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Newgarth Revisited: Mrs. Robinson's Case

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Sanders: Newgarth Revisited: Mrs. Robinson's Case
**NEWGARTH REVISITED:
MRS. ROBINSON'S CASE**

ALEXANDER M. SANDERS, JR.**

*We see the Judges look big, look like Lions,
but we do not see who moves them.****

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* "God bless you, please, Mrs. Robinson We'd like to know a little bit about you for our files." PAUL SIMON, "Mrs. Robinson", in *THE SONGS OF PAUL SIMON* 126-27 (1972).

** Formerly Chief Judge of the South Carolina Court of Appeals, Adjunct Professor of Law at the University of South Carolina, member of the clinical faculty at the Harvard Law School, and currently President of the College of Charleston. My gratitude runs in several directions: First, to my professors at the University of Virginia Graduate Program for Judges, especially Professor Thomas F. Bergin; my thesis advisor, Professor Calvin Woodard, who taught me jurisprudence; and Professor Robert E. Scott, who taught me contemporary legal thought. Second, to Professor Charles H. Randall, Jr., who taught me evidence thirty years ago and who loaned me the notes he took when he was a student of Professor Lon L. Fuller ten years before that. Third, to Professor Rufus G. Fellers, who calculated for me how long it would take to stop a train traveling at the speed of sound. Fourth, to Patti Goff, my secretary; Deborah Neese, Joyce Cheeks, Deborah Davis, and Rebecca Fulmer, my former law clerks; Betsy Williams, research librarian at the College of Charleston; and Casey Fields, College of Charleston student and proofreader *par excellence*. And fifth, to my personal lawyer, Zoe Sanders Nettles. While a student at the University of South Carolina Law School, she led me to the "law of the wild tiger." See *infra* note 87. These people are largely responsible for my being able to write this paper. They are, of course, exclusively responsible for any errors it may contain.

In the preface to his book, *Six Great Ideas*, Mortimer Adler said: "It is with the kind of piety that Confucius thought should be accorded our ancestors for their contribution to our being that I look upon the sources of this book." MORTIMER J. ADLER, *SIX GREAT IDEAS* ix (1981). This is precisely how I look upon the legal philosophers and legal historians, and the lawyers and judges, who are the sources of this paper.

*** JOHN SELDEN, *TABLE TALK* 59 (Edward Arber ed., Westminster, A. Constable and Co. 1895).

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I. INTRODUCTION

*The reader . . . who seeks to trace out contemporary resemblances where none is intended or contemplated, should be warned that he is engaged in a frolic of his own, which may possibly lead him to miss whatever modest truths are contained in the opinions delivered by the Supreme Court of Newgarth.*¹

Exactly forty-nine years ago, Harvard Professor of Jurisprudence Lon L. Fuller wrote a classic law review article, *The Case of the Speluncean Explorers*.² He cast his article in the form of an opinion, or rather a series of opinions, by the judges of a mythical appellate court, the Supreme Court of Newgarth. The Court, as wildly diverse as the Serengeti migration, decided the case in the farflung-future, the year 4300.³ The opinions of the various judges illustrate, most vividly, the eternal problems of those of us who engage in what the English barrister, John Mortimer, calls "the coarse trade of sitting in judgment on our fellow men and women."⁴ Although Professor Fuller denies his article is intended as a work of satire, sensitive readers, particularly if they happen to be appellate judges, may detect whiffs of satire, as well as parody, throughout.⁵ Professor Fuller also denies his article is a prediction of the future. Whether that is true, of course, remains to be seen.

This paper is modeled on the article by Professor Fuller.⁶ While the

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

2. Fuller, *supra* note 1.

3. The centuries between now and the year 4300 are roughly equivalent in time to those that have elapsed since the Age of Pericles. See 1 JOHN P. MCKAY ET AL., A HISTORY OF WESTERN SOCIETY 81 (3d ed. 1987).

4. JOHN MORTIMER, CLINGING TO THE WRECKAGE: A PART OF LIFE 159 (1982); see also JOHN G. WHITTIER, *Maud Muller*, in THE PANORAMA, AND OTHER POEMS 127, 130 (1856) (describing the life of a judge as the "doubtful balance of rights and wrongs," and "lawyers with endless tongues").

5. Ernest Hemingway said, "The step up from writing parodies is writing on the wall above the urinal." David Streitfeld, *Book Report: How the Other Half Lives*, WASH. POST, July 9, 1989, at 15.

6. This is not the first time Newgarth has been revisited. See Anthony D'Amato, *The*

hypothetical cases are entirely different, much of the analysis engaged in by the judges is the same. I freely acknowledge, but do not apologize for, this fact. Most legal writings, particularly the briefs of lawyers and the opinions of appellate courts, bear the fingerprints of plagiarists.⁷ After all, it is hardly possible for anyone to convince a court of anything unless the person can first convince the court that someone else has already said it. Courts term this sort of institutionalized nostalgia, quaintly enough, *stare decisis*.⁸ Moreover, the problems illuminated by Professor Fuller surely bear re-examination every forty years or so. As he himself observed, these problems "are among the permanent problems of the human race."⁹

Professor Fuller later revealed two other cases decided by the Supreme Court of Newgarth.¹⁰ The cases he revealed, and the cases cited within those cases, are the only known cases decided by the Newgarth Court. Therefore, most of the authorities cited here are necessarily of more current vintage. The cases cited in the notes often stand for diametrically opposed principles of law. Thoughtful readers may find irony in the fact that many

Speluncean Explorers—Further Proceedings, 32 STAN. L. REV. 467 (1980) (imagining a scenario in which the Chief Executive of Newgarth constituted a Special Commission of law professors to review a question involving executive clemency); J.B. Ruhl, *The Case of the Speluncean Polluters: Six Themes of Environmental Law, Policy, and Ethics* 27 ENVTL. L. 343 (1997) (discussing six environmental reform approaches to resource use in the year 4310 when "placidium" reserves have been exhausted); Naomi R. Cahn et al., *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754 (1993) (applying current jurisprudential thought to the question of whether the Newgarth explorers committed murder).

7. See RUDYARD KIPLING, *When 'Omer Smote 'Is Bloomin' Lyre*, in T.S. ELIOT, A CHOICE OF KIPLING'S VERSE 146 (1941) ("When 'Omer smote 'is bloomin' lyre, / He'd 'eard men sing by land an' sea; / An' what he thought 'e might require, / 'E went an' took—the same as me!"); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) ("There is no such thing as a wholly original thought or invention. Each advance stands on building blocks fashioned by prior thinkers.").

8. Holmes thought precedent could be a burden upon justice. Reviewing a year's decisions of the Iowa Supreme Court, Holmes burst into philosophy and paradox: the Iowa court, unencumbered by tradition, had been able to arrive at sensible results more in accord with modern times than the decisions of more learned judges: "No branch of knowledge affords more instances than the law, of what a blessing to mankind it is that men begin life ignorant."

SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 119 (1989) (quoting Oliver Wendell Holmes). Holmes later stated that "judges' ignorance is a source of variation in the law that allows it to evolve." *Id.* at 425 n.23. Jefferson thought it was wrong for one generation to be bound by the laws of another. See Letter from Jefferson to Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 396 (1958).

9. Fuller, *supra* note 1, at 645.

10. See LON L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* (temp. ed. 1949) (revealing *The Case of the Interrupted Whambler* and *The Case of the Contract Signed on Book Day*).

of them were decided by a single court, the South Carolina Court of Appeals. They may find even greater irony in that the conflicting views often were expressed by a single judge, the author of this paper.

The Commonwealth of Newgarth, like the Commonwealth of Massachusetts, purports to have "a government of laws and not of men."¹¹ Brief biographical data on the various judges is, nevertheless, included for skeptical readers who may doubt this claim.

Three of the judges, Chief Justice Straight and Justices Emerson and Caduceus, the first three in seniority, were appointed to the bench for life. After they were appointed, the law of Newgarth was changed to provide for the popular election of judges. Justices Adams and Christian were subsequently elected for four-year terms. Justice Christian will face re-election soon.

Chief Justice Straight graduated from a law school similar to the Harvard Law School of the years following World War II. Justice Emerson received his legal education at a law school similar to the Yale Law School of the same period. The two schools were contrasted in an article published in *The New York Times*:

Yale doesn't teach you any law, Harvard teaches you nothing but; Yale turns out socially conscious policy-makers; Harvard turns out narrow legal technicians; Yale thinks that judges invent the law, Harvard thinks that judges discover the law; Yale is preoccupied with social values, Harvard is preoccupied with abstract concepts; Yale is interested in personalities, Harvard is interested in cases; Yale thinks most legal doctrine is ritual mumbo-jumbo, Harvard thinks it comprises a self-contained logical system; Yale cares about results, Harvard cares about precedents; Yale thinks the law is what the judge had for breakfast, Harvard thinks it is a brooding omnipresence in the sky.¹²

After graduating from law school, Chief Justice Straight became a staff attorney for one of the standing committees of the Legislature. The

11. MASS. CONST. pt. 1, art. XXX.

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Id.

12. Victor S. Navasky, *The Yales vs. The Harvards (Legal Division)*, N.Y. TIMES MAG., Sept. 11, 1966, at 47, 49.

chairman of the committee subsequently became the Executive of Newgarth and, remembering the faithful service rendered by Straight, appointed him to the bench. Chief Justice Straight, true to his name, has the reputation of being a rather straight-laced and distinctly humorless man. Prior to becoming a judge, he was nominally a Republican but was not known to have been politically active. His opinion begins with perhaps the worst line in all of English literature.¹³

Justice Emerson, after graduating from law school, was elected to the Legislature as a Democrat. He was re-elected to successive terms, serving a total of twenty years. Upon his eventual defeat for re-election, he was appointed to the bench by a grateful Executive, whom he had actively supported both politically and as a legislator. He is widely known for his gregarious personality and is a popular after-dinner speaker. He is a great baseball fan. To the consternation of the Chief Justice, he peppers his opinions with literary references, humorous metaphors, and even outright jokes.¹⁴ Like Horace Rumpole, he delights in quoting Robert Burns when people least expect it. He fancies himself to be something of a poet, although not everyone agrees. One wag has said of him: "Justice Emerson will be revered after Wordsworth and Shakespeare have been forgotten but not until then."

Justice Caduceus graduated from a law school similar to the University of Chicago. Upon graduation he joined the law school faculty of his alma mater, remaining a full-time faculty member until he was appointed to the bench. He also taught sociology in the College of Arts and Sciences and economics in the Business School. Before being appointed a judge, he was an active member of the Republican party.

13. See SCOTT RICE, *IT WAS A DARK AND STORMY NIGHT* (1984) ("The funniest opening sentences from the worst novels never written.").

14. *E.g.*, *Yaeger v. Murphy*, 291 S.C. 485, 354 S.E.2d 393 (Ct. App. 1987).

We fully recognize that our opinion from this point on is no more than dictum. As everyone knows, dictum technically does not count because it is outside of what is necessary in resolving a matter. But those who disregard dictum, either in law or in life, do so at their peril. We are reminded of the apocryphal story of a duel which was about to take place in a saloon. One of the antagonists was an unimposing little man, thin as a rail—but a professional gunfighter. The other was a big, bellicose fellow who tipped the scales at 300 pounds. "This ain't fair," said the big man, backing off. "He's shooting at a larger target." The little man quickly moved to resolve the matter. Turning to the saloon keeper, he said, "Chalk out a man of my size on him. Anything of mine that hits outside the line don't count."

Id. at 490 n.2, 354 S.E.2d at 396 n.2 (quoting PAUL TRACHTMAN, *THE GUNFIGHTERS* 39 (1974)).

Justice Adams, who like Justice Christian was popularly elected, received his legal education at a law school similar to the now defunct Antioch Law School. His law practice was primarily devoted to the representation of various leftist causes. He has no known political affiliation, although rumor has it that, in his youth, he was a member of several Marxist organizations.

Justice Christian, the only female member of the Court, is also the only member who is not a lawyer. The requirement that members of the Newgarth Supreme Court be members of the Bar was dropped with the change in the law providing for the popular election of judges.¹⁵ She majored in theology at a school similar to Southern Methodist University and is an ordained Protestant minister. She was elected as an Independent and has never been a member of any organized political party. Some people say she is privately a Democrat. Others are sure she is a "closet Republican."

All the judges write in the manner and style of real judges. However, their opinions are both adumbrated and exaggerated (the former for the sake of achieving some degree of brevity, the latter in a desperate effort not to bore readers to tears).

None of the judges are intended to represent accurately any particular school of jurisprudence. Indeed, some of them embrace aspects of more than one school.¹⁶ Rather, the author of this paper has simply tried to show some of the ways people think about law. The relationship between real judges and these judges is, in the phrase of Veblen, approximately the "same as that existing between . . . real horse[s] and sawhorse[s]."¹⁷

Before proceeding further, a caveat: the creator of the German Empire, Bismarck, is reputed to have said that people who like law, like people who like sausage, should not watch it being made.¹⁸ Similarly, introspection can be dangerous. As they say on TV: "This stunt is being performed by a professional. Do not try it at home."

15. The members of the United States Supreme Court have never been required to be lawyers. See U.S. CONST. art. III, § 1.

16. See generally Herold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 779 (1988) ("Integrative jurisprudence is a legal philosophy that combines the three classical schools: legal positivism, natural-law theory, and the historical school.").

17. JOSEPH DORFMAN, THORSTEIN VEBLEN AND HIS AMERICA 248 (1934) (quoting Thorstein Veblen).

18. The quotation appears to be apocryphal. Although the words of Bismarck are well known to lawyers and judges, no authority can be found for his actually having said them. Similarly, there is folklore to the effect that "Bismarck believed that it was undesirable to have the judges at the seat of government, mingling with other officials, where they might be subjected to baleful political influences." DANIEL JOHN MEADOR, *IMPRESSIONS OF LAW IN EAST GERMANY* 18 (1986).

II. THE DECISION OF THE COURT

Respondent, Mrs. Robinson, a person *non compos mentis*, brought this suit by her guardian ad litem against appellant, Chookoosokudensha Corporation, a/k/a "Suupaatorein, Inc.," the Japanese railroad which owns and operates the so-called "Super Train USA." The facts appear sufficiently in the opinion of the Chief Justice.

A. The Opinion of Chief Justice Straight

STRAIGHT, C.J.: It was a dark and stormy night when Mrs. Robinson and her husband, the prominent plastics manufacturer, departed home to attend a party in honor of a recent college graduate. However, the unspeakable tragedy which befell them on that fateful evening cannot be attributed to the inclement weather.

Anomalously, those gathered to honor the graduate were not his contemporaries but those of his parents. Unsurprisingly, alcohol was the drug of choice. To the great distress of Mrs. Robinson, no one imbibed more abundantly than her husband. By the time they left the party, he was by all accounts far too inebriated to drive. The other guests were relieved, therefore, to observe she was driving and he was beside her in the front seat, fast asleep. Between the party and their home was a main line railroad crossing. Super Train USA was headed toward that crossing, traveling at just over the speed of sound.¹⁹

Exactly what happened next is the subject of this dispute. It is, however, undisputed that the train collided with Mrs. Robinson's car, causing an explosion which drowned out the thunder. Witnesses, miles away, described it as sounding like a "nuclear bomb." The first people to arrive on the scene after the collision witnessed a gruesome sight.

The train sustained little or no damage. None of its crew was injured in the slightest. The car, on the other hand, was reduced to a mass of mangled steel. Inside was the lifeless body of Mrs. Robinson's husband, mutilated almost beyond recognition.

Mrs. Robinson was, at first, nowhere to be found, and it was assumed that her husband had been the sole occupant of the car. More than an hour later, her broken body was discovered, lying in a drainage ditch, some distance from the crossing. Miraculously, she was still alive.

