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Naomi R. Kahn

John O. Calmore

Mary I. Coombs

University of Miami School of Law, mcoombs@law.miami.edu

Dwight L. Greene

Geofrey C. Miller

See next page for additional authors

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Authors

Naomi R. Kahn, John O. Calmore, Mary I. Coombs, Dwight L. Greene, Geoffrey C. Miller, Jeremy Paul, and
Laura W. Stein

The Case of the Speluncean Explorers: Contemporary Proceedings

Naomi R. Cahn
John O. Calmore
Mary I. Coombs
Dwight L. Greene*
Geoffrey C. Miller
Jeremy Paul
Laura W. Stein

Lon Fuller's classic article, *The Case of the Speluncean Explorers*,¹ presents the following scenario: Five men, members of the Speluncean Society, are trapped after a landslide covers the mouth of the cave that they were exploring. A rescue effort is undertaken, but the rescue of the explorers proves to be a difficult task and will take several days. More important, it appears that the explorers' provisions will be depleted before any rescue is possible.

On the twentieth day of their imprisonment in the cave, the explorers are contacted by means of a two-way radio that they had taken with them. They are told that rescue is at least ten days away. The explorers describe their current condition and ask whether there is any hope that they will live to see the rescue. Doctors tell them that survival is unlikely.

One of the explorers, Whetmore, then asks whether they would survive if one of the five explorers were killed and eaten. The

* [EDITORS' NOTE: Professor Greene died in July, 1993. The Board of Editors of *The George Washington Law Review* offers its condolences to Professor Greene's family, colleagues, and students. In the editing process we have tried to adhere as closely as possible to the language of Professor Greene's original draft.]

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

doctors respond in the affirmative. Whetmore then requests advice regarding a proper method of determining which of the explorers should be killed. No rescuer, doctor, member of government, or priest is willing to advise Whetmore. The radio then becomes silent.

When the explorers are finally rescued twelve days later, it is revealed that they have killed and eaten Whetmore. On Whetmore's suggestion, the men had agreed to throw dice to determine which of them would be killed. Before the dice were thrown, however, Whetmore objected to the plan and stated that he withdrew from it. The others cast the dice for him on his turn, and Whetmore lost. His fellow explorers asked Whetmore whether he objected to the fairness of the throw, and Whetmore replied that he had no objections. He was then killed and eaten.²

This issue of *The George Washington Law Review* presents seven contemporary opinions that interpret the murder statute of the fictional Commonwealth of Newgarth. These modern jurists attempt to address whether the four surviving explorers violated the murder statute in the light of current jurisprudential thought.

NAOMI R. CAHN, J.* This case presents a problem because we have been, as Justice Foster explained, living in a society with laws designed to "regulate *men's* relations with one another."¹ That is, we look to the law to create one right answer and to help us derive a neutral principle that will enable us to triumph over our emotions and biases so that we can apply the law correctly. As a result, even though this case does concern men's relationships with one another—in a cave—no one seems satisfied with the outcome of this case in the lower court.

In this Court, Justice Tatting is paralyzed, finding himself unable "to dissociate the emotional and intellectual sides of [his] reactions"² and so feels that he must withdraw from consideration of the case. My other colleagues implicitly separate the emotional from

2. *Id.* at 616-18.

* Associate Professor, National Law Center, The George Washington University. In developing this opinion, I have gone beyond the record of the case and the cited materials and consulted the following sources: William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189 (1991); Cynthia R. Farina, *Getting from Here to There*, 1991 DUKE L.J. 689; Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); Kim L. Scheppele, *Facing Facts in Legal Interpretation: Questions of Law and Questions of Fact*, 30 REPRESENTATIONS 42 (1990); Lucie E. White, *Seeking "... The Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992). I have also discussed the case with, and benefitted from the insights of, Bill Eskridge and Tony Gambino, and my colleagues on the bench, Mary Coombs and Laura Stein. Thanks to Larry Mitchell for making this opinion possible.

1. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 622 (1949) (emphasis added) (opinion of Foster, J.).

2. *Id.* at 626 (opinion of Tatting, J.).

the rational and strain to find a solution that ignores their feelings and emotions about this case. The Chief Justice acknowledges that "our sympathies may incline us to make allowance for the tragic situation" of the explorers but nonetheless feels compelled to decide that the statute will not allow us to make such an "exception."³ By contrast, Justice Foster seeks either to place the explorers outside of civilized society and its laws or else to reinterpret the statute according to its alleged purpose so as to allow for an exception to cover this case. Justice Keen aspires to put aside questions of whether what the explorers did was " 'right' or 'wrong.'"⁴ Although Justice Handy points out that our decision must be made "in a context . . . of human realities,"⁵ he looks to public opinion as the basis for his conclusion, relying solely on principles concerning the legitimacy of an unelected court.

Given my colleagues' dissatisfaction with the outcome of this case, it seems appropriate to reexamine their approaches to interpreting the statute at issue. Rather than relying on neutral principles concerning men's relations with one another, we need to reexamine these principles to determine what has been left out and then begin the process of developing more flexible standards. As a relatively new member of this Court, chosen for my feminist approach, I take this opportunity to set out some of my preliminary views on our interrelated tasks of judging and legislative interpretation. Even though this case is unlikely to recur (for at least another fifty years), it presents complex questions about moral choices, statutory interpretation, and the society in which we live and thus provides a solid basis for such reflection.

Feminism provides a useful perspective from which to examine the dilemma of the explorers and from which to rethink the process of statutory interpretation. Although there can be no one feminist approach to statutory interpretation, the differing perspectives within feminism provide a basis for showing the dilemmas in a finding that the explorers violated, or did not violate, N.C.S.A. (N. S.) § 12-A. In the rest of this opinion, I shall draw on different branches of feminism: (1) pragmatic feminism, which counsels us to examine, and then to reason from, the specific situation presented by each case;⁶ (2) critical cultural feminism, which suggests that it is important to examine both hierarchies of rights and connections between people; and (3) liberal feminism, which defends the concept of individual autonomy and choice. Each of these branches of feminism provides insights into statutory interpretation. Pragmatic feminism might suggest that seeking to establish universal principles of statutory interpretation is a dangerous undertaking because it ignores the context in which these principles will be applied. Critical

3. *Id.* at 619 (opinion of Truepenny, C.J.).

4. *Id.* at 632 (opinion of Keen, J.).

5. *Id.* at 637-38 (opinion of Handy, J.).

6. See Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1704 (1990).

cultural feminism, which similarly suggests the importance of context, also questions the primacy of rules over connections between people and, in its critical phase, draws attention to the importance of dissolving dichotomies between hierarchy and connection. And liberal feminism focuses on the choices made by individuals in complying with statutes and by legislators in enacting statutes. All three forms of feminism question traditional methods of statutory interpretation and judging, emphasizing the context in which individuals act.⁷ I begin my consideration of this case by reexamining traditional methods of determining legislative intent. I then comment on our responsibilities as judges in this case.

Feminism suggests that this reexamination should occur in the light of the multiplicity of possible interpretations of each statute by each different audience that must construe it. One specific place to start, suggested by pragmatic feminism, is with what Professor Katharine Bartlett terms “the woman question”:⁸ How does the process overlook values and experiences that are gendered and that more typically describe women?⁸ One of the most obvious matters that is left out is an acknowledgment of the different normative perspectives that even traditional judges use in deciding legislative intent. Feminists have called attention to the importance of identifying and using traditionally obscured perspectives to expose hidden bias and to develop new interpretations. Such actions require, however, recognition of the partiality of the “original” perspective, that it is but one method that shapes results.⁹

When it comes to § 12-A, my older colleagues seek to determine

7. I recognize that I could have examined this case from other feminist perspectives, such as postmodernism, which would recognize the indeterminacy of any rules of statutory interpretation. As yet another alternative, Bill Eskridge suggests that a feminist theory of statutory interpretation might counsel attention to “community needs and group interests” and might seek to mediate between opposing norms. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (forthcoming 1994) (ch. 6, text accompanying nn.79 & 88, on file with author).

8. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990). My colleague, Justice Laura Stein, asks a similar question, although we focus on different answers. *See post* at 1808 (opinion of Stein, J.).

9. Professor Bartlett gives the following illustration: “A strong view of precedent in legal method, for example, protects the status quo over the interests of those seeking recognition of new rights.” Bartlett, *supra* note 8, at 845. A seemingly “neutral principle” has dramatic political and substantive implications.

As judges, we focus inevitably on different aspects of cases. There are, as John Conley and William O’Barr pointed out in an ethnographic study of judging, at least five different types of judges. JOHN M. CONLEY & WILLIAM M. O’BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* 82 (1990). Some judges, for example, find legal procedural rules more important than legal substantive rules; some are more concerned with the relationships between the litigants. We cannot avoid being influenced by forces outside of the case, such as our own experiences, public opinion, even our law clerks.

whether and how this statute applies to the situation of the explorers by using various traditional methods of statutory interpretation. Instead, however, there are difficulties with relying on these universal principles of statutory interpretation (or of judging), of ascertaining exactly what the legislature intended when it enacted the statute at issue. When judges seek to apply one set of principles to decide cases or to divine legislative intent, this has traditionally meant objective, rational standards that are capable of general application, regardless of the particular circumstances of the case and the individuals who have constructed the case. But as the outsider critique developed by feminists and critical race scholars has shown, such standards have served as a trope for one dominant interpretation of neutral principles. Indeed, each of the original Justices believes that his approach is the correct one. Each of their perspectives, on the one hand, aspires to universality but, on the other hand, remains only one of many available perspectives. These particular neutral approaches are designed to ignore context, not to examine relationships and dependence (one can, of course, imagine other “neutral” approaches that focus on different issues but still claim the title of neutrality). Instead, we must realize that our acts of judging depend on context: the context in which the legislation was enacted, the context of the litigant, and the context in which we perform the acts of interpretation.

Turning to the context in which the legislation was enacted, our legislature is composed of many individuals who, when they take collective action, act based on diverse experiences and expectations. First, pragmatic feminism might challenge the possibility of ascribing one collective purpose to the legislative body, notwithstanding legislative reports and statements. Our legislators’ staffers, who are generally responsible for developing the legislators’ statements and reports on any specific piece of legislation, in turn have many and diverse reasons for using particular phrases. We simply are unable to determine exactly what was intended; even the “plain meaning” of the statute is ambiguous, varying according to who decides the plain meaning of words.

That our legislature has acquiesced, for example, in our development of a self-defense exception to § 12-A is an uncertain measure of the legislative intent of the enacting legislature. There is no record of any such explicit acquiescence, merely our own inferences. We cannot get inside the minds of the original legislators to know precisely what was intended (and, given the ambiguity and complexity of the process of enacting statutes, I am not certain that the enacting legislators *could* have articulated one clear purpose or intention).

While we may discern the general purpose of a statute, we cannot (nor could the legislators) envision all of the specific situations to which it might be applied. It seems quite possible that, as Justice Foster explains, the explorers’ situation is outside the purpose of the statute. But unlike Justice Tatting, who seems paralyzed by the

concept that there may be many purposes for which legislation is enacted,¹⁰ I would use the multiplicity of possible purposes to support a pragmatic, situation-specific approach to interpreting the statute at issue.

I am not, then, arguing that we jettison all attempts to understand why a particular statute was enacted; rather, I am suggesting that legislative intent is not gospel, that it is but one of multiple factors to be considered in interpreting the statute before us, and that we need to speak of legislative *intents*. Moreover, while our legislators generally enact statutes to address a specific topical problem, they should understand that good legislation will outlast the legislators' tenure (or else each legislature would be required to enact new laws to cover new situations). That is, legislators should recognize that their laws will need to respond to changes in society or to situations that they could not have anticipated at the time that they enacted the original bill.

Second, a pragmatic feminist approach would question the validity of various other traditional methods of deciding how to interpret statutes, methods that aspire to universality: the plain meaning rule, the use of precedent, and the separation of law from fact. The plain meaning of the words of the statute at issue is unclear, even though the Chief Justice claims that the "language of our statute is well known . . . [and] permits of no exception."¹¹ The meaning of the language of the statute depends on who is reading the statute and where she places emphasis as to what different "plain meaning(s)" will emerge. Our statute requires that one "willfully take the life of another."¹² This could mean that the explorers must have acted "willfully" in killing Roger Whetmore, or that they "willfully" killed Roger Whetmore. But perhaps they were "willfully" seeking to prolong their own lives rather than to take the life of Whetmore. What does it mean to kill someone "willfully"? What facts must be shown to meet this standard? We know that killing someone in self-defense does not fit under the statute (although it is the taking of another's life), presumably because it is not a "willful" act, as explained by Justice Tatting.¹³ Here, whether the explorers willfully killed Whetmore turns, in part, on what (f)acts show willfulness. Is it a crime to seek to prolong life, regardless of the means? As liberal

10. Fuller, *supra* note 1, at 628-29 (opinion of Tatting, J.).

11. *Id.* at 619 (opinion of Truepenny, C.J.).

12. *Id.*

13. *Id.* at 629 (opinion of Tatting, J.). Justice Keen dismisses this explanation. *Id.* at 636 (opinion of Keen, J.). It may be that the self-defense exception was developed because our predecessors simply decided that there were situations in which the willful taking of the life of another should not be punished. If so, then this provides an illustration of the norm-based nature of statutory interpretation. It also shows the difficulties in interpreting "plain meaning."

feminism suggests, the issue of individual choice is an important consideration. How were Whetmore's choices constructed? The record, as summarized in the Chief Justice's opinion, does not give enough information about Roger Whetmore's "participation" in the decisionmaking process. The stories of the four defendants are not available to us and may not have been available to the jury. Each defendant could have described Whetmore's actions, as a means of providing more texture to help the jury decide whether the four defendants should be liable for killing him. Perhaps the surviving explorers merely assisted Whetmore in committing suicide; the drawing of lots was, after all, his idea. We thus need to develop more "facts" to determine the meaning of "willfully." What is presented in the trial court as the "facts," and then what we, as judges, do with those "facts," is critical to our application of the law. The plain meaning of the statute cannot exist apart from the context in which the statute is applied.

Rather than the plain meaning of the statute, we could look to our precedent as the sole guide for our decision today. Justices Foster and Tatting each cite conflicting cases on the flexibility of our statutes and *stare decisis*.¹⁴ In the law of self-defense, I can cite to *Newgarth v. Wauker*, in which a battered woman killed her sleeping abuser, and we attempted to decide whether she was in such imminent danger to have been "justified" in killing a sleeping person. We expanded our definition of "imminence" in order to accommodate the realities of this battered woman. We can thus find precedent for however we choose to decide this case. We must remember that our own precedents, like the words of the statute itself, will be interpreted and reinterpreted in a changing world.

Yet another traditional method of review requires that we look at the law essentially in a vacuum. While the standard of review of our appellate courts has been an examination of the law (and great deference to the trial judge who has had the opportunity to assess the credibility of witnesses), we must instead recognize that law and facts are intertwined, and that how we view the facts is influenced by how we view the law. When I first read about this case in the *Newgarthian News*, before I dreamed that it would be before us, I thought in terms of what would justify the explorers' actions. That is, I imagined the various conversations between the explorers in the context of when our law allows one to take another's life. The explorers themselves appear to have been guided by the law in deciding what actions to pursue.¹⁵

Even beyond the failure to acknowledge perspectives and the biases of traditional methods of statutory interpretation, the opinions of my earlier colleagues leave out feelings, anything other than pure

14. Compare *id.* at 624 (opinion of Foster, J.) with *id.* at 628-29 (opinion of Tatting, J.).

15. See the opinion of Justice Laura Stein for further discussion of the actions taken by the explorers to proceed in accordance with societal norms. *Post* at 1809-10 (opinion of Stein, J.).

reason and intellect. Clearly, emotions—which have traditionally been associated with the feminine—have been left out of the development of the standards that my more senior colleagues seek to apply. Instead, we should not be afraid to acknowledge and examine the interrelationship of our intellectual and emotional sides, and then to use them in interpreting the statute at issue. We are, after all, men and women, with differing perspectives, informed by our experiences, on the situation before us. This diversity is a strength of our judiciary, which, though not elected, has become more representative of the population. While in the past some (including me) have doubted whether adding women, men and women of color, and lesbians and gay men to the bench would actually have an impact on the process of judging, we have seen changes as a result of this diversity that are wondrous to contemplate—decisions that reflect our (always contingent) realities.

Before my colleagues accuse me of delving too deeply into philosophical hermeneutics and metaphysics (some of the older members of this court can be decidedly anti-intellectual and intolerant), I want next to use critical cultural feminism to relate the questions in this case to some alternative methods for judging based on a contemporary dilemma within moral reasoning. We are all familiar with the work of Carol Gilligan, who identified two different methods of moral reasoning: one based on an ethic of care, and one based on an ethic of justice.¹⁶ Within the ethic of care, reasoning draws on interconnections between people and seeks to minimize harms to others; for example, statutes should be interpreted in the light of their effect on people's interactions and mutual interdependence. Within the ethic of justice, reasoning is based on hierarchies of values, seeking to do what is morally (or legally) right; for example, people's interactions should be interpreted in the light of whether they comply with the law as written. Within the ethic of justice, statutory *interpretation* becomes more of an exercise in statutory *application*. While I believe that this model simplifies the complexities inherent in judging and itself establishes universal interpretive categories, it does provide an important lesson on the utility of seeking to examine multiple perspectives on any case. Our judgments should integrate insights from the two different ethics, seeking to do justice yet respecting connections between people and recognizing that our own (sometimes shifting) perspectives construct this decision.

