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The Hermeneutical and Rhetorical Nature of Law

Francis J. Mootz III

In its most venal manifestation, scholarly writing betrays the anxiety of influence by claiming to offer a radically new solution to age-old conundrums. The goal is to make a clean break from a traditional path of thought that has become trapped in a cul-de-sac, to make progress by finding a new way forward. Not so with Professor Jean Porter’s work, and particularly her most recent book. Porter demonstrates that thinking through an established tradition – one that has responded to numerous challenges within very different contexts over several millennia – can sometimes offer the most productive response to contemporary dilemmas. She rejects the Sirens’ lure to make a sharp break from received traditions. Instead, she chooses to engage the natural law philosophy of the early Scholastic period from our contemporary perspective and its attendant problems. This provides helpful resources to deal with these contemporary dilemmas, but it also opens new possibilities for the development of natural law thinking. The resulting book, Ministers of the Law, is erudite, artfully presented, and provocative.

In this article, I view Porter’s successful resuscitation of a plausible account of natural law through a particular lens. My thesis is that we can productively extend her work by more strongly acknowledging the hermeneutical and rhetorical nature of law. This may seem paradoxical, if not incoherent, in light of the common understanding that contemporary hermeneutical and rhetorical philosophy participates in the postmodern critique of rationality. Although many might assume that natural law is wholly at odds with hermeneutical philosophy and rhetorical theory, I argue that the case is just the opposite. Porter acknowledges that rhetorical persuasion is at the center of the practices that gird the natural law tradition, but we should...
strengthen this acknowledgment to the point of embracing fully the theoretical commitments of contemporary hermeneutical and rhetorical theorists.

My discussion is divided into three parts. First, I survey Porter's argument and establish that she regards hermeneutical and rhetorical practices as critical features of her natural law account. Next, I adumbrate a hermeneutical-rhetorical understanding of natural law that builds on my previous work. Finally, I explore how this account expands and deepens Porter's natural law account of legal authority. I conclude that we should recognize law's hermeneutical and rhetorical nature, but that Porter has demonstrated the necessity of taking into account the Scholastics' natural law philosophy as part of this project.

1. The Role of Rhetoric in Porter's Natural Law Account

Porter begins Ministers of the Law by acknowledging that the ascendancy of legal positivism has posed a seemingly intractable problem for contemporary jurisprudence: if we must separate the social fact of law from moral considerations about how we should act, it seems impossible to gain critical traction in assessing the conventional practices of the legal system. She turns to an unlikely source to respond to this familiar intellectual crisis: the natural law tradition as articulated by the early Scholastic thinkers. It is a commonplace that natural law was consigned to the dust heap of history after H.L.A. Hart defeated Lon Fuller's minimalist natural law account in their famous debate in the pages of the Harvard Law Review. Natural law is the old answer that failed, many would argue, and not an appropriate resource for fashioning a new answer. But these critics would be wrong.

In the face of profound social, economic and political dislocation, the early Scholastics sought to articulate a critical basis from which to assess the nascent legal structures that were emerging to bring order to social life. As law became formalized through institutions rather than existing as an organic aspect of society or as the command of an all-powerful sovereign, there was a felt need to articulate the limits of power through notions such as due process. They argued that we may assess legal institutions against the baseline of the purpose of law: the

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2 Id. at 42-43.
3 Id. at 51-52.
promotion and facilitation of the natural forms of human flourishing.\textsuperscript{4} This natural baseline is real yet underdetermined. Caricatures of natural law assume that a "fairly specific set of precepts" is available to humans, but the early Scholastics identified natural law "in the primary sense with capacities or general principles for rational judgment, which must be exercised or specified in more or less contingent ways in order to be practically effective."\textsuperscript{5} Although some theological critics may argue that this approach to natural law is too beholden to mere social conventions, the early Scholastics believed that "the intelligible natural structures of the human organism and human life" are sufficiently strong that they "do have a normative purchase on human conduct and the laws regulating that conduct."\textsuperscript{6} Hence the title of Porter’s book: judges are constrained by law, and are to be regarded as "ministers of the law."\textsuperscript{7}

Porter demonstrates that the early Scholastics believed that the general constraints of the natural law could be expressed through a variety of conventional forms, and so respect for the natural law can, and must, be sensitive to the cultural context of its application.

\textsuperscript{4} In an earlier work Porter emphasized the distinction between human nature and the manifestations of human nature through social structures as the key feature of natural law thinking. Jean Porter, Nature as Reason: A Thomistic Theory of the Natural Law 1 (2005) [hereinafter Porter, Nature as Reason].

\textsuperscript{5} Porter, Ministers of the Law, supra note 1, at 61. Porter notes that the early Scholastics interpreted St. Paul’s famous phrase that all persons may know the law because it is "written on their hearts" to mean that the natural law is a capacity. See id. at 77. "Now for the first time, the natural law is identified directly with a subjective faculty of reason rather than with an objective normative order discerned through reason." Id. at 78.

\textsuperscript{6} Id. at 61-62; see also id. at 68.

\textsuperscript{7} Porter succinctly makes this point in historical terms:

Roman jurists had of course acknowledged the existence of a natural law, but for them the natural law was associated with the pre-rational, organic aspects of human existence, and as such it had little or no direct legal force. The scholastics, in contrast, developed ancient classical and Christian perspectives on the natural law into a natural law jurisprudence, yielding an account of natural rights and relations that the lawgiver is bound to respect. They did not hold that the lawgiver can derive a comprehensive system of laws directly from natural law (or for that matter, from revealed divine law): from the time of Innerius and Gratian forward, they are keenly aware that legal enactments must be formulated and promulgated by an authoritative act of will. Nonetheless, legislative authority operated within boundaries for them. By the same token, the authority of the courts was likewise limited by natural law principles, developed in this context into doctrines of due process. The judge was, in their view, a "minister of the law," someone whose actions were not, so to say, his own individual acts, but actions of the law itself.

\textit{Id.} at 48 (footnote omitted).
There is no unchanging formal law in the heavens, not even hidden in the mind of God. Rather, to the extent that the eternal law can be said to govern human affairs, it does so through the natural law, which is in turn specified through individual and communal processes of practical deliberation and free choice. At the same time, these processes are themselves constrained—by norms of reasonableness, by the contingent yet practically irreversible determinations shaping an ongoing common life, and by considerations of natural right and equity which can be justified as such through processes of rhetorical persuasion, even in the absence of any extensive framework of shared beliefs and practices.8

That is to say, rather than regarding social conventions as more or less direct and unchangeable expressions of human nature, they emphasize the need for processes of rational, communally shared deliberation, in order to move from natural principles to their conventional formulations.9

This perspective avoids the perennial criticism that natural law is disproved empirically by the fact that there are diverse and contradictory cultural practices throughout the world. A broad diversity of practices, even of foundational legal practices, is consistent with the existence of human nature. "Indeed, a general conception of human nature is not only compatible with the reality of irreducible cultural diversity—we can only recognize this diversity for what it is, and begin to make sense of it, because we presuppose a general conception of human nature."10

The important question, of course, is how we can articulate the natural forms of human flourishing in a manner that is consistent with our ability to express these forms through a variety of different conventional practices. Porter turns to cultural psychology to explain how there is something that we might consider a core human nature, even if this nature may be expressed and fulfilled in many different ways.11 Contemporary biology teaches that other animals and plants have a fixed telos of development that is stable enough to serve as a measure of developmental defects, but humans use reason to discern and to pursue their ends such that there is a whole range of life plans that follow from a general conception of the good.12 Consistent with these modern scientific insights, the early Scholastics provide the basis from

8 Id. at 344.
9 See PORTER, MINISTERS OF THE LAW, supra note 1, at 81.
10 Id. at 107.
11 See id. at 110-13.
12 See id. at 102-03. Porter provides a much more detailed analysis of this point in Nature as Reason. See PORTER, NATURE AS REASON, supra note 4, at 82-103.
which to build a plausible natural law account that has purchase on contemporary debates without pretending to resolve these debates definitively for all time.