Mrs. Robinson was taken, unconscious, to a hospital where by means of extraordinary medical procedures her life was saved, but barely. She

19. According to a standard scientific text, the speed of sound is 335 meters per second or 750 miles per hour. *See, e.g.,* JAMES T. SHIPMAN ET AL., AN INTRODUCTION TO PHYSICAL SCIENCE 78 (4th ed. 1983).

never regained consciousness while in the hospital and eventually lapsed into a deep coma. The doctors termed her condition a "persistent vegetative state." In due course, she was transferred to a nursing home. Her comatose condition persisted. Her doctors abandoned hope of any improvement. More than a decade passed.

Then, an amazing thing happened. It was, predictably, another dark and stormy night. Mrs. Robinson reposed, unconscious, in the nursing home. A nurse kept a silent vigil at her bedside. Suddenly, a bolt of lightning, followed by a tremendous clap of thunder, violently shook the earth. A mighty charge of electricity surged through the nursing home. All at once, Mrs. Robinson awoke and began to speak. Her eyes were open but heavy-lidded, as if burdened by some immense sorrow. She spoke deliberately, with great precision. With her very first words, she told the nurse exactly how the accident happened.

She approached the crossing most cautiously, she said, taking care to be sure that a train was not coming. She drove onto the track, intending to cross it. The car stalled, straddling the rails. She tried to get it started. Several minutes passed. Suddenly and to her horror, red lights began flashing and bells began ringing. The signal at the crossing activated, warning of the imminent arrival of Super Train USA.

Panic-stricken, she fled from the car, screaming for her husband to follow. But he did not follow. She looked back and saw that he remained in the car, apparently still asleep. She ran back to the car in a desperate attempt to rescue him. She almost reached the door on the passenger side when the train struck the car. The sound of the explosion which followed was the last thing she remembered.

Immediately following this startling revelation, the nurse summoned three people to Mrs. Robinson's bedside: a medical doctor specializing in neurology, a Roman Catholic priest, and a well-known plaintiffs' lawyer. Mrs. Robinson repeated what she said to the nurse while the doctor attempted to stabilize her condition, the priest administered the Last Rites of the Church, and the lawyer discretely recorded her account of the accident on a tape recorder he brought with him.

The efforts of the doctor failed, and within a short time, Mrs. Robinson lapsed back into unconsciousness. She eventually regained consciousness but, due to the brain damage she suffered, has never achieved a mental age of more than seven years. Her condition is not expected to change, except for the worse. She has never again given a lucid account of how the collision occurred. Apparently, she has completely forgotten what happened. The doctor says that, under the circumstances, he is not surprised.

Until Mrs. Robinson broke her ten-year silence, everyone assumed that she ignored the signal at the crossing and drove onto the track too late for the engineers to stop the train. Therefore, the authorities faulted her for the

accident. What she said to those gathered at her bedside cast an entirely different light on the matter. Based on her account of the accident, the lawyer arranged for the appointment of a guardian and filed suit on her behalf. In due course a jury was assembled, and the trial of the case commenced.

At trial, it was undisputed that two different warning devices were in place to prevent collisions between the train and vehicles approaching the crossing. The first device was the signal which warned approaching vehicles of the impending arrival of the train. This device was timed to activate flashing red lights and ringing bells three minutes before the train arrived. In addition, the train was equipped with a device to warn its engineer of any obstruction present on the track. Both devices were in good working order.

An additional fact, easily provable by expert testimony, was also undisputed. If the engineer had been given as much as three minutes warning that the car was on the track, he could have, and should have, stopped the train in time to avoid the collision.²⁰

If it is true, as Mrs. Robinson said, that she drove onto the track before the signal activated, her car was there at least three minutes before being struck by the train. Thus, if her account of the accident is true, the engineer could have stopped the train in time to avoid the collision, and therefore, the engineer, not Mrs. Robinson, was at fault in causing the accident.

Counsel for Mrs. Robinson called the nurse, the doctor, and the priest as witnesses to testify regarding what Mrs. Robinson said. He did not attempt to testify himself, but he did proffer the tape recording to corroborate the testimony of the others.

Counsel for Mrs. Robinson also attempted to have the doctor and the priest testify as expert witnesses. He attempted to have the doctor testify that, in his professional opinion, it was highly unlikely that Mrs. Robinson had, at the time she spoke, the mental acuity necessary to fabricate an account of the accident. He attempted to have the priest testify that, in his professional opinion, it was highly unlikely, especially in these circum-

20. Professor Fellers calculated that an engineer could stop a train traveling at the speed of sound in substantially less than three minutes. His conclusion is, of course, highly theoretical and involves a number of assumptions, all of which he says are completely reasonable. He based his calculation, in part, on the formula applicable to the French Aerotrain (which, at 264 miles per hour, is the fastest train now in operation). See generally GEORGE BEHREND, *LUXURY TRAINS FROM THE ORIENT EXPRESS TO THE TGV* (1982); JANE COLLINS, *HIGH SPEED TRAINS* (1978); *ENCYCLOPEDIA OF RAILROADS* (O.S. Nock ed., 1977); P.M. KALLA-BISHOP, *FUTURE RAILWAYS: AN ADVENTURE IN ENGINEERING* (1972); O.S. NOCK, *RAILWAYS OF THE MODERN AGE SINCE 1963* (1975).

stances, that a devout Catholic, such as Mrs. Robinson, would lie to a priest.

Counsel for the railroad vigorously objected to all the proffered testimony and to the introduction of the tape recording. The trial judge ruled, without hesitation, that neither the doctor nor the priest was competent to express an opinion as to the truthfulness of what Mrs. Robinson said.²¹ However, he agonized at great length before ruling on whether they or the nurse could testify as to Mrs. Robinson's account of the accident. He also hesitated before ruling on the question of whether the tape recording was admissible.

Finally, after much deliberation, the trial judge overruled the objection and permitted the witnesses to testify as to what Mrs. Robinson said. He also allowed the introduction of the tape recording. Although he discussed in some detail the various considerations attendant upon his ruling, he ultimately decided to admit the testimony simply because, in his words, "her account of the accident has the unmistakable ring of truth."

The railroad offered no testimony or other evidence, choosing instead to rest on its objection. After only brief deliberation, the jury returned a large verdict for Mrs. Robinson. Judgment was entered and this appeal followed. Other than what Mrs. Robinson said, there is no evidence the engineer was at fault in causing the accident. Therefore, the dispositive issue on appeal is whether the trial judge erred in admitting her account of the accident. If what she said is admissible, the judgment must be affirmed. If, on the other hand, her account of the accident is not admissible, the judgment must be reversed.

The amount of the verdict is not at issue. Suffice it to say the amount is sufficient to allow Mrs. Robinson to live comfortably for the remainder of her life. The verdict was rendered not a minute too soon. After ten years she had exhausted all her resources, including all available government benefits. By the time of the trial, the administrators of the nursing home were on the verge of expelling her into the streets to fend for herself. They have since agreed to hold her expulsion in abeyance pending our decision to affirm or reverse the judgment. The appeal has hit our bench like a hand grenade, rending the Court asunder like no case since the infamous *Case of the Speluncean Explorers*.²² The vitriol that the members of the Court have directed toward one another has resulted in, among other things, the permanent alienation of all members from each other and the resignation of one member in disgrace. Who among us could

21. Georgia has permitted a witness to express an opinion as to whether an out-of-court statement was truthful at the time it was made. *See State v. Butler*, 349 S.E.2d 684 (Ga. 1986).

22. *See Fuller*, *supra* note 1.

have foreseen that such horrendous consequences would flow from a case so straightforward, so preordained in result, so simple to decide?

I begin by setting aside two questions which are not before the Court—indeed, which are never before any court, at least not any appellate court. We are not called upon to decide whether Mrs. Robinson's statements are true. Rather, it is our task to decide the very narrow question of whether, in reaching its verdict, the jury should have been allowed to consider her account of the accident. Nor are we called upon to decide what, under the circumstances, would be a "just result." Our sympathies for the plight of Mrs. Robinson, however great those sympathies may be, can have nothing whatsoever to do with the result we are bound to reach. As judges we are sworn to apply not our own conceptions of justice, but the rule of law.²³ Where, as here, a matter is controlled by statute, the morality of the legislator must provide the moral content of the law, not the morality of the judge. We must put aside our personal biases.²⁴

More than a thousand years ago the Legislature, in an effort to bring some semblance of order to the trial of cases, established rules of evidence by statute. See Act of Jan. 2, 2975, Pub. L. No. 93-595, 88 Stat. 1926 (establishing rules of evidence for certain courts and proceedings).²⁵ Theretofore, a hodgepodge of rules, exceptions to rules, and exceptions to exceptions had grown over time to such immense proportions that an orderly trial had become well-nigh impossible.²⁶

The statute adopts the familiar common-law definition of hearsay: "Hearsay" is a statement, other than one made by the declarant while

23. This is, in essence, the position of Justice Keen in *The Case of the Speluncean Explorers*. Fuller, *supra* note 1, at 632. Much of the language that follows is essentially his language in that case.

24. According to an article published in the New York Law Journal, these are essentially the words of Judge Robert H. Bork. Mordecai Rosenfeld, *A Personal Choice for the Supreme Court*, 193 N.Y. L.J. 2 (1985) ("In a constitutional democracy the moral content of the law must be given by the morality of the framer or the legislator, never by the morality of the judge." (quoting Judge Bork)); see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 95 (1881) ("[T]he only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability."); Robert H. Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decision Making*, JUDGES J., Summer 1987, at 13, 17 ("[O]nly by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators . . .").

25. This citation is modeled on the citation for the statute enacting the Federal Rules of Evidence. (The date has been changed from 1975 to 2975.)

26. See *Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 153 n.1, 314 S.E.2d 603, 612 n.1 (Ct. App. 1984) (beseeching the law professors of America to "not craft from our decision yet another exception to the rule against hearsay (e.g. The 'doctor explaining to man how his wife died' exception) lest the exceptions to this already complex rule become literally innumerable").

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." NEW. R. EVID. 801(c).²⁷ Under the statutory definition, what Mrs. Robinson said to those gathered at her bedside is clearly hearsay. Her statement was not made while she was testifying. Her statement was offered in evidence to prove the truth of the matter asserted—how the accident happened.

The statute also contains the equally familiar prohibition against the admission of hearsay: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of the Chamber of Representatives." NEW. R. EVID. 802.²⁸ In other words, a hearsay statement is not admissible unless it falls within one of the exceptions to the hearsay rule.

Counsel for Mrs. Robinson argues her statement is admissible under the so-called "*res gestae* exception." The statute recognizes a version of this common-law exception by allowing the admission of "[a] statement relating to a startling event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."²⁹ NEW. R. EVID. 803(1). This exception is, however, patently inapplicable by its terms. Mrs. Robinson did not make her statement while perceiving the accident nor immediately thereafter—a delay of more than ten years is hardly immediate. No other exception recognized by the statute is even

27. This definition is identical to the definition provided by FED. R. EVID. 801(c). The statute, however, qualifies the general definition with certain exemptions clearly not applicable in this case. See FED. R. EVID. 801(d).

28. This language is essentially the same as the language of FED. R. EVID. 802. ("Congress" has been changed to "Chamber of Representatives.") According to Professor Fuller, the Newgarth legislature is named the "Chamber of Representatives." Fuller, *supra* note 1, at 625.

29. This language is an amalgamation of the exceptions provided by FED. R. EVID. 803(1) and (2). The *res gestae* exception, as recognized by the common law, is essentially the same:

[T]o qualify for admission under the exception to the rule which our Court calls *res gestae*, a statement must be "substantially contemporaneous with the litigated transaction, and be the instinctive, spontaneous utterances of the mind while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or designed to make false or self-serving declaration[s]."

Bain, 281 S.C. at 146, 314 S.E.2d at 608 (quoting *Addyman v. Specialties of Greenville, Inc.*, 273 S.C. 342, 344-45, 257 S.E.2d 149, 150 (1980)).

arguably applicable.³⁰ Therefore, the unambiguous language of the statute compels the conclusion that Mrs. Robinson's statement is not admissible.

Counsel for Mrs. Robinson perseveres. He urges the court to admit her statement because of the circumstances under which it was made. He argues that, under the circumstances, it is highly unlikely her statement is not true. In support of his argument, he cites a number of old cases holding that the decision to admit or exclude hearsay is left to the discretion of the trial judge.³¹ All the cases on which he relies were decided before the rules of evidence were established by statute. In more than a thousand years no case has been decided on this nebulous basis. To accede to his argument now would require us to add to the statute by engrafting an exception not included by the Legislature. If we were to do so, we would be legislating, not adjudicating.

There was a time when no clear distinction existed between the various branches of government. During this period, judges did freely legislate. Statutes were made over by the Judiciary willy-nilly. It became impossible for people to know the law with any degree of certainty, much less to conform their conduct to its requirements. Judges made law like a man makes law for his dog, he waits until his dog does something wrong and then beats him for it.³² The Legislature and the Executive reacted with understandable outrage. We all know the great tragedy which resulted—the Civil War, otherwise known as “The War Between the Branches.”³³ Historians agree that the principal cause was the conflict between the Judiciary on one side, and the Legislature and the Executive on the other. One factor leading to the struggle for power was the division of

30. Two exceptions that might appear applicable clearly are not. The exception for a statement made to a physician applies only where the statement is “made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” FED. R. EVID. 803(4). Mrs. Robinson was not speaking to her doctor for these purposes. The exception for a dying declaration applies only where the declarant believes death is imminent. FED. R. EVID. 804(b)(2). No evidence exists to suggest Mrs. Robinson thought she was dying.

31. See generally *Bain*, 281 S.C. at 151, 314 S.E.2d at 611 (rejecting the argument that “[t]he ruling of the trial judge (on evidence offered pursuant to the *res gestae* exception) will not be disturbed unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be” (quoting *Marshall v. Thomason*, 241 S.C. 84, 89, 127 S.E.2d 177, 179 (1962) (citation omitted))).

32. It is the Judges (as we have seen) that make the common law:—Do you know how they make it? Just as a man makes laws for his dog. When your dog does any thing you want to break him of, you wait till he does it, and then beat him for it.

JEREMY BENTHAM, *TRUTH VERSUS ASHHURST* 11 (London, T. Moses 1823).

33. This Civil War erupted in Newgarth sometime between 3900 and 4300. Fuller, *supra* note 1, at 633.

Newgarth into election districts, irrespective of population. Another factor was the great popular following of the then Chief Justice.

Thankfully, those tumultuous times are behind us and the principle that the legislative branch is supreme is now firmly established. From this principle comes our obligation to enforce the statutory law as written, and to interpret that law according to its plain meaning without regard to our individual concepts of justice.³⁴

Most judges understand that the "legitimacy of the law is at risk when judges pretend to powers that no one ever gave them."³⁵ Regrettably, however, there are still some judges who attempt to function as legislators in black robes. I suppose I should not be surprised. Some people simply cannot handle authority without abusing it. As the American jurist Frankfurter cautioned:

All power is, in Madison's phrase, "of an encroaching nature." Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint. . . .

. . . It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what [the legislative] and the Executive Branch[es] do.³⁶

34. [The result-oriented judge] asks what decision in each case is politically or morally attractive to him, devises a rule that achieves that result, and then works backward. The rule does not come out of, but is forced into, the Constitution. There is nothing that can be called legal reasoning in this. It is a process of personal choice followed by rationalization; the major and minor premises do not lead to a result, the result produces the major and minor premises. There is, furthermore, no point in testing those premises by hypotheticals to determine what results they might produce in the future, because the future results will be chosen by personal desire and the premises will be abandoned or reshaped to fit the new desired outcome.

ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 262 (1990).

