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Cannibalism and the Common Law, 19 J. Marshall L. Rev. 821 (1986)

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BOOK REVIEW

CANNIBALISM AND THE COMMON LAW BY A.W. BRIAN SIMPSON
UNIVERSITY OF CHICAGO PRESS, 1984, 353 PAGES, HARDCOVER: \$25.00;
PAPERBACK: \$12.95

Reviewed by Ann Lousin*

One ought not, as I did, begin reading this book while consuming a heavy meal and a bottle of red wine aboard an Italian train. It is the meticulous, but witty, account of the trial of two British seamen, Thomas Dudley and Edwin Stephens, for the murder and cannibalism of Richard Parker, which occurred when all were adrift in a dinghy after a shipwreck. It is also a history of several British and American cannibalism cases, of the morals and mores among nineteenth-century seamen, and of the ways—often devious, convoluted ways—that the legal system copes with cases involving defendants who may technically be murderers, but whom society does not really wish to punish. The book is almost certain to become a classic.

The case that forms the core of Professor Simpson's book, *Regina v. Dudley & Stephens*,¹ is well-known to virtually every lawyer in the common law world. The facts, as related in the opinion, are fairly straightforward. On July 5, 1884, the yacht *Mignonette* sank in the South Atlantic. Her crew were Captain Thomas Dudley; first mate Edwin Stephens; able seaman Edmund Brooks; and Richard Parker, who served as cabin boy. All four managed to scramble into the yacht's dinghy at the last moment, taking along the navigational equipment and two tins of turnips, the only provisions they were able to rescue. The harsh weather, lack of food and lack of water tortured them. There was no rescue ship in sight, and they had vir-

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NOTE: After I had completed all but the final draft of this book review, Professor William K. Carroll pointed out that the issues I discussed had been handled in other articles on legal philosophy, most notably in Lon L. Fuller's famous article entitled *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949), and more recently in Anthony D'Amato's article entitled *The Speluncean Explorers—Further Proceedings*, 32 STAN. L. REV. 467 (1980). Although I had heard of Fuller's article, I do not recall ever reading it; I certainly had not read D'Amato's. Therefore, their ideas were not part of my analysis of the issues presented by the book.

1. 14 Q.B.D. 273 (1884).

tually no hope of rescue because they were not in a regular shipping lane. The four seamen had apparently discussed casting lots to see which of them should be killed and eaten to prolong the others' lives, thereby increasing the chances of rescue. Maritime tradition condoned both the lottery and the homicide/cannibalism.

After nineteen days adrift at sea, the three seamen, but not the cabin boy, who was desperately ill, concluded that they were only hours away from death. They probably did not cast lots to determine who should die; if they did so, they probably rigged the lottery against Parker, who was the weakest of the four and likely to die first. The ship's master, Thomas Dudley, said a short prayer and proceeded to slit the boy's throat. It is unclear whether Parker was conscious when he died. The three men survived on the boy's remains until July 29th, when a passing German barque rescued them.

After the three survivors landed in Britain, the two officers were indicted for murder, but the seaman was not indicted and served as a witness for the state instead. The defendants pled the defense of necessity, but were convicted of murder. Although they were sentenced to death, their sentences were later commuted to six months imprisonment.

As presented to neophyte law students, the "issue of law" presented in *Dudley* is obvious: under these circumstances, do the defendants have a defense of necessity to the charge of murder? As presented to my criminal law class in 1965, it was a marvelous introduction to the necessity defense, the nature of *mens rea* and the very concept of a "crime." A criminal law professor can, as Professor Norval Morris did, use the case as a theme upon which to ring various changes. He led us in discussing *United States v. Holmes*,² a pre-*Dudley* American case involving too many people set adrift in a lifeboat and the manner in which some were selected to be thrown overboard. We also discussed the hypothetical case of mountain climbers hanging from a cliff by a rope and whether the top-most climbers may cut the rope and save their lives by sending the climbers at the bottom to their certain doom. I distinctly remember *Dudley* and the changes rung upon that theme forming the first two weeks of our criminal law classes—and an intellectually exciting fortnight it was. We loved it. One of our number, Michael G. Mallin, was sufficiently interested in the case that he later wrote a law review comment on its singular procedural aspects.³ It is one case that law students often remember the rest of their lives.

