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The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell

William N. Eskridge, Jr.*

Roger Whetmore is cannibalized by his cave-exploring colleagues in Lon Fuller's hypothetical case of the Speluncean Explorers.¹ The survivors are convicted of violating a law making it a crime that one "willfully take the life of another,"² notwithstanding their defense of necessity. The explorers were trapped in a cave and would have died but for the sustenance of Roger Whetmore.³ An evenly divided Supreme Court of Newgarth affirms the convictions. Voting to affirm, Justice Keen follows the plain meaning of the statute and refuses to consider the equitable defense of necessity,⁴ while Chief Justice Truepenny urges the Chief Executive to grant clemency based upon the defense.⁵ Voting to reverse, Justice Foster argues that neither the understandings of common society nor the purpose

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¹ Lon L. Fuller, The Case of the Speluncean Explorers, 62 HARV. L. REV. 616 (1949). The discussion in the text is drawn from Fuller’s article and will be more fully elaborated infra. For other cases from the hypothetical Supreme Court of Newgarth, see LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE 71-102, 628-36 (temp. ed. 1949). For excellent introductions to Fuller and his philosophy, see ROBERT S. SUMMERS, LON L. FULLER (1984), and Martin P. Golding, Jurisprudence and Legal Philosophy in Twentieth-Century America: Major Themes and Developments, 36 J. LEGAL EDUC. 441, 473-80 (1986).

² Fuller, supra note 1, at 619 (opinion of Truepenny, C.J.).
³ Id. at 618.
⁴ Id. at 631-37 (opinion of Keen, J.).
⁵ Id. at 616-19 (opinion of Truepenny, C.J.).
of the statute is served by conviction, while Justice Handy votes to reverse as well, relying on virtual consensus in popular opinion. Anguished Justice Tatting—the potential tiebreaker—recuses himself because he cannot choose among the various arguments.

The Justices' opinions constitute a microcosm of this century's debates over the proper way to interpret statutes. A historical understanding of those debates reveals the breathtaking intellectual accomplishment of Fuller's article, which closes one period of American statutory law (legislative positivism), announces its successor (the legal process school), and anticipates the arguments that will bedevil the successor in its turn.

I. The Pre-History of the Speluncean Explorers: The Positivism-Natural Law Debate in Statutory Interpretation, 1890-1940

One way to situate the case of the Speluncean Explorers is to view it as a moment in the Anglo-American debate over the role of equity and natural law in statutory interpretation. Justice Keen's plain-meaning opinion conceptualizes the enterprise as nothing more than implementing the positive law enacted by the legislature. That view, separating law from politics and morals, is challenged in the opinions of Justices Handy (who argues that law is politics) and Foster (who argues that law implicates morality). The debate between positivism and natural law was a prominent theme of statutory interpretation debates in the first half of the century, and Fuller's article is an accessible time capsule of that debate.

Before the 1890s, American theories of statutory interpretation largely tracked English theory: Follow the plain meaning of the statute, except in the rare case in which the plain meaning is absurd. Thus, American theory was in the main positivist, demanding that courts follow the rules enacted by the legislature. It contained a safety valve—the exception for absurd results—that was jurisprudentially ambiguous, however. A meaning leading to an absurd result should not be imputed to the legislature either because the result was probably not the legislature’s intent (the positivist argument) or because it was not right, just, or fair (the natural-law argument). This ambiguity is illustrated by the Supreme Court’s most celebrated statutory case of the Lochner era.

6. Id. at 620-26 (opinion of Foster, J.).
7. Id. at 637-44 (opinion of Handy, J.).
8. Id. at 626-31 (opinion of Tatting, J.).
In 1892, the Supreme Court decided *Church of the Holy Trinity v. United States*. The church had hired an English clergyman to be its rector and provided for his transportation to the United States. The latter action appeared to violate a federal immigration statute making it “unlawful for any person . . . in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . to perform labor or service of any kind in the United States.” Although the prohibition against employment contracts facilitating immigration was broad and filled with loophole-plugging language, the Supreme Court refused to interpret the statute to exclude the rector from entering the United States. The Court held “that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” To determine the statute’s “spirit,” the Court first relied on positive evidence, mainly the statute’s legislative history, which suggested that the words “labor and service” really should have read “manual labor” or “manual service” and assuredly were not meant to cover “brain toilers.” The Court’s opinion, however, then proceeded to a natural-law appeal, arguing that our history as a “Christian nation” should remove all doubt that the statute might intend to obstruct efforts to bring religious leaders into the country.

*Holy Trinity Church* was a prolegomenon to the *Lochner* era, in which the Court expressed a constitutional hostility to socio-economic regulatory statutes that displaced old common-law rules. The judicial philosophy of the *Lochner* era, scorned by Professor Roscoe Pound as “mechanical jurisprudence,” was one nostalgic for the economic, libertarian values of the common law, which

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10. 143 U.S. 457 (1892).
11. Id. at 457-58.
13. Elsewhere, for example, the statute listed specific occupations excluded from the prohibition, and clergy were not mentioned. Id. § 5, 23 Stat. at 333 (excepting from the statute professional actors, artists, lecturers, and singers, among others).
15. Id. at 464. It appears from the case that the committee was operating under end-of-session pressure and did not believe it necessary to vote an amendment to the statute. Id. The Supreme Court also relied on the statute’s title and the circumstances of its adoption to hold it inapplicable to “brain toilers.” Id. at 465.
16. Id. at 471; see also id. at 465 (“[N]o purpose or action against religion can be imputed to any legislation, state or national, because this is a religious people.”). The author of the opinion, Justice David Brewer, was the evangelical son of Christian missionaries.
17. The standard citation is *Lochner v. New York*, 198 U.S. 45 (1905), in which Justice Brewer and his allies struck down a statute setting maximum work hours for bakers in New York.
judges felt were under assault from new regulatory statutes.¹⁹ The conservatives of the bench and bar in that period expressed their arcanian philosophy through statutory as well as constitutional interpretation.²⁰ The common law had long been a natural-law surrogate in statutory interpretation, and a nostalgic Supreme Court pursued that theme episodically for two generations, from 1892 to 1938.