35. Editorial, *Justices vs. Judges*, WALL ST. J., Jan. 12, 1990, at A12.

36. *Trop v. Dulles*, 356 U.S. 86, 119-20 (1958) (Frankfurter, J., dissenting) (citation <https://scholarcommons.sc.edu/sclr/vol49/iss3/5>)

Of course, judges who insist on ignoring these principles do not admit to any usurpation of power. Rather, they purport somehow to be carrying out "legislative purpose." The essential duplicity of such attempts to give legitimacy to the rewriting of statutes is at once apparent. A judge simply cannot apply a statute as it is written and, at the same time, rewrite it to suit his own desires.

In any event, the Legislature specifically rejected the notion that hearsay should be admitted on the basis urged by counsel for Mrs. Robinson. When the legislation establishing the rules of evidence was most recently before the Chamber of Representatives, an amendment was proposed allowing trial judges to admit hearsay "having sufficient circumstantial guarantees of trustworthiness." A great hue and cry was raised against the amendment with opposition coming from both within and without the Chamber. The organized Bar rose up in arms, fearing a return to the system whereby the whims of judges, instead of objectively applied rules, would govern the trial of cases. (Members of the Bar well know that, if judges are no more than legislators in black robes, lawyers are no more than lobbyists with law degrees.) After only several hours of debate, the amendment was unanimously rejected, garnering not even the vote of its author.³⁷ 120 CH. REC. H12255-57 (daily ed. Dec. 18, 4274).³⁸ It is

omitted); *cf.* *Busby v. State Farm Mut. Auto. Ins. Co.*, 280 S.C. 330, 337, 312 S.E.2d 716, 720 (Ct. App. 1984).

This court has no legislative powers. In the interpretation of statutes our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature. We must do this based upon the words of the statutes themselves. To do otherwise is to legislate, not interpret. The responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts.

Id.

37. The aspects of the Federal Rules of Evidence regarding hearsay have a somewhat similar legislative history. These federal rules regarding hearsay, as adopted by Congress, are substantially different from those submitted by the Supreme Court. The more flexible version submitted by the Court contained residual exceptions providing that the rule against hearsay does not exclude "[a] statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." 5 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S FEDERAL EVIDENCE* § 803App.01[3], at 803App.-28 (Joseph M. McLaughlin ed., 2d ed. 1997).

The Court's version of the rules is itself an alternative to an even more flexible preliminary draft of the Advisory Committee. That draft set forth general provisions governing when a statement is not excluded by the hearsay rule and then enumerated illustrative examples, stated to be by way of illustration only and not by way of limitation. *Id.* at 803App.-24.

The House rejected the Court's version of the rules, deleting "these provisions (proposed Rules 803(24) and 804(b)(6)) as injecting 'too much uncertainty' into the law of evidence and impairing the ability of practitioners to prepare for trial." *Id.* § 803App.01[4],

therefore clear from the history of the statute that to admit Mrs. Robinson's statement would thwart—not carry out—the so-called “legislative purpose.”³⁹

at 803App.-50.

The Senate essentially reinstated the residual exceptions submitted by the Court, but added the requirement that a determination must first be made that certain conditions, designated (A), (B) and (C), have been met. (The Senate also substituted the word “equivalent” for the word “comparable.”) In doing so, the Senate reported:

We disagree with the total rejection of a residual hearsay exception. While we view Rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

....

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. . . .

. . . The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Id. at 803App.-50 to -52.

The Conference Committee ultimately adopted the Senate amendment. However, the Committee added an additional requirement that

a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

Id. at 803App.-52 to -53.

38. This citation is modeled on the citation to the daily Congressional Record.

39. See *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972) (“[I]t is essential that we place the words of a statute in their proper context by resort to the legislative history.”); *Southern Bell Tel. & Tel. Co. v. South Carolina Tax Comm’n*, 297 S.C. 492, 377 S.E.2d 358 (Ct. App. 1989) (resorting to legislative history in determining legislative intent

For these reasons, I am compelled to conclude that the trial judge erred in admitting the statement of Mrs. Robinson, and therefore, the judgment in her favor must be reversed.

ADDENDUM

I address two additional matters not strictly necessary to the decision. Needless to say, neither I nor, I am sure, any of my colleagues want Mrs. Robinson to suffer further. I am sure all of us would like to see her needs met for as long as she may live. Yet the law, in its current state, gives us no means to accomplish this humanitarian goal. It therefore seems to me that a legislative remedy is sorely needed to mitigate the rigors of the law.⁴⁰ Such a remedy is immediately apparent. The Chamber of Representatives could enact legislation providing government benefits, in the nature of workers' compensation benefits, to the victims of railroad accidents.⁴¹ The Chamber could draft the law to have retroactive application so that the benefits would be available to Mrs. Robinson. The Chamber's Representatives could easily obtain the funds necessary to pay the benefits by levying a small tax, such as a tax on railroads. Of course the railroads could pass the tax painlessly to users of their services. As an alternative, railroads could simply be required to pay the benefits directly to accident victims. The railroads surely could obtain insurance, similar to workers' compensation insurance, to cover the payment of these benefits,

even though the language of a statute was unambiguous). *But see* Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) ("[L]egislative history only can be resorted to for the purpose of solving doubt, not for the purpose of creating it.").

40. For similar examples of judicial "buck-passing," see *Bratcher v. National Grange Mutual Insurance Co.*, 292 S.C. 330, 334, 356 S.E.2d 151, 153 (Ct. App. 1987), where the court stated, "The legislature can amend its statute so as to authorize the exception which National Grange included in its policy, but this Court cannot"; and *American Fast Print Ltd. v. Design Prints of Hickory*, 288 S.C. 46, 47, 339 S.E.2d 516, 517 (Ct. App. 1986), where the court stated, "The Supreme Court may want to grant certiorari in the instant case and modify or overrule its previous decision, but this court has no authority to change it."

41. The social philosophy inherent in this suggestion is, indeed, the same as that underlying workers' compensation laws.

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 2.20 (1997).

and then pass the costs of the premiums to their passengers and freight customers.

There is every reason to believe the Chamber of Representatives will enact such legislation if only my colleagues would join with me in suggesting it. If this is done, justice will be accomplished without violating either the letter or spirit of the statute establishing the rules of evidence and without encouraging disregard of law.⁴²

I conclude on a more solemn note about the recognition of a fundamental failure of this Court. Among the imperatives of appellate justice is the requirement that judges on an appellate court act collegially (by which I mean that they render decisions based on shared thinking). A collaborative effort provides both institutional coherence and an assurance of correctness of results reached. "[I]f [the judges] do not act together, their decision may be properly viewed simply as an official event, not as a rational process."⁴³

As will soon become apparent, the judges of this Court are either unable or unwilling to act collegially. Each is so overwhelmingly desirous of applying a personal imprint to the decision in this case that any consideration of the views of the others has become impossible. The voice of the Court cannot be heard over the unmistakable whine of axes being ground. As the titular leader of the Court, I must treat this state of affairs as a personal failure. Despite my best efforts to do so, I have been utterly incapable of remedying the situation. Given the current make-up of the Court, no change is in sight. I therefore believe I should resign as Chief Justice of the Supreme Court of Newgarth, and I hereby do so.

*B. The Opinion of Justice Emerson*⁴⁴

EMERSON, J.:

*But what his common sense came short,
He eked out wi' law, man.*⁴⁵

42. This is similar to the proposal of Judge Keen in *The Case of the Speluncean Explorers*. Fuller, *supra* note 1, at 632-37.

43. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 10 (1976).

44. The name is derived from Ralph Waldo Emerson who said: "Nothing astonishes men so much as common sense and plain dealing." RALPH WALDO EMERSON, *Essay on Art*, in *ESSAYS OF RALPH WALDO EMERSON* 122 (1941).

45. ROBERT BURNS, *Extempore in the Court of Session*, in *THE COMPLETE WORKS OF ROBERT BURNS* 197 (Allan Cunningham ed., Boston, Phillips, Sampson, & Co. 1855).

*"If you haven't got common sense, you shouldn't get out of bed in the morning." (At what hour people without common sense should get out of bed, he didn't say.)*⁴⁶

A long, long time ago, before it fell from fashion to do so, the judges of an ancient and honorable court, in a faraway land, boldly eschewed the pretense of formality and actually decided a case using common sense. The Supreme Court of Mississippi in *Pillars v. R.J. Reynolds Tobacco Co.*⁴⁷ stated: "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless."⁴⁸

Not long thereafter, Chief Judge Parker of another antique court observed in *United States v. 25,406 Acres*:⁴⁹ "[W]e must never forget that the common sense of the twelve men on the jury is a surer guaranty of justice than any attempt that might be made to give logical application to antiquated rules of evidence."⁵⁰

I propose a common-sense approach in deciding this case. But before I render my opinion on how the case should be decided, I address the extraneous matters raised by our erstwhile Chief Justice in his so-called "Addendum."

I am shocked that our dear, departed Chief has proposed so sordid an expedient as lobbying the Legislature. This is, indeed, a day that will live in ignominy.⁵¹ Something more is on trial in this case than the fate of Mrs. Robinson—that is the law of our Commonwealth and the efficacy of this Court. If we reverse the judgment, then both our law and this Court stand convicted in the forum of common sense. For us to admit that the law we uphold and expound compels a conclusion from which we can escape only by appealing to another branch of government, amounts to a shameful admission that the current state of the law does not incorporate justice, and that this Court is incapable of rendering justice.⁵²

As to the matter of our acting collegially, I agree, in theory, that it is desirable for our decisions to be based on shared thinking. (I hold all the members of this Court in at least minimum high regard.)⁵³ At the same

46. PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 5 (2d ed. 1989) (quoting Harry Truman).

47. 78 So. 365 (Miss. 1918).

48. *Id.* at 366.

49. 172 F.2d 990 (4th Cir. 1949).

50. *Id.* at 995.

51. Cf. THE ROOSEVELT READER 300 (Basil Rauch ed., 1957) ("Yesterday, December 7, 1941—a date which will live in infamy" (quoting President Franklin D. Roosevelt)).

52. These are essentially the words of Judge Foster in *The Case of the Speluncean Explorers*. Fuller, *supra* note 1, at 620.

53. This is the same way Oklahoma's late Democratic Senator Robert S. Kerr said he

time, if judges do not think for themselves they cannot be responsible for the results reached.⁵⁴ There is nothing inherently wrong with their reaching different results. (Courts, unlike baseball teams, do not have to bunch hits.) Unanimity is neither necessary nor is it always desirable. As the Hun Attila cautioned: "A king with chieftains who always agree with him reaps the counsel of mediocrity."⁵⁵

I would also point out to our late, lamented Chief that the best way for him to engender collegiality is not to insult gratuitously his colleagues by referring to them as "legislators in black robes." I assure him that I, for one, am well aware of the difference in function of a judge and a legislator. I did not become a judge to continue being a legislator, but neither did I become a judge to be a lobbyist, beseeching the Legislature, hat in hand, for the enactment of a statute to my liking. Nor did I become a judge to be an engrossing clerk for the Legislature, enrolling by rote its statutes into the case law of the Commonwealth.

As to the resignation of our melodramatic Chief, mindful of the admonition not to speak ill of the departed, I nevertheless cannot restrain myself from observing that his timing, at least, is exquisite. He became eligible to retire at full pay only last month.

I turn now to the merits of the decision. Fortunately, no machinations of any kind are necessary for us to reach a just result. We neither need to appeal to the Legislature for the enactment of a new statute, nor do we need to rewrite judicially the existing statute establishing the rules of evidence. Nothing more is required than a rational application of the statute as written—an application based on common sense, not on unthinking fidelity to the letter of the law.

The vast majority of everything we know, or think we know, is not based on our personal observations but on information we have received from others. Reasonable and prudent people rely every day on hearsay in making important decisions in their lives. Such people might very well find the statement by Mrs. Robinson reliable. If such people would find it reliable, why shouldn't we allow a jury to do so? Despite the statute, hearsay pervades the trial of almost every case. Consider the first question asked every witness: "What is your name?" How would the witness know unless someone had told him?

regarded Indiana's Republican Senator Homer Capehart. Senator Kerr, in keeping with the honored tradition of collegial courtesy, said he held Senator Capehart "in minimum high regard." His exact words, spoken on the floor of the Senate, were that Senator Capehart was "a rancid tub of ignorance whom I hold in minimum high regard." JACK W. GERMOND & JULES WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS?* 65 (1989).

54. CARRINGTON ET AL., *supra* note 43, at 10 ("If the judges do not think for themselves, they cannot be fully responsible for the results . . .").

55. WESS ROBERTS, *LEADERSHIP SECRETS OF ATTILA THE HUN* 101 (1985).

The reason for excluding hearsay is that out-of-court statements are not subject to the same tests of truth as statements made from the witness stand. These statements are neither made under oath, nor are they subject to cross examination. In addition, the Court has no opportunity to observe the declarant.⁵⁶ At the same time, it is recognized that an absolute prohibition against the admission of hearsay would cripple the truth-searching process of trial. As everybody knows, the safeguards of credibility present when testimony is given in court are by no means perfect. People regularly lie and deceive others when testifying in court. For this reason, the statute—like the common law from which it is derived—wisely includes numerous exceptions to the rule excluding the admission of hearsay. (Statutes are to be read in light of the common law, and a statute affirming a common-law rule is to be construed in accordance with the common law.)⁵⁷ Primary among these exceptions is the exception our martyred Chief, a denizen of the pre-Wigmorean darkness, refers to—archaically and incorrectly—as the “*res gestae* exception.”⁵⁸

No hard and fast rule can be laid down for the admissibility of a statement pursuant to this exception. Rather, each case must be decided on its own facts.⁵⁹ Generally speaking, in order to qualify for the *res gestae* exception, a statement must comprise the “instinctive, spontaneous utterances of the mind while under the active, immediate influences” of the event or condition; “the circumstances precluding the idea that the utterances are the result of reflection or are designed to make false or self-serving [statements].”⁶⁰

56. The reason for the rule excluding hearsay is that out-of-court statements are not subject to the same tests of truth as statements made from the witness stand. The out-of-court statement is not made under oath or subject to cross examination in the presence of the Court. There is therefore no opportunity for the court to observe the declarant as he speaks or to investigate either his character or motives. A further reason sometimes given is the misconception to which hearsay may be exposed, due to the ignorance, inattention or bad motives of the hearers.

Bain v. Self Mem'l Hosp., 281 S.C. 138, 145, 314 S.E.2d 603, 607 (Ct. App. 1984).

57. See *Bandfield v. Bandfield*, 75 N.W. 287, 288 (Mich. 1898).

58. See *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 972 n.5 (4th Cir. 1971) (“[T]he term ‘*res gestae*’ should be banished from our vocabulary.”); Charles E. Moylan, Jr., *Res Gestae, or Why Is That Event Speaking and What Is It Doing in This Courtroom?*, 63 A.B.A. J. 968, 968 (1977) (“Judge Humpty Dumpty doesn’t need to know the law of evidence. He gets his rulings from *res gestae*.”).

59. *Bain*, 281 S.C. at 146, 314 S.E.2d at 608 (“No hard and fast rule can be laid down as to the admissibility of evidence pursuant to the *res gestae* exception, but each case must be decided on its own facts.”).

60. *Id.* (quoting *Addyman v. Specialties of Greenville, Inc.*, 273 S.C. 342, 344-45, 257 S.E.2d 149, 150 (1980)).

Both the statute and the common-law version of the exception require that the statement be substantially contemporaneous with the event or condition to which it is related. The precise language of the statute requires that the statement must be made "while the declarant was perceiving the event or condition, or immediately thereafter." NEW. R. EVID. 803(1). The rules, however, do not require that it be precisely concurrent with the event or condition. If the statement is made at a time sufficiently proximate thereto so that the idea of deliberate design is reasonably precluded, then it should be regarded as contemporaneous.⁶¹

By making the exception a part of the statute, the Legislature has implicitly recognized that, under certain circumstances, an out-of-court statement is at least as likely to be true as a statement made in court and, therefore, is admissible on this basis. The circumstances in which Mrs. Robinson spoke, rationally analyzed, satisfy every criterion for application of the exception. She quite obviously made her statement spontaneously and instinctively. She was under the active influence of the accident. (In fact, she had been both physically and mentally incapable of being influenced by anything else for more than a decade.) The fact that she had been unconscious since the time of the accident precludes the idea that her statement was the result of reflection or was designed to be false or self-serving.