2. 26 F. Cas. 360 (1842).

3. Comment, *In Warm Blood: Some Historical and Procedural Aspects of Regina v. Dudley and Stephens*, 34 U. CHI. L. REV. 387 (1967). Mallin's description of the case and analysis of Baron Huddleston's use of the special verdict are also well worth reading.

In *Cannibalism and the Common Law*, Simpson, who enjoys re-searching classic cases, has provided us with a casenote on *Dudley* replete with exhaustive detail. We learn the histories of the four principal players before the "incident," and of three of them afterwards. We learn of their families, their ships and the supporting cast—the last being chiefly members of the nautical and legal communities of Victorian Britain. I must confess that the genealogy of the seamen's families is a bit mind-boggling, but it does provide a splendid introduction to the shipping and seafaring world of south-western England a century ago. The world of sailors was a tightly-knit community, a sub-culture of seafarers bound together by generations of intermarriage and decades of facing common dangers at sea. England's first line of defense has always been the sea; the seafarers were the defenders in that first line and the skilled craftsmen who built England into the power that ruled the waves.

Not surprisingly, professional seamen developed their own *esprit de corps*, their own ethos and their own standards of behavior. One of the most valuable contributions of this book is its description of the sailors' sub-culture. It was a discrete society that operated quite apart from the greater society ruled by the Queen and the Queen's Justice. These sailors did not reject the common law; they simply adapted it to the needs of their own circumstances.

For example, long before the *Mignonette* sank in 1884, sailors had developed a well-constructed response to the threat of death by drowning, starvation and thirst: they drew lots to decide who should be cast overboard to lighten the ship or who should be killed to provide food and liquid for the others. The casting of lots dated from Jonah, the luckless passenger in the Biblical story, and continued down through the centuries. In fact, it may have formed part of the maritime or admiralty law of Britain in 1884, thereby raising a fascinating issue of jurisdiction: may or must sailors in a dinghy follow one law to survive, while land-lubbing mountaineers dangling from a cliff may or must follow another law? In any event, what little we know of comparable situations among continental sailors strongly suggests that Europeans brought up in a civil law system followed practically the same rules as British sailors brought up under the common law.⁴ Certainly the German seamen who rescued the survivors considered them victims of a tragedy, not criminals.

To be sure, casting lots sometimes presented difficulties. When both passengers and crew were at risk, the crew often limited the macabre lottery to passengers, on the theory that the crew was needed to keep the vessel afloat.⁵ In the case of the *Mignonette*, the

4. A. W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* 249 (1984).

5. Perhaps, however, one could also justify limiting the lottery by noting the

crew apparently discussed casting lots. If such a discussion took place, these men, all weak and getting weaker, decided against the custom. If the three conscious men did abide by the custom, they probably rigged the lottery against the cabin boy, presumably on the grounds that he was virtually dead anyway and, besides, had no family to support.⁶

Apart from occasional procedural difficulties in the casting of lots, sailors knew precisely what to do, and Dudley did it. He killed the boy as mercifully as he could by slitting his throat.⁷ Then began the grisly ritual of the order of consumption: blood first, as it congeals quickly and the survivors needed liquid more than food, and then the most nutritious, blood-rich organs—heart, liver, *et cetera*. If we accept the notion of cannibalism to preserve life, this is rational cannibalism indeed.

Given this background, which Simpson recounts in great detail, it is not surprising that Dudley, the chief defendant, made no effort to hide the gruesome facts from either his rescuers or the authorities in Falmouth. He could not have expected prosecution for murder, nor indeed anything except profound sympathy from the nautical community. In fact, he immediately paid his respects to the boy's family, who, seafarers all, apparently forgave him.

There the case would have lain, one of the hundreds of tragic deaths at sea in the 1880's, but for one thing: almost accidentally the Falmouth authorities commenced a prosecution for murder. It is not clear, even to Simpson after his research, why this unusual, indeed unique, prosecution occurred. Perhaps the rumors of "a murder at sea" grew too loud for the local magistrates to ignore. Simpson has no firm answer, but his account of the bungled and muddled messages flying to the higher authorities in London and back to Falmouth suggests that once the idea of an indictment for murder arose, the bureaucracy responded by failing to do anything to stop

great number of times sailors put themselves at risk in crossing the sea, in comparison to the relatively few voyages made by passengers.

