

# **Children as Contraband, Citizens as Cavemen: On Case Selection in Political Theory**

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## **Introduction**

Political theorists have relatively free hands when it comes to choosing methods for plying their trade. This is partly because their trade is so varied: practitioners include dutiful believers in the 11<sup>th</sup> thesis on Feuerbach, the people who want to change the world by spelling out what the world should look like; they include scholars who aim to understand and interpret texts, concepts, arguments and vocabularies that map out the political world; and they include a variety of hybrids. Moreover, there are many ways in which one can try to argue, persuade or interpret. One important aspect in many of those ways is that the relationship between a theorist's work product and the empirical world needn't be anywhere near as tight as it is for those whose job description is to *explain* the empirical world: question selection doesn't determine case selection. For example, theorists developing political arguments can draw from a rhetorician's toolkit. They can use thought experiments, fiction, metaphors. Unlike explanatory social scientists, whose explananda reside in their cases, theorists' cases can actually help do their work for them.

I am interested in how that work gets done and in how theorists think or hope that it gets done. In this paper, I focus on one small area of conventional normative political theory, on prescriptive accounts of how things should be, and consider two different cases. They are Lon Fuller's natural law argument, which uses a hypothetical case of deserted cave explorers (Fuller 1949), and Immanuel Kant's parenthetical argument that children born out of wedlock don't deserve state protection because they are equivalent to "contraband merchandise" (RL, VI: 337).<sup>1</sup> The selection, despite the differences between the examples, isn't random. First, each theorist trades with the theory — and metaphor — of a social contract and its sidekick, the state of nature. This is despite the somewhat diminished luster the metaphors have had in political theory since empiricists like Montesquieu and Hume got them in their teeth in the early 18<sup>th</sup> century. By exploring Fuller's and Kant's employment of these devices and their failures to get the right job done, I want to ask the following questions: What is the best interpretation for what the theorists' cases are doing? What are the criteria by which one can decide whether metaphorical devices, allegories and appeals to intuition are used well, as opposed to badly?

On the first question, I want to suggest that a pragmatist model of "justification" best captures what political theorists (or at least these two) are doing with their combination of arguments and appeals to intuition. The pragmatist model is the familiar device known as "reflective equilibrium" and developed by Nelson Goodman (Goodman 1983) and employed and defended in social and political theory by John Rawls (e.g., Rawls 1971, 2001) and Norman Daniels (e.g., Daniels 1996). Rather than thinking that there is some one particular kind of "foundational" validator for arguments, something counts as justified

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<sup>1</sup> References to Kant are to the Akademie Ausgabe volume and page number; "RL" stands for *Rechtslehre* of *Metaphysics of Morals*.

when our intuitions are in balance with more general principles. We get to reflective equilibrium by starting with our intuitions from which we try to generate the general principles; if the principles are acceptable, we adjust our intuitions to match them, if not, we look for other principles, and so on (Rawls 1971, 20). All there is for a set of principles to be justified is that they can lead to a reflective equilibrium.

Although this relaxes the whole notion of justification significantly — and beyond what many theorists particularly in analytic traditions consider acceptable — it doesn't mean that anything goes, which is one of the things I will try to show with my two examples below. Those considerations provide an answer to the second question. One of the motivations behind this project is to think about the notion of rigor in political theory. I want to find a balance between two positions: on the one hand, I am skeptical that the most narrow-minded analytic types have got the monopoly on rigor. The hyper-analytic types take rigor to mean strict logical validity, which, at the extreme, means that formal theory and normative econometrics would be the purest exemplars of *political* theory, while highly abstract analytic ethics would be the only valuable currency in *normative* theory. On the other hand, I am equally leery of the view that regards the hyper-analytic argument as so much insidious hodgepodge without which everyone and definitely political theorists would be better off. I have no desire to join in beating this particular dead horse about who is right; I don't think there was a horse to be beaten — or even harnessed — in the first place. It is reasonable, I simply want to suggest here, to think about criteria for good political theory, and the fact that rigor makes some people think of necrophilia and others phalluses doesn't mean the rest of us need to.

In the cases below, I want to apply two criteria of rigor. One is empirical adequacy, the other theoretical consistency.<sup>2</sup> By themselves, the criteria sound trivial, but the conception I offer them makes them less so. The empirical adequacy requirement comes in two flavors: weak and strong.<sup>3</sup> The weak empirical adequacy requirement demands that an account be consistent with empirical reality. This may seem trivial — and no theory I know has articulated a normative goal whose attainment violates the second law of thermodynamics, for example — but does point to the fact that some kinds of empirical accounts can rule out normative ones. The familiar undergraduate lament “Marxism won’t work because it goes against human nature” *could* be a sound claim if there were a generally accepted theory of human nature with which Marxism were in conflict.