Our retiring Chief rejects application of the *res gestae* exception with the cavalier parenthetical: "A delay of more than ten years is hardly immediate." He, of course, would have us give the words of the statute their literal meaning—without regard to any extrinsic facts. "By this logic, we would be obliged to conclude that the New York Yankees had no players from the South and the Cincinnati Reds adhered to the teachings of Marx. Much of the misunderstanding abroad in the world can be attributed to literal thinking."⁶²

61. See *id.* (quoting *Lazar v. Great Atl. & Pac. Tea Co.*, 197 S.C. 74, 83, 14 S.E.2d 560, 563 (1941)).

62. *Southern Bell Tel. & Tel. Co. v. South Carolina Tax Comm'n*, 297 S.C. 492, 495, 377 S.E.2d 358, 360 (Ct. App. 1989) (footnote omitted).

Indeed, life is a metaphor for baseball. Ted Williams often said: "Be quick and swing slightly up." See DAVID HALBERSTAM, *SUMMER OF '49* (1989). This is great advice for judges as well as batters. Ted Williams played a pivotal role in perhaps the best story demonstrating a profound similarity between the rules of baseball and "the rule of law."

Twenty-five years ago, Ted Williams, retired a year, and Mike Roarke, then a Detroit Tiger catcher and now the pitching coach for the St. Louis Cardinals, were discussing the strike zone. They were interrupted by their companion, who just so happened to be a blind judge.

"What is the big deal?" asked the judge. "The strike zone is a vertical rectangle 17 inches wide extending from the armpits to the top

Furthermore, time is but one factor to be considered in deciding to apply the exception.⁶³ "Surely, courts, having rejected the technology of the polygraph as determinant of credibility cannot logically substitute that of the stopwatch."⁶⁴ The rational basis for the exception is the thought process of the person making the statement.⁶⁵ At the time Mrs. Robinson spoke, she was expressing her first conscious thought since the instant the accident occurred. Certainly, nothing whatsoever happened in her life between the time of the accident and the time of her statement. Thus, as far as she was concerned, her statement was "immediate."⁶⁶

From antiquity, one of our legitimate functions as a court is to declare that something within the letter of a statute is not governed by the statute because it is not within the intention of the Legislature.⁶⁷ As the Supreme Court of the United States eloquently declaimed:

of the batter's knees."

"Don't take offense, your highness," said Williams. "But that's an ideal set forth in the rule book. Baseball isn't played with ideals. The strike zone is whatever that day's umpire says it is. So if a hitter is smart, he knows that particular umpire as well as he knows the opposing pitcher."

"I see," replied the judge. "That means that the strike zone is no different than a court of law."

Peter Gammons, *What Ever Happened to the Strike Zone?*, SPORTS ILLUSTRATED, Apr. 6, 1987, at 36, 36.

Baseball pervades every aspect of American life, even its ivory towers. In the fall of 1973, Justice Potter Stewart, an avid Cincinnati Reds fan, heard oral arguments during the play-off game between the Reds and the New York Mets. He told his law clerk to give him batter-by-batter bulletins while he was on the bench. One bulletin read: "Kranepool flies to right. Agnew resigns." GEORGE F. WILL, *MEN AT WORK: THE CRAFT OF BASEBALL I* (1990).

There are other remarkable correlations between baseball and law. In the history of major league baseball, five managers have been lawyers: Tony La Russa, Branch Rickey, Miller Huggins, Hughie Jennings, and Monte Ward. Tony La Russa was the manager of the world-champion Oakland A's and the other four are in the Hall of Fame. *Id.* at 28; *see also The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975) (showing that the same forces that shaped the common law also generated the Infield Fly Rule).

63. *Bain*, 281 S.C. at 148, 314 S.E.2d at 609.

64. *Id.*

65. *See id.* ("Spontaneity refers to the state of mind of the person making a statement.").

66. *See Chestnut v. Ford Motor Co.*, 445 F.2d 967, 972-73 (4th Cir. 1971) (articulating essentially the same rationale).

67. *See Southern Bell*, 297 S.C. at 495-96, 377 S.E.2d at 361 ("It is a familiar rule 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." (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892))).

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.'"⁶⁸

None other than Aristotle, the Greek ethicist, has agreed:

[L]aw is always a general statement, yet there are cases which it is not possible to cover in a general statement. . . . [I]t is then right, where the lawgiver's pronouncement because of its absolute-ness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question.⁶⁹

We need not depend on such ancient authority for this principle. Contemporary decisions are in accord. In the words of Faulkner, the Mississippi iconoclast: "The past is never dead. It's not even past."⁷⁰

Consider our familiar statute providing the penalty for murder: "Whoever shall willfully take the life of another shall be punished by death." N.C.S.A. (N.S.) § 12-A.⁷¹ Nothing in the wording of the statute which suggests any exception for self-defense. Yet, thousands of years ago courts recognized that killing in self-defense is excused. While various attempts have been made to reconcile this apparent contradiction, they are patently no more than ingenious sophistries. The truth of the matter is that

68. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 461 (1892) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1868)).

69. ARISTOTLE, *THE NICOMACHEAN ETHICS*, Book V, x. 4-6, at 315, 317 (T. E. Page et al. eds. & H. Rackham trans., rev. ed. 1934).

70. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

71. Fuller, *supra* note 1, at 619.

the self-defense exception cannot be reconciled with the literal words of the statute, only with its underlying purpose.

A very recent case explicitly held that the language of a statute should not be applied literally where the facts of a particular case were not within the contemplation of the Legislature. I refer, of course, to our decision in *Commonwealth v. Staymore*.⁷² In *Staymore* the defendant was initially convicted of violating a statute making it a crime to park a car on the street for longer than two hours. Staymore attempted to move his car before the two hours passed, but he was prevented from doing so because the street was blocked by a political demonstration. (He had no part in the demonstration or any reason to expect it.) This Court reversed his conviction despite the fact that his case fell squarely within the wording of the statute.⁷³

Similarly, the Legislature could hardly have had in mind what happened to Mrs. Robinson. The facts of this case are unprecedented. (Even our timorous Chief acknowledges that what happened was “an amazing thing.”) Nor could the Legislature have intended for the statement of Mrs. Robinson to be excluded. Such a result is clearly inconsistent with the purpose of the statute.

Our analysis is no artful dodge to avoid an undesired result. . . . The result we reach raises no question about our fidelity to this long-standing policy, but this case may very well demonstrate the distinction between intelligent and unintelligent fidelity. Consider the “Master and Servant.” No Master wants a Servant who does not think. Even the most dutiful Servant will sometimes not obey when called by the Master to “drop everything and come running.” For example, the Servant will not obey when the Master is unaware, at the time, that the Servant is in the act of rescuing the baby from the rainbarrel. In not obeying, the Servant does not thwart the intent of the Master, but rather gives effect to that intent. Surely, the Legislature expects the same modicum of intelligence from [its servants, the judges of] this Court.⁷⁴

Our myopic Chief, of course, sees things differently. His profound misunderstanding is that “the law is an independent branch of thought, as

72. *Id.* at 624.

73. The analogies in this paragraph and the preceding paragraph are, in essence, those of Judge Foster in *The Case of The Speluncean Explorers*. Fuller, *supra* note 1, at 620-26. Much of the language in these paragraphs is essentially his language in that case.

74. *Southern Bell Tel. & Tel. Co. v. South Carolina Tax Comm'n*, 297 S.C. 492, 497, 377 S.E.2d 358, 361-62 (Ct. App. 1989) (footnotes omitted). The same analogy also was used by Judge Foster in *The Case of the Speluncean Explorers*. Fuller, *supra* note 1, at 625.

abstract [and objective] as mathematics . . . rather than a tool for the administration of justice and [the] alleviation of misery.”⁷⁵ The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.⁷⁶ “[C]ourts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”⁷⁷

Our hapless Chief makes the point that no previous case has allowed a trial judge to admit an out-of-court statement based on circumstantial guarantees of trustworthiness. I find this unsurprising. As I have said, no case involving these facts has ever been appealed. (Nor, I might add, is any such case likely to arise again.) Courts of appeal, like well-behaved children, only speak when spoken to, and do not answer questions they are not asked.⁷⁸ Thus, the question of whether to admit a statement made under the circumstances in which Mrs. Robinson spoke has never been answered simply because, until now, the question has never been asked.

Finally, our deferential Chief clings to the slender reed of “legislative history.” “‘What is history,’ said Napoleon, ‘but a fable agreed upon?’”⁷⁹ Time is the enemy of truth. “[T]here is properly no history, only biography.”⁸⁰ “To look to history for a scaling of values is to confront the problem of differentiating history from the historians, or in Yeats’ words, the dancers from the dance, or in Santayana’s, looking over a crowd to find one’s friends.”⁸¹ Speaking of friends, my old friend and long-time colleague in the Legislature was the author of the proposed amendment allowing trial judges to admit hearsay “having sufficient circumstantial guarantees of trustworthiness.” I refer, of course, to the distinguished and

75. Michael Gebert, Letter to the Editor, *O'Connor's Misunderstanding*, WASH. POST MAG., July 16, 1989, at 3.

76. HOLMES, *supra* note 24, at 1 (“The life of the law has not been logic: it has been experience.”).

77. *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (Black, J.).

78. *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985); *see also Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244 399 S.E.2d 783, 784 (1991) (citing with approval *Langley*, 284 S.C. 162, 325 S.E.2d at 550).

79. EMERSON, *supra* note 44, at 15.

80. *Id.*

81. Ruggero J. Aldisert, Book Review, 72 CAL. L. REV. 275, 277 (1984); *see also Southern Bell Tel. & Tel. Co. v. South Carolina Tax Comm'n*, 297 S.C. 492, 494 n.1, 377 S.E.2d 358, 360 n.1 (Ct. App. 1989) (“Reading legislative history is like looking into a crowd and seeing your friends.”).

esteemed Senator Beauregard T. Claghorn.⁸² His speech, just before the final vote, casts an entirely different light on the matter: I quote, verbatim from the Journal of the Chamber of Representatives:

MR. CLAGHORN proposed an amendment. Amend the Bill, as and if amended, so as to add a section, appropriately numbered: "Also excepted from the rule against hearsay are statements not covered by any of the foregoing exceptions but having, in the opinion of the trial judge, sufficient circumstantial guarantees of trustworthiness."

[Lengthy debate then ensued.]

MR. CLAGHORN: Mr. Speaker, I rise this afternoon to give you and my fellow members of this honorable body a precious gift: the gift of time. I can see that my little amendment, which in my view is purely innocuous, has caused great consternation in the minds of some people. We have consumed an entire afternoon arguing about this matter, time which could have been spent resolving important affairs of State, or even better, with our husbands or wives, our sweethearts or our children. The hour is late. Dusk approaches. Bullbat time is nigh.⁸³ I will not be the instrument of detaining you to debate further a matter of no real practical importance. I will not trespass further on your patience. *We all know that the judges are going to apply the rule against hearsay however they want to, whether my amendment passes or not.* Accordingly, Mr. Speaker, I move to table the amendment.

[Whereupon, by unanimous vote, the amendment was tabled.]

120 CH. REC. H12255-57 (daily ed. Dec. 18, 4274) (statement of Sen. Claghorn)⁸⁴ (emphasis added). Therefore, the record does not support the proposition that the amendment was defeated due to the Legislature's unwillingness to allow trial judges any discretion in applying the statutory rules. In fact, the record appears to support just the opposite conclusion.

82. The name is derived from Senator Beauregard T. Claghorn, a regular on the old Fred Allen radio program, *Allen's Alley*. See ROBERT TAYLOR, FRED ALLEN: HIS LIFE AND WRIT 272 (1989).

83. The Honorable Solomon Blatt, who presided as the Speaker of the South Carolina House of Representatives longer than anyone ever presided over any deliberative body in the English speaking world, coined the phrase "bullbat time." He used the expression to refer to the twilight time of day when the nighthawks, known as "bullbats" in the deep South, circle overhead. The expression is also a euphemism for what is called in other parts of the country "the cocktail hour." JOHN K. CAUTHEN, SPEAKER BLATT: HIS CHALLENGES WERE GREATER 224 (1965).

84. See *supra* note 38.

For these reasons, I conclude that the trial judge properly admitted the statement of Mrs. Robinson, and therefore, the judgment in her favor should be affirmed.

In addition to the foregoing, another reason, entirely different and perhaps better, justifies affirming the judgment. Even if I am wrong about everything I have said so far, even if the trial judge was wrong in admitting the statement of Mrs. Robinson, and even if the engineer was not at fault in causing the accident, the judgment should, nonetheless, be affirmed.

The law unduly exalts the act of blaming, “which it takes as a sign of virtue.”⁸⁵ I do not believe judges are “sufficiently perfect to render justice in the name of virtue.”⁸⁶ It is unrealistic to expect perfection in human behavior,⁸⁷ even in judges. Accordingly, I am convinced the fault of the defendant should no longer be singled out as the sole basis of a plaintiff’s right to recover. It should now be recognized that a defendant who engages in an abnormally dangerous activity is strictly liable for all harm resulting from the activity, even if the utmost care to prevent harm has been exercised.

The idea of strict liability is neither new nor original with me. Consider *Spence v. Buck*, an old case decided before the Great Spiral, when wild beasts still roamed the earth. The defendant captured a large and vicious lion, brought it to the village in which he lived, and very carefully put it in a cage on his own private property.

To make sure the lion didn’t get away he put another cage around the cage, and he locked all the doors, and then to make sure that the locks held he put on more locks, and locks on the locks.

But one night while the lion’s owner was sleeping the lion escaped—no one knows just how—and he went charging through the village injuring and killing innocent people. When the townspeople came to the owner and demanded their damages he said, “Can’t you see—it was not my fault the lion escaped. See here! See the cage! It was very secure. See the locks! They were very strong. I am not to be blamed.”

But the townspeople said, “Neither are we to be blamed. It was not we who brought the lion to the village. It was you, and if your lion escapes, you are responsible.”⁸⁸

85. Lewis H. Lapham, *Inspectors General*, HARPER’S MAG., July 1989, at 12, 12 (quoting Lionel Trilling).

86. See ANATOLE FRANCE, *THE RED LILY* (Frederic Chapman ed. & Winifred Stephens trans., 1925).

87. *Aakjer v. Spagnoli*, 291 S.C. 165, 178, 352 S.E.2d 503, 511 (Ct. App. 1987) (quoting *Langley v. Boyter*, 284 S.C. 162, 188, 325 S.E.2d 550, 565 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985)).

88. The case referred to in this paragraph and the preceding paragraph is, of course, <https://scholarcommons.sc.edu/sclr/vol49/iss3/5>

The Court agreed with the townspeople, holding the defendant liable without regard to whether he was negligent. The defendant, said the Court, "brought the beast to town."

