

## FULLER'S FAIRNESS: 'THE CASE OF THE SPELUNCEAN EXPLORERS'

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There is much to appreciate in Lon Fuller's 'The Case of the Speluncean Explorers' published in the *Harvard Law Review* in 1949.<sup>1</sup> The article offers still-valuable insights into the various connections between law and morality. It is also an important contribution to the topic now commonly discussed under the rubric of legal defeasibility.<sup>2</sup> In addition, it remains a timely contribution to knotty questions about statutory interpretation. And all of this is written with a marvelous combination of charm and brio, even apart from the virtues of a law review article with no footnotes whatsoever.

All of these positive features of Fuller's masterpiece are worthy of comment, but perhaps most deserving of attention, and most often overlooked, is the way in which Fuller presents strong and sympathetic arguments for a host of mutually exclusive positions, all of which, save one, are positions that Fuller himself, in other writings, in fact rejects. In a world of academic legal writing in which adjectives all too often substitute for analysis, and in which invective takes the place of argument, Fuller's efforts to make the strongest arguments even for positions with which he disagrees is a model of intellectual honesty and academic rigor, and would remain worthy of emulation even were the substantive arguments in the article no longer timely.

### I THE CASE OF THE SPELUNCEAN EXPLORERS: THE 'FACTUAL' BACKGROUND

Fuller's allegorical Case of the Speluncean Explorers, set in the Supreme Court of Newgarth in the year 4300, is a fictionalized variation on the very real case of *R v Dudley and Stephens*,<sup>3</sup> a staple of introductory criminal law cases throughout the common law world, and a case made even more famous in Brian Simpson's *Cannibalism and the Common Law*.<sup>4</sup>

In the real case, itself an all-too-common exemplar of a situation common in the age of sail,<sup>5</sup> the four survivors of an 1884 shipwreck aboard the racing yacht *Mignonette*, en route from England to Australia via the South Atlantic, found

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<sup>1</sup> Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

<sup>2</sup> See, eg, Jordi Ferrer Beltrán and Giovanni Battista Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford, 2012); Luís Duarte d'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (Oxford, 2015).

<sup>3</sup> [1884] 14 Q.B.D. 273.

<sup>4</sup> A W B Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (Chicago, 1984). A less scholarly but highly readable (and slightly novelized) account is Neil Hanson, *The Custom of the Sea* (Wiley, 1999).

<sup>5</sup> Among the more famous examples was the wreck of the *Essex*. See Nathaniel Philbrick, *In the Heart of the Sea: The Tragedy of the Whaleship Essex* (Penguin, 2001). See also *United States v Holmes*, 26 F. Cas. 360 (E.D. Pa, 1842), which did not involve cannibalism, but rather the act by several seamen in an overcrowded lifeboat of throwing others overboard so that some could survive.

themselves starving and dying of thirst in a thirteen foot dingy.<sup>6</sup> Under circumstances that still remain not entirely clear, at least two and possibly all three of the survivors proceeded to kill the fourth, and weakest, of their number, in order that the body of the deceased would provide food and water for the remaining seamen. In the event, the three survivors were rescued and two of them were subsequently prosecuted for murder, with the third, Brooks, who likely did not participate in the decision to kill the young and weakened Parker, testifying for the prosecution. The two, Dudley and Stephens, were duly found guilty, but subsequently received a partial royal pardon, reducing their sentence from death down to imprisonment without hard labor for a period of six months.

In Fuller's fictional variant, the survivors were not seamen but rather a group of amateur explorers investigating a cave. The cave entrance collapsed, leaving five of the explorers stranded and starving. After the failure of several rescue attempts, the starving survivors agreed to hold a lottery<sup>7</sup> to determine which of their number should be killed and eaten so that the remaining explorers could possibly survive until rescued. Immediately prior to conducting the lottery, one of the survivors, Whetmore, sought to withdraw from the agreement, a request that was denied by the remainder, who proceeded to hold the lottery in Whetmore's absence, the results of which went against Whetmore. He was thereupon sacrificed for the benefit of the others, who shortly thereafter were rescued. Tried for murder under a statute that seemingly contained no exceptions for circumstances such as these, the defendants were found guilty by a jury and a judge,<sup>8</sup> and then sentenced to death by the trial judge in accordance with the literal words of the Newgarth statute, which provided simply that 'Whoever shall willfully take the life of another shall be punished by death'.<sup>9</sup> The Case of the Speluncean Explorers is the defendants' appeal of the trial court's judgment, and the article takes the form of Fuller's presentation of the separate opinions of each of the five Justices of the Supreme Court of Newgarth.