The rallying cry of anti-Court progressives during this period was distinctly positivist: They contended that the common law was no longer sufficient to the needs of a complex, strife-ridden society, that the legislature was in a better position to gather facts and make judgments necessary for such a society, and that the role of courts lay in following these progressive commands of the legislature and abandoning their Lochnerian obduracy. Pound argued, for example, that the importation by judges of their libertarian values into statutes was "spurious" statutory interpretation and inconsistent with the proper role of courts in a democracy.²¹ According to Pound, the proper method of statutory interpretation was an "imaginative reconstruction" of the legislature's specific intent.²² That view had many adherents among progressive jurists²³ but was not so jurisprudentially sophisticated as the progressive theory of Justice Oliver Wendell Holmes, Jr.

Justice Holmes believed that statutory interpretation was usually just an exercise in determining the statute's ordinary meaning.²⁴ Like Pound, Holmes was a positivist who astringently believed in the separation of law and morals. Like Pound, he rejected as spurious a judge's effort to read his own values into statutes and believed the judge ought to bow to legislation expressing authentic social forces,

²¹. Roscoe Pound, Spurious Interpretation, 7 Colum. L. Rev. 379, 382 (1907).
²². For Pound, the role of the judge should be to discover "what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy." Id. at 381; see also Roscoe Pound, Enforcement of Law, 20 Green Bag 401 (1908). Pound himself was following Judge Sanborn's formula in In re Clerkship of Circuit Court, 90 F. 248, 251 (C.C.S.D. Iowa 1898).
²³. Judge Learned Hand was perhaps the most notable of these. See Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 788-91 (2d Cir.), aff'd, 328 U.S. 275 (1946); Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914), cert. denied, 295 U.S. 705 (1915).
²⁴. "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 419 (1899).
such as the labor movement and nosey social regulations. Unlike Pound, however, Holmes emphasized the importance of plain meaning, not only for reasons of democratic theory, but also for rule-of-law reasons. According to Holmes, our polity could not be a government of laws and not men unless legal standards were external to the decisionmaker. For the same reasons that Holmes favored a "reasonable man" standard in torts cases, he advocated a "normal speaker" theory of plain meaning.

The legislature-grounded positivism of Holmes's plain-meaning theory is similar to Justice Keen's opinion in The Case of the Speluncean Explorers. Keen makes quite a show of segregating his own moral view—that the defendants should not be punished—from his responsibility as a judge:

[A] question that I wish to put to one side is that of deciding whether what these men did was "right" or "wrong," "wicked" or "good." That is . . . a question that is irrelevant to the discharge of my office as a judge sworn to apply, not my conceptions of morality, but the law of the land. . . .

. . .

Whence arise all the difficulties of the case . . . ? The difficulties, in whatever tortured form they may present themselves, all trace back to a single source, and that is a failure to distinguish the legal from the moral aspects of this case. To put it bluntly, my brothers do not like the fact that the written law requires the conviction of these defendants. Neither do I, but unlike my brothers I respect the obligations of an office that requires me to put my personal predilections out of my mind when I come to interpret and apply the law of this Commonwealth.

In a representative democracy, the law is the statutes enacted by the
elected representatives in the legislature, which is supreme in lawmaking. "From that principle [of legislative supremacy] flows the obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice." For Keen, as for Holmes, bending the statute to accommodate the members of the Speluncean Society would be a sacrifice of law's objectivity and hence of both its democratic legitimacy and its usefulness.

Although Keen's approach to statutory interpretation was (when Holmes was writing) a progressive approach, it was one that had been undermined by the time Fuller wrote *The Case of the Speluncean Explorers*. The realists in the 1920s and 1930s had debunked the possibility of objectivity in statutory or any other kind of interpretation, arguing that judges had an enormous lawmaking discretion that was little confined by statutory plain meaning or imaginative reconstruction. The realists unsettled the statutory interpretation debate. Although the realists had no use for *Lochner*-style conservatives or natural law, neither were they simple legislative supremacists, as Pound and Holmes were. The realists viewed the sovereign's rules as the results of the judicial and not the legislative process (i.e., because there is no law until the statute has been interpreted) and also tended to accept the tenets of ethical positivism. Moreover, because they believed that judges have great leeway in reading their own policy preferences into statutes, the realists emphasized the importance of instrumental, policy-driven considerations.

In *The Case of the Speluncean Explorers*, Justice Handy reflects the realists' disdain for the "obscuring curtain of legalisms" and "abstract theory" and their endorsement of doctrinal solutions that

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30. Id. at 633.
31. See Benjamin N. Cardozo, *The Nature of the Judicial Process* 166 (1921) ("I have grown to see that the [judicial] process in its highest reaches is not discovery but creation."); Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* 131 (1933) ("The meaning of a statute... is a juridical creation in the light of social demands."); Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 Vand. L. Rev. 407, 407-08 (1950) (arguing that "the belief that the interpretation of legal documents consists essentially in a search for the intention of the author" is "orthodox... yet... quite wrong"); Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259, 1267-70 (1947) ("We do not usually speak of [legislative] 'delegation' to the judiciary, but the fact of such delegation is undeniable, whatever the label."); K.N. Llewellyn, *The Constitution as an Institution*, 34 Colum. L. Rev. 1, 31-40 (1934); see also John C. Gray, *The Nature and Sources of the Law* 124-25 (2d ed. 1927) (a realist taking the position that "it is only words that the legislature utters; it is for the courts to say what those words mean; that is, it is for them to interpret legislative acts").
33. See, e.g., Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum. L. Rev. 431, 431-33 (1930). By "ethical positivism," I mean the view that law is the command of the sovereign and that the goodness of law (the "ought") is a matter separate from what the law actually requires (the "is"). See Owen M. Fiss, *The Varieties of Positivism*, 90 Yale L.J. 1007, 1007 (1981).
34. Fuller, *supra* note 1, at 637 (opinion of Handy, J.).
reflect "efficiency and common sense." Handy is Keen's doppelgänger: Keen emphasizes the stability and externality of law, and Handy emphasizes its mobility and contingency. Keen rigidly separates legal interpretation from politics, and Handy responds by making legal interpretation an exercise in practical politics (stressing, for example, the role of popular opinion in his vote to acquit). Keen is serious and pompous while Handy winks at the reader, deflates the pretensions of his colleagues, and treats the case like a game.