[Sound principles of] public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in [abnormally dangerous activities]. It is evident that [those who engage in such activities] can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from [such activities] are unprepared to meet its consequences. The cost of an injury . . . may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by [those who engage in abnormally dangerous activities] and distributed among the public as a cost of doing business. It is to the public interest to discourage [activities] that are a menace to the public. If [dangerous activities are nevertheless carried on, it is in the public interest to place the responsibility for whatever injuries may be caused upon those engaged in such activities. Even if they are not negligent, they are undeniably responsible for the existence of the activities and the hazards they pose.] However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and [those who engage in abnormally dangerous activities are] best situated to afford such protection.⁸⁹

The railroad reaps great profits from the operation of Super Train USA. Presumably, the general public also benefits from its operation, otherwise, the railroad would not have been licensed by the government. Costly injuries, such as those suffered by Mrs. Robinson, are an inevitable

purely imaginary. It was invented by a trial lawyer extraordinaire, Gerry Spence, to explain the concept of strict liability to juries. Gerry L. Spence, *How to Make a Complex Case Come Alive for a Jury*, A.B.A. J., Apr. 1, 1986, at 62, 66. There have been, however, real cases involving similar facts and reaching similar results. See, e.g., *Behrens v. Bertram Mills Circus Ltd.*, 2 Q.B. 1, 7 (Eng. 1957) (holding the owner of an elephant that had escaped strictly liable). Professor Keeton's torts treatise quotes Baron Bramwell as having said that "if a person kept a tiger and lightning broke its chain, he might be liable for all the mischief the tiger might do." W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 79, at 559 (5th ed. 1984).

89. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944); see also *RESTATEMENT (SECOND) OF TORTS* § 519(1) (1977) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.").

and utterly predictable consequence. Why should a person so unfortunate as to suffer such an injury be made to suffer further by being required to bear the whole cost to the exclusion of those who profit and benefit from the instrument of the injury?

There can be no serious dispute that the activity engaged in by the railroad is abnormally dangerous. Indeed, I cannot think of an activity more dangerous than propelling a ten-thousand-ton vehicle along the surface of the earth at the speed of sound—an activity which outruns even our ability to say what we think about it. Until the advent of Super Train USA, trains traveled at a moderate speed of no more than 250 miles per hour. The railroad should be held liable whether or not it was negligent. After all, the railroad “brought the beast to town.”

For this additional reason, I would affirm the judgment for Mrs. Robinson.

C. *The Opinion of Justice Caduceus*⁹⁰

CADUCEUS, J.:

*Emerson says: “You cannot, with your best deliberation and heed come so close to any question as your spontaneous glance shall bring you while you rise from your bed or walk abroad in the morning after meditating the matter before sleep on the previous night.” Emerson may be right if he has in mind those intuitions which penetrate to the very core of human existence. But what he says is open to grave question so far as it relates to judicial decision.*⁹¹

I scarcely know where to begin. The opinion of Justice Emerson is fundamentally flawed in almost every respect. He is right about only one thing: it is not the business of this Court to propose changes in the statutory law. To do so is to jumble the functions of the judicial and legislative branches—a confusion of which the judiciary should be the last to be guilty. Nevertheless, I wish to state that, were I a legislator instead of a judge, I would support wholeheartedly the legislative remedy proposed by our distinguished Chief Justice. The efficacy of his proposal, as well

90. A caduceus is the serpent-entwined rod, traditionally regarded as a symbol of commerce. Lately it has become the symbol of the medical profession, apparently representing a linkage between business and science. PETER BOWLER, *THE SUPERIOR PERSON'S BOOK OF WORDS* 18 (1985).

91. BERNARD L. SHIENTAG, *THE PERSONALITY OF THE JUDGE* 78-79 (1944) (quoting Ralph Waldo Emerson, *Essay on Intellect*).

as his humanitarian motive, is apparent. He certainly does not deserve the crude scorn and ridicule heaped upon him by Justice Emerson. (However, I want it clearly understood that I make these remarks not as a member of the judiciary, but strictly as a private citizen, who, by the sheer coincidence of his office, happens to have acquired an intimate acquaintance with the facts of this case.)⁹²

The nit-picking by Justice Emerson regarding the desirability of our acting collegially is hardly worth mentioning. He petulantly asserts the right of judges to "think for themselves." Of course, no one suggests denying him this right. Individuality and collegiality are twin imperatives of the judicial process. The reconciliation between the two quite obviously lies in the distinction between deliberating about a case and deciding it. Certainly, each judge must have the opportunity to think, and evaluate, independently. Yet the functions of the appeal are not served unless the decision is a joint one, based on shared thinking.⁹³ I very much regret the innate recalcitrance of some members of this Court which makes the laudable goal of collegiality unattainable.

The wrong-headedness of Justice Emerson is even more egregious in his decision on the merits. His opinion is all sail and no anchor.⁹⁴ He blithely proceeds, unfettered by either the law or the facts, purporting to be guided by something he calls "common sense." (Somehow, the gurus of intuition, like Justice Emerson and his ilk, always seem to present their guesswork in the guise of something they persist in calling "common sense.")

The rule against hearsay protects the fundamental right of a defendant to be confronted with the witnesses against him. The word "confront" derives from "contra," meaning "against," and "frons," meaning "forehead." The English playwright "Shakespeare was . . . describing the root meaning of confrontation when he had Richard the Second say: 'Then call them into our presence: face to face, [a]nd frowning brow to brow, ourselves will hear the accuser and [t]he accused freely speak . . .'"⁹⁵

92. This is precisely the criticism Judge Handy directed to Judge Keen in *The Case of the Speluncean Explorers*. Fuller, *supra* note 1, at 644.

93. If each judge is effectively to apply a personal imprimatur to the decision, he must have at least the opportunity, and must present the appearance, of doing individual thinking and evaluating. Yet the functions of the appeal are adequately served only if the decision is a joint decision based on shared thinking.

CARRINGTON, *supra* note 43, at 9.

94. In a letter to Henry Stephens Randall, Thomas Babington Macaulay criticized the United States Constitution as being "all sail and no anchor." THOMAS BABINGTON MACAULAY, *THE SELECTED LETTERS OF THOMAS BABINGTON MACAULAY* 286 (Thomas Pinney ed., 1974).

95. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (quoting WILLIAM SHAKESPEARE,

The right of confrontation carries with it the right to cross-examine the witnesses. As every trial lawyer knows, cross-examination is "the greatest engine ever invented for the discovery of truth."⁹⁶ The right of confrontation "comes to us on faded parchment,' with a lineage that traces back to the beginnings of Western legal culture."⁹⁷

In 100 A.D., Pliny the Younger, the Governor of Bithynia, wrote to the Roman Emperor Trajan, asking how to react to a rumor that someone was a Christian. Trajan replied: "Anonymous information ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and is quite foreign to the spirit of our age."⁹⁸

Later, the Roman Governor Festus, discussing the proper treatment of his prisoner Paul, said: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."⁹⁹

Still later, the American soldier Eisenhower described face-to-face confrontation as a part of the code of his hometown. In Abilene, Kansas, it was necessary, he said, to

"[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. . . . In this

RICHARD II act 1, sc. 1).

96. IRVING YOUNGER, AN IRREVERENT INTRODUCTION TO HEARSAY 2 (ABA Litigation Monograph No. 3, 1977).

97. *Coy*, 487 U.S. at 1015 (citation omitted); cf. *State v. Williams*, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985).

Some people view the constitutional right of confrontation as merely a legal technicality or loophole in the law through which the guilty can escape just punishment. We see it otherwise. The right of an accused to be confronted by the witnesses against him is perhaps the most important constitutional right provided to people who are not guilty. The right to a trial, standing alone, is fairly meaningless if a conviction can be obtained based only on a prosecution witness reciting a statement allegedly made outside of court. Unfortunately, there is no way the right of confrontation can be accorded people who are not guilty to the exclusion of those who may be guilty. This is because, under our system of justice, no one is guilty until he has been tried and proven guilty. In other words, the right of confrontation cannot be accorded to anyone unless it is accorded to everyone. This is a price we pay for living in the United States of America. Many people feel it is a small price.

Id. at 556, 331 S.E.2d at 361.

98. Lawrence Grey, *Intermediate Judicial Creativity*, TRIAL, Apr. 1985, at 26, 28 (quoting Trajan).

99. *Coy*, 487 U.S. at 1015-16 (quoting *Acts* 25:16).

country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."¹⁰⁰

Although the right of confrontation is usually thought of in the context of a criminal case, where the defendant is an individual, there is no reason why the right should not be accorded where, as here, the defendant is a corporation accused of a civil wrong. The principle of fairness is the same whether the life or liberty of an individual or the property of a corporation is at stake.¹⁰¹

As Justice Emerson says, a hearsay statement is admitted only where circumstances make it at least as likely that it is as true as a statement made in court. In a *tour de force* of statutory construction, he justifies extending the rule against hearsay to admit the statement of Mrs. Robinson, thereby denying the railroad the right of confrontation on the ground that, under the circumstances, what she said is likely to be true. He implicitly assumes the circumstances make not one but two things unlikely: Mrs. Robinson lied, *and* she was mistaken.

I am perfectly willing to concede that a degree of choice is inevitable in the application of the rules of evidence.¹⁰² Even though the rules are

100. *Id.* at 1017-18 (quoting President Dwight D. Eisenhower's remarks given to the B'nai B'rith Anti-Defamation League (Nov. 23, 1953)).

101. Consider the following exchange from Edgeworth's *Love and Law*:

Justice Carver: The poor have nothing to do with the laws.

O'Blaney: Except the penalty.

Carver: True, the civil law is for us men of property.

E.F.J. TUCKER, *CORAM PARIBUS: IMAGES OF THE COMMON LAWYER IN ROMANTIC AND VICTORIAN LITERATURE* 41 (The Citadel Monograph Series: Number XX, 1986).

Also consider the following:

Property rights have long been regarded as fundamental in Western civilization. GOTTFRIED DIETZE, *MAGNA CARTA AND PROPERTY* 7 (1965) ("The Great Charter was thus in a large measure prompted by the desire to have property rights protected."); JOHN NEVILLE FIGGIS, *THE POLITICAL ASPECT OF SAINT AUGUSTINE'S 'CITY OF GOD'* 99 (1921) ("The 'reception,' as it is called, of Roman Law in 1495 in Germany may be taken as the date when the Middle Ages came to an end and the Roman ideas of property had conquered the West."); JOHN ADAMS, *A Defense of the Constitutions of Government of the United States of America*, in 6 *THE WORKS OF JOHN ADAMS* 9 (Charles F. Adams ed. 1851) ("The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.").

Keane/Sherratt Partnership v. Hodge, 292 S.C. 459, 465 n.3, 357 S.E.2d 193, 196 n.3 (Ct. App. 1987) (citations altered).

102. See THOMAS F. BERGIN & PAUL G. HASKELL, *PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS* v (1966) ("[C]hoice on the part of judges is an inescapable part of the

statutory, I fully recognize that this Court has the latitude to construe the statute either strictly or liberally. I am unwilling, however, to base the construction on pure conjecture, especially where, as here, the conjecture is contradicted by solid "social authority." (By which I mean, of course, that empirical information which is treated like common law under our rules of procedure.)¹⁰³

Empirical studies, well known in social science, reveal that, although excitement temporarily stills the capacity of reflection and, thus, tends to produce statements free of conscious fabrication, excitement also impairs the accuracy of observation as well as the ability to accurately recall what has been observed.¹⁰⁴ It would be difficult to imagine circumstances more likely to produce excitement than those in which Mrs. Robinson found herself. Based on these studies, I conclude that, while it is possible she did not consciously lie, it is equally possible she was mistaken. Thus, no basis exists for extending the rule so as to admit her statement.

Justice Emerson proceeds, slipping down the incline of his vast ignorance. Apparently as a fall-back position, he conjures up a rule of strict liability out of thin air. His analysis is "what the French call a *fausse idée claire* . . . an idea brilliantly illuminating, except that it is wrong."¹⁰⁵ He bases the rule on "public policy." Of course, he does not trouble himself to define the criteria of "public policy"—a concept every bit as illusory as "common sense." Knights' errant, like Justice Emerson and his ilk, never pause to consider the effects of their good deeds—it is quite enough for them to go about randomly improving the human condition. Their "natural, self-aggrandizing instinct . . . is to stand up and do

decisional process.").

103. See John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488 (1986) (proposing that "courts treat social science research as they would legal precedent under the common law").

When an agency wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which inform its legislative judgment may conveniently be denominated legislative facts. The distinction is important; the traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts.

Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942). The U.S. Supreme Court has also used empirical studies in at least one instance. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing various empirical studies in support of the conclusion that separate educational facilities are inherently unequal).

104. See Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 438-39 (1928) (criticizing the theory of the exception on the ground that excitement impairs accuracy of observation).

105. *Hamaas v. State*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983).

something—anything at all—when any aspect of life seems less than perfect.”¹⁰⁶

Justice Emerson implicitly raises a number of complicated questions. Why should not considerations of efficiency *and* equity be taken into account? What are the effects of the rule of strict liability on the amount of care exercised by those who engage in abnormally dangerous activities? What are the effects on the amount of care exercised by those who may be injured by such activities? What are the effects on the price and production of the services rendered by those who engage in the activities? Do the answers to these questions depend upon whether the risks of the activities are properly perceived? Do the answers depend on whether the victim is a third party? What defenses to the rule should be allowed, if any? Who is the better bearer of risk? Does the answer to this question depend on the availability of insurance?¹⁰⁷ A systematic economic analysis provides the answers to these questions.

In a world of unrelenting scarcities it is critical that we decide cases in ways which drive people to behave efficiently. The only reason for law, particularly tort law, is to influence behavior and thus achieve greater efficiency. Efficiency constitutes justice.¹⁰⁸ An application of economic principles is necessary if we are to succeed in this regard. I will spare readers of this opinion the details. Such an analysis is already familiar to even minimally educated people and readily available to those who are so unfortunate as to be ignorant of economic principles. (Unlike the other social sciences, which normally require the gathering of empirical information, a judge can put the science of economics to use without even leaving his chambers.) Suffice it to say that by the rankest of coincidences, Justice Emerson may actually be half right (which is, of course, exactly the same as saying he is all wrong).

In accident situations, where the problem is to induce the injurer to take appropriate care, a rule of strict liability is efficient. This rule induces efficient behavior because it forces the injurer to take into account all of the adverse effects of its behavior on the victim. In most situations, however, the problem is not just to control the behavior of the injurer. Generally, the victim, as well as the injurer, can affect the probability and the magnitude of the potential harm. For example, the driver of a car can

106. Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 336 (1985) (referring to the “instinct of altogether too many lawyers and judges”).

107. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 3 (1983) (questions posed in response to the concurring opinion of Judge Traynor in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944)).

108. But see Eleanor M. Fox, *A Century of Tort Law*, TRIAL, July 1989, at 79, 84 (criticizing the Chicago School law and economics—“Efficiency is not justice.”).

approach a railroad crossing slowly rather than at a moderate or rapid speed. Where, as here, both the injurer and the victim can affect the harm, the problem becomes one of inducing both parties to take appropriate care. One way to solve the problem is to allow the defense of contributory negligence (in other words, adopt a rule that the injurer is strictly liable unless the victim is contributorily negligent). Such a rule will result in the efficient behavior of both parties.¹⁰⁹

It is undisputed that Mrs. Robinson drove her car directly into the path of the oncoming train. (As previously discussed, her exculpatory statement is not admissible.) Therefore, it appears she was contributorily negligent. Thus, even if a rule of strict liability is adopted, Mrs. Robinson is barred from recovering against the railroad. This result is entirely proper. Where a rule of law results in injurers gaining more than victims lose, wealth is increased and, thus, efficiency is promoted. Efficiency, so defined, is normally served by judgments for defendants.¹¹⁰ Legal intervention is seldom appropriate.¹¹¹

Justice Emerson is like Sherlock Holmes's dog who did not bark. He does not confront, but instead ignores, the foregoing considerations. The law, to him, is no more than a collective hunch.¹¹² He presumes, somehow, to simply know what the law should be. The greater "menace [to the social order] does not come from our ignorance, but from our presumptions of knowledge."¹¹³ Along these lines, I offer a concluding observation, a final thought or two.