## II THE OPINIONS

There is a possible reading of the relevant statute that would seemingly have eliminated what all of the Justices perceived as a genuine dilemma. Because the statute prohibited only that taking of life that was done 'willfully', there is a plausible view that a killing done under perception of immediate death is not willful at all. If the killers perceived that killing Whetmore was a necessary condition of their survival, then perhaps the statutory language could be interpreted in such a way as to exclude the behaviour of the defendants.

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<sup>6</sup> 1884, the year the *Mignonette* foundered, was well after what is commonly called The Age of Sail, and by 1884 most sea-going ships were steam-powered. But although the era of the sailing ship was coming to an end by the time of the *Mignonette* disaster, the most relevant fact was that the events preceded the invention of radio, to say nothing of cellular telephones, Global Positioning Systems, airplanes, and helicopters, meaning that the survivors of a shipwreck were as cut off from the rest of the world as they would have been a hundred years earlier.

<sup>7</sup> Holding a lottery was part of the long-accepted 'custom of the sea', and the failure to follow the norm of conducting a lottery was part of the reason that Dudley and Stephens had been prosecuted.

<sup>8</sup> As Fuller constructed the case, the jury delivered a special verdict on the facts only, leaving it to the judge to determine the legal consequences of those facts. Fuller, above n 1, 618-19.

<sup>9</sup> *Ibid* 619.

Fuller recognizes this possibility, but cleverly includes a (fictional) precedent eliminating this alternative.<sup>10</sup> And with the possibility of innocence by virtue of self-defense, duress, necessity, or other excuse eliminated, the case represents a situation, as all five of the Justices agreed, in which the literal reading of the statute demanded guilt, but in which morality seemed to point in the opposite direction. None of the Justices believed, that is, that the defendants had acted wrongfully, but all agreed that their behaviour was unlawful according to the literal and ordinary meaning of the words of the statute.

Faced with this dilemma, each of the Justices comes to a different conclusion. Chief Justice Truepenny agrees that the law had been violated and that judges, both at trial and on appeal, have no choice but to uphold the conviction. 'This statute permits of no exception applicable to this case, however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves'.<sup>11</sup> But although the Chief Justice agreed that the law required the sentence of death, he also believed that it was open to the Justices to communicate to the Chief Executive (the governor) the court's recommendation that he exercise his power of clemency to pardon the defendants despite their guilt. Chief Justice Truepenny's preferred result was thus close to the outcome in *Dudley & Stephens* itself, but with the added fillip of the Chief Justice explicitly urging that the court itself recommend this course of action to the governor.

Justice Foster, whom astute jurists will recognize as pretty close to Fuller himself,<sup>12</sup> offered two arguments for acquittal, arguments that went against the literal application of the statute. The first argument was that the statute was designed to be applied within a normal functioning society, and that the existence of such a society was a necessary condition for the application of the law. But because this situation arose in something closer to a state of nature, and was thus analytically if not temporally pre-legal, the laws of Newgarth simply did not apply, and therefore this statute did not apply. 'When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When that condition disappears, then it is my opinion that the force of our positive law disappears with it'.<sup>13</sup>

In the alternative, Justice Foster argued, in an even more Fullerian tone, that all of the language of all law should be interpreted in light of the goal of law to offer reasonable solutions to human problems. Moreover, laws should be interpreted according to their spirit (or purpose) and not strictly by the letter of the law. '[A] man may break the letter of the law without breaking the law itself. Every proposition of positive law, whether contained in a statute or judicial precedent is to be interpreted reasonably, in light of its evident purpose'.<sup>14</sup> Thus, Justice Foster concluded, neither the purpose of this law nor the purpose of law in general would be served by a literal

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<sup>10</sup> Ibid 629-30, describing *Commonwealth v Valjean*, which refused to accept starvation as an excuse for stealing a loaf of bread.

<sup>11</sup> Ibid 619.

