

REVIEW

Cannibalism and the Common Law. A.W. BRIAN SIMPSON. University of Chicago Press, Chicago, 1984. Pp. xiv, 353. \$25.00.

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As every English lawyer will tell you, the leading case on necessity as a defense involved two starving castaways, Dudley and Stephens, who saved their lives by killing the ship's cabin boy and eating him. If he is a criminal lawyer, he will also be able to tell you that the defense of necessity failed and Dudley and Stephens were convicted of murder;¹ he may also know that the death sentence was commuted to six months' imprisonment. He is unlikely to be able to tell you any more. Henceforth, however, every criminal lawyer who relishes a rattling good yarn will be able to furnish further details because, in *Cannibalism and the Common Law*,² Professor Simpson has written the definitive account of the incident, which he sets in its place in legal and maritime history.

The behavior of Dudley and Stephens, it seems, was far from unique. We are nostalgic for sailing ships nowadays, as we are for windmills, their land relations. The truth about both, unfortunately, is that they were highly dangerous to those who worked on them. Both were easily wrecked by the wind that powered them, from which they could not escape if it blew too hard. If a sailing ship foundered, those it carried usually drowned. If they managed to take to the boats—assuming there were any boats—they frequently died of hunger and thirst instead. There were no radios to summon help, no helicopters for search missions, and the chances of rescue were remote. In these circumstances, the survivors were often reduced to eating the bodies of those who had died,³ and

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¹ *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884).

² A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984) [hereinafter cited without cross-reference as SIMPSON].

³ See SIMPSON at 114-21.

there are a number of well-authenticated instances of survivors actually killing one of their number in order to eat him.⁴

Professor Simpson has lovingly assembled a large collection of these gruesome cases, which he zestfully recounts with no details spared. It was customary, it seems, for the survivors to draw lots to decide who was to be eaten—although, as Professor Simpson wryly points out, the lot usually managed to fall on the weakest, the fattest, or the least popular person in the boat.⁵ Nautical delicacy further required the survivors to cut their shipmate's head off and throw it overboard before they began their meal.⁶ Sailors who had done all this and lived to tell the tale saw no reason not to tell it, and no attempt was ever made to prosecute them when they did. The stories were known on land and very well known to seamen, among whom they circulated in ballad form.⁷ It was, Professor Simpson concludes, the custom of the sea: “[M]aritime survival cannibalism, preceded by the drawing of lots and killing, was a socially accepted practice among seamen until the end of the days of sail.”⁸

Originally, if sailors ate one another, nobody cared. For most of the days of sail, seamen inhabited a harsh and barbarous world of their own where landsmen left them to their own vices and devices. On the one hand, sailors were often hideously exploited, with unseaworthy ships, inadequate food, and wages often unpaid. If the ship sank, no one except the owner wanted to know why—and not even the owner if it was adequately insured.⁹ On the other hand, what sailors did to one another on the high seas was largely their own business. Except for piracy, nobody much troubled about crimes on the high seas. It was often quite uncertain which courts on land had jurisdiction to try ordinary crimes committed at sea, and in some cases it was even uncertain whether any court had jurisdiction at all.¹⁰

During the nineteenth century, however, all this began to change. Public concern about the condition of the poor in factories generated public concern about the condition of the poor at sea, and a series of maritime reforms took place. Charitable people set

⁴ See *id.* at 122-40.

⁵ See *id.* at 124, 131.

⁶ See *id.* at 142.

⁷ Several of these ballads are recounted by Professor Simpson, *id.* at 140-44.

⁸ *Id.* at 145.

⁹ On conditions at sea through the eighteenth century, see *id.* at 106-10.

¹⁰ See *id.* at 103, 232.

up lifeboat stations to save sailors from drowning in shipwrecks,¹¹ and Parliament passed an endless string of acts to make the sailor's life better and safer: acts regulating maximum loads, navigation lights, and the rule of the road at sea; acts instituting examinations and licenses for ships' masters and mates; acts providing for official inquiries into shipwrecks; and acts making it easier for seamen to claim their wages if unpaid.¹² Alongside this attempt to civilize conditions of work at sea went a determined attempt to civilize the sailors themselves. The charitable not only founded lifeboat stations to save sailors' lives, they founded missions in an attempt to save their souls as well.¹³ The Merchant Shipping Act of 1854 not only provided for fuller and further wreck inquiries; it also gave the land courts jurisdiction over crimes committed on British ships on the high seas and committed anywhere by sailors serving on them.¹⁴ Thus marine cannibalism, although tolerated by sailors, came within the reach of the common law.