Reasoning constructed solely under an ethic of care might find

16. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). See generally MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION (Carol Gilligan et al. eds., 1983).

none of the defendants guilty. They examined all of the different options, talked amongst themselves, and agreed to a solution initially suggested by Roger Whetmore. Rather than all five people dying, only one person died: The collective good was served at the expense of one individual. The conflict between the community's needs and the law was resolved by a method most likely to accommodate both interests. Indeed, the explorers reached consensus, and Whetmore indicated that he would not block that consensus. Power was exercised responsibly and compassionately, in consideration of the rights and interests of the community of explorers. The explorers willfully considered the lives of each other and the impacts of different solutions on their survival before Whetmore died.¹⁷

Under an ethic of justice, the defendants might be deemed guilty because they clearly violated the law: They took Roger Whetmore's life, and their own reasons for doing so are irrelevant. They acted willfully in killing him. The context in which they acted should not affect the legal decision that they violated a statute. Using this reasoning, our Court decided *Commonwealth v. Valjean*, discussed in Justice Tatting's opinion, in which a man was punished for stealing a loaf of bread to feed his family.¹⁸ He violated the letter of the law, and my more senior colleagues decided that the law's words were more important than food for a starving family.¹⁹

There is, however, an alternative interpretation of Valjean's actions pursuant to an ethic of justice. I could also argue that *Valjean* created a hierarchy of laws: The Constitution—which is the Supreme Law of the Land and guarantees life—trumps a mere law that denies life to a family. Similarly, for the explorers, the Constitution should take priority over § 12-A.

Given these alternative perspectives even within an ethic of justice (which is the form generally taken by conventional legal reasoning), the outcome of this case must depend on certain underlying normative judgments concerning the morality of taking the life of another. In this particular context, killing may be lawful. While the law against killing another is meant to be enforced, our own feelings of compassion and mercy are integral components of the enforcement of the law, and the particular action of the explorers (or of a person who steals a loaf of bread to feed a starving family) may show not a lack of respect for the law but rather a sign of respect for community and life.

These possible uses of the ethics of justice and care again show the need to examine any problem from different perspectives as well

17. An ethic of care might also support the opposite outcome, however. If the explorers cared about their interdependence with each other, then they would have considered Whetmore's feelings and recognized that killing is the ultimate destroyer of relationships and community.

18. Fuller, *supra* note 1, at 629 (opinion of Tatting, J.).

19. It is interesting that Carol Gilligan, in her famous dilemma of whether Heinz should steal a drug to save his dying wife, echoes the *Valjean* case but suggests a range of possible solutions. See GILLIGAN, *supra* note 16, at 25-31.

as the difficulty that we should have with separating “justice” from “care.” Just as prosecutors have discretion in deciding which cases to bring (subject to limits imposed by the Newgarth Constitution), so too should judges have discretion in deciding cases based on those same laws. Discretion is built into our legal system; judges are not mere robots. We are people, and our emotions inevitably affect our judgments. We can pretend otherwise, but we fool only ourselves. Other legal systems are more explicit about the need for discretion in judging and respect judges who are capable of integrating discretion, compassion, and understanding in judging.

The challenge for us is to acknowledge the different strands at play in our decisions. Instead of seeking to find our answers only in a hierarchy of rights, our decision should integrate care *and* justice. Even then, we will not reach the one “just” result. Indeed, there is no one just result; we can only make contingent judgments.

The final pieces left out of the judicial opinions of my earlier colleagues are the voices of the explorers. The process that is due to them requires that we listen to them and use their voices to help us interpret the law.²⁰ This leads to a need for more understanding, hearing the voices of those who survived. While I believe I could never kill or eat another human being, I do not know. I have never been in the situation of the explorers, and it is thus difficult for me to judge their actions as violating our statute. As a judge, I try to use empathy as a guide—not an empathy that requires me to put myself in the exact same situation as the accused here, but an empathy that seeks to draw on our own experiences and understandings and openness to others and that recognizes our communities and differences.

Thus, I would remand this case with directions to the jury and trial judge to consider the context in which this case arose and to encourage them to use their own emotions as a guide to interpreting the statute and to deciding the meaning of “willfully.” While this call for context is not a call for unrestrained emotions and standardless discretion, it is an invitation to integrate emotions with the application of standards and to use our power responsibly, morally, and generously.²¹

20. Although the Newgarth Constitution grants witnesses a right against self-incrimination, it is unclear to me, as an appellate judge, to what extent the defendants did testify. Knowing that their voices make a difference might have helped in structuring their testimony.

21. Although the issue is not now before us, I would, like Justice Calmore, strike down the death penalty as inhumane, cruel, not respectful of life, and violative of international norms. *Post* at 1780-81 (opinion of Calmore, J.).

CALMORE, J.* In this case we are faced with difficult issues that transcend the matter at hand. Petitioners appeal an earlier decision of our judicial predecessors who, in an evenly divided vote, affirmed petitioners' convictions for murder and their death sentences.¹ As explained below, I would set aside their death sentences.

The record reveals facts that are quite unusual. In May of 4299, five members of the cave-exploring Speluncean Society found themselves trapped in a cave-in. Survival became such a pressing issue that in order to save four of the cave explorers, one was killed and eaten. Upon a throw of the dice, the unlucky Roger Whetmore was sacrificed. The survivors were subsequently prosecuted and convicted under Newgarthian statute, N.C.S.A. (N. S.) § 12-A, which provides: "Whoever shall willfully take the life of another shall be punished by death."²

The statutory formulation here is so firmly rigid that it appears to permit no exception on the facts, "however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves."³ Yet sympathy is not entirely irrelevant. Out of sympathy for the explorers' plight, both the trial judge and the jury have communicated a request to the Chief Executive that he exercise his authority to commute the sentences of each petitioner to a six-month term of imprisonment. Although the narrow latitude for statutory interpretation in this case implies a legislative intent to remove sentencing discretion from both judge and jury, the Chief Executive apparently awaits this Court's disposition of the pending petition of error before he will render a decision regarding clemency.⁴

I doubt that the legislature ever contemplated that capital punishment would apply to anyone who might be convicted under the circumstances of this case. As our late colleague, Justice Greene, points out, "many criminal laws are little more than automatic legal traps set for the less privileged. The privileged [male] defendants in this case have been ensnared in one of these traps."⁵ I am therefore confident that the Chief Executive will find substantial public and political support to grant clemency. He will not have to stretch statutory interpretation to fit concerns of justice within the law's reach. We, on the other hand, must apply the law as written or declare that law to be unjust per se. As written, the law proscribes killing without regard to the extenuating circumstances presented by the explorers. Although I believe that those circumstances will be taken into account by the Chief Executive and that he will commute the

* John O. Calmore, Associate Professor of Law, Loyola Law School, Los Angeles. I am indebted to Dwight Greene and Laurie Levenson for their constructive critiques of this opinion.

1. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).
2. *Id.* at 619 (opinion of Truepenny, C.J.).
3. *Id.*
4. *Id.*
5. *Post* at 1791 (opinion of Greene, J.).

sentences at issue, I am quite worried about other convicted murderers who will present less favorable profiles and circumstances in support of the plea for clemency.

This concern leads me to the opinion that petitioners' death sentences should be set aside even though the odds of avoiding death are good for them. I firmly believe that in all instances capital punishment is a violation of human rights because it constitutes "cruel and unusual punishment."⁶ Moreover, racial bias plagues the criminal justice system to the extent that the law of capital punishment, so facially uniform and fair under Newgarthian law, really operates as an instrument of social control that disproportionately subjects people of color and Newgarthian Jews⁷ to the service of the hangman.

Although the particular petitioners before us do not raise specific issues that implicate the racist aspects of the criminal justice system, I take the opportunity presented here to discuss the larger human consequences that stem from our capital punishment law. I want to examine the value orientations that are implicated.

In order to tell my story, however, I must liberate myself from the traditional constraints of judicial opinion writing.⁸ In departing from expected format, my exposition draws upon the work of late

6. See the Eighth Amendment to the U.S. Constitution of 1789 for an early example of a similar standard.

7. Newgarthian Jews came to our planet from Earth's United States in 1994. Here on Newgarth, of course, they are an oppressed group much like the African Americans who resided in twentieth century America. See *infra* note 22.

8. In voicing this response I follow the lead of critical scholars from American legal academies who wrote as far back as the 1990s. Consider the insight of one such scholar, Peggy Davis:

When legal scholars believed that law was only and always derived by reasoning from fixed principles, legal scholarship was confined, justifiably, to the critique of deductive syllogisms within the judicial opinion. Our beliefs have become more complicated. We no longer imagine law, or much of anything, to be a matter of simple deduction. Instead, we understand that law is created by people—people who reason within a culture, from a perspective, and with a set of sensibilities. Accordingly, we see that law is shaped by culture, perspective, and sensibility as well as by logic. Mastery of the deductive syllogism is still foundational, but no longer sufficient, to fulfillment of the legal scholar's obligation to provide critical commentary as law evolves. The thorough scholar looks not only to the logic of principles that we call law, but also to the characteristics of interactive, cultural processes that comprise lawyering and judging. S/he takes as texts both the statutes and judicial opinions that constitute law and the discursive acts by which law is articulated, debated, and applied.

Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1635 (1991).

An important objective of antidiscrimination law is to militate against the behavioral consequences that stem from prejudice, bias, and stereotyping. The law will remain inadequate, however, as long as courts and legal theorists fail to broaden today's narrow and inflexible references to harm and redress, references that fail to take into account the actual experience of subordination. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 395-96; see also GIRARDEAU A.

twentieth-century scholars in the United States of America who developed a genre of scholarship known as “critical race theory.”⁹ Thus, in what follows, I rely on a “contextualized historical analysis of racial hierarchy as part of a challenge to the presumptive legitimacy of social institutions.”¹⁰ The original record of the explorers’ case is color blind. But because we on Newgarth live under circumstances of racial oppression that are analogous to those of the United States in the late twentieth century, a contextualized examination of the legitimacy of the criminal justice system and the imposition of capital punishment cannot be separated from issues of “race” and racism.¹¹

I. *The Coming of American Blacks and Jews to Newgarth*

Our death penalty law is presently a product of a tortured history of racial conflict.¹² Thus, we must begin over two thousand years

SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 20-25 (1993) (discussing the socialized judiciary’s bias toward majoritarian values).

9. According to Kimberlé Crenshaw:

While no determinative definition of this work is yet possible, one can generally say that the literature focuses on the relationship between law and racial subordination in American society. It shares with liberal race critiques a view that law has provided an arena for challenging white supremacy. Critical race theory goes beyond the liberal race critiques, however, in that it exposes the facets of law and legal discourse that create racial categories and legitimate racial subordination.

Other broad themes common to critical race theory include the view that racism is endemic to, rather than a deviation from, American norms. This developing literature reflects a common skepticism toward dominant claims of meritocracy, neutrality, objectivity, and color blindness The work manifests an appreciation of the role of the lived experience of people of color in constructing knowledge about race, law, and social change.

. . . The work is thus aggressively interdisciplinary in an effort to understand more fully how race is constructed, rationalized, and experienced in American society. Critical race theory goes beyond liberal understandings of race and racism by exploring those of its manifestations that support patriarchy, heterosexism, and class stratification. The normative stance of critical race theory is that massive social transformation is a necessary precondition of racial justice.

Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 195, 213-14 n.7 (David Kairys ed., rev. ed. 1990); see also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Richard Delgado & Jean Stefanac, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

10. Crenshaw, *supra* note 9, at 214 n.7.

11. See Symposium, *Criminal Law, Criminal Justice, and Race*, 67 TUL. L. REV. 1724 (1993). Here, I place “race” in quotation marks to indicate that it refers to a socially construed, subjective meaning. See *infra* text accompanying notes 52 and 53. During the 1990s, the only western nations on Earth to sanction the death penalty were the United States and South Africa. Relations between blacks and whites in those two countries, not coincidentally, were more problematic than in any others.

12. In Los Angeles, California, during the 1990s, it was noted:

The most serious criminal cases are tried at the Criminal Courts Building in high-security courtrooms dubbed the “Long Cause” courts. These are mostly the death-penalty cases that rarely have white defendants. With the exception of one white woman, every judge hearing these cases is a former

ago and consider how our oppressed Jewish Americans and African Americans arrived on Newgarth.

It started out as a record \$300 million sequel to Spike Lee's film about the mythical Malcolm X.¹³ Although a "myth," many inner-city people saw the folk hero as a "real" man, both in the 1960s and 1990s.¹⁴ The director of the sequel patterned herself after the great Oscar Micheaux, who, according to author bell hooks, had used melodrama to displace the power of the word.¹⁵ Through the strength of the melodramatic aesthetic, which "throws doubt on the adequacy of speech to express the complexities of passion," Micheaux had been able to depict "a whole terrain of the 'unspeakable.'" ¹⁶ Critic Marilyn Jimenez observed that "the distinctive mark of a Micheaux film is the relationship between text and subtext, between what the film says and what it really says."¹⁷ With visionary obsession, Micheaux had embodied "the ancient characteristic of black artistic creation: the trope of reversal, the use of 'indirections to find directions out.'" ¹⁸

Ultimately the sequel was an adaptation of the rebel scholar Derrick Bell's *SpaceTrade* story, which had prophesied the coming of American blacks to Newgarth, but not the Jews.¹⁹ According to Bell, in the year 2000, the United States government and visitors from outer space would transact a monumental trade. The people from outer space would offer solutions to some of the most complex problems then facing the United States. Their offers would include

career prosecutor or police officer. No blacks or Latinos sit on the Long Cause courts.

♦ ♦ ♦
If all the Afrikaaner judges in Johannesburg swore an oath that they were absolutely impartial, nobody in Soweto would believe them. History gets in their way.

Or put it another way, if you are white, assume that almost every judge is black, that virtually all courthouse power is held by blacks, that you are frisked very carefully simply because of your skin color and that much of what you say is greeted with automatic skepticism. Assume also that you can safely expect that your jury will have a majority of black members. Comfortable?

Charles L. Lindner, *Judicial L.A.: South Africa Without the Formality*, L.A. TIMES, March 14, 1993, at M1, M6.

13. The film was made in the early 1990s to celebrate the life of an American black civil rights leader. See Joe Wood, *Denzel Washington (The Making of Malcolm X)*, ROLLING STONE, Nov. 26, 1992, at 34; see also ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

14. See Gerald Horne, "Myth" and the Making of "Malcolm X," 98 AM. HIST. REV. 440 (1993); Marshall Frady, *Reflections—The Children of Malcolm*, THE NEW YORKER, Oct. 12, 1992, at 64.

15. BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 134 (1992).

16. *Id.*

17. *Id.*

18. *Id.* at 135.

19. DERRICK BELL, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158-94 (1992).

(1) a sufficient amount of gold to bail out the virtually bankrupt federal, state, and local governments; (2) special technology that would cleanse the wretched Earth environment; and (3) completely safe nuclear power to relieve the national dependency on fossil fuels. In exchange, the people from outer space would want just one thing—all African Americans! For a brief spell the nation would go into turmoil as the controversial deal was debated. After soul-searching deliberations, however, the United States would reinstitute a military draft law under which only African Americans would be called upon, in the name of national interest, to go along with the proposed trade.

To calm draft resistance and protest, the American president would address the nation in a televised speech, explaining the color blind intent of the law:

Of course, I am aware of the sacrifice that some of our most highly regarded citizens would be asked to make in the proposed trade. While these citizens are of only one racial group, there is absolutely no evidence whatsoever to indicate that selection was intended to discriminate against any race or religion or ethnic background.²⁰

The nation's Supreme Court would uphold the new draft law.²¹

With the exception of up to one thousand blacks with detainee status, the SpaceTrade would be completed. Stripped of all but a single undergarment, almost thirty million black men, women, and children ("including babes in arms") would board the one thousand huge space ships for their journey from America. As depicted in Bell's closing description: "The inductees looked fearfully behind them. But, on the dunes above the beaches, guns at the ready, stood U.S. guards. There was no escape, no alternative. Heads bowed, arms now linked by slender chains, black people left the New World as their forebears had arrived."²²

Though not precisely analogous to the true events, Bell's prediction was a fairly accurate representation of the forces that actually

20. *Id.* at 179.