Strong empirical adequacy asks for more: it demands that generally accepted explanatory theories support the analytic conception in some way. This doesn’t — and couldn’t possibly — mean that the empirical theory must *entail* the analytic conception. To put the matter in deliberately inexact terms, all it means is that the empirical theory (a) confirm at least some aspects of the analytic account and (b) not contradict any. There is, in a way, underdetermination of higher-order theory by lower-order theory, just as philosophers of science have argued there is underdetermination of theory by facts.

In the cases I consider here, empirical adequacy requires that the *relevant features* of a hypothetical device or an appeal to intuitions not be inconsistent with relevant explanatory accounts of the world. This vagueness is deliberate; my account is pragmatist and accords no *uncontestable* robustness to what explanatory theories regard as facts or to what facts are relevant. So all the empirical adequacy condition really requires is that the theorist be able to

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<sup>2</sup> My conception of empirical adequacy differs from the standard account developed in Van Fraassen 1980, but shares the pragmatist spirit which motivates Van Fraassen.

<sup>3</sup> The rest of this paragraph and the next come from ch. 1 of LaVaque-Manty 2002.

articulate *how* his theory accords with explanatory accounts of the world. As I will try to show, neither Fuller nor Kant fully acquit themselves in this manner.

Theoretical consistency, in turn, simply refers to the consistency between the details of the case at hand and the overall theses of the theory, *not* to an internal consistency of the case. Fuller's case, I argue, fails in this respect, while Kant's succeeds.

### **The Social Contract Background**

Apart from Plato's cave, which I have no desire visiting (or perhaps more accurately, leaving), and "the body politic," "the state of nature" is probably the most used fictional device in political theory. Its attraction for the moderns is obvious: if you want to drive home the appeal of a *contract* as a legitimation instrument and represent the idea that the divinely ordered king (if not yet God herself) is dead, have your interlocutor imagine a situation in which persons themselves have only their own agency to rely on for setting up rules for social life. Hence the *status naturalis* as a common appendage to the social contract: in the state of nature, no "artificial" (in the Hobbesian sense of the term) help is available for you to figure what you should do and how you should live.

This is, of course, a crude account, and the conceptions and purposes of the state of nature fiction vary widely, as any undergraduate who has taken introduction to political theory ought to know. But even at this level of generality, one can appreciate a common feature in the persuasive logic of the device. At the risk of stating the obvious, we should remember that a theorist uses the *in order to* make his or her particular model attractive. It should not surprise us, although it apparently has surprised many of Rawls's readers, for example, that the details are deliberately rigged to produce the very result the author wants.

What *is* clever, however, is how the “from state of nature to contract” model tries to achieve its purpose. Let’s grant, for the sake of argument, a more robust distinction between a “context of discovery” and a “context of justification” than we obedient readers of Kuhn are generally willing to grant. The standard assumption in any analytic business is that it’s the context of justification that matters for anything more than a marginal biographical interest. But, in fact, the genius of the traditional social contract argument is the opposite: it puts forth its justification as a “context of discovery” story. The story’s persuasive power emerges from the implied fact that it is *our* story: this is (more or less) how we are (Rousseau), how we got here (Locke) or how we might get out of this nasty situation, given how we are (Hobbes). So one way in which the device works is that “nature,” as an implied descriptive account of humanity, serves as a critical standard.

As we know from the arguments by homophobic conservatives, by Robert Bly or by Earth First!, nature does quite a bit of argumentative work still today. However, the straightforward state of nature fiction has been less prominent for a long time, largely since Montesquieu and Hume heaped their well-warranted scorn on the device. The key for us to notice is that both were empiricists, which explains the logic of their complaint: if you want to tell a story of how we actually are, they essentially said, then you’d better get the facts right. Of course, Hume famously adds, even that doesn’t mean you get to infer anything about how we ought to be.

Note, however, that Montesquieu didn’t take the poverty of the state of nature theories to imply a general ban on fictions in political theorizing. In fact, he offers his own case against state of nature stories in a fiction, in the Troglodyte narrative of the *Persian Letters*. His — an other empiricists’ — position suggests a division of labor for empirical arguments and arguments that aren’t strictly empirical but neither purely formal. Post-

Humean fictional devices generally seem to make an attempt to adhere to *some* empirical constraints, and, as we see in both Fuller's and Kant's cases, the "nature" of the state of nature isn't necessarily the critical standard.

