

# Mercy *in Extremis*, In-Group Bias, and Stranger Blindness

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[W]hen you get a chance to choose, of course, you choose your own kind.

- KAZUO ISHIGURO, *NEVER LET ME GO* 4 (2005)

There are other good guys. You said so.

Yes.

So where are they?

They're hiding.

Who are they hiding from?

From each other.

- CORMAC MCCARTHY, *THE ROAD* 155 (2006)<sup>†</sup>

Now, it is a fact of our common humanity that these appeals *in extremis* . . . do not depend on ethnic or communal solidarity. They transcend all such boundaries. They depend only on the sheer fact of one human being confronting another and mouthing a cry for help.

- Jeremy Waldron, *Who Is My Neighbor?: Humanity and Proximity*, 86 *MONIST* 333, 350 (2003).

## Introduction

L.P. Hartley once wrote: “The past is a foreign country: they do things differently there.”<sup>1</sup>

The same may be said of lives lived in dire straits. In a world turned upside down—either by acts of God or man—individuals may do awful

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<sup>†</sup> In *THE ROAD*, Cormac McCarthy relies upon several grammatical idiosyncrasies, including abandoning use of apostrophes. In all quotations from the book, I reinsert apostrophes to avoid the misimpression that this Essay contains typographical errors.

1. L.P. HARTLEY, *THE GO-BETWEEN* 7 (1953).

things that we would not tolerate or forgive in a world set right side up.<sup>2</sup> This is not to say that *anything goes* when all is (almost) lost. Even if there may be “morally unthinkable” circumstances so lacking in “minimum sanity” that “it is insanity to carry the decorum of sanity into it,”<sup>3</sup> in most situations we still may hope to find ways to treat each other with some amount of equal concern and respect.<sup>4</sup> All the same, we should be humble not to judge (or punish) too harshly behavior undertaken *in extremis*.

This is an Essay about bubbles—the bubbles to which we retreat when we are apprehensive about what lies beyond. These bubbles go by many names: family, religion, ethnicity, identity, occupation, hobby, trade. By bubbles, then, I do not mean anything precise or profound—just any affinity group that describes, at once, an inside and an outside. The immediate observation is not foundational: as social science and human experience reveal, individuals display *in-group biases* for teammates and partners, colleagues and associates, friends and family, compatriots and countrymen. In turn, they are prone to discriminate against *others* and *strangers*, treating them antagonistically or at least indifferently. My novel claim is only that there is a curious duality between two highly distinct (almost contrary) contexts where these biases prove particularly powerful and pernicious—and sometimes these two contexts intersect.

First, judges and prosecutors are especially likely to favor their own craft and kind. These proud professionals cherish order and fellow custodians of it. To them, all becomes law and *outlaw*—and the outlaw presents a threat that must be neutered by punishment. This is, in a nutshell, the logic of criminal legalism. Institutional pride generates a lack of understanding for the actor or approach that operates beyond the bounds of the criminal-legal order’s often binary rules. And institutional pride is blinding. Under its sway,

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2. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 621 (1949) (quoting the fictional Justice Foster for the proposition that starving and trapped cavers, who resorted to cannibalism, had found themselves “as remote from our legal order as if they had been a thousand miles beyond our boundaries”).

3. Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 77, 92–93 (1973) (“For him, there are certain situations so monstrous that the idea that the processes of moral rationality could yield an answer in them is insane: they are situations which so transcend in enormity the human business of moral deliberation that from a moral point of view it cannot matter any more [sic] what happens.”); see also Fuller, *supra* note 2, at 620. The fictional Justice Foster writes:

[O]ur positive law is predicated on the possibility of men’s coexistence in society. When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When that condition disappears, then it is my opinion that the force of our positive law disappears with it.

*Id.*

4. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xv (1977) (describing a right to be treated with “equal concern” and “respect” as “fundamental and axiomatic”).

legal professionals may be unable to determine effectively when it is appropriate to *go soft*, to exercise mercy—to bridge the gap “between the inflexibility of the law and moral justice.”<sup>5</sup>

Second, *in extremis*, when ordinary people perceive danger from all sides (or, rather, from the *outside*), moral gazes turn reflexively inward. Frightened individuals, “trembling like ground-foxes in their cover,”<sup>6</sup> are likelier, thereafter, to disregard the corresponding moral and prudential concerns of strangers. It is not selfishness necessarily but rather an instinct to protect one’s own. In any event, the epistemic problem remains the same: once we perceive “another” to be “an other” (that is, a stranger and not a friend), it becomes comparatively difficult to appreciate when mercy and care for the *other* may be merited. Under threat—when there is too little good (and people possess too few goods)—the penchant is to prioritize the clan.

In this Essay, I examine the overlap between these distinct settings where mercy’s exercise is impaired. To illustrate my insights and claims, I interweave three case studies—one contemporary, one biblical, and one literary. In Part I, I describe a set of tragic events that occurred at New Orleans’s Memorial Medical Center in the aftermath of Hurricane Katrina when several patients were likely euthanized by doctors and nurses. And I examine the role that *in-group bias* played in setting the stage for eventual mercy killings. In Part II, I discuss the Parable of the Good Samaritan (and Jeremy Waldron’s interpretation of it) to highlight what we owe to strangers, and I map this message onto the moral drama at Memorial Medical Center and its players. In Parts III and IV, I introduce Cormac McCarthy’s post-apocalyptic novel, *The Road*, and I draw analogies between that narrative and our other case studies. In Part V, I conclude that a legal order is particularly ill-equipped to address the moral complexities of actions (and inactions) undertaken *in extremis*.

From our comfortable perch of relative peace and plenty, it is difficult to determine with moral certainty who at Memorial was insufficiently *other*-regarding. In such circumstances, an Orleans Parish grand jury properly relied upon something like a “presumption of mercy”<sup>7</sup> to refuse to indict a doctor who was credibly suspected of euthanasia—an equitable decision the grand jury apparently reached not because it concluded that mercy killings were right, but because it recognized appropriately that a conventional criminal-legal response was wrong.

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5. Alwynne Smart, *Mercy*, 43 PHIL. 345, 355 (1968).

6. CORMAC MCCARTHY, *THE ROAD* 110 (2006).

7. *Infra* note 212 and accompanying text.

## I. Five Days at Memorial<sup>8</sup>

The command had come. It was time to go. Because of purported ongoing civil unrest, police ordered everyone out of New Orleans's Memorial Medical Center by 5 p.m. on Thursday, September 1, 2005.<sup>9</sup> The officers “stood stone-faced on the emergency ramp, shotguns on their hips, barking threats at anyone who came too close, only increasing the sense of urgency” and leaving people feeling “intimidated, not protected.”<sup>10</sup> By that evening, the hospital complex would be emptied of the approximately two thousand patients, staff, and family members who had ridden out the storm and its aftermath in the medical center's confines.<sup>11</sup> Hurricane Katrina had ravaged the city days earlier, leaving New Orleans inundated by floodwaters after the failure of its poorly designed levee system.<sup>12</sup>

But not everyone would leave the hospital alive. In stifling 110 degree heat, with a dwindling food supply and without proper sanitation or electricity to operate lifesaving medical equipment, hospital staff struggled with what to do with some of the weakest and most infirm patients who could not be evacuated expeditiously.<sup>13</sup> Several of these individuals remained stranded, near death, on the medical center's seventh floor, which was leased to LifeCare, a small facility that provided long-term treatment to the acutely ill.<sup>14</sup> LifeCare was its own entity—“a hospital within a hospital.”<sup>15</sup> The rest of the medical center was owned and managed by Tenet Healthcare, which had no administrative relationship to LifeCare. This institutional divide would come to influence much of what would happen when things fell apart.<sup>16</sup>

With the 5 p.m. evacuation deadline looming, choices were made. Exactly what decisions were reached and by whom remains in some dispute. But, for the purposes of the Essay, I take the following (for which there is

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8. SHERI FINK, *FIVE DAYS AT MEMORIAL: LIFE AND DEATH IN A STORM-RAVAGED HOSPITAL* (2013).

9. *Id.* at 215.

10. *Id.*

11. *Id.* at 52, 224.

12. *Hurricane Katrina: The Aftermath*, ATLANTA J.-CONST., Aug. 31, 2005, at A9; Campbell Robertson & John Schwartz, *Decade After Katrina, Pointing Finger More Firmly at Army Corps*, N.Y. TIMES (May 23, 2015), <https://www.nytimes.com/2015/05/24/us/decade-after-katrina-pointing-finger-more-firmly-at-army-corps.html> [<https://perma.cc/X5JG-L83F>].

13. FINK, *supra* note 8, at 99, 236; *see also* Sheri Fink, *The Deadly Choices at Memorial*, N.Y. TIMES MAG. (Aug. 25, 2009), <https://www.nytimes.com/2009/08/30/magazine/30doctors.html> [<https://perma.cc/D9Y8-UVJS>]; Kathleen Johnston, *Staff at New Orleans Hospital Debated Euthanizing Patients*, CNN (Oct. 13, 2005, 2:58 PM), <https://www.cnn.com/2005/US/10/12/katrina.hospital/index.html> [<https://perma.cc/AQ3N-U433>].

14. FINK, *supra* note 8, at 96–99.

15. Fink, *supra* note 13.

16. *Cf.* CHINUA ACHEBE, *THINGS FALL APART* (1959) (tinting his novel with that evocative term).

substantial evidence) to be true: a group of medical professionals, led by Dr. Anna Pou, *involuntarily* and *non-voluntarily* euthanized patients, using a mixture of morphine and the fast-acting sedative midazolam.<sup>17</sup> Nine of those killed were from LifeCare.<sup>18</sup>

From the beginning of the disaster, LifeCare patients got the short end of the stick. The facility lacked advocates and caregivers. It had no assigned doctors, and its medical director was “absent for the storm.”<sup>19</sup> All caregiving duties fell to the nursing staff. When one of these nurses complained that LifeCare felt “somewhat forgotten,” a Memorial physician stepped up, only to have another respond: “You don’t have to do that. You’re not under any obligation at all.”<sup>20</sup> Once it came time to leave, the situation deteriorated further. LifeCare patients were excluded from Memorial’s initial evacuation plans.<sup>21</sup> Later, “Memorial’s less sick patients were [] prioritized over LifeCare’s generally very sick ones.”<sup>22</sup> Thus, by the end of Tuesday, Memorial Hospital had managed to reduce its patient count from 187 to 130, while none of LifeCare’s fifty-two patients were able to get out.<sup>23</sup>

As the triage system changed to give preference to the most mobile, only seven LifeCare patients were included on the “ambulatory” list.<sup>24</sup> Tenet Healthcare even achieved something of a private takeover of public emergency services. According to Sheri Fink, a *New York Times* reporter who wrote the definitive account of what happened at Memorial Medical Center: “[T]he corporate overseers at Tenet would be asked for permission to transport LifeCare patients with the Coast Guard . . . . Why Tenet corporate permission should be required for LifeCare to use federal rescue assets was unclear.”<sup>25</sup> One volunteer was particularly “shocked” by all this.<sup>26</sup> He could not understand why Memorial Hospital had placed its own patients ahead of the “sickest patients belonging to another company.”<sup>27</sup> “Holy crap,” they’re

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17. FINK, *supra* note 8, at 291–92. “Voluntary” euthanasia is performed with a patient’s consent. “Involuntary” euthanasia is performed against it. And “non-voluntary” euthanasia describes circumstances where the patient’s will remains undetermined. Steven Daskal, *Support for Voluntary Euthanasia with No Logical Slippery Slope to Non-Voluntary Euthanasia*, 28 KENNEDY INST. ETHICS J. 23, 24 (2018); FINK, *supra* note 8, at 396–97 (discussing different categories of euthanasia and the ethics of killing versus letting die).

18. FINK, *supra* note 8, at 198–99.

19. *Id.* at 97.

20. *Id.* at 97–98.

21. *Id.* at 99–100.

22. *Id.* at 100. As Memorial’s onsite community relations manager wrote in a message to Tenet: “We are prioritizing our patients.” *Id.* at 105.

23. *Id.* at 110.

24. *Id.* at 104 (discussing the shift “from the original idea of maintaining a singular focus on getting the most vulnerable and dependent out first” to the least vulnerable and most independent).

25. *Id.* at 105.

26. *Id.* at 126.