"We have a fine new world [in Newgarth]. It works repeatedly, not in random fits and starts. We have what the ancients only dreamed of: reliability."¹¹⁴ This is why, despite our romantic longings for a less technically suffocating world, we no longer believe in ghosts, mental telepathy, the New Age or the zodiac. We rely, instead, on science and the scientific method. Guesswork, like superstition, "do[es] not produce the reliable and specific data required by jumbo-jet pilots, brain surgeons, market analysts, or, for that matter, wheat farmers."¹¹⁵ Nor is guesswork

109. POLINSKY, *supra* note 107, at 45; cf. RESTATEMENT (SECOND) OF TORTS § 524(2) (1977) ("The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability.").

110. See *United States Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022 (7th Cir. 1982) (Posner, J.) (concluding that a shipowner did not negligently cause the death of a longshoreman who fell through an open cargo hatch).

111. Fox, *supra* note 108, at 84.

112. See JANE WAGNER, *THE SEARCH FOR SIGNS OF INTELLIGENT LIFE IN THE UNIVERSE* 18 (1985) ("After all, what is reality anyway? Nothin' but a collective hunch.").

113. Daniel J. Boorstin, *The Shadowland of Democracy*, U.S. NEWS & WORLD REP., Nov. 14, 1988, at 61, 61.

114. Rick DeMarinis, *Insulation*, HARPER'S MAG., July 1989, at 51, 52.

115. *Id.*

a sufficient basis for the decisions of judges. Judges are like field-goal kickers: their calculations must be exact. Those who ignore hard knowledge do so at their peril and, more ominously, at the peril of the society they exist to serve.

They want the shortcut that bypasses the difficult road between cause and effect. But no one gets off this road. Superstition remains superstition and it can only lead to the dark side of the mind where illumination is scant and quirky. Those who travel there soon find themselves lost in the eclipse of reason¹¹⁶

or lost in the "wilderness of the single instance."¹¹⁷

For these reasons, the judgment in favor of Mrs. Robinson should be reversed.

*D. The Opinion of Justice Adams*¹¹⁸

ADAMS, J.:

*Life's but a Walking Shadow, a poor Player
That Struts and Frets his hour upon the Stage
And then is heard no more. It is a Tale
Told by an Ideot, full of Sound and Fury,*

116. *Id.*

117. BERGIN & HASKELL, *supra* note 102, at x; see also FRED RODELL, WOE UNTO YOU, LAWYERS! 40 (1939) (quoting Alfred, Lord Tennyson: "[T]he lawless science of our law, / That codeless myriad of precedent / That wilderness of single instances"). Compare the following comments by Michael J. Saks:

The offerings of applied empirical social psychological researchers to the law tend to resemble those of civil engineers inventing new techniques for construction companies or electrical engineers adapting basic knowledge for the consumer electronics industry. They assume that their client institutions want more accurate measures, more robust materials, higher signal-to-noise ratios, more hits, and fewer misses. If the law is a decision making machine, runs this implicit reasoning, then surely it will be eager to adopt findings and techniques that will allow it to make more correct and fewer incorrect decisions, and to do so at greater speed and lower cost.

Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 LAW & CONTEMP. PROBS., 243, 243 (1988).

118. The name is derived not from the patriot Samuel Adams or from the president John Adams, but from the historian Henry Brooks Adams, who said: "Chaos was the law of nature; Order was the dream of man." HENRY ADAMS, THE EDUCATION OF HENRY ADAMS 451 (1918).

*Signifying Nothing.*¹¹⁹

The law, like life, is "but a walking shadow." The opinions of my pretentious colleagues are "full of sound and fury, signifying nothing."

In the unlikely event anyone is still reading this mumbo jumbo, one thing, at least, should be abundantly clear: there are no neutral principles of law.¹²⁰ Nor is there any such thing as legal reasoning. "Law is politics. It does not exist independently of ideological battles within society."¹²¹ Judges, like my colleagues, perch pretentiously upon their wooolsacks.¹²² They play God with the facts of the cases, "manipulating, omitting or inventing key facts" to make cases come out the way they want.¹²³ They purport to reveal some manifest destiny.¹²⁴ They make sham references

119. WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5.

120. See *Lux et Veritas Redux?*, WALL ST. J., Feb. 23, 1989, at A18 (among the theories of the Critical Legal Studies movement is that "[t]here are no neutral legal principles").

121. See LORD LLOYD OF HAMPSTEAD & M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 710 (5th ed. 1985) ("Critical legal thinkers believe there is no distinctive mode of legal reasoning.").

122. Wooolsacks traditionally gave an impression wealth and power:

In the Middle Ages, the wool trade was the main source of commercial wealth in England, and tradition has it the wooolsack was introduced in the House of Lords to symbolize the importance of wool in the commerce of the realm. Royal officials attending Parliament were entitled to sit on a wooolsack, and the Lord Chancellor, who enjoyed precedence over all peers except a prince royal, sat on the wooolsack nearest the throne. In time, it became customary for the Lord Chancellor to sit on the wooolsack when he delivered judgment in the Court of Chancery. He was referred to as "the noble Lord on the wooolsack." The designation distinguished him from the common law judges who sat on a bench and were referred to as "the justices of the bench."

C. Ray Miles Constr. Co. v. Weaver, 296 S.C. 466, 469 n.3, 373 S.E.2d 905, 906 n.3 (Ct. App. 1988) (citing THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 66-67 (5th ed. 1956); JOHN CAMPELL, *LIVES OF THE LORD CHANCELLORS* 15-16 (7th ed. 1885)). Of course, the reference to the Newgarth judges sitting on a wooolsack is purely figurative.

123. David Margolick, *At the Bar*, N.Y. TIMES, Oct. 13, 1989, at B5 (discussing a paper by Professor Anthony D'Amato delivered at a program on "Deconstruction and the Possibility of Justice"); Lisa Green Markoff, *Law Schools: 'Crit.' Legal Studies, Move Over: Here Comes Deconstruction*, NAT'L L.J., Oct. 16, 1989, at 4, 4.

124. The idea of manifest destiny was popularized in the context of American expansion in North America:

Manifest destiny was a term used to describe the belief in the 1840's in the inevitable territorial expansion of the United States. People who believed in manifest destiny maintained that the United States should rule all North America because of [its] economic and political superiority, [and its] population was growing rapidly The phrase was first

to rules of law. They foolishly persist in claiming they are being obedient to abstract principles.¹²⁵ The truth is that no such principles exist for them to follow.

The law is both incoherent and indeterminate. It is shot full of contradictions at every level. For every legal conclusion there is an equally plausible argument for an opposite conclusion. Legal doctrine is invariably aimed at legitimizing structures of power and distributions of wealth that are both unjust and illegitimate. "Explanations of legal rules and practices, especially those that purport to use general scientific methods and theories . . . , are often mere attempts to create an illusion of necessity, in order to lull people into accepting the status quo and adopting a defeatist attitude toward the possibility of radical change."¹²⁶

Explanations based on empirical information and economic analysis are especially deluding. Empirical studies are notoriously unreliable. The behavior of a particular person cannot be extrapolated from the behavior of another person or group of persons. Every human being is different. (I find it nothing less than bizarre that Caduceus, who rejects out-of-court statements as unreliable, would readily accept empirical studies which were not presented at trial.) Economics, the most morally bankrupt of the sciences, promotes avarice in the name of efficiency. A great variety of forces have shaped the world, for example, love, religion, pride, and greed.

used in 1845 by John L. O'Sullivan in an article on the annexation of Texas. The spirit of manifest destiny was revived at the end of the 1800's, during and after the Spanish-American War.

13 THE WORLD BOOK ENCYCLOPEDIA 141 (W. Richard Dell ed., 1996).

125. One commentator states that

according to the school of Legal Realism, in which many of us were nurtured, judges in fact follow their instincts in deciding cases, making sham references to rules of law; generally they are themselves unaware of what they are doing, and persist foolishly in believing that they are being obedient to precedent.

Benjamin Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?*, 70 MASS. L. REV. 10, 10 (1985). Schlesinger's comment is similar:

The Yale thesis, crudely put, is that any judge chooses his results and reasons backward. The resources of legal artifice, the ambiguity of precedents, the range of applicable doctrine, are all so extensive that in most cases in which there is a reasonable difference of opinion a judge can come out on either side without straining the fabric of legal logic. A naive judge does this unconsciously and conceives himself to be an objective interpreter of the law. A wise judge knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results.

Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE, Jan. 1947, at 73, 201.

126. *In Critical Legal Studies, the West Is the Adversary*, WALL ST. J., Feb. 23, 1989, at A18 (excerpts from comments on the Critical Legal Studies movement by Dean Robert Clark at a Federalist Society program in New York City in 1985).

From this smorgasbord of human passions, the economist fastidiously chooses greed. No wonder economics is called the "dismal science." For abject amorality, no one tops the economist, except perhaps the judge. Justice Caduceus is, of course, both. (The world to him should be for sale to the highest bidder. The law to him is no more than a means of crowd control.)

An economic analysis in this case is particularly absurd. Anyone not already disinclined to place himself in the path of a ten-thousand-ton vehicle, traveling faster than the speed of sound, would hardly be deterred by some obscure doctrine of law. Of all its many vanities, "[t]he greatest vanity of the legal profession . . . is its conviction that there are no limits to the contributions lawyers [and judges] can make to the public safety."¹²⁷

My colleagues purport to base their decisions on legal principles essentially derived from two sources, the law of statutory construction and the law of torts.

The Code Reporter Llewellyn, relying on the earlier work of Driscoll, has demonstrated that "[s]tatutory interpretation still speaks a diplomatic tongue."¹²⁸ (It would be more accurate to say "with a forked tongue."¹²⁹) He cleverly laid out the various canons of statutory construction in pairs thereby revealing that for each rule there is an opposite rule. The English sociologist Jonathan Swift asked: Is not "conscience a pair of breeches, which, though a cover for lewdness as well as nastiness, is easily slipped down for the service of both?"¹³⁰ Llewellyn exposed the same truth about the canons of statutory construction.

It is even easier to demonstrate that the law of torts is inherently corrupt. Legal historians, too numerous to mention, have agreed that tort doctrine has been deliberately manipulated to protect the capital of corporations. In the early nineteenth century, "courts jettisoned a potent . . . rule of strict liability in favor of a lax negligence standard, leniently applied that standard to [corporate] defendants, administered a severe defense of contributory negligence, and placed strong controls on negligence law under the name of 'duty.'"¹³¹ Thus, they constructed a

127. Huber, *supra* note 106, at 336.

128. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950).

129. See 1 A DICTIONARY OF AMERICANISMS 647 (Mitford N. Mathews ed., 1951) (defining forked tongue as a term "used, in imitation of Indian speech, to mean a lying tongue, a false tongue"). The term is used here to imply duplicity.

130. Jonathan Swift, *A Tale of a Tub*, in THE TALE OF A TUB AND OTHER WORKS 33, 73 (Henry Morley ed., London, George Routledge & Sons 1889) (1704).

131. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1717 (1981); see also *Wilson v. The Wil. and Man.*

corrupt and highly formalized system in which justice, if it has any place at all, is only an accidental by-product.

Why would virtually all judges, ever since, have fallen in line so docilely? The answer is fairly obvious. Judges are like soldiers, regularly required to do things they know are wrong and sometimes able to justify their actions on the ground they are serving some higher purpose. But, more often than not, judges convince themselves that what they do is right simply because they are required to do it. After a while, they get used to it, and eventually, like everything else they do, it becomes a snap. The law has sustained them all their lives. Naturally, they take care to sustain the law. (If the world ever became just, judges would have to stand in bread lines—right behind sheriffs.¹³²)

In any event, the historian Friedman got it mighty right when he said: “the thrust of the rules, taken as a whole, approached the position that corporate enterprise would be flatly immune from actions sounding in tort.”¹³³

The law favoring corporate defendants is routinely applied today. From the beginning, railroads, like the defendant in this case, have been among the principal beneficiaries. In fact, the law was once known as “tort-and-railroad law.”¹³⁴ It was the railroad magnate, William H. Vanderbilt, who coined the phrase: “The Public be damned!”¹³⁵

I suppose I should speak to the insipid quibbles of my colleagues about collegiality and about asking the Legislature for a new law. I reject the concept of collegiality altogether. Those who deprecate conflict “want crops without plowing up the ground, . . . rain without thunder and lightning . . . [and] the ocean without the awful roar of its many waters.”¹³⁶ Collegiality is the hallmark of a great country club, not a great court.

The Chief Justice asks that we join him in making a direct request to the Legislature. Justice Emerson refuses, saying he is “shocked.” Justice

R.R. Co., 44 S.C.L. (10 Rich.) 52, 54 (1856) (holding that a train does not have to stop for domestic animals because of “the influence which such a doctrine would have upon the interests of railroads—it would certainly go far to diminish the almost incalculable benefits that are conferred upon society, by these important enterprises”).

132. Cf. THE BIG BOOK OF JEWISH HUMOR 214 (William Novak & Moshe Waldoks eds., 1981) (quoting Lenny Bruce: “If the whole world were tranquil, without disease and violence, I’d be standing in the bread line—right back of J. Edgar Hoover.”).

133. Schwartz, *supra* note 131, at 1717-18 (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 417 (1973)).

134. FRIEDMAN, *supra* note 133 at 410 (referring to nineteenth-century tort law as “tort-and-railroad law”).

135. DICTIONARY OF QUOTATIONS 564 (Bergen Evans ed., 1968).

136. JOHN W. BLASSINGAME, FREDERICK DOUGLASS: THE CLARION VOICE 46 (1976) (quoting Frederick Douglass on the subject of agitation for equal rights).

Caduceus "emulated Pooh-Bah in the ancient comedy by stepping to the other side of the stage to address a few remarks to the [Legislature] in my capacity 'as a private citizen.' (I may remark, incidentally, that the advice of Private Citizen [Caduceus] will appear in the reports of this court printed at taxpayers' expense.)"¹³⁷ All this is "much ado about nothing."¹³⁸ We have the power to make law without any help. This is, of course, what I have been saying from the outset: There is no law binding on us. We are now, and always have been, free to decide this case, and any case, anyway we want.

Mr. Robinson, who thus far barely rates a mention, is food for worms. Nothing more can be said or done for him. The childlike Mrs. Robinson is with us still. Her brains and blood have greased the golden rails of Supertrain USA. Like Blanche DuBois, she depends for her survival "on the kindness of strangers."¹³⁹ She cries out for our protection. I vote to affirm the judgment in her favor for two reasons: First, to hasten the overthrow of a rancid legal system, and second, for the unbounded joy, the absolute ecstasy, I experience in trashing such a system. I say, "the law be damned; the railroad be damned."

E. The Opinion of Justice Christian

CHRISTIAN, J.:

*Today alike are great and small,
The nameless and the known.
My palace is the people's hall,
The ballot box my throne.*¹⁴⁰

*"No matter whether th' constitution follows th' flag or not,
th' supreme court follows th' election returns."*¹⁴¹

*"Any Christian who is not a hero is a pig."*¹⁴²

137. Fuller, *supra* note 1, at 643.

138. WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, act 3, sc. 1 ("[O]f this matter / Is little Cupid's crafty arrow made, / That only wounds by hearsay.").

139. TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* 178 (1947).

140. Anonymous.

141. *THE QUOTABLE LAWYER* 291 (David S. Shrager & Elizabeth Frost eds., 1986) (quoting Finley Peter Dunne).

142. See JOHN IRVING, *A PRAYER FOR OWEN MEANY* 10 (1989) (quoting Leon Bloy).

*Whether I shall turn out to be the hero of my own life, or whether that station will be held by anybody else, these pages must show.*¹⁴³

*"The last temptation is the greatest treason:
To do the right thing for the wrong reason."*¹⁴⁴

Some things are over analyzed, like sunsets, romantic love, and cases on appeal. Sometimes an appellate court is "like a little boy with a magnifying glass. The passerby may think he's just looking at a bug on the sidewalk, when he's actually frying it to death."¹⁴⁵

"[G]overnment is a human affair," and the judiciary is a part of government.¹⁴⁶ "[People] are ruled not by words on paper or by abstract theories, but by other [people, some of whom are called judges]. They are ruled well when [they] understand the feelings and conceptions of the [people they govern]. They are ruled badly when that understanding is lacking."¹⁴⁷ "This is the essence of democracy, faith in the wisdom of the people"¹⁴⁸

"Of all branches of the government, the judiciary is the most likely to lose contact with the [people]."¹⁴⁹ This failing is the whole reason for the recent change in our law to provide for the popular election of judges. (Were it not for this change, I would not be a judge.)