If The Case of the Speluncean Explorers had been written in the early 1930s, when realism was overtaking the philosophies of Pound and Holmes, a debate between Keen's law/formalism and Handy's politics/functionalism might have been the centerpiece of the case. Instead, the centerpiece is Justice Foster's opinion, which specifically reflects intellectual developments from the end of the 1930s. The New Deal ensured the complete defeat of mechanical jurisprudence and offered the prospect of a very attractive positive law regime in which smart, young judges and administrators (many of whom were prominent realists) were making policy. Yet at the very moment of progressive positivism's electoral triumph over Lochner-based natural law, positivism found itself intellectually vulnerable. As American intellectuals learned about European fascism in the 1930s, the more restive they became with a positivist separation of law and morals. Were Nazi decrees "law" in the same way that New Deal statutes were? Were decrees that basically attacked an entire segment of the body politic entitled to obedience?

Like others on the eve of America's entry into World War II, Fuller himself invoked these quandaries as an occasion to question

35. Id. at 639.

36. I believe theirs is an uneven match, however. I read Keen's opinion as a serious intellectual statement reflecting the respect that Holmes still engendered at the Harvard Law School in the 1940s. I read Handy's opinion as more of a caricature of realism, reflecting both Fuller's ambivalence about realism, see Lon L. Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429 (1934) (stating that realism "reveals rather conspicuously the defects of youth"), and the Harvard Law School's tendency to consider the realist project as having presented nothing particularly new or productive, see generally Robert S. Summers, Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law, 92 Harv. L. Rev. 433 (1978) (comparing the views of Fuller with dominant theories of law).

37. Fuller, supra note 1, at 639, 643-44 (opinion of Handy, J.).

38. Foster's is the opinion that best resonates with Fuller's own work, see Lon L. Fuller, The Law in Quest of Itself (1940); Fuller, supra note 1, at 693-743; Lon L. Fuller, American Legal History at Mid-Century, 6 J. Legal Educ. 457 (1954); Lon L. Fuller, Reason and Fiat in Case Law, 59 Harv. L. Rev. 376 (1946). It is the second opinion in the case (following the Chief Justice's, which simply states the facts and then rests its legal analysis on a fatuous appeal to executive clemency that no one else takes seriously), and it is the primary focus of the critical responses in the opinions of Justices Tatting, Keen, and Handy.

39. This story is told in Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value 159-78 (1973).
ethical positivism in law. In his 1940 Rosenthal Lectures, Fuller suggested, first, that decrees such as those of the Nazis were not binding law, because the conditions of human coexistence ceased to exist for most of the citizenry. Secondly, he argued that there is no sharp distinction between the “is” and “ought” in law. Both suggestions show up nine years later in the opinion of Justice Foster.

Accordingly, one reason that Foster gives for acquitting the defendants is that the positive law ceased to apply to them when they were thrust back into a “state of nature” by their entrapment in the cave:

Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common. When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.

Under pure natural law, Foster asserts, the defendants acted out of necessity and were “guiltless of any crime” as a result. Foster asserts a second and independent reason for voting to acquit, one more subtly echoing natural-law influences. Even conceding that the explorers' conduct “violates the literal wording of the statute,” he argued that one “may break the letter of the law without breaking the law itself” and that a law must “be interpreted reasonably, in the light of its evident purpose.” To a reader of the 1920s and 1930s, Foster's statement would have been an uncomfortable echo of the natural law in Holy Trinity, with Foster's rejection of the law's “letter” for the law's “purpose” (a seeming euphemism for Holy Trinity's “spirit”). Could the invocation of a “Christian nation” be far behind? By the late 1940s, readers would have been more comfortable with Foster's second argument, whose intellectual background and relationship to his first argument I shall now explore in detail.

II. After the Positivism/Natural Law Debate: The Case of the Speluncean Explorers and the Legal Process Synthesis, 1940-1958

American law faced an intellectual crisis on the eve of World War II. Formalist theories of law, like those of Newgarth's Justice Keen, were vulnerable to realist attacks concerning their objectivity. On the other hand, realist theories, like the view of Justice Handy that

40. See FULLER, supra note 38, at 122-25.
41. Id. at 4-15.
42. Fuller, supra note 1, at 621 (opinion of Foster, J.).
43. Id. at 624. To support his interpretation of the law's purpose, Justice Foster invokes the exception to murder statutes for self-defense. Id. at 624-25.
judges are nothing more than another set of political actors, seemed inconsistent with traditional theories of democracy or the rule of law. The shortcomings of both formalism and realism gave rise to a demand for a theory of statutory interpretation that tied law to reason as well as to democracy and rules. Judges and academics grappled with this conundrum, and a tentative answer emerged in the period from 1939 to 1942: Statutory interpretation must be informed by the purposive role of state actors.  

Although earlier scholars had acknowledged the idea that legislative purpose was important to statutory interpretation, and the Supreme Court had occasionally invoked purpose-based reasoning, this idea did not become central until 1939-1942, after the New Deal had been politically consolidated, just as the New Deal majority was forming on the Supreme Court, and right before the United States entered World War II.

The new generation of scholars and judges accepted the realist argument that unelected officials do engage in lawmaking, but they suggested that such lawmaking had some direction from democratic sources. "Legislation has an aim," asserted Justice Felix Frankfurter. "[I]t seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government." Therefore, added Professor Harry Willmer Jones, "[t]he 'law' of a statute is not complete when the legislative stamp has been put upon it; subsequent judicial decisions add meaning.


My assertion about the dramatic break in the literature is based in part on the dramatic surge in articles with strikingly similar arguments in or around 1940 and in part on the different emphasis in these articles. Compare, for example, de Slovoère's 1940 article emphasizing legislative purpose, see de Slovoère, Extrinsic Aids, supra, at 532-33, with his earlier work emphasizing imaginative reconstruction, Frederick J. de Slovoère, Preliminary Questions in Statutory Interpretation, 9 N.Y.U. L.Q. Rev. 407, 411-16 (1932). A way-station article is Frederick J. de Slovoère, The Equity and Reason of a Statute, 21 CORNELL L.Q. 591, 598 (1936), which advocates the Golden Rule, that statutes should be interpreted reasonably.