I now turn to the cases.

### **Citizens as Cavemen**

Fuller frames his "The Case of Speluncean Explorers" as a set of opinions offered by the justices of the Supreme Court of Newgarth in the year 4300.<sup>4</sup> The sci-fi setting adds no "sci" — the fifth-millennium Newgarth is a cultural replica of the United States of the late 1940s, complete with an all-male Supreme Court — but seems merely a convenient device for Fuller to refer back to contemporary concerns without having to give anything the status of legal precedent. The Newgarthian Supreme Court has five members, and the polity is a presidential representative democracy with statutes generally liberal-democratic.

The divisive case on which *each* justice feels compelled to offer an opinion is that of "Speluncean explorers," four men convicted of murder. The four men and a fifth one, their victim Roger Whetmore, had been members of cave exploration club. On one of their excursions, they had been trapped inside a cave for 20 days without food. They had reasonably believed that they all would die before their projected rescue if they did not get food. Whetmore had proposed a contract according to which they would draw lots to pick one person whom they would kill and eat. All had agreed to the plan, except Whetmore, who had backed out of the contract. The four men had drawn lots, anyway, and drawn one for Whetmore, on whom — you guessed it — the lot fell. Whetmore had been killed and eaten,

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<sup>4</sup> In this section, my references to Fuller's positions are all references to Fuller 1949, except when otherwise indicated.

the men eventually rescued, and subsequently prosecuted and convicted for murder under the straightforward Newgarthian homicide statute.

The case raises rich questions, particularly on the interpretation of statutes and on the scope of legal authority. The opinion each justice enters offers different theoretical models on how to answer the questions. One justice defends a plain meaning doctrine, another legislative purpose, yet another turning to popular opinion, and one a “modern” natural, or moral, law doctrine. It is, of course, also an exploration of the very concept of social contract and the idea of a state of nature. One justice interprets the situation of the trapped men as a state of nature. Finally, one of Fuller’s punch lines — quite literally the end of the “case” — is an ironic one: *no* justice believes the men *deserve* to be put to death. However, the rules of the Newgarthian system has an even disagreement result in the court’s affirming the lower court’s death penalty.

Everything in the article is, of course, rigged to make the points Fuller wants to make. The difficulty is in ascertaining what they — or maybe just *it* — might be. The arguments for the wildly divergent theoretical models make the piece an excellent pedagogical tool: nothing disabuses an aspiring law student better of the notion that legal or political interpretation is easy. But the piece is hardly just a teaching tool. First, the very divergence alone pulls the rug from under the naïve legal positivist, Fuller implies: plain meaning of the law is never plain. Also, the final irony is to shake our intuitions deeply: something *has* to be wrong, we can take Fuller to be saying, when the outcome is one everyone opposes. The point isn’t just some clever variant of the collective action problem; Fuller is decidedly not Posner. Rather, I argue, his position is the very opposite.

Begin by considering the state of nature–social contract interpretation, offered by Fuller’s “Justice Foster.” His argument is straightforward and shares features with Kant’s, as



we'll see later. The circumstances in which the five explorers had found themselves had extinguished the reach of the Newgarthian — or anyone's — laws and had pushed them into the state of nature, in which the men were free to establish their own new social contact and become the citizens of their own extraordinary state in which the "murder" of Whetmore was both beyond Newgarthian jurisdiction and acceptable, given the circumstances.

The first part of Foster's argument turns on the *purpose* of the law. Laws exist, he claims, to make fair and equitable social co-existence of humans possible. And when

the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force. (621)

The men's "moral" separation from Newgarth was analogous to a territorial separation: the law could not serve its purpose among them, Foster argues. Therefore, Foster concludes his first part, "the men were, to use the quaint language of nineteenth-century writers, not in a 'state of civil society' but in a 'state of nature'" (ibid.) and free to pursue their own agreements, on the principle — explicit in Newgarth — that all legitimate governments are founded on a contract (622). And so, after offering one additional argument against the literal interpretations of statutes, Foster feels doubly confident in declaring the four men innocent of the crime (626).

There is much in Foster's position that Fuller wants to present as appealing. The idea that people may find themselves "morally" beyond the reach of the law tracks intuitions most people have. Furthermore, as I mentioned briefly above, one of the attractions of the social contract talk is that it respects persons' *equal* individual *autonomy*, and a state of nature argument is a very good way of illustrating why that is so: *if* there is no authority over you and others in similar circumstances, then each of you are the sovereigns over your own decisions, and any joint project thus a negotiation *inter pares*.