Given these limitations, can a natural law analysis offer any second-order normative judgments, on the basis of which to evaluate and perhaps to reform specific ways of life—our own, or (more problematically) those of other societies? . . . I am a value pluralist—I do not believe that there is a basis on which to decisively resolve every normative conflict, even—especially!—those concerned with fundamental issues. Ethical systems will remain to some degree ineradicably, incommensurably different, whatever progress we make toward shared values and normative commitments. And yet we have good reason to believe that we can make progress, both in self-critique and agreement on some norms of practice with those who disagree with us on matters of fundamental importance.

In earlier work, I argued that the natural law, properly understood, generates substantive norms in the form of ideals of virtue and broad categories of harm. These are not sufficiently determinate to secure agreement at the level of concrete norms, but neither are they purely formal. At least, they have enough substantive content to provide a basis on which to engage in processes of rational self-scrutiny and persuasive advocacy.\(^{13}\)

Porter suggests that the burning social issue of authorizing same-sex marriage is a case-in-point of the natural law at work. The public debate centers on the role of marriage in human flourishing, and there is no logically compelling answer to be drawn from the varied, subtle and historically-evolving purposes of this legal, social and religious convention.\(^{14}\)

Porter emphasizes in her natural law account that it is necessary for communities to engage in dialogue oriented toward persuasion regarding the appropriate contours of the contingent forms of human practices that should be sustained and developed to facilitate human flourishing. This is not a concession to our fallen state as flawed and sinful, but rather a celebration of man's distinctive character as a rational being. The necessity of deliberation is what separates human nature from the natural world; our deliberative capacity is our human nature. Porter appropriately emphasizes this point:

In contrast with non-rational creatures, we cannot attain natural perfection through the spontaneous unfolding and development of innate inclinations. In order to count as rational, our acts must be elicited and informed by an intelligent grasp of the end we seek, considered as in some way desirable and worth pursuing.

\(^{13}\) Porter, Ministers of the Law, supra note 1, at 113 (footnote omitted).

\(^{14}\) See id. at 122-24.
Returning to the question of gay marriage, Porter concludes that the debate about same-sex marriage is – or should be – a process “of rational self-scrutiny and persuasive advocacy” in an effort to translate the virtues developed in a society to address specific contingent questions of social ordering through the recognition and promotion of certain family structures. It is illegitimate to quell this debate by pronouncing that marriage is, and always must be, the union of one man and one woman, because the supporters of same-sex marriage make plausible (and, for Porter, persuasive) claims that this practice promotes human flourishing, both individual and social.

We bring practical reasoning to bear on moral questions through rhetorical persuasion. Natural law is universal, but the high degree of contingency means that general “ideals and norms must be formulated through processes of communal discernment and mutual persuasion before they can be appropriated and put into practice by individuals.” Rhetoric and public deliberation are necessary because there is no compelling reason to choose one option rather than another in this realm, and this in turn implies an obligation to respect differing viewpoints. Porter emphasizes the necessarily social character of the effort to concretize natural law principles in contingent forms of life, an effort that works from – and also works toward – a shared understanding.

The rational principles of natural law must be specified in order to be put into practice, and yet these specifications cannot be left to individual judgments; they

15 Id. at 94.
16 Id. at 113.
17 Porter reasons as follows:

I think we should be very hesitant to rule out unconventional forms of marriage too quickly on the grounds that these are contrary to the natural purposes of the institution. What seems from one perspective to be contrary to natural purposes might appear on longer experience as a legitimate expansion of these purposes, which does not undermine, and may well strengthen, the central purposes which the institution must serve if society is to continue at all. For this reason, I would support the legal recognition of same-sex unions as marriages, and I would grant legal recognition to some forms of plural marriages as well.

Id. at 287.
18 Id. at 98; see also 169-75, 285.
19 Porter, Ministers of the Law, supra note 1, at 189.
20 Id. at 196.
must be generally accepted in order to provide a framework for social activities, and that means at least that they must be public and relatively stable.\textsuperscript{21}

This is precisely the positive effect of a well-ordered legal system: it provides the necessarily social venue in which to articulate principles that serve as the touchstones for members of the society to engage in reflection and critique.

Porter argues that law is not just a system of sanctions against bad behavior, but instead is the positive means by which values and norms are socially generated.\textsuperscript{22} The Enlightenment prejudice is that individuals may rationally discern moral and ethical principles, but this is fundamentally at odds with the sociality of human beings. As Porter explains,

\begin{quote}
by no means would I deny that an individual can and should arrive at his own independent judgments with respect to these matters, but even so, rational deliberation of this kind will inevitably presuppose that the individual has been formed in normative categories mediated by his society. He may well transform or even reject the ideals of his society, but without some ordering structure of social norms, he would not be able even to begin an effective process of practical reasoning.\textsuperscript{23}
\end{quote}

She connects this social dimension with the necessity of rhetorical exchange.

This line of analysis confirms Cicero's claim that the common good of a particular community, subjectively understood in terms of its idealized sense of the values embodied in a particular way of life, constitutes it as a true republic, a polity within which free men and women can join together in shared deliberation, fruitful debate, and communal activities of all kinds.\textsuperscript{24}

Rhetoric is a product of the social nature of our existence, but it also is the means by which our social existence is defined, maintained and extended.

Porter explains how rhetoric and natural law mutually implicate each other by linking the existence of shared agreement with elaboration through debate:

The processes of persuasion and deliberation presuppose at least some consensus of beliefs and commitments, without which genuine disagreement and debate are

\textsuperscript{21} Id. at 81.
\textsuperscript{22} Id. at 143-44.
\textsuperscript{23} Id. at 138.
\textsuperscript{24} PORTER, MINISTERS OF THE LAW, supra note 1, at 161.
impossible. Ultimately, this consensus is rooted in the claims of a shared humanity, as expressed in the first principles of the natural law. But shared humanity and the natural law are only given concrete meaning and efficacious force in and through their active appropriation into a specific way of life, including the political processes of deliberation and persuasion.  

Natural law is the shared basis that always is insufficient to provide guidance in specific cases, causing the need for rhetorical specification of a form of life appropriate to the community at that time.

Broadening the scope of discussion to the theological account that underwrites natural law, we may recognize the realm of rhetoric as the space in which we exercise free will. Porter emphasizes that precisely because human deliberation and action are grounded in God's eternity, our formal legal systems and normative practices do not need to imitate the universality and necessity of God's law, nor do we need to save ourselves from the ambiguities of our own laws. We are free to be creatures in a finite world and to conduct our affairs accordingly.

God's eternal (and, therefore, inaccessible to us) law anchors the natural law without any practical effect on the articulation of its contingent expressions. Nevertheless, natural law principles provide sufficient constraint on social deliberation to guide the effort to create contingent social practices and institutions in the face of diverse and incommensurable considerations. Porter writes that in our ongoing efforts to assess and to reform our own social conventions, we as a society will inevitably find ourselves making (at least) partially contingent judgments regarding the relative urgency, significance, and concrete realization of diverse natural purposes, seen in the context of the complex affairs of human life. These processes of comparative assessment and formulation, in turn, presuppose some more comprehensive judgment regarding central ideals and the bounds of acceptable behavior, in order to provide a basis for ranking these diverse values and expressing them within a set of acceptable parameters. This

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25 Id. at 219.

26 Id. at 6. Porter makes this point forcefully near the end of her book:

There is no unchanging formal law in the heavens, not even hidden in the mind of God. Rather, to the extent that the eternal law can be said to govern human affairs, it does so through the natural law, which is in turn specified through individual and communal processes of practical deliberation and free choice. At the same time, these processes are themselves constrained — by norms of reasonableness, by the contingent yet practically irreversible determinations shaping an ongoing common life, and by considerations of natural right and equity which can be justified as such through processes of rhetorical persuasion, even in the absence of any extensive framework of shared beliefs and practices.

