THE CASE OF THE SPELUNCEAN EXPLORERS:  
A FIFTIETH ANNIVERSARY SYMPOSIUM

FOREWORD: A CAVE DRAWING FOR THE AGES

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I. INTRODUCTION

When I was a student in law school, my two favorite law review articles were Henry Hart’s famous dialogue and Lon Fuller’s presentation of the case of the speluncean explorers. They still are.

Why is that so? Perhaps one never quite gets over the joy of discovering a fine work of art or literature when one is young. (I still revere War and Peace, which captivated me as a college sophomore, even though I can’t get past the first hundred pages any more.) But I think more is involved here. The wonderful essays by Hart and Fuller each combine a timely consideration of contemporaneous debates with a timeless quality that continues to entice students and scholars to think and write about them some half a century later — and will doubtless engage our successors well into the next millennium. Moreover, each of the essays takes a form that I have always admired and that seems especially suited to the exploration of such basic questions as the nature of our federal union and the nature of law itself: an exchange of views in which competing positions are stated as forcefully as the author knows how. Indeed, an author’s ability to make compelling statements of contrasting views is, for me, a powerful signal of the author’s worth as a scholar.

Small wonder then that when I was invited to contribute a foreword to this revisiting of Fuller’s great work, I felt both flattered and

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1 Unlike several of the writers of the opinions that follow, I cannot resist the temptation to use footnotes (in moderation, of course). The purpose of this footnote is to suggest to the reader that you may well prefer, as I do, to read a foreword, if at all, only after you have read all that follows. This practice not only tends to make the foreword more readable, but also eliminates any chance that the views expressed in the foreword will affect your reactions to what follows. Thus, you are in a better position to assess the merits and defects of the foreword itself. But if you must, read on.


3 Lon L. Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949). The article is reproduced below, see infra, at 1851–75, and for ease of reference, citations will be to the article as it appears in this issue.
intimidated. If good wine needs no bush,4 and the lily is not made more beautiful by being gilded, then what could I hope to add to such an extraordinary achievement? No more, perhaps, than some thoughts on just why Fuller’s piece has proved so durable and so provocative, and some effort to connect its insights with those of our contributors to this celebration.

II. FULLER’S ACHIEVEMENT

To be sure, Fuller, like Hart and just about everyone else, was only mortal, and he could not wholly escape the context of the times in which he wrote. Hart was necessarily dealing with the state of constitutional doctrine as it then stood,5 and casually followed the custom of the times by using the term “wetback” when referring to a Mexican who had illegally entered the country across the Rio Grande.6 As for Fuller, his hypothetical case was staffed by justices who were all male, and though we have little to go on, may also have been all white and all from relatively affluent backgrounds.7 After all, judges predomi-

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4 This saying is a Shakespearean phrase I learned from Paul Freund and have always treasured because it is so obscure. In olden times, a branch of ivy (a bush) was hung outside a tavern to indicate wine for sale.

5 Hart’s Dialogue was reproduced in the third edition of Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, Hart and Wechsler’s The Federal Courts and the Federal System (3d ed. 1988), but was replete with footnotes bringing aspects of the text up to date. See id. at 393–423. Because this burden had become increasingly heavy, we decided, as editors of the fourth edition, to discuss and quote liberally from the article but not to reproduce it. See Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler’s The Federal Courts and the Federal System 366–67 (4th ed. 1996).

6 See Hart, supra note 2, at 1395. At this point, Hart was complaining that under then-current Supreme Court doctrine, an alien who had entered the country illegally had all the protections afforded by the guarantees of due process, while a resident alien who goes abroad to visit a dying parent and seeks to return with a duly issued passport and visa appeared to have none.

Now, we live in an era when — perhaps as a reaction to earlier times — one can be accused of a racial slur and lose one’s job (at least for a while) for using “niggardly,” a word of Scandinavian origin, see Jonathan Chait, Doubletalk, New Republic, Feb. 22, 1999, at 50, 50, and when “he” is no longer a politically acceptable generic pronoun. We are all caught up in our times.

7 That all the justices are male is evident from the internal references by the justices themselves to their colleagues. Their other characteristics are matters of conjecture, and indeed assumptions about those characteristics can only be based on a guess about how people in the late 1940s thought about the judiciary, and on the failure of any of the justices to make a point about his race, nationality, or background. To quote Professor Eskridge in his 1993 discussion of Fuller’s piece, “There is no explicit clue of any sort to the race of any participant. That is, itself, an implicit clue. In the 1940s, it went without saying that you were white if your race was not noted.” William N. Eskridge, Jr., The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell, 61 Geo. Wash. L. Rev. 1731, 1750 n.111 (1993). (Is this assertion — that a black writer in the 1940s, writing in any context, would always refer to his race — supported by empirical data?) Eskridge goes on to say, “The affluence of the Speluncean world is suggested by the preppy, upper-class context of the hypothetical: the hobby is the rarefied, relatively expensive one of cave-exploring. Moreover, [the case ends] up as a battleground of New-garths’s political elites (the Chief Executive and the Court).” Id. at 1750–51 n.112 (citation omitted). (Was Fuller’s move — from the real-life seafaring cases cited below, see infra note 9, to a
nantly had those qualities when Fuller wrote. And when one of his justices wanted to argue that it can be easy to tell that a speaker's precise language contains a slip of the tongue or an overgeneralized command, the justice pointed to the ability of the "stupidest housemaid" to interpret her employer's words in light of their purpose — thus perhaps revealing some assumptions about the nature of the employer-employee relationship, especially when the employee is a domestic. Other examples doubtless abound, as they do in the work of every writer.