6. Dudley and Stephens, the officers who actually perpetrated the killing, had wives and children who would have been left to the mercies of the charitable in pre-workers' rights Britain. Brooks, the seaman who claimed that he opposed both the lottery and the killing, apparently took part in the crime only insofar as he ate part of the boy's remains. Brooks had no dependents.

7. It is interesting, although not germane to Simpson's book, that bleeding to death was considered a "humane" form of mercy killing down through the nineteenth century. Physicians who wished to "ease the passing" of hopelessly ill patients applied leeches years after medical opinion had concluded that leeching did not promote recovery. In the days before intravenous feeding and "heroic measures," the steady sinking into unconsciousness and death was considered preferable to starvation and pain. This may be one reason why Dudley chose this method of death for the boy. Another might be that he needed to drink the blood to obtain liquid; this required a swift killing, as blood coagulates within a minute after death. No other liquid was available and the men's thirst was even more acute than their hunger.

the proceedings. Once set in motion, a trial became necessary to dispose of the charges.

By the time the legal proceedings were underway, the national press had, in modern parlance, "picked up the story." American lawyers will find illuminating, and perhaps all too familiar, the role of the newspapers in the progress of the trial. If the old clippings are to be believed, the seafaring community, and indeed much of the country, was shocked that the government would put men who had already endured so much agony through even more travail.

At the trial at Exeter assizes in November, 1884, counsel of unusually high competence appeared for the Crown and for the defendants. The judge, Baron Huddleston, was the son of a merchant sea captain. The Baron had risen through the ranks of the bar and society, including a decade as judge advocate for the fleet. Despite these maritime experiences, Huddleston seems not to have been fond of the sea or sailors. He, who had never been to sea, much less been in a shipwreck, nevertheless sought to "outlaw the barbarous practices of seamen" caught in dilemmas similar to Dudley's. He disapproved of homicide/cannibalism even if committed after drawing lots, which he considered blasphemous because it involved God in the process of selecting the victim.⁸

Even after reading Simpson's book and Mallin's article, I still find appalling Huddleston's decision to turn a routine sea disaster into an opportunity to discuss a Great Legal Issue and to use Dudley's and Stephens' plight as a means of "making law." Only a certain kind of mind, rarely found outside the rarefied world of legal academe, thinks that all potential Great Legal Issues really ought to be "decided." Often it is better for society to leave legal loose ends, as it were, quite loose.⁹ The "decisions" reached by law professors and law students cannot do much harm. The decisions of judges and juries are another matter.

Baron Huddleston, whom Simpson calls "the devious Baron," was apparently convinced that he could guide, even manipulate, the legal system into doing good without running any risk that it would do harm instead. Although he did not want Dudley and Stephens to hang, he wanted a binding determination that their act was murder, with no defense of necessity allowed as a matter of law. He, as an assizes judge, could not make such a determination. Only the higher court judges could do that. Therefore, with a guile and cunning so

8. CANNIBALISM AND THE COMMON LAW, *supra* note 4, at 233-34.

9. Indeed, for some time there had been discussion in parliamentary and legal circles about the wisdom of the practice of leaving the defense of necessity to royal mercy. Some favored codifying the defense in the penal statutes, but even the leading proponent of codification, James Fitzjames Stephen, had abandoned that idea by 1884 in favor of leaving the matter to juries. *Id.* at 235.

shameless that they make him worthy of the sobriquet "devious," he maneuvered the case into the higher courts.

