference Report argument directly, adding that "adversary presentation of a controversy is perhaps the most effective means we have of combating the evils of bureaucracy." An official who judges hastily on the basis of preconceptions is the very definition of "the term 'bureaucrat' in a critical sense."  

Second, if the judge and not the lawyer had to "absorb" the embarrassment of her initial theory of the case being exploded in court, she would be "under a strong temptation to keep the hearing moving within the boundaries originally set for it." That would turn a fair trial into a mere "public confirmation for what the tribunal considers it has already established in private."  

These arguments, unlike the previous one, have a well-confirmed psychological basis. The theory of cognitive dissonance holds that when we perform an action, our beliefs become more congruent with the action. In a classic experiment, subjects paid a small amount of money to perform a boring, repetitive experimental task came to believe that it was actually rather interesting, while well-paid subjects did not. The well-paid subjects could rationalize wasting their time by thinking "I did it for the money"; the poorly paid subjects had to eliminate the dissonance by reconfiguring their beliefs. An inquisitorial judge, pursuing her theory of the case, will call witnesses, request evidence, and ask questions. To abandon the line of inquiry is tantamount to admitting that she has been wasting everyone's time. Here, she eliminates cognitive dissonance by continuing to believe that her theory of the case is plausible even when it should be abandoned.

The problem with the argument, of course, is that the shortcomings of inquisitorial procedure do not necessarily put it at a comparative disadvantage to adversarial procedure. The adversary system has its own shortcomings, which derive from the fact that zealous advocates can sometimes obfuscate successfully to win a weak case. In addition, many "inquisitorial" courts use multi-judge panels, which mutes the psychological distortions of cognitive dissonance. If one judge becomes overly invested in a fruitless line of inquiry, the other judges can take the reins.
VI. PARTISANSHIP AS A PRINCIPLE OF HUMAN NATURE

Speculative arguments, like those of the Joint Conference Report, will never establish that the adversary system is a mightier instrument of truth than its alternatives, because the issue is not a speculative one. It is an empirical issue, one that is virtually impossible to investigate. For that reason, perhaps, Fuller turned in *The Adversary System* to arguments of a different character — normative arguments more in keeping with his general theory of adjudication.  

For Fuller, "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself." In *The Adversary System*, Fuller uses this criterion to defend the role of the advocate in criminal trials (a defense he subsequently extends to civil trials as well):

> When the matter comes for final trial in court, the only participation accorded to the accused in that trial lies in the opportunity to present proofs and reasoned arguments on his behalf. This opportunity cannot be meaningful unless the accused is represented by a professional advocate. If he is denied this representation[,] the processes of public trial become suspect and tainted. It is for this reason that I say that the integrity of society itself demands that the accused be represented by counsel.

In both the passages just quoted, Fuller speaks of "presenting proofs and reasoned arguments." But this blameless, rationalistic activity is quite different from "the function of the advocate," whose "task is . . . to persuade. He is not expected to present the case in a colorless and detached manner, but in such a way that it will appear in that aspect most favorable to his client." The difference takes us straight back to the critique of rhetoric in Plato's *Gorgias*. There, Socrates gets Gorgias to admit that the rhetorician "is not a teacher of law courts and other public gatherings as to what is right or wrong, but merely a creator of beliefs." No advocate should claim anything more, and yet Fuller conflates partisan advocacy with proof and reasoned argument.

I do not believe that Fuller is guilty of a simple confusion, however. On the contrary, I think that he has deep but mistaken reasons for identifying "proofs and reasoned arguments" with interest-based persuasion. Consider three charac-

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130. Fuller, *The Adversary System*, supra note 111, at 36-43 (defending the adversary system on grounds that it enhances the integrity of society).
131. Fuller, *Forms and Limits*, supra note 123, at 92.
133. *Id. at* 31.
134. PLATe, GORGias 14 (W.C. Helmbold trans. 1952; *455a).
teristic passages. First, from The Adversary System: "It is the task of the advocate to help the judge and jury to see the case as it appears to interested eyes, in the aspect it assumes when viewed from that corner of life into which fate has cast his client."¹³⁵ Second, from the Joint Conference Report: "The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client's interest."¹³⁶ And third, a simple, telling phrase from The Forms and Limits of Adjudication, where Fuller argues that it is an advocate's "task during the deliberations to represent an interest, a point of view."¹³⁷