21. At the time, the Supreme Court had great difficulty recognizing that intent was too narrow a basis upon which to claim and redress racial discrimination. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 38 STAN. L. REV. 317 (1987); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

22. BELL, *supra* note 19, at 194.

History is not clear on why Jews were brought to Newgarth. It is not discussed in Bell's account so I can only speculate. The American strain of anti-Jewish racism was never as virulent as its European form. The United States has always had more vulnerable targets than Jews for its racism. Jews remembered that at the time of the Holocaust, however, they had become highly assimilated and were influential agents in shaping German culture, economy, and politics. So, although Jews were not outside of the American mainstream to the same degree as most non-European people of color, Jews were ever vigilant because they remembered their history. Scapegoating is a prevalent feature of racism, and the powers that be at the time of the SpaceTrade must have feared the undue influence that the Jews were seen as having. What is clear is that the treatment of Jews on Newgarth represents a practice that has historically perpetuated the starkest antisemitic attitudes and behavior toward the Jews, as if our Newgarthian society were built on the model of Nazi Germany—albeit a kinder and gentler model.

directed American blacks and Jews to Newgarth in 1994. The theme of those forces is captured in the observation of Stewart Hall that the basic analysis of racism's complex structures and dynamics reveals a fundamental fear. More precisely, he has said: "It is the fear—the terrifying, internal fear—of living with *difference*," a profound fear that grows from a "fatal coupling of difference and power."²³ Accordingly, the new sequel was to be "a counter-hegemonic" cultural production.²⁴

Intrigue cloaked the entire production of the original film by Lee, and great excitement and anticipation attached to the unveiling of its sequel. Although the primary stars were unrecognizable, many superstar blacks and Jews were in the film melodrama. Indeed, it appeared that every black and Jewish man, woman, and child in America had been ascribed a role to play. Not since the televised version of Alex Haley's *Roots* had a representation of "the heroic black life" so attracted a national buzz of interest.²⁵ Moreover, the political ear of the then-recently elected President, Bill Clinton, heard the message. Sensing the taste for national renewal, and the chance to interrogate conventional wisdom concerning racism—and perhaps other oppression—the President issued an Executive Order that mandated a national celebration to end racism now, "ERN," and his order required that everyone in America see the twelve-hour epic film, which was to be shown on Martin Luther King's (a celebrated black civil rights leader) birthday, January 15, or on Independence Day in America, the Fourth of July. The Congress—America's legislative body—split over which would be the more appropriate day to celebrate, concluding that it would depend on the content or message of the film. The President, however, vetoed their indecision.

The film event was advertised as "the ultimate solution to racism." It was therefore thought that America could finally move beyond denial to redemption. Thus, in the name of national security, "peace dividends" were allocated to deploy previously undisclosed military apparatus and super-high-tech satellites to beam pictures across the land to screens that had been constructed to the size of football fields. As a final piece to the "solution," the government undertook elaborate mind-control applications developed by Martians to secure better, more trusting black-Jewish relations.²⁶ The

23. Stewart Hall, *Race, Culture, and Communications: Looking Backward and Forward at Cultural Studies*, 5 *RETHINKING MARXISM* 10, 17 (1992).

24. HOOKS, *supra* note 15, at 133.

25. ALEX HALEY, *ROOTS* (1976); see also *Why "Roots" Hit Home*, *TIME*, Feb. 14, 1977, at 69-77.

26. In 1990, The American Jewish population numbered approximately six million and the African American population approximately 30 million. American Jews had become "the largest, wealthiest, most influential and politically powerful [Jewish group]

Administration thus hoped to shore up two of its greatest “blocs” of racially polarized voters from the 1992 election.

The black allegiance to the Democrats—one of America’s two major political parties, and that of President Clinton—was well known.²⁷ Less well known was the extent and significance of Jewish support. Indeed, with the exception of blacks, Jews were the most loyal and liberal supporters of Democrats—more loyal even than union members and welfare recipients.²⁸ In 1993, it was reported that although Jews constituted only three percent of the national population and only four percent of the electorate, Jews resided heavily in key electoral states, such as New York (twenty percent of the voters), California, New Jersey, Florida, Illinois, and Pennsylvania.²⁹

Perhaps more important than their small but strategically located

that [had] ever existed in Diaspora history.” ROBERT S. WISTRICH, *ANTISEMITISM: THE LONGEST HATRED* 114 (1992). By the 1990s, however, blacks and Jews were often antagonistic toward each other. See, e.g., BELL, *supra* note 19, at 119-25 (discussing why it is inappropriate to expect black leaders to repudiate Louis Farrakhan); HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* 476 (1967) (“Among the many myths life and history have imposed on Negroes . . . is the myth that the Negro’s best friend is the Jew.”); CORNEL WEST, *RACE MATTERS* 71 (1993) (expressing regret that the time has passed when the common histories of oppression and degradation of both groups served as a spring board for genuine empathy and principled alliances); Jeffrey C. Alexander & Chaim Seidler-Feller, *False Distinctions and Double Standards: Antisemitism at UCLA*, 7 *TIKKUN* 12 (Jan.-Feb. 1992) (discussing the appearance of antisemitic statements in a UCLA black student publication); Jim Sleeper, *Demagoguery in America: Wrong Turns in the Politics of Race*, 6 *TIKKUN* 43, 48 (Nov.-Dec. 1991) (observing in the aftermath of black-Jewish conflict in Brooklyn’s Crown Heights that “[i]f there is any coalition aborning in New York today, it is one against blacks”); cf. Bob Sipchen, *L.A. Jews Look Past the Riots*, *L.A. TIMES*, Oct. 16, 1992, at A1 (noting that the bonds between Jews and blacks “are increasingly rare and frayed”).

According to Wistrich:

The picture that emerges from the more recent research is that some 37 per cent of blacks as against 20 per cent of whites score as antisemitic, with particular emphasis in the black community on the perceived business power of the Jews.

Nevertheless, it is significant that Negroes as a whole emerge as significantly less antisemitic than whites when it comes to supporting discriminatory behaviour. As a persecuted minority themselves, Negroes display more opposition to occupational or social club discrimination against Jews, to laws against Jewish immigration or to antisemitic violence of any kind. Neo-Nazi attacks on Jewish stores or synagogues are usually condemned sharply in the black press as expressions of white racist persecution. Thus, although Negroes are more prone to accept negative economic stereotypes about Jews, they are less likely than whites to approve of discriminatory attitudes or practices.

This pattern coincides with the fact that historically black antisemitism has been less of a threat to American Jews than white racism.

WISTRICH, *supra*, at 123-24. There was great interest in the growing tensions between the communities. For instance, *Time* observed: “Along with Michael Lerner, editor of the Liberal Jewish magazine *Tikkun*, [Cornel West] received a \$100,000 advance for a joint book on black-Jewish tensions, an almost unheard-of sum for a scholarly work.” Jack E. White, *Philosopher With a Mission*, *TIME*, June 7, 1993, at 60, 62.

27. COMM. ON THE STATUS OF BLACK AMs., NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND SOCIETY* 216-18 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

28. Jay P. Lefkowitz, *Jewish Voters & the Democrats*, *COMMENTARY*, April 1993, at 38.

29. *Id.*

population, the Jewish community was associated—albeit stereotypically—with a status, wealth, and power in American society far greater than their numbers would imply. In the words of one commentator, “[n]ot only are they unusually affluent, they occupy important positions in America’s elite opinion-making fields: education, journalism and the media, politics, and law. Moreover, they have become prodigious fund-raisers and fund-givers to political campaigns.”³⁰ So, although Jewish power was very different than black power, some members of the respective groups had hoped that the election of President Clinton might lead to a new “politics of meaning” between themselves and the larger national community.³¹ Alas, it was not to be.

The big day finally arrived, either in January or July 1994; it was hard to determine the appropriate date and the record is silent as to this unimportant fact, or, should it be said, symbol.³² At any rate, the film was a spectacular success—all that most people had hoped for, prayed for, and even died for; and still more: It was “really experienced.” The film depicted a reincarnation of Adolf Hitler—a mid-twentieth century leader of Nazi Germany whom the United States defeated in Earth’s Second World War—leading a stealth space squadron of former slave-ship captains, slavemasters, and the Los Angeles Police.³³ The Jews and African Americans were

30. *Id.*

31. Michael Lerner, *Memo to Clinton: Our First Hundred Days*, *TIKKUN*, Jan.-Feb. 1993, at 8.

32. In commenting on Independence Day celebrations, abolitionist Frederick Douglass noted:

Your denunciation of tyrants, [is] brass fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to Him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of the United States, at this very hour.

A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR—RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 385 (1980) (quoting Frederick Douglass, *The Meaning of the Fourth of July to the Negro* (1852)).

33. According to Mobile Digital Terminal (MDT) communications made by the Los Angeles Police Department (LAPD) during the 1990s, racist humor was common among their ranks:

“Batten down the hatches, several thousand Zulus approaching from the North.”

“We have his oriental buddy for 11364.”

“Great . . . make sure u burn him if he’s on felony probation . . . by the way does he need any breaking.”

“Hi . . . just got mexercise for the night.”

Josephine Chow, Note, *Sticks and Stones Will Break My Bones, But Will Racist Humor?: A Look Around the World at Whether Police Officers Have a Free Speech Right to Engage in Racist Humor*, 14 *LOY. L.A. INT’L & COMP. L.J.* 851, 851 (1992) (footnotes omitted). The Micheaux-like film often quoted the LAPD. For examples of these quotations, see *id.* at

brought back, at “low cost,” to the planet Newgarth on Martin Luther King’s birthday, or perhaps it was the Fourth of July.

Upon departure, the actor playing Hitler declared, “Racial degeneration [cannot continue] apace. The bastardization of great states has [ended]. The Negroization of culture, of customs—not only of blood—[has been stopped.]”³⁴ The character playing Thomas Jefferson—a founder and former President of America—echoed Hitler’s words: “Negro music is now the rage. But if we put the shimmy alongside a Beethoven symphony, then the triumph is clear.”³⁵

The final scenes were a collage of images of Jews going to gas ovens,³⁶ of blacks hanging from trees as “strange fruit,”³⁷ of corpses

851-54 & nn.13-16 & 20. See also *id.* at 852 n.7 (describing in graphic detail the LAPD beating of black citizen Rodney King on March 3, 1991).

34. Paraphrasing a speech quoted in *COMMUNISM, FASCISM, AND DEMOCRACY: THE THEORETICAL FOUNDATIONS* 412 (Carl Cohen ed., 1966) [hereinafter *COHEN*]. Adolph Hitler (1889-1945) became the Chancellor of Germany in 1933 and assumed absolute power in the German Third Reich. According to Professor Cohen: “As a dictator pursuing policies of external expansion, terrorization, and war, he has had no real equal in all history. An impassioned orator with the power to inspire an almost hysterical enthusiasm, he best revealed the character of his philosophy, such as it was, in his speeches to the German nation.” *Id.* at 405.

35. *Id.* at 412. But see *PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS* 110-16 (1991) (discussing the controversy at Stanford University that erupted in 1988 when a white student there, a descendent of German Jews, learned that Beethoven was black). The story Professor Williams tells is interesting, both in terms of how the Jewish student’s property interest in whiteness was discombobulated and how Professor Williams’s humanity interest in blackness was devalued. She reports:

[The student] found the assertion that Beethoven was black not just annoying but “preposterous.” In the wake of the defacement [his coloring a poster of Beethoven to represent a black stereotype], he was assigned to do some reading on the subject and found that indeed Beethoven was a mulatto. This discovery upset him, so deeply in fact that his entire relation to the music changed: he said he heard it differently.

....

The most deeply offending part of the Beethoven injury is its message that if I ever manage to create something as monumental as Beethoven’s music, or the literature of the mulatto Alexandre Dumas or the mulatto Alexander Pushkin, then the best reward to which I can aspire is that I will be remembered as white. Perhaps my tribe will hold a candle in honor of my black heart over the generations—for blacks have been teaching white people that Beethoven was a mulatto for over a hundred years now—and they will be mocked when they try to make some claim to me. If they do press their point, the best they can hope for is that their tormenters will be absolved because it was a reasonable mistake to assume I was white: they just didn’t know. But the issue is precisely the appropriation of knowledge, the authority of creating a canon, revising memory, declaring a boundary beyond which lies the “extrinsic” and beyond which ignorance is reasonably suffered. It is not only the individual and isolating fact of that ignorance; it is the violence of claiming in a way that denies theories of group rights and empowerment, of creating property that fragments collectivity and dehumanizes.

Id. at 112-14 (footnote omitted).

36. During World War II, European Nazis implemented an antisemitic program whose stages resembled the treatment of blacks in America: legal discrimination, expropriation, forced immigration, and later ghettoization and mass exterminations. The 1994 SpaceTrade was transacted in lieu of mass extermination.

The ‘Final Solution’ would not adopt the spontaneous pogrom violence of Russian and East European antisemitism but rather be implemented in a methodical manner by the highly organised, bureaucratized state machine of

simply identified as Chaney, Goodman, and Schwerner.³⁸ Against this background was an image of the real Adolf Hitler, the Führer, bigger than life. Hitler, in rapid-fire German, declared:

What are the aims of the Jews? They aim to expand their invisible state as a supreme tyranny over the whole world. The Jew is therefore a destroyer of nations. In order to realize his domination over peoples he has to work in two directions. Economically he dominates the peoples, politically and morally he subjugates them. Politically he accomplishes his aims through the propagation of the principles of democracy and the doctrine of Marxism, which makes the proletariat a terrorist in domestic matters and a pacifist in foreign policy. From the ethical point of view the Jew destroys the peoples in respect to religious and moral considerations. Anyone who is willing to see that, can see it; and no one can help the person who refuses to see it. The Jew, voluntarily or involuntarily, consciously or unconsciously, undermines the foundation on which alone a nation can exist.

....

It is said that we are only making a lot of noise about anti-Semitism. Yes indeed, we want to stir up a storm. The people must

the Third Reich, using the SS and the Wehrmacht as its instruments. They would be helped by thousands of top bureaucrats, by German industrialists, lawyers, doctors, engineers, accountants, bankers, clerks, railway officials and ordinary workers, without whom the trains to Auschwitz would never have run on time.

This machinery of destruction, as historians like Raul Hilberg and sociologists like Zygmunt Bauman have pointed out, reflected the technological and organisational alienation of a bureaucratically organised society such as Nazi Germany, as well as the totalitarian methods of domination perfected by the SS. But massive ideological conditioning was also required in addition to the routinising of operations and the deliberate fragmentation of responsibilities encouraged by a modern technically advanced state, in order to carry out the mass murder of an entire people. Indeed, Nazi antisemitism achieved its greatest success in the complete *depersonalisation* of the Jews, their gradual dehumanisation as a result of ceaseless propaganda and their transformation in the eyes of ordinary Germans first into social pariahs and then into *total* outsiders. . . . In historian Ian Kershaw's words, "depersonalisation increased the already existent widespread indifference of German popular opinion and formed a vital stage between the archaic violence of the pogrom and the rationalised 'assembly line' annihilation of the death camps."

WISTRICH, *supra* note 26, at 74-75 (citations omitted).

37. See STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988); Kendall Thomas, *Strange Fruit*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* 364 (Toni Morrison ed., 1992); cf. LEONARD DINNERSTEIN, *THE LEO FRANK CASE* (1968) (describing the lynching of a Jew in 1916).

38. In efforts to register black voters in Mississippi during the summer of 1964, James Chaney, black, and Andrew Goodman and Michael Schwerner, both Jews, were murdered. Chaney had been beaten to death, and Goodman and Schwerner had been shot in the head. Three years later Neshoba County Deputy Sheriff Cecil Price was convicted on a federal conspiracy charge related to the murders and served 44 months in prison. MILTON VIORST, *FIRE IN THE STREETS: AMERICA IN THE 1960s* 258-59 (1979).

not sleep, they should know that a storm is gathering. We have therefore laid down the principle in our program that only Germans can be citizens of the state. We could tolerate Jews only as guests, providing they did us no harm. But they are harmful.³⁹

The photoplay ended with John Coltrane's—a twentieth century jazz musician—compositions "Ascension"⁴⁰ and "A Love Supreme"⁴¹ playing simultaneously in the background as these words appeared on the uniquely personal "screens" of every one present: "THERE IS NO END, JUST THE AFTERMATH." There were four solid hours of applause and strident calls of "ENCORE! ENCORE!" Others looking at "others" called out loudly for a series of sequels. The anxious "others" recalled the words of James Baldwin, in his letter to Angela Davis—another black civil rights leader—during her imprisonment:

Some of us, white and black, know how great a price has already been paid to bring into existence a new consciousness, a new people, an unprecedented nation. If we know, and do nothing, we are worse than the murderers hired in our name.

If we know, then we must fight for your life as though it were our own—which it is—and render impassable with our bodies the corridor to the gas chamber. For, if they take you in the morning, they will be coming for us that night.⁴²

II. *The Centrality of "Race" and Racism*

As a descendant of African American slaves, even from my privileged perch, I see our planet in a "race" predicament that is disturbingly analogous to that of America at the time that the Space Trade brought African Americans and Jewish Americans to Newgarth to establish a new world order that would truly reflect the enlightened ideals of Thomas Jefferson, who declared that all persons are created inherently equal and autonomously free to pursue life, liberty, and happiness.⁴³

39. Adolph Hitler, speech delivered in Munich, April 20, 1923, *Völkischer Beobachter* (April 22-23, 1923), in COHEN, *supra* note 34, at 415-16.

40. JOHN COLTRANE, *ASCENSION* (Atlantic Records 1965). One critic has described *Ascension* as "the most powerful human sound ever recorded." LEN LYONS, *THE 101 BEST JAZZ ALBUMS: A HISTORY OF JAZZ ON RECORDS* 380 (1980).