To accomplish his dual purpose, the Baron convinced everyone, beginning with the grand jury, that although it was necessary to convict the defendants of murder as a necessary means of upholding The Law, Thomas Dudley and Edwin Stephens would never suffer hanging or imprisonment. Despite Huddleston's deviousness, Simpson thinks that Huddleston's charge to the grand jury was a fair statement of the necessity defense in Great Britain in 1884. Huddleston compared the defense of necessity with that of self-defense, concluding,

It is impossible to say that the act of Dudley and Stephens was an act of self-defense. Parker, at the bottom of the boat, was not endangering their lives by any act of his: the boat would hold them all, and the motive for killing him was not for the purpose of lightening the boat, but for the purpose of eating him, which they could do when dead, but not while living. What really imperilled their lives was not the presence of Parker, but the absence of food or drink.¹⁰

This was a broad interpretation of self-defense. It covered the mountain climbers hanging from a cliff, who could conclude that the very existence of the climbers at the bottom of the rope imperiled the lives of the men above. Unlike sailors in a boat, the mountain climbers could not draw lots to see who would be dropped into the crevasse. Under Huddleston's interpretation, mountain climbers in that situation could probably justify cutting the rope in self-defense.

Huddleston let the grand jury know *sub rosa* that by accepting his interpretation and his charge, they could do "good"—uphold the definition of murder at the common law—while avoiding doing "harm"—endangering the lives and liberty of two sympathetic defendants. He succeeded at that level and, ultimately, at the highest levels of the judiciary. The complicated procedure he utilized centered upon his innovative use of the special verdict in criminal cases. He asked the jury to find certain facts which, as a matter of law as he stated it, amounted to murder without justification. He thereby prevented a runaway jury—indeed, bypassed the jury—and preserved for appeal the precise issue of law he wished the higher courts to resolve.

Although my summary does not convey the spirit of the trial proceedings, Simpson's account of the trial is, for lawyers, scarcely less exciting than the tale of "the horrid deed" at sea. I also found interesting the newspaper accounts of the debates among the opposing viewpoints, virtually all of it on the high levels of "legality" and "morality." Very few contemporary commentators seem to have

10. *Id.* at 201.

shared the seafaring community's view that killing (at least after lots were cast) and cannibalism were practical necessities designed to preserve as many lives as possible. Moreover, no one seems to have asked himself, at least in public, whether he, if faced with the conditions in the dinghy that July morning, would have behaved differently.

This sanctimonious tone reached its peak in the opinion of the highest court when Lord Coleridge said that sometimes, as in war, it is one's highest duty to sacrifice his own life. He concluded,

The duty, in case of shipwreck, of a captain to his crew . . . impose[s] on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk.¹¹

Thus was The Rule of Law served, the "good" accomplished. The "harm" of punishment would be avoided by exercise of the royal prerogative. So sure was Coleridge of a royal clemency for the men that he forewent the custom of donning a black hat when passing the sentence of death.

Although everyone involved, presumably including Dudley and Stephens, seems to have understood that there would be a pardon or commutation of sentence, the convicted murderers were doubtless appalled by Coleridge's statements. Huddleston had succeeded in forcing decision of a Great Legal Issue. The legal system had finished its morality play. All that remained was for the agreed-upon denouement, a royal pardon, to end the defendants' troubles.

Although the trials of Dudley and Stephens had ended, their tribulations continued. Apart from the seafaring community, national opinion seems to have swung against them. They had become convicted murderers, suffering the public opprobrium normally attaching to that status, however unjustified.

While the convicts languished in one of the more comfortable prisons, Sir William Harcourt, the home secretary, began the investigations preparatory to making his recommendation to the Queen. At that time the exercise of the quality of mercy was not merely unconstrained; being a royal prerogative, it was also immune from criticism. I found Simpson's discussion of the liberal use of this prerogative as a means of modifying the harshness of the murder laws one of the most valuable parts of his book.¹²

In 1884, murder carried a mandatory death sentence. This penalty was especially harsh because there were no degrees of murder in

11. *Id.* at 238.

12. *Id.* at 242-47.

the homicide statutes. The only distinction drawn in homicide cases was between murder and manslaughter. In 1882, Sir William had tried, but failed, to amend the homicide statute to provide for degrees of murder. The harsh effects of the mandatory death penalty for murder led the legal system to adopt, on an informal basis, a two-step procedure to prevent a large number of hangings.