The passages are identical in thought and similar in phrasing, and the key to understanding them lies in the six words I have italicized in the final passage: an interest, a point of view. The syntax shows that Fuller identifies interests with points of view. The identification appears in the first passage as well, where the case as it appears to interested eyes gets identified with the case in the aspect it assumes when viewed from that corner of life into which fate has cast the client. The Joint Conference Report passage speaks only of "the case as seen from the standpoint of his client's interest."¹³⁸

The implication seems to be this: Fuller simply doesn't believe that there is such a thing as a disinterested point of view, a point of view in which (to borrow a phrase from Jürgen Habermas) the only interest is a cognitive interest.¹³⁹ In one essay, he cites Polanyi and Kuhn as authorities for the proposition that "there is always in any given science . . . a tacit commitment to certain lines of inquiry as offering the only legitimate outlet for the scientific spirit."¹⁴⁰ This paraphrase, of course, harmonizes with the psychological argument in the Joint Conference Report, that without precommitments there can be no inquiry.¹⁴¹ But I suspect that what attracted Fuller to Polanyi's and Kuhn's view of science is not their psychology, but their epistemology — their insistence that personal and political interests define, not impede, the pursuit of knowledge.

Yet, surely an interest and a point of view are quite different. My viewpoint discloses facts as I believe them to be; the standpoint of my interest discloses facts as I want them to be. No distinction could be more basic, and no epistemology that denies it deserves to be taken seriously. Without the distinction, we could make no sense of such fundamental human experiences as embarrassment or remorse — the emotions characteristic of someone who wishes

¹³⁵. Fuller, The Adversary System, supra note 111, at 32.
¹³⁶. Fuller & Randall, Joint Conference Report, supra note 28, at 1160.
¹³⁷. Fuller, Forms and Limits, supra note 123, at 114 (emphasis added).
¹³⁸. Fuller & Randall, Joint Conference Report, supra note 28, at 1160.
¹³⁹. JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 196-98 (Jeremy J. Shapiro trans., 2nd ed. 1978) (defining "cognitive interest").
¹⁴⁰. Lon L. Fuller, Two Principles of Human Association, in PRINCIPLES OF SOCIAL ORDER, supra note 1, at 72 (citing Michael Polanyi and Thomas Kuhn).
¹⁴¹. Fuller & Randall, Joint Conference Report, supra note 28, at 1160.
the world were different, someone whose case as seen from his standpoint differs from his case as seen from the standpoint of his interest. And, to return to Fuller’s argument for partisan advocacy, we can agree with him that an adjudication should include all points of view without conceding that each point of view should be spin-doctored by an advocate to advance a party’s interest.

Why would Fuller make this mistake? It is a particularly glaring one for someone who believes that there are objective truths about better and worse ways to order human affairs. One clue lies in Fuller’s remarks about what he calls the “expanded sense of the adversary system.” All human institutions involve compromises of divergent interests, and an effective compromise requires that “each party is permitted to state fully what its own interest is and . . . urge with partisan zeal the vital importance of that interest to the enterprise as a whole.”

That is the expanded adversary system — “expanded” in that it is a system for making decisions in all areas of life. In The Philosophy of Codes of Ethics, Fuller illustrates: “In the total processes of society the engineer, lawyer, physician, military expert, and the scholar must each pull his oar, but to pull it effectively he must act to some extent as if it were the only oar, as if it were through his efforts alone that the ship of state moved forward. This is what is meant by partisanship.” At the same time, however, Fuller insists that “partisanship . . . must also be enlightened and tolerant,” not only of opposing viewpoints, but also of partisan advocacy on their behalf.

Interestingly, Fuller takes the ideal of tolerant partisanship to lie at the heart of professional ethics. More important, however, is his idea about why tolerant partisanship is good:

In the end, the justification for the adversary system lies in the fact that it is a means by which the capacities of the individual may be lifted to the point where he gains the power to view reality through eyes other than his own, where he is able to become as impartial, and as free from prejudice, as “the lot of humanity will admit.”