In 1874, when the survivors of the *Euxine* were landed at Singapore, having told their rescuers how they had killed and eaten one of their comrades in order to survive, an attempt was made to prosecute them. The sailors were brought back to England but were eventually released without trial, partly because the Colonial Office, the Board of Trade, and the Home Office could not agree on who should pay the legal costs¹⁵ and partly because vital evidence had been lost while the file was shuffled from desk to desk.¹⁶ This debacle seems to have rankled in the Home Office, which determined to get it right next time. Next time was *Regina v. Dudley & Stephens*.

In 1883, Thomas Dudley, who had first gone to sea at the age of nine, was engaged to sail to Australia a yacht called the *Mignonette*, whose new owner wanted it delivered to him in Sydney.¹⁷ Dudley left Southampton with a crew of three: Stephens, Brooks,

¹¹ See *id.* at 102.

¹² These statutory provisions were consolidated in the Merchant Shipping Act, 1854, 17 & 18 Vict., ch. 104, §§ 20-29 (measurement of tonnage), §§ 131-140 (examinations and certificates for masters and mates), §§ 170-191 (payment and modes of recovery of wages), § 295 (lights and fog signals), §§ 296-299 (ships meeting and passing), §§ 432-438 (inquiries into shipwrecks), reprinted in 2 F. MAUDE & C. POLLOCK, A COMPENDIUM OF THE LAW OF MERCHANT SHIPPING at xxiii, xxix-xxxiv, lvii-lix, lxvi-lxx, ci-cii, cxxxi-cxxxii (1881).

¹³ See SIMPSON at 110.

¹⁴ Merchant Shipping Act, 1854, 17 & 18 Vict., ch. 104, §§ 267-270, reprinted in 2 F. MAUDE & C. POLLOCK, *supra* note 12, at xciii-xciv.

¹⁵ See SIMPSON at 190.

¹⁶ See *id.* at 192.

¹⁷ Professor Simpson tells the story of the voyage, *id.* at 13-72.

and a boy called Richard Parker. The yacht was wrecked in a storm in the South Atlantic, and the four men were cast adrift in an open boat. Only the heroic efforts of Dudley kept the boat afloat and maintained in its crew the will to live. After surviving for nineteen days on two tins of turnips, a little rainwater, and a turtle, they were all in very bad shape, the weakest being Richard Parker. At this point, Dudley and Stephens killed him by cutting his throat. It was a minimal breach of the Sixth Commandment. Parker was at death's door and was killed primarily because his shipmates thought it would be impossible to obtain his blood if they waited for him to die naturally. Having drunk his blood, all three fed on his body for a further four or five days, at the end of which they were rescued. The details come from them, but there seems no reason to doubt their word. All three men were of excellent character. They went straight to the harbor authorities at Falmouth when they landed and told them everything.¹⁸ Had they wanted to lie, they could have said that Parker had died naturally, and nobody would have known the truth. They saw nothing wrong in what they had done and were amazed to be arrested and charged with murder.¹⁹ In Falmouth, and in other seaports, people shared their surprise. The victim's family was very understanding, the Falmouth magistrates granted the men bail—almost unheard of in a murder case—and a defense fund that was set up to help them with their legal costs was filled and oversubscribed.²⁰

It was precisely because of the widespread popular feeling that what had been done was right and proper that the Home Secretary and the Government Law Officers decided to prosecute. They wanted it clearly established, against popular opinion among sailors, that what Dudley and Stephens had done was wrong.²¹ It followed that the authorities were anxious not only for a trial, but also for a conviction at the end of it—although it was clear to all concerned that the death penalty would have to be remitted in the end.²² The prosecution presented problems, however. One was securing evidence, which was done by discharging Brooks and calling him as a witness for the Crown.²³ A more serious one was the danger inherent in every prosecution brought as a matter of principle

¹⁸ See *id.* at 4.

¹⁹ See *id.* at 10.

²⁰ See *id.* at 79-86.

²¹ See *id.* at 89.

²² See *id.* at 92.

²³ See *id.* at 91.

against a transgressor whom popular opinion favors—that the jury would rebel and perversely acquit, so turning the intended public object lesson on its head.²⁴ Baron Huddleston, the judge who tried the case at Exeter Assizes, seems to have been as anxious as the Home Secretary to avoid this and took extreme measures to prevent it. He told the jury—falsely—that they were not at liberty to acquit Dudley and Stephens and that their choice lay between convicting them of murder and finding a special verdict.²⁵ When the jury, which seems to have been sympathetic to the defendants, chose the special verdict, he persuaded them to adopt as their findings a statement of the facts that he had earlier prepared.²⁶ Thus they were steamrollered into finding that the men would “probably” have died if they had not eaten Richard Parker, when they wanted to find that the men would otherwise *certainly* have died.²⁷ Then, having further touched up their findings in his lodgings after the trial,²⁸ Baron Huddleston referred the question of whether the findings amounted to guilty or not guilty to his brother judges in London. The judges—predictably—rejected the defense of necessity, convicted Dudley and Stephens of murder, and sentenced them to death;²⁹ the death sentence was later commuted to imprisonment for six months.³⁰ On his release Dudley, like many a less appealing convict, emigrated to Australia where he made his fortune.³¹ Stephens and Brooks retired to obscurity in England, where they died poor.³²