However, Foster's position isn't Fuller's. In the later fictional opinions — Foster is the second to offer his — the other justices will call him to task, offering considerations which *also* should be intuitive for many, even though they conflict with the intuitive appeal of the social contract reasons. The most obvious one is that it violates our intuitions to think that a *de novo* contract can justify *anything* the contracting parties agree to. In fact, the very reason that has us respect individual sovereignty to enter into contracts is just a part of our respect for individuals' *lives*. The state of nature–social contract story gives rise to a dilemma: If the men are *truly* in a state of nature, then the appeal to their status as *equal* parties to a contract is superfluous: they can do whatever they want, and the contract is a waste of time. If, on the other hand, they are not in a state of nature, then they remain within the purview of the Newgarthian laws and cannot create a new set of rules for themselves.

Fuller's solution to the dilemma is natural law. Even in the state of nature, there are rights and wrongs, and *those* are what make us both find the idea of contract *and* the fact that one can't write the legitimacy of murder into a social contract intuitively appealing. Interestingly, however, none of Fuller's justices articulates this position; we learn it from his other works. The remaining justices each simply offer intuitively appealing considerations — even the positivist, whom Fuller least wants to endorse, contributes the observation that one ought not treat law as fully open to Lochnerian tinkering. But none has the final word.

So we are back at the question of what the point of the allegory is. This can be put in two related but slightly different ways: What *exactly* is the position one can infer from the allegory, if we think one can be inferred without our having to turn to Fuller's other works? And why does he use the allegory, if a superficial reading is either a skeptical or a cynical one? I have rejected a purely pedagogical reading as plausible, except insofar as the very

point of allegories is to “teach” us something. This isn’t trivial, but it isn’t the answer to the questions, What is it teaching and how?

Recall that the end of the case is ironic: the principles by which the Newgarthian system operates has the four men condemned to death despite the fact that it goes against the considered moral intuitions of each justice (and, we are told, 90% of Newgarthians). Each justice scrambles more or less desperately to uncover a principle with which to reconcile his morality and the law; only the positivist is reasonably cheerful in just doing his job (like any good Nazi, Fuller might add), but even he would rather have the men not convicted. But the Newgarthian law offers nothing, and that indicts the law, not *tout court*, but in this case.

Why tell the story in this way, then? At the end of the allegory, Fuller’s readers are left with a sense (1) of conflict between law and morality, (2) that morality should override, and (3) *a set of tools to go about reconciling it*. The appealing intuitions are appealing because they are each correct in some way. But they can conflict, and the point is to figure out, in new cases, how to get rid of the conflicts. Fuller doesn’t spell out a solution to this particular hard case because, I contend, it is not meant to track some *particular* hard case — it is far too complex and contrived for that — but to track the conflict between law and morality in general.

So what? What is the connection between Fuller’s use of the allegory and his substantive position? The question is not whether there is a connection between his position and the details of the allegory — it is, as I said above, rigged to make his point — but whether there is a higher-order connection, between his style of natural law theory and the use of allegories. I argue that there is an interesting connection. After all, he did seem to find the device very appealing in general. He used lengthy allegories elsewhere and defended their

use in a prolonged fight with the philosopher Ernest Nagel. The fight was about the relationship between fact and value, and although Fuller's point about the use of hypothetical cases is almost parenthetical, it is helpful for us:

Before leaving the question of the efficacy of collective endeavor in defining moral and legal ends, I should like to raise for brief consideration the problem of the utility of hypothetical or imaginary cases. Throughout the centuries it has been thought that such cases may be useful in legal and moral discussions. It has been believed that sounder decisions will be reached when a wide range of such cases has been taken into account. I should like to ask how such cases fit into Professor Nagel's views of the decisional process. To be sure, we can expect him to say that they are admissible whenever their facts can be defined in non-evaluative terms. But the question is not whether they are admissible, but *why* are they useful? Am I again falling into an absurdity if I suggest they are useful because they facilitate a process I have called the collaborative articulation of shared purposes? (Fuller 1958b, 99)

Some background: Nagel had found Fuller's notion of "the collective articulation of shared purposes" mythical because of the natural law spin the latter had given it (Nagel 1958, 81). In Fuller's view, there is some small set of general *human* purposes which we don't necessarily know or even regard as our ends but which we nevertheless pursue. Nagel thought this was not only bad sociology — the claim does seem to run counter to a *de facto* pluralism over ends — and, insofar as Fuller countered the sociological claim by saying the purposes were pursued unconsciously, unintelligible: "But I regard it as a myth to suppose, and at best as a perversion of language to say, that the *unintended* product of our actions is the 'end-in-view' toward which those actions had been *directed* all along" (Nagel 1959, 38).