Id. at 344.
is tantamount to saying that deliberative processes presuppose some overall conception of what it means to live a good human life, a life worthy of the kinds of creatures that we are, within bounds set by our commitments to ourselves and to one another. To the extent that we presuppose such an ideal, we will find ourselves articulating it through the processes of assessment and reform of our major social conventions. And to the extent that we lack such an ideal, we will need to develop one, in order to continue deliberating in a principled, reasonable way.\textsuperscript{27}

Appeals to human nature at this level will not help us decide among these alternatives, because what they have in common is precisely their status as expressions of our shared nature. Thus, as John Kekes argues, human nature underdetermines moral norms, at least at a level sufficiently concrete to be put into practice. At best, we might be able to formulate general principles expressing these natural patterns of behavior, but if these are to be at all plausible as expressions of universal tendencies, they will necessarily be too broad to serve as moral principles, without further – necessarily particular and contentious – specification.\textsuperscript{28}

In order to be effective in a genuinely political rhetoric, appeals to civic and individual virtue must be tethered to what are recognizably expressions and appropriate developments of fundamental human capacities and inclinations. But these capacities can be developed and brought together in more than one way, not all of them compatible with one another, and not all of them possible in every social arrangement. The same observations apply to the individual virtues correlative to these political ideals.\textsuperscript{29}

And so, the eternal law both grounds and compels the exercise of human freedom, while the natural law provides sufficient guidance for the underdetermined exercise of this freedom through rhetorical practices of persuasion and communal self-definition.

2. A Hermeneutical-Rhetorical Understanding of Natural Law\textsuperscript{30}

Porter places substantial reliance on rhetorical advocacy and hermeneutical discernment as social activities by which we fashion a contingent political order in which the virtues may be developed in

\begin{flushright}
\textsuperscript{27} Id. at 128. \\
\textsuperscript{28} Porter, Nature as Reason, supra note 4, at 126. \\
\textsuperscript{29} Porter, Ministers of the Law, supra note 1, at 201. \\
\textsuperscript{30} The remainder of this paper builds on, and takes from, several other works by the author, including: Perelman's Theory of Argumentation and Natural Law, 43 Phil. and Rhetoric 383-402 (2010); Symposium, Faithful Hermeneutics, Mich. St. L. Rev. 361-76 (2009); After Natural Law: A Hermeneutic Response to Law's Quandary, 9 Rutgers J.L. & Religion (Number 2, 2009); Law in Flux: Philosophical Hermeneutics, Legal Argumentation and the Natural Law Tradition, 11 Yale J.L. & Human. 311-82 (1999); Natural Law and the Cultivation of Legal Rhetoric, in Rediscovering Fuller: Implicit Law and Institutional Design (Willem J. Witteveen & Wibren van der Burg eds., 1999).
\end{flushright}
accord with natural law principles. In this section of the article, I extend Porter’s point and argue that the natural law must be understood within the theoretical framework established by contemporary hermeneutical and rhetorical philosophy. The hermeneutical and rhetorical turn in contemporary jurisprudence has replaced the homage to universal and eternal principles with attention to the fluidity and historical contingency of meaning. The natural law tradition appears to be hopelessly 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. However, Porter’s work admirably advances the connections between the natural law and persuasion in public discourse, bringing together these seemingly disparate traditions. I wish to radicalize Porter’s insights in line with my own work, while also acknowledging that her insights help to shape my conception of a hermeneutical and rhetorical conception of natural law.

A. Philosophical Hermeneutics and Rhetorical Theory

I begin by explaining what I mean by the terms hermeneutical and rhetorical, since these longstanding intellectual traditions are complex and evolving. I endorse the philosophical hermeneutics articulated by Hans-Georg Gadamer, in which he offers a phenomenology of human understanding rather than a method for interpreting texts. Gadamer argues that understanding occurs when a person brings her finite and prejudiced horizon of preunderstandings into dialogue with a text that itself has a “history of effects” within the culture that shapes its reception. The interpreter never comes to an interpretive event as a neutral observer, but rather is always an interested party posing a question that is itself shaped by the cultural context created, in part, by the text. Understanding is a fusion of these horizons that only appear to be wholly distinct from each other, but which in fact share fundamental commonalities established through the linguisticality of human experience. Understanding is always an act of application rather than simply a matter of recovery. It is an activity in which the horizon of the text is brought into dialogue with the interpreter’s horizon, such that neither remains unchanged as a result of this experience.

Gadamer’s phenomenological account of hermeneutical experience draws upon the familiar experience of a conversation, in which understanding occurs as the product of the give-and-take experiences of the
interpreter within a given historical and social situation.\textsuperscript{31} This leads Gadamer to conclude that "putting at risk" is the guiding normative implication of his philosophy. He emphasizes 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."\textsuperscript{32} Georgia Warnke argues that this normative principle underwrites a new approach to the problem of justice. Abandoning the fiction of a consensual social contract as the source of political legitimation, she promotes a hermeneutical account of justice as the "fair and equal hermeneutic discussion" that accepts the reality of "disagreements between equally well justified interpretations" of the substantive requirements of a just society.\textsuperscript{33} It is important not to misread Warnke as conceding an "anything goes" relativism. Warnke emphasizes that even if many interpretations can equally be justified on formal grounds, we should not abandon the goal 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. The key hermeneutic insight is that the better interpretation is always advanced in a contextual and historical dialogue with others, and therefore can never achieve the status of a timeless logical truth that can be apprehended by a single individual through the exercise of reason.

The legal system – which is premised on the production and interpretation of authoritative texts as sources of governing authority – is the

\textsuperscript{31} Gadamer writes:

Conversation is a process of coming to an understanding. Thus it belongs to every true conversation that each person opens himself to the other, truly accepts his point of view as valid and transposes himself into the other to such an extent that he understands not the particular individual but what he says. . . . [When interpreting a text] the interpreter's own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says.

. . .

We can now see that this is what takes place in conversation, in which something is expressed that is not only mine or my author's but common.


\textsuperscript{33} GEORGIA WARNKE, JUSTICE AND INTERPRETATION 12, viii (1993).
most prominent venue today for this hermeneutical experience oriented toward questions of justice. Gadamer insists that every attempt to understand a legal text is a function of applying the text to the case at hand, and therefore legal reasoning provides a particularly vivid model of all hermeneutical activity.34 He rejects the scientific impulse to reduce law to a disciplined methodology of deductive subsumption of specific cases under general principles, recognizing the impossibility of bridging the chasm between the presumed universal and timeless meaning of the text and the practical demand of resolving the dispute at hand. The model of conversation proves to be especially illuminating in this context: an interpreter understands a legal text by suppressing her subjective designs and allowing the texts to speak to the question posed by the case. The model of conversation also underscores the rhetorical nature of legal practice: An interpreter can understand a text best by suppressing the urge to chart the line of inquiry in advance, 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 unfolding meaning of the historically effective text as it is revealed in the present circumstances. Law is authoritative because it is the hermeneutically-sound practice of appropriating governing texts to current disputes.

Gadamer’s philosophical hermeneutics underwrites the practical discourse described by Porter in which members of a community bring the natural law to bear through the development and maintenance of historically contingent practices. Hermeneutical discernment is inevitable, but it also always underdetermines the instantiation of natural law principles in a given society. As Porter repeatedly emphasizes, members of society must engage in persuasive discourse to foster and elaborate the normative contours of the social world in which practical decisions about morality are made. There is no natural law truth that stands outside this discourse and provides a unique answer to concrete moral problems that arise, just as there is no invariant meaning of a text that may be retrieved independently of the social circumstances in which the interpretation takes place.