Paradoxically, then, for Fuller the point of partisanship is to attain impartiality. Like Plato, Fuller believed that the human condition is to dwell in a cave of opinion and prejudice. But, unlike Plato, Fuller doubts that dialectic, philosophy, or honest intentions can lift us out into the Sun. The inquisitorial judge honestly intends to get at the truth, but human psychology gets in the way. In ordinary life, where we lack the judge’s sworn commitment to impartiality, we are even worse situated to escape the Cave. Within the Cave, the only way to see around our own

142. Fuller, The Adversary System, supra note 111, at 41.
143. Id. at 42.
144. Fuller, Codes of Ethics, supra note 36, at 918.
145. Id.
146. Fuller, The Adversary System, supra note 111, at 42.
147. Id. at 43.
partisan corner is to imagine the world as it appears from someone else's, and the point of advocacy is to make the other person's world vivid — to make it easier to imagine. In an extraordinary passage, Fuller defends a legal ethics combining partisan advocacy with a detached outlook (tolerant partisanship once again) and concludes, "I believe that when lawyers have come generally to view their work in this manner we shall have a society in which philosophers are kings . . . ." 148

VII. THE LAWYER AS PHILOSOPHER-KING

This remarkable evocation of Plato appears at the end of Fuller's most revealing discussion of partisan legal ethics. 149 There he asks us to imagine a young lawyer in a firm, five or six years out of law school. When he first began to practice, the lawyer feared that he might be asked to take on repugnant cases, but he soon discovered that this was not a real problem. Cases were always gray, never black and white, so winning them raised few issues of conscience. For that reason, law has come to seem like a game — a game with high stakes, but an enjoyable game nevertheless.

Now, Fuller says, let him take a week off for some ruthless, candid introspection. As he looks at himself as others view him, he is likely to suspect that the law game, which he admittedly enjoys, is little more than "a sordid trifling with the public interest, a waste of taxpayers' and clients' money." 150 On further reflection, however, he will "come to see that a profound morality justifies what may be called, in the broadest sense, the adversary system and the game-like spirit that goes with that system." 151

In brief, Fuller argues that the competitive spirit fostered by the adversary system is necessary because, otherwise, nobody could be induced to do the hard work of investigating facts and constructing arguments — work that Fuller insists is in the public interest. 152 "Viewed in this light[,] the zeal of advocacy is one of those tricks of nature by which a man is lured into serving the public interest without knowing it . . . ." 153 Once he sees this, our young lawyer will return to the game with a clear conscience. But he will want to play the law game differently. Instead of seeking only victory, he will now seek "that double satisfaction that comes from serving both his client and the public interest." 154

148. Lon L. Fuller, Philosophy for the Practicing Lawyer, in PRINCIPLES OF SOCIAL ORDER, supra note 1, at 290.
149. Id.
150. Id. at 288.
151. Id. at 289.
152. Id. at 289-90.
153. Id. at 290. This striking formulation echoes a letter Holmes wrote to John Wu (which Fuller may have read), in which Holmes describes the belief that life has meaning as "the trick by which nature keeps us at our job." Letter from Oliver Wendell Holmes to John Wu (May 5, 1926), in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 430 (Max Lerner ed., 1943).
154. Fuller, Philosophy for the Practicing Lawyer, supra note 148, at 290.
He will advocate for his client, but remain detached from his client’s cause. It is at this point that he becomes a philosopher-king.

Although I think that Fuller has brilliantly nailed down the phenomenology of law practice, I have my doubts about his happy ending. One difficulty with his solution is psychological: how can anyone combine whole-hearted partisanship in action with clear-headed philosophical detachment? Cognitive dissonance theory predicts that detachment will soon give way to rationalization. At that point, the philosopher-king will return to the Cave, where “doubts evaporate after he has worked on the case for a few days; his client’s cause then comes to seem at once logical and just.”