<sup>12</sup> See Francis J Mootz, III, 'Natural Law and the Cultivation of Legal Rhetoric' in Willem J Witteveen and Wibren van der Burg (eds) *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam, 1999) 425, 449 ('... it is plain that Justice Foster most closely articulates Fuller's own views').

<sup>13</sup> Fuller, above n 1, 620.

<sup>14</sup> Fuller, above n 1, 624. For Fuller's purposive view of law, see Lon L Fuller, *The Morality of Law* (Yale, revised ed, 1969) 145-51. And, as applied to statutory interpretation, Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 661-69.

application of the statute, and accordingly the defendants should simply be deemed innocent of any crime.

Justice Tatting expressed sympathy with Justice Foster's position about purposive interpretation (but not with Foster's 'state of nature' argument), but was troubled in applying that position in light of the multiple purposes of the criminal law, and even more troubled in considering the possible future implications (the 'quagmire of hidden difficulties')<sup>15</sup> of setting aside the literal meaning of a statute. But he professed to be equally troubled by the 'absurdity of directing that these men be put to death when their lives have been saved at the cost of the lives of ten heroic workmen'.<sup>16</sup> As a result, he found himself undecided and anguished. Although he wished that the defendants had not been indicted in the first place, he noted that it was too late in the day for this option. For him, therefore, the moral/legal dilemma was unavoidable. Unable to reach a decision, he felt compelled, with regret, to withdraw from the decision of the case entirely.

No such doubts plagued Justice Keen. For him the law was clear, and for him the role of the judge was limited to applying the law. Questions of policy, of executive clemency, and of morality were for others. 'The difficulties, in whatever tortured form they may present themselves, all trace back to a single source, and that is a failure to distinguish the legal from the moral aspects of this case. . . . I respect the obligations of an office that requires me to put my personal predilections out of mind when I come to interpret and apply the law of this Commonwealth'.<sup>17</sup> Justice Keen thus had no hesitancy in saying simply that the conviction should be upheld. Moreover, whether the governor did or did not grant clemency was the governor's business and not the courts, he argued, and he insisted that the courts should no more tell the governor how to do his job than the governor should tell the courts how to do theirs, which was not to legislate but simply to rule on the law in its actual and literal meaning.

All of this, on both sides, was too much for Justice Handy, who expressed frustration with the 'tortured ratiocinations to which this simple case has given rise'.<sup>18</sup> For Handy, simple common sense, coupled with a consultation of the public opinion about the matter at hand, was sufficient to resolve the issue, and without all of the legalistic trappings that so troubled his colleagues. Common sense dictated acquittal, and common sense should be the court's guide. Moreover, Justice Handy argued, because he knew (from his wife's niece, who knows the Chief Executive's secretary) that the Chief Executive would not commute the sentence, the right result, he concluded, was just to apply common sense as the public understands it, and thus reverse the conviction.

With one justice refusing to decide, and the other four divided two to two, the tale ends with Justice Tatting declining to reconsider his refusal to decide. As a consequence, the judgment below is upheld, and the Public Executioner is directed to impose the sentence of death on all of the defendants.

### III A WEALTH OF RICHES

Because the goal of this Essay is much more to recommend that readers read 'The Case of the Speluncean Explorers' for themselves than it is to have me describe the

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<sup>15</sup> Fuller, above n 1, 630.

<sup>16</sup> Ibid 631.

<sup>17</sup> Ibid 632-33.

<sup>18</sup> Ibid 637.

article in detail for them, I have omitted many intriguing details of the various opinions. Still, it is worth noting that each of the opinions contains well-presented and by-now-familiar arguments in favour of each of the positions. Justice Keen's literalism, for example, is supported by a strong plea for rule of law values of notice and predictability, as well as worries about the dangers of excess judicial discretion. Similarly, Justice Foster carefully develops the argument for law as a purpose-driven enterprise in which reason reigns supreme and in which law's moral dimension is inescapable. The exchange between Chief Justice Truepenny and Justice Keen about executive clemency probes at some depth enduringly important debates about separation of powers and the judicial role. And Justice Handy's references to common sense and the role of public opinion appropriately, from his perspective, stress the importance of not seeing law as a closed set of norms or a limited domain of sources,<sup>19</sup> just as Justice Keen, especially, argues fervently and intelligently for exactly the opposite approach, and for seeing judging as a substantially constrained enterprise.