The continuity with Porter’s argument is underscored by recognizing the deep affinities of Gadamer’s philosophical hermeneutics with contemporary rhetorical theory. Châi:m Perelman’s development of a “new rhetoric” provides an important link between Gadamer’s phenomenology of understanding and the concrete ways in which people pursue

34 Gadamer, Truth and Method, supra note 31, at 324-41.
questions of justice in everyday life. 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.35

Working from Aristotle's rhetorical philosophy, Perelman argues that it is necessary to distinguish rational truths from reasonable arguments. 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 dispute.36 He argues that philosophers can gain insight into the nature of moral argumentation by looking to the practical engagement that occurs in legal argumentation rather than to an abstract model of theory as a guide.


36 CHAIM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 129 (John Petrie et al., trans., D. Reidel Publishing 1980) [hereinafter PERELMAN, JUSTICE, LAW, AND ARGUMENT]. 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.

Id. at 174.
knowledge characterized by reasonableness and by the taking into consideration diverse aspirations and multiple interests, defined by Aristotle as phronesis or prudence, and which is so brilliantly manifested in law, in Roman jurisprudentia.

... 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.37

The new rhetoric essentially is a philosophy about how argumentation can be reasonable.38

Perelman's rhetorical philosophy is distinctly at odds with the account of natural law philosophy as the discovery of abiding truths that have normative force in the absence of argumentation. It should come as no surprise, then, that Perelman roundly criticizes the natural law tradition.39 He emphasizes that the traditional approach to natural law continually runs aground on the shoals of experience, as demonstrated by the fact that reason has failed to settle debates regarding justice that reach back at least as far as Sophocles.40 He concludes that justice is not univocal; instead, it always requires making choices between justifiable tenets that are in conflict. Law must operate in the realm of the reasonable as well as the rational if it is to do justice.

Nevertheless, Perelman's philosophy is deeply indebted to Aristotle, and Perelman recognizes that there may be room for a very different understanding of natural law by drawing on Aristotle. Aristotle offers a counterpoint to modern rationalist conceptions of natural law because he was too wedded to the necessity of an equitable leavening of the law to endorse a thoroughly rationalized approach to legal practice. In a seminar Perelman summarized his conclusion: "I don't see either Aristotle or Thomas Aquinas saying as Grotius says, that there are

37 Id. at 119, 146; 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.").

38 To reason with another person "is not merely to verify and demonstrate, but also to deliberate, to criticize and to justify, to give reasons for and against—in a word, to argue." PERELMAN, JUSTICE, LAW, AND ARGUMENT, supra note 36, at 69.

39 Perelman rejects the secular, rationalist incarnation of the natural law tradition because it presumes that reason can determine not only what is true in the world of empirical fact, but also what is just in the social world. See id. at 29-32, 42-43, 131.

40 Id. at 163-66.
eternal laws of justice, just as eternal as the laws of mathematics. It is impossible.\(^{41}\) Perelman recognizes that classical approaches to natural law might supplement his rhetorical philosophy by carefully attending to the interplay between the hypothesized rational legal system and the reasonable resolution of specific cases.

It is immediately apparent that Perelman's rhetorical philosophy extends Gadamer's philosophical hermeneutics in a manner that recalls Porter's emphasis on the need for hermeneutical discernment and rhetorical elaboration of the natural law in specific social contexts. But whereas Porter begins with a natural law account and then grants substantial importance to the role of hermeneutics and rhetoric in practice, Gadamer and Perelman provide an ontological account of the hermeneutical and rhetorical nature of human understanding. I join their effort and argue that we ought to conceive of natural law as naturalized rhetoric, by which I mean that the manner in which we engage in legal regulation and moral deliberation is rooted in our human nature as interpretive and rhetorical beings.

\section*{B. Natural Law as Naturalized Rhetoric}

Gadamer is one of the leading philosophers of the anti-foundationalist movement during the last century that located all understanding in the hermeneutical-rhetorical experience of finite beings. It might be surprising, then, to learn that at a critical juncture of \textit{Truth and Method} he endorses Aristotle's classical account of a "changing" natural law.

For Aristotle, this changeability [the fact that natural law is not timeless and unchanging] is wholly compatible with the fact that it is "natural" law.\ldots [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.\ldots [Aristotle] quite clearly explains that the best state "is everywhere one and the same," but it is the same in a different way that "fire burns everywhere in the same way, whether in Greece or Persia."

\ldots [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). . . .42

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 he wishes to emphasize just the opposite in his reading of Aristotle.

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.43

This leads to the paradoxical conclusion that natural law is experienced only by virtue of the bounded flexibility experienced in interpretation, which always is an application and adjustment to context.44

Significantly, Gadamer extends the scope of his analysis beyond law and politics and applies it to all moral knowledge. Philosophical hermeneutics rejects the idea that moral knowledge exists independently of contextual efforts to live correctly, that moral ends can be discovered and then pursued as preestablished goals by utilizing appropriate means. Gadamer emphasizes this point by refining Heidegger’s creative reading of Aristotle’s terminology: Morality is never just a matter of techne — a learned skill such as carpentry that pursues known ends — but rather is a matter of praxis that exhibits phronesis attentive to chaires — a practical judgment rendered within a given

42 GADAMER, TRUTH AND METHOD, supra note 31, at 319-20.
43 Id. at 519.
44 Id. at 519-20.
situation concerning the appropriate course of action at that time. Thus, morality simultaneously is an end and a means. Gadamer insists that we 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.

Although the natural law — both in terms of moral knowledge and legal correctness — is known only contextually and historically, Gadamer insists that it is appropriate to regard it as natural law when that term is understood in its classical sense as articulated by Aristotle. This is why he denies that the interpreter may validly impose an interpretation or moral judgment as a manifestation of subjective will: there is something in "the nature of the thing" that prevents such hubris.

Perelman proceeds from this same ontological commitment, but he focuses on the rhetorical means by which the "changeable" natural law is established, utilized, and refined. In a manner that echoes Gadamer, Perelman insists that the natural law tradition can embrace the ontological pluralism of legal argumentation without degenerating into a formless 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.

This quotation is potentially misleading, inasmuch as it suggests that natural law is "just" a line of argument and has no "ontological" status. Perelman is best read as advancing a naturalized rhetoric that connects Gadamer's ontological claims with the argumentative practices of law and moral decision making.

45 Id. at 316-22.
46 Id. at 317 (emphasis added).
47 PERELMAN, THE NEW RHETORIC, supra note 35, at 33-34.
In a recent article I have delineated three ways in which Perelman's theory of argumentation connects to natural law philosophy. As revealed in the quotation above, it is certainly true that Perelman regarded natural law as a commonplace of legal and moral argumentation. He cites the decision by the Allies to justify the Nuremberg trials with appeals to natural law as a concession to the fact that the demands of justice require reasoning that extends beyond application of conventional positive law. Perelman rejects the authoritarian and ideological overtones of the natural law tradition, but he argues that the tradition is not a "mistake" that should—or can—be exorcised from our vocabulary. If natural law is an ontological feature of the world, it must be the case that when both parties in a debate invoke natural law one of them must be wrong. However, when natural law is understood as a commonplace from which one may argue many points in different ways, we see that natural law is a supple and polysemic concept that does not yield singular answers to social and legal disputes. In short, Perelman strips natural law precepts of their inauthentic claims to eternal and universal validity and urges legal theorists and practitioners to utilize the principles as vital (indeed, unavoidable) resources for introducing innovation and for critiquing existing legal relations.