46. See, e.g., United States v. Whitridge, 197 U.S. 135, 143 (1905) (Holmes, J., for the Court) ("[W]e cannot forget that . . . the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.").

47. Frankfurter, supra note 45, at 538-39. Even arch-realist Max Radin accommodated the new consensus in a 1942 article, which argued that a statute is a "ground design," an "instruction to administrators and courts to accomplish a definite result, usually the securing or maintaining of recognized social, political, or economic values." Radin, supra note 45, at 407.
and effect to the statutory direction.” Such subsequent lawmaking would be guided by “the principle that in determining the effect of statutes in doubtful cases judges should decide in such a way as to advance the objectives which, in their judgment, the legislature sought to attain by enactment of the legislation.” By tying statutory interpretation to legislative purpose, these thinkers established a link to democratic theory. They argued further that this link contributed to the rule of law, because ascertaining legislative purpose could be determined easily by examining the statute’s legislative history.

Remarkably, at the same time that the academic consensus was forming against the plain-meaning rule and in favor of interpreting statutes to fulfill their purposes, the New Deal Court was filling the U.S. Reports with the fruits of that consensus. Writing for the Court in 1940, Justice Stanley Reed (who had been Solicitor General during the early New Deal era) explained in *United States v. American Trucking Associations, Inc.*:

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. . . . In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one “plainly at variance with the policy of the legislation as a whole” this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no “rule of law” which forbids its use, however clear the words may appear on “superficial examination.”

The purposive spirit of Justice Reed’s opinion in *American Trucking* was followed for a generation by the Supreme Court.

Justice Foster’s opinion in *The Case of the Speluncean Explorers* deploys the purpose-of-the-statute theory in several interesting and important ways. Foster introduces the purpose rule with a neat rhetorical appeal to history and tradition:

48. Jones, Extricinis Aids, supra note 45, at 761; see Frank, supra note 31, at 1270 (arguing that legislatures must delegate filling in statutory meaning to courts and agencies).
49. Jones, Extricinis Aids, supra note 45, at 757; see Frankfurter, supra note 45, at 538-39; Radin, supra note 45, at 399.
50. “By reference to extrinsic aids it is usually possible . . . to discover . . . the purposes or objectives which the enacting legislators, or some of them, sought to achieve by enactment of the legislation.” Jones, Extricinis Aids, supra note 45, at 756-57; see de Slooivre, Extricinis Aids, supra note 45, at 540 (arguing that the study of legislative history by the interpreter creates a “comprehensive and detailed . . . contextual setting” that protects against idiosynratic interpretations by judges); Radin, supra note 45, at 410-11. Indeed, “the purpose or policy embodied in a statute[] is more often discoverable than is an understanding of legislators as to technical meaning or specific application.” Jones, Extricinis Aids, supra note 45, at 761.
51. 310 U.S. 534, 543-44 (1940) (footnotes omitted).
Now it is, of course, perfectly clear that these men did an act that violates the literal wording of the statute which declares that he who "shall willfully take the life of another" is a murderer. But one of the most ancient bits of legal wisdom is the saying that a man may break the letter of the law without breaking the law itself. Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose. This is a truth so elementary that it is hardly necessary to explicate on it.\textsuperscript{53}

For this "truth so elementary," Foster cites (fictional) cases in which the court followed such an antiliteralist approach, and readers in 1949 could have substituted \textit{American Trucking} and other chestnuts that had been publicized by academics in the 1930s.\textsuperscript{54} Most tellingly, Foster invokes the established exception for self-defense: No matter how broadly a murder statute is phrased, wouldn't a court infer a self-defense exception?\textsuperscript{55} Such an exception is lawful and not merely equitable, he argues, because it is the interpretation supported by the deterrent purpose of a criminal statute.\textsuperscript{56}

Foster is aware of the then-familiar charge of Lochnerism, for Keen specifically maintains that Foster's purposivist interpretation is nothing more than judicial "revision" of a statute and a "specious" approach to statutes, both of which are inconsistent with legislative supremacy\textsuperscript{57} and its corollary "obligation of the judiciary to enforce faithfully the written law."\textsuperscript{58} Not only does Foster deny the charge, but he responds that his approach, not Keen's, best reflects "fidelity to enacted law" and the role of the judiciary as agents of the legislature:

No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told "to peel the soup and skim the potatoes" her mistress does not mean what she says. She also knows that when her master tells her to "drop everything and come running" he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence from the judiciary. The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.\textsuperscript{59}

\textsuperscript{53} Fuller, \textit{supra} note 1, at 623-24 (opinion of Foster, J.) (emphasis added).
\textsuperscript{54} The main cite was Heydon's Case, 76 Eng. Rep. 637, 638 (Ex. 1584), which urged courts to interpret statutes in a way "as shall suppress the mischief, and advance the remedy" sought by the statute.
\textsuperscript{55} Fuller, \textit{supra} note 1, at 624-25 (opinion of Foster, J.).
\textsuperscript{56} \textit{Id.} at 625.
\textsuperscript{57} \textit{Id.} at 634 (opinion of Keen, J.).
\textsuperscript{58} \textit{Id.} at 633.
\textsuperscript{59} \textit{Id.} at 625-26 (opinion of Foster, J.). Thus, Foster's explanation implies that the
The most important contribution of Foster's opinion extends beyond these specific arguments and reposes in the interplay of his two grounds for decision. Foster asserts that the second ground for decision (interpret the law to fulfill its rational purpose) is independent of the first (the rule of law lapsed when the explorers became trapped in the cave), but the two are related insofar as they share a common theory of state legitimacy. Just as the second ground insists that laws be interpreted with reference to statutory purpose, the first ground insists that law is purposive generally. Recall Foster's observation that law is "directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common."60 Foster makes the point more clearly a page later: "The powers of government can only be justified morally on the ground that these are powers that reasonable men would agree upon and accept if they were faced with the necessity of constructing anew some order to make their life in common possible."61 It is this view of the state as an organism of cooperation in Foster's first ground for decision that validates the normative assertion in the second ground that statutes must be interpreted in accord with their purposes.