Beneath these broad strokes, however, there lie a wealth of subtleties. At first glance, for example, Justice Handy's reference to the extrajudicial information provided by the Chief Executive's secretary by way of Justice Handy's wife's niece may seem ridiculous, but on further reflection it not only raises interesting questions about the sources of judicial information, but also offers a timely connection with modern debates about the judicial use of so-called extra-legal information. If as respected a judge as Richard Posner can unashamedly defend the practice of extrajudicial Internet research,<sup>20</sup> and a judge as prominent of Supreme Court Justice Stephen Breyer can engage in extrajudicial factual research about the very situation he is adjudicating,<sup>21</sup> it is clear that describing a practice that might have appeared beyond the pale in 1949 was a prescient preview into an issue now the subject of serious debate. Indeed, it is not only Justice Handy's stress on an unlimited universe of available information that links with important issues about adjudication, but also his extended discussion of the legitimacy of reliance on both common sense and public opinion implicitly tracks Legal Realist claims that were as alive in 1949 as they are now.

Several other examples of these subtleties will have to suffice. One of these is the question of the moral implications of Justice Tatting's refusal to decide. Can a judge consistent with his oath and responsibilities ever refuse to decide? And, more profoundly, is a refusal to decide while knowing the consequences of that refusal really be considered a refusal at all. Are the deaths of the defendants any less Tatting's responsibility just because he has claimed not to know how to resolve the case, given that his recusal turns out to be a known-in-advance but-for cause of the ultimate sentences? Here, as elsewhere in the opinions that constitute Fuller's article, a short but pithy argument turns out to be a window into issues that are as deep as they are enduring.

Similar enduring problems are presented by the discussions of several of the justices about the purposes of the criminal law. Is the criminal law designed only for retribution, in which case putting these defendants to death seems pointless? Or does

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<sup>19</sup> See Larry Alexander and Frederick Schauer, 'Law's Limited Domain Meets Morality's Universal Empire' (2007) 48 *William and Mary Law Review* 1579; Frederick Schauer, 'The Limited Domain of the Law' (2004) 90 *Virginia Law Review* 1909.

<sup>20</sup> Richard A Posner, *Reflections on Judging* (2013) 131-48. Compare Frederick Schauer, 'The Decline of "The Record": A Comment on Posner' (2013) 51 *Duquesne Law Review* 51.

<sup>21</sup> See *Parents Involved in Community Schools v Seattle School District*, 551 U.S. 701 (2007) (Breyer J, dissenting).

criminal law also have deterrence goals, in which case it may be important, as Justice Keen points out, to deter those in slightly less dire circumstances from acting on their immediate impulses. Those who think about these issues can do far worse than use the Case of the Speluncean Explorers as the platform for their contemplations and analyses.

#### IV A PERSISTENT PROBLEM

The exact situation allegorized in Fuller's story may be somewhere between rare or non-existent in an era of modern technology,<sup>22</sup> but the general problem presented by the Case of the Speluncean Explorers is a persistent part of the law. As long as the norms of law are not congruent with the norms of society in general,<sup>23</sup> and as long as those norms are written in language with at least partly context-independent meanings,<sup>24</sup> and as long as rules are drafted with at least some degree of generality, there will always be the problems of legally-generated outcomes that diverge from the best all-things-considered result for a particular situation. The problem presented by the Case of the Speluncean explorers is thus not only of a piece with the situation that gave rise to *Dudley & Stephens*, but is also very much the same problem presented in *Riggs v Palmer*,<sup>25</sup> where the result indicated by the written rule – the New York Statute of Wills – indicated a result – allowing the inheritance to one who had murdered the testator precisely to ensure and accelerate that inheritance – was diametrically at odds with the result indicated by almost any conception of justice and fairness. The views of Justice Keen, and to a slightly less extreme extent Chief Justice Truepenny, can thus be seen as not much different from the views of dissenting Judge Gray in *Riggs*, who would have taken the literal meaning of the Statute of Wills to be controlling despite the injustice such a reading would produce. And, similarly, Judge Earl's majority opinion in *Riggs*, which drew on moral principles to set aside the literal meaning of the statute, could with only minimal modification have been written by the same Justice Foster who sat in judgment of the Speluncean Explorers.