Regarding the natural law as a rhetorical commonplace may be descriptively accurate, but this does not grant natural law principles any more status than mere maxims of the law. I argue that Perelman's argumentation theory connects with the natural law tradition in at least two additional, more substantive, ways. First, we can connect Perelman's contested (and often misunderstood) idea of a "universal audience" to the natural law tradition. Second, we can think of natural law as a rhetorical commonplace with a descriptive force that is not reducible to mere maxims of the law. But it also offers a solution to "law's quandary" because "modern legal discourse is operating in a sort of 'ontological gap' that divides our explicit or owned ontological commitments"—essentially, legal positivism—"from the ontological assumptions not only implicit in but essential to our discourse and practice"—essentially, natural law principles. Steven D. Smith, Law's Quandary 63 (2004). Put more simply, our quandary is that legal discourse depends upon something analogous to the religious ontology of natural law, but we expressly disavow such an ontological grounding despite the necessary role it plays in our practices. Similar to my tack in this article, I contend that we can find a natural law solution to law's quandary in the account offered by contemporary rhetorical and hermeneutical philosophy, which is very different from the traditional natural law accounts toward which Smith gestures, but which no longer are persuasive. Francis J. Mootz III, After Natural Law: A Hermeneutical Response to Law's Quandary, 9 Rutgers J.L. & Religion 1 (2008).

50 Steven Smith has pronounced the inevitability of natural law argumentation as "law's quandary" because "modern legal discourse is operating in a sort of 'ontological gap' that divides our explicit or owned ontological commitments"—essentially, legal positivism—"from the ontological assumptions not only implicit in but essential to our discourse and practice"—essentially, natural law principles. Steven D. Smith, Law's Quandary 63 (2004). Put more simply, our quandary is that legal discourse depends upon something analogous to the religious ontology of natural law, but we expressly disavow such an ontological grounding despite the necessary role it plays in our practices. Similar to my tack in this article, I contend that we can find a natural law solution to law's quandary in the account offered by contemporary rhetorical and hermeneutical philosophy, which is very different from the traditional natural law accounts toward which Smith gestures, but which no longer are persuasive. Francis J. Mootz III, After Natural Law: A Hermeneutical Response to Law's Quandary, 9 Rutgers J.L. & Religion 1 (2008).
law in more far-reaching theoretical terms by conceiving Perelman’s philosophy as propounding a “naturalized rhetoric.”

Perelman famously recuperated the ancient attention to audience, but he placed emphasis on the speaker’s active creation of the audience in the course of addressing it. In some circumstances, a speaker will aspire to more than persuading the audience to which the speech is immediately directed and will claim to offer reasons that would be convincing to all reasonable persons. “This refers of course, in this case, not to an experimentally proven fact, but to a universality and unanimity imagined by the speaker, to the agreement of an audience which should be universal, since, for legitimate reasons, we need not take into consideration those [who] are not part of it.” Rhetors construct a universal audience not only to shape their discourse but also to entreat the concrete audience before them – which “can never amount to more than floating incarnations of this universal audience” – to imagine themselves as part of such an audience. We can regard natural law arguments as addressing a particular audience in their capacity as a contingent example of a hypothesized universal audience.

A natural law argument is directed to a universal audience for whom the actual audience – whether a jury, judge, or appellate panel – serves as a stand-in. This is not to say that the audience is hypothesized to be generically “rational” because reasonableness is still the hallmark of the inquiry. Claims in this setting are tradition-bound, even as they move beyond convention. For example, Aristotle notes that natural law argumentation is appropriate when arguing against an accepted practice such as slavery. This argument might be paraphrased as: “No reasonable person seeking to implement the values of our legal system could conclude that slavery is legitimate, notwithstanding our custom and written laws to the contrary.” Arguments traditionally couched in natural law terms are not made to a timeless and decontextualized rational being; rather, these arguments are designed to provoke the actual audience to rise above their parochial interests and to conceive of themselves as empowered to articulate truth, justice, and other confused notions in a manner that all members of the community should find persuasive. Using the terminology of contemporary rhetorical

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51 See id. at 390; see also Chaim Perelman & Lucie Olbrechts-Tyteca, The New Rhetoric: A Treatise on Argumentation 19 (John Wilkinson & Purcell Weaver trans., 1969) [hereinafter Perelman, A Treatise].
52 Perelman, A Treatise, supra note 51, at 31.
53 Id.
54 See id. at 389.
criticism, we can say that natural law arguments address a particular audience of intended readers with the goal of invoking an idealized (universal) audience.\textsuperscript{55} Natural law is not just a topic used in argumentation, then, but is an invocation of a special relationship between speaker and audience, by calling upon the audience to live up to its aspirations.

The most radical sense in which we can connect natural law with Perelman's theory of argumentation is by "naturalizing rhetoric." This is a potentially misleading term, and so I want to unpack my meaning carefully. As used in contemporary philosophical discourse, "naturalism" refers generally to a philosophy that sees itself as clarifying the empirical dimensions of reality rather than engaging in speculative metaphysics. The overriding assumption is that the only features of reality capable of resolution by rational thinking are those that are subject to scientific investigation. I use the term "naturalized rhetoric" as a provocation meant to challenge such a limited notion of "nature." The ontological claims made by Gadamer and Perelman establish that human nature is radically hermeneutical and rhetorical, and it is this nature that should serve as the focus of an inquiry into the natural law. Simply put, it is our persistent human condition to continuously recreate ourselves and our society through rhetorical exchanges with others. A naturalized rhetoric embraces the paradox that nonessentialism is essential to our being, that we can find a foundation for reflection in antifoundationalism.

A naturalized rhetoric regards Perelman's theory of argumentation as an affirmative account of our reasoning nature rather than a reluctant concession to the limitations of our ability to be thoroughly rational. Important normative implications follow from a naturalized rhetoric. If it is our nature to be rhetorical, an ethical system oriented toward promoting human flourishing would require that we ensure the social and legal context for the development of this capacity. This recognition would not yield specific policy prescriptions nor would it provide definitive answers to specific legal dilemmas, but it would establish the necessity of maximizing dialogic exchanges.

By naturalizing rhetoric we can address one of the central questions in rhetorical theory more productively: whether there is a basis for distinguishing "good" rhetoric from "bad" rhetoric. It is crucial to avoid

the temptation to essentialize our rhetorical nature by supposing that it includes more substantive agreement on shared norms than can be secured in dialogue and argumentation. In other words, it is always illegitimate to recognize our rhetorical nature but then to prescribe certain “natural law” claims that must be accepted by all rational persons and and thus can legitimately be coercively imposed. Such ideological tendencies are closely associated with traditional natural law claims, but it is precisely by naturalizing rhetoric that we can avoid this misuse of the commonplace of natural law. By recognizing that it is our nature to be rhetorical, and that the variety of legal systems rest on this naturalized rhetoric rather than on an objective state of affairs that can be discerned by reason alone, we can understand how natural law argumentation works to construct a universal audience through rhetorical engagements.

C. Reconsidering Lon Fuller’s Natural Law in Rhetorical Terms

I am not writing on a blank slate, as Porter recognizes. Even the inveterate Legal Positivist, H.L.A. Hart, recognized that human nature provided some constraint on lawmaking, if only to the extent that there are biological requirements for human survival. However, Porter argues that more robust efforts to preserve the natural law tradition against the positivist orientation have failed, and she particularly notes that Lon Fuller’s “internal morality of law” was “underdeveloped” because it was limited to procedural elements. She argues that we should deepen Fuller’s insight that formal lawmaking authority appears to have naturally emerged in society by focusing on the purposes of this contingent, yet nearly universal, development of modern societies. I contend that Porter has missed the depth of Fuller’s natural law thinking, and that his approach is in sync with the rhetorical and hermeneutical ontology that I have described.

Fuller clearly was a natural law philosopher who embraced the tradition of discovering natural patterns of order that provide guidance to in situations calling for judgment. At the same time, Fuller rejected the claim to have discovered human goods according to a transcendent standard. As he later explained with reference to his early book, “The

56 See Porter, Ministers of the Law, supra note 1, at 22.
57 See id. at 23.
59 See Lon L. Fuller, American Legal Philosophy at Mid-Century, 6 J. Legal Educ. 457, 477-80 (1954).
Law in Quest of Itself,” Fuller advocated “not a system of natural law but the natural-law method.” He argued that reasoned discovery was possible in the moral realm, but he was equally adamant that it was beyond the capacity of reason to elaborate the full detail of moral obligations. Fuller was not merely a proceduralist; his natural law method attempted to steer a course between the extreme skepticism of positivist cultural relativism and the imperious dictates of moral absolutism too often associated with theological accounts of natural law. His hopes for the shifting intellectual tide in the late 1960s capture his meditative efforts.