41. JOHN COLTRANE, *A LOVE SUPREME* (Impulse Records 1964). Lyons, who has included this among the 101 best jazz albums, has observed: "Throughout the album, Coltrane displays a dazzling variety of tonal color on his tenor, ranging from a newly adopted vibrato to climactic, harmonic 'screams' and cries in the horn's highest register." LYONS, *supra* note 40, at 285.

42. James Baldwin, *An Open Letter to My Sister, Angela Y. Davis*, in *IF THEY COME IN THE MORNING: VOICES OF RESISTANCE* 19, 23 (Angela Y. Davis ed., 1971).

43. Jefferson included these words in America's Declaration of Independence. Americans often referred back to the document.

"We routinely return to Jefferson and his era in order to discover the glory of America," wrote Charles A. Miller, a Jefferson scholar at Lake Forest College in Illinois. "We should also be willing to return in order to find early evidence of our distress." Mr. Miller added: "I believe that Jefferson was firmly—centrally and emblematically—in the stream of American

Responding to the appropriate call to recognize the need for critical analysis that frames issues in the light of the interactive and cultural context of judicial decisionmaking, I have come to appreciate better the profound complexities, breadth, depth, dialectical dynamics, forms, and expressions of "race" and racism. The concept of "race formation" can help us to appreciate the many ways that "race" and racism are manifested in the agency of individuals and groups and in the institutional structures that they produce and maintain over time and under changing circumstances.⁴⁴ "Race formation" refers to the process through which unstable and contradictory societal processes, organization, and beliefs shape the content and salience of racial categories, which, in turn, develop racial meaning and significance.⁴⁵ The articulation of this meaning finds its most powerful expression through an ideology that has "race" as its foundation.⁴⁶ As the particular ideology is generated, a system of racial subordination and oppression is enforced through institutional and individual means.⁴⁷ Finally, at subsequent historical periods, new instabilities and contradictions arise and the pre-existing system is again challenged and new articulations develop.⁴⁸

Racism represents a process of signification.⁴⁹ For instance, as an ideological articulation of exclusion, the concept of racism's early development traces to the Nazi theory of Aryan superiority over European Jews. The Nazi ideological articulation was derived from nineteenth-century scientific theories of "race." In this way we see that the precondition for identifying racism is the existence of a discourse on "race."⁵⁰ This is why I speak so often of "race" and racism as operating in tandem.

anguish over slavery and race, and he knew it. I also believe that the present, in altered form, is like Jefferson."

Recognizing this becomes especially important in an era when many whites seem convinced that racism has abated, that blacks have equal opportunity, that the slate was wiped clean by the civil rights laws of the 1960's.

Whites who oppose antidiscrimination measures often argue sincerely that they are not responsible for a past that is long gone. What they don't acknowledge is that while slavery and legal segregation have ended, many attitudes that drove those practices remain, although muted and often concealed beneath the surface of propriety.

Racism is still the most corrosive problem in America, and its major elements can be seen clearly in what Jefferson wrote and did.

David K. Shipler, *Jefferson Is America—And America Is Jefferson*, N.Y. TIMES, Apr. 12, 1993, at A24.

44. PAUL GILROY, 'THERE AIN'T NO BLACK IN THE UNION JACK': THE CULTURAL POLITICS OF RACE AND NATION 41 n.9 (1991).

45. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 61-69 (1986).

46. GILROY, *supra* note 44, at 43.

47. *Id.*

48. *Id.*

49. ROBERT MILES, RACISM 69-98 (1989).

50. *Id.* at 69.

I now see that, as a multidimensional and intricately configured phenomenon, racism “results from a complex process of acculturation in which individuals come to see and interpret the world through lenses carefully crafted by a history of racism.”⁵¹ I now see “race” as a social construction.⁵²

The recognition of “race” as a social construction moves the analysis beyond treating the concept as signifying a natural human division that is based on either biology or culture. Signifying societal differentiation, “race” serves as a marker. “Race” is given social and political meaning as “it” is formed in specific struggles. In the 1980s and 1990s, the focus on “race” in the United States was part of the contested meanings of national belonging and multiculturalism. Racial meanings are secured and maintained by an elaborate ideological framework.⁵³ As racism evolves from the vulgar to the sophisticated, the process of racism may display plural forms within the same historical period, such as individual, institutional, and cultural racism. The latter emphasizes complex differences rather than a mere hierarchy. As in Paul Gilroy’s Britain, this racism in America “did not necessarily proceed through readily apparent notions of superiority and inferiority. The order of racial power relations [had] become more subtle and elusive than that.”⁵⁴ Linked with the perpetuation of white supremacy, racism is practiced by dominant group members and institutions to exclude and subordinate people of color from the material and symbolic rewards of status and power.⁵⁵

During the 1980s and 1990s, it appears that American racism had become known throughout the world as “state of the art.” Its picaresque genius lay in developing so brilliantly the conception that it had disappeared except as it was “imagined” by its subordinated subjects, who continued to “suffer” in an unbelievable world—a color blind world of white innocence. Race neutrality, or “racism in drag,”⁵⁶ had displaced race consciousness.⁵⁷

Shortly before dying from the effects of AIDS—a disease not yet curable in twentieth-century America—the American tennis great Arthur Ashe said, “Race has always been my biggest burden. . . .

51. See Anthony Cook, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 DENV. U. L. REV. 297, 297 (1993).

52. See F. JAMES DAVIS, WHO IS BLACK?: ONE NATION’S DEFINITION (1991); Neil Gotanda, *A Critique of “Our Constitution is Color Blind,”* 44 STAN. L. REV. 1, 23-36 (1991); Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 628, 656-709; Alex M. Saratoga et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L.J. 1, 4-11 (1992).

53. MILES, *supra* note 49, at 87-90.

54. GILROY, *supra* note 44, at 40.

55. Peter Jackson, *The Idea of ‘Race’ and the Geography of Racism*, in RACE AND RACISM: ESSAYS IN SOCIAL GEOGRAPHY 3, 12 (Peter Jackson ed., 1987).

56. WILLIAMS, *supra* note 35, at 116.

57. But see generally T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) (arguing that race-conscious policies were needed to counter the second class citizenship of people of color); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (arguing that integrationists inappropriately delegitimized race-consciousness by viewing it as an extreme expression of white supremacy or nationalism).

Having to live as a minority in America. Even now it continues to feel like an extra weight tied around me.”⁵⁸ When I think about how “race” matters, how matters are “raced,”⁵⁹ and how I experience racism, I too think about “race”/racism’s weight: How it weighs on people; how it measures and apportions; how it counts; how it merits consideration as important, as in the “weight of the evidence” or the “burden of proof”; how it overburdens and depresses; how it cracks, splinters, and breaks things; how it mashes vision and distorts discourse; how it crushes self-esteem, respect, and confidence, while providing a foundation for estrangement and anger; how it flattens spirits, buries dreams, and entombs lives; how it fatigues and overpowers; how it knocks hard on your door when you need peace and want quiet; how it fills your space, denting it and blocking you; how it is backed by the weight of society; how it harshly and cruelly governs—oppresses—with your hard-fought “democratic” vote against it wasted; how it weights public opinion against you; how it weighs/ways into/under class; and, yes, how it really is a heavy load and even when you can handle it—push it, pull it, carry it—the weight is weigh/way too heavy to bear no matter how you bear down or what you bear in mind. I even think how the homonym to “weight” is “wait”: How the nation plays a “waiting game” with racism; how, with respect to simple justice, so many people of color spend so much time in a “waiting room,” or waiting on a ride, or waiting for Aretha to sing “Respect” again; or how many others are waiting for *Dred Scott* to be overruled and for their forty acres and a mule; or for the Freedom Train a’ comin’. I think further how, for justice delayed, all kinds of colored people are on a “waiting list,” or waiting on a “call-back,” or waiting on “Talley’s Corner,” or waiting for “Godot”; how they are “waiting” hopelessly/(ware)housed in prisons; and how so many blacks are “waiting” on death row.⁶⁰

58. R.Z. Sheppard, *Match Points*, TIME, June 21, 1993, at 69 (reviewing ARTHUR ASHE & ARNOLD RAMPERSAD, *DAYS OF GRACE: A MEMOIR* (1993)).

59. I owe the reference to “race” as a verb to Kendall Thomas. According to Cornel West:

To establish a new framework, we need to begin with a frank acknowledgment of the basic humanness and Americanness of each of us. . . . The paradox of race in America is that our common destiny is more pronounced and imperiled precisely when our divisions are deeper. The Civil War and its legacy speak loudly here. And our divisions are growing deeper. Today, eighty-six percent of white suburban Americans live in neighborhoods that are less than 1 percent black, meaning that the prospects for the country depend largely on how its cities fare in the hands of a suburban electorate. There is no escape from our interracial interdependence, yet enforced racial hierarchy dooms us as a nation to collective paranoia and hysteria—the unmaking of any democratic order.

WEST, *supra* note 26, at 4.

60. In the 1990s, racism in death penalty imposition had become constitutionally acceptable. See *McClesky v. Kemp*, 481 U.S. 279 (1987).

This racism is neither simple nor static. In its forms and expressions, this advanced racism is a dynamic, adaptable, and sophisticated set of social beliefs and practices that is reflected in individuals, institutions, and culture. As the metamorphosis of racism matures, like magic, it shows little resemblance to its former self. As a consequence, many people fail to appreciate its passing from one form or shape to another and fail to recognize its evolving expressions.⁶¹

Often, it is as if only those who are outside and getting wet know that it is raining/reigning. Those on the inside and looking out see only a bright, sun-shiny day. What they see, however, is at best really tomorrow, not today (and, God knows, not yesterday). Those on the inside fail to identify the reality of those on the outside. They are unresponsive to the simple request to reach out with an umbrella. Even later, after forty days and nights, those on the inside see no need to construct drainage ditches. Having been locked out for the forty days and nights, when those from the outside trickle in, they are criticized for being sickly with a cold, for having failed to take responsibility for their own welfare, or for not looking as good as those who were inside all along. Finally, when the new entrants try to explain that rainy seasons repeat themselves and suggest that the roof should at least be checked for leaks, those who have occupied the privileged position as insiders laugh off the outsiders' preoccupation with old problems that, even if recurring, would at most simply inconvenience the insiders. The harm for those poor souls still on the outside would result from a natural disaster for which the insiders would not be responsible. There is no legal duty to rescue. Besides, if those outside would just work hard and play by the rules, sooner or later, they too would gain entry upon their individual merit. And what is the standard? It is simply to come in out of the rain and appear never to have been rained upon.

Our society is not only color blind but also rain-free. In other words, the reigning of "race" is considered only in isolation from its social context. As Peter Jackson points out, liberal attitudes towards "race" that reflect general complacency and optimism fail to connect racism to institutionalized practices that are deeply rooted in society's fundamental structure of unequal power.⁶² He adds that "[t]o regard 'race' as a social construction rather than a biological

Of the over 2200 prisoners on death row, more than 39% are African-American, even though African-Americans constitute only 12% of the nation's population. The remainder of death row inmates awaiting death by electrocution, gas pellets, lethal injection, or other means, is composed of Caucasians (50.43%), Hispanics (6.89%), and native Americans (1.83%). Since 1930, of the nearly 4000 people who have been executed, more than half have been people of color—mostly African-Americans. The disproportionate number of people of color both in prison and on death row presents a strong case for the existence of racial discrimination in capital sentencing.

M. Shanara Gilbert, *Racism and Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice*, 18 N.Y.U. REV. L. & SOC. CHANGE 51, 54 (1990) (footnotes omitted).

61. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 8 (3d ed. 1992).

62. Jackson, *supra* note 55, at 17.

given may now be widely accepted in the social sciences but it has yet to penetrate the public consciousness and to influence the realm of common-sense understanding.”⁶³ This modest opinion is intended to aid in a small way that penetration and that influence.

Racism, we now see, is a process whereby a dominant group exercises power to dominate and oppress another group on the basis of a societally constructed definition of “race.” Racism constantly changes forms, expressions, and applications, as those disadvantaged by their “race” status struggle against the discrimination, inequality, and subordination that are associated with the racist intents and effects of dominant institutions and cultural habits.⁶⁴ Sometimes, like a simple battery—a punch in the nose—racist expression is manifested in individual attitudes and intentional behavior.⁶⁵ Sometimes, racism plays a significant role in instituting our “recipe knowledge”⁶⁶ and in authoring a guiding script for interaction at both the interpersonal and intergroup levels. Racism plays a significant role in assigning status in ways that place people of color in a stratified position beneath whites. Within this hierarchy, color is layered from lighter to darker.⁶⁷ Although racism is manifested in material deprivation, it is primarily explained and justified in ideological terms.⁶⁸ As an ideology, the active function of racism extends beyond influencing or determining individual roles within social groups. At its present state-of-the-art design and operation, extending well beyond its power to form roles, it establishes a significant component of the nation’s societal organization.⁶⁹ In these ways, we now know that advanced racism insinuates itself so into the

63. *Id.*

64. See Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -isms)*, 1991 DUKE L.J. 397; James M. Jones, *The Concept of Racism and Its Changing Reality*, in IMPACTS OF RACISM ON WHITE AMERICANS 27 (Benjamin P. Bowser & Raymond G. Hunt eds., 1981); Lawrence, *supra* note 21. *But see* JOSEPH G. CONTI & BRAD STETSON, CHALLENGING THE CIVIL RIGHTS ESTABLISHMENT: PROFILES OF A NEW BLACK VANGUARD (1993) (analyzing the de-emphasis of race by black neoconservatives); YEHUDI O. WEBSTER, THE RACIALIZATION OF AMERICA (1992) (arguing that race is overemphasized in characterizing social relations).

65. See T. Alexander Aleinikoff, *The Constitutional Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992).

66. This knowledge is that which “supplies the institutionally appropriate rules of conduct, . . . constitutes the motivating dynamics of institutionalized conduct . . . [and] defines and constructs the roles to be played in the context of the institutions in question.” PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY 65 (1966).

67. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710-13 (1993).

68. *But see* Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988) (“Coercion explains much more about racial domination than does ideologically induced consent.”).

69. I mean “societal organization” to describe what William J. Wilson refers to as

nation's way of life that it becomes virtually indistinguishable from various other harms that run from "bad luck" to "acts of God." Racism becomes a misfortune, but not an injustice.⁷⁰ The most serious racism is marked by its intersection with capitalism, the original American intersection being chattel slavery and its dehumanization of Africans who were reinvented as "Negroes."

The eliding of "race" as central from considerations of social and economic justice has been accompanied simultaneously with the recognition of "race" as a threat to the nation's domestic tranquility. In this manner, as when slavery existed, capital punishment is simply the end of the line in a conveyor-belted criminal justice system in which Newgarthian blacks and Jews "experience law only as an enemy and not a friend."⁷¹ For these reasons, I would find capital punishment to violate the Constitution of the Commonwealth of

"the working arrangements of society, including those that have emanated from previous arrangements, that specifically involve processes of ordering relations and actions with respect to given social ends, and that represent the material outcomes of those processes." WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 132-33 (1987).

70. Katharine T. Bartlett, *Minow's Social-Relations Approach to Difference: Unanswering the Unasked*, 17 *LAW & SOC. INQUIRY* 437, 445 (1992) ("The disadvantages of blacks and other minorities are so taken for granted that they may appear to be natural misfortunes rather than social injustices.").

71. A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As An Enemy:" The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 *N.C. L. REV.* 969, 971 (1992). The racist effects of a conveyor-belted criminal justice process are discussed in Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 *U. PA. L. REV.* 2245, 2316-32 (1992).

America's criminal justice system near the time of the Space Trade reflected "glaring contrasts" between blacks and whites. Consider the following:

*A recent study by the National Center on Institutions and Alternatives found that 85% of all Washington, D.C., black males have been arrested at least once in their lifetimes.

*In a Memphis study on the excessive use of deadly force by police officers in pursuing suspects, it was discovered that black suspects were 10 times more likely than white suspects to have been shot at by police officers, 18 times more likely to be wounded, and five times more likely to be killed.

*According to 1989 survey by the National Institute on Drug Abuse, blacks made up 12% of drug users that year. But according to a USA Today article citing 1989 FBI figures, blacks accounted for 44% of all drug possession arrests.

*Under federal law, possession for personal use of five grams of crack cocaine (predominantly used by minorities) carries a five-year mandatory *minimum* sentence without parole. By contrast, simple possession of any amount of powder cocaine, or any other drug, is a misdemeanor punishable by a *maximum* sentence of one year.

*In Sacramento, where 70% of the people sent to prison for drug offenses are black, more than 63% of public drug treatment slots go to whites.

*A 1991 review of 700,000 criminal cases throughout the state of California showed that white defendants got better plea bargain deals than Latinos or blacks accused of similar crimes. The study also found that whites received more lenient sentences and went to prison less often.

*In Dallas, the rape of a white woman results in an average sentence of 10 years while the rapist of a Latino woman gets five years and the rapist of a black woman gets two years.

*Nationally, murderers with white victims are up to 4.3 times more likely to be sentenced to death than murderers with black victims.