But Fuller was still able to write a piece that will endure — one that posed eternal dilemmas in a remarkably lucid and accessible fashion. Let me count the ways.

First, while the hypothetical — about the dilemma facing those who must kill one of their number or all die of starvation — drew loosely on two famous cases, Fuller made his own case more difficult and challenging through a variety of devices. He moved the setting to Newgarth, a jurisdiction of which we know little except for a few matters that leak out of the opinions — for example, that it has precedents, statutes, judges (all male in this case), a chief executive with the power to pardon, and housemaids who may sometimes be stupid. And to confirm the limits of our knowledge, the time of the relevant events is in the fifth millennium.

With respect to the facts themselves, Fuller enriched the knowledge of the defendants and increased the dilemmas of the case in wondrous

case involving explorers — made in order to change the social class of the accused or because the cave situation was more pliable in terms of the facts he wanted to develop? And is the institutional issue he wanted to present — the issue of institutional role in a system of law — properly characterized, in terms of either its significance or the author's purpose, as a "battleground" of "political elites"?

8 Fuller, infra, at 1859 (Foster, J.). To quote Professor Eskridge again, "The only appearances of nonwealthy people in the case are demeaning. . . . Most revealing is the snide reference by Justice Foster — the 'nice' Justice — to the 'stupidest housemaid.'" Eskridge, supra note 7, at 1751 n.112. This point is made the capstone of Professor Paul Butler's opinion on this issue. See infra, at 1917 (Stupidest Housemaid, J.).

9 See Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884) (involving defendants, who, after twenty days on a lifeboat, killed and then ate the youngest person on the boat — evidently without any agreed-upon procedure for determining the one to be sacrificed — and who were ultimately convicted of murder but had their death sentences commuted); United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383) (involving a defendant who was a member of the crew of a ship that sank and who was convicted of manslaughter and sentenced to six months imprisonment for throwing several passengers out of a long-boat so that he and the others in the boat might survive).

10 Some think that to deal with a case fairly and fully, we must be able to explore in depth every aspect of the context in which it arises. Cf., e.g., JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 111-51 (1976) (discussing the context of Paisgraf v. Long Island Railroad, 162 N.E. 99 (N.Y. 1928)). Of course, no hypothetical can meet such a demanding standard, though Fuller has clearly gone beyond the standard A, B, and C of the law school classroom, and made a concerted effort to provide enough information for full debate of the issues he wanted to raise.
ways. For example, his trapped explorers find out that they cannot be rescued in less than ten days and are assured by experts that their chances of survival for ten days are slim to none unless they eat one of their members. Then, most intriguing of all, they all agree to draw lots (actually, to throw dice), to determine who shall be sacrificed, but before the lottery, Whetmore tries unsuccessfully to pull out of the agreement. Predictably (Fuller was never a candidate for a Booker Prize), Whetmore turns out to be the loser when the dice are cast for him by another, and he is killed and eaten. The others survive and are prosecuted for murder under a statute providing, in its entirety, "Whoever shall willfully take the life of another shall be punished by death."11

We learn of other important matters as well — that ten members of the rescue party died in the course of their efforts, that Newgarth’s Chief Executive was well known for his hard-nosed attitude toward clemency, and that there were significant precedents on the books, addressing such issues as the availability of self-defense as a justification for killing (despite the failure of the legislature to mention it), the willingness of Newgarth’s courts to construe statutes to avoid absurd results, and the application of the anti-theft law to one who stole bread (Valjean) because he was starving and could not afford to buy it. In sum, as one who has often faltered in the effort to construct a flawless hypothetical, I think that Fuller’s comes about as close to perfection as one can get.

Second, Fuller’s opinions for his five justices managed to express an extraordinary range of views, and to do so with vigor and power. Truepenny, the Chief Justice, plays the role of narrator (a bit like the butler who comes on stage in Act I of a drawing-room comedy to dust the furniture and tell the audience what happened before the curtain went up). But he goes on, briefly but eloquently, to express two important viewpoints: first, that statutory language governs when it is free from ambiguity (as he claims it is in this case); and second, that institutionally, the role of mercy-giver in the criminal context belongs not to the judiciary but to the executive in the exercise of the pardon power.12

Chief Justice Truepenny is followed by Justice Foster, who strongly disagrees that the conviction must be affirmed, and in doing so puts forward two separate (but perhaps related)13 arguments: the defendants, when they acted, were “in a ‘state of nature,’” as much outside the laws of Newgarth as if they were on the moon, and under the principles applicable in such a state (in other words, the principles of “natural law”), they were guiltless;14 and, in any event, and in a more

11 Fuller, infra, at 1853 (Truepenny, C.J.).
12 See id. at 1853–54.
13 Eskridge suggests that they are, and I agree. See Eskridge, supra note 7, at 1742.
14 Fuller, infra, at 1855 (Foster, J.).
traditional vein, the murder statute must be interpreted in accordance with its purpose — namely, deterrence.15 That purpose, he concludes, would no more be served by upholding a conviction on the facts at bar than in the case of the recognized justification of self-defense.16