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.\(^{61}\)

Fuller presciently sought to articulate a scholarly program for investigating the natural laws of social dynamics – a program he termed “economics” – without relapsing to the comforting but misguided project of developing a comprehensive natural law system of substantive moral principles.

Fuller distinguished the inner morality of law from substantive principles, but he did not draw a sharp distinction. Rather, his claim was that the inter-penetration of efficacious means and desired ends results from man’s social nature. 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 only possible within certain social structures and cultural settings, and the morality of law inheres precisely in its valuable contributions to shaping the context that gives rise to correlative moral obligations of legislators, judges, and lawyers to maximize this state of affairs.

Appreciating the degree of complexity and nuance in Fuller’s account, we can see that he did not claim to maintain strict neutrality toward ends that extend beyond his desiderata of procedural principles of legality. In his final reply to the persistent criticisms of The Morality of Law,

\(^{60}\) Lon L. Fuller, Letter from Lon L. Fuller to Thomas Reed Powell, in The Principles of Social Order: Selected Essays of Lon L. Fuller 293, 296 (Kenneth I. Winston ed., 1981); see also Lon L. Fuller, The Law in Quest of Itself 103-04 (1940).

Fuller readily concedes that there is a substantive core to his natural law philosophy in the form of two commitments that simultaneously are constitutive of, and predicated on, law. First, the inner morality of law is premised on the view "that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults." This substantive commitment embodies nothing more than an affirmation of the reality of morality and a rejection of the behavioral-modification/coercion theory of law and his adoption of a model of tacit reciprocity. More interesting is Fuller’s claim that the inner morality of law is premised on man’s nature as a communicative being. In contrast to Hart’s grudging concession that a core natural law principle might be located in man's struggle to survive the physical conditions of scarcity and violence, Fuller argues that the moral commitments generated by communicative exchanges between moral beings extend beyond, and sometimes override, the biological imperative to survive.

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

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

With the principle of open communication between moral beings as a normative underpinning, it is best to view Fuller’s “tacit cooperation” thesis as a practical condition of social life that is essential to the ongoing practices of a good and workable legal system.

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. In the end, Fuller’s work is an attempt to

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62 Id. at 162.
63 Id. at 184-85.
64 Id. at 184.
65 Id. at 186.
specify different institutionalized forms of discourse that contribute to the free and open dialogue from which meaningful substantive aims may 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, official must respect the integrity of emergent efforts at cooperation in local settings.66

This should not be regarded as a skeptical extreme; rather this position should be embraced as the facilitation of man's human nature as a social being who builds his society through hermeneutical and rhetorical engagement with others. This is the abiding lesson of Fuller's famous hypothetical case of the Speluncean Explorers, in which the judges engage in a dialogic clash of competing opinions in the face of an underdetermined clash of moral and legal values.67

Fuller's natural law philosophy can be understood fully only by recognizing his largely implicit commitments to substantive principles of justice that have generally been overlooked. Fuller labored within the confines of a dying debate between traditional natural law philosophy and analytical legal positivism, but he anticipated the work of contemporary theorists who draw on sophisticated accounts of the connections between man's nature as a communicative social being and the operation of legal institutions.68 Philosophical hermeneutics and rhetorical theory provide the conceptual resources necessary to appreciate and extend Fuller's important insights. It is precisely this tack I wish to take in deepening and broadening Porter's natural law account of legal authority.

3. Expanding and Deepening Porter's Natural Law Account: The Hermeneutical and Rhetorical Nature of Law

In this part of the article I reinforce Porter's effort to provide a theological justification of an independent, secular legal system by

67 See Mootz, supra note 58, at 359-63.
68 I have argued that Lloyd Weinreb's natural law philosophy is similarly productive for modern thought, in that it rejects skepticism in the wake of the failure of post-Thomistic natural law by reaffirming the truth of morality. Id. at 345-52. Weinreb summarizes: "Natural law doesn't provide moral truths, it just rebuts skepticism and existentialism." Lloyd L. Weinreb, The Moral Point of View, in NATURAL LAW, LIBERALISM AND MORALITy 195, 208-09 (Robert P. George ed., 1996).
elaborating how such a legal system relates to the natural law. Once we acknowledge that human nature is hermeneutical and rhetorical, the relationship between the natural law and the legal system can be understood with greater depth and nuance. The human goods traditionally identified by natural law theorists do not arise directly from the biological constitution of the human species, but instead reflect millennia of social construction through hermeneutical appropriation and rhetorical elaboration. Returning to the seat of the human condition — that we are finite and tradition-bound beings who constantly exercise free will through the unavoidable processes of non-deductive interpretation and persuasion — provides a more persuasive argument in favor of the rule of law in constitutional democracies. Of course, I acknowledge that this is a judgment no less subject to argumentation and to reassessment in the face of developments in the human condition than any other natural law claim.

Justifying a legal system that is independent of the speculative efforts by diverse religions to define the nature of human goods through theological reflection begins with the recognition that it is human nature to innovate constantly and to reshape the social structures within which humans can flourish. This relates to one of Porter’s most important insights: the legal system is not just a concession to the reality of original sin (by providing punishment for wrongdoing), it is a social institution that provides the positive means for the development and expression of human capacities.\(^69\) Porter explains that law is not merely ameliorative,

\[\text{[it] provides in addition something that cannot be supplied in any other way. That is, it offers institutional forms and structures through which men and women can actually practice the political virtues, through publicly sanctioned individual activities and through participation in shared activities and practices. Without these institutional forms, individuals could of course still promote the common good through all kinds of private contributions to public utility. But they could not act specifically as citizens of a polity, because they would have no way in which to carry out publicly recognized and sanctioned legal actions, nor could they participate in activities which by their nature require the coordinated activities of many individuals.}\(^70\)

For example, we may compare a sophisticated and coordinated system of social welfare benefits with a strictly libertarian system that relies solely on individual charitable donations to those in need. The latter is politically anemic because it does not expressly acknowledge the priority of the social realm in sustaining all individual freedoms. A coordinated

\(^{69}\) See Porter, Ministers of the Law, supra note 1, at 126.

\(^{70}\) Id. at 234.
political and legal system of rights and obligations is not a constraint on individual human freedom; to the contrary, it provides the context that enables the development of individual human capacities.

One cannot understand a text without a horizon of preunderstandings, nor can one persuade another without drawing on shared topoi. Similarly, the expressive role of the social institutions created by law is a precondition in the modern world for the exercise of human freedom. The libertarian ideology itself rests on certain expressive features of modern constitutional democracies regarding individual rights, as well as an intricate system of property entitlements created through the "common" law. The claim that this form of social authority is "natural" and that other assertions of social authority are not natural is not an argument; rather, it is the topic sentence for an argument that must be elaborated and which already concedes the primacy of the social structures within which individuals acquire their attributes and express their freedom.