The first step was the non-reviewable discretion of prosecutions and juries. In 1884, there were 170 or 192 reported homicides, depending upon whose statistics one believes. We do not know how many cases resulted in an indictment. Many of the indictments returned were for maternal killings of infants, often against poor girls killing their newborn illegitimate children. The prosecutors, knowing that juries would never convict and hang such defendants, reduced the charge to either concealment of birth or manslaughter. Indeed, some prosecutors indicted the mothers only for wrongful concealment of death and never charged them with any kind of homicide. Such were—and are—the uses of prosecutorial discretion.

In the remaining cases, juries acquitted about a fifth of the defendants and returned verdicts of manslaughter against many other defendants. The penalty for manslaughter was imprisonment, not hanging. In 1884, forty convicted murderers were actually hanged; presumably, the others were granted royal clemency. This was a rather large number of executions; a more normal figure at the time was twenty-five annually.

The second step was the Royal Pardon, which involved both the home secretary and the sovereign. We know a good deal about this step because Simpson found the record of Sir William's remarks on the subject during a parliamentary debate in 1881. Sir William said that if a jury recommended mercy, the home secretary automatically recommended it to the sovereign, who automatically graciously consented. In the remaining cases, the home secretary saw it as his role to distinguish between deliberate murders and non-deliberate murders. In the former cases, he refused to recommend mercy to Her Majesty, but in the latter cases, he asked the Queen to pardon the offenders or to commute their sentences.

Queen Victoria's acquiescence was never a foregone conclusion. She had her own views about capital punishment, as about everything, and there were some fairly spirited debates on individual cases between that model of rectitude and her home secretary, whom she considered "much too soft."

Sir William faced a special dilemma when he reported to the Queen in December, 1884. Because the jury had recommended mercy, Dudley and Stephens would certainly not be hanged. Should they, however, suffer imprisonment? Substantial segments of the le-

gal community thought that the defendants must serve long sentences of imprisonment if the judges' decision was not to be a mockery. Others thought the defendants had suffered enough in the course of the morality play. Although Sir William originally disapproved of a nominal sentence, he was eventually persuaded by his son's argument that a long sentence would reactivate sympathy for the defendants and vitiate the solemn effect of the judicial pronouncement on the issue of the necessity defense in murder cases. Sir William recommended six months imprisonment to Queen Victoria. Apparently distracted by her anxiety for that quintessential Victorian, General "Chinese" Gordon, then on his last adventure in Khartoum, the Queen gave her consent without fuss.

It is not surprising that Dudley and Stephens were bitter. The drastic reduction of their sentence, while certainly welcome, confirmed their view that they were the innocent victims of a legal system that valued a legalistic morality above compassion for human beings caught in a miserable and tortuous dilemma. Although Stephens and Brooks remained seamen and died in England after leading ordinary careers, Dudley knew his conviction had ruined his future as a ship's master. He had been considering emigration for some time. In 1885, after he and his family had been ruined both emotionally and financially by the case, he abandoned the sea to become a shopkeeper in Sydney, Australia, where he died of the plague in 1900.

It is difficult not to agree with Tom Dudley. Whatever the merits of the legal discussion of "murder" and "necessity," Dudley was surely only one of scores of men who followed an admittedly unpleasant practice of seamen. Apart from resolving a Great Legal Issue, what was the effect of *Regina v. Dudley and Stephens*? There is no indication that either European or British sailors changed their customs; they simply were not as chatty about them as they formerly were.

Professor Simpson has written a long chapter on cannibalism in other situations. Apart from Alferd "Man-eating" Packer, who consumed a large number of Democrats, I found most of these cannibals unsympathetic, unamusing and uninteresting. Few seemed to have been as honorable as Dudley was, putting aside his killing of a sick boy when placed in the desperate circumstances of the dinghy.

Even if Simpson had given us no more than a detailed history of *Dudley* and of cannibalism, he would have made a valuable contribution to legal scholarship. Fortunately, he has also shown us the modern relevance of the case. Several issues that appeared in *Dudley* still arise today. These are

- 1) the proper role of "necessity" as a defense;

- 2) the ways a legal system uses statutes, prosecutorial discretion, juries and executive clemency to arrange desired results in individual cases while upholding the Rule of Law; and
- 3) the conflicts arising between sub-cultures with certain sets of mores and the greater society, which controls a legal system with a different set of rules.