Regardless of how mythical the notion is — I tend to agree with Nagel that it is — the point of hypothetical devices is to help us *discover* those ends, as Fuller says in the passage above (see also Fuller 1958b, 84). They are useful *because* they do that. The Speluncean case is, as I suggested earlier, a meta-allegory meant to motivate natural law theory. It does this by showing that many principles we already have are *partially* correct but that circumstances may always rise which show their partiality, but which also help us discover more about our

collective purposes and articulate them. In short, the idea is that the Speluncean story shows us *that* the natural law story of the relationship between law and morality is appealing.

Consider Fuller's difficulty: On the one hand, there is some context-independent truth about human purpose, although it must be discovered as a social process and won't be revealed either divinely or by reason, as earlier natural law theorists had hoped. But, on the other hand, it cannot be discovered from any brute facts of human action because there are no facts that can be separated from "evaluation": in any purposive activity, (which most human activity is), "fact and value merge" (Fuller 1958a, 69). Any consideration of such social facts requires an evaluative application *of* the natural law, insofar as we know it. Fuller's argument for this merging actually fails because he equivocates two very different meanings of "evaluation" (Nagel 1958, 79; 1959, 31–37; see also Nagel 1994, 575–578), but that needn't concern us quite yet. Fuller's point is that the use of hypotheticals provides an appropriate epistemic access point to those natural laws *and* shows *that* there are such entities. They are, he believes, demonstrations of those two facts. They are on no weaker justificatory footing than strictly analytic arguments since the key component of all evaluation — the value — cannot be captured any better in logic than in a story that jogs our intuitions.

Part of this may be quite right. The contract allegory in the overall story tells us two key things. First, the natural law — human purpose — won't *always* be discovered. It's not that cavemen or the neo-cavemen of Newgarth couldn't become citizens; it simply depends on whether they hit on the right principles. Sometimes they might, but sometimes they don't. And given Fuller's long-term view of the "collaborative articulation of human purpose," *de novo* construction in a historical vacuum, he wants to say, is not likely to discover it. And that is the second point: completely new rules make no sense. If you think

you are creating principles out of the blue, you are mistaken. This very Burkean point is, then, both Fuller's clever employment of the state of nature metaphor and a critique of it at the same time.

However, it is questionable whether the story succeeds in doing what Fuller has set it to do, namely to motivate the truth of the natural law hypothesis. There is no reason to read the Speluncean case as demonstrating anything about the truth of a natural law doctrine at all. It does show, compellingly enough, that the relationship between law and morality can become problematic, that there ought to be a relationship, and that the articulation of moral, legal and political principles is an essentially social process. But it does not show that morality as such always ought to override or that there is any single coherent morality to be *discovered* rather than, say, created. The only way to believe the conflicts in the Speluncean case to demonstrate the existence of human purposes is to presuppose their existence in the first place. Our intuition about the limits to what a contract can do might, after all, be wrong; the fact that it is so strong in this particular case turns heavily on the ambiguity on whether the Spelunceans really are in a state of nature.

In a way, Fuller's strategy sounds like a textbook Kantian transcendental argument: if there is something whose existence cannot be demonstrated but without which some human endeavor would not be possible — knowledge, morality, social life — then we had better act *as if* it existed and simply try to articulate the conditions of possibility for it: how ought we to think about knowledge, morality, politics, religious faith if we work with the assumption. However, the difference is that Fuller's argumentative strategies — either his hypotheticals or his more straightforward arguments — do not specify such conditions, but instead *undermine* them by opening alternatives. The Speluncean case does not convince us that we must presuppose the existence of a natural law to be able to motivate the social practice of

law. It suggests equally plausibly that the principles we use are fundamentally contingent and that hard cases offer us opportunities to revisit, perhaps fundamentally reconstruct them.

Now, since case selection is my focus in this paper, we might ask whether there might actually be some different sort of example or simply a different style of argumentation that Fuller ought to have employed instead of the Speluncean case. This counterfactual consideration is, of course, limited by my — and our — imagination, but something general can be said. The question is *not*, Can there be a deductively valid and sound argument for the existence of natural laws? The post-18<sup>th</sup>-century consensus is that there isn't one on offer, certainly not of Fuller's variety, which insists on the discovery of something that, at the same time, isn't even in principle observationally available — because all meaningful observation happens through evaluative lenses colored by the natural law or something else. The question instead is, What kind of story might (not “will”) motivate the natural law conception without at the same time motivating alternative and contrary theories?