Justice Foster is then powerfully attacked in the two opinions that follow. Justice Tatting derides Justice Foster’s first argument — questioning when one can decide that an actor has crossed over into a state of nature and how the court acquires its authority to apply natural law — and then heaps similar scorn on Justice Foster’s “purposive” analysis, in part by insisting that purposes are both difficult to ascertain and, usually, multiple.17 The justification of self-defense is readily distinguished, the Valjean precedent is invoked, and then Justice Tatting, baffled by the difficulty of the case and resentful of the decision to prosecute these hapless defendants under a statute providing a mandatory death penalty, decides to withdraw.18

Justice Keen, a man of similar views but made of sterner stuff, votes to affirm. He insists that his own view of the morality or immorality of the acts charged is irrelevant, and that the court must recognize the supremacy of the legislature by applying the statute as written — not by rewriting it as the justices would like it to read through the dodge of ascertaining some fancied “purpose” or filling some nonexistent “gap.”19 He even suggests that the courts may have erred years earlier in recognizing the justification of self-defense instead of leaving it to the legislature, if it wished, to spell out the precise contours of such a defense.20

Finally, Justice Handy, the realist-pragmatist, scoffing at the learned debates among the other justices, insists that the justices must follow their own common sense and the popular will — in this case, evidenced by a poll showing that ninety percent of the people want to let the defendants off with little or no punishment — and reverse the convictions.21 He suggests achieving this result by using whatever legalistic device seems most adaptable (“handy”?) to the occasion — in this instance, Justice Foster’s second rationale.22

Given a chance to reconsider his withdrawal, Justice Tatting sticks to his guns (if that is an apt metaphor for a coward), and partly as a

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15 See id. at 1858.
16 See id.
17 See Fuller, infra, at 1859–61 (Tatting, J.).
18 See id. at 1863.
19 See Fuller, infra, at 1864 (Keen, J.).
20 See id. at 1868.
21 See Fuller, infra, at 1868, 1870 (Handy, J.). In a delightful passage in which Fuller perhaps gets carried away, Justice Handy dismisses the likelihood of executive clemency on the basis of his knowledge of the Chief Executive’s character — knowledge acquired because, as it happens, “my wife's niece is an intimate friend of his secretary.” Id. at 1872.
22 See id. at 1870.
result of his refusal to face up to his responsibility as a judge, the convictions are affirmed by an equally divided vote.

Thus, Fuller managed in these five opinions to introduce just about every dispute about the nature of law and the role of judges. As Justice Handy notes before launching into his realist critique, the prior opinions have explored the clash between natural law and positivism, have examined a range of approaches to statutory interpretation, and have raised fundamental questions about the roles and limits of our legal institutions.

A third virtue of Fuller’s essay is that if one were unfamiliar with his other works, one would be hard-pressed to identify his own preferred approach, although he is perhaps too cynical about the techniques of the realists (as embodied in Justice Handy’s opinion) to be readily identified with that school of thought. In fact, Fuller’s other works reveal an affinity for both aspects of Justice Foster’s approach.\(^\text{23}\) Indeed, Fuller’s view of the significance of purposive analysis in interpreting statutes gave rise in later years to the “legal process” theories of Professors Hart and Sacks,\(^\text{24}\) and yet his criticisms of that approach in the opinions of Justices Tatting and Keen are so trenchant that future scholars have been able to add little to their arguments. As noted earlier, this ability — to recognize and articulate the weaknesses in one’s own theories — constitutes, in my view, a hallmark of true scholarship.

Fourth, Fuller not only used his “quintalogue” to explore some of the burning issues of his own day, especially the effort to resolve the challenges that natural law and positivism posed for each other; he also hit upon a technique for articulating these problems that has succeeded in engaging students and teachers ever since — witness this second symposium on the case in the last six years. Moreover, as I try to show, the scholars that have followed him may have cast some further light, but the real illumination still comes from Fuller himself.

Finally, Fuller did all this in a remarkably compact form. Although it is not unusual for a present-day article on an obscure problem of, say, bankruptcy law to stretch out for a hundred dreary pages, Fuller’s five opinions consumed only thirty. And the style was not only lucid and accessible; it was also lively and witty throughout. Erwin Griswold, a man of simple tastes and direct speech, caught the essence of Fuller’s gift for avoiding pretense and obscurity when he once introduced Fuller as “the only jurisprude I can understand.”

\(^{23}\) See Eskridge, supra note 7, at 1737 n.38 (citing Lon L. Fuller, The Law in Quest of Itself (1940); Lon L. Fuller, American Legal Philosophy at Mid-Century, 6 J. Legal Educ. 457 (1954); and Lon L. Fuller, Reason and Fait in Case Law, 59 Harv. L. Rev. 376 (1946).