*Riggs* may be the example that comes most immediately to mind for those steeped in contemporary jurisprudential debates, but the same problem is, more or less, everywhere.<sup>26</sup> When the Supreme Court of the United States, only a year ago, was

<sup>22</sup> See above n 6. But see Piers Paul Read, *Alive: The Story of the Andes Survivors* (Lippincott, 1974), recounting the story of the survivors of a 1968 plane crash in the Andes, where again cannibalism appeared to play a role in the survivors' survival.

<sup>23</sup> See Alexander and Schauer, above n 19.

<sup>24</sup> It is fashionable to observe that language must be understood in context, but if the components of language did not rest, at least in part, on context-independent linguistic conventions, it is hard to see how we could understand each other, or understand sentences we had never heard before. And thus there is always the possibility that a law's situation-independent meaning will diverge from the optimal result in a particular situation. The issues are of course far more complex than can be summarized in a brief footnote, and a slightly longer but still abbreviated treatment can be found in Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon/Oxford, 1991) 53-62.

<sup>25</sup> 22 N.E. 188 (NY, 1889).

<sup>26</sup> In the American canon, for example, the questions about what to do when statutory language appears to indicate an immoral, unjust, impolitic, absurd, or otherwise unsound result in a particular case are exemplified in cases such as *United States v Kirby*, 74 U.S. (7 Wall.) 482 (1868), *United States v Church of the Holy Trinity*, 143 U.S. 457 (1892), and *United States v Locke*, 471 U.S. 84 (1985). And although different legal systems differ in how they treat such situations, it is plausible to conclude that Justice Foster's opinion in the Case of the Speluncean

asked to decide whether a fisherman who had thrown unlawfully small fish back into the sea in order to evade prosecution could be convicted under a statute aimed at large financial entities that had shredded documents in order to avoid legal sanctions, it once again dealt with the same problem.<sup>27</sup>

The problem in the Case of the Speluncean Explorers and the cases just noted – a morally or otherwise unsound result indicated by the clear language of a clearly applicable rule – is decidedly not the problem of legal indeterminacy, nor is it the problem of vague legal language that by virtue of its vagueness fails to indicate a clear answer. The problems of vagueness or other indeterminacy are of course among the persistent features of much of law, and volumes upon volumes have been written about how to apply language such as 'equal protection of the laws'<sup>28</sup> or 'cruel and unusual punishments'<sup>29</sup> to concrete situations. But the problem presented by The Case of the Speluncean Explorers is decidedly different. Here, as elsewhere, the problem is created not by vague legal language but rather by language that is clear and precise but nevertheless points to an immoral or otherwise unsound outcome. Ronald Dworkin may have described *Riggs v Palmer* under the rubric of 'hard cases',<sup>30</sup> but that description is misleading. *Riggs* becomes a hard case only if one accepts Dworkin's understanding of the vast domain of legal sources, a domain that includes a host of moral and political principles. But more conventionally, and more accurately, *Riggs* is in fact a legally *easy* case that becomes an all-things-considered hard case by virtue of the fact that the legally easy result is morally problematic.

And so too with The Case of the Speluncean Explorers. Under a standard understanding of what counts as law, this is an easy case, as both Chief Justice Truepenney and Justice Keen recognized. But the straightforward conventional legal result is hard to swallow from a moral (or policy) perspective, and the very persistence of such cases shows that they are inevitable as long as 'law' and 'morality' are understood as non-congruent, even if overlapping, categories. Indeed, even under a (more plausible) natural law approach that recognizes the category of potentially morally defective human law,<sup>31</sup> the problem will recur, and it is part of the prescience of 'The Case of the Speluncean Explorers' that it highlights an issue that is as present within a wide range of legal theories as it is within an even wider range of legal systems.

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Explorers, especially the second part of his opinion, dealing with reason and purpose, is not far from the centre of gravity of the general American approach. See Patrick Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (Clarendon/Oxford, 1987). See also D Neil McCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth, 1991).

<sup>27</sup> *Yates v United States*, 135 S. Ct. 1074 (2015).

<sup>28</sup> *United States Constitution* amendment XIV.

<sup>29</sup> *United States Constitution* amendment VIII.

<sup>30</sup> Ronald Dworkin, *Law's Empire* (Harvard, 1986) 15-44; Ronald Dworkin, *Taking Rights Seriously* (Harvard, 1977) 23, 81.