It is not clear that any would do. Because Fuller insists — reasonably, I contend — on the fundamentally social aspect in the discovery of the human purpose, any story, hypothetical, or an allegory that motivates his theory and remains minimally empirically adequate — roughly: plausible enough — can be interpreted as a *purely* constructive story. It may be a strike slightly below Fuller's belt to illustrate this point with a metaphor from a logical positivist, but consider Otto Neurath's famous image of the sailors who must rebuild their ship on the open sea and without the help of docks and proper parts:<sup>5</sup> Fuller thinks that the fact of contingent, here-and-now rebuilding only makes sense if the ship has a

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<sup>5</sup> “Wie Schiffer sind wir, die ihr Schiff auf offener See umbauen müßen, ohne es jemals in einem Dock zerlegen und aus besten Bestandteilen neu errichten zu können.” Cited in the epigraph to Quine 1960.

destination it is headed in. This doesn't, of course, follow at all: the crew might just be trying to avoid drowning.

Fuller's theory, then, seems unable to motivate itself as much as Fuller would want it to, whether it is with the help of the Spelunceans or something else. A large part of the problem is simply that his conception of natural law affords him no resources with which to get the theory compellingly off the ground, and while there is much to appreciate in his use of the hypothetical device, it doesn't quite suffice.

Let us contrast Fuller's case with one from Kant.

### **Children as Contraband**

The Kantian example I consider is far less elaborate than Fuller's Speluncean case. Instead of an allegory, it is merely an example meant to illustrate a point Kant wants to make. It is significant in this context partly because of the way it deploys the state of nature metaphor. It is also significant because of the way it seems to fail to do its job, at least for modern readers. My anecdotal evidence of how our contemporaries respond to the case is that they either regard it as a *reductio ad absurdum* of Kant's political philosophy, or they mercifully ignore and/or forget it.

The case in question comes in a passage in the *Rechtslehre* — so not in any obscure minor piece — in which Kant engages in curious casuistry to illustrate the limits of state power in punishment:<sup>6</sup>

There are, however, two crimes deserving of death, with regard to which it still remains doubtful whether *legislation* is also authorized to impose the death penalty. The feeling of honor leads to both, in one case the *honor of one's sex*, in the other *military honor*, and indeed true honor, which is incumbent as duty on each of these two classes of people. The one crime is a mother's *murder of her child (infanticidum maternale)*; the other is *murdering a fellow soldier (commilitonicidum)* in a *duel*. Legislation

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<sup>6</sup> The following discussion draws from and develops further my discussion in ch. 4 of LaVaque-Manty 2002.



cannot remove the disgrace of an illegitimate birth any more than it can wipe away the stain of suspicion of cowardice from a subordinate officer who fails to respond to a humiliating affront with a force of his own rising above fear of death. So it seems that in these two cases people find themselves in the state of nature, and these acts of *killing (homicidium)*, which would then not even have to be called murder (*homicidium dolosum*), are certainly punishable but cannot be punished with death by the supreme power. A child that comes into the world apart from marriage is born outside the law (for the law is marriage) and therefore outside the protection of the law. It has, as it were, stolen into the commonwealth (like contraband merchandise), so that the commonwealth can ignore its existence (since it rightly should not have come to exist in this way), and no decree can remove the mother's shame when it becomes known that she gave birth without being married. (RL, VI: 336)

The passage raises many questions; I want to address two. First, why does Kant want to bring up these two exceptions? A historical explanation — that these were pressing issues of the day — would not be exhaustive, even though it is interesting, given the ahistorical way Kant is often read. Second, what can we make of the relationship between the claim that the mother is in the state of nature and her child “contraband”?

We know that, unlike Fuller later, Kant was not fond of hypothetical cases to make his points. Conjectures, he claimed,

should not make undue claims on our assent. On the contrary, they should not present themselves as a serious activity but merely as an exercise in which the imagination, supported by reason, may be allowed to indulge as a healthy mental recreation. Consequently, they cannot stand comparison with a historical account which is put forward and accepted as a genuine record of the same event, a record which is tested by criteria quite different from those derived merely from the philosophy of nature. (CBH, VIII: 109)<sup>7</sup>

This particular point is about historical conjectures, but it is clear from other contexts and from the lack of elaborate counterfactuals in Kant's work that he took his “empirical adequacy” criterion seriously. Furthermore, we also know that many of the topics he addresses are prompted by a concrete, practical concern: “What Is Enlightenment?” addresses a acute question of the day, as does *The Conflict of the Faculties*. Even in the

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<sup>7</sup> “CBH” refers to the “Mutmaßlicher Anfang der Menschengeschichte.”