III. LATER ANALYSES AND ONSLAUGHTS

A

The first extensive return to Fuller’s cave appeared as two articles in the George Washington Law Review in 1993. The articles were entitled The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell25 and The Case of the Speluncean Explorers: Contemporary Proceedings.26 Professor William Eskridge, the architect of the project, contributed an introductory analysis of Fuller’s work, and his essay was followed by seven new opinions in the case authored by a range of academics. Most of Eskridge’s introductory analysis consisted of a scholarly exegesis of Fuller’s piece, which Eskridge described as representing “a moment in the Anglo-American debate over the role of equity and natural law in statutory interpretation,”27 and also as a harbinger of the “Legal Process” approach more fully developed in later years by Professors Hart and Sacks.28 Eskridge also noted the skill with which Justices Tatting and Keen question both the legitimacy and appropriateness of Justice Foster’s use of natural law in his first argument and of “purposivism” in his second. Then, as part of his introduction of the opinions that follow, Eskridge notes that the world of the case “and of its Justices — and Lon Fuller’s world — [is one] in which the only actors who matter are male, white, affluent, and heterosexual.”29

Eskridge’s introduction is knowledgeable, informative, and generally respectful of Fuller’s insights. My view, which is already apparent and which may not quite jibe with his, is that Fuller’s essay is much more than a document of historical importance — that it transcends a moment in legal history, or even several moments, and that (granting that it cannot wholly escape the tacit assumptions and understandings of its day) will continue to fascinate and provoke its readers as long as it remains available.

In the seven opinions that followed Eskridge’s introduction, perhaps the most notable feature is that not one new justice voted simply to affirm the conviction and sentence; rather, three voted to reverse the conviction; two voted to remand for further factual inquiry relating to — or for jury determination of — guilt or innocence; one voted to re-

25 Eskridge, supra note 7.
27 Eskridge, supra note 7, at 1732.
28 Id. at 1743.
29 Id. at 1750–51.
mand solely on the question of the appropriate sentence; and one voted to reverse the sentence of execution.\textsuperscript{30}

That no one voted to affirm both the conviction and sentence is, in part, a result of Professor Eskridge's selection of judges. As he acknowledges, three were selected as representatives of feminist theory and two as representatives of critical race theory.\textsuperscript{31} Of the remaining two, one advocated a "purposive" analysis reminiscent of that espoused by Justice Foster,\textsuperscript{32} while the other appeared to speak for the neorealist, "critical legal studies" approach presaged by Justice Handy.\textsuperscript{33}

The three advocates of feminist theory were Naomi Cahn, Mary Coombs, and Laura Stein. Professor Cahn voted to remand for further development of the facts in order effectively to "integrate" the ethics of "care and justice."\textsuperscript{34} Professor Coombs noted that it was too easy for judges to identify themselves with the "privileged" male defendants who found themselves facing death; she then concluded (perhaps in part because of her fear of judicial bias) that, since the record did not establish an effective waiver of trial by jury by the defendants themselves, the case should be retried in order to obtain a jury verdict on the ultimate question of guilt.\textsuperscript{35} Professor Stein, after speculating on the possible impact of the decision on the disempowered (specifically including battered women), concluded that much would be lost by executing these defendants and that as one who "willfully would not give [the defendants] guidance beforehand," she was "estopped from judging with hindsight."\textsuperscript{36}

As for the two representatives of critical race theory, Professor John Calmore concluded in light of his own narrative of the history of racial

\begin{itemize}
\item \textsuperscript{30} This is my reading of the conclusions reached, but in some instances, the authors might disagree with that reading.
\item \textsuperscript{31} See Eskridge, supra note 7, at 1751–52.
\item \textsuperscript{32} See Contemporary Proceedings, supra note 26, at 1800 ("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 . . . .") (opinion of Professor Geoffrey C. Miller).
\item \textsuperscript{33} See id. at 1801–07 (opinion of Professor Jeremy Paul). Paul rejects Justice Handy's reliance on the views of "the common man." Id. at 1806. But in reaching his conclusion that it would be "monstrous . . . to put these defendants to death for actions we can't even agree constitute a crime," id. at 1807, Paul confesses his "inability to announce an overarching principle that compels reversal," along with his lack of concern that this is so, id. at 1805.
\item \textsuperscript{34} Id. at 1763 (opinion of Professor Naomi R. Cahn).
\item \textsuperscript{35} See id. at 1785, 1787, 1789 (opinion of Professor Mary I. Coombs). In Fuller's hypothetical, the jury foreman asked that the question of guilt be determined by the court on the facts as found, and we are told that "counsel for the defendants" accepted the procedure. Fuller, infra, at 1853 (Truepenny, C.J.).
\item \textsuperscript{36} Contemporary Proceedings, supra note 26, at 1811 (opinion of Professor Laura W. Stein). Chief Justice Truepenny's summary of the facts states only that Whetmore (speaking from inside the cave and just before communications were cut off) "asked if there were among the party [outside the cave] a judge or other official" who would tell them whether it "would be advisable" to cast lots to determine who should be eaten, but "[n]one of those attached to the rescue camp was willing to assume the role of advisor in this matter." Fuller, infra, at 1852 (Truepenny, C.J.). Thus, we are not told whether any judges or other authorities on the law were present at all.
\end{itemize}
and religious persecution on the planet Newgarth that the entire Newgarthian criminal justice system was suspect "because we on Newgarth live under circumstances of racial oppression," and Professor Dwight Greene, viewing the criminal law as a "legal trap[... ] for the less privileged," decided to affirm the conviction because he knew that the "affluent, all-Caucasoid, male panel" would not overturn the Valjean case, and one could not (under a theory of neutral principles?) find murder justifiable in order to survive when theft was punished under similar circumstances.