27. *Id.*

going to “let them die,” he thought.<sup>28</sup> And, to some extent, they did. When the generators failed and the elevators ground to a halt, all LifeCare patients remained stranded on the seventh floor, awaiting their fate.<sup>29</sup>

The case of LifeCare patient Emmett Everett was particularly tragic. The “poster child” for the prospective charges against Dr. Pou and others, he remained alert and upbeat throughout the catastrophe.<sup>30</sup> After finishing breakfast on the final morning, Everett asked: “[A]re we ready to rock and roll?”<sup>31</sup> Sensing what was coming, he even begged his nurse: “Cindy, don’t let them leave me behind.”<sup>32</sup> By the end of the day, he would be dead, smothered by a towel after lethal drugs had failed to take intended immediate effect on his 380-pound, paraplegic frame.<sup>33</sup> To be sure, Everett’s weight posed a particular challenge for would-be rescuers. Yet he was, according to one forensic expert, “in stable medical status with no clear evidence that death was imminent or impending.”<sup>34</sup> More to the point, rescuers had successfully navigated similar complications to evacuate a Memorial ICU patient of “immense” size, managing to lug him in his wheelchair up to a rooftop helicopter pad.<sup>35</sup>

Ultimately, forty-five bodies would be recovered from Memorial Medical Center—more lives lost than at any other comparable-size hospital during the disaster.<sup>36</sup> Toxicology reports revealed that twenty-three corpses tested positive for either morphine, midazolam, or both, even though not all of the patients had been lawfully prescribed those drugs.<sup>37</sup> Rumors of misconduct circulated, fueled by an internist, Dr. Bryant King, who reported to CNN that “the discussion of euthanasia was more than talk.”<sup>38</sup> Charles Foti, the Louisiana State Attorney General, launched a criminal probe, and forensic experts concluded that several of the deaths were homicides.<sup>39</sup> Medical staff reported seeing Pou inject LifeCare patients with drugs that she said would make them “feel better.”<sup>40</sup>

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28. *Id.*

29. *Id.* at 110, 113, 117.

30. *Id.* at 297.

31. *Id.* at 297, 313, 461.

32. *Id.* at 297.

33. *Id.* at 26, 292–93; Fink, *supra* note 13.

34. Fink, *supra* note 13.

35. FINK, *supra* note 8, at 93, 161–62, 226–28.

36. Fink, *supra* note 13.

37. FINK, *supra* note 8, at 357–68; Fink, *supra* note 13.

38. Johnston, *supra* note 13.

39. Fink, *supra* note 13. A bioethicist concluded that the toxicology reports were “not consistent with the ethical standards of palliative care.” *Id.* And one expert observed: “All these patients survived the adverse events of the previous days, and for every patient on [LifeCare’s seventh] floor to have died in one three-and-a-half-hour period with drug toxicity is beyond coincidence.” *Id.*

40. FINK, *supra* note 8, at 314–15, 338; Fink, *supra* note 13.

With ample evidence to establish probable cause, Pou and two nurses were arrested for second-degree murder.<sup>41</sup> The two nurses were dropped from the case after they agreed to cooperate.<sup>42</sup> And the matter was closed after an Orleans Parish grand jury subsequently refused to indict.<sup>43</sup> Pou later successfully sued the state of Louisiana for legal fees.<sup>44</sup> And, shortly thereafter, Attorney General Charles Foti lost his bid for reelection, placing third in an open primary where he was dogged by criticism of his aggressive handling of post-Katrina investigations into hospital and nursing home employees.<sup>45</sup>

In examining this moral drama, my principal interest is not to offer a concrete claim about the ethics of mercy killings. Rather, I use the case study only to focus on an underappreciated facet of social life that is made worse *in extremis*: as the world becomes scarier and more uncertain, we turtle more deeply into our respective shells. *In-group bias grows*. We may not, thereafter, be outright hostile toward perceived outsiders, but we are likelier to be at least apathetic.

And, significantly, the lines of affinity need not be rational. Indeed, social scientists have manufactured allegiances merely by sorting “complete strangers . . . into groups using the most trivial criteria imaginable.”<sup>46</sup> For instance, Henri Tajfel randomly divided study participants into two cohorts, and each cohort was then instructed only that their respective group shared an appreciation for a certain artistic style.<sup>47</sup> In short order, the participants came to “like[] the members of their own group better [and] they rated the members of their in-group as more likely to have pleasant personalities.”<sup>48</sup> The groupings may have been arbitrary, but the feelings of affection were not absurd. Kinship bonds served to boost participants’ self-esteem and sense of

41. FINK, *supra* note 8, at 339, 360; Carrie Kahn, *Doctor and Nurses Charged in Post-Katrina Deaths*, NPR (July 19, 2006, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=5567190> [<https://perma.cc/J3GX-KLAX>].

42. Kahn, *supra* note 41.

43. *Id.*

44. Jan Moller, *Panel Recommends Paying Dr. Pou’s Legal Fees*, TIMES-PICAYUNE (Mar. 18, 2009), [https://www.nola.com/news/panel-recommends-paying-dr-anna-pous-legal-fees/article\\_3e3b629b-dfc3-5f44-9f68-c32699dfc3a9.html](https://www.nola.com/news/panel-recommends-paying-dr-anna-pous-legal-fees/article_3e3b629b-dfc3-5f44-9f68-c32699dfc3a9.html) [<https://perma.cc/N6G4-DMME>].

45. *Katrina Cases’ Backlash Hurts La. AG*, ABC NEWS (Oct. 23, 2007, 7:30 PM), <https://abcnews.go.com/Politics/story?id=3767720&page=1> [<https://perma.cc/L67S-ZUQD>].

46. ELLIOT ARONSON, TIMOTHY D. WILSON & ROBIN M. AKERT, *SOCIAL PSYCHOLOGY* 398 (7th ed. 2010).

47. *Id.*

48. *Id.* Likewise, Pascal Molenberghs demonstrated that when participants were arbitrarily separated into groups and asked to watch individuals from their own and another team compete in tasks, participants thought their own team members completed the tasks faster, even though speeds were identical. Pascal Molenberghs, Veronika Halász, Jason B. Mattingley, Eric J. Vanman & Ross Cunnington, *Seeing Is Believing: Neural Mechanisms of Action-Perception Are Biased by Team Membership*, 34 HUM. BRAIN MAPPING 2055, 2057, 2061–62 (2013).

belonging—characteristics that are always valuable but that take on outsized importance in times of scarcity and perceived or genuine threat.<sup>49</sup>

The entire sports-industrial complex is built around like notions of social cohesion—for that matter, so is fascism, racism, ethnocentrism, and nationalism. As the latter examples reveal, the danger is that, as we construct a social identity, we may come to see our own group—our own ways of being—as superior to others. As William Graham Sumner observed:

Loyalty to the group, sacrifice for it, hatred and contempt for outsiders . . . all grow together . . . . Men of an others-group are outsiders . . . . Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders. Each group thinks its own folkways the only right ones . . . .<sup>50</sup>

Favoritism is, in this way, the bedfellow of animus. People feel a need not only to belong but also to define their belonging by “a process of difference” against the *other*.<sup>51</sup> As Ursula K. Le Guin wrote in her chilling short story, *The Ones Who Walk Away from Omelas*:

It is the existence of the [mistreated and suffering] child, and their knowledge of its existence, that makes possible the nobility of their architecture, the poignancy of their music, the profundity of their science. It is because of th[at decrepit] child that they are so gentle with [their own] children. They know that if the wretched one were not there sniveling in the dark, the other one, the flute-player, could make no joyful music as the young riders line up in their beauty for the race in the sunlight of the first morning of summer.<sup>52</sup>

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49. Consider the famous Robbers Cave Experiment where Muzafer Sherif and Carolyn Wood Sherif generated hostility between groups of boys competing in games for limited valuable prizes. MUZAFER SHERIF, O.J. HARVEY, B. JACK WHITE, WILLIAM R. HOOD & CAROLYN W. SHERIF, *THE ROBBER'S CAVE EXPERIMENT* 96–97 (Wesleyan 1988) (1961). As the study demonstrated, conflicts metastasized in the face of resource scarcity. *Id.* Even more surprising, Lutfy Diab replicated the Sherifs' results using interfaith teams of boys in Beirut. DAVID BERREBY, *US AND THEM: THE SCIENCE OF IDENTITY* 178 (2005). The immediate ties of team trumped even religion as a means for cultivating *in-group bias*. *Id.*

50. WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 13 (1906).

51. BETHAN BENWELL & ELIZABETH STOKOE, *DISCOURSE AND IDENTITY* 25 (2006) (emphasis omitted) (discussing social identity theory).

52. URSULA K. LE GUIN, *THE ONES WHO WALK AWAY FROM OMELAS* (1973); *see also* KAZUO ISHIGURO, *NEVER LET ME GO* 258 (2010). As the main character in Ishiguro's novel is told:

[T]heir overwhelming concern was that their own children, their spouses, their parents, their friends, did not die . . . . So for a long time you were kept in the shadows, and people did their best not to think about you. And if they did, they tried to convince themselves you weren't really like us. That you were less than human, so it didn't matter.

*Id.*



My tribe, your tribe. My country, your country. My team, your team. My job, your job. My company, your company.

As the events at Memorial Medical Center demonstrate, these divisions may exert lasting influence, even after concepts like “corporation” ought no longer to count—when all that genuinely matters is life and death. At the end of the world, we still find meaning even in obsolete institutional allegiances. As Cormac McCarthy observed in his post-apocalyptic masterpiece, *The Road*: “[Y]ou won’t survive for yourself . . . . A person who had no one would be well advised to cobble together some passable ghost. Breathe it into being and coax it along with words of love.”<sup>53</sup> For many at Memorial Medical Center, the “passable ghosts” of a once-ordered society were Team Tenet and Team LifeCare.

It may be unfair to expect individuals to resist completely an *in-group* mentality. As a human instinct, the bias is entirely natural. Indeed, the very concept of society depends on ties that bind.<sup>54</sup> Significantly, even Peter Singer—a proponent of “moral universalism,”<sup>55</sup> who famously claimed that it “makes no moral difference whether the person I can help is a neighbor’s child ten yards from me or a Bengali whose name I shall never know”<sup>56</sup>—lacked the courage of his convictions when a loved one needed expensive end-of-life care: “Perhaps it is more difficult than I thought before, because it is different when it’s your mother.”<sup>57</sup> We may aspire to “love . . . each and every person on the face of the earth in virtue of their simple humanity,”<sup>58</sup> but perhaps it is right—or at least inevitable—that we may love and care for kinfolk more.<sup>59</sup> *Ought implies can*.<sup>60</sup> In this vein, I can hardly fault the

53. MCCARTHY, *supra* note 6, at 49, 63 (“All of this like some ancient anointing . . . . Evoke the forms. Where you’ve nothing else construct ceremonies out of the air and breathe upon them.”).

54. REBECCA SOLNIT, *A PARADISE BUILT IN HELL: THE EXTRAORDINARY COMMUNITIES THAT ARISE IN DISASTER 3* (2009) (“The very concept of society rests on the idea of networks of affinity and affection, and . . . the keeping of one’s brothers and sisters.”).

55. See Jeremy Waldron, *Who Is My Neighbor?: Humanity and Proximity*, 86 *MONIST* 333, 339 (2003) (describing moral universalism).

56. Peter Singer, *Famine, Affluence, and Morality*, 1 *PHIL. & PUB. AFFS.* 229, 231–32 (1972).

57. Michael Specter, *The Dangerous Philosopher*, *NEW YORKER*, Sept. 6, 1999, at 46, 55 <https://www.newyorker.com/magazine/1999/09/06/the-dangerous-philosopher> [<https://perma.cc/7U8Q-AHQP>].

58. Waldron, *supra* note 55, at 338. Consider also the Baha’i teaching: “It is not for him to pride himself who loveth his own country, but rather for him who loveth the whole world. The earth is but one country, and mankind its citizens.” BAHÁ’U’LLÁH, *TABLETS OF BAHÁ’U’LLÁH REVEALED AFTER THE KITAB-I-AQDAS* 129 (Project Gutenberg 2005) (1978).

59. Peter Berkowitz, *The Utilitarian Horrors of Peter Singer: Other People’s Mothers*, *NEW REPUBLIC*, Jan. 10, 2000, at 27, 31 (recognizing that “[a]mong the more disconcerting implications” of Singer’s moral universalism “is that the happiness of your spouse, or child, or mother is to you, morally speaking, of no greater significance than the happiness of a distant stranger”).

60. See generally Robert Stern, *Does ‘Ought’ Imply ‘Can’? And Did Kant Think It Does?*, 16 *UTILITAS* 42 (2004) (examining the dictum that a moral command must, as a necessary condition, be capable of being followed).

LeBlanc family, who used personal connections with public entities to conscript boats to rescue an elderly relative trapped at Memorial Medical Center.<sup>61</sup> But it would have been even better had they done more to rescue more. Still, we should not expect people consistently to see beyond their own moral horizons.