*Rechtslehre*, some of the particular cases Kant wants to bring up are incidentals of his day, such as book piracy, which the discussion of “What is a Book” addresses.<sup>8</sup> It is perfectly reasonable to think he brings up the cases of maternal infanticide and military dueling as relevant considerations because they were real social problems of the day.

At the same time, the cases also do more general theoretical work. The sociological fact that these particular problems existed *and* generated the legal paradox Kant describes is of great theoretical importance. Consider: The purpose of the state is to create conditions in which it possible for human’s to attain their *full* moral autonomy. In Kant’s language, the state is to create the conditions of “external freedom,” which are the precondition for a general attainment of full “internal freedom.” Under perfect conditions of external freedom, laws and moral dicta would largely converge because people would not have morally valid reasons to act immorally. However, such perfect conditions did not exist at least in the Prussia of the late 18<sup>th</sup> century. (I’ll leave open the question of the extent to which Kant thinks they could even be reached or whether the idea is simply a regulative ideal, a benchmark against which existing conditions can be compared.) Given that legislation reflects contemporary social relations, attitudes, beliefs and conditions — *those* are what laws regulate — a “barbarous and underdeveloped” (Kant’s words) society will have barbarous and underdeveloped legislation.

What “barbarous and underdeveloped” means in this context is that there are situations which should not exist because they are inescapable sources of shame. Kantian morality appreciates the empirical human penchant for avoiding shame; in fact, as the passage suggests, avoiding shame is *licensed* by morality because shame threatens the self-respect we owe to our own moral agency. To be sure, it is very likely that the ideal world in

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<sup>8</sup> J.C. Laursen, [APSA 2000 paper].

which these sources of shame would not exist is different for Kant than it would be for us (at least in the case of the maternal killing): Kant likely imagines a world in which sexual mores aren't so loose as to generate any out-of-wedlock births; we imagine a world (ours, perhaps?) in which out-of-wedlock status for children is not a source of shame for either the mother or the child. Either way, however, the discussion is a case of "normative sociological analysis" in which Kant illustrates the historically contingent and stage-dependent relationship between the principles of morality (which are non-historicist) and political principles (which are). Kant's solution to the paradox at hand is explicitly historicist:

The knot can be undone in the following way: The categorical imperative of penal justice remains (unlawful killing of another must be punished by death); but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and underdeveloped, is responsible for the discrepancy between the incentives of honor in the people (subjectively) and the measures that are (objectively) suitable for its purpose. So the public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people. (RL, VI: 337)

In short, the case is useful because it identifies a problematic social practice and what particular aspect in it is in need of reform.

Most interesting for my purposes in this paper is the way the case does its theoretical work with the state of nature metaphor. When the state fails to provide the conditions of external freedom for its constituent members, that is, when it makes it impossible for a person to act according to the requirements of morality, its legitimacy evaporates *vis-à-vis* that individual, and she finds herself in the state of nature. Morality still applies — it always applies for Kant — but the individual has only herself to rely on. The situation is, in many ways, analogous to the logic of Hobbes's model of the state of nature: when the state no longer protects you, you are back in the state of nature.

The situation is also analogous to Fuller's discussion of the Spelunceans and, in particular, to the state of nature analysis of their situation. Furthermore, both Kant and

Fuller think that while being in the state of nature gets you a Get Out of Jail card, it doesn't get you out of the grips of morality. However, one significant difference is that Kant's argument for why morality binds is fully (and famously) developed elsewhere. *That* is not Kant's theoretical goal in his discussion; he can simply assert it here, and the reader's assent depends on how convinced she is by Kant's moral theory developed elsewhere.

The passage does nevertheless trade on an appeal to intuitions, and this gets me to my second question: what of the relationship between the state of nature story and the contraband merchandise analogy? Notice a curious shift in the state's role *vis-à-vis* the mother, on the one hand, and the child, on the other. The mother is in the state of nature *because* the state cannot do its putative duty to her, *not* because she had an illegitimate child. She is *not* an outlaw and the state must refrain from punishing her for the homicide. (Interestingly, Kant remains silent on whether the state may prosecute the mother as the "smuggler" of her particular brand of illegal goods.) The child, on the other hand, is an outlaw, neither entitled to state support or even intervention in his killing. That status does *not* turn on the fact that the child is not yet a full agent and thus not in a position to have offered his hypothetical social contract which legitimates the state.<sup>9</sup> One of purposes of the institution of marriage is to create future members of the commonwealth who are immediately entitled to the protection of the state. Children, in Kant's terms, are born with "innate rights" (see RL, VI: 280, 283).<sup>10</sup>

Here is where things begin to get peculiar. On the one hand, the term "right" is always a political one in Kant's political philosophy; there aren't moral rights. This means

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<sup>9</sup> Crudely: Here, again, Kant's account resembles Hobbes's to some extent. If the state enforces the principle of external freedom in a way that makes you its beneficiary, you can be inferred to have endorsed the legitimacy of the state. There are, to be sure, numerous differences between Kant and Hobbes, but they needn't involve us here.