Professor Simpson does not deal with these issues at length, preferring to raise them and leave them to another study. This is proper, however, because every book must stop somewhere. Nevertheless, I hope that his book will provide some of the scholarship necessary for others to complete such a study.

For instance, I can think of three types of modern cases raising at least one issue worthy of further study. The first type raises the issue of the necessity defense. Consider the father who, with his infant son and several other people, was hiding from the Nazis in a cellar. When the child's coughing threatened to expose all to danger, the father smothered him to death. Upon hearing this story—which occurred several times in those days—most of us are moved to pity for the father. Even those who doubt that they could have smothered their own child can understand that his motive was that of sacrificing one so many might live.

Was the father a murderer? A casuist might say he was not because he acted to prevent the coughing, and death was only a tragic by-product of that action. According to Baron Huddleston, the father could not assert self-defense because the real danger came from the Nazi searchers, not from the coughing baby. Would he, however, have the defense of necessity? LaFave and Scott would say that because the situation was caused by human beings rather than physical forces, such as a shipwreck, the defense should properly be labelled "duress," not "necessity."¹³ Even with their revised nomenclature, the test is one of balancing the value of saving one's life or other people's lives by breaking the letter of the law. Both the defense and the arguments against the defense are founded upon the public policy of encouraging higher values over lower values.¹⁴ Everyone making that value judgment, defendant or judge, uses the standard of the "reasonable man" or "man of reasonable firmness."

Even today, a century after the *Mignonette* sank, the law has done little more than refine its enunciation of the standards of necessity and duress. It is impossible to predict how a given judge might review the actions of a starving man in a dinghy or a man

13. W. LAFAVE AND F. SCOTT, *CRIMINAL LAW* 381 (1982).

14. *Accord* R. PERKINS AND R. BOYCE, *CRIMINAL LAW* 1065-74 (3d ed. 1982).

hiding from Nazis. The value each defendant sought to protect was not just his own life, but the lives of others with him. Ought we simply add up the lives presumed saved and balance them against the one lost?¹⁵

The second type of case illustrates the way in which the actors in the legal system respond to a reported homicide that was committed by a defendant who is, at least in the eyes of large segments of society, not really guilty of murder. An example of this type of case is that of Roswell Gilbert. He was convicted of the first-degree murder of his wife, who had apparently begged him to end her suffering from Alzheimer's Disease and osteoporosis. "Mercy killings," especially those committed by a spouse of a permanently ill and suffering person, are not uncommon in the Western World. Police, who regularly investigate deaths of painfully, incurably ill people sometimes suspect homicide. Sometimes the police "re-arrange" their reports to show death by natural causes. Sometimes, as well, prosecutors, exercising their ancient discretion, simply refuse to proceed. Normally these cases receive little attention, and the administrative decisions described are rarely known, let alone questioned. The unusual facets of the *Gilbert* case are the open way in which Gilbert killed his wife—by shooting her twice in the head—and the decision of the authorities to prosecute him.

Although we do not know exactly why the prosecution began, begin it did. The jury found Gilbert guilty of the premeditated murder of his wife, and the trial judge sentenced him to twenty-five years imprisonment, a life sentence for a 75-year-old man. There is no indication that either the judges or prosecutors hinted to the jury that Gilbert would be granted executive clemency. We do not know what the jurors expected.

Many, if not most, Floridians were horrified by the verdict and sentence. Many expected the outcry to influence the six cabinet officers in Florida, including the Governor, to release Gilbert while he awaited the two-year appeals process. Yet the cabinet voted 4-2 against conditional clemency.¹⁶ Now that the appellate courts know that there is little hope of the American version of royal mercy, it will be interesting to see how they decide Gilbert's fate. The same issues of "upholding the law" and "not wishing to punish a wretch further" presented in *Dudley* will surely rise again in the *Gilbert* appeal.

15. For a collection of cases and a bibliography concerning the necessity defense, see Morris, "The Veraswami Story," 52 U. CHI. L. REV. 948, 987-98 (1985). For a good modern discussion of the necessity defense and prosecutorial discretion, see Arnolds and Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 NW. U. J. CRIM. L. & CRIMINOLOGY 289 (1974).