This normative insight in Foster's opinion provided scholars in the emerging legal process school with a political theory by which to rethink statutory interpretation. In the 1950s, Fuller's colleagues at the Harvard Law School, Professors Henry Hart and Albert Sacks, dilated the theoretical structure of Foster's opinion into more than 1,400 pages of materials on what they called "The Legal Process."62 Following the views of Foster's opinion, Hart and Sacks' intellectual starting point was the interconnectedness of human beings and the utility of law in helping us coexist together peacefully. "Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living," they asserted.63 Because the legitimacy of law rests upon its purposiveness and not upon abstract social contract principles, Hart and Sacks further maintained that "[e]very statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible."64

Hart and Sacks emphasized that the process of lawmaking hardly ends with the enactment of a statute and that law is a process of

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60. Fuller, supra note 1, at 621 (opinion of Foster, J).
61. Id. at 622. Compare this with the "veil of ignorance" articulation of the social contract in John Rawls, A Theory of Justice 136-42 (1971).
63. Id. at 217.
64. Id. at 1156; see also id. at 1414-15; Robert Weisberg, The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 Stan. L. Rev. 213, 214 (1983).
reasoned elaboration of purposive statutes by courts and agencies.\footnote{Hart & Sacks, supra note 62, at 162-68.} Following not only Foster's opinion but also the leading statutory scholars of the 1940s,\footnote{See supra note 45.} Hart and Sacks reasoned that, because "every statute . . . has some kind of purpose or objective,"\footnote{Hart & Sacks, supra note 62, at 166.} ambiguities can be intelligently resolved, first, by identifying that purpose and the policy or principle it embodies, and then by deducing the result most consonant with that principle or policy.\footnote{Id. at 166-67; see id. at 1148-79, 1200 (describing purposive interpretation in greater detail and contrasting it with the plain-meaning rule).} Hart and Sacks not only rejected the plain-meaning rule in favor of a rule of reasonable interpretation but rejected imaginative reconstruction as well.\footnote{"The internal legislative history of the measure . . . may be examined," they declared, but only "for the light it throws on general purpose. Evidence of specific intention with respect to particular applications is competent only to the extent that the particular applications illuminate the general purpose and are consistent with other evidence of it." Id. at 1415-16. Thus, Hart and Sacks warmly endorsed as their exemplar Johnson v. Southern Pac. Co., 196 U.S. 1 (1904), which used legislative history to figure out general purpose. Hart & Sacks, supra note 62, at 1165-74, 1180-86, 1200. Jones had similarly flagged this case as an exemplar. Jones, Extrinsic Aids, supra note 45, at 759. Moreover, Jones and virtually all his colleagues from the 1930s had revived interest in Heydon's Case, the leading English case for purposive interpretation. See id. at 757; see also de Sloovere, Extrinsic Aids, supra note 45, at 546 & n.103; Radin, supra note 45, at 388-89.}

The legal process theory of purposive statutory interpretation was an intellectually robust legacy of the New Deal and World War II. Under such a theory, statutory interpretation could be both dynamic and legitimate, equitable as well as lawlike. Although Fuller's precise influence on Hart and Sacks (his faculty colleagues after 1940) is unknowable to us today, it is clear that the primary analytical devices in legal process's theory of interpretation were precisely anticipated by Justice Foster's opinion in The Case of the Speluncean Explorers. For this reason alone, Fuller's fictional exercise must be counted as one of the important jurisprudential documents in this century.

III. The Case of the Speluncean Explorers and Problems with the Legal Process Synthesis, 1958-Present

As the creator of Speluncean Justice Foster, Lon Fuller was a parent of legal process theory. What may be even more interesting, however, is the way in which Fuller was also legal process's most perceptive critic, nine years before the Hart and Sacks materials assumed their final form and decades before serious attacks on the theory were launched by the next generation of scholars. Recall
that no one in *The Case of the Speluncean Explorers* joins Foster's opinion and that the explorers' conviction is affirmed. More significantly, all the other opinions attack the aspirational vision in Foster's work. True to his academic integrity, Fuller made sure that the attacks have bite, so much so that they generally anticipated the next generation's criticisms of purposive theory. Consider the main lines of attack on Foster's approach:

1. **Because Purpose Is Fictional, Interpretation Becomes Judicial Lawmaking.** No one else on the Newgarth Supreme Court accepts Justice Foster's argument that purposive interpretation is not judicial lawmaking, and Justices Tatting and Keen appear to refute it altogether. Tatting (the Justice too conflicted to cast a vote) finds Foster's purpose-of-the statute argument appealing but ultimately unpersuasive, in part because the criminal law has several purposes other than to deter wrongdoing. These other purposes include retribution and rehabilitation, both of which would be served by punishing cannibals, even cannibals acting under conditions of necessity. Tatting further wonders whether deterrence is really a serious purpose of criminal laws, when so many of their sanctions seem unrelated to any plausible deterrence. "Assuming that we must interpret a statute in the light of its purpose, what are we to do when it has many purposes or when its purposes are disputed?"

Finally, Tatting questions whether even the deterrent purpose of the criminal law would not be subserved by convicting the explorers. "The stigma of the word 'murderer' is such that it is quite likely, I believe, that if these men had known that their act was deemed by the law to be murder they would have waited for a few days at least before carrying out their plan." Tatting might have observed that the explorers could have cannibalized the first of their numbers to have died, and that they might have chosen that strategy had they better internalized society's prohibition of murder. In some circumstances, waiting a few days could mean the difference between life and death.

Tatting's opinion suggests that purposivist statutory interpretation is no more determinate or objective than the approaches (plain meaning and imaginative reconstruction) criticized by the legal realists. Although one advantage of grounding statutory interpretation on legislative purpose is that general purpose is more easily determinable than specific intent, a corresponding disadvantage is that purpose is too easy to determine, yielding a plethora of purposes, cross-cutting purposes, and purposes set at such a general level that

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70. Fuller, *supra* note 1, at 645.
71. *Id.* at 628-29 (opinion of Tatting, J.).
72. *Id.* at 628.
73. *Id.* at 629-30. Tatting cites *Commonwealth v. Vajean*, in which the hypothetical Court upheld the conviction of a man for stealing a loaf of bread for his family. *Id.* at 629. In today's America, the willingness of the state to execute convicted criminals, notwithstanding unimpressive evidence of deterrent effects, is testimony to this point.
74. *Id.* at 628-29.
75. *Id.* at 630.
they could support several different interpretations. Purposive statutory interpretation, therefore, might be even less determinate than more traditional approaches. This has been a standard criticism of legal process interpretation, and newly appointed Justice Paul makes this criticism of all the "general" approaches presented by the prior Justices.