This is not the place to analyze each of these approaches in detail. Suffice it to say that while I think there is much to be learned from the neo-realists, the feminists, and the critical race theorists, I do not count myself among any of these schools, and I am troubled by each of their conclusions in the context of Fuller’s case. Some have simply refused to accept the case as stated and have used the opportunity to make up a story of their own and then act on the basis of that story. (Fuller might well respond, as I often do in class, that “It’s my hypothetical.”) Others seem to me to have copped out — Tatting-like — by imagining that more facts might help or by insisting on a trial by jury of the ultimate issues. In sum, the opinions rendered in the 1993 Symposium may represent much more of a relatively brief moment in legal history, and much less of a timeless consideration of a fundamental dilemma than Fuller’s original. In any event, Fuller’s work emerges, in my view, neither bloodied nor bowed.

B

We come then to the present symposium. This time, the editors have sought to obtain a broader range of views. Their success in this effort is indicated by the closely divided vote. As I count, the vote to affirm the conviction is 3-3, with one of the three who voted for affirmance voting at the same time to invalidate the mandatory death penalty and to remand for further hearing on the issue of the appropriate sentence. Since, unlike Justice Tatting, I have not been assigned a judicial role, I could not break the tie if I wanted to — and I don’t. Thus the defendants will have to serve time, but they may not have to

37 Contemporary Proceedings, supra note 26, at 1766 (opinion of Professor John O. Calmore).
38 Id. at 1790–91 (opinion of Professor Dwight L. Greene).
39 Fuller does not tell us whether Newgarth has a constitutional guarantee of jury trial like ours or whether it has a constitution at all. Indeed, I am sure he wanted his readers to think about these issues free from whatever constraints a constitution might impose. Moreover, Professor Coombs seemed determined to jam a jury trial down the defendants’ throats whether they wanted one or not — an idea squarely at odds with our own constitutional precedent, see Patton v. United States, 281 U.S. 276 (1930).
40 My count assumes that Professor Butler would reverse the conviction in its entirety. If he would reverse only on the issue of the appropriate sentence, then the vote to affirm would be 4-2.
face the tribulations of death row, and worse. (I assume that there is no higher tribunal to which a further appeal would lie.)

A look at the six opinions reveals some surprises and many insights. But once again, I find myself concluding that the foundation for all that has followed was laid by Fuller in his thirty pages, and that while much of the subsequent filigree is entrancing, and sometimes brilliant, both the groundwork and the structure above it can be found in Fuller’s pages.

To begin with the justices who voted to affirm, Alex Kozinski (a federal court of appeals judge in real life) takes the “textualist” route blazed by Chief Justice Truepenny and Justice Keen, and also embraces the institutional view espoused by Chief Justice Truepenny in his reference to the possibility of relief in the “political arena.”41 Adding to Fuller’s arguments, Kozinski points out that we cannot be sure that the defendants took the wisest course — perhaps they should have waited for one of their number to expire before diving into their questionable repast — and that judges should not engage in lawmaking by disregarding the plain language of a statute. For example, he asks, should the courts permit an indictment and conviction for killing a dog (“canicide”) on the theory that the drafters of the statute have left a gap that needs to be filled?42

This opinion is an eloquent statement of the textualist view, but it raises some concerns. Should the courts regard themselves only as messengers when applying the broad language of a statute to a particular problem as long as the words used are “plain”? Should it matter that the legislature, in the light of centuries of experience, may have come to expect the process of interpretation to comprise elements of both agency (the court as applier of the legislature’s mandates) and partnership (the court as fine tuner of the legislature’s general, and sometimes overly general, proscriptions and commands)? To take the case at hand, Kozinski manages to sidestep the problem posed for him by the earlier precedent (in Fuller’s hypothetical), recognizing a “common law” justification of self-defense. He does so by invoking other statutory provisions, apparently not on the books when Fuller wrote, that “define justifiable homicide” and then by chiding the defendants for not invoking these previously unknown statutes, “doubtless be-

41 Infra, at 1878 (Kozinski, J.). Since I first set down my thoughts on the initial drafts of the contributors to this revisiting of Fuller’s case, several of those contributors have supplemented their opinions with insightful critiques of the approaches of their colleagues. Perhaps the most complete of these critiques is Kozinski’s, whose comments sometimes overlap, sometimes improve on, and sometimes considerably surpass, my own. But having invested the initial effort in collecting my own thoughts, I am unwilling to forgo the opportunity to voice them now.

42 See id.
cause they do not apply." And his "canicide" example is especially ironic in view of the statutory language proscribing the killing of "another." Another what? Living thing? Homo sapiens? The question may not be answerable without an analysis of legislative purpose — with whatever materials are at hand.