Likewise, I do not mean to imply that people are ungenerous *in extremis*. An entire literature says otherwise.<sup>62</sup> It is just that there is always the temptation to turn the mind (and corresponding generosity) *inward*—away from the perceived *other* and toward members of one’s own tribe (manufactured or otherwise). In this way, even the most heroic medical personnel were prone to lose sight of the larger tragedy not only inside but also beyond the hospital. As one physician reported, he could appreciate the full picture only from the vantage point of a departing rescue helicopter:

For a moment, [he] considered the larger reality, . . . as waters suffocated an entire city. He was only doing what is ingrained in a doctor—*advocating for his own patients*—but now he saw that the struggle to save lives extended far beyond the two critically ill neonates in the helicopter, or Memorial’s entire population of sick babies, or even the whole hospital, much as it had seemed like the universe when he was back there.<sup>63</sup>

George Orwell wrote: “To see what is in front of one’s nose needs a constant struggle.”<sup>64</sup> It is even harder to see what is beyond it. Orwell’s words are an admonition to strive actively to keep our eyes open. Even as we care for those we love, we ought to look around to determine whomever else might need help. We should be ready to *stretch* morally and appreciate outsiders’ desperation as our own, particularly when we come face-to-face with that despair—when we are “unavoidably” placed “‘side-by-side’ with strangers, with people alien to . . . our community.”<sup>65</sup>

## II. Neighbors & Strangers

This was Jeremy Waldron’s understanding of the Parable of the Good Samaritan, which Mark Osler likewise draws upon in his contribution to this

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61. FINK, *supra* note 8, at 131–35.

62. *E.g.*, Solnit, *supra* note 54, at 95, 208, 234; JAMIL ZAKI, *THE WAR FOR KINDNESS: BUILDING EMPATHY IN A FRACTURED WORLD* 25–26, 31 (2019).

63. FINK, *supra* note 8, at 94–95 (emphasis added). This image of the hovering helicopter brings to mind Desmond Morris’s prescriptive point about how best to overcome in-group favoritism: “[W]e must try to step outside our groups and gaze down on the battlefields of the human animal with the unbiased eyes of a hovering Martian.” DESMOND MORRIS, *THE HUMAN ZOO* 124 (1969).

64. GEORGE ORWELL, *IN FRONT OF YOUR NOSE* (1946), *reprinted in* 4 *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 125 (Sonia Orwell & Ian Angus eds., 1968).

65. Waldron, *supra* note 55, at 351 (citing IMMANUEL KANT, *The Metaphysics of Morals*, in *PRACTICAL PHILOSOPHY* 353, 451–52 (1996)).

symposium on mercy.<sup>66</sup> On Waldron’s reading, what made the Samaritan “good” was that, with suffering staring him in the face, he just could not look away:

[W]e may consider the importance of *sight* in the way the parable is presented—the immediate visibility of the predicament of the man who fell among thieves. The priest “saw” him, the Levite “came and looked on him,” and the Samaritan “when he saw him, he had compassion on him.” . . . The suffering and injury . . . was close enough to make a direct appeal to their sympathy: it was there, *in their face*, so to speak.<sup>67</sup>

Waldron’s interpretation sought to uncover a middle ground between the moral universalists (or “telescopic philanthropist[s]” who ignore suffering in their own backyard because there may be more effective or efficient means for altruism afar) and the communitarians (who “want to insist that morality is most at home in the confines of the family, the village, or the national community”).<sup>68</sup> Waldron, instead, highlighted the “arbitrary ‘thrownness’” of much of life—particularly in times of dire emergency where “action does not take place within the comfortable confines of a community”:

It may well be that a moral outlook that begins with the sheer fact of the *proximity* of two human beings—irrespective of their affiliations—is a better bet for these circumstances than a moral outlook which takes as its starting point what we owe to those we know and to those with whom we already have a connection.<sup>69</sup>

Waldron appreciated two things at once: we should be prepared to reject the traditional “boundaries” that divide us—to push back against the communitarian notion that “family membership” and “national community” ought to “predominate over common membership of the human species.”<sup>70</sup> At the same time, it is simply untrue that “boundaries of family and community are not intrinsically important.”<sup>71</sup> This is what Waldron found so

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66. Mark Osler, *Rule Complexity, Story Complexity, Mercy & Hope*, 102 TEXAS L. REV. 1495, 1510.

67. Waldron, *supra* note 55, at 350 (quoting *Luke* 10:32–33 (King James)).

68. *Id.* at 341, 351 (quoting CHARLES DICKENS, *BLEAK HOUSE* 41 (Rowland Classics Publication 2009) (1853)). See William MacAskill, *Effective Altruism: Introduction*, in 18 ESSAYS PHIL. 1, 2–3 (2017), for a discussion on effective altruism.

69. Waldron, *supra* note 55, at 351.

70. *Id.* at 339.

71. *Id.* As Waldron notes:

Universalism seems to posit the moral agent as a rootless being responsive only to the most abstract characteristics of humanity. It seems to detach us from the concrete reality of our lives, where blood, neighborhood, and nationality do matter, and where

instructive and even “startling” about the Parable of the Good Samaritan.<sup>72</sup> It is not the fact that the Samaritan helped; it is *who* he helped—an injured Jewish person. Waldron highlighted the “antipathy” between Jews and Samaritans of the era.<sup>73</sup> They lived in proximity to each other, but they did not live *with* each other.<sup>74</sup> The lesson, on Waldron’s reading, is that proximity ought to be enough. In response to the question “who is my neighbor,” the answer is just those who surround you. The commandment to “love thy neighbor” is, first and foremost, *geographic*: “[T]he sheer fact of proximity (to a person in desperate need) gives rise to special duties, because of what proximity to need is like . . . .”<sup>75</sup> The moral obligation, here, is not defined by culture, religion, family, vocation, company, or any other “traditional divisions.”<sup>76</sup> What we owe to each other is determined by *where* we happen to be, and what we can do while we happen to be *there*: “In a case like this, where I am on the spot, and where help, if it is to come at all, can only come from me, the demands of morality are compelling. I have no choice.”<sup>77</sup>

On this reading, the Good Samaritan was atypically good precisely because he achieved the difficult state of *self–other merging*—a disposition that social scientists posit is an antidote to the *bystander effect* and *social loafing*.<sup>78</sup> The aim is to reconfigure a social setting such that commonalities are emphasized, rather than differences. By way of example, in one study, researchers first found that bystander football fans were likelier to help injured individuals who wore jerseys of the bystander-participants’ preferred teams, but when researchers primed bystanders to recognize that fans of *all*

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the particularity of our affections and our relations to others constitute the very fabric of moral existence.

*Id.*

72. *Id.* at 336.

73. *Id.* at 336–37 (“[I]n the era of the Second Temple . . . Jews regarded Samaritans with contempt . . . . The antipathy between Jews and Samaritans had its origins in the division of the people of Israel into southern and northern parts . . .”).

74. *Id.* at 337 (“One might as well tell a story about a Palestinian coming to the aid of an Israeli.”).

75. *Id.* at 347–48 (noting that the salient consideration is “in a quite literal sense . . . actual proximity . . . [or] ‘neighborhood’ [i]n the crudest geographical sense of that term” (emphasis omitted)).

76. *Id.* at 336.

77. *Id.* at 345 (citing Peter Winch, *Who Is My Neighbor?*, in TRYING TO MAKE SENSE 154, 157 (1987)).

78. See C. Daniel Batson, Karen Sager, Eric Garst, Misook Kang, Kostia Rubchinsky & Karen Dawson, *Is Empathy-Induced Helping Due to Self–Other Merging?*, 73 J. PERSONALITY & SOC. PSYCH. 495, 506 (1997) (finding a relationship between empathy and helping); see generally John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCH. 377 (1968) (finding that individuals are less likely to respond to emergencies when other bystanders are present); Steven J. Karau & Kipling D. Williams, *Social Loafing: A Meta-Analytic Review and Theoretical Integration*, 65 J. PERSONALITY & SOC. PSYCH. 681 (1993) (finding that individuals expend less effort when working in a group than they do when working individually).

teams shared, in the first instance, a love of football (that is, by expanding their definition of *team*), bystanders grew likelier to help injured fans of opposing squads.<sup>79</sup> In fact, bystander-participants were even likelier to help injured fans of opposing squads than injured individuals who wore plain shirts.<sup>80</sup> The study successfully upended conventional conceptions of neighborhood.<sup>81</sup>

The same may be said of the Parable of the Good Samaritan. Consider Jesus's question to his listener, who notably was a lawyer:<sup>82</sup> "Which now of these three, thinkest thou, was neighbour unto him that fell among the thieves?"<sup>83</sup> The lawyer immediately hit upon the answer: "*He that shewed mercy on him.*"<sup>84</sup> The Parable flips the causal arrows on the very concept of neighborliness: I do not care for another because she is my neighbor; she is my neighbor because I care for her. My *self* and the *other* in this way *merge*. We are not neighbors in virtue of "ethnicity, community, or traditional categories" but in virtue of the "mere fact" of our shared "humanity," expressed one to the other.<sup>85</sup> She is a human in need, and I am a human in geographic position to meet it:

[T]he important moral work in the story of the Good Samaritan is [] done . . . by the sheer particularity of the accidental conjunction in time and space of two concrete individuals. A particular man is in need in a particular place. . . . So it is wrong to see the "moral" of the parable as prescribing nothing but a diffuse and universal concern. . . . [W]hat it prescribes—and the reason it hangs on to the idea of "neighbor"—is openness and responsiveness to actual human need in whatever form it confronts us. And what it prohibits is the action of those . . . who would come where the man and his need is, and look on him, and then pass by on the other side. . . . To pass by and do nothing to help a person whose need is so immediately present seems plainly wrong: even the lawyer in the original story sees this.<sup>86</sup>

What, on this score, do we make of Dr. Pou and her conduct? My claim is not that Dr. Pou acted appropriately by euthanizing others but only that she

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79. Mark Levine, Amy Prosser, David Evans & Stephen Reicher, *Identity and Emergency Intervention: How Social Group Membership and Inclusiveness of Group Boundaries Shape Helping Behavior*, 31 PERSONALITY & SOC. PSYCH. BULL. 443, 448–50 (2005).

80. *Id.* at 450.

81. See Philip F. Esler, *Jesus and the Reduction of Intergroup Conflict: The Parable of the Good Samaritan in the Light of Social Identity Theory*, 8 BIBLICAL INTERPRETATION 325, 341–42 (2000) (discussing the Parable of the Good Samaritan).

82. *Id.* at 343.

83. *Luke* 10:36 (King James).

84. *Luke* 10:37 (King James) (emphasis added).

85. Waldron, *supra* note 55, at 346, 348.

86. *Id.* at 342–43, 348–49 (noting that it is a matter of meeting people "*where they actually are*, and not on the basis of . . . real or imagined ethnic and communal sympathies").

demonstrated an admirable kind of moral *courage* throughout the crisis (even though it was, at times, misdirected or worse). From the beginning, she refused to retreat to her own team—her own clan. She did not divide the hospital into *us* and *them*—“our patients” and “their patients.” She engaged consistently not only with Memorial’s patients but also LifeCare’s. When “none of the physicians . . . [were] eager to take responsibility for the seventh floor,” Pou “took complete control of the whole situation.”<sup>87</sup> She “gave orders,” “stood ready to receive” all patients, and volunteered for “the most difficult tasks.”<sup>88</sup> LifeCare patients were her patients—even those to whom she owed no formal professional duty. She resisted the human bias to segregate her neighbors into *in-groups* and *out-groups*. Thus, by means of “focused concern,” she built a “special relationship” with individuals whom the moral universe happened to throw into her orbit.<sup>89</sup>

Until that last day at least, this is what good moral doctors are supposed to do. Indeed, medical “good Samaritan laws” are designed precisely for such circumstances. These laws immunize physicians from liability for ordinary negligence but only where no preexisting patient relationship exists and care is provided outside conventional clinical settings.<sup>90</sup> In other words, doctors cannot be considered good Samaritans once they are compensated for care.<sup>91</sup> Significantly, then, we may think of good Samaritan laws as “nudges,” pushing doctors to treat *others*—particularly *in extremis*—who fall *outside* of the formal professional bonds that traditionally tie physicians to patients.<sup>92</sup> These statutes express the norm that physicians should provide emergency care even when they have “no duty to treat.”<sup>93</sup> Whenever and wherever they see suffering, they should act, regardless of where established lines of “kith and community” happen to fall.<sup>94</sup>

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87. FINK, *supra* note 8, at 97, 350.

88. *Id.* at 138, 350.

89. See Waldron, *supra* note 55, at 346. Discussing the Parable of the Good Samaritan, Waldron observes:

Though there was no antecedent special relationship between the man who fell among thieves and the Samaritan that might ground a traditional duty to rescue . . . [t]heir relationship . . . was morally significant in its particularity, and special by virtue of the immediate concrete circumstances of their encounter at that particular moment in that particular place.

*Id.*

90. O. William Brown, Good Samaritan Statutes: A Malpractice Defense for “Doing the Right Thing,” 51 J. VASCULAR SURGERY 1572, 1572 (2010).

91. *Id.* at 1573.

92. See generally RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (endorsing regulatory efforts that provide incentives, but not directives, to individuals to engage in socially useful behavior).

93. Brown, *supra* note 90, at 1573.

94. *Id.*; Waldron, *supra* note 55, at 341–42.