Justice Keen presses this criticism more deeply when he observes that "not one statute in a hundred has any such single purpose, and ... the objectives of nearly every statute are differently interpreted by the different classes of its sponsors." Although Keen does not develop this criticism in detail, subsequent legal scholars and judges have done so, based upon theories of the political process such as public choice theory. The criticism suggests that legislators often support statutes for nothing more than self-serving political pressures and that statutes might have no overall public-regarding purpose at all. Even if legislators had purposes, the legislature probably does not, and the process of statutory enactment undermines any coherent purpose the proposed statute might at one point have had. The process by which statutes are enacted is one of coalition-building, compromise, and sometimes deceit. Different groups and interests supporting enactment of a statute might have very different ideas about what the statute is attempting to do, and this heterogeneity might be encouraged by the sponsors themselves. In short, inquiries based upon legislative purpose may be worse than indeterminate; they may be incoherent or analytically impossible.

If that is so, Foster's theory of interpreting statutes to carry out their purposes is judicial lawmaking, a concession discreetly made by Hart and Sacks. Lawmaking by unelected officials requires justification under traditional theories of democracy. Neither Foster

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76. See United Steelworkers v. Weber, 443 U.S. 193, 219-22 (1979) (Rehnquist, J., dissenting) (arguing that the majority's purposivist interpretation was "reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini"); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1545-46 (1987) (arguing that "the Hart and Sacks 'gambit' has more often than not been used to the Court's discredit, having contributed to sloppy opinions.").


78. Fuller, supra note 1, at 634 (opinion of Keen, J.).


80. Hart and Sacks speak of "what purpose ought to be attributed to a statute." Hart & Sacks, supra note 62, at 1157. In attributing purpose, they suggest that a court "should not do this in the mood of a cynical political observer, taking account of ... short-run currents of political expedience that swirl around any legislative session." Id. at 1414.
nor his intellectual heirs, Hart and Sacks, provided such justification. This theoretical gap has left legal process theory vulnerable to critique from both the left and the right. Both wings of the critique are anticipated by opinions in The Case of the Speluncean Explorers.

2. Judicial Lawmaking Is Questionable for Reasons of Democratic Theory and Institutional Competence. Justice Keen’s opinion in The Case of the Speluncean Explorers lays out the primary objection to judicial revision of statutes: It is inconsistent with “the supremacy of the legislative branch of our government.”

Subsequent legal process work has built on this “counter-majoritarian difficulty” as the key problem with activist statutory interpretations by courts. Indeed, the issue of legislative supremacy is a primary litmus test that divides “liberal” process thinkers from more “conservative” ones. The former are more likely than the latter to update statutes to reflect changed circumstances, to interpret a statute to effectuate a reasonable purpose notwithstanding a contrary plain meaning, and to read a statute to avoid inequities and not just absurd results.

Justice Keen invokes both rule-of-law and democratic values in defending the primacy of legislative supremacy. His initial defense emphasizes rule-of-law values and tradition:

I am not concerned with the question whether the principle that forbids the judicial revision of statutes is right or wrong, desirable or undesirable; I observe merely that this principle has become a tacit premise underlying the whole of the legal and governmental order I am sworn to administer.

Yet he also hints that a polity’s failure to follow a “clear-cut principle” of governmental ordering can have calamitous consequences:

There was a time in this Commonwealth when judges did in fact

81. Fuller, supra note 1, at 633 (opinion of Keen, J.).
82. The term is taken from ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962), a conservative legal process work that focuses on constitutional as well as statutory issues.
83. For examples of this approach, see RONALD DWORKIN, LAW’S EMPIRE ch. 4 (1986), JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4 (1980), CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990), and Eskridge, supra note 59, at 320-21.
85. Compare the separate concurring and dissenting opinions of Justices Brennan and Scalia in K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988). Justice Brennan argued that “[m]anifestly, ... legislators ... viewed trademark ownership differently than we view it today” and that “[a]ny prescient legislator ... would almost certainly have concluded” that the interpretation of Justice Brennan was the correct one. Id. at 315 (Brennan, J., concurring in part and dissenting in part). Justice Scalia chided Justice Brennan for “asserting that we have the power—indeed the obligation, lest we commit a ‘stolid anachronism’—to decline to apply a statute to a situation that its language concededly covers ... I confess never to have heard of such a theory of statutory interpretation.” Id. at 324-25 (Scalia, J., concurring in part and dissenting in part).
86. Fuller, supra note 1, at 633-34 (opinion of Keen, J.).
87. Id. at 633.

legislate very freely, and all of us know that during that period
some of our statutes were rather thoroughly made over by the ju-
diciary. That was a time when the accepted principles of political
science did not designate with any certainty the rank and function
of various arms of the state. We all know the tragic issue of that
uncertainty in the brief civil war that arose out of the conflict be-
tween the judiciary, on the one hand, and the executive and the
legislature, on the other. 88

Although no one (these days) asserts that the republic will end if
judges revise statutes, a Keen-like formalism grounded upon the
concept of legislative supremacy has proven to be an enduring
theme of conservative legal process attacks on purposive or creative
statutory interpretations as politically illegitimate. 89

At the end of his opinion, Justice Keen provides a functional,
democratic justification for text-centered statutory interpretation
that ignores the equities:

Now I know that the line of reasoning I have developed in this
opinion will not be acceptable to those who look only to the im-
mediate effects of a decision and ignore the long-run implications
of an assumption by the judiciary of a power of dispensation. A
hard decision is never a popular decision. . . . But I believe that
judicial dispensation does more harm in the long run than hard
decisions. Hard cases may even have a certain moral value by
bringing home to the people their own responsibilities toward the
law that is ultimately their creation, and by reminding them that
there is no principle of personal grace that can relieve the mis-
takes of their representatives.