Was the case bound to go the way it did, once Dudley and Stephens were deprived of the chance of jury equity? Professor Simpson points out that the judges in London were served up a defense case that was badly presented, in which some powerful arguments were not put at all.³³ Some intelligent people then, and many intelligent people since, have argued that Dudley and Stephens should have succeeded in their defense.³⁴ It is certainly possible for a legal system to swallow a defense of necessity to cover a case like this. In the Norwegian counterpart of Dudley and Ste-

²⁴ See *id.* at 199.

²⁵ See *id.* at 209, 212.

²⁶ See *id.* at 213.

²⁷ See *id.* at 214.

²⁸ See *id.* at 218.

²⁹ See *id.* at 237.

³⁰ See *id.* at 247.

³¹ See *id.* at 291, 294.

³² See *id.* at 288-90.

³³ See *id.* at 223, 229-34, 239-40.

³⁴ See GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 606 (2d ed. 1983).

phens, which Professor Simpson has unearthed in his researches, the sailors (by agreement of the king and his cabinet and the other public officials involved) were not charged. The incident later inspired a section in the Norwegian Penal Code that provides a utilitarian defense of necessity that would have gotten Dudley and Stephens off.³⁵ In light of the English judges' attitude toward the case (as shown by Baron Huddleston's conduct of the trial and the tone of Lord Coleridge's judgment in London), it is hard to believe that they would have let Dudley and Stephens off, whatever arguments had been put forward. English judicial attitudes simply precluded the possibility.

The problem facing Dudley and Stephens was that English judges seem to have a long-standing love of broadly defined offenses and a deep suspicion of broad defenses. This leads to a very strict rule of criminal law, tempered only by the judges' liking for the administrative discretion not to prosecute and by judicial discretion to give a light sentence. These are the real limits of criminal liability. The attitude is ancient, durable, and widespread, and most judges past and present seem to share it; judges like James Fitzjames Stephen and Lord Reid, whose writings favor clarity and precision in the criminal law, are very much the exception. Examples of this paternalistic attitude abound. Thus, eighteenth-century judges happily defined the crimes of seditious and blasphemous libel in the widest terms and were not at all worried that most of the publications that fell foul of their definitions were not in practice prosecuted.³⁶ Their treatment of these offenses led to the intervention of Parliament with Fox's Libel Act of 1792.³⁷ More recently, the courts were called upon to define the limits of the crime of defamatory libel. In the *Wicks* case,³⁸ the court said that it covers any publication that amounts to a civil libel;³⁹ to the objection that this definition was dangerously wide, the court an-

³⁵ Almindelig borgerlig Straffelov § 47 (Nwy. 1902), translated in THE NORWEGIAN PENAL CODE 29 (H. Schjoldager trans. 1961). See SIMPSON at 264-66.

³⁶ William Hone was tried in 1817 for blasphemous libel over some parodies of the Book of Common Prayer. His defense was that many people, including Luther and Milton, had parodied sacred works to their purposes and that no one had been prosecuted for publishing these. Said Abbott, J.: "The employment of the style of scripture narrative was in itself a high offence . . . None of these instances could, however, furnish the slightest excuse to the defendant." THE FIRST TRIAL OF WILLIAM HONE 19-35, 47 (anon. London 1817).

³⁷ An Act to remove Doubts respecting the Functions of Juries in Cases of Libel (The Libel Act), 1792, 32 Geo. 3, ch. 60.

³⁸ 25 Crim. App. 168 (1936).

³⁹ See *id.* at 173.

swered that prosecutors ought not to prosecute in trivial cases.⁴⁰

Another example is the English judges' taste for offenses of strict liability. Again and again over the years, the courts have imposed strict liability for statutory offenses. To the argument that this is unjust, the courts reply that in a hard case the court has discretion to impose a nominal penalty. They have broadly defined more serious offenses too. In *Sykes v. Director of Public Prosecutions*,⁴¹ the House of Lords upheld the existence of an offense of "misprision of felony," consisting of any failure to report a known felony to the police. To the argument that this made it a crime for a householder not to report to the police a small boy seen picking up windfall apples, Lord Goddard said that prosecutors can be relied on to act decently and with common sense.⁴² In the *Kamara* case,⁴³ Lord Justice Lawton ruled that an agreement to commit any civil trespass, however trivial, is a criminal offense, but "as a matter of practice prosecutions should not