Many years ago, the New England political scientist Henry Lummus made the practical observation: "A judge in office for a term of years who does not consider the coming election invites a martyr's crown—and many deem a martyr only a glorious sort of fool."¹⁵⁰ (Remarkably, Henry Lummus was, at the time, an associate justice of the Supreme Judicial Court of Massachusetts.)

143. CHARLES DICKENS, *DAVID COPPERFIELD* 41 (Edward Chauncey Baldwin ed., Scott, Foresman & Co. 1919) (1850).

144. T.S. ELIOT, *MURDER IN THE CATHEDRAL* 44 (1935) (quoting St. Thomas à Becket).

145. *THE NEW REPUBLIC*, Feb. 27, 1989, at 42 (appearing in an advertisement).

146. Fuller, *supra* note 1, at 638; see also Kenneth Jost, *Holding the Center*, A.B.A. J., Mar. 1990, at 108, 108 ("Throughout history, the [United States Supreme] Court always has been, in part, a political institution—its members influenced by their political background and its decisions influenced by the justices' views of contemporary society and politics.").

147. Fuller, *supra* note 1, at 638.

148. JOHN F. KENNEDY, *PROFILES IN COURAGE* 14 (Perennial Library 1964) (1956).

149. Fuller, *supra* note 1, at 638.

150. See HENRY T. LUMMUS, *THE TRIAL JUDGE* 92 (1937) ("A judge in office for a term of years who does not consider the coming election invites a martyr's crown—and many deem a martyr only a glorious sort of fool.").

I have implicit faith in the wisdom of the people. I am a judge in office for a term of years. I do not aspire to martyrdom, nor am I a fool. Therefore, I directed the public relations firm handling my campaign for reelection to conduct a poll asking potential voters their opinions about this case.¹⁵¹ I have just received the results of that poll—they are stunning.

More than ninety percent of those polled responded that Mrs. Robinson should recover against the railroad. Nine percent declined to express an opinion, saying “the decision should be left to the courts,” while less than one percent had no opinion. Not a single person polled said the railroad should prevail, and no one expressed any doubt about how the accident happened. Apparently, everyone accepted the account of the accident given by Mrs. Robinson. (My brother Caduceus, of course, thinks she may have been mistaken. It would seem that, by the most remarkable of coincidences, the only person in all Newgarth who overtly doubts what she said happens to be a judge on the court deciding her case.)

For these reasons—and these reasons alone—I should affirm the judgment in favor of Mrs. Robinson. I should, but I cannot.

Lord Salisbury, the English Prime Minister, is reputed to have written his Lord Chancellor: “The judicial salad requires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not observed.”¹⁵² I did not become a judge to serve as a seismograph of public opinion. The voters elected me because they had confidence in my judgment and in my ability to exercise that judgment honestly and impartially. If I am to be faithful to their trust, I must inform, correct, and, as painful as it may be, ignore their opinions.¹⁵³ I am bound by my oath of office to decide cases according to law, not public opinion. I am also mindful that judges who have decided cases based on the will of the

151. See generally *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969, 976 (2d Cir. 1948) (Frank, J., dissenting) (basing his opinion on a survey that he personally conducted of adolescent girls and women to determine whether anyone could reasonably believe there was a relationship between *Seventeen* magazine and girdles labeled “Miss Seventeen”); *Repouille v. United States*, 165 F.2d 152, 154 (2d Cir. 1947) (Frank, J., dissenting) (implying that information as to what was morally acceptable conduct could be obtained using polls).

Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs. And if a judge on coming to the bench were to decide to hermetically seal himself off from all manifestations of public opinion, he would accomplish very little; he would not be influenced by current public opinion, but instead by the state of public opinion at the time that he came onto the bench.

Quotes, A.B.A. J., Aug. 1989, at 30, 30 (quoting Chief Justice William H. Rehnquist).

152. Professor Herbert Hausmaninger, Lecture at the University of Virginia Graduate Program for Judges (summer 1989).

153. See KENNEDY, *supra* note 148, at 15.

majority have not fared well in the annals of history. An example of such a judge is the Judean jurist Pontius Pilate.¹⁵⁴

I cannot accede to the views of my brother Adams. He looks at both the law and the world from the bottom up. He is essentially an anarchist, seeking the overthrow of the existing legal system without offering anything in its place. Perhaps he envisions a utopia in which people live together without the necessity of any coercive force. If so, his is a pathetic pipe dream. Furthermore, he may very well be wrong about the genesis of tort law. Brother Adams confidently states: "Legal historians, too numerous to mention, have agreed that tort doctrine has been deliberately manipulated to accommodate the economic interests of corporations." In fact, a number of respected legal historians disagree.¹⁵⁵ While I agree that our legal system leaves much to be desired, I cannot embrace anarchy as the alternative.

Nor can I subscribe to the opinion of my brother Emerson. He argues that judges have the authority to invent law, not merely to discover it. The analogies on which he relies will not wash.¹⁵⁶ Like a monkey reaching for the moon in the water, he sees things in the law which are not there.¹⁵⁷

154. See *Mark 15* (King James); *Luke 23* (King James); *John 19* (King James); see also Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 44, 56 (1989) (criticizing the United States Supreme Court for its deference to "majoritarian decisionmaking").

155. See Schwartz, *supra* note 131, at 1774 (arguing that neither New Hampshire nor California courts have sheltered industries from liability); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 73 (1972) (rejecting the idea of ongoing legal bias in favor of industry); Mark V. Tushnet, Commentary, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81, 96 (criticizing theory that laws are developed only to promote enterprise). But see *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul R.R.*, 232 U.S. 340, 352 (1914) (Holmes, J., concurring in part) (arguing that a "well-managed train" should not be held liable for setting fire to flax near tracks).

156. A favorite expression of Holmes was "that won't wash." He delighted in turning the slang expression into purposefully dreadful Latin: "Non lavabit." Chief Justice William Howard Taft once pretentiously corrected him: "Non lavetur." NOVICK, *Supra* note 8, at 365.

157. "This analogy is extrapolated from a Zen word puzzle called a 'koan.'" Garrett v. Snedigar, 293 S.C. 176, 184 n.3, 359 S.E.2d 283, 288 n.3 (Ct. App. 1987) (citing GEORGE PLIMPTON, *THE CURIOUS CASE OF SIDD FINCH* 41 (1987) ("A pair of monkeys are reaching for the moon in the water.")); cf. EZRA POUND, *Epitaphs*, in *PERSONAE: THE COLLECTED SHORTER POEMS OF EZRA POUND* 117, 117 (1926) ("And Li Po also died drunk./ He tried to embrace a moon/ In the Yellow River."). The most famous example, at least in the Western world, is the quizzical observations: "What is the sound of one hand [clapping]?" PHILIP KAPLEAU, *THE THREE PILLARS OF ZEN* 144 (1980). "Zen is a Buddhist sect which teaches that enlightenment can be attained by means of paradoxical and nonlogical statements." Garrett, 293 S.C. at 184 n.3, 359 S.E.2d at 288 n.3.

He calls attention to two statutes, the statute providing the penalty for murder and the statute making it a crime to leave a car parked for longer than two hours. He claims that courts have amended the murder statute to recognize a defense which the statute itself does not recognize. He further claims that this court, in *Commonwealth v. Staymore*, refused to apply the parking statute according to its terms. Upon careful examination, it appears neither of these two things actually happened.

The murder statute provides: "Whoever shall willfully take the life of another shall be punished by death." N.C.S.A. (N.S.) § 12-A. Any literate person, even someone with no formal legal education, can plainly see the statute requires that the defendant must have acted willfully. "The man who acts to repel an aggressive threat to his own life does not act 'willfully,' but in response to an impulse deeply ingrained in human nature."¹⁵⁸ Thus, no amendment of the statute is necessary to recognize the defense of self-defense.

The parking statute also requires that the defendant must have acted willfully. In *Commonwealth v. Staymore* the defendant was forced to leave his car parked by circumstances entirely beyond his control. He was obviously not guilty of having acted willfully. Thus, in reversing the conviction of the defendant, the Court applied the statute according to its terms.

I am sorry to say the Chief Justice is right. The statute establishing the rules of evidence does not allow the statement of Mrs. Robinson to be admitted and, therefore, the statute requires that the judgment in her favor must be reversed. My regret is especially profound because I am equally convinced of something else—Mrs. Robinson told the truth. To reverse the judgment is a grave injustice and morally wrong.

The legal system chases the truth "[l]ike an old man chasing a bus . . .": the process is awkward, but the objective is almost always realized.¹⁵⁹ The Chief Justice says: "We are not called upon to decide whether what Mrs. Robinson said is true." He is right again but only in a very narrow sense. We do not have to decide whether what Mrs. Robinson said is true because the jury, by its verdict, decided she spoke the truth. The jurors believed her statement. So did the trial judge, her doctor, her priest, and so do I. It is inconceivable to me that her account of the accident is not true. Even my brother Caduceus does not claim Mrs. Robinson lied instead pointing to empirical studies showing "excitement impairs the accuracy of observation as well as the ability to recall accurately what has been observed."

158. Fuller, *supra* note 1, at 629.

159. Pope Brock, *Lost at Sea—and on Land*, LIFE, Feb. 1990, at 78, 78.

I can understand how excitement might cause a person to make a mistake in describing the details of a startling event, but I cannot believe excitement could cause a person to be completely mistaken about what happened. My confidence in the essential accuracy of what Mrs. Robinson said is based on, among other things, the fact that her account of the accident is validated by the undisputed facts. For example, if she had been mistaken about being outside the car when it was struck by the train, she would have been found inside, not outside, the mangled vehicle. It is impossible for me to believe that ten years later she could have spontaneously blurted out an account of the accident which fits squarely with the undisputed facts while simultaneously being mistaken about what happened. Nor can I subscribe to the condescending claim of my brother Caduceus that cross-examination is "the greatest engine ever invented for the discovery of truth." The numerous trial transcripts I have read do not support this grand claim. Honest errors are sometimes ferreted out by artful cross-examination. "However, the best of cross-examination can rarely crack deliberate perjury or its next of kin, the conscious shading of the truth by a witness out of his own self-interest."¹⁶⁰

It seems to me that truly effective cross-examination takes place largely in television portrayals of trials rather than in real trials. Primary among these portrayals are the reruns of the old Perry Mason series. "Perhaps, if [the creator of Perry Mason] had had a flair for writing closing arguments we would have been spared the unrealistic portrayals of those devastating cross-examinations which terminated the trials and made summations superfluous."¹⁶¹

Thus, the dilemma is this: A statute, duly enacted by the Legislature, compels one thing, while justice in the case compels another. Should the enacted law prevail over justice, or should justice prevail over the enacted law? That is the real question before us. Everything else is completely beside the point.

The Chief Justice says: "The moral content of the law must be given the morality of the legislator, not the morality of the judge. Our personal

160. JUDGE ROBERT SATTER, *DOING JUSTICE: A TRIAL JUDGE AT WORK* 44 (1990) (discussing the efficacy of cross-examination).

161. JAMES W. JEANS, *TRIAL ADVOCACY* 298 (1975). E.B. White, noted observer of the American scene, predicted the influence of television. When he saw the first public demonstration of the medium, he wrote:

"I believe television is going to be the test of the modern world, and that in this new opportunity to see beyond the range of our vision, we shall discover a new and unbearable disturbance of the modern peace, or a saving radiance in the sky. We shall stand or fall by television—of that I am quite sure."

Doug Nye, *TV Celebrating its 50 Years—Again*, *THE STATE* (Columbia, S.C.), Nov. 26, 1989, (T.V. Weekly), at 17 (quoting E.B. White).

biases must be put aside." He proceeds to disclaim any responsibility for producing "a just result." I am not so sure. I recognize there is much to be said for this mechanical way of judging. After all, none of us was commissioned a philosopher king.¹⁶² (Indeed, some of us were not even rushed by Phi Beta Kappa.) Why should judges, of all people, have the right to impose their personal values on others? On the other hand, to say judges should be morally neutral in deciding cases is to say that they should be either without moral principles or somehow able to subvert their moral principles. In other words, judges should be either amoral or immoral. I do not believe my constituents want their cases decided by such judges. If they do, they made a bad mistake when they elected me.

Nor do I believe my constituents really want unbiased judges (although they give lip service to the concept). They, themselves, are biased. However, that is not to say they are morally defective because a bias is not necessarily a flaw. "[T]o . . . purge the mind of all biases is to confuse an open mind with an empty mind. Biases are one's intellectual fortune . . . and are the starting points of rational inquiry. The goal is to arrive at biases that have been well-formulated, tested, and corrected."¹⁶³ (After all, the presumption of innocence, fundamental in our criminal law, is a bias.)

The question of whether enacted law should prevail over justice, or the other way around, is by no means younger than springtime. Throughout history, the view that enacted law should prevail has been defended by both political philosophers and philosophers of law, as well as by lawyers and judges.

In responding to the teacher Socrates, who said justice consists of "rendering what is due," the law professor Thrasymachus "declared . . . the opposite view . . . that what is just or unjust is determined solely by

162. E.D. HIRSCH, JR. ET AL., *THE DICTIONARY OF CULTURAL LITERACY* 101 (1988) (The philosopher-king was defined as "the ideal ruler, who has the virtue and wisdom of the philosopher."); see also *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (stating that to reject the Kentucky Legislature's choice to allow the execution of sixteen-year-olds would be "to replace judges of the law with a committee of philosopher-kings").

[A] philosopher is a blind man in a dark cellar at midnight looking for a black cat that isn't there. He is distinguished from a theologian, in that the theologian finds the cat. He is also distinguished from a lawyer, who smuggles in a cat in his overcoat pocket, and emerges to produce it in triumph.

William L. Prosser, *My Philosophy of Law*, in *TRIALS AND TRIBULATIONS: APPEALING LEGAL HUMOR* 1, 3-4 (Daniel R. White ed., 1989).

163. JOE E. BARNHART, JIM AND TAMMY: CHARISMATIC INTRIGUE INSIDE PTL 230 (1988); see James C. Freund, *Ten Years After*, NAT'L L.J., Jan. 8, 1990, at 15, 16 ("The more I practice law, the more evidence I see of the central role that bias and self-interest play in decision-making and in what postures as objective advice.").

whoever has the power to lay down the law of the land."¹⁶⁴ Thereafter, the Roman jurisconsult Ulpian agreed, declaring "that whatever please[d] the prince ha[d] the force of the law."¹⁶⁵ Later, in the sixteenth century, the same view was set forth by another defender of absolute government, the English philosopher Hobbes.¹⁶⁶ Still later, in the nineteenth century, the English economist Jeremy Bentham and the English judge Austin expressed the same view.¹⁶⁷ Their error is not only basic but also egregious. In the words of Lord Acton, "[t]here is no error so monstrous that it fails to find defenders among the ablest men."¹⁶⁸

Instead of regarding justice as the fountainhead from which enacted law springs—the source of its authority and the measure of its legitimacy—Thrasymachus and his successors turn things upside down. They contend that enacted law is the sole source of justice—the only thing that determines how people should behave in relation to one another and to the community in which they live. The problem with their view is that when justice is made a subsidiary of enacted law, what is just and unjust necessarily varies from place to place and from time to time. Consider to prime examples: slavery and the political disenfranchisement of women. If these practices are just where they are allowed by enacted law, then they are just in one jurisdiction and not in another. Likewise, within a particular jurisdiction, these practices are just at one time and not at another. I cannot accept this view of justice or of law.