Indeed, I will go farther and say that not only are the principles
I have been expounding those which are soundest for our present
conditions, but that we would have inherited a better legal system
from our forefathers if those principles had been observed from
the beginning. For example, with respect to the excuse of self-
defense, if our courts had stood steadfast on the language of the
statute the result would undoubtedly have been a legislative revi-
sion of it. Such a revision would have drawn on the assistance of
natural philosophers and psychologists, and the resulting regula-
tion of the matter would have had an understandable and rational
basis, instead of the hodgepodge of verbalisms and metaphysical
distinctions that have emerged from the judicial and professorial
treatment. 90

88. Id.
89. For examples of the revival of formalism in statutory interpretation, see MARTIN
H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND
AMERICAN POLITICAL THEORY ch. 2 (1991), Frank H. Easterbrook, The Role of Original
note 84, at 294-306, Mal tz, supra note 84, at 773-82, and Thomas W. Merrill, The Common
90. Fuller, supra note 1, at 636-37 (opinion of Keen, J.).
Keen's analysis rests upon a theory of comparative institutional competence in a democracy: Courts are not institutionally as competent as legislatures to create whole new policy regimes. If courts insist on performing that gap-filling function, they will discourage the legislature from doing so, which is not only undemocratic but is also bad policy.

This line of argument has been a recurring theme of conservative process theory and has been of particular interest to Justice Scalia on our current Court. Like Keen, Scalia invokes both formalist and functional reasons for a plain-meaning approach to statutory interpretation. Thus, Scalia and his legal process allies invoke tradition and constitutional structures to insist upon a textualist approach to reading statutes. They argue, moreover, that statutory interpretation should not aspire to reach results that are good ex post but should instead subserve ex ante goals, such as providing Congress with "clear interpretive rules" so that it can know the effect of language it adopts. This approach, they argue, stimulates Congress and not the courts to make important policy decisions. "I think we have an obligation to conduct our exegesis in a fashion which fosters the democratic process" embedded in the Constitution, Scalia has said. Though there is much to be said for his insistence that elected representatives and not unelected judges update statutes, Scalia's argument is subject to newly appointed Justice Miller's response that the democratic process can foster itself, and that the democratic process has delegated the lawmaking responsibilities to courts and agencies—and the duty to do justice ex post—when it enacts broad statutes.

A final line of conservative legal process thought is anticipated by the opinion of Chief Justice Truepenny. After stating the facts, the Chief Justice announces that he will follow the plain meaning of the statute and vote to affirm the convictions. He accommodates the equitable concerns in the case somewhat differently than Justice

91. These are described in William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 640-56 (1990).
93. See Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment) ("Although I believe the Court's result is quite sensible, I cannot go along with the unhealthy process of amending the statute by judicial interpretation.").
94. Finley v. United States, 490 U.S. 545, 556 (1989) (Scalia, J., for the Court) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").
96. Id. at 346; see Public Citizen, 491 U.S. at 473 (Kennedy, J., concurring in the judgment) ("It does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.").
97. For arguments pro and con, see William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991).
99. Fuller, supra note 1, at 619 (opinion of Truepenny, C.J.).
Keen does. At the end of his opinion, the Chief Justice invokes "the principle of executive clemency" as the most legitimate way "to mitigate the rigors of the law" and urges the Chief Executive to ameliorate the defendants' punishment.100

The Chief Justice's opinion is something of a lark in Fuller's exercise, but it does have a serious point that has become a pillar of conservative process theory: the principle of institutional settlement. Hart and Sacks made this principle a centerpiece of their legal process materials. Because law must be dynamic and adaptive and because the exact direction of the change is unpredictable, it is more important for a polity to agree on the procedures and institutional roles for making such changes than it is for the polity to map out the substantive rules themselves.101 Exactly what these institutional roles ought to be has become an important battleground in process theory. Echoing Truepenny and Keen, conservative process theorists and judges argue for very little law-updating by the judiciary and for law-changing by organs more connected with the political process (particularly the Executive Branch).102 Echoing Foster and Handy, liberal process theorists and judges argue for more law-updating by the judiciary and against excessive reliance on legislative and executive organs.103

3. Judicial Lawmaking Is Questionable on Grounds of Elitism. Although Keen's opinion is a rather complete statement of conservative objections to purposivist interpretation, Handy's opinion suggests just an outline of subsequent progressive objections to purposivist interpretation. Handy's main objection, made against both Keen and Foster, is that their opinions rest upon legalisms and abstractions, both of which deflect attention from the "human realities" of the case.104 His philosophy is stated at the outset:

100. Id. This recommendation is bitterly denounced by Justice Keen, who believes that the defendants should be pardoned but does not think it appropriate for the Court to instruct the Chief Executive. Id at 632 (opinion of Keen, J.). Justice Handy reveals secret evidence that the Chief Executive is not inclined to grant clemency and then shows how all the Justices are bending their judicial roles in transparent efforts to sway the Executive. Id. at 642-43 (opinion of Handy, J.).

101. HART & SACKS, supra note 62, at 3-4 ("[I]nstitutionalized procedures . . . are obviously more fundamental than the substantive arrangements in the structure of a society . . . since they are at once the source of the substantive arrangements and the indisputable means of making them work effectively.").


104. Fuller, supra note 1, at 637-38 (opinion of Handy, J.).
Government is a human affair, and . . . men are ruled, not by words on paper or by abstract theories, but by other men. They are ruled well when their rulers understand the feelings and conceptions of the masses. They are ruled badly when that understanding is lacking.

Of all branches of government, the judiciary is the most likely to lose its contact with the common man.\textsuperscript{105} Handy's charge is elitism. The legitimacy of government rests upon how well it serves "We the People." A danger of any kind of judge-made legalism is that it is alienated from popular needs. Handy's theme has surfaced in the work of progressive republican scholars who urge popular, political engagement rather than judicial surrogacy as the aspiration for progressive legal work.\textsuperscript{106}

Handy's charge can be broadened and even turned against its author, who is after all a judge who must by his own admission be "most likely to lose . . . contact with the common man."\textsuperscript{107} Although he lamely tries to escape the charge by appealing to public sentiment in his opinion,\textsuperscript{108} Handy is just as unelected and unaccountable as his brethren and more arrogant in asserting the rightness of his own views. Indeed, Handy's willingness to rest private rights on public opinion reveals him to be a less sympathetic figure in that respect. This willingness reveals an ironic and final line of progressive critique of legal-process statutory interpretation.