But no good Samaritan law could or should ever cover *involuntary* euthanasia. It feels odd, off-putting, and even immoral to assert otherwise. Indeed, Waldron described the prohibition on murder as a prime example of a *perfect* moral duty—that is, a duty that “kicks in” whenever “the question of [] murdering [] arises.”<sup>95</sup> I am not so certain that the moral prohibition on murder (at least as applied to mercy killings) ought to be so absolute.<sup>96</sup> But, for present purposes, it matters only that the euthanizers at Memorial Medical Center *believed* they were helping. As one of Pou’s colleagues put it: “Let’s just say what I did I thought was right. Others think it was wrong.”<sup>97</sup> This doctor’s *intention* was to minimize harm. He was acting in ways he *thought* were helpful and merciful. More to the point, when it came to LifeCare patients, he was exercising his brand of mercy toward *outsiders*—toward patients not his own.

We may compare the actions of the euthanizers to the inaction of others. Another protagonist in this morality play was Dr. Bryant King, perhaps the most outspoken critic of euthanasia from within the hospital. King is to be praised for his service in the first days of the tragedy.<sup>98</sup> Like Pou, he did rounds on LifeCare’s seventh floor.<sup>99</sup> But by the fifth day, he grew “desperat[e] to escape Memorial.”<sup>100</sup> And once he got wind of the planned mercy killings, he did nothing to try to stop them, but instead, just boarded a boat and left the hospital.<sup>101</sup> He would subsequently tell CNN: “I’d rather be considered a person who abandoned patients than someone who aided in eliminating patients.”<sup>102</sup>

From my cossetted vantagepoint, I cannot confidently judge the moral implications of King’s abandonment of patients any more than I can judge the moral implications of Pou’s killing of patients. That said, King probably could have tried to stay longer to do what he could to prevent the planned euthanasia to which he objected so forcefully—just as Pou could have stayed

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95. Waldron, *supra* note 55, at 344 (“A *perfect* duty determines a particular action that must be performed (or, as the case may be, not performed) on every occasion it crops up.”).

96. Fuller, *supra* note 2, at 623 (quoting the hypothetical Justice Foster: “The usual conditions of human existence incline us to think of human life as an absolute value, not to be sacrificed under any circumstances. There is much that is fictitious about this conception even when it is applied to the ordinary relations of society.”).

97. FINK, *supra* note 8, at 295. As reported by another doctor suspected of euthanasia at another hospital: “I had to make snap decisions, under the most appalling circumstances, and I did what I thought was right.” *Id.* at 277.

98. *See id.* at 188–89 (describing King’s actions during the tragedy).

99. *Id.* at 202.

100. *Id.* at 202–03.

101. *Id.* at 213; Fink, *supra* note 13; Johnston, *supra* note 13.

102. *Louisiana AG Orders Autopsies of 50 Memorial Medical Patients* (CNN television broadcast Oct. 14, 2005, 8:00 PM), <http://www.cnn.com/TRANSCRIPTS/0510/14/ng.01.html> [<https://perma.cc/2M9V-V8DV>].

longer (even if it meant defying immoral police commands) to find creative merciful alternatives to extermination. One respiratory therapist, for instance, wondered why more was not done to evacuate the stable patient, Emmett Everett: “There’s a big flat roof next to the seventh floor. They could have knocked a window out and passed him [and other purportedly ‘expendable’ patients] through a window and then across to the helicopter pad.”<sup>103</sup>

Medical personnel at nearby Lindy Boggs Medical Center offered an object lesson in what doctors and nurses might have done differently at Memorial. On the same fateful Thursday, Lindy Boggs was, like Memorial, prioritized for evacuation.<sup>104</sup> But some staff, including Dr. James Riopelle, courageously refused to leave.<sup>105</sup> A past president of the state humane society coalition, Riopelle chose to violate the command and remain behind because he knew that several dozen pets were otherwise going to be abandoned.<sup>106</sup> It did not even occur to him that *people* would likewise not make it out—that is, until the hospital was emptied, and he found himself in the company of twenty-five remaining patients, to whom he and others promptly provided treatment.<sup>107</sup> Sheri Fink described his thinking about the immoral official directive to leave the hospital:

This isn’t the *Titanic* . . . Lindy Boggs isn’t going down. We’re only a mile from dry ground, with plenty of drinking water. Rescue efforts [have] been slow, but . . . would eventually gain traction . . . There was no way he was leaving behind the sixty or seventy pets at the hospital, including his own, just because some twenty-year-old fireman from Shreveport had ordered him to go. He’d made a pledge to himself years earlier, after touring the Holocaust concentration camp Dachau, to refuse to comply with misdirection.<sup>108</sup>

To be sure, the story of Riopelle’s heroism is complicated by allegations (which Riopelle denies) that he, too, offered morphine so patients could “go at ease.”<sup>109</sup> My aim here is not to lionize or chastise Riopelle for his overall conduct, but only to commend his *one* decision to refuse to evacuate and to emphasize that it would have been better if some staff from Memorial Medical Center had likewise declined to acquiesce to official command. None did, but at least Pou stayed (and worked) a bit later.

For King’s part, there just seems to be something a little too convenient about, at once, taking the moral high ground *and* getting to go home—about

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103. FINK, *supra* note 8, at 312.

104. *Id.* at 133.

105. *Id.* at 374.

106. *Id.*

107. *Id.* at 374–75.

108. *Id.* at 374.

109. *Id.* at 375 (purportedly explaining to a family member that the dose would allow the patient to “go at ease”).



leaving the dirty work to others (however misguided that work might have been). I am reminded, on this score, of the seminal lifeboat case, *Regina v. Dudley & Stephens*.<sup>110</sup> Most people forget that there was a fourth sailor aboard, Edmund Brooks, who refused to take part in the killing of the cabin boy but nevertheless consumed his flesh.<sup>111</sup> Brooks kept his nose and conscience clean *and still got to eat*.

Like Dudley and Stephens, Pou was willing to do the dirty work. And it was dirty. At that point of mercy killing, she was no longer providing *ethical* care. But she kept on working, even at significant cost to her own wellbeing. On this reading, she deserves some credit for having done *something*. Sheri Fink observed: “Those who did better were those who didn’t wait idly for help to arrive. In the end, with systems crashing and failing, what mattered most and had the greatest immediate effects were the actions and decisions made in the midst of a crisis by individuals.”<sup>112</sup> Pou was one of the people who made decisions and took action.

To be sure, it could be that Pou was animated not by an impulse to help but by a particularly pernicious form of *outsider* disdain. Perhaps she euthanized these patients because she did not care for them (literally or figuratively) at all. As a doctor, she was a member of a highly privileged class that did not match, demographically, the composition of New Orleans or the patient population at Memorial Medical Center.<sup>113</sup> I cannot know for certain her motivations. But contempt seems like the least likely explanation. It stands to reason that scorn, in this instance, would take the form of apathy, not action. After all, Pou stepped up and put herself in legal jeopardy when nothing more was professionally required of her. The path of least resistance was to go home. She could have taken that path, but she did not.<sup>114</sup> She avoided the comfortable route. She gained nothing from killing. It did not make her safer; she was, by then, safer than she had been at any point since the complex lost power. Killing did not ease her workload; her official duties were done. She chose to stay and euthanize because she wanted, in her way, to help—because “suffering . . . was close enough to make a direct appeal to

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110. [1884] QB 273.

111. *Id.* at 274.

112. FINK, *supra* note 8, at 348.

113. Compare *QuickFacts, New Orleans City, Louisiana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/neworleanscitylouisiana/PST045223> [<https://perma.cc/5CDQ-3ZKT>] (last visited Mar. 3, 2024) (showing that from 2018–2022, the median household income in New Orleans was \$51,116), with *2019 Physician Compensation Report*, DOXIMITY 4 (2019), <https://press.doximity.com/reports/physician-compensation-report-2019.pdf> [<https://perma.cc/728U-4L8J>] (demonstrating that in 2018, the average physician in New Orleans made \$384, 651, over seven times the median household income).

114. Pou was fortunate to live in an elevated part of the city, and her home largely escaped damage. FINK, *supra* note 8, at 243.

[her] sympathy.”<sup>115</sup> And when she provided that help (such as it was) she gave it liberally, independent of whether the recipient was a “member of [her] community” or not.<sup>116</sup>

Thus, we return to Jesus’s question: “Which now . . . thinkest thou, was neighbour unto him that fell . . . ?”<sup>117</sup> When people come face-to-face with suffering, the traditional lines between omission and commission dissolve. Inaction becomes a kind of “intentional doing: . . . a choice to go out of [one’s] way to avoid the predicament.”<sup>118</sup> In crises, when the mind ought to become inextricably “focused on the victim’s predicament,” it takes “a serious effort of will” to be apathetic—to go about one’s “ordinary business” with “self-absorbed concerns.”<sup>119</sup> In such circumstances, indifference and misconduct grow somewhat indistinct morally. With that in mind, consider the following: on the day before the medical center was emptied, a family member of one patient complained that his mother was no longer receiving an IV for hydration. When told that the hospital was in “survival mode, not treating mode,” he responded curtly: “Do you just flip a switch and you’re not a hospital anymore?”<sup>120</sup> I am left to wonder who flipped that switch and abandoned metaphorical neighbors and who did not. It is an open question, and the answer is not obvious.

### III. On the Road

The notion of being “on the road” is critical to Waldron’s reading of the Parable of Good Samaritan. Waldron is skeptical of communitarianism as a basis for moral duties precisely because humans are itinerant—because so much of our lives is spent “on the road” in proximity to strangers: “When you are on the road, there is no telling who you might meet, who you might run into, who you might find yourself in the immediate neighborhood of . . . .”<sup>121</sup> The notion of “the road” on this telling represents more than a means of journey. It represents a site of uncertainty and insecurity—of potential catastrophe where comforts are few and dangers plenty. In Cormac McCarthy’s post-apocalyptic novel of the same name, the metaphor carries the same meaning. In *The Road*, a man and his son travel a dystopian hellscape. They are headed south for no reason other than that things may be better by the sea (they are not). The two have almost nothing—except each

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115. Waldron, *supra* note 55, at 350.

116. *Id.* at 336, 341.

117. *Id.* at 338.

118. *Id.* at 343. For a discussion on the distinction between omission and commission, see MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 22–23 (Tony Honoré & Joseph Raz eds., 1993).

119. Waldron, *supra* note 55, at 344 (emphasis omitted).

120. Fink, *supra* note 13.

121. Waldron, *supra* note 55, at 351.

other. Each is “the other’s world entire.”<sup>122</sup> They lack even names, dubbed by McCarthy only the “Man” and the “Boy.”<sup>123</sup> There was once the Boy’s mother—the “Woman,” who died by suicide years earlier, shortly after the cataclysm.<sup>124</sup> Before killing herself, she threatened to euthanize the Boy, letting him live only because his death would devastate the Man.<sup>125</sup>

The novel’s MacGuffin is the notion of “the good guys,” whom the Man and Boy seek in an effort to rebuild some semblance of preexisting society. The dilemma is that the Man is distrustful and hypervigilant—and with good reason. Everyone is a potential threat, everyone an incipient killer or cannibal. And to *others*, the Man is a threat, too. In moments of hope, the Man reassures the Boy: “There are people. There are people and we’ll find them. You’ll see.”<sup>126</sup> But the effort is impossible, because anytime they do encounter others, the Man quickly resorts to violence in purported defense of the Boy.<sup>127</sup> The Man’s credo is that “[i]f trouble comes when you least expect it then maybe the thing to do is to always expect it.”<sup>128</sup> Thus, they are stuck. The Man cannot trust anyone beyond their two-person clan.<sup>129</sup> He cannot let down his guard: “He said the right dreams for a man in peril were dreams of peril and all else was the call of languor and of death.”<sup>130</sup>

In Waldron’s terms, the Man fails to see *others* “as moral subjects,” rather than “potential predators.”<sup>131</sup> In turn, he becomes an inadvertent predator. He kills “the first human being other than the boy that he’d spoken to in more than a year”—a person the Man ironically calls “[m]y brother at last.”<sup>132</sup> He strips clothes from another who made off with their supplies, leaving the would-be plunderer to freeze and starve.<sup>133</sup> He refuses to come to the aid of a man injured by a lightning strike.<sup>134</sup> And heartbreakingly, after

122. MCCARTHY, *supra* note 6, at 5.

123. *Id. passim*.

124. *Id.* at 49–50.

125. *Id.* at 47–48.

126. *Id.* at 206.

127. *Infra* notes 132, 134–36, 180, 190.

128. MCCARTHY, *supra* note 6, at 128.

129. *Id.*; see also ISHMAEL BEAH, A LONG WAY GONE: MEMOIRS OF A BOY SOLDIER 43 (2007) (“This was one of the consequences of the civil war. People stopped trusting each other, and every stranger became an enemy.”).

130. MCCARTHY, *supra* note 6, at 15.

131. Waldron, *supra* note 55, at 349.

132. MCCARTHY, *supra* note 6, at 64; see also BEAH, *supra* note 129, at 67–68 (“My children, this country has lost its good heart. People don’t trust each other anymore. Years ago, you would have been heartily welcomed in this village. I hope that you boys can find safety before this untrustworthiness and fear cause someone to harm you.”).