164. MORTIMER J. ADLER, *SIX GREAT IDEAS* 200 (1981). The Greeks, who found a place in their theology for both Bacchus and Dionysius, were able to accommodate Socrates and Thrasymachus in their philosophy. See Geoffrey Norman, *Did Winston Churchill Pump Iron?*, *PLAYBOY MAG.*, Feb. 1990, at 95, 151.

165. ADLER, *supra* note 164, at 200.

166. See THOMAS HOBBES, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* 55 (Joseph Cropsey ed., 1971) ("It is not Wisdom, but Authority that makes a Law.").

167. See BENTHAM, *supra* note 32, at 14 ("Bad as the law is and badly as it is made, it is the tie that holds society together. Were it ten times as bad, if possible, it would still be better than none: obey it we must, or every thing we hold dear would be at an end.").

Poetry, Bentham thought, was only printed matter with lines of irregular length. The vast untidiness of society should be corrected by rational legislation.

John Austin was Bentham's prophet among lawyers. His book *The Province of Jurisprudence Determined* seemed to explain all of law the way Euclid deduced his theorems. Law, said Austin, was not a species of morality or revelation. Law was the command of the sovereign, backed by the force of the state.

NOVICK, *supra* note 8, at 99-100 (footnote omitted).

168. LEARNED HAND, *THE SPIRIT OF LIBERTY* 261 (Irving Dilliard ed., 3d. ed. 1963) (quoting Lord Acton).

I associate, instead, with an altogether different crowd—the Greek philosophers Plato and Aristotle, the Roman orator Cicero, the Christian saints Augustine and Aquinas, the German Reformer Martin Luther, the English political scientist Locke, the French philosopher Rousseau, the American educator Jefferson, and the theologian Martin Luther King, Jr.¹⁶⁹ An unjust law, according to them, is “a law in name only.”¹⁷⁰ “Lacking the authority that can be derived only from . . . antecedent principles of natural justice, it has coercive force and that alone.”¹⁷¹ A law inconsistent with justice does not deserve to be called “‘law,’ any more than a harmful chemical packaged by a non-druggist [is] entitled to be called a ‘prescription.’”¹⁷² “Force without authority is might without right,” the province of despots, both tyrannical and benevolent, throughout

169. See PLATO, *The Laws*, Book IV, in 2 THE WORKS OF PLATO 101 (Floyer Sydenham & Thomas Taylor trans., 1804) (“[N]o man ever at any time established laws, but that fortunes and all-various events, taking place in an all-various manner, gave us all our laws.”); Aristotle, *Nicomachean Ethics*, Book V, in 9 GREAT BOOKS OF THE WESTERN WORLD 376, 382 (W.D. Ross trans., 1952) (“Of political justice part is natural, part legal,—natural, that which everywhere has the same force and does not exist by people’s thinking this or that”); Cicero, *De Legibus*, Book II, in CICERO 371, 385 (Clinton Walker Keyes trans., 1928) (stating that true laws are those consistent with justice); 2 SAINT AUGUSTINE, *THE CITY OF GOD (DE CIVITATE DEI)* 258 (Ernest Rhys ed. & John Healey trans., 1945) (“For what law does, justice does, and what is done unjustly, is done unlawfully.”); St. Thomas Aquinas, *II The Summa Theologica*, in 20 GREAT BOOKS OF THE WESTERN WORLD 1, 224 (Fathers of the English Dominican Province trans., 1952) (“[W]e must say that the natural law, as to first common principles, is the same for all, both as to rectitude and as to knowledge.”); George F. Will, *Europe’s Second Reformation*, NEWSWEEK, Nov. 20, 1989, at 90, 90. (“The primary idea of the Reformation [begun by Martin Luther] was the primacy of individual conscience. It has been the high-octane fuel of all subsequent history.”); JOHN LOCKE, *Of Civil Government*, in 2 THE WORKS OF JOHN LOCKE 219, 270 (8th ed., 1777) (“[T]he law of nature stands as an eternal rule to all men, legislators as well as others.”); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 53 (Maurice Cranston trans., 1968) (“[M]ight does not make right, and . . . the duty of obedience is owed only to legitimate powers.”); WILLIAM D. WORKMAN, JR., *THE CASE FOR THE SOUTH* 7-8 (1960) (purporting to quote a letter, dated September 20, 1810, from Thomas Jefferson to one J.B. Colvin stating that “a strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest”).

This brings in the whole question of how can you be logically consistent when you advocate obeying some laws and disobeying other laws. Well, I think one would have to see the whole meaning of this movement at this point by seeing that the students recognize that there are two types of laws. There are just laws and there are unjust laws. Martin Luther King, Jr., *Love, Law, and Civil Disobedience*, in A TESTAMENT OF HOPE 43, 48 (James Melvin Washington ed., 1986).

170. Anthony D’Amato, *Lon Fuller and Substantive Natural Law*, 26 AM. J. JURIS., 202, 203 (1981) (stating the view of Cicero).

171. ADLER, *supra* note 164, at 201.

172. D’Amato, *supra* note 170, at 203.

the course of history.¹⁷³ Jefferson said it best: "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."¹⁷⁴

I understand that I am required, by tradition, to cite at least one case. Fortunately, my most efficient law clerk has found one: *The Case of the Vindictive Wife*.¹⁷⁵

The case was decided in Germany just after the second of two great wars in which the country, and indeed the whole world, had been engaged. Prior to and during the war, Germany was ruled by a despot named Hitler. Laws were enacted during this period, making it illegal to make statements against the government. Near the end of the war, a woman wanting to be rid of her husband denounced him to the authorities for insulting remarks he had made about Hitler. The husband was arrested and sentenced to death, but he was not actually executed.

When the war was over, the wife was prosecuted for the offense of illegally causing a person to be imprisoned. This offense was punishable as a crime under an earlier German code which had remained in force during the rule of Hitler. The wife, of course, pleaded that the imprisonment of her husband was pursuant to a duly enacted statute and, therefore, she had committed no crime. The German court rejected her plea. The statute, said the court, "was contrary to the sound conscience and sense of justice of all decent human beings."¹⁷⁶

Other cases decided in post-war Germany rejected the defense of having followed enacted law. Among these were the trials of the German war criminals at Nuremberg.¹⁷⁷ The judgment at Nuremberg was rendered

173. ADLER, *supra* note 164, at 201.

174. WORKMAN, *supra* note 169, at 8; see Chemerinsky, *supra* note 154, at 66 (pointing out that for the first hundred and fifty years of American constitutional law, "[t]he [United States Supreme] Court strove to discover and enforce natural rights").

175. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618-19 (1958) (citing to Judgment of July 27, 1949, Oberlandesgericht, Bamberg, 5 Süddeutsche Juristen-Zeitung 207 (Germany 1950), and criticizing the decision); Lon L. Fuller, *Positivism and Fidelity to Law—a Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (defending the decision); see also Stephen Kinzer, *A Few Bits of Nazi Past Still Linger*, N.Y. TIMES, May 28, 1995, at 9.

176. Hart, *supra* note 175, at 619 (quoting the German court).

177. See generally ABBY MANN, JUDGMENT AT NUREMBERG (1961).

"When democracy granted democratic methods to us in times of opposition, this was bound to happen in a democratic system. However, we National Socialists never asserted that we represented a democratic point of view, but we have declared openly that we used the democratic methods only in order to gain power and that, after assuming the power, we would deny to our adversaries without any consideration the means which were granted to us in times of our opposition."

about two thousand years ago. The judgment of Pontius Pilate was rendered about two thousand years before Nuremberg. Apparently, the issues in this case crop up every two thousand years or so. I hope I can finally resolve them. (But I doubt it.)

For all these reasons, I conclude that justice should prevail over enacted law, and thus, the statute in this case, like the statutes in the German cases, should not be applied. I, therefore, conclude that the judgment in favor of Mrs. Robinson should be affirmed.

I need not enter the tiresome quarrel regarding collegiality. Those who shop for grievances will always find bargains. Obviously, I have acted collegially by carefully considering the opinions of all my colleagues. Nor do I need to decide whether to ask for a change in the statutory law. It is equally obvious no action by the Legislature is now needed, at least not by Mrs. Robinson. I would, however, like to say something in conclusion.

I am sure my opinion will be roundly criticized, and I will be charged with rank hypocrisy. I will be accused of embracing those concepts which I have pretended to reject. Some people will say I have capitulated to political considerations. Others will say that, like my brother Adams, I have promoted anarchy by refusing to apply a duly enacted statute. Still others will say that, like my brother Emerson, I have usurped the authority to make law.

At the same time, I am also sure I would be castigated just as severely if I joined with the Chief Justice and my brother Caduceus to reverse the judgment. I have thought about all this very carefully, and I have reached the conclusion that I would rather be flogged for being right than flogged for being wrong. It is a personal preference of mine. I recall something Sir Thomas Moore said: "I believe, when statesmen forsake their own private conscience for the sake of their public duties . . . they lead their country by a short route to chaos."¹⁷⁸

By a vote of three to two, with Justices Emerson, Adams and Christian concurring, and Chief Justice Straight and Justice Caduceus dissenting, the judgment of the trial court is

AFFIRMED.

HUNTER S. THOMPSON, *THE GREAT SHARK HUNT* 276 (1979) (purporting to quote Nazi propagandist Josef Paul Goebbels).

178. ROBERT BOLT, *A MAN FOR ALL SEASONS* 22 (1990). Justice Christian could have been, but obviously was not, reminded of something else Sir Thomas Moore is supposed to have said: "Yes, I'd give the Devil benefit of law, for my own safety's sake." *Id.* at 66.

III. CONCLUSION

*Myself when young did eagerly frequent
 Doctor and Saint, and heard great Argument
 About it and about: but evermore
 Came out by the same Door as in I went.*¹⁷⁹

Thus, the Supreme Court of Newgarth has spoken once again. The judges of the Court have again rendered their wildly diverse opinions. (In the words of Sir Walter Scott: "Wild wark they make of it; for the Whigs were as dour as the Cavaliers were fierce, and it was which should first tire the other."¹⁸⁰) What are we to make of them? Most people look upon judges like a small child views a troupe of cavorting clowns: for the most part mildly amusing, at times hilarious, and at other times frightening. Doubtless, most of us think of the Newgarth judges in the same way.

Or do we?

I, for one, do not. I know the Newgarth judges personally, having spent a considerable amount of time with each of them. Like the other judges I have known, they are thoroughly decent, reasonably intelligent, and quite civil in every way (except, sometimes, to each other). They work hard, not just to decide the cases that come before them, but to reveal those legal principles which guide us in our daily lives. They stand at the beck and call of everyone with the price of a filing fee. Professors Bergin and Haskell have described them best: "They are, in the main, principled men, trained as lawyers, and deeply committed to legal tradition. They are like the thrown stone which, coming to life while descending, announces, 'I have decided to come down.'"¹⁸¹ They reflect values typical of the society they serve. They dwell among us, and our values are within them. Because of us, they know the law. Because of them, we know the law. At least, we understand the law as well as Newton understood gravity: we know how it behaves, if not how it works. At the very least, we know this much about law.

Or do we?

Constitutional historian Charles A. Miller said: "The three sources of decisions—values, rules, and facts—combine to focus on the mysterious 'act of deciding.'" While the sources of the decisions are rationally

179. OMAR KHAYYÁM, *THE RUBÁIYÁT OF OMAR KHAYYÁM*, verse 27, at 20 (Edward FitzGerald trans., 1947). Professor Prosser began his review of *My Philosophy of Law—Credos of Sixteen American Scholars* by quoting this verse from *The Rubáiyát*. See William L. Prosser, Book Review, 27 CORNELL L.Q. 292, 292 (1942).

180. WALTER SCOTT, *Wandering Willie's Tale*, in REDGAUNTLET 113 (1970).

181. BERGIN & HASKELL, *supra* note 102, at v.

comprehensible, the act of deciding is not."¹⁸² This paper began by quoting a song by Paul Simon. How shall it end? The lyrics by Joni Mitchell, only slightly paraphrased, leap to mind:

I've looked at law from both sides now,
From up and down, and still somehow . . .
It's law's illusions I recall . . .
I really don't know law at all.¹⁸³

Or do we?

It may very well be that the illusions are enough. Stonewall Jackson said: "It is images, not ideas, upon which men base their decisions."¹⁸⁴ Bill Moyers followed up with a compelling observation: "For the law to hold authority beyond mere coercion, the power of the judge must be ritualized, mythologized."¹⁸⁵ Perhaps, in the final analysis, General Jackson and Mr. Moyers are right.¹⁸⁶

IV. EPILOGUE

Chief Justice Straight, of course, retired from the Court. Justice Emerson took his place as Chief Justice. Justice Caduceus remains a member of the Court. Justice Christian was re-elected by a wide margin. Justice Adams has announced he does not plan to run for re-election. A new member of the Court, Justice Gilligan, was elected, becoming the second female member. Unlike Justice Christian, she is a radical feminist. The other members await her first opinion with some apprehension, anticipating she will speak "in a different voice."¹⁸⁷

182. SATTER, *supra* note 160, at 76 (quoting Charles A. Miller).

183. JONI MITCHELL, *BOTH SIDES NOW* (1992).

184. Stonewall Country (Lime Kiln Theater, Lexington, Va. 1988) (purporting to quote Stonewall Jackson).

185. JOSEPH CAMPBELL, *THE POWER OF MYTH* xiv (Betty Sue Flowers ed., 1988).

186. See also Alexander M. Sanders, Jr., *Everything You Always Wanted to Know About Judges but Were Afraid to Ask*, 49 S.C. L. REV. 343, 351 (1998).

187. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (describing women, men, and the differences between them).

[There are] contrasting ways of understanding what it means to act morally. One approach relies on rights, duties, individual autonomy, and generally applicable rules; the other, on care, responsiveness, avoidance of harm, and interdependent relationships. One has dominated political and social moral discourse in our society. The other has been limited to the private sphere but is now an emerging force in public life as part of a dialogue of moral perspectives. Traditionally, men in our culture have followed one path and women the other.

V. POSTSCRIPT

The curious reader may wonder about the author of this paper. What kind of a judge was I? The answer is: it depended. In some cases, I invented the law. In some cases, I discovered it. In some cases, I deferred to other authority. In some cases, I didn't. Who decides what I do and when? Me, that's who. And that's the scary part.

The metaphor I like best is the one of judges being like monkeys swinging on a vine. The monkeys are free to swing right or left, and even around and around, at their choice. However, the vine is always tethered at the top so the monkeys do not jump around randomly in the jungle and, thus, can always be found more or less together.¹⁸⁸ What tethers the vine? People have a variety of opinions. Some say the legislature. Other say the common-law tradition. Still others say God.

To extend this metaphor: trial judges, not appellate judges, are at the top of the vine, closer to whatever tethers it—whether the legislature, the common law, or God. But, because trial judges are at the top of the vine, they are less able to influence the swing. Judges on courts of last resort are at the bottom of the vine, doing most of the free swinging. I, myself, am an intermediate monkey. This is my place in the greater scheme of things. I am fairly well reconciled to it.

How would I decide Mrs. Robinson's case? A judge deciding a case is like a person taking a Rorschach test: the judge often reveals more about himself or herself than about the case being decided. As for me, I have the right to remain silent.¹⁸⁹

VI. POST POSTSCRIPT

Any judge who reads this paper should remember what Homer said: "Quid rides? Mutato nomine, de te fabula narratur." (Why do you laugh? Change the name, and the story is told of you.)¹⁹⁰

RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS 1 (1989) (footnote omitted).

188. Professor Calvin Woodard, Lecture at the University of Virginia Graduate Program for Judges (summer 1988).

189. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

190. ROBERT FULGHUM, *IT WAS ON FIRE WHEN I LAY DOWN ON IT* 5 (1989) (quoting Homer).