The image of the Commonwealth of Newgarth that emerges from the five opinions, including Handy's, is one of a false homogeneity.\textsuperscript{109} The world of The Case of the Speluncean Explorers and of its Justices—and Lon Fuller's world—presents itself as a world in which the only actors who matter are male,\textsuperscript{110} white,\textsuperscript{111} affluent,\textsuperscript{112} and...

\begin{thebibliography}{10}
\addcontentsline{toc}{section}{References}
\bibitem{105} Id. at 638.
\bibitem{107} Fuller, \textit{supra} note 1, at 638 (opinion of Handy, J.).
\bibitem{108} I say "lamely," because Handy is interpreting a "text," just as Keen and Foster are. His text is "a poll of public opinion," id. at 639, which is just as subject to interpretation and manipulation as statutory text and purpose.
\bibitem{110} The Justices advert to the views of their "brothers" throughout. \textit{E.g.}, Fuller, \textit{supra} note 1, at 627-31 (Tatting's constant reference to "my brother" Foster); id. at 633 (Keen's reference to the other Justices as "my brothers"); id. at 633-37 (Keen's constant reference to "my brother Foster" and "my brother Tatting"); id. at 638 (Handy's reference to the other Justices as "my brothers"); id. at 642-43 (Handy's reference to the Chief Justice's flapping "his judicial robes" and to "my legalistic brother Keen"). It appears from the opinions that the explorers were themselves all men. \textit{See, e.g.}, id. at 616 (referring to the explorers as "the men"); id. at 642 (referring to the explorers as "these men"). The Chief Executive is characterized as "a man now well advanced in years." \textit{Id.} at 642. Even the jury was headed by a "foreman." \textit{Id.} at 644.
\bibitem{111} There is no explicit clue of any sort as 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.
\bibitem{112} 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, once their plight is discovered, the state goes to great lengths to...

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heterosexual.\textsuperscript{113} Unless Newgarth is vastly different from America of 1949, that image is false, for half the real people are women, a majority are not affluent, and many are not white or heterosexual. These people (a majority) are not only ignored (as in the opinions) but are also segregated—confined to the kitchen, the other side of the tracks, the closet—in ways that Handy’s “popular opinion” approves. The same public opinion that supported Handy’s willingness to overturn the convictions of the Speluncean Explorers would, in 1949, have supported racial apartheid, unequal job opportunities for women, and aversion therapy for lesbians, gay men, and bisexuals.

A similar criticism can be made of purpose-based statutory interpretation. Notwithstanding Handy’s own elitism, his suggestion that legal process’s purposive interpretation threatens to alienate government from the people and obscure their underlying problems is a criticism that has gained force over time, especially from progressive communities. Focusing on solving the problems arising out of people’s coexistence in the melting pot of the 1950s, legal-process theory seems to assume a cultural homogeneity that was more apparent in the 1940s and 1950s than it is today, in an era of emerging multiculturalism.\textsuperscript{114} Multicultural approaches to statutory interpretation would depart from legal-process theory in a number of ways, as revealed by several of the opinions penned by newly appointed Justices.

Feminist theory (represented in this reconsideration by Justices Cahn, Coombs, and Stein) is critical of the distance placed by the original Justices between the case’s social context and the Justices’ reasoning and grand theorizing. This critique affects one’s approach to the case in several ways. One is that feminist theorists tend to be more interested in the “effect of [the Justices’] decisions on distributions of power among groups in our society,” especially

\textsuperscript{113} In 1949, just after the first Kinsey Report was published, most people were not aware of, or were unwilling to admit, the existence of “homosexuals.”


Moreover, The Case of the Speluncean Explorers—like virtually all the cases and examples in the Hart and Sacks materials nine years later, see supra note 62 and accompanying text—derives its interest from posing a conflict between two issues on which there is cultural consensus. Here, murder is bad, but survival is good.
gender-based distributions. The jurists appointed for this Symposium explore various cross-cutting implications for battered women who kill their batterers, abusive male lovers, and future Spelunceans. Relatedly, feminist theory tends to be empathetic, viewing the situation at least in part from the perspective of the people being judged. It is significant that none of the feminist judges is willing to condemn the Speluncean defendants to death. Finally, it is significant that all three jurists “resist the question” insisted upon by the original Justices. The feminist jurists approach the case from an angle different from the original Justices, and their approach yields an interesting array of resolutions: Justice Cahn would remand for a more complete development of the facts of the case; Justice Coombs would remand for a jury trial; and Justice Stein would reverse outright because the explorers acted only after the authorities refused to advise them on how to cope with their dilemma.

Critical race theory (represented by Justices Calmore and Greene) is in this case more sharply critical, even angry. Like feminism, race theory is aware of patterns of subordination that pervaded Lon Fuller’s America. Unlike most theories of feminism, however, critical race theory directly attacks the assumed legitimacy of American democracy. For example, Justice Calmore’s opinion is an extended indictment of the racist foundations of American culture. Justice Greene seems to agree with most of this indictment, for he accuses the acquitting Justices—implicitly including the feminist justices—of showing an unwarranted sympathy to the “privileged” defendants in this case, in stark contrast to the unsympathetic treatment accorded defendant Valjean for stealing bread to feed his family. The broader critique of his and Calmore’s opinions is that race and poverty differences are not only pervasive in America, but that elite legal culture enforces these differences in draconian

118. Cahn, supra note 116, at 1756 (opinion of Cahn, J.).
119. Id. at 1761-63 (contrasting the “ethic of justice” with the “ethic of care”).
120. Id. at 1763.
122. Stein, supra note 115, at 1809-11 (opinion of Stein, J.).
123. See Peller, supra note 109, at 561-66.
124. The feminist Justices in this reconsideration rely more on “cultural” or “liberal” feminist theories, see Cahn, supra note 116, at 1756-57 (opinion of Cahn, J.), than on “radical” feminist theories, such as CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1990).
practice (*Valjean* as racism) while ignoring the differences doctrinally (*Speluncean Explorers* as unconscious racism).

I believe this Symposium on *The Case of the Speluncean Explorers* is most valuable, not just as an occasion to praise Lon Fuller, or to rehash Hart and Sacks and their critics, but as a challenge to feminist and critical race theorists to apply their experiences and insights to statutory interpretation, and not just to issues of jurisprudence or constitutional law.