The next vote to affirm, cast by Cass Sunstein, may come as a bit of a surprise to some, but the opinion is in fact a masterful application of Sunstein's view, developed elsewhere in his writings, that it is possible to reach a result on the basis of what he has described as an incomplete theory — one that reasons by analogy and does not resolve the most fundamental issues of the nature of law: While recognizing the virtues of a plain meaning approach (and indeed placing a good deal of reliance on that aspect of the case), as well as of a purposive analysis, Sunstein at the same time points out their weaknesses and limitations. For him, the problem is best approached by a comparison of the facts to the prototypical case at which the statute is aimed (the killing of an innocent for selfish purposes) and to its polar opposite (a killing to prevent the destruction of life by a wrongdoer). Following this analogy, Sunstein concludes that this killing should not be held justifiable, especially because Whetmore made a timely effort to pull out of the agreement.

This analysis, in my view, is both stunning in its own right and an illuminating example of Sunstein's broader approach to the resolution of legal problems. But I can't resist noting that its elements were, at least to some degree, present in the opinions of Fuller's justices, including the critiques of textualism and purposivism, the distinction of the justifications that had been recognized in the past, and the relevance of Whetmore's effort to get out of the lottery before the dice were thrown.

Robin West casts the third vote for affirmance of the conviction. After rehearsing (with some new insights) the arguments of Justices

43 Id. at 1879.
44 In this example, Kozinski asks whether it would be appropriate for a court to remedy a "legislative oversight" or fill in what may or may not have been an inadvertent gap in the statute, by applying the law to the killing of a dog. Id. at 1878.
45 See Eskridge, supra note 7, at 1798 (opinion of Professor Geoffrey C. Miller) ("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.").
47 See infra, at 1884–85 (Sunstein, J.).
48 See Fuller, infra, at 1860–62 (Tatting, J.), 1864–67 (Keen, J.).
49 See Fuller, infra, at 1861 (Tatting, J.) (noting the impulsive character of resisting an aggressive threat to one's life).
50 See id. at 1862 (questioning whether it would have mattered if Whetmore had refused from the beginning to participate in the plan).
Tatting and Keen that a statute of this kind has multiple, sometimes conflicting and sometimes unknowable, purposes, Professor West focuses on the distinction between the case at bar and the classic justification of self-defense.\textsuperscript{51} She joins with Sunstein in noting that it is one thing to resist aggression and quite another deliberately to take an innocent life in order to save the lives of others. (In the course of this discussion, she analogizes Whetmore’s plight to that of a woman who cannot be required to sacrifice her own life to save that of the fetus within her.)\textsuperscript{52} Finally, she concludes that the mandatory death penalty cannot withstand constitutional assault because it fails to permit consideration of mitigating circumstances.\textsuperscript{53} At least when it comes to punishment, she insists, we need not “bifurcate” justice and mercy.\textsuperscript{54}

Once again, the seeds of these powerful arguments were planted by Fuller in his critique of purposive analysis, in his distinction of the case of self-defense against an aggressor, and in his suggestion (in Justice Handy’s opinion) that a formalistic separation of institutional roles — leaving questions of “mercy” to the executive branch — was a dubious exercise.\textsuperscript{55} Of course, Fuller did not have the benefit (if that’s what it is) of our Supreme Court’s later pronouncements on the validity of the death penalty,\textsuperscript{56} or of its decisions dealing with the constitutionality of limitations or prohibitions on abortion. Indeed, it is far from clear that Newgarth has a constitution that bears any resemblance to ours\textsuperscript{57} or that our Supreme Court’s highly controversial and somewhat meandering interpretations of the Constitution on these issues should serve as a model. And in any event, West’s use of the abortion analogy is a puzzling one since it could, in my view, be turned completely around. Perhaps instead of analogizing Whetmore to the woman who may not be sacrificed to save the life of the fetus within her, we might more appropriately draw the analogy between the mother and the defendants. After all, just as the greater good may consist in allowing the sentient mother to preserve her health or life by sacrificing an unborn child, so the greater good may be achieved by

\textsuperscript{51} See infra, at 1895–97 (West, J.).
\textsuperscript{52} See id. at 1896–97.
\textsuperscript{53} See id. at 1899.
\textsuperscript{54} See id. at 1898.
\textsuperscript{55} See Fuller, infra, at 1870–73 (Handy, J.).
\textsuperscript{56} The history of the Supreme Court’s struggle with the constitutional problems presented by capital punishment is remarkable, with respect to both the changes in the Court’s approach over time and the deep divisions within the Court at any particular time. For several decades, the Court has grappled with a steady series of cases involving the permissible circumstances in which capital punishment may be imposed, as well as the considerations that may, may not, or must be taken into account. See Carol S. Steiker & Jordan M. Steiker, \textit{Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment}, 109 \textit{Harv. L. Rev.} 355 (1995) (describing and critiquing the Supreme Court’s treatment of these issues since 1972 and concluding that “the death penalty is, perversely, both over- and under-regulated”).
\textsuperscript{57} See supra note 39.
sacrificing one innocent to preserve the lives of many (at least if fair procedures are followed).

When we turn to those who would reverse the convictions, Frank Easterbrook’s vote and rationale may come as something of a surprise to those who associate him with the “textualist” approach. In concluding that this case does not fall within the broad language of the statute, Easterbrook (a once and continuing academic and a federal appellate judge in real life) emphasizes such matters as historical context, the common law function of the courts in developing defenses to criminal charges, and the role of the courts not just as agents but as partners of the legislature in fitting new statutes into the “normal operation” of the legal system. His thoughtful distinction between the Valjean case and the case of the starving mountaineer is presented as part of a “utilitarian” analysis of the justification of necessity. Following this analysis, he concludes that acting behind a veil of ignorance, five explorers willing to take the risks associated with a dangerous expedition would rationally agree in advance to a cannibalistic arrangement that reduced the risk of death by starvation by eighty percent. (He analogizes such an agreement to the use of a connecting rope by mountain climbers.)