133. *Infra* note 190 and accompanying text.

134. MCCARTHY, *supra* note 6, at 42–44 (“Can’t we help him Papa? No. We can’t help him. There’s nothing to be done for him. . . . He’s going to die. We can’t share what we have or we’ll die too.”).

the Boy spots another child, the Man refuses to let the Boy go after him, even after the Boy expresses deep concern for the child's wellbeing.<sup>135</sup> Most horrifying, when the Man and the Boy stumble upon a cellar of half-eaten, half-dead people, the Man compels the Boy to flee, rather than free the prey: "Help us, they whispered. . . . He pushed the boy up the stairs. Help us, they called. . . . He stood and got hold of the door and swung it over and let it slam down . . . ."<sup>136</sup> The Man seals their sad fate—literally.

The Man has no hope of finding "the good guys" precisely because he is blinded by a deep and abiding *in-group* mentality. His tragic—and, in a real sense, fatal—flaw is *love*. His smothering affection for his own son is so great—his fear of harm to his son so acute—that he transforms their lives into the existence of "two hunted animals."<sup>137</sup> As he informs his son: "My job is to take care of you. I was appointed to do that by God. I will kill anyone who touches you."<sup>138</sup> But the Boy, by contrast, is *other*-regarding. He appreciates the paradox. When his father insists that they are unlikely to "meet any good guys on the road," the Boy notes that *they*, too, are on the road.<sup>139</sup> And, if they are decent, and they are on the road, then other travelers might be decent, too. In a similar vein, the boy worries that they—in their unmerciful insularity—have become indecent: "Are we still the good guys? . . . [I]n the stories we're always helping people and we don't help people."<sup>140</sup>

The book is, to put it mildly, a ghastly narrative. But it has a strangely hopeful (and, for our purposes, instructive) ending. The Man succumbs to illness, whispering to his son: "[D]o everything the way we did it. . . . You need to find the good guys but you can't take any chances. No chances. Do you hear?"<sup>141</sup> The Man's dying wish is only that the Boy may stay safe by continuing to live a rulebound and mollycoddled life, keeping the world at bay rather than interacting daringly with it. But in the moment of his father's demise, the Boy is not wholly fixated on this impending rupture to their *pas de deux*. He is likewise worried about an *other*—a *stranger*:

Do you remember that little boy, Papa?

Yes. I remember him.

Do you think that he's all right that little boy?

Oh yes. I think he's all right.

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135. *Id.* at 71–73 ("Come back, he called. I won't hurt you. . . . I just wanted to see him, Papa. I just wanted to see him. . . . I'm afraid for that little boy. . . . We should go get him, Papa. We could get him and take him with us.").

136. *Id.* at 93–94.

137. *Id.* at 110.

138. *Id.* at 65.

139. *Id.* at 127.

140. *Id.* at 65, 225.

141. *Id.* at 234.

Do you think he was lost?

No. I don't think he was lost.

I'm scared that he was lost.

I think he's all right.

But who will find him if he's lost? Who will find the little boy?

Goodness will find the little boy. It always has. It will again.<sup>142</sup>

And, notably, once the Man dies, the Boy almost immediately defies his father's strict edicts. An armed man approaches, but the Boy does not run or fight.<sup>143</sup> Instead, he decides "to take a shot" on openness and trust.<sup>144</sup> He joins the man, not knowing whether he is a "good guy" or cannibal.<sup>145</sup> And the risk pays off. The man takes him to live with his wife and children in a house off the road: "The woman when she saw him put her arms around him and held him."<sup>146</sup> New neighbors.

The ending—and all that precedes it—is, on this reading, a stark warning that *in-group bias* is a trap. In the face of threat, we tend to cocoon. But the struggle to build a safe existence, especially *in extremis*, constitutes its own kind of threat—not a threat to safety as such, but to our capacity to be present for *others*, to help *others*, to live "side-by-side" with *others*, to be *other*-regarding when *others* are *others*—to wit, *strangers*.<sup>147</sup> When, to the contrary, we open ourselves up to *others*, we may be met with a soft hand or a hard fist. We cannot know which. But goodness demands that, sometimes, we "take a shot."<sup>148</sup> And, when we do, goodness may find us in turn.

#### IV. The Man as the Proverbial "MAN"

There are parallels to be drawn between *The Road*'s cast of characters and the real role players at the center of the drama at Memorial Medical Center. To my thinking, both Drs. Pou and King resemble the Woman. In different ways, life *in extremis* became just too much for all three. And, once they reached their limits, they stopped fighting. King gave up and left the hospital, just like the Woman gave up on life. The Woman sought to bring the Boy with her: "I should have done it a long time ago. . . . I'd take him

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142. *Id.* at 236.

143. *Id.* at 237.

144. *Id.* at 238–39.

145. *Id.*

146. *Id.* at 241.

147. See Waldron, *supra* note 55, at 351 (exploring "the basis on which the intuitions evoked by the parable of the Good Samaritan plainly trump or overwhelm any thoughts about people owing assistance only to those connected to them by ties of blood or communal affiliation"); *infra* notes 67–86 and accompanying text; cf. BEAH, *supra* note 129, at 79 ("[S]omething in his eyes told me that he didn't care for my safety but only for his and his village's.").

148. MCCARTHY, *supra* note 6, at 238.

with me if it weren't for you. . . . It's the right thing to do."<sup>149</sup> And, in this way, her intentions track Pou's actions and motivations: both saw euthanasia as the good and right course to facilitate escape (even involuntarily) from a world transformed by horror.

But the more interesting analogues are to the Man and the Boy. We have, until this point, left two groups largely offstage in our discussion of the events at Memorial Medical Center—prosecutors and the grand jury. Here, the principal prosecutor was Charles Foti, then-Attorney General for the State of Louisiana.<sup>150</sup> Like Victor Hugo's Inspector Javert or Lon Fuller's fictive Justice Keen, Foti took a rigid, binary, rulebound approach to a morally complicated question.<sup>151</sup> As he wrote in an editorial: “[Y]ou may argue that Dr. Pou was under immense pressure [and that] this [is] an excuse for her alleged actions[.] I cannot accept this argument.”<sup>152</sup> In prosecuting Pou and others, Foti was criticized heavily for his overzealousness and insensitivity, drawing contemporaneous comparisons to Michael Nifong, the disgraced North Carolina prosecutor who fanatically pursued (and mishandled) wrongful rape charges against three Duke University lacrosse players.<sup>153</sup>

The problem, as I see it, is that Foti—like most prosecutors (and, indeed, most all public officials)—was unprepared and unwilling to reckon with the genuine reasons for the catastrophe, both at Memorial Medical Center and throughout the state. He did what prosecutors typically do. He placed blame on distressed individuals for conduct motivated by constrained circumstances. There was no effort by Foti to address or even consider, as Dr. Pou put it in a court filing, “[t]he real cause of loss of life”—that is, “the government's abandonment of the patients and the doctors.”<sup>154</sup> Pou's lawyer explained: “If you look at what happened on Wednesday to Thursday when a lot of these events occurred, the state of Louisiana abandoned the hospitals . . . . Where was the state of Louisiana on September first? It wasn't at Memorial Hospital, I can tell you that!”<sup>155</sup>

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149. *Id.* at 47–48.

150. *Arrest of Katrina Doctor, Nurses Stirs Up Strong Support for the Accused*, RELIAS MEDIA (Sept. 1, 2006), <https://www.reliasmedia.com/articles/122579-arrest-of-katrina-doctor-nurses-stirs-up-strong-support-for-the-accused> [<https://perma.cc/98FS-A52Y>].

151. CLAUDE-MICHEL SCHÖNBERG & HERBERT KRETZMER, *Javert's Suicide*, in LES MISÉRABLES (1980), based on VICTOR HUGO, LES MISÉRABLES (1862) (“I am the law, and the law is not mocked.”); Fuller, *supra* note 2, at 639 (describing Justice Keen's “fidelity to the written law” above all).

152. FINK, *supra* note 8, at 446.

153. *Id.* at 429, 436.

154. *The Week in Review*, HEALTH CARE BLOG (July 20, 2007), <https://thehealthcareblog.com/blog/2007/07/page/3/> [<https://perma.cc/3JQ3-5J7V>]; see also FINK, *supra* note 8, at 348 (noting that the “official response” to the tragedy revealed “a lack of situational awareness . . . of what was happening and what needed to be done”).

155. FINK, *supra* note 8, at 346 (emphasis omitted).

In this way, the events at Memorial Medical Center were something of a “microcosm” for broader systemic collapse.<sup>156</sup> LifeCare patients were marginalized and effectively ignored by the hospital complex.<sup>157</sup> The hospital complex was marginalized and effectively ignored by offsite corporate hacks and incompetent or indifferent city, state, and federal politicians; bureaucrats; and civil servants.<sup>158</sup> Storm-ravaged New Orleanians—principally Black, Brown, and poor—were not only marginalized and effectively ignored but also vilified by police, prosecutors, and members of the press who labeled them looters and thugs:

Individual decisions at the hospital had occurred in a context of failures of every sort. . . . Why, in the end, had more than a thousand died immediately in New Orleans—many of them in medical facilities . . . ? So many reasons. The mayor’s delayed evacuation order. The lack of buses and drivers . . . . Uncoordinated rescue efforts. Confusion and turf battles between different agencies and levels of government. Poor communications . . . . Hospitals and nursing homes that didn’t evacuate before the storm and had not invested in backup power systems and backup water systems . . . . Alarm over lawlessness, which interrupted rescues. . . . [T]he fear of violence [that] outweighed the actual violence . . . .<sup>159</sup>

Simply put, the failures were institutional. And what is an institution at its most basic level? It is a collection of people with shared aims, experiences, and values—a kinship network that provides social support for its members,

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156. *Id.* at 348 (“The hospital was a microcosm of these larger failures, with compromised physical infrastructure, compromised operating systems, and compromised individuals.”).

157. *See supra* notes 14–35 and accompanying text. Notably, Tenet Healthcare would later come to likewise marginalize some of its *outsider* doctors by refusing to pay legal fees to contract physicians; this included one doctor, under suspicion for euthanasia, who experienced a stroke in the disaster’s aftermath and, shortly thereafter, ended up on a ventilator suffering from metastatic cancer. FINK, *supra* note 8, at 294–95, 437–39.

158. *Id.* at 272 (“Some workers recalled the sense of abandonment they had felt during the disaster both before and after leaving the hospital.”). In the midst of the disaster, Tenet’s CEO insisted that the evacuation was under control and proceeding expeditiously and safely, leading a Memorial nursing director to respond: “[H]ow dare you give this nation the impression that you were providing for these patients and for your employees.” *Id.* This prompted a different nurse to write a letter to the CEO, insisting: “Tenet [failed its] duty during Hurricane Katrina to protect [its] employees . . . . When I consider how [we] put ourselves in harm’s way for Tenet, I feel a sense of indignation that the company wasn’t there to take care of those taking care of its patients.” *Id.* at 272–73.

159. *Id.* at 346–47; *see also* Julie Hollar, *Brian Williams Rehashes Katrina Violence Myth*, FAIR (Oct. 1, 2010), <https://fair.org/extra/brian-williams-rehashes-katrina-violence-myth/> [<https://perma.cc/M5R3-X2ZT>] (“[M]ost of the worst crimes reported at the time never happened.”). Memorial Medical Center staff likewise used fears that “intruders from the neighborhood might ransack the hospital for drugs and valuables” to justify turning away refugees who drifted up to the medical center entrance: “[T]he hospital was harboring dogs and cats while babies floated over polluted water on unsteady skiffs.” *Id.* at 157.

particularly in times of peril.<sup>160</sup> More to the point, it is a fountainhead for *in-group bias*. The legal profession is one such institution with its own hardwired norms and traditions: a preference for peace and order over substantive justice, a “strongly formalist[ic]” culture oriented around supposedly neutral principles, an obsession with rulebound absolutes, and a preoccupation with human agency and personal responsibility over social solidarity.<sup>161</sup>

Law is, moreover, a particularly proud institution with a cherished set of traditions and practices, especially amongst its statist practitioners. Elsewhere, I have written extensively about the pernicious influence of judicial and prosecutorial *institutional pride*.<sup>162</sup> To my thinking, the root of the problem is righteous adoration. Judges and prosecutors love law, and that affection colors their perceptions of what falls beyond it. As Judge Dennis Jacobs explained, legal officials “have a bias in favor of legalism and the legal profession” and “[an] incremental preference for the lawyered solution . . . .”<sup>163</sup> The basis “is a matter of like calling unto like.”<sup>164</sup> Judges and prosecutors are convinced that rules of law “produce the best results”<sup>165</sup> and are the most effective bulwark against “perfect anarchy.”<sup>166</sup> In turn, they fancy themselves “[a]rchitects of a stable society”<sup>167</sup>—indispensable

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160. Under investigation and facing prosecution, Pou retreated likewise to her own institutional support system. She enjoyed the “lockstep defense of the medical community,” as “organized medicine’s main response to the alleged murders at Memorial was to close ranks and defend itself”—an effort which included a push for legislation that would mandate that “any complaints about a doctor’s actions in a disaster be reviewed by other doctors instead of lawyers and judges.” FINK, *supra* note 8, at 428, 459.

161. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 63 (2003); Josh Bowers, *What if Nothing Works? On Crime Licenses, Recidivism, and Quality of Life*, 107 VA. L. REV. 959, 1003–05 (2021). As David Gray describes elsewhere in this volume: “The criminal justice system is populated by individuals who are state agents and therefore occupy roles defined and constrained by institutional rules. Specifically, the criminal law privileges objective, detached judgment and the rigorous enforcement of rules as rules.” David Gray, *Mercy in Context*, 102 TEXAS L. REV. 1615, 1620 (footnotes omitted).

162. Josh Bowers, *McCleskey Accused: Justice Powell and the Moral Price of Institutional Pride*, 2 AM. J.L. & EQUAL., 122, 127 (2022). See generally Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010) [hereinafter Bowers, *Legal Guilt, Normative Innocence*] (discussing cognitive and institutional biases affecting prosecutors).

163. Dennis Jacobs, Lecture, *The Secret Lives of Judges*, 75 FORDHAM L. REV. 2855, 2856, 2859 (2007).

164. *Id.* at 2859.

165. *Id.* at 2856.

166. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 245 (1975).

167. J. HARVIE WILKINSON III, ALL FALLEN FAITHS: REFLECTIONS ON THE PROMISE AND FAILURE OF THE 1960S, at 74 (2017).



lynchpins for “establishing, maintaining, and perfecting the conditions necessary for community life.”<sup>168</sup>

This is not entirely a knock. Order has instrumental value. As Jeremy Bentham made plain, without an effective legal order, man lacks the ability effectively to predict and plan a life course.<sup>169</sup> But there is, likewise, the risk that the custodians of that order, acting in concert as a *group*, may come arrogantly to morally value too highly the enterprise and their roles within it. Everything that is beyond law is threat and disorder—dangers that must be eliminated in service to the “cause of social stability.”<sup>170</sup>

Consider, in particular, the criminal legal system. It is defined by a commitment to *punitive prohibitionism*—a logic grounded in the belief that human interactions inevitably occur between people bent on doing harm to one another.<sup>171</sup> From that starting point, “soulless individualism” and suspicion take precedent over countervailing efforts to foster a “radical community of aid.”<sup>172</sup> Unmet human needs are confused with “dreaded chaos,” and chaos must, according to the criminal legalists, be controlled coercively by the state.<sup>173</sup> Thus, the day after authorities ordered Memorial Medical Center abandoned, plainclothes NOPD police officers opened fire on a group of unarmed and innocent storm refugees, injuring four and killing two.<sup>174</sup> Thus, Attorney General Charles Foti looked at the events at Memorial Medical Center and thought first about whom to blame, shame, and punish, clumsily mapping peacetime criminal-legal rules onto a world made mad not

168. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 102 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (quoting J.M. Snee, *Leviathan at the Bar of Justice*, in *Government Under Law* 47, 52 (1955)).

169. Jeremy Bentham, *Principles of the Civil Code*, reprinted in 1 *THE WORKS OF JEREMY BENTHAM* 297, 308 (1962). Indeed, Bentham wrote: “Expectation is a chain which unites our present and our future existence . . .” *Id.* It is expectation by which “we are enabled to form a general plan of conduct . . .” *Id.* (“The principle of security comprehends . . . that events, inasmuch as they are dependent upon the laws, should be conformed to the expectations to which the laws have given birth.”).

170. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 470 (1994).

171. For a discussion on *punitive prohibitionism*, see Bowers, *supra* note 161, endorsing harm reduction over punitive prohibitionism, and Josh Bowers & Daniel Abrahamson, *Kicking the Habit: The Opioid Crisis, America’s Addiction to Punitive Prohibition, and the Promise of Free Heroin*, 80 OHIO STATE L.J. 787, 788 (2019).

172. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 2 (1993) (“By elevating rights over responsibilities, critics have argued, the law discourages the positive acts of communal solidarity that are part and parcel of citizenship.” (footnotes omitted)).

173. JEFFRIES, *supra* note 170, at 470.

174. Andy Grimm, *A Decade After Danzinger Bridge Shooting, Killings Still Cast a Shadow*, TIMES-PICAYUNE (Sept. 5, 2015), [https://www.nola.com/news/crime\\_police/a-decade-after-danzinger-bridge-shooting-killings-still-cast-a-shadow/article\\_00bb8d39-aa35-5959-b613-873905a4e734.html](https://www.nola.com/news/crime_police/a-decade-after-danzinger-bridge-shooting-killings-still-cast-a-shadow/article_00bb8d39-aa35-5959-b613-873905a4e734.html) [https://perma.cc/Z4CW-DSU9].

only by the meteorological consequences of extremely low atmospheric pressure but also by institutional incompetence.<sup>175</sup>

There is, then, a curious overlap between a life in law and *in extremis*. In the former context, it becomes difficult for traditional law enforcers to see beyond their chosen institutional bubbles. They cannot adequately identify suffering and its systemic causes, perceiving only an anarchic world that must be tamed by over- and under-inclusive rules. To the extent they adopt an attitude of care, it is too often directed primarily toward teammates. The problem is most visceral in policing contexts where officers sometimes respond reflexively with excessive force to perceived risks to in-group safety and security (as in the killing of twelve-year-old Tamir Rice and so many others victims of police violence),<sup>176</sup> or, alternatively, where officers sometimes prioritize passivity and preservation of the flock over protection of *others* from danger (as in the failure of police to timely neutralize a school shooter and rescue injured students and teachers at Robb Elementary in Uvalde, Texas).<sup>177</sup> And prosecutors display corresponding institutional bias when, in turn, they excuse such police brutality or indifference by refusing to charge officers for misconduct or inaction, endorsing instead proffered police narratives of purported danger and reasonable fear.<sup>178</sup> More generally, it is this systemic penchant toward *in-group* solidarity that grounds troubling

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175. In like fashion, the British High Court of Justice, in *R v. Dudley & Stephens*, legally rejected a moral code designed for events *in extremis*—the informal so-called “custom of the sea,” whereby, in starving times, a man may randomly be sacrificed for food—and “pompous[ly]” replaced it with the conventional criminal rule that there is no necessity defense to murder, [1884] QB 273 at 287–88; A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW 238, 240 (1984). Never mind that judges tend not to experience such deprivation.

176. Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 197 (discussing the killing of Tamir Rice). Elsewhere in this volume, Avlana Eisenberg describes the prominence of the “danger narrative” in police culture—that “policing is inherently dangerous, and officers are under constant threat of grave physical harm at the hands of those whom they police.” Avlana K. Eisenberg, *The Case for Mercy in Policing and Corrections*, 102 TEXAS. L. REV. 1409, 1418 (quoting Avlana K. Eisenberg, *Policing the Danger Narrative*, 113 J. CRIM. L. & CRIMINOLOGY 473, 476 (2023)).

177. Lomi Kriel, Alejandro Serrano & Lexi Churchill, “*Cascading Failures*”: *Justice Department Blasts Law Enforcement’s Botched Response to Uvalde School Shooting*, TEX. TRIB. (Jan. 18, 2024, 6:00 PM), <https://www.texastribune.org/2024/01/18/uvalde-school-shooting-federal-investigation-policeresponse/#:~:text=The%20Justice%20Department's%20long%20anticipated,killed%20on%20May%2024%2C%202022> [<https://perma.cc/6V9U-9RRJ>].

178. See, e.g., Bowers, *supra* note 176, at 197, 204–05 (discussing a prosecutor’s decision not to charge the officer who killed Tamir Rice and concluding that “there are good reasons to believe that *partial* state actors, like police officers and prosecutors, are particularly bad at seeing past their own professional perspectives—their own cognitive and institutional biases”); Daniel Marans, *How a Prosecutor Managed to Blame a 12-Year-Old for Getting Killed by a Cop*, HUFFINGTON POST (Dec. 29, 2015, 11:22 PM), [http://www.huffingtonpost.com/entry/tamir-rice-timothymcginty\\_us\\_5681d451e4b014efe0d91562](http://www.huffingtonpost.com/entry/tamir-rice-timothymcginty_us_5681d451e4b014efe0d91562) [<https://perma.cc/FH75-3RSX>]. For discussion describing the close institutional relationships between police officers and prosecutors, see generally *Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

phenomena like “the blue wall of silence.”<sup>179</sup> For these professionals, it is the institutional perspective that counts, not the interests of *outsiders* who occupy spaces beyond legal institutions.

*In extremis*, “hunted animals” react analogously. Too frightened of *others* to express universal concern, they burrow deep into warrens populated by their own kind only. And when they cannot effectively hide in holes, they attack their perceived aggressors, independent of whether their perceptions of threat align with reality. This, then, is the paradox: in the absence of a state, people need to be able to trust and love each other, but paradoxically, it is precisely in this stateless state that trust and love for *others* becomes impossible. To be sure, life under a legal order is far preferable to this state of nature, but it is not a wholesale remedy for the problem of *in-group bias*, because the law—like all institutions (and all human collectives, for that matter)—creates its own sets of insiders and outsiders.

It is time, then, to identify the first of our two final literary analogues. Attorney General Charles Foti represents the Man from *The Road*. The Man can affectively see only the dangers that threaten his son. Foti can affectively see only the rule-breaking that imperils his cherished legal order. The Man believes that he is all that stands between the Boy and oblivion, and Foti superciliously thinks the same of society *writ large*. Both actors perceive menace on all sides and use force to eliminate it. The parallel is this: in *extremis*, every insider becomes a prosecutor against every outsider, and every outsider becomes a criminal in the eyes of the terrified tribesperson.

Consider, on this score, the Man’s interactions with the Thief—another traveler who took food and supplies from the Man and the Boy. Technically, this individual *was* a “thief.” But he was also a victim of circumstance, suffering from conditions beyond his personal control. Thus, the Thief begs the Man: “I’m starving, man. You’d have done the same. . . . Come on, man. I’ll die. . . . I’m begging you.”<sup>180</sup> But the Man remains almost wholly unmoved.

In this way, the Man resembles the paradigmatic authority figure of “THE MAN”—a prosecutor who divides the world, formalistically, into “good guys” and criminals.<sup>181</sup> As David Gray observes elsewhere in this symposium:

[T]he criminal law engages offenders in a limited, almost abstract way, eschewing interest in the narratives of their lives and the

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179. See generally Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998) (discussing in-group biases that inform officer solidarity).

180. MCCARTHY, *supra* note 6, at 217.

181. Cf. Eisenberg, *supra* note 176, at 1422 (describing how law enforcers adopt an “us versus them” perspective with corresponding “professional roles” that pit them “in direct opposition” to the perceived “‘bad guys’ or ‘thugs’”).

complexities of their agency to focus narrowly on discrete moments, acts, and mental states. When the criminal law is interested in the particularities of an offender or his act, it is only to the extent those details can be comprehended by generally applicable rules . . . .<sup>182</sup>

Prosecutors operate within a system of “bounded morality”—a system that “limits its agents to their institutional roles.”<sup>183</sup> Their professional selves are “organized around specialized, hierarchical institutions that stand apart and above society,” leaving prosecutors unable adequately to engage “ethical and moral capacities” or to appreciate “the moral and social complexity” of other lives.<sup>184</sup>

In the same vein, the Man’s moral vision is made myopic by love and fear for his son. Beyond that bubble, he is cold, uncaring, and inflexible. With prosecutorial hypervigilance, he flattens potential threats to safety and security into criminal-legal archetypes. Like a conventional law enforcer, the Man is committed to punishment over mutual aid and understanding. *The legal order and the family*: both institutions cleave insiders from outsiders—sometimes violently.<sup>185</sup>

#### V. The Normative Grand Jury

What, then, do we make of the Boy? There is something admirable (and, like the Good Samaritan, almost “startling”<sup>186</sup>) about his *other*-regarding nature. He shares with his father neither a preference for a rule-bound existence nor a retributive instinct to violently blame, shame, and punish. He neither dehumanizes nor categorizes. Most of all, he has the capacity to empathize independent of preexisting relationship. When the father and son encounter the so-called “Thief,” the Boy is able to appreciate who this individual *actually* is—not *only* a thief but also a familiar who shares their suffering, a brother as much as an *other*. And, out of such fellowship, the Boy finds common cause with this supposed stranger—a *self-other merging*:

Papa please don’t kill the man.

The thief’s eyes swung wildly. The boy was crying.

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182. Gray, *supra* note 161, at 1618–19 (footnote omitted).

183. *Id.* at 1620, 1629.