<sup>31</sup> See Brian Bix, 'Natural Law Theory' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996) 223; John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, 2002) 1.

## V THE FIRST SCHOLARLY VIRTUE

'The Case of the Speluncean Explorers' deals with a central and enduring legal problem, and does so with subtlety and insight, but perhaps its greatest virtue is as an example of scholarship – and not simply legal scholarship – at its best. Although there are many scholarly virtues, surely one of them, and a hallmark of intellectual honesty, is the ability to make the best arguments for the positions with which ones disagrees. And this is not merely a matter of striving for a sympathetic understanding of the arguments that happen to exist, or that happen to have been made by identifiable individuals in particular places. Rather, intellectual honesty at its best is the willingness to recognize, and if necessary to make, the best arguments for opposing positions, and then to confront only those best arguments, and not the caricatures too-often offered as exemplars of opposing positions.

In 'The Case of the Speluncean Explorers', Fuller does just this. With the possible exception of Justice Handy's reliance on what he learned from the Chief Executive's secretary via his wife's niece, all of the arguments contained in each of the opinions are more than plausible, and the genuinely open-minded reader will find that she is at least somewhat drawn to the conclusions offered by each of the Justices. Each of the positions would be easy to caricature, but Fuller will have none of this. We find in the opinions a strong case for a literal and controlling reading of the governing text, for reliance on common sense (likely these days to be labeled as 'practical wisdom'), for interpreting statutory language in light of its purpose even if that means departing from literal meaning, and for many other positions. Indeed, although it is impossible to predict what one would have concluded without the knowledge that one actually has, it seems more than plausible to believe that someone knowing nothing of Fuller's other writings would be unable to divine that it was Justice Foster who was Fuller's alter ego.<sup>32</sup> Fuller of course had his own well-worked-out theory of law, and he had much of it by 1949, but it is remarkable how little of this, if any, is apparent in 'The Case of the Speluncean Explorers'.<sup>33</sup>

Fuller's article is thus, content apart, a model of one form of scholarship at its best. At some level it may appear non-scholarly, with its lack of footnotes and absence of references to the works of others, but scholarship is an attitude as well as a set of

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<sup>32</sup> My own evidence for this conclusion comes from my jurisprudence students, who read 'The Case of the Speluncean Explorers' before reading Fuller's response to H L A Hart (Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 661-69), and before being exposed in any other way to Fuller's thinking. And on this blank slate, very few of the students suspect that Fuller is Foster, and very few of them believe that the Case of the Speluncean Explorers is presented with more sympathy for one of the opinions than for any of the others.

<sup>33</sup> Thus, the anti-positivism that is apparent as early as 1940 (Lon L Fuller, *The Law in Quest of Itself* (Beacon, 1966)) is effectively suppressed in 'The Case of the Speluncean Explorers', as is the anti-realism in Lon L Fuller, 'American Legal Realism' (1934) 82 *University of Pennsylvania Law Review* 429. Obviously there are objections to positivism and realism that appear in some of the opinions, but with no more fervor or argumentative power than the positions to which they are objecting. And perhaps the best evidence of all of Fuller's ability to set aside his own preferences in 'The Case of the Speluncean Explorers' is the fact that that article nowhere appears in Kristin Rundle's deep and comprehensive analysis of Fuller's jurisprudential ideas. Kristin Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart, 2013). The same is true of Kenneth Winston's 'Introduction' to *The Principles of Social Order: Selected Essays on Lon L. Fuller* (revised ed, Hart, 2001). And if the two leading scholars of Fuller's thought find little or nothing to say about 'The Case of the Speluncean Explorers', we can applaud Fuller for so successfully removing his own comprehensive legal theory from this particular article.

trappings, and Fuller's persistent fairness to a wide range of positions, and especially positions that are not his own,<sup>34</sup> is a scholarly virtue all too often forgotten in a world in which legal scholarship and legal advocacy are scarcely distinguishable.

#### VI AN EXERCISE IN DESCRIPTIVE SOCIOLOGY

In the opening pages of *The Concept of Law*, H L A Hart describes the book as 'an essay in descriptive sociology'.<sup>35</sup> The statement is controversial, in part because it refers to the now less fashionable methods of ordinary language philosophy, and in part because nothing in Hart's book or his training connected very much with academic sociology, even as it was practiced in 1961. But if we assume, with Hart, that accurate description might qualify as sociology, then 'The Case of the Speluncean Explorers' is a much better example of descriptive sociology than *The Concept of Law*.