Alan Ellis, *A Glaring Contrast: Criminal Justice in Black and White*, WALL ST. J., May 14, 1992, at A13; see also CORAMAE R. MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR*

Newgarth.⁷²

III. *De-Reifying Consciousness and Humanizing Law*

Judge A. Leon Higginbotham—who served in late twentieth-century America's federal court system—has detailed how, during the centuries of slavery in America, those in power employed the entire legal apparatus to establish and solidify a "legal tradition for the absolute enslavement of blacks."⁷³ He has argued, moreover, that Americans chose to distort their history rather than to face the extraordinary brutality that the nation's system of laws promoted and sanctioned.⁷⁴ We on Newgarth must avoid this trap.

Few people in America at the time of the SpaceTrade in 1994 fully appreciated the devastating impact of slavery on the black spirit, mind, and soul. There was therefore virtually no appreciation and no acceptance of the claim that the legacies of slavery could project and penetrate as profoundly as they did.⁷⁵ It is important to realize that from 1619, even prior to the 1776 "invention" of America, until the formal emancipation in 1863, the institution of chattel slavery was, as its name expresses, particularly dehumanizing and debilitating. Imagine yourself as a *thing* valued only to the degree of satisfaction *it* provided to the slave master. Consider two "family" stories, as told in legal advertisements:

One hundred and twenty Negroes for sale—The subscriber has just arrived from Petersburg, Virginia, with one hundred and twenty likely young Negroes of both sexes and every description, which he offers for sale on the most reasonable terms. The lot now on hand consists of plough-boys, several likely and well-qualified house servants of both sexes, several women and children, small girls suitable for nurses, and *several small boys without their mothers*. Planters and traders are earnestly requested to give the subscriber a call previously to making purchases elsewhere, as he is enabled to sell as cheap or cheaper than can be sold by any other person in the trade. (Hamburg, South Carolina, Benjamin Davis.)

....

(1993) (a comprehensive treatment of minority experiences in the criminal justice system).

72. See Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 778 (1990-91). Even Newgarth's clemency provisions fail to render the death penalty constitutional because discretionary racism still applies. See Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-91).

73. HIGGINBOTHAM, *supra* note 32, at 14.

74. *Id.* at 13.

75. See, e.g., Higginbotham & Jacobs, *supra* note 71, at 974-76 (discussing 10 precepts of American slavery).

Negroes for sale—a Negro woman, 24 years of age, and her two children, one eight and the other three years old. Said Negroes will be sold separately or together, as desired. The woman is a good seamstress. She will be sold low for cash, or in exchange for groceries. For terms apply to Matthew Bliss and Company, 1 Front Levee.⁷⁶

It is like reading today's classifieds, with a casual acknowledgment that the so-called free market is still properly regulating "human" affairs as business as usual; it is simply that mundane. Are you interested in buying two small boys *without* their mother? How about a *few groceries in exchange for a mother*? How could this be?

In order to legitimate slavery—to give a normative dignity to the institutional order's practical imperatives—it was necessary for America to construct slavery as a normal, natural state of affairs.⁷⁷ In other words, slavery was represented as "objective" reality through the institutionalization of it.⁷⁸ An important legitimating aspect of the construction of slavery was thus to "reify" it as a social world that existed outside of human agency and responsibility.⁷⁹ Berger and Luckmann explain that "reification is the apprehension of the products of human activity *as if* they were the product of something else than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will."⁸⁰

In this way society's institutional order is "objectified" as a non-human inert facticity.⁸¹ Under this analysis, while people of color might experience racism as "reigning" perpetually, those outside of that experience might perceive racism as "raining" a lot long ago, but very little today. The divergence here results from the latter view being conditioned by a reified "reality" that merges the social world with that of nature, while the former view is a product of *de*-reified consciousness and an orientation to contest the dominant "symbolic universe" that superimposes itself on, or superintegrates itself with, the objective or reified world.⁸² In the Berger-Luckmann scheme of things, the symbolic universe is the foundation of legitimation in that it comprehensively integrates society's discrete institutional processes. As indicated by the referent, "universe," symbolism here is tied to dominant narratives, myths, ideologies, truths, and claims. In short, the symbolic universe provides comfort

76. HIGGINBOTHAM, *supra* note 32, at 12.

77. BERGER & LUCKMANN, *supra* note 66, at 86.

78. According to Berger and Luckmann, "Institutions . . . control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible." *Id.* at 55. In this way, institutional racism serves to mobilize bias and foreclose "objective" options that depart from the status quo of subordination.

79. *Id.* at 88-92.

80. *Id.* at 89.

81. *Id.* at 88-89.

82. *Id.* at 90; see also Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

and security to the dominant "world view."⁸³ It "puts everything [and everybody] in its right place." That is, now all of society "makes sense."⁸⁴

Today, in Newgarth as well, there are few who appreciate how this nation's historic oppression and generally dehumanizing treatment of our Jewish citizens has so devastated these once proud and accomplished people. Once stripped of history, like African Americans, the Newgarthian Jews have been reduced to pitiful victims and insoluble problems.⁸⁵

If we continue to sit back and allow this decimation of Jews and African Americans, then we are no better than the "innocent" slave-ship captains, the silently "innocent" Nazis, or the see-no-evil "innocent" witnesses to internment of the Japanese during planet Earth's World War II. Neither the dubious fate of the oppressed, nor our moral foundation, collective integrity, or sense of justice can survive in complicity with innocent slave-ship captains, silent Nazis, and see-no-evil witnesses.

Conclusion: The Large View

The fundamental struggle today is over whether certain people can secure, maintain, and keep humanity. No matter what the social justice campaign objective, we all must be humanitarians first and then whatever else is called for. Certainly none of us can do it all,

83. Howard Lesnick has characterized a "world-view" as "a set of ordering perceptions, priorities, and premises" that shape our answers to specific questions. These "answers tend to be perceived as given; their content is initially implicit, and if made explicit tends [sic] to be regarded as self-evident and uncontroversially true." Howard Lesnick, *The Wellspring of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413, 413 n.3.

84. BERGER & LUCKMANN, *supra* note 66, at 98.

85. A similar plight was experienced by British blacks and described by Paul Gilroy:

The idea that blacks comprise a problem, or more accurately a series of problems, is today expressed at the core of racist reasoning. It is closely related to a second idea which is equally pernicious, just as popular and again integral to racial meanings. This defines blacks as forever victims, objects rather than subjects, beings that feel yet lack the ability to think, and remain incapable of considered behaviour in an active mode. The oscillation between black as problem and black as victim has become, today, the principal mechanism through which "race" is pushed outside of history and into the realm of natural, inevitable events. This capacity to evacuate any historical dimension to black life remains a fundamental achievement of racist ideologies. . . . It generates some complex problems in racial politics which will not be easily solved. Racism is not akin to a coat of paint on the external structures of social relations which can be scraped off if the right ideological tools and political elbow grease are conscientiously applied to the task. Seeing racism in this way, as something peripheral, marginal to the essential patterns of social and political life can, in its worst manifestations, simply endorse the view of blacks as an external problem, an alien presence visited . . . from the outside.

GILROY, *supra* note 44, at 11.

and few of us can really do a lot, but all of us must do something to reintroduce the divided national community to the value of humanity and the moral indignation that ought to be associated with dehumanization.

Racism is not easily bounded. Sometimes it calls out to us like an alarm bell and we can prepare or maneuver to avoid its damage, or at least to mitigate it. At other times, though, it sneaks up on us like a disease, eating away at us even when we are unaware of it. Like a poison in the air, it can pollute our lives across large areas, even when we feel that our community is environmentally safe and even when our hands appear clean. All of us ultimately have a stake in battling racism and liberating those whom it oppresses. As British scholar Robert Miles has observed, "If racism brutalises and dehumanises its object, it also brutalises and dehumanises those who articulate it. . . . As a phenomenon of mediation, all who are witness to it necessarily have a (sometimes specific) role in its identification, explanation, condemnation, and elimination."⁸⁶

I have tried to develop this opinion in agreement with Justice Foster's belief that "something more is on trial in this case than the fate of these unfortunate explorers."⁸⁷ For him, that "something" was the law of our Commonwealth. For me it is more—our very humanity itself is on trial. Our jurisprudence must reflect compassion⁸⁸ and fidelity to justice.⁸⁹ It must incorporate the righteous decency of those who should sleep comfortably at night.⁹⁰ The nightmare of

86. See MILES, *supra* note 49, at 10.

87. Fuller, *supra* note 1, at 620 (opinion of Foster, J.).

88. According to Andreus Teuber:

Compassion sees the rights of others from the "inside" as it were, and takes the interests others have in their rights to heart. Although it does not in itself define any rights, compassion does this much: conveying certain attitudes without which we would lose sight of the values expressed by these rights. It is not a very strong claim but we can see in it at least the value of cultivating this sense of equality. Compassion works in relationship to the obligations and rights we already have in much the same way self-acceptance works for an individual who is punished by a law he has broken. . . . If we lose sight of the human interest and values that a right is designed to secure and protect, we shall see that right only as a barrier which insulates and isolates others from us. A compassionate attitude "sees" a person on the other side of this boundary with a definite interest in the values which the right is designed to protect. Rights are not just abstract creations; they have a context. In this sense, compassion urges us to respect . . . this particular person who (among other things) has these rights. To regard this particular person who (among other things) has these rights, it is necessary to look behind his interests to the interests of his they are designed to secure and protect. Indeed, without the cultivation of such an attitude, a system of rights is unlikely to be very effective.

Andreus Teuber, *Simone Weil: Equality as Compassion*, 43 PHIL. & PHENOMENOLOGICAL RES. 221, 235-36 (1982), *quoted in* Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1027 (1989).

89. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990). Young sees "injustice" as a manifestation of oppression and domination, not simply as the inequitable distribution of goods and resources. *Id.* at 33-38; *see also* Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993).

90. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413-15 (1989).

a state-sanctioned hanging death is incongruent with this judicial philosophy of anti-dehumanization.

MARY I. COOMBS, J.* We have been asked to reconsider the case of these Speluncean explorers. My colleagues and court-watchers will not be surprised to find that I approach this case in a manner rather different from that of the traditionalists on this Court. That approach is feminist. I recognize that the presence of myself and the other newly appointed women is unpopular with some of my senior colleagues. I have overheard the comment of one that "I suppose now I'll have to refer to the Court as my brethren and cistern." Others are skeptical whether there is such a discipline as feminist jurisprudence.¹ I disagree. In this opinion and in all my work on this Court, I hope to persuade them otherwise. In the interim, those who resent sharing their sanctuary with feminists should remember the appalling sexual harassment scandals throughout the Newgarth government in the early 4300s that led to a demand for women in the legislature, the executive branch, and on this Court.

As a feminist judge, I ordinarily would begin my analysis by asking "the woman question," i.e., seeking to understand the lives of the women subject to the rule, the doctrine, or the policy under consideration and examining how those lives would be affected by different outcomes. Here, however, I confront a preliminary question: Where are the women? My senior colleagues, in their earlier opinions, propose and argue grand jurisprudential principles based on a set of events involving only men.²

Consider the facts of this case. Five men—the unnamed defendants and the deceased, Roger Whetmore—set off on a cave-exploring expedition. Such an expedition, daring, difficult, with a soupçon of danger, is alluring. It is also obviously quite expensive, rather like our equivalent of twentieth-century polo or mountain

* Professor of Law, University of Miami School of Law.

1. In positing a feminist approach to jurisprudential issues that is distinct from previous schools, I do not claim that the approach here is the only one that might be considered feminist. See, for example, the opinions of my fellow Justices Stein and Cahn. An examination of the rich feminist literature of the twentieth-century ancients shows a vigorous debate among feminists; I claim only that this is one way to approach the law which is fundamentally feminist: concerned with women and critical of doctrines that assume away their views and experiences.

2. The statement of facts in Chief Justice Truepenny's opinion consistently refers to the explorers and the rescuers with male pronouns. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 616-19 (1949) (opinion of Truepenny, C.J.). Although Truepenny has been known to assume that the male pronoun is a universal rather than a gendered signifier, it would be so striking if women had taken on these roles that such a fact surely would have been noted. Justice Handy has specifically acknowledged that the jury foreman was male. *Id.* at 641 (opinion of Handy, J.).

climbing. These men used their wealth and leisure to indulge in the pretense of being cavemen (without the obligations of families).

This time, the attractive risk became real danger. While the Spelunceans engaged in the events that are the focus of our judicial scrutiny, others mounted rescue operations. Huge sums of money, partly supplied by legislative grant, were expended to rescue the Spelunceans. Eight hundred thousand frelars, to provide a context, is more than half the budget last year for prenatal care for all the poor women of Newgarth. Ten workmen, who scarcely could dream of exploring caves, were killed on the job during the rescue efforts, leaving widows and orphans. Many other Newgarthians whose lives are at risk everyday from disease, accident, or the violence of others do not receive such attention. But, of course, the day-in and day-out threats to the lives and well-being of such marginalized groups as women or the poor do not make such exciting copy for the media.

The precise facts of this case are quite extraordinary. Were it not presented to us in a record and attorneys' briefs, I might have thought it the fantasy of some law professor. Even accepting the truth of the events, they would be a wholly inappropriate vehicle for the sort of grand theorizing indulged in by my senior colleagues. First, the facts are too unusual to be a safe basis for wider decision-making. Indeed, grand theorizing itself is a questionable enterprise. To adopt an ancient paradox, I suggest that the only true absolute is that we should be suspicious of all absolutes. More specifically, the attempts by my senior colleagues to use this case as a vehicle for announcing universal, objective, neutral rules are misguided. Such acontextual justice is, in fact, rarely possible or desirable. We cannot sensibly use the facts of a single case as a vehicle for pronouncements that would channel decisions in a wide range of unforeseen and perhaps unforeseeable cases.

Chief Justice Truepenny and Justice Keen suggest that the meaning of N.C.S.A. (N. S.) § 12-A, "[w]hoever shall willfully take the life of another shall be punished by death,"³ is clear and that we may not, consistent with our constitutional role, distort that meaning because of our sympathies in a particular case. That position, however, is based on the false premise that the statute's meaning is incontestable.

Other recent appointees to this Court will no doubt explain in detail the inherent indeterminacy of legal language and the impossibility of a unitary, objective, plain-meaning view of judging.⁴ I concur. As Justice Foster indicated, the courts traditionally have read a self-defense exception into the statute.⁵ Even if we follow the explanation of our law professors, that such a killing is instinctive and thus not willful,⁶ this simply shifts the dilemma. Now the statute's scope is blurred by the need to decide when an intended killing is

3. *Id.* at 619 (opinion of Truepenny, C.J.).

4. See in particular *post* at 1803 (opinion of Paul, J.).

5. Fuller, *supra* note 2, at 624 (opinion of Foster, J.).

6. *Id.* at 629 (opinion of Tatting, J.).

willful. We know that that exception was applied in *Commonwealth v. Madmax* to a defendant who, after being stalked across the Numonian Desert by the deceased, finally turned and killed when his hope of escape was gone. It was found irrelevant that Madmax had considered how to respond and had not killed in an immediate, unthinking reaction. Surely we would also read in an exception to cover the actions of the state's executioner.

This Court, then, is less constrained than some of my more senior colleagues seem to believe. Furthermore, no reconceptualization of the issue will allow us to avoid exercising judgment. Justice Tatting is as correct that "statutory purpose" is not self-evident as Justice Foster is in his parallel critique of the alleged plain meaning of statutory language.⁷

Moreover, Justice Tatting is engaging in self-deception when he asserts that he is "usually able to dissociate the emotional and intellectual sides of [his] reactions, and to decide the case before [him] entirely on the basis of the latter."⁸ We can and should avoid unconstrained application of our personal preferences. But a central insight of feminism is the inevitability of perspective. I can never judge a case in exactly the same way as Justice Tatting, for our beliefs and values have been formed by our diverse experiences. Let me briefly illustrate how perspective is embedded in the claims of my senior colleagues. I will then apply my own feminist perspectives to the analysis of this case.

All of my senior colleagues, as well as the trial judge and jury, call on the Chief Executive to exercise clemency. Whatever their legal position, all find the Spelunceans sympathetic figures, with the partial exception of Justice Tatting (whose "abhorrence and disgust"⁹ seem directed more at the defendants' culinary tastes than at the homicide). Truepenny is "sympath[etic]";¹⁰ Foster finds a murder conviction "monstrous";¹¹ Tatting calls the case "tragic";¹² and Handy refers to the defendants as "four men who have already suffered more torment and humiliation than most of us would endure in a thousand years."¹³ Dare I suggest that sympathy with these particular defendants, rather than the many others subject to § 12-A, might reflect an easy identification with the plight of other accomplished, privileged men who responded with logic, determination, and manly courage to their dilemma? Whatever the historical reasons for the recent appointment of a more diverse set of judges, a

7. Compare *id.* at 628-29 with *id.* at 624-25 (opinion of Foster, J.).

8. *Id.* at 626 (opinion of Tatting, J.).

9. *Id.*

10. *Id.* at 619 (opinion of Truepenny, C.J.).

11. *Id.* at 620 (opinion of Foster, J.).

12. *Id.* at 626 (opinion of Tatting, J.).