184. *Id.* at 1620–21, 1629. As Paul Butler wrote analogously of judges: “[F]ormal adherence to their legal role not only blinded them to justice but also eroded their humanity.” Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1790 (2007).

185. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”). See generally Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (examining the great gulf that “divides the knowledgeable, powerful participants inside American criminal justice from the poorly informed, powerless people outside of it”).

186. Waldron, *supra* note 55, at 336–37.

Come on, man. I done what you said. Listen to the boy.<sup>187</sup>

The Boy sees before him something more than crime and criminal; he sees the basic needs of a fellow human. He recognizes, like Terence, that “nothing . . . human is alien.”<sup>188</sup> And mercy flows naturally from such “full consideration of the sympathetic circumstances . . . including past and present hardship.”<sup>189</sup> Indeed, the Boy manages even to influence his father, however slightly. At the Boy’s urging, the Man decides ultimately not to kill the Thief. But the Man remains unwilling to help him, leaving him worse for wear, stripped of possessions, unfed and unclothed, with prospects made bleaker by the harsh elements—an eye for an eye.<sup>190</sup>

For the Boy, however, social solidarity takes priority. But there is only so much the Boy can do. So long as his powerful father lives, the Boy is held tightly in the Man’s grasp—stuck in his social order, his system, his bubble. The Boy is only capable of radically reordering his relationship to *others* once his father dies. Still, the Boy is not entirely helpless. In the interim, he can check the Man’s worst instincts, shielding outsiders from the Man’s most extreme acts of violence and calling into question his persistent indifference. As a screen against the Man’s worst excesses, the Boy operates something like a jury that equitably dissents—a jury working within the criminal legal system that bucks its punitive efforts, striving to exercise mercy even *contra* clear legal command. I have dubbed such bodies “normative” juries.<sup>191</sup> They cannot effect structural change, but they can protect against discrete instances of official overreach, even (or perhaps especially) legally authorized overreach.

Most of the literature on so-called jury nullification has focused upon trial or *petit* juries.<sup>192</sup> But, in previous work, I identified the *grand* jury as a

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187. MCCARTHY, *supra* note 6, at 216. On *self-other merging*, see *supra* notes 78–81 and accompanying text.

188. Terence, *Eunuchus* (*The Eunuch*) (“*Homo sum, humani nihil a me alienum puto*” or “I am human, and I think nothing of which is human is alien to me”).

189. Gray, *supra* note 161, at 1619.

190. MCCARTHY, *supra* note 6, at 216–17.

191. Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1671–72 (2017) [hereinafter Bowers, *Upside-Down Juries*]; Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 323 (2012) [hereinafter Bowers, *Normative Grand Juries*]; see also Bowers, *Legal Guilt, Normative Innocence*, *supra* note 162, at 1723–26 (arguing that the power of adjudication needs to be shared for charges to be equitable).

192. For a discussion on the *petit* jury’s power, but not authority, to act against official legal command, see generally Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996) and Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Put differently, *petit* juries are instructed that they must follow judicial instructions, but when they fail to do so, their extralegal decisions are unreviewable.

more promising instrument for equitable oversight.<sup>193</sup> I proposed restructuring the grand jury to foreground moral and prudential considerations. The “normative grand jury,” as I called it, would be instructed to presume legal guilt and thereafter confront only the question of whether the state *ought* to charge—a particularistic evaluation, grounded in affective understanding.<sup>194</sup> This is, of course, not how grand juries tend to operate presently. As anyone familiar with sky high indictment rates can readily attest, the institution provides little screening of any kind, because, as currently constituted, it is dominated by prosecutors, and prosecutors seldom provide jury members with the evidence, arguments, and latitude to address equitable questions.<sup>195</sup>

There are, however, rare instances of prosecutors providing grand jurors substantially more leeway. The case against Dr. Pou is a prime example. By the time prospective charges reached the grand jury, Attorney General Foti was no longer calling the shots.<sup>196</sup> Instead, local prosecutors presented the counts, and they were agnostic about whether and how to proceed.<sup>197</sup> Their allegiances were somewhat split between their commitments to criminal legalism and their responsiveness to a more-forgiving constituency that had experienced Katrina’s wrath directly. To be clear, most New Orleanians did not suffer the ravages of the storm’s floodwaters in a manner comparable to the staff and patients at Memorial Medical Center, but they—like local prosecutors—were closer to the action and its aftermath than legal officials stationed in Baton Rouge. Even if local prosecutors, left to their own preferences, might have been inclined to default to punitive approaches, they

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193. See Bowers, *Upside-Down Juries*, *supra* note 191, at 1671–72 (proposing a normative grand jury). In Bowers, *Normative Grand Juries*, *supra* note 191, at 338, I likewise argue that “the grand jury’s exercise of equitable power is qualitatively different than impermissible jury nullification.” As an accusatory, rather than an adjudicatory body, “the grand jury is merely sharing equitable authority with another actor [(the prosecutor)] to whom such authority is already lawfully entrusted.” *Id.*

194. Bowers, *Normative Grand Juries*, *supra* note 191, at 349. In essence, the proposal would refocus the grand jury on what Mark Osler, elsewhere in this volume, calls “story complexity” over “rule complexity.” Osler, *supra* note 66, at 1496–97. As Osler explains:

We have erred [] in too often favoring rule complexity over story complexity, and that has played a role not only in over-incarceration, but in the loss of mercy as an ancient value . . . We need more room for story complexity, for the earthy realities of people’s lives, and a smaller role for rules that limit our consideration of that humanity.

*Id.* (footnote omitted); see also Gray, *supra* note 161, at 1616, 1620 (describing mercy as “flexible and situational,” as compared to conventional prosecution and punishment, which may be “unjust because it excludes morally salient facts and arguments”).

195. Bowers, *Normative Grand Juries*, *supra* note 191, at 344.

196. FINK, *supra* note 8, at 357.

197. See *id.* (“District Attorney Jordan . . . had made it plain that he wanted the coroner’s classification of the deaths before bringing the cases to a grand jury for possible indictments.”).

were hearing from affected voters.<sup>198</sup> And that matters. As I have examined elsewhere, prosecutorial perspective is shaped not only by institutional bias but also by political pressure.<sup>199</sup>

Whatever the reason, local prosecutors equivocated, making plain, as one explained, that they “weren’t gung-ho” about the charges.<sup>200</sup> Or as another put it: “We were going to give some deference to the defendant. We weren’t going to just rush in and indict her” but “we weren’t going to shirk our duties and tank it.”<sup>201</sup> Again, it is not obvious why the government took this tact. But it was probably strategic—an effort, as one professor suggested, to rely upon “the grand jury to provide [] cover” for a case that would otherwise likely end with petit jury acquittal (by nullification or otherwise).<sup>202</sup> Indeed, a subsequent Orleans Parish District Attorney, largely conceded as much, observing that, even though “human beings were killed as a result of actions by doctors,” he didn’t have plans to reinstate prosecution, suggesting he believed no local jury would convict.<sup>203</sup>

What seems clear to me is that there was ample evidence of technical *legal* guilt—at least enough to satisfy the low indictment threshold of probable cause.

But legal guilt was, of course, not the question upon which the case did turn (or ought to have turned). The requisite inquiry was into the morally fraught and ambiguous issue of whether it was appropriate to convert Dr. Pou’s actions, undertaken *in extremis*, into a peacetime criminal-legal matter. My personal view is that a criminal-legal response was equitably unwarranted. But opinions differ. Thus, it was appropriate to submit the matter to a grand jury. If the state is to have a criminal legal system at all, it owed it to the decedents’ families to allow a lay and local collective to consider the proposed charges. More to the point, the case was presented in

198. As Sheri Fink observed, after the arrests, comments on the online discussion threads of the *Times-Picayune* were “mostly favorable toward the medical professionals.” *Id.* at 348–49 (quoting one comment: “Instead of arresting three women for alleged murder, we should put our Local, State and Federal Government on trial for this atrocity”).

199. Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 114 (2007).

200. FINK, *supra* note 8, at 446. As Fink explained, they worried about how “to apply civilian law to a war zone.” *Id.* at 363.

201. *Id.* at 446.

202. Mary Foster, *Grand Jury to Investigate Hospital Deaths*, NICHOLLS WORTH (Mar. 8, 2007) (quoting Loyola University Law Professor, Dane Ciolino), <https://thenichollsworth.com/100849/uncategorized/grand-jury-to-investigate-hospital-deaths/> [<https://perma.cc/G4LD-YYPU>].

203. Peter Kovacs, *Orleans DA Testifies That He Believes Patients Were Killed at Memorial Medical Center After Katrina, but He Can’t Prove It*, TIMES-PICAYUNE (July 9, 2010), [https://www.nola.com/news/crime\\_police/orleans-da-testifies-that-he-believes-patients-were-killed-at-memorial-medical-center-after-katrina/article\\_26cf5557-48bb-5dee-849c-751cc9df1ed6.html](https://www.nola.com/news/crime_police/orleans-da-testifies-that-he-believes-patients-were-killed-at-memorial-medical-center-after-katrina/article_26cf5557-48bb-5dee-849c-751cc9df1ed6.html) [<https://perma.cc/FCF7-HNB9>] (“Whether or not there was a homicide and whether or not there is a case that can be brought are different matters.”).

the right way: an evenhanded presentation of all the relevant information—legal and extralegal.<sup>204</sup>

A final question remains, however, that I, unfortunately, cannot definitively resolve—that is, whether these jurors genuinely were “neighbors” of *all* the affected parties. On the one hand, even though the empaneled grand jury was diverse, it was demographically distinct from the population most affected by Hurricane Katrina. Specifically, Black individuals comprised sixty-seven percent of New Orleans’s pre-Katrina population and seventy-six percent of its flood victims.<sup>205</sup> Yet, the ten-person grand jury consisted of six white members and only four Black members.<sup>206</sup> When this presumably more-privileged cohort voted “[n]ot a true bill” on charges of second-degree murder and conspiracy to commit murder,<sup>207</sup> perhaps they were just exercising their own form of *in-group bias* toward a fellow privileged figure—Dr. Pou—at the expense of a patient population that more closely reflected New Orleans’ historically subordinated classes. It is not lost on me that Dr. Bryant King, the loudest in-hospital voice objecting to euthanasia, was also one of the few Black doctors at the medical center.<sup>208</sup>

Because few of us, on our own roads, are as virtuous as the Good Samaritan or the Boy, the best way for a jury to transcend *in-group bias* is simply to ensure that it genuinely represents a fair cross section of all affected communities—a bubble comprised of as many discrete bubbles as possible.<sup>209</sup> The means to achieve that difficult end is beyond the scope of this Essay, though plenty of worthwhile ink has been spilled on the question.<sup>210</sup> To be sure, I would feel more comfortable with this grand jury’s decision if its composition had been more representative of the City of New Orleans. Still, on matters of mercy, we should, to my thinking, trust the

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204. See JEFFREY BRAND-BALLARD, LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING 73 (2010) (“Deciding whether one has good reasons to deviate often requires one to consider a wider range of factors than would blind adherence to the law.”); *supra* notes 182–84, 195, 212 and accompanying text (citing additional sources).

205. Richard Campanella, *An Ethnic Geography of New Orleans*, 94 J. AM. HIST. 704, 714 (2007).

206. FINK, *supra* note 8, at 444–45.

207. *Id.* at 445.

208. Fink, *supra* note 13.

209. Bowers, *Normative Grand Juries*, *supra* note 191, at 333 (“[F]rom a community-prosecution standpoint, it is critical that the [grand jury] represent the relevant community (in whatever way that community may be defined). And, notably, studies demonstrate that perspectives on blameworthiness and on the optimal balance between order and liberty tend to vary across communities.”).

210. See generally, e.g., Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353 (1999) (providing just one example of the literature on impartial jury selection).



efforts of even a somewhat imperfectly constituted lay jury over too-infrequent professional exercises of sovereign grace.<sup>211</sup>

More to the point, the genuine question is what to do in the face of moral doubt. And, with respect to that, I am confident that this grand jury adopted an appropriate and even laudable guiding principle for a peacetime body evaluating decisions and actions undertaken *in extremis*—what James Q. Whitman termed a “presumption of mercy” (as compared to a legalistic “presumption of innocence”).<sup>212</sup> Unlike proud professional prosecutors, Dr. Pou’s grand jury seems to have approached criminal legalism with a sense of trepidation and welcome humility. To be sure, Dr. Pou was not a central victim of the events at Memorial Medical Center. The most affected parties were, of course, the patients and their families—people like Emmett Everett who lost his life to innumerable natural and manmade causes beyond his control. But the question before the grand jury was whether to continue an official process that would legally make Dr. Pou a murderer. A presumption of mercy dictates that, if we cannot answer that question affirmatively with sufficient normative certainty, we ought not to proceed. As Alice Ristroph once observed: “[T]he moment when reason runs out is . . . the time to stop punishing.”<sup>213</sup>

Interestingly, James Whitman—a student of European justice—believed that bureaucratization and professionalization were the best ways to strip free the criminal legal system of bloodlust in order to implement, thereafter, an equitable “presumption of mercy.”<sup>214</sup> But, on this score, Whitman’s argument ignores the formalistic and mechanistic predilections of hubristic American legal professionals—their institutional biases that auger against the kind of contextual (and often extralegal) considerations relevant to equity.<sup>215</sup> We are better off, to my thinking, putting the question

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211. Bowers, *Normative Grand Juries*, *supra* note 191, at 334 (discussing the “value of lay and local participation in criminal justice”); Bowers, *Legal Guilt, Normative Innocence*, *supra* note 162, at 1659, 1723 (discussing institutional biases against prosecutorial exercises of equitable discretion).

212. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEXAS L. REV. 933, 934, 944–45 (2016). Elsewhere in this volume, Marah Stith McLeod considers Whitman’s “presumption of mercy” in greater detail. Marah Stith McLeod, *Showing Mercy Through a Presumption of Retribution*, 102 TEXAS L. REV. 1473, 1473–75 (2024).

213. Alice Ristroph, *Games Punishers Play*, in CRIMINAL LAW CONVERSATIONS 173, 174 (Paul H. Robinson et al. eds., 2009). Or, as David Gray writes in this volume: “[M]ercy provides a critical corrective for criminal justice systems that are often rule-bound, blind to human suffering, arrogant, or even cruel.” Gray, *supra* note 161, at 1615.

214. Whitman, *supra* note 212, at 934–35. See generally JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (comparing European and American criminal legal systems and finding bureaucratized European systems to be less punitive).

215. *Supra* notes 149–54, 160–84, 195, 212 and accompanying text.

to the folk-sense of laypeople—decisionmakers who are less likely to prioritize legalism over an evaluation of mercy, which Martha Nussbaum defined as “a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story.”<sup>216</sup> As I wrote elsewhere:

Unlike the legal inquiry, this equitable inquiry demands no specialized or technical training and, accordingly, no instruction from the prosecutor—just an intuitive judgment grounded in experiential wisdom. And because a lay body—by its very nature—brings a deinstitutionalized perspective to the charging decision, there may be value to a normative grand jury independent of the question of whether it is genuinely representative of the relevant community. Concretely, a grand jury may better exercise equitable discretion not only because it is local but also because it is lay.<sup>217</sup>

Or, more aptly, as Lon Fuller’s fictive Justice Handy wrote of the legal fate of cannibal cavers in his hypothetical (and largely analogous) “Case of the Speluncean Explorers”:

[G]overnment is a human affair . . . men are ruled, not by words on paper or by abstract theories, but by other men. They are ruled well when their rulers understand the feelings and conceptions of the masses. . . . all branches of the government, the judiciary is the most likely to lose its contact with the common man. . . . Lawyers are hired by both sides to analyze and dissect. . . . When a set of facts has been subjected to this kind of treatment for a sufficient time, all the life and juice have gone out of it and we have left a handful of dust.<sup>218</sup>

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216. Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFS. 83, 92 (1993); see also Bowers, *Upside-Down Juries*, *supra* note 191, at 1664–67 (offering reasons why lay bodies are better situated to evaluate normative innocence); Bowers, *Normative Grand Juries*, *supra* note 191, at 332–33 (same); Bowers, *Legal Guilt, Normative Innocence*, *supra* note 162, at 1690–92 (same). This is what David Gray elsewhere in this volume terms “a literary mindset.” Gray, *supra* note 161, at 1619 (describing this “literary mindset” as “akin to the empathetic judgment we exercise as readers of novels or engaged members of the audience at the theater”).

217. Bowers, *Normative Grand Juries*, *supra* note 191, at 332–33 (footnote omitted); see also Rachel E. Barkow, *Mercy’s Decline and Administrative Law’s Ascendance*, in CRIMINAL LAW CONVERSATIONS 663, 672 (Paul H. Robinson et al. eds., 2009) (“[T]he question of what constitutes justice in a particular case is one on which the entire polity has the relevant expertise.”). Notably, studies of lay perspectives of medical ethics likewise reveal that people’s moral views are sophisticated and insightful. FINK, *supra* note 8, at 479 (describing a study from the Program for Deliberative Democracy: “[R]egular citizens showed they were able to gather, engage, discuss these issues, and learn from one another. They easily grasped ethical concepts that some health officials had assumed were the province of only experts.”); see also *id.* at 481 (quoting a CDC official: “They are the holders of our public values and are in the best position and in the most nonpartisan position to weigh competing values. . . . [But w]e don’t make good use of the people. We don’t make good efforts to access public wisdom on public policy choices.”).

218. Fuller, *supra* note 2, at 638.

Perhaps things are different enough in the kinds of continental justice systems upon which Whitman focused. I am skeptical, but perhaps legal elites over there are competent to instantiate what Ekow Yankah called a “republican view of criminal responsibility,” grounded on something like Whitman’s “presumption of mercy,” whereby the focus is not “autonomous rights” but “the basic idea that we do not merely live beside each other but that we live together and as such there are reciprocal duties and obligations we impose on each other in order to secure our common good.”<sup>219</sup> But this is America—a nation with a distinctive institutional history grounded in a logic of “rugged individualism” and a corresponding legal tradition of atomized personal responsibility.<sup>220</sup> If we are to achieve the objective of building a society “where everyone can look each other in the eye,”<sup>221</sup> it may best be realized not by legal professionals but by a collective of ordinary former strangers, bound together, hopefully, by a shared set of experiences, and empowered, thereafter, to arbitrate an ambiguous and fraught moral question *as one*. Of course, laypeople likewise may be affected by America’s exceptionally legalistic culture of blame and shame, but it stands to reason that they will not internalize its philosophies to the same degree as criminal-legal professionals whose very institutions are premised upon the worldview.

Formal systemic rules simply do not map well onto a broken world. Analytic statutory questions of action, omission, and *mens rea* just seem less important than a contextual normative account of what occurred *in extremis*. And laypeople are comparatively better situated to appreciate these stories holistically. In Dr. Pou’s case, the grand jury was presented with a horrific narrative—the moral drama of a group of generally good people forced to endure a terrible ordeal. In that drama, Pou found herself “on the spot” with suffering patients. The grand jurors, in turn, found themselves “on the spot” with Pou.<sup>222</sup> Both parties saw fit to exercise their own form of mercy. We can debate, of course, whether their respective approaches were right or wrong. For my part, I support the grand jury’s version but not Dr. Pou’s. And these views are compatible because, ultimately, we cannot and should not depend upon the criminal legal system to coerce us to live most righteously. The criminal law is, at most, a tool to ensure that we do well enough. Perhaps Pou

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219. Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 464–65 (2015); *see also* Ekow N. Yankah, *Deputization and Privileged White Violence*, 77 STAN. L. REV. (forthcoming 2025) (manuscript at 42) (on file with author) [hereinafter Yankah, *Deputization*] (“Republican justification does not assume an atomistic individual, solely concerned with protecting her rights against those who would crash into her. . . . Republican justifications, then, are distinguished by the elevation of active citizenship and pursuit of a common civic good.”).

220. Bowers, *supra* note 161, at 1003–05 (examining the exceptional American logic of “rugged individualism”); *see also* Gray, *supra* note 161, at 1629 (describing conventional criminal legalism as a system that “makes a virtue of alienation”).

221. Yankah, *Deputization*, *supra* note 219 (manuscript at 43).

222. Waldron, *supra* note 55, at 345, 348.

did not do well enough. But, from dry land, I believe I am ill-equipped to know for sure.<sup>223</sup> And the grand jurors, apparently, concluded likewise. Even if she involuntarily euthanized patients, they felt that they could not criminally condemn her for it.

Some of the grand jurors no doubt weathered the storm and thereby had an affective understanding of the tragic circumstances. Others may have merely had the humility to recognize that they were in too poor of a position to judge—not unlike the fictive Justice Tatting who, in *The Case of the Speluncean Explorers*, was so paralyzed by moral doubt that he withdrew from the matter completely.<sup>224</sup> In either event, the jurors seemingly landed in the same place: the state had not rebutted a presumption of mercy. Thus, they rescued Pou from the clutches of an overzealous criminal legal system, reaching empathetically across the divide that separated the bubble of their ordered time from Katrina's chaos. They practiced what Waldron thought was the genuine moral of the Parable of the Good Samaritan: "We must recognize one another not just as potential predators but as moral subjects . . . ."<sup>225</sup>

If that reading is right, then these jurors (together with the Boy from *The Road*) are the true heroes of our story.

### Conclusion

Hurricane Katrina was largely a manmade disaster—an institutional failure at every level. Dr. Anna Pou was, of course, responsible for her own good and bad acts throughout the crisis. But she was not responsible for the destroyed levees, the shambolic evacuation efforts, and the shameful and impractical police directive to leave the hospital complex by day's end on September 1, 2005. More to the point, she bore no fault for the unconcern with which LifeCare patients were treated (or, more accurately, *not treated*) during the early days of the catastrophe. To the contrary, she fought against that indifference and the *in-group* biases that bred it. And, for that much at least, she should be praised.

As with so many institutional failures (from bank collapses to insurrections), the criminal-legal propensity post-Katrina was to cast aspersions outward, to point fingers at individuals (often bit players), to rely upon a patina of punitive reordering to whitewash over systemic collapse, to blame and shame rather than pursue radical structural reform or the transformative justice of, say, a truth and reconciliation commission. Even

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223. This is a point the LifeCare nursing director made to an investigator. In response to the investigator's remark, "I can just imagine what you went through," the nurse responded angrily: "You *can't* imagine. . . . It was unbelievable." FINK, *supra* note 8, at 279.

224. Fuller, *supra* note 2, at 631.

225. Waldron, *supra* note 55, at 349.

the Man from *The Road* could appreciate the charade. In a rare instance of insight, he observed that “in the history of the world it might even be that there was more punishment than crime.”<sup>226</sup> For that one moment (however briefly), the Man saw his (and our) tragic flaw: we mistreat each *other* when we most fear that what we cherish is under threat, that we and our loved ones are not safe and secure. The temptation, thereafter, is to recast our mistreatment as righteous punishment of a culpable *other*. Thus, violence begets violence.

We are better served, by contrast, when we follow the Boy’s lead—when we “take a shot” on trusting, supporting, and even (when warranted) forgiving each *other* (especially when the *other* is a *stranger*).<sup>227</sup> This is what the grand jury did for Dr. Pou. This is how we begin to repair broken worlds. As Shakespeare famously observed: “The quality of mercy . . . is twice blest: It blesseth him that gives and him that takes.”<sup>228</sup> Or as David Gray concludes in this symposium:

Mercy plays an important role . . . as a check on criminal law’s propensity to be harsh and unyielding. It reminds us to look at defendants and victims more holistically in their full narrative contexts. It challenges us to accept the burdens of our own agency rather than hiding behind the constraints of institutional roles. . . . But perhaps most importantly, it guards against complacency . . . .<sup>229</sup>

This is the kind of complete justice championed by Martha Nussbaum.<sup>230</sup> It demands active engagement, and it is not easily achievable. But, done right, it is restorative.<sup>231</sup> We all may be healed by mercy’s appropriate exercise.

To be sure, no one can know for certain when mercy is genuinely merited. My claim is only that *in-group biases* further problematize the epistemic question. To address that challenge, the best we can do is to think critically about how we allocate, institutionally, the power to dispense mercy. Who gets to decide when we drop the lash?<sup>232</sup> Consider, on this score, a

226. MCCARTHY, *supra* note 6, at 28.

227. *Id.* at 238.

228. William Shakespeare, *The Merchant of Venice* act 4, sc. 1, l. 190–93.

229. Gray, *supra* note 162, at 1632–33.

230. Nussbaum, *supra* note 216, at 93, 96 (describing exercises of equity and mercy as “correcting” or “completing” justice); *see also* Bowers, *Legal Guilt, Normative Innocence*, *supra* note 162, at 1672 (“Complete justice demands both the *simple* justice that arises from fair and virtuous treatment and the *legal* justice that arises from the application of legal rules.”).

231. *See* John Braithwaite, *Restorative Justice and De-Professionalization*, 13 GOOD SOC’Y 28, 28 (2004) (offering a broader discussion on restorative justice and explaining that “[w]ith crime, restorative justice is about the idea that because crime hurts, justice should heal”).

232. *Cf.* Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY, AND CLEMENCY 16, 19 (Austin Sarat & Nasser Hussain eds., 2007) (“[T]he creation of institutional possibilities for the exercise of mercy within the criminal justice system is extremely attractive as a way of mitigating the draconian harshness of our current penological regime.”).

confession from a doctor working in Katrina's aftermath: "I injected morphine into those patients who were dying and in agony. . . . And at night I prayed to God to have mercy on my soul."<sup>233</sup> God's stance on mercy remains, of course, always obscure. But the grand jury, applying something like a "presumption of mercy," made its own position on the matter plain. And, under prevailing institutional conditions, that's probably as good as it gets.

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233. FINK, *supra* note 8, at 277.