The theological lesson that we derive from our hermeneutical-rhetorical situation is the radical nature of free will, and the corresponding obligation to facilitate its sound exercise. Theologians ask how we can persist in the drama of human life with nothing but human life to sustain us, but if there is a God she stands mute in the face of this question, prodding us to answer it ourselves. We must find within our human practices the resources to continue those practices with integrity, true to our nature as meaning-making beings. Aristotle provided guidance, as did the early Scholastics, but this wisdom has been overcome by the fool's errand to secure indubitable truths by which to guide our behavior. Perhaps ironically, it is only by acknowledging the all-too-human hermeneutical and rhetorical foundations of our social practices that we can catch a glimpse of the radical finitude of our striving, and thereby appreciate the mystery that is God. Theologians argue that the eternal law secures these practices, but the eternal law does not guide us in the day-to-day practice of law and politics. In these circumstances, we can refer only to the natural law that can be perceived by all persons—believers and non-believers alike—because it is the touchstone of the human experience rather than a metaphysical claim. John Finnis's "new natural law" fails because it is Catholic orthodoxy masquerading as the operation of practical rationality that compels all persons to accept certain conclusions.71 In contrast, the natural law cannot

71 Porter demonstrates that Finnis fails in his project to ground specific moral prescriptions in reason alone. Her natural law account is best viewed as a response to the failure of the "new natural law." See Porter, Nature as Reason, supra note 4, at 127-31.
plausibly be premised on the dictates of rationality because it may be brought to bear on questions of social organization only through efforts to identify and choose between reasonable alternatives.

Porter emphasizes that the lack of a rationally compelling answer to social questions, and thus the inevitability of deliberation, reveals that it is human nature under discussion. Our deliberation is about something that is real even if it is contingent, dynamic and contextual. She recognizes "that deliberative processes presuppose some overall conception of what it means to live a good human life," and that this ideal will be articulated "through processes of assessment and reform of our major social conventions" as a prerequisite for our ability "to continue deliberating in a principled, reasonable way."72 Theological reflection adds an important qualification that accentuates our nature: we must resist the authoritarian urge to specify in advance the outcome of deliberative discourse because we have access only to the natural law, not to the eternal law.

Gadamer's hermeneutical philosophy and Perelman's rhetorical philosophy are united in opposing authoritarian claims precisely because such claims run counter to our human nature as finite and social beings. Gadamer argues that interpretation is possible because there is an underlying shared agreement embodied in a tradition, but he emphasizes that the fusion of horizons is never complete and that the tradition is dynamic. This leads him to conclude that there is a sharp distinction between authority in interpretation, and authoritarianism. Similarly, Perelman recognizes that important rhetorical claims are made to the universal audience, but he rejects the idea that an actual audience has the attributes of a universal audience, or that we can short-circuit dialogue and specify what the universal audience would conclude about a given matter. In short, both thinkers provide detailed examinations of our human nature in a manner that supports Porter's claims that we must engage in dialogue to resolve the contours of social authority.

The primary goal of Ministers of the Law is to locate the source of authority for law and thereby to legitimate the exercise of power. Porter's natural law account properly emphasizes that authority is a social reality and she rejects the suggestion that authority amounts to an individual choice to submit to another's will or derives from a social contract that individuals enter to promote their collective well-being. However, she does not press this point to its fullest extent by

72 Porter, Ministers of the Law, supra note 1, at 128.
rejecting entirely the idea that authority depends on the pedigree of a pronouncement and recognizing that authority is continually earned only in dynamic social practices. Porter provides a careful and sophisticated analysis of Joseph Raz's attempt to discover how authority can be legitimate when each individual has the moral obligation to act rationally in all circumstances, but Raz's claim that it is irrational to adhere to authority when it deviates from rationality misses the crucial insight that rationality is not at issue in these matters. Rather, it is a question of accepting a reasonable resolution of an underdetermined question. We may — and in some cases, must — reject authority, but only if the authoritative pronouncement is not in accord with one of the many reasonable solutions to the question presented. The space between personal beliefs and authoritative pronouncements inevitably results from the lack of a single rational solution to most questions that arise in society, and the need for diologic determinations of reasonable courses of action that combine to provide the framework that enables individual flourishing.

Porter acknowledges the priority of the social realm for moral decisionmaking and refers specifically to the necessity for rhetorical efforts of persuasion, and so her position is conducive to the ontological reading that I propose. This is the wisdom we have inherited from Aristotle: man is a social animal who lives through communal structures and institutions that provide the very possibility for individuals to participate in the virtues. Hermeneutical understanding is an effort to identify unproductive prejudices in the course of understanding another person or a text, but this is not to pretend that we can rise above the socially-constituted prejudices that form our preunderstanding. Rhetorical claims can be inventive uses of cultural topoi to effect a change in understanding, but the topoi that make this possible cannot be brought into question wholesale. Understanding and critique are possible only because we work within a broad social framework of preunderstandings and agreement. Porter accepts this point, in a quotation that bears repeating. Without "the coherence provided by a culture, with its limitations and possibilities, we could not even begin the reflective processes necessary to [cultural] critique."74

Porter's analysis lends itself to my argument that human nature is hermeneutical and rhetorical, but she doesn't fully embrace the fundamental significance of this point. Porter argues that Lon Fuller offers

73 Id. at 143.
74 Id. at 164.
only a proceduralist account of natural law that cannot establish the authority of legal procedures, but this reading of Fuller ignores his late recognition that his procedural desiderata were shaped by, and responsive to, man's hermeneutical and rhetorical nature. As related above, Fuller acknowledged that the procedural desiderata that comprise the internal morality of law were the means by which we facilitate rhetorical knowledge in society by opening up communication and sponsoring transparent decisionmaking when there is no rationally-compelled answer. This is not a strategic decision to achieve other, pre-determined ends, but instead is an acknowledgment of the core of human nature.

The hermeneutical philosopher, P. Christopher Smith, emphasizes this point by revising the Cartesian dictum that set the stage for the Enlightenment worldview. Smith has undermined this conceit in a forceful manner, emphasizing that “we never think in wordless ideas, but only in the words we have first heard from others and then hear again in our thinking.”\(^75\) He explains:

In other words, language, audible speech, is not invented by private individuals to signify thoughts they already have but is the gift of the community that allows the individual to think in the first place. Not cogito ergo sum [“I think, therefore I am”] is the truth of the matter, rather loquimus ergo cogito [“We speak, therefore I think”].\(^76\)

Thinking is the residue of our deliberations with others, which is how we come to have a world. Political and legal structures must attend to this core of our nature if they are to be legitimate.

This point has important consequences for Porter's account of law's legitimacy. If we recognize that human nature is hermeneutical and rhetorical, it follows that law's legitimacy is secured only to the extent that it is responsive to this nature, rather than by virtue of its pedigree. Porter embraces intentionalism as the ground of legal meaning because this approach reaches back to the moment that legitimate authority is exercised by the lawgiver, but this focus on original intent is misguided because it is simply implausible. The authority and legitimacy of the legal system is secured by the character of the hermeneutical-rhetorical practices in which legal actors exercise power, and not by supposing


\(^76\) Id. at 736 (emphasis added).
that legal actors can retrieve original intentions of persons who have legitimacy as lawgivers.

Porter argues that the intention of the legitimate lawgiver is an abiding source of authority that must be recuperated by the judge in her interpretation of the law.77 Her target is the "new textualist" attempt to render the meaning of law objective by looking to the original understanding of semantic meaning, which she correctly criticizes as an effort to deny the purposiveness at the heart of natural law principles.78 However, Porter errs by embracing intentionalism, going so far as to conclude that "to some extent, and with all due caution, the judge must function as a kind of historian."79 This fundamental mistake runs contrary to Porter's otherwise careful account, and could be avoided by embracing a naturalized rhetoric.

Porter acknowledges that legitimate legal rules must be specified through communal rhetorical processes and cannot be deduced from natural law principles, and this recognition implies that legal authority does not have a stagnant, ahistorical quality. First, she is careful not to completely separate the functions of judge and legislator, acknowledging "a necessary complementarity" relationship between their roles because they both simultaneously are creative architects and ministers of the law.80 When she argues that the judge must be more subordinate to the lawgiving, acting as a kind of historian, she does so only with ample qualification. The judge is obligated to recuperate the original intention of the lawgiver, but only by providing a "plausible construal of the trajectory set by the reception of the original law" in full recognition that there is no pure original intent, but rather a "fuller meaning" that unfolds historically "through the processes of reception and development that are integral to the life of the law."81 She is not a simplistic intentionalist, although her attack on new textualism leads her too readily to embrace the intentionalist perspective.