What makes Fuller's article such an admirable exercise in descriptive sociology is that he has accurately captured the various arguments – the 'moves', as some would put it – that are respectable parts of legal argument, at least in the United States and likely in much of the common law world as well.<sup>36</sup> Although the arguments are largely incompatible with each other, each of them is a sociologically permissible part of the lawyer's arsenal and the judge's toolkit. Whether and when they are used will of course depend on the outcome a lawyer is urging as well as on a judge's own outcome-based or methodological proclivities. But it would not take very much exposure to actual legal arguments or to actual judicial opinions to find reliance on plain meaning, purpose, common sense, extrajudicial information, precedent, and all of the other positions exemplified in the various opinions in 'The Case of the Speluncean Explorers'. What Fuller has provided for us, therefore, at the very least, is a catalogue of permissible legal arguments, especially if one takes the notion of 'permissible' in a descriptive and sociological sense.<sup>37</sup> Fuller may have had his deficiencies as an analytic philosopher,<sup>38</sup> but he had a feel for legal argument and a feel for the terrain of common law decision-making. This 'feel' comes through in much of Fuller's writings, but it is nowhere more apparent than in 'The Case of the Speluncean Explorers'.

<sup>34</sup> See James Allan, 'Lon Fuller's "The Case of the Speluncean Explorers"' in Witteveen and van der Burg (eds), above n 12, 411, 412 ('Fuller . . . gives the reader debate, disagreement, and dissensus without making his own point of view clear') at 414 ('Fuller succeeds in making the views he opposes more powerful for some readers than his own Fosterian views. Again, that too deserves much credit').

<sup>35</sup> H L A Hart, *The Concept of Law* (3<sup>rd</sup> ed, Clarendon/Oxford, 2012).

<sup>36</sup> Philip Bobbitt's *Constitutional Fate: Theory of the Constitution* (Oxford, 1982) is analogous, in that Bobbitt also describes the various forms of argument that are accepted within constitutional discourse, even though some of them are inconsistent with others.

<sup>37</sup> There are certain arguments that would cause a judge to bridle, or that would seem outside of the bounds ('off the wall') of accepted or plausible legal argument. But a wide range of arguments remain 'on the wall', even if some lawyers, scholars, and judges would prefer one of them to the others.

<sup>38</sup> Deficiencies which he freely acknowledged. See Rundle, above n 33, 5-6. On Fuller's sociological perceptiveness despite his analytic philosophical weaknesses, see also Frederick Schauer, 'A Critical Guide to Vehicles in the Park' (2008) 83 *New York University Law Review* 1109, 1132-34.

## VII CONCLUSION

Like a fine work of art, 'The Case of the Speluncean Explorers' reveals something new with every successive encounter.<sup>39</sup> Even after many readings and many classroom discussions, I find something new every time I take up the article. But what persists is Fuller's ability to present strong arguments for a range of positions, to keep his own preferences well-hidden, to let his arguments speak for themselves without the artificial support of strong language,<sup>40</sup> and to bend over backwards to be fair even to the conclusions he believes mistaken. Would that more of contemporary legal scholarship exhibited these qualities.

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<sup>39</sup> And thus it is not surprising that two symposia have been devoted to the article, even after many years. 'The Case of the Speluncean Explorers: Contemporary Proceedings' (1993) 61 *George Washington Law Review* 1754; 'The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium' (1999) 112 *Harvard Law Review* 1834. Especially worth reading in the latter is David L Shapiro, 'Foreword: A Cave Drawing for the Ages' (1999) 112 *Harvard Law Review* 1834. Indeed, one of the many admirable features of Shapiro's engaging and insightful contribution is that it exhibits many of the qualities that Shapiro sees in Fuller's article.

<sup>40</sup> In the preface to *Legal Fictions* (Stanford, 1967), Fuller writes (at xii), in reference to the task of combining a series of his previous articles into a book, that '[i]n preparing the text for its present publication, I have concentrated chiefly on deverification, that is, pruning out needless adjectives and superlatives'.