13. *Id.* at 644 (opinion of Handy, J.).

crucial benefit is the different range of natural sympathies and experiential understandings we will bring to the Court.

My analysis and conclusions are inevitably colored by my experiences. They also are colored by my commitment to the methods of consciousness raising, contextual decisionmaking, and feminist pragmatic reasoning. I examine an issue by considering the impact of alternative outcomes on women and other traditionally disempowered groups. Although I can draw on my own experiences, I recognize the variety of perspectives and experiences among women and seek as wide a range of information as possible.

Feminist jurisprudence calls for different forms of legal rules and for different methods of developing those rules. It is deeply skeptical of broad, abstract rules. Instead, feminism generally favors particularized, concrete decisions that reflect the specific facts of a dispute. Such particularity is in tension with what appellate courts ordinarily are supposed to do, namely, to enunciate general principles for a wide range of cases. One resolution to that tension is to reconceptualize the task of appellate courts. We could focus on creating rules and structures that facilitate the work of the real lawmakers: the trial courts that resolve individual disputes and provide individualized justice. For example, we could construe statutes and precedents to ensure that those decisionmakers are adequately informed, as we did in *Commonwealth v. Probonium*, approving the appointment of litigating amici.

Unfortunately, the peculiar procedural posture of this case seems to require an authoritative interpretation of the Newgarth murder statute. As my senior colleagues have set out our interpretive task, we have three choices: construe the statute as an absolute prohibition on all taking of life (leaving it to the Chief Executive to avoid the consequences for the defendants); save the defendants by finding some implicit exception that will cover this case; or, as Justice Handy seems to propose, pretend we are a jury and engage in an act of nullification. All are unsatisfactory.

Unlike the jury (which shirked its duty), we cannot render a decision for this case only. Any substantive decision we render will likely have broad-ranging implications for future, less bizarre, cases. We cannot tell, however, what those implications will be.

Feminist method requires us to consider the effect of various possible, technically plausible interpretations of § 12-A on homicides that do not take place in caves. For example, there are numerous cases in which women who have been subjected to domestic violence kill their abusers. Lower courts have struggled with these cases, examining both the appropriate interpretation of the self-defense exception to the statute and such evidentiary questions as the admissibility of expert testimony on battered women's syndrome. Our decision here is likely to affect those cases. For example, if the self-defense exception were inapplicable to the Spelunceans because they deliberated before they killed Whetmore rather than acting impulsively, as Justice Tatting suggests, it might also be

inapplicable to a woman who has endured a long and escalating pattern of abuse, because her action is not sudden.

On the other hand, women are more frequently victims than perpetrators of violence. What if we were to interpret § 12-A, as Justice Foster proposes, to include an implicit exception whenever the defendant is undeterrable? Would we open the door to exculpation of men who kill their wives and lovers in uncontrollable jealous rages? Neither interpretation is logically compelled by the statute's language, its legislative history, or some unique purpose. Rather, we must exercise judgment, informed by study and empathy, in making our determination. I feel obliged to interpret the statute in the light of justice. Yet, I lack sufficient information to know what justice requires and sufficient perspicacity to draft an exception certain to have no unforeseen and undesirable broader consequences.

It is, I suggest, both inappropriate for this Court merely to decide the fate of the Spelunceans and dangerous for us to make grand pronouncements that affect the lives of numerous others, without a sufficient basis of knowledge. Am I, then, left to join my brother Tatting in utter ambivalence and failure of nerve? Perhaps, but I at least see a more judicious way to avoid a task we ought not to have been given. This case reaches us in this form only because the jury (led by a foreman both male and a lawyer) evaded its assigned task.¹⁴ I concede that the counsel agreed to this extraordinary proceeding. Under the Newgarth Constitution, however, every defendant is entitled to a trial by jury. Nothing in the record indicates that the defendants personally waived that right, which is too fundamental to be waivable by counsel alone. I would therefore find this case, in the form presented to us, procedurally defective and remand for a new trial.

I seek to return this case for a jury decision because that institution is, of those currently available, the likeliest to render particularized justice. Had I the power, I might prefer an institution that would allow all affected parties a direct voice in determining the appropriate resolution. The defendants, Whetmore's family, the families of the workmen who perished, and the leaders of the Speluncean Society all have knowledge relevant to a just decision; they all have concerns that ought, ideally, to be addressed. We do not, however, have any such procedures in our legal system,¹⁵ and the conceptual divide that we have created between tort law and

14. It is somewhat ironic that, in a case without women, the legal institution that may best represent the equitable, contextual, feminine side of law was excised from the process, due to the legal maneuverings of the foreman. Instead, this jury, in a conclusion as circular and hollow as those of some of my former students, found that "if on these facts the defendants were guilty . . . then they found the defendants guilty." *Id.* at 618-19 (opinion of Truepenny, C.J.).

15. Furthermore, I recognize the risks to women and other disempowered groups

criminal law makes it unlikely that we could readily create one. Unfortunately, private parties have long had little or no role in the prosecution of criminal actions. The jury, a group from the community, is the closest existing equivalent of the community. We long ago recognized that race and gender are illegitimate bases for excluding people from jury service. A jury, then, is far more likely than a panel of judges to represent the range of our society's experiences and views. More than any other legal actor, a jury is expected to intertwine law, fact, reason, and emotion in rendering its verdict. More than any other, the jury decides collectively, in a process that can, and sometimes does, lead to wisdom.¹⁶

I recognize that the preceding opinion is explicitly self-reflective. The traditional pattern of Newgarthian jurisprudence is one in which judges write opinions that embody their judicial philosophies. Law professors then fill the pages of law reviews with articles examining those opinions and seek to render the implicit assumptions explicit. I have here, in effect, cut out the middleman.¹⁷

GREENE, J.* The four defendants, all members of the Speluncean Society, an organization of amateur cave explorers, have been convicted of murder and ordered to be hanged. This case was heard originally by an affluent, all-Caucasoid, male panel of this Court, which was not able to reach a unanimous decision.¹ The matter has been reheard by a newly constituted and more diverse Supreme Court of Newgarth. In their petition of error, the questions the defendants present are whether under the applicable statute they have been properly convicted, and, if so, whether courts have discretion with respect to their sentencing.

The statute in question reads: "Whoever shall willfully take the life of another shall be punished by death." N.C.S.A. (N. S.) § 12-

from such informal procedures; in a nonideal world like ours, rules and rights may sometimes be a protection against raw power.

16. A jury may decide to reaffirm the verdict. That decision, if reached by a properly constituted body, under adequate procedures, ought be affirmed. My current intuition is that I would vote to acquit if I were a juror but, before deciding, I would want to consider facts not in the record before us. Did the defendants reach a consensus on the need for such sacrifice? When Whetmore balked, did they reconsider their decision, seek to persuade him, or simply impose the prior decision on him? Do they, by their subsequent statements, see what they did as cruel necessity? Or do they defend their actions as the cost-effective solution to a dilemma?

Even on the existing record, given existing law and its quite severe application to other, less privileged defendants, a conviction following proper procedure would not be so extraordinary, or so clearly unjust, that it would demand appellate intervention. I decline, even in footnoted dicta, to consider how I might respond, as a Justice of this Court, to a renewed death sentence for these defendants.

17. Academics do, of course, have a valuable role within the institutions of Newgarthian law. In drafting this opinion, I have consulted both my colleagues Justices Paul, Greene, and Stein, and the wisdom of prominent twentieth-century scholars Hugh Baxter, Lawrence Sager, Frederick Schauer, Aviam Soifer, and John Stick.

* Dwight L. Greene, Late Professor of Law, Hofstra University School of Law. Thanks to Twila L. Perry and Mary Coombs.

1. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 645 (1949).

A.² Under this statute, the question, according to most of my colleagues, is whether the defendants “willfully” took the life of their fellow explorer, Roger Whetmore. To place my conclusions in context, I join this discourse. In addition, in my opinion, the sentencing of the defendants raises separate issues which require guiding comments and further proceedings.

For the reasons stated below, I vote to affirm the convictions of the defendants but reverse their death sentences and remand for further proceedings consistent with this opinion. In doing so, I expressly rely on some of my perspectives as a Melanoderm.³ As such, I generally favor expansive and contextual criminal adjudicatory processes by diverse juries, trial courts, and appellate courts. I believe that the Constitution of Newgarth requires some of this contextualization at sentencing. As developed below, however, there is no such contextual constraint on the predicate substantive, fact-finding process. As construed, many criminal laws are little more than automatic legal traps set for the less privileged. The privileged defendants in this case have been ensnared in one of these traps.

That the defendants are among the privileged has been persuasively argued by our colleague Justice Coombs.⁴ To her insights on class and gender privileges should be added the defendants’ privileges from their lack of the color genes associated with Melanoderms. (Since the year 3000, all people have been typed by their DNA combinations to minimize superficial passing.) Being Caucasoid confers many structural privileges in Newgarth. For example, Caucasoids can assume that the excess labor pool, three-quarters of which is Melanoderm, is available to them whenever they need it. Although the racial composition of the rescuers is not of record, we can assume that in this case, as in other similar rescue efforts, many of the rescuers were Melanoderms. Ten lives were lost rescuing these Caucasoids from their recreational follies.

Rarely does this Court have the opportunity to interpret a non-commercial criminal statute. The group against which such laws are most often enforced, Melanoderms, and in particular those who have killed Caucasoids, can rarely afford to prosecute an appeal to this Court. Moreover, our society long ago decided that state-underwritten criminal appeals were not cost-effective, because of the

2. *Id.* at 619 (opinion of Truepenny, C.J.).

3. My use of the term Melanoderm incorporates the term Xanthoderm and the old terms Blacks, Yellows, and Coloreds, as well as the ancient terms African Americans and Latinos of color. Some of the perspectives upon which I rely have intellectual roots in the ancient schools of thought associated with what was called in the latter part of the twentieth century critical race theory.

4. *Ante* at 1785-86 (opinion of Coombs, J.).

low value ascribed to the people most often accused. This case provides an opportunity to consider principles for decisionmaking in countless cases affecting the economically unprivileged.

The statute in question, like many of our other laws, was adopted by the legislature to reduce the power of fact-finding juries and sentencing judges in favor of the legislature. By defining the ultimate facts and prescribing the punishment to be imposed if an ultimate fact is found, the statute increases superficial consistency by reducing contextual fact-finding and sentencing. The legislature substituted general deterrence and incapacitation for contextualized justice and possible social equity.

Ironically, this restrictive legislative effort has had as a cohort the legislative mandate that participants in the criminal justice system's adjudications be from diverse backgrounds and groups. At the same time that those traditionally excluded from power are being included in decisionmaking, the power of their new positions is being restricted. From my perspective as a Melanoderm, this is troublesome. Diversity in the criminal justice system is meaningful only if it is accompanied by power. A wide contextual scope for the fact-finding process and discretion in sentencing, both of which are subject to review by appellate courts (the members of which are drawn from diverse groups, backgrounds, and experiences), would allow outsider perspectives, partially eclipsed in the legislative process, to emerge as necessary components of all decisionmaking. Statutes like § 12-A have the effect of reducing to mere symbolism the presence of these diverse participants. Although this serves the interests of those in control of the legislative branch by enhancing the appearance of justice, it does not enhance the reality of justice. As a member of an unprivileged group, it is my obligation to demand a modicum of real justice from a system that is structured to benefit the privileged, as the price for the legitimation my participation confers on it.

Section 12-A's mandate is elegantly simple, albeit draconian: an eye for an eye. There is but one route for escape, via the word "willfully." This limiting word at times has meant that juries must find that a defendant acted knowingly and purposefully, with the intent to commit the act proscribed, and possibly with the intent to accomplish the result. As construed by this Court, this word provides a narrow excuse focused on the individual accused without consideration of the social context out of which that individual's act arose. Under § 12-A, through the use of the word "willfully," the legislature excuses a killing only if it was not knowing and intentional. An evil motive is not required.

As defined by the words "knowing" and "intentional," the actions of these defendants were willful. Their decision was made over a relatively long period of time. There was an unexplained break-off in communications with authorities outside the cave during which they presumably discussed the option of killing and how they would select and execute their victim. They then executed the victim they

had selected. This killing was barbaric but rational. It was a killing of a nonthreatening victim to maximize the chances of survival for the remaining four killers. There can be no argument but that the killing of Whetmore was knowing, deliberate, and intentional.⁵ Thus the question before this Court is whether a knowing, deliberate, and intentional killing to enhance the probabilities of the defendants' survival can be deemed not willful. Can the word "willful" be construed so as to exclude such behavior through a method with which I can concur?

If I were starting on a clean interpretive slate, without adopting a universal standard, I would allow a jury composed of diverse participants to consider whether the defendants' actions were directly influenced by exogenous social circumstances. The finders of fact could consider whether circumstances beyond the killers' control, a kind of social duress, mitigated the killing. Assuming diverse jury compositions, this discretion would assure that a wide range of perspectives—including but not limited to those of Melanoderms, women, and other unprivileged people—would be necessary ingredients in reaching all verdicts. This would improve the quality of justice in many unsuspected ways by including a rich variety of perspectives on human experience in the fact-finding process, and it would do so without the pitfalls of imposing an assumed, universal standard. Based on precedent, however, I am precluded from adopting such an open-ended fact-finding process in this case. This Court has construed the word "willfully" in a manner that precludes fact-finders from considering the influence of social circumstances.

The precedent to which I refer is obviously *Commonwealth v. Valjean*. In that case, a starving man was indicted for stealing a loaf of bread and offered his starving condition as a defense. The trial court refused to accept the defense, and the jury was not allowed to hear evidence of the defendant's starving condition. This Court affirmed that the social circumstances under which property is taken cannot be considered as negating a defendant's willfulness, even if the stolen property is the bread literally necessary to sustain life. This niggardly construction of willfulness controls the case now before this Court.

Although some of my colleagues on the earlier panel agreed that *Valjean* controls the disposition of the substantive component of this

5. This case does not require an exposition on the relationship between that which is deliberate and that which is intentional, or even comment as to whether a killing always must be deliberate under § 12-A. Suffice it to say that it is not enough that the act of killing was knowing and deliberate. Those who gave the orders that sent the rescuers to their deaths knew there was risk of death and gave the orders after deliberation, but they did not intend the result, that is, the death of the rescuers. By contrast, the defendants did intend Whetmore's death. Under § 12-A, the killing must be intentional in this latter sense.

case, others struggled to distinguish *Valjean*; still others conveniently ignored this prior precedent. Several approaches were employed.

First, it was argued by Justice Foster that the defendants were in circumstances beyond the normal, that is, beyond our jurisdiction in a state of nature.⁶ Under such circumstances, he contends, they were free to renegotiate their own social contract and impose its distributive burdens at a cost of Whetmore's life. It is of little to no moment to me in determining the factors to be considered in connection with guilt or innocence that the procedure they adopted to determine whose life would be utilized was suggested by the victim or was "fair" (that is, random, from a mathematical perspective). Foster's discourse assumes they had the right to adopt such a procedure over the decedent's objection, but there is nothing in the statute to suggest that the legislature contemplated such a delegation to citizen groups. Moreover, even if, through some bizarre logic, Whetmore could be viewed as having consented, consent is no defense to killing a person who is not irrevocably moribund.

Justice Foster's approach also reinforces an elitist perspective of contractarian social theory in our jurisprudence, which I reject. This approach provides options selectively under the criminal laws for the privileged while denying the same prerogatives to the unprivileged. Although the myth of an open society with transactions between and among freely contracting individuals is popular, it does not now reflect and never has reflected the reality of most people in Newgarth and certainly not that of Melanoderms. All contracts depend not only on the free will of the participants but also on their power within a real, not hypothetical, social context. For example, although not true today, Melanoderms and women were disenfranchised at the time our Commonwealth was formed and its basic laws were adopted. Today, many Melanoderms and abandoned women and children live with inadequate education and in abject poverty, conditions they did not choose. These conditions, against which there is constant struggle, severely limit their power in social contracts. They are bound, nevertheless, by the laws of Newgarth.

Indeed, one could argue that in many of our ghettos conditions have deteriorated to a virtual state of nature "removed morally from the force of a legal order."⁷ Surely, this Court would be unwilling to excuse a group of Melanoderms from such a ghetto who formed their own social contract and imposed its outcomes on others within the community who dissented from that contract. Stated differently, assume Whetmore had been trapped in a ghetto during a riot with four nonrioting Melanoderms and food supplies were cut off. If these Melanoderms had used the same procedure used here to kill and eat Whetmore and then argued that their actions were in accord with their own social contract, such a specious argument would have been summarily rejected.

6. Fuller, *supra* note 1, at 621 (opinion of Foster, J.).

7. *Id.*

We are all, privileged and unprivileged, bound by the laws of Newgarth and bound to make our choices within social contexts that are substantially imposed and often unfair. These defendants cannot choose unilaterally to renegotiate the Newgarth social contract that protected Whetmore's life any more than Melanoderms and women can unilaterally reject the constraints of race, class, and gender imposed on them from birth. In real life, as opposed to mythical states of nature, we are all limited in our ability to choose, and to contract, by social externalities. If the law is too constraining, then it must be changed for everyone.

Next, some members of this Court have sought to limit the application of the word "willful" in situations in which defendants respond to impulses "deeply ingrained in human nature."⁸ Here again, *Valjean* would appear to preclude their efforts. There is no suggestion that the behavior in this case was a physiological reaction like the blinking of an eyelid. Deliberate choices were made to kill Whetmore to sustain the defendants' lives. In what sense then could this killing have been prompted by an excused human nature?

Among some of my colleagues there is a tacit assumption that the poor deserve their plight and that these recreational cave explorers did not deserve theirs. The poor are treated as if they chose their poverty and therefore deserve the consequences of poverty. They are viewed as deviants; those of us with money as normal. As a result of these unstated perspectives on social status, the desperately poor who steal bread cannot be excused as a matter of law. The word "willfully" cannot exclude acts caused by poverty. Apparently it is felt that this would excuse the poor for their presumed indolence.

I reject these subtexts, but I cannot reverse the *Valjean* cornerstone protecting property at the expense of life unless a sufficient number of my colleagues concur. I do conclude, however, that if the poor cannot be excused their poverty as sometimes necessitating the theft of the bread of life, then the privileged cannot be excused their killings to sustain their lives. The constraint imposed on the word "willfully" by *Valjean* limits the privileged just as it does the unprivileged. If social circumstances are irrelevant in deciding whether the actions of the poor are willful, then social circumstances are irrelevant in deciding whether the actions of the privileged are willful.⁹ These defendants have been trapped by laws designed to

8. *Id.* at 629 (opinion of Tatting, J.).

9. Even if I were at liberty to explore this factual question I still might conclude that the killing in this case was willful. For example, even if cannibalism were their only source of sustenance, there is nothing in this record demonstrating that the defendants could not have waited until one of their number died of natural causes before consuming that person's body. Of course, here, as elsewhere, no matter how much courts limit the scope of facts before juries, and legislatures attempt to direct verdicts through the

deny the unprivileged contextual review in efficient criminal justice machines. This is the legislative will in which this Court concurred in *Valjean*. So be it.

Some other discussion in this Court's original opinions focused on the circumstances and the alternatives apparently available in deciding whether the defendants' killing was willful. These jurists assume that there is some universal or objective person against whom the behavior of these defendants could be measured. This is unsound. There is no single universal man from whose vantage point human nature can be calibrated. The very fact that the decedent, Whetmore, did not choose to participate in the process that led to his killing indicates the impossibility of formulating a single standard by which to judge whether the actions of the others reflected some inexorable human nature. Some people in this situation as a matter of principle and belief would rather die than take another life. Others would choose to kill if that were the efficient thing to do to preserve their own lives. My colleagues who found the acts of the defendants instinctive imposed their perspective on human nature in construing the word "willful." In other contexts, similar privileged perspectives have been adopted as benchmark universals.

My life experiences as a Melanoderm support this conclusion. Historically, privileged Caucasoid males have frequently engrafted their perspective of what is instinctive onto the law. The excusal of killings in self-defense is illustrative. Rationalizations of other acts of violence as "human nature" have been used in many circumstances to excuse Caucasoid male behavior directed against people whose status renders them less powerful in society. For example, women, gay men and lesbians, and people of color have long been subjected to the excused violence of these males on the premise that the victims somehow provoked or deserved the violence or other oppression. Acts of violence are cast as natural, "human" reactions that any *man* would commit under the circumstances or as necessary given the intrinsic qualities of the victims' group.

In this case, the actions of the defendants suggest that they were privileged men accustomed to assigning values to the lives of others and then presuming that they had the right to impose their values on others as long as the process was (in their view) fair. Some of my colleagues implicitly legitimated such impositions of majoritarian viewpoints even when those viewpoints literally put dissenters at risk of death. They suggested that the acts of the majority group could be excused because they were arguably instinctive reactions fairly imposed and necessary for the survival of that majority. I reject the adoption of these perspectives as a universal standard.

What differentiates this case from *Valjean* is not what the circumstances were, but who was acting. These privileged men seem tragic and sympathetic to some because they have been caught in the net

use of the word "shall," juries still maintain some discretionary power through the right of jury nullification.

of draconian laws designed to ensnare the unprivileged. Some members of this Court are willing to create legal fictions or to invoke their versions of human nature or "common sense" to free them. I am not. The actions of these defendants satisfy the legal requirements of having been willful, as that term was construed in *Valjean*.

This brings me to the second question before this Court, whether there is discretion in the imposition of the sentence. The statute uses the word "shall," indicating that the legislature intended to leave the courts no discretion in imposing the death sentence. Such legislative efforts to divest courts of sentencing discretion have a long and sordid history. The legislature has long sought to reduce the power of courts to be lenient with the unprivileged. The ancient drug laws exemplify this impulse.

Notwithstanding this legislative history, however, this Court is not entirely constrained by it. I concede that the legislature has broad—but not unlimited—powers to determine that which is substantively criminal. In my view, however, under our Constitution, legislative determinations of penalties must be subjected to our independent judgment. The Constitution allocates to courts a special role in assuring that sentences are not extreme and are tailored to individuals. Moreover, although the legislature has been allowed great latitude in noncapital crimes, surely legislative power must be checked against a measured justice before the hangman tightens his noose.

Individuals have a constitutional right and courts a constitutional duty to judge the individual in the light of his or her social context before a death sentence is imposed. Justice must not be blind. Historically, over the last five thousand years, from Greece, to America, to Newgarth today, where justice has been blind, it has failed to see systemic and individual injustices. All people have the basic dignity of being considered in the light of their individual circumstances—who they are and what they did—before being sentenced, especially to death. Consistent with our Constitution, there can be no absolute denial of judicial discretion in death sentences.

Moreover, construing § 12-A to deny all sentencing discretion in death penalty cases would be inconsistent with the mandate that the courts be composed of a diverse group of judges. The inclusion of a diverse judiciary at the trial and appellate levels improves the chances that judicial sentencing discretion will reflect the sensibilities of all of the people better than the legislative process. There would be little point to this diversity if judges existed merely to legitimate symbolically the automatic imposition of sentences. Moreover, although these defendants are among our society's privileged,

justice requires no less consideration of their particular circumstances before imposing sentence. In my view, the Constitution requires this for Melanoderms, the privileged, and all who come before the courts for judgment.

These defendants, whose very names are not revealed, are people, and they must be treated with the dignity our Constitution requires, even though they apparently denied such dignity to their victim, Whetmore. Their treatment of Whetmore does not necessarily mean that they should pay with their lives. Redemption is possible even for the most culpable cost-benefit analyzers.

I vote to reverse the order below and to remand for consideration of whether death is an appropriate punishment for each of the individual defendants involved. The sentencing court must take into consideration and articulate in writing what each defendant's role was in causing the death of Whetmore and how that role should be understood in the light of that defendant's life and the circumstances in which he found himself. After sentencing, the parties can appeal any alleged sentencing errors to this Court.

MILLER, J.* The facts not being in dispute, this case turns on the interpretation of the statute, N.C.S.A. (N. S.) § 12-A, as to which this court exercises the authority to review *de novo* the trial court's decision.

The case appears straightforward. Section 12-A provides that "[w]hoever shall willfully take the life of another shall be punished by death."¹ The defendants admit they killed Whetmore, deliberately and with the intent to cause his death. At first blush, our duty as judges appears clear: affirm the sentence of death as dictated by the statute. If the defendants' actions were not culpable in the moral sense, that is a matter to be addressed to the Chief Executive on petition for clemency.

But this view is inadequate. Despite its apparent clarity, the statute requires interpretation. Someone kills a horse. It may seem preposterous to think that § 12-A applies, but why? The statute prohibits willfully taking the life of "another," without the qualification "human being," a qualification that the legislature could have added easily. There are many contexts in which "another" can mean an animal. True, we naturally read the qualification "human being" after the word "another," but that is only because execution for killing an animal seems excessive. Even if one concludes that the statute does not apply to animals, what about a fetus? Section 12-A has never been interpreted to condemn abortions; yet abortions take the life of human beings or potential human beings.

It may be argued that even if § 12-A is vague in other cases, its

* Geoffrey C. Miller, Kirkland & Ellis Professor of Law, University of Chicago Law School.

1. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 619 (1949) (opinion of Truepenny, C.J.).

application to the case at hand is clear: Whetmore was unquestionably within the class of persons or beings protected by the statute. Yet § 12-A cannot be applied to all cases that fall within its literal terms. Otherwise, for example, the law would require that the person charged with carrying out the sentence be *himself* put to death: The executioner, after all, willfully takes the life of another. The person who executes the executioner would be executed in turn. This would result, if the statute were enforced, in the eventual depopulation of Newgarth. But the statute would not be enforced: The job of executioner would go unstaffed and no one would be put to death. Obviously, the statute cannot apply to executioners; but if executioners are excluded, why not others?

It should not be necessary to elaborate this point. The meaning of a word depends on its context. This is as true for statutes as for other speech acts. The job of a court is to interpret the language in context and to attempt, as far as is possible, to construe the statute in a way that advances the legislature's ends. In this light, it is emphatically the court's province and duty to interpret statutes to avoid absurdity or the infliction of unnecessary pain, even if doing so departs from the literal meaning.

The court's power of interpretation is based, in part, on economic principles. A legislature could attempt to draft a statute so specific as to resolve all possible cases that might arise in the future. But because the possibilities of future events are virtually infinite, the legislature would have to spend inordinate effort to specify even the most common permutations. A statute that addressed events as improbable as the case at bar, in which explorers trapped in a cave ate one of their party, would require the legislature to spend all its time and energy for years.

Even if the legislature were able to accomplish this task, its labors would be counterproductive. The resulting statute would be so enormous that almost no one would know what it said. Public notice of the statute's commands would diminish, not increase. This is especially problematic for statutes such as § 12-A because persons contemplating violence ordinarily do not consult attorneys. It is no accident that § 12-A speaks in magisterial terms, as compared, let us say, with our banking law, a notorious monstrosity of over five thousand pages, which is now a historical relic (our last bank voluntarily liquidated over a century ago as a result of regulatory burdens imposed by that very statute).

Excessively detailed statutes contain another threat to the public welfare as well. The specific elaboration of particular circumstances subject to the statute may imply that other circumstances that *could* be specified are *not* subject to the statute. The legislature, by precisely defining conduct subject to the statute, may create loopholes

under which conduct that ought to be covered is omitted. This result is particularly troubling in the case of criminal statutes, dealing as they do with conduct that society may have an overwhelming interest in deterring.

The efficient solution to the problem of establishing rules to govern future behavior is for the legislature to set forth a general rule and leave for the courts the resolution *ex post* of those cases that actually arise out of the nearly infinite possibilities *ex ante*. In this way, the legislature's time is not wasted detailing the legal consequences of events that will probably never occur, and the statute is not unintentionally rendered underinclusive because of excessive specification.

Why should a court perform this task and not the legislature? Our legislature of over five hundred members is not suited for the factual investigation and *ex post* interpretation that are the essence of the judicial function. The job might be delegated to a legislative committee. Such committees, however, are not experts at factfinding or interpretation, and the responsiveness of a legislature to political pressure creates a danger of arbitrariness or abuse. Our Constitution has, accordingly, given the task of *ex post* interpretation to the courts.

Having been charged with this function, we should not shirk it. We have both the right and the responsibility to interpret statutes in such a way as to serve the apparent legislative purpose—indistinct as that may be—and to avoid absurdity or the infliction of unwarranted pain.

Having set forth what I believe to be the proper task of a court in interpreting the statute, I turn to the case at hand. The facts show conclusively that the death of one was necessary to prevent the death of all. Medical experts on the surface advised the trapped explorers that a rescue would not occur in time to prevent all from starving. The explorers could have awaited the death of one by natural causes, but then the condition of the others may have been irreparably weakened. The death of one while the rest were healthy was the most likely means for avoiding further fatalities.

Society would not be served by executing these defendants. They are not dangerous. There is no cause for retribution. Nor would their release encourage wrongdoing. The circumstances are so unusual, even unique, that this case will have no impact on the vast run of cases. On the other hand, executing these defendants would be costly. It would deprive them of their remaining life, remove them from the work force, and inflict emotional suffering on them and on their families.

The impact of executing the defendants on exploration activities would be mixed, but on balance a cost-benefit analysis dictates that the statute not be applied. Some cave explorers might stay above ground if they knew that in the event of an interment they could not sacrifice one to prevent the death of all. Although cave exploration may not seem a particularly important social value, some enjoy it

(those who want examples based on more obviously productive activities might consider astronauts marooned in space or divers trapped in an underwater mine). On the other hand, if punishment is administered here, future explorers probably would exercise greater care to avoid becoming trapped. They also would pack more provisions. Fewer explorers would get into trouble and the costs of rescue—which here included the deaths of ten relief workers—would be reduced.

It is said that failing to enforce the statute as written will encourage disrespect for the law. I find this unpersuasive. We have observed that the statute is not applied against executioners although they fit within its terms. No one's respect for the law is diminished. Rescue cases are similar. Indeed, enforcement is likely to backfire: Executing these defendants might seem so unjust as to raise public doubts about the law's morality.

The most plausible argument for enforcing the statute is that the function of mercy has not been omitted from our system of criminal law; it has simply been vested in another body: the Chief Executive. Despite superficial plausibility, the argument is false. In cases in which the statute is obviously overinclusive, it is no answer that the judge should apply the statute as written and rely on executive discretion in individual cases to correct injustice. There is no assurance that the Executive will not prosecute, nor is there any certainty that the Executive, having prosecuted, will grant clemency. In the present case it is suggested that if the convictions are sustained the Executive will grant clemency; but if this is so, why did the Executive prosecute in the first place? Because executive discretion is discretionary, and accordingly subject to whim, caprice, or abuse, the courts may properly limit penal statutes in order to prevent prosecutions that do not serve the legislative purposes.

For these reasons, it is appropriate for this court to apply a limiting construction to § 12-A. Hence, a crime is not committed when co-adventurers are placed accidentally in a situation in which the death of one is necessary to prevent the death of all, and by fair lot one is chosen and killed by the others. This conclusion, of course, has no bearing on the potential civil liability of the survivors to the family or estate of the deceased, a question not presently before the Court.

I would reverse the judgment and sentence imposed by the Court of General Instances of the County of Stowfield.

PAUL, J.* It is with serious misgivings but nonetheless voluntarily that I assume my duties as a member of this Court, called upon in

* Jeremy Paul, Professor of Law, University of Connecticut School of Law.

my first case to help resolve the extraordinary case of the Speluncean Explorers. It has always been my view, and the view of my compatriots and former colleagues in the legal academy, that the organized violence of the state is a poor method for resolving human conflict. I cannot deny, however, that some form of coercion is as inevitable as it is undesirable. And so, with the hope of disrupting this Court's traditional ways of looking at legal problems and in some small way contributing to the liberation of the human spirit, I agreed to assist in the way our new Chief Executive thought best.

I find immediately, however, that the constraints of the judicial role, which require me both to reach and argue toward an outcome, conflict with my passion for speaking the truth about matters of this kind. Having donned judicial robes, I would like to convince my colleagues and the general public that reversal of the defendants' convictions is the only appropriate outcome. In that regard, I am highly tempted to construct an argument emphasizing the monstrosity of a system that would consider putting people to death for an action that does not even constitute a crime in the eyes of many citizens or in the considered view of distinguished members of its highest Court. How can we, in short, consider sanctioning the invocation of the state's harshest penalty upon defendants whose actions we can easily imagine as our own, when the fact remains that too often a mere slap on the wrist is administered to perpetrators of commercial frauds that bankrupt thousands?

Generalizing this point, I would wish to remind my colleagues of Newgarth's historical hostility to state intervention in private affairs. In the absence of clear and compelling reasons to the contrary, all branches of the government, including the judiciary, have always struggled to respect the autonomous, self-governing character of our citizenry. What else accounts for the oft-repeated maxim that courts will not rewrite the terms of freely agreed-upon contracts? We, too, should pause before concluding that these defendants, placed in an impossible position calling for resourcefulness and self-determination, not only reached the wrong conclusion but one deserving of severe, official punishment.

Here, to be sure, the defendants went well beyond the confines of a voluntary agreement by violently inflicting death as a solution to their problem. But the infliction of injury alone has never been enough to warrant coercive sanction. The megapharmacy need not fear punishment when it opens next door to the small druggist, thus stripping her of her livelihood. If we justify such harm (which the druggist will experience as violent harm) on the dubious grounds that lower prices produce a greater good for the greatest number, surely these defendants too can convincingly maintain that their actions produced the most collective satisfaction possible under such dreadful circumstances.

Neither will a reversal of the defendants' convictions, as the Chief Justice appears to fear, pose any threat to the Rule of Law, or even

to the undeniably salutary principle that physical violence is a generally inappropriate means for resolving disputes. The circumstances of this tragic case are so unlikely to recur that our sanction of the defendants' conduct is less likely to provide license to potential murderers than the more realistic possibility that vigilantes might use the insanity defense to convince sympathetic juries to condone crimes of vengeance. Indeed, even those seeking a broad characterization of my proposed holding reversing the convictions couldn't fairly say much more than that those who kill with reason to believe it necessary to save their own lives and those of others (outside the family) don't deserve to be treated as garden variety murderers. Surely this is preferable to executing defendants about whose guilt so much doubt remains.

Finally, we would be naive to embrace the Chief Justice's view, echoed by Justice Keen, that the literal language of the statute settles the legal issue. As ably demonstrated by Justice Foster, this Court has refused to read the murder statute literally and has thus avoided the injustice of punishing persons who act in self-defense. More important, if called upon to do so, we should reach a similar conclusion again. How else could we respond, for example, to a case like *Commonwealth v. SuperDad*, in which the courts of our sister state, Oldgarth, recently acquitted a father when the evidence showed that he had shot a woman as she was in the process of strangling his young son? The point is that we ask too much of the legislature if we expect them to anticipate every imaginable future occurrence. Perhaps it would be better, as Justice Keen suggests, for the legislature to amend the murder statute to allow defendants to argue self-defense. But would Keen have authorized the state to execute a defendant who acted reasonably to save his own life merely to punish the legislature for its lack of foresight? Should we really order these defendants put to death because the legislature failed to consider including an exception for explorers trapped in a cave? The question seems to answer itself.

But if I am right, and my judicial instincts tell me I am, and if everything I have said thus far points, as I believe it does, to the conclusion that we should reverse the convictions and go home, why then do I pause before simply casting my vote? Alas, the answer lies in my search for judicial candor. As noted, I am entirely persuaded that all I have said compels reversal of the defendants' convictions. Yet I must also concede that were a different question before the Court, I can easily imagine myself disputing virtually all the arguments above that I find here so convincing.

Consider, for example, my well-founded reliance on Newgarth's historical aversion to state intervention in private affairs. I would be the last member of this Court to invoke this principle were we facing

a government plea to reverse our long-standing common law rule that shields a husband from prosecution for raping his wife. The woman's right to bodily integrity and personal dignity far outweigh any "anti-intervention" principle, and I would vote this way even were I persuaded that punishing the husband flew in the face of much popular sentiment and the considered judgment of some of the less enlightened members of this Court.

Indeed, as I think about it further, I'm not sure I can even make sense of the notion of keeping the state out of private affairs. Since the government is responsible for setting the rules of property and contract under which all transactions take place, and since the government sets the rules that determine who constitutes a family and what powers parents have over children, I wonder whether we can speak coherently of a private realm from which government should be excluded. And, if not, then what happens to my claim that we should withhold punishment of these defendants in the name of an undisturbed private sector?

I am tempted to respond that the longer a public rule is in effect, the more we will tend to forget its role in shaping conditions that now appear to us private. Police officers, for example, returning runaway children don't feel like meddlesome intervenors. Perhaps, then, some element of timing can serve to rescue Newgarth's long-standing faith in a public/private distinction. But my colleagues will likely point out that the laws against murder are among our oldest, so that my claim that the state should not intervene here is merely a restatement of the idea that the defendants aren't murderers rather than a defense of that idea.

Similar doubts arise over the general principle that private citizens may justifiably coerce their fellows in the name of overall social utility. I would summarily reject this argument were it raised on behalf of a land developer who sought to bulldoze his neighbor's home to make way for a new shopping mall. Indeed, I would vote to enjoin the proposed demolition no matter how valuable I thought the mall would be to the community. But, of course, my concern for the homeowner's right not to be treated as a means to a greater end parallels quite closely my colleagues' outrage over the extinction of Mr. Whetmore's rights. I see the cases as different in part because the developer has other ways to proceed, whereas our defendants had few other choices. Again, however, this is merely another way of saying I find the defendants' conduct justified and for reasons other than mere invocation of the greatest good for the greatest number.

Neither would I always want to rely on the *sui generis* nature of events to excuse what I thought was wrongdoing. Suppose a man killed his identical twin to harvest blood products that were then successfully used to save the lives of the killer's quadruplets suffering from the effects of a rare poison for which no other cure was available. We would probably be safe in concluding that no similar circumstances would arise, whether or not we reversed the killer's

conviction. Yet I am not sure I would vote to let the killer go free. In my view, our defendants are less culpable since, unlike the desperate father, they had reason to believe their victim would die of starvation if they did not kill him. Again, however, the point is that although the slim precedential value of our case may diminish our worry over how to decide future cases it cannot alone tell us how to decide this case.

Finally, like my colleagues Truepenney and Keen, I can imagine myself at times looking to a statute's literal language to help resolve a dispute. I grow tired, for example, of ceaseless efforts on behalf of Newgarth's reactionary forces to exclude certain top policy jobs from our antidiscrimination laws or to exclude certain cash receipts from the legislative definition of taxable income. To these folks I would readily say that such exceptions are best drafted in the legislature and that they should expect no help from this Court. It is clear then that my hostility to statutory literalism also draws heavily on the context of the case now before us in which an advance legislative exception appears unlikely and the consequences of enforcing the literal language are so harsh. Indeed, as my persistent doubts have revealed, context appears at the root of virtually every argument I have advanced on behalf of reversing the convictions.

So it is at this point that I must return to a more extended consideration of my judicial role. I continue to believe strongly in the reversal of the defendants' convictions. Under a traditional view of judicial authority, however, my inability to announce an overarching principle that compels reversal might suggest that I should follow Justice Tatting's lead and withdraw from the case. Nothing could be further from my mind.

For if there is one point on which I disagree clearly with my colleagues, it concerns the necessity of a logical and irrefutable explanation to justify the imposition of judicial authority. Justice Foster, whose views are often close to mine, claims that his argument (that the defendants were effectively in a state of nature) "permits of no rational answer,"¹ but I think Justice Tatting provided one when he illustrated the difficulties in determining when the defendants had passed into this state of nature and when he explained this Court's lack of authority or ability to render judgment pursuant to natural law. Tatting fled the case, leaving the defendants to be executed, because he could not "decide the case on the basis of a convincing and logical demonstration of the result demanded by our law."² But in doing so he helped decide the case nonetheless. Justice Handy

1. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 622-23 (1949) (opinion of Foster, J.).

2. *Id.* at 626 (opinion of Tatting, J.).

finds the case “one of the easiest”³ he has had to decide because he reduces it all to a question of what the common man would decide. One wonders if he would give the same effect to constitutional guarantees designed to safeguard the rights of minorities against the demands of the common man. As noted above, the Chief Justice and Justice Keen would rely heavily on the literal language of the statute despite the obviously strong arguments against doing so. Each of these judges clings to a version of the case that candor should compel them to disavow. But each of them has (or in Tatting’s case wants) something to offer that I quite plainly do not.

I have no story to persuade the affected parties that they should listen to me because I am merely following the law. I acknowledge that being a judge often requires me to make up the law as I go along and that there is nothing I can do about this. Before becoming a judge, I had hoped that forcing judges to acknowledge this would make it more difficult for them to impose unjust decisions because they would have to take responsibility for outcomes. At the same time, I feared that allowing judges to acknowledge their power would make it easier for them to impose unjust decisions because outcomes could no longer be criticized as plainly against the law. Perhaps now I will discover how this tension will play out in New-garth politics. To be truly candid, however, I must concede that whether my emphasis on judicial originality will have politically progressive consequences is itself a matter of context.

I plan to proceed with my strategy of emphasizing the contextual nature of my decisions nonetheless. In part, this is a matter of personal faith in that I have come to believe that a society built on truth is our best defense against tyranny. In part, it is a matter of personal style in that I enjoy highlighting complexity. And in part I act out of sheer distaste for the pretension and sham that I believe characterize the relentless effort to cloak difficult decisions in the garb of abstract principle.

Let me be absolutely clear then that I take no refuge in any of the more familiar attempts to justify my vote in the face of my inability to defend it by reference to universal principles. I find no comfort in the idea that my arguments supporting reversal may be accumulated so that their weight overwhelms the other side despite the possibility that each counterpoint to the arguments I have advanced may be valid individually. Aggregating bad arguments to make the whole greater than the sum of the parts differs little from the alchemist’s claim of turning lead into gold. Neither do I ask my colleagues or my readers to validate my conclusion merely because I have acted in good faith. I want you to attend to the persuasiveness of what I have said, not the sincerity with which I have said it.

Finally, I emphatically reject the idea that my explicit willingness to find a principle persuasive in one context that I would reject in another means that my decision here boils down to nothing more

3. *Id.* at 638 (opinion of Handy, J.).

than “politics.” I acknowledge that my past experience and unconscious mental constructs help shape my decision, but I can’t imagine a world in which this would not be true of decisionmakers with power. I wonder then precisely what is meant by “politics.” Certainly, there is no ready-made political agenda that corresponds to the needs of our unfortunate defendants. Moreover, I cannot envision an intelligent form of politics that would not be beset by the same tendency toward contextual decisionmaking, which appears to bedevil the law. In short, my decision not to punish these defendants does reflect a political predilection hostile to state-imposed violence. But this predilection is no more universal than any of the legal principles that I have already invoked.

I vote then to reverse the convictions. You may still ask why, and I answer that, alas, there is no more for me to say. It would be a monstrous thing to put these defendants to death for actions we can’t even agree constitute a crime. You may disagree and offer your own reasons in support of a different outcome. Fate has it, however, that I am the judge. If you can’t agree with me, I ask you whether in all honesty you can see yourself bringing matters to the task that I have not considered. If so, let’s talk, but in the meantime I would set these defendants free.

Laura W. Stein, J.* We are all of us on this Court in agreement: These men should not be hanged. This unanimity will shock any student of this Court’s recent history. But what is more shocking to any of our citizens not schooled in the ways of the law is that, despite this unanimity, two and one-half of us are willing to see these men hang.

My brothers Truepenney and Keen and half of my brother Tatting falsely blame this result on the Chamber of Representatives. To the extent they claim that the Chamber thought about a case like this and decided on the result of hanging, that seems almost certainly to be mistaken history. There is no evidence that would support such a conclusion. To the extent they claim that if the Representatives had thought about this case, they would have intended the result of hanging, it does great disservice to that body’s members; it imputes to the legislators a belief that not one of my brothers believes reasonable. Finally, to the extent that my brother Keen would suffer these men to be hanged to pressure our legislature to pass clearer laws in the future, that result is monstrous. One cannot expect the legislature to think in advance of the myriad cases that could arise

* Associate Professor of Law, New York Law School. My deliberations have been enhanced by consultation with several colleagues, including Scott Altman, Naomi Cahn, Mary Coombs, Karen Gross, Carlin Meyer, Edward Purcell, Ruti Teitel, and the participants in the New York Law School faculty colloquium.

that might someday arguably fall within the reach of the words it enacts. To send people to their deaths to force the legislature to cover all possibilities is both barbaric and futile. Although the Act's meaning may not be wholly indeterminate, it is certainly underdeterminate. Our role as judges is to assess how the words of the legislature apply to the concrete situations that come about in this world. My brothers have expressed a willingness to let these men hang; if such hanging occurs it is they, and not the Chamber, who will be responsible.

The result that we should reach—absolving these men of the murder charge—seems clear based on all of our intuitions. Two points, however, bear further discussion. First, on what are these intuitions based? Second, how can we legally justify this absolution, which we intuit to be morally just?

The first question is a difficult one, and it is one that my colleagues have not attempted to answer. As students of my prior opinions are no doubt aware, I believe that the proper way to assess questions of justice is to consider the effect of our possible decisions on distributions of power among groups in our society. I approach questions this way because I think that the greatest injustice that exists in our society is the systematic oppression of certain social groups; the only way to remedy that injustice is to take distributions of power seriously. Within this context, I often focus on the effect of a decision on the power of women, because women clearly are among the groups that have suffered and do suffer social oppression.¹

This case, however, is so exceptional and so easily limited to its extreme facts that whatever decision we render will have little direct effect on the empowerment of any social group. These men became stranded and were in such difficult straits that they reasonably believed that the only way to preserve their own lives was to kill and eat one of their members. We may decry the irresponsibility of these men in putting themselves in this position and then expecting rescue at all costs. That does not change, however, the extraordinary nature of their predicament or, concomitantly, of this case.

The indirect effects of our decision are harder to measure. At times, I have heard friends argue that leniency in criminal matters generally harms women because women are disproportionately victims of crime. On the other hand, I recently read an article analogizing this case to the ancient cases that recognized that battered women who kill their abusers can be relieved of criminal liability. As this exemplifies, expanding criminal defenses can, at times, be empowering for women. Consequently, as is frequently the case, general principles about the impact of criminal law do not help me.

1. One need only read the opinions of my brother Justices to see the demeaning way that women are regarded in our society. The opinions of my brethren mention only two women: the "stupidest housemaid" and the mistress who orders her to "peel the soup and skim the potatoes." Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625 (1949) (opinion of Foster, J.).

Why then do I conclude that these men should not be hanged? Although I am not fully sure what lies behind my intuition, it seems to be a sense that much would be lost and nothing gained by hanging these men. They would lose their lives and their families, and others who loved them would lose them, and to what benefit? We would not make a believable statement about the sanctity of life by taking theirs; nor does it seem likely that we would deter any troubling behavior in the future.

But how am I to justify this result as a legal matter, so that my decision can fit into a fabric that has more strength to it than simply the personal preference of an unelected jurist? My brother Foster would say that we have no right to judge these men, because the killing did not take place in our society, but in a new society of the cave, governed by the state of nature, into which our laws did not reach. This type of reasoning disquiets me. It reminds me too much of the now thankfully discredited grossest understanding of privacy that some of our forefathers (and I do mean *fathers*) held dear, namely, a notion that because certain activities took place in isolation from a public space, the public could not judge them. Why is it logically more compelling to say that everything that takes place in the cave escapes our social judgment than to say the same thing about activities that take place in a "private" home?

True, there were no women in this cave, so unlike the home, it could not have been used as a sphere for the oppression of women. But, suppose there had been one woman among the Spelunceans, and the men chose her to be killed on the theory that female life is less valuable. In that situation, I would want to condemn the behavior of the Spelunceans; I cannot accept that because they were in a cave I would lose the ability to render judgment.

Nonetheless, I think that my brother Foster is onto something. As my foremothers have argued, a vision of justice is incomplete if it does not take into account the relationships among the people who are, in a broad sense, involved in the case. See *Gilligan v. Kohlberg*.² I think that we have lost the ability to judge these men at this time, not because they were in a different society from us, but because they were in the same society, and we failed in our social obligations to them.

The Spelunceans asked for our guidance again and again. Given the constant coverage that this event received in our media, it is unlikely that anyone in our society was not aware of their plaintive request for guidance as to whether they should kill one of their

2. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 18-23 (1982) (arguing that a prior theory of development authored by Lawrence Kohlberg is incomplete because it omits the voices of women).

members to save the rest of the group. None of us (and I include myself in the group) would answer. We were willing to see this problem as theirs and not our own.

In this regard, I have always felt some discomfort with the role that society gives to this Court, which is constrained to after-the-fact judgment, without an institutional ability to advise beforehand those people who could be affected by our vision of the law. If we expressed our opinions before the fact, we would be inviting a dialogue among members of our society at a meaningful time about how those in our society should act. In contrast, by waiting to announce our judgment until after the fact, in conjunction with a final decision to free or condemn human beings, we set ourselves apart from our society, as if we have some privileged access to truth. I agreed to serve on this Court despite these reservations. In ordinary cases I move beyond these concerns and find myself able to render judgment. This case, however, is different. In ordinary cases, those in our society have engaged in some prior dialogue about how people should behave in the relevant situation. But in this case there was no such dialogue that the Spelunceans could have looked to for guidance. Indeed, we declined to discuss the issue with them even after they begged us to do so.

If we would not condemn this act before it happened, how can we be heard to condemn it now? By refusing to make a decision at a time when it could have influenced these men's action, we cannot now condemn them for making their difficult choice. *Cf. State v. Abused* (recognizing a legal defense for battered women who kill their abusers, resting in part on society's failure to provide these women with any meaningful alternatives).

Colleagues with whom I have discussed my reasoning have asked me to address how I would decide this case if our society had answered the Spelunceans' call. My first inclination is to resist this question. I am not at all sure about the utility of addressing strange hypotheticals, unlikely ever to occur. But to quiet their concerns, let me say that we who were outside the cave could have responded to our compatriots' cries for help in three ways: We could have told them to go ahead and kill one of their members; we could have told them not to; or various members of this Court could have given them conflicting opinions. In the first case, we clearly would be estopped from condemning the Spelunceans. In the second and third cases, we may have acquired the ability to judge them, but I find it unnecessary to decide what judgment we should have rendered if the facts had been thus presented.

Finally, I do not mean or want to say that, given our unwillingness to answer these men, we cannot judge any of their possible actions. As I mentioned above, there were some criteria that they could have used to make their choice that would have been so clearly wrong that I would willingly judge and condemn the survivors. But their lottery—which they proposed to the world while they were inside the cave and which we did not then condemn—does not fall into

that category.³ I am estopped from judging with hindsight those to whom I willfully would not give guidance beforehand. I say, let these men go free.

3. I do not mean to equate randomness with fairness. I do not pass on the ultimate fairness of what the Spelunceans did. I merely say that, because I would not pass on it earlier when my opinion could have made a difference, I cannot pass on it now.