We can illuminate Porter's subtle understanding by carefully considering a key paragraph relating her conception of legal authority.

This implies that the laws and legal institutions of a particular society are genuinely authoritative because, and only to the extent that, they serve the general

77 Porter, Ministers of the Law, supra note 1, at 269.
78 See id. at 270.
79 Id. at 271.
80 Id. at 258-59.
81 Id. at 271.
purposes of law in the concrete circumstances of a particular community. More specifically, the legitimacy of these enactments and institutions depends most fundamentally on their character as public expressions and embodiments of a society's key values, the common objects of love holding it together as a society. Secondarily their legitimacy rests on their effective functioning in serving the complex of natural and ameliorative purposes that can best or only be served by the rule of law, including especially the critical ameliorative purposes of securing public peace and protecting the members of the community from those who would otherwise do them harm. Of course, the laws must serve these functions, and must be seen to serve them, in order to preserve the minimal level of acceptance necessary for their effectiveness. But more fundamentally, on the account of authority being developed here, the laws derive their normative force, their status as norms that ought to be followed, from the fact that they are rationally defensible public expressions of the values and mores of a given society, which additionally serve the secondary but critically important functions just noted.\(^2\)

This passage elegantly captures the reality of legal authority precisely because it acknowledges that authority is an ongoing articulation of values by a community and not an authoritative command frozen in time and applied ministerially by functionary judges. Authority is lodged in the law, which has meaning only in its ongoing judicial application and legislative supplementation, and it cannot be attributed to the intentions of any particular actor at a particular point in time.

The fiction that we can recuperate the original intentions of the legislature as the basis for rule of law governance is thoroughly discredited by contemporary hermeneutical and rhetorical theorists. We should employ Porter's broader arguments against her specific conclusion that we should adopt an intentionalist approach to legal interpretation and authority. Accepting a naturalized rhetoric at the heart of legal practice clarifies that legal authority results from the response to persistent challenges that call for an articulation of the broad aspects of human nature within the parameters of an existing social setting with its own institutional history. Legal authority is gained when the processes of law are attentive to our hermeneutical and rhetorical nature.

Another way in which Porter's account should be modified as part of a naturalized rhetoric is to embrace the possibility of a global legal culture emerging out of the current age of nation-states. Porter is correct to emphasize that a naive appeal to "human nature" as a source of regulatory principles that are untethered to a specific social, economic and legal community risks the fragile accomplishments of the constitutional democracies to connect legal regulation with human nature, a historical achievement that unfolded as part of the modern

\(^{82}\) Porter, Ministers of the Law, supra note 1, at 245.
nation-state era. She contends that our common humanity provides an insufficient basis to ground a global legal order, arguing that we abandon the historical trajectory of the nation state, with its attendant traditions and institutional developments, at our peril. Her targets are theological critiques of the nation state for inhibiting the experience of our common humanity as God’s children. I join in her rejection of a naive disregard of the positive nature of the socially constructed features of constitutional democracies within a system of nation states that have facilitated human flourishing. This aspect of Porter’s argument is, in fact, another manifestation of her careful refusal to flatten natural law thinking to a rationalistic enterprise. She skillfully focuses on the contextual specification of natural law principles within certain communities that are defined by institutions and cultural practices that necessarily are contingent rather than essential.

Nevertheless, by adopting a naturalized rhetoric we can reinforce Porter’s wisdom without devaluing the possibilities of a nascent global rhetorical culture grounded in natural law. It pays to recall that Chaîm Perelman participated in the drafting of the Declaration of the Rights of Man in response to the Nazi horrors, and that the Nuremberg trials were grounded in similar claims. It was the catastrophic failure of the nation-states to protect human rights during the twentieth century that spurred these rhetorical innovations that now are manifested in international criminal tribunals and courts. The European Union is a potential successor to the nation-state system of Western Europe, and it

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83 Although I accept the force of her argument in the context in which it is made, it does bear emphasis that there is a community of beings who must consciously face mortality, and it is a mistake to bypass too quickly the notion of shared humanity. See, e.g., ALPHONSO LINGIS, THE COMMUNITY OF THOSE WHO HAVE NOTHING IN COMMON (1994). Lingis cautions that the delicate achievements noted by Porter can too often mislead us into accepting the socially constructed world as the entirety of the world, rendering us oblivious to those who are not part of this rational body. “In our system of laws and our social institutions, we recognize our formulated experience, our judgment, our debated consensuses. In our rational collective enterprises we find, in principle, nothing alien to us, foreign, and impervious to our understanding; we find only ourselves.” Id. at 6.

84 See PORTER, MINISTERS OF THE LAW, supra note 1, at 310-12 (critiquing Niebuhr’s thesis that the nation state is emblematic of our fallenness).

85 Porter emphasizes that the nation-state is not per se legitimate, and that it is legitimate only insofar as rhetorical processes of persuasion tether the government to rational and natural considerations that can be appreciated, and to some extent shared, by all the members of the community. There is really no such thing as a properly unconditional authority; the pretension to absolute power is a mark of tyranny, and as such it exercises no proper normative force over its putative subjects.

Id. at 294.
already has had powerful effects on economics, politics and human rights. By adopting a naturalized rhetoric we can chart the potential for the rhetorical tethering of global and multi-state initiatives to purposeful human nature. For example, the EU has advanced fundamental human rights through the work of the Court of Justice of the European Union, which has facilitated the development of human rights discourse outside the strict nation-state framework (even though it is implemented through existing nation-states).

Admittedly, the example of the EU might also be used to confirm Porter’s emphasis on the importance of the nation-state as the context in which human rights may flourish. Significant portions of the population are wary of the EU precisely because it lacks the democratic legitimacy provided by a constitutional democracy, and the long-term success of the EU may be contingent on its emergence as a federal system that assumes nation-state status just as the federal government in the United States did early in our country’s history. Nevertheless, the tension between the nation-state regime of world governance and alternatives presented by developments such as the EU indicates that we should pay attention to the rhetorical structures of the EU as potential sources for explicating the natural law. Moreover, there are supranational institutions such as the European Court of Human Rights and non-governmental organizations addressing endemic global problems such as human trafficking, the plight of refugees, and the spread of AIDS that seek to implement the natural law in ways that are not limited to the formal governance structures of the nation states. Porter recognizes these possibilities, but she focuses too much on the less tangible efforts to develop an effective “international law” than on quasi-governmental bodies such as the EU, or non-governmental efforts, both of which are developing rich discourses.

4. Conclusion: The Hermeneutical and Rhetorical Nature of Law

Jean Porter has written an important book that reinvigorates the natural law approach to legal authority. My qualifications and extensions of her argument are offered as friendly amendments, as I endorse

86 My colleague, Marketa Trimble, helpfully made this observation.
87 Porter admits that rhetoric regarding our common humanity may be appropriate in certain contexts, and that the era of the nation-state may be ending. See Porter, MINISTERS OF THE LAW, supra note 1, at 296, 304. I am suggesting that a naturalized rhetoric provides us with the best means to recognize what has already happened and to chart the course for productive developments in the future.
her approach. In this article I have argued that we gain clarification by regarding human nature as hermeneutical and rhetorical, and utilizing contemporary hermeneutical philosophy and rhetorical theory to elucidate the nature of human flourishing. As Porter insists, there is no determinate ground that will generate unique conclusions to moral, political and social dilemmas. The eternal law may vouchsafe the human condition, but humans do not have access to it. A naturalized rhetoric provides the means for exploring natural law in the manner suggested by Porter: with sensitivity to context, history and human finitude. Legal scholars owe a great debt to Porter for advancing a conversation that has occurred over several millennia, renewing the natural law tradition in light of our contemporary challenges and current resources.