16. Chicago Tribune, Aug. 27, 1985, sec. 1, at 3.

In the two types of "murder" cases just discussed, many of us would say that we can only have sympathy for the defendants because, but for the grace of God, there we, too, would be. In the third set of modern cases arising from an issue in *Dudley*, this is not so. These are the cases presenting a "cultural defense" to a charge. Two recent cases in California have received great attention. In January, 1985, Mrs. Fumike Kimura, a Japanese-born American, tried to drown herself and her small children. She had recently learned that her husband was keeping a mistress and she felt she could expiate her shame only by committing suicide. By Japanese custom, she was required to include her children in her suicide, lest they, too, be left to a life of shame. Although *oyako-shinju*—parent-child suicide—is illegal in modern Japan, it does occur. If the attempt is successful, there is no one to punish; if the parent survives, he or she is rarely prosecuted because Japanese officials realize that the shame of having failed is a severe social punishment.

California officials indicted Mrs. Kimura for first-degree murder "with special circumstances," thereby exposing her to a possible death penalty. The Japanese-American community rose up in outrage and helped her lawyer present a "cultural defense": as a member of the tightly-knit sub-culture, Mrs. Kimura obeyed its customs, not the conflicting laws of California. Like nineteenth-century seamen, she did not actively reject the law of the greater society; she simply adapted it to her own deeply-internalized concepts of honor and mores.

The *Kimura* case also illustrated the differing roles of actors in the legal system. Plea bargaining is an established institution of the criminal justice system in California and elsewhere in America. In late October, 1985, Mrs. Kimura pled no contest to two counts of voluntary manslaughter, which carries a maximum sentence of thirteen years imprisonment. Her attorney introduced a "cultural defense" at the sentencing hearing. In November, 1985, Mrs. Kimura received a sentence of five months probation, an even lighter penalty than that meted out to *Dudley* and *Stephens*.

The amelioration of the original charges against Mrs. Kimura arose from two sources: the statutory differentiation among different types of homicide and the sophisticated use of plea bargaining. In plea bargaining, a prosecutor can state publicly the most severe sentence he wishes and then negotiate privately for the approximate sentence he is willing to accept. We shall probably never know what the prosecuting authorities in California said or really wanted. Surely, however, one influence upon them is the presence of Asian sub-cultures with strong customs drastically different from those of the greater American society.

One month after Mrs. Kimura was sentenced, another Califor-

nia judge rejected the "cultural defense" in another murder case. The defendant, Tou Moua, belongs to the Hmong culture, which requires a husband to kill his wife if she commits adultery. After Mrs. Moua confessed her infidelities to her husband, he shot her dead. Although Moua pled guilty to charges of voluntary manslaughter and raised a cultural defense, he received a sentence of eight years imprisonment. It is apparent that, in California at least, the cultural defense can help in getting charges reduced, but that it is not a true defense to a criminal charge. The California legal system can neither ignore the deaths of the victims nor the influence of sub-cultural mores upon Asian-born Americans. Perhaps this is the best practical solution: assert a rejection of the sub-culture's value judgments but recognize the existence of those values in imposing punishment.

What good, however, will punishment accomplish? I doubt that homicide/cannibalism ceased with the decision in *Regina v. Dudley and Stephens*; it probably just ceased to be confessed openly. Sailors can toss remains overboard and say the deceased drowned; persecuted fathers will say their infants died of natural causes, knowing most witnesses either died later or feel constrained to remain silent; husbands will quietly give ailing wives overdoses of sleeping pills instead of shooting them; and mothers committing *oyaku-shinju* will find more certain ways to do it.

The few prosecutions that do occur will probably result in an upholding of the majesty of The Rule of Law. Society can take comfort from knowing that the integrity of the homicide statutes remains intact, while relatively few killers suffer anything close to the full penalty of the statutes. Prosecutions will continue to follow the devious ways that prosecutions of troublesome cases have followed since *Regina v. Dudley and Stephens*.

This, then, is Tom Dudley's and Baron Huddleston's legacy.