<sup>10</sup> The *key* purpose is to regulate and thus make moral the otherwise immoral practice of sex (which violates the formulate of humanity). On this, see RL, VI: 277–280 and Herman 1994. I will say more of this below.

that they are contingent on the political creation of a system of rights. At the same time, a given right need not be established by a *specific* statute (*Act*); it may exist as a matter of law (*Gesetz*) in general.<sup>11</sup> Children's innate right to their parents' protection is one of those rights:

children, as persons, have by their procreation and original innate (not acquired) right to the care of their parents until they are able to look after themselves, and they have this right directly on the basis of law (*lege*), that is, without any special act being required to establish this right. (RL, VI: 280)

In other words, there is no need for there to be a *children's* right for protection and care as long as there is a *general* right of *persons* for the protection of the state.

Kant never fully spells out why illegitimate children are not entitled to the protection; the parenthetical "marriage is law" and the analogy to contraband are doing all the heavy lifting. We can read between the lines of his discussion of marriage that since sexual intercourse — whether for reproduction or for enjoyment — is only legitimate within marriage (RL, VI: 277–280), then the "product" of illegitimate sex is also outside the law. But there is no unambiguous theoretical reason to read the text in this way. Marriage may be law, but there is no contradiction in thinking that the very fact of children's personhood, regardless of their parents' marital status, would be enough to have their innate right to protection be acknowledged. It is obvious Kant doesn't think they have such right, but the argument isn't there.

So the case is much like Fuller's allegory. One key point, although not all, turns on an appeal to intuitions. After all, although it is reasonable to think that at least some contemporaries would have flinched on Kant's particularly heartless analogy, this was a culture which (as Kant has just told us) regarded unmarried motherhood as thoroughly shameful. Attitudes have cognitive content; "illegitimate children are like smuggled goods" is

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<sup>11</sup> Gregor translates *Gesetz* as "principle."

a likely candidate for what such content might have looked like. We may find it ironic that Kant himself did not stop to think about that possibility or that if he did, he did not regard it as worth exploring. The point remains, however, that absent those intuitions, Kant's theory licenses an alternative interpretation of the case. We could read the theory as implying protection for *any* child. In such a case, we, along with Kant, might find ourselves at a loss of how to reconcile the conflicting moral reasons to avoid shame and to protect children. More likely, though, we and Kant might find ourselves concluding, even more unequivocally than I suggested above, that having children outside marriage *ought* not be a source of shame and, insofar it is, social conditions indeed are underdeveloped and barbarous, and in dire need of reform.

## **Conclusion**

Despite the similarity in Kant's and Fuller's appeals to their readers' intuitions, the cases are also different. Although both fail to compel their readers to their authors' intended conclusions, the failure is much more devastating for Fuller. He essentially asks his readers to supply the *demonstrandum*, that is, the truth of his version of natural law theory. There might be nothing wrong in using argumentative and rhetorical devices to elicit one's reader or interlocutor to see, in sharper light, higher relief, or with greater clarity what she already knows. But all Fuller's reader need do is to deny she already knows the truth of natural law theory, and the story remains entirely consistent, interesting and a source of valuable observations about law and morality, yet unconvincing about natural law. Kant's case, on the other, *is* consistent with Kant's theory on the whole and in fact helpfully enriches our understanding of Kant as more sociologically and historically attuned scholar than the textbook caricatures have him. It even licenses a proto-feminist reading of Kant's theory,

even though such a reading goes against of what we know of Kant the person. A theory's inconsistency with the beliefs of its author need not be devastating; a theory's overall internal inconsistency more likely is.

This verdict may strike the reader as unfair: I have compared Fuller's elaborate allegory typical of much of its author's scholarly corpus with Kant's short passage, offered as an aside to a "general remark" in one of its author's many treatises. I leave open the question of whether there is a lesson in *that* fact; my overall point has not been to pass judgments, but to explore what these two cases try to do and how.

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