Moreover, the lawyer is on the client’s team, and loyalty is a powerful force. In one experiment, subjects were given a supposed “aesthetic preference test” and told that the test showed them to prefer Klee to Kandinsky. That turned out to be enough for them to favor other subjects who also supposedly preferred Klee, and to discriminate against subjects who supposedly preferred Kandinsky. Similarly, thirty-two boys were told, after an experiment in visual perception, that they belong to a group that overestimates (or underestimates) the number of dots flashed on a screen. Asked to divide some money among the other boys, they systematically discriminated in favor of their own group and against the other. Results like these suggest that it will be very hard for the lawyer to play the law game with the public interest in mind.

But even if the lawyer does keep the public interest in mind, Fuller has assumed the problem away. What if a lawyer cannot serve both the client and the public interest, because what the client wants is not in the public interest? What makes the hard labor of advocacy “work that is vital in the public interest?” Fuller has no answer to these questions; and, lacking answers to them, I believe that he has no fully satisfactory argument for the adversary system and partisan advocacy, unless what he means by partisan advocacy turns out not to be so partisan after all.

VIII. THE LIMITS OF ADVOCACY

Let us, then, turn to Fuller’s ideas about the ethical limits on advocacy. Fuller tells us that once we understand the public interest served by the adversary system,

it becomes clear by what principle limits must be set to partisanship. The advocate plays his role well when zeal for his client’s cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses

155. See supra notes 128-29 and accompanying text.
156. Id. at 287.
158. Id. at 58.
159. Fuller, Philosophy for the Practicing Lawyer, supra note 148, at 289.
against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to a controversy, he distorts and obscures its true nature.\textsuperscript{160}

I have no quarrel with the argument. The trouble is that its conclusion is a version of advocacy so watered down that no champion of the adversary system can accept it.

Consider, for example, complaints by the president of a lawyers’ organization about a recent American innovation in which jurors are permitted to question witnesses directly. “You work very hard to keep certain information out of the trial. Then all of your finesse and art and technique are thrown out the window when a juror comes in and asks, ‘Where were you on the night in question?’”\textsuperscript{161} In other words, his objection to the innovation is precisely that it prevents lawyers from “muddy[ing] the headwaters of decision.” Fuller invariably thinks of advocacy as a means for injecting more arguments and information into hearings, but the example illustrates what every trial lawyer knows: the real finesse and art and technique of advocacy lies in keeping arguments and information out of hearings.

Consider another example. A criminal defense lawyer “may not, to free his client, cast suspicion on innocent persons.”\textsuperscript{162} In fact, casting suspicion on innocent persons is one of the most common techniques of the defender, and every defender that I know would regard failing to use the technique as close to malpractice.\textsuperscript{163} In cases involving multiple defendants, there is often no defense to offer except the argument that the client’s partner, not the client, was the trigger-man.

My point is not to defend the standard conception of advocacy. On the contrary, I much prefer Fuller’s conception. My point is simply that what Fuller envisions is far from adversary advocacy as common-law lawyers understand and practice it. Fuller said that he was defending the adversary system, and I am quite sure that he meant what he said. But, in the end, what he really believed in was the lawyer as “architect of social structure.” And when Fuller insisted that “the view that sees [the lawyer] primarily as an expert in structure can be interpreted to embrace his activities as an advocate in litigation,” he was indulging in wishful thinking. In Fuller’s eyes, the advocate is a “partisan collaborator”\textsuperscript{164} in a process that pushes parties toward a peaceful settlement.\textsuperscript{165} But interests cannot always be reconciled; and, when they can’t be, there simply is no such thing as a partisan collaborator.

\textsuperscript{160} Fuller & Randall, Joint Conference Report, supra note 28, at 1161.

\textsuperscript{161} Bill Miller, Making a Case For Questions From Jurors; Process, Rare Now, Is Judicial Trend of Future, Backers Say, WASH. POST, May 26, 1997, at A1.

\textsuperscript{162} Fuller, The Adversary System, supra note 111, at 38.

\textsuperscript{163} Nor is casting guilt upon the innocent a uniquely American or uniquely contemporary legal technique. See DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 192-204 (1973) (discussing fascinating nineteenth-century British cases).

\textsuperscript{164} Fuller, American Legal Philosophy, supra note 63, at 253.

\textsuperscript{165} Id.