Easterbrook’s departure from the textualist orthodoxy in this case is not that surprising, given the sophistication of his approach to statutory construction and the particular nature of this statute. While much legislation represents a carefully-wrought compromise between conflicting forces — a compromise that might be perverted or even wrecked by a refusal to adhere to the text — this criminal statute is surely more sensibly viewed as an over-general prohibition enacted by a legislature that, at least implicitly, contemplated the necessity of judicial fine-tuning.

Nor should Easterbrook’s view of the utilitarian nature of the “necessity” defense, which is, I believe, a major contribution to our thinking about the problem of the case, come as a surprise to those familiar with his academic work. Once again, though, the approach was heralded in Fuller’s piece when Justice Foster (in the “natural law” part of his argument) said:

If it was proper that these ten lives [of members of the rescue party] should be sacrificed to save the lives of five imprisoned explorers, why

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59 See infra, at 1915 (Easterbrook, J.).
60 See id. at 1915–16.
61 In a previous article, Easterbrook more fully discusses this distinction, emphasizing, inter alia, the difference between a statute that enacts a code of rules, on the one hand, and a statute that delegates a kind of common law interpretive function to the courts on the other. See Frank H. Easterbrook, Statutes’ Domains, 50 U. CHI. L. REV. 533 (1983).
then are we told it was wrong for these explorers to carry out an arrangement which would save four lives at the cost of one?62

That Fuller regarded this analysis as most relevant to a "natural law" thesis, while Easterbrook sees it as an appropriate tool of statutory interpretation, is revealing. West insists that the prohibition of murder is about "rights," in particular the right of the innocent not to be assaulted or killed,63 while Easterbrook views the issue of justification in terms of the net cost or benefit to those affected.64 If Easterbrook is right, don't we have to worry about how far the many can go at the expense of the few? And why is it irrelevant that on the "actual" facts (of the hypothetical), Whetmore tried to pull out before the drawing — a point not mentioned by Easterbrook? In view of Whetmore's decision, wouldn't it have been both fairer and at least as sound from a cost-benefit standpoint to exclude him from the drawing and from the meal that followed?

Another vote to reverse is cast by Alan Dershowitz, writing under the pseudonym of Justice De Bunker.65 Professor Dershowitz, embellishing Fuller's hypothetical, posits a religious war in the third millennium that culminated, at least for the vast majority of survivors, in the abandonment of both religious precepts and any notions of natural law.66 Having eliminated one horn of Fuller's dilemma, Dershowitz proceeds — in the first part of his analysis — to decide for the defendants on the basis of his own preference (which he hopes will appeal to others) for allowing all conduct that is not explicitly prohibited by law. Since the murder statute, in his view, does not address the situation at bar, his preference, derived from his libertarian principles, furnishes a basis for his vote to reverse.67

While Dershowitz is surely entitled to choose the positivist road, it is a bit unfair to Fuller's hypothetical to eliminate the clash with natural law principles by assuming that society rejected the concept of natural law a thousand years earlier. And as to allowing whatever is not prohibited, it is hard to quarrel with that view as a general approach to interpretation — in truth, I find it very attractive — but I'm not sure that it is helpful in this case. To be sure, there were two widely noted cases several thousand years earlier (in other jurisdictions), but both resulted in convictions under a general statute like this one.68 To the extent those decisions have any relevance, why isn't the conviction of the defendants in those cases an indication that if the

62 Fuller, infra at 1856-57 (Foster, J.).
63 See infra, at 1803 (West, J.).
64 See infra, at 1914 (Easterbrook, J.).
65 Who turns out to be a "gay woman of color." Infra, at 1901 n.3 (De Bunker, J.).
66 See id. at 1899-1900.
67 See id. at 1904-05.
Newgarth legislature was aware of the problem, it was quite content with the way it had been treated in the past. Indeed, if Dershowitz’s reading of the statute is correct, can it be taken to prohibit a murder of a kidnap victim when the ransom is not paid, or for that matter, any killing under facts not specified in the statute itself?

Perhaps aware of the difficulties of his “interpretation” of the Newgarth murder statute, Dershowitz goes on in what looks like an alternative rationale to make an argument based on “necessity.” This argument bears a strong resemblance to Easterbrook’s utilitarian calculus, and as I have tried to suggest and others have forcefully argued, such an argument has both virtues and shortcomings. The most important of the shortcomings, in my view, is that it poses agonizing problems for a system of law that seeks in general to protect the innocent from being sacrificed by others for the greater good. In any event, I remain unpersuaded by Dershowitz’s concluding effort to tie together the two strands of his argument by noting that “our legislature has not explicitly spoken to this specific problem [of the nature and scope of a “necessity” defense].”

All of which brings us to Paul Butler’s opinion. Already known for his article in the Yale Law Journal, advocating that black jurors practice nullification when black defendants are charged with non-violent crimes, Professor Butler has decided to do himself at least one better. Seizing on Justice Foster’s use of a “stupid[] housemaid” to make a point about purposive construction, Butler writes an opinion from the perspective of that housemaid — and writes it in a style that is a curi-

69 Citing what is surely the more famous of these cases — Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884) — in support of his argument, Dershowitz notes that the Dudley court was divided, that the result was followed by executive clemency, and that in any event, “the vast majority of comparable cases — both before and after that decision — resulted in acquittal or decisions not to prosecute . . . .” infra, at 1904 (De Bunker, J.). The first two of these points strike me as furnishing little support for Dershowitz’s argument. Few controversial decisions are unanimous; what is critical is that neither the British nor the Newgarth legislature opted to reject the result. And as for the subsequent commutation, it resembles what Chief Justice Truepenny urged in voting to affirm; such extraordinary cases, he contended, are not appropriate for rules promulgated by courts without any legislative authorization, but rather, they call for the case-by-case exercise of executive discretion focused on the particular circumstances. See infra, at 1853–54 (Truepenny, C.J.).

Finally, I am puzzled by the reference to “[t]he vast majority of comparable cases.” There is no citation of supporting authority, and I did not know that the practice of cannibalism in these circumstances is so common that it is possible to speak of the cases in terms of a vast majority. (Perhaps my notion of what cases are comparable is a less expansive one.) There may be a large iceberg under the few appellate cases on the subject, but I am unaware of any empirical studies to support its existence.

70 Kozinski’s examples in support of this point, see infra, at 1880 (Kozinski, J.), are a delight.

71 See infra, at 1905–09 (De Bunker, J.).

72 Id. at 1909.


74 Fuller, infra, at 1859 (Foster, J.).
ous mixture of Butler’s version of ebonics, four-letter words, thoroughly Bluebooked legal citations, and rather elegant phrases like “Having determined no moral culpability in the defendants’ actions,” and “[I]n the last part of the twentieth century, ... Negroes ... were difficult and expensive to rehabilitate and it was pleasurable to punish them.” The thrusts of his opinion are that no crime deserving of moral condemnation has been committed, that there is no sense in killing someone to prove that killing is wrong, and that in any event, there is no true rule of law because “the Supreme Court of Newgarth ain’t never gone choose law to favor the poor and colored folks ... at least not to the point that the rich white folks’ richness and whiteness is threatened.” And in the peroration, the housemaid is beguiled by the irony that after “sacrificing the lives of people of color for centuries,” Newgarth has come to the point where “white folks sacrifice white lives for the greater good.”

Granted (as Fuller recognizes in invoking the image of Jean Valjean), the law may appear even-handed when in fact — as Anatole France so brilliantly put it — it frequently treats the poor more harshly than the rich, and the poor in this country have often been people of color, especially blacks. Granted too, Butler’s prose has an attention-grabbing, if disconcerting, shock value. The question still remains whether — by operating on the assumption that Newgarth in the fifth millennium is like twentieth-century society at its worst, and on the more patronizing assumption that a hypothetical “stupid housemaid” is black — Butler has treated Fuller’s case with respect, or has simply used it as a platform to sound a brassier version of a note he has played before. Butler’s challenge to the whole concept of “legal reasoning” echoes the criticism of the legal realists in the early decades of this century and of their intellectual successors in the critical legal studies movement of more recent times. Fuller himself, who valued the rule of law, may have gone overboard in suggesting, through Justice Handy, that the alternative is to take the popular pulse and act ac-

75 Infra, at 1918 (Stupidest Housemaid, J.).
76 Id. at 1919.
77 See id. at 1918.
78 See id.
79 Id. at 1920.
80 Id. at 1923.
81 See Fuller, infra, at 1862 (Tatting, J.).
82 “[T]he majestic equality of the law ... forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” ANATOLE FRANCE, LE LYS ROUGE 111–23 (1894), quoted in THE OXFORD DICTIONARY OF QUOTATIONS 292 (Angela Partington ed., 4th ed. 1992).
83 I must admit that in spite of myself, I couldn’t help smiling at Butler’s Handy-like trashing of the opinions of the other new justices, as well as of his own, and at the allusion (advertent, I’m sure) to Henny Youngman’s most famous one-liner.
cordingly. But I am left wondering whether Butler’s critique carries us beyond these earlier contributions. As Kozinski states forcefully in his opinion, Butler’s approach contains its own puzzling inconsistencies and leaves us in the dark about how a better world might apply the rule of law in a case like this. The difficulty may well lie in Butler’s insistence on viewing the explorers’ case as a parable about race and class.

A Jewish colleague of mine — one of the participants in this project who shall remain nameless — told me years ago that when he was young, he would come home from a baseball game and announce proudly to his grandmother that “The Dodgers won!,” to which his grandmother would reply, “So, is it good for the Jews?” Probably not, but it wasn’t bad for them either.

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In raising some questions about the new opinions assembled for this project, I do not mean either to deny the many insights in these opinions or even remotely to suggest that I could have done better. I am quite sure that I could not. But — as the reader must be tired of reading by now — I am convinced that one proposition is established by the continuing debate: Lon Fuller has posed a problem as challenging for those who worry about the law and legal institutions as is the origin and ultimate fate of the universe for astronomers.

84 See Fuller, infra, at 1870 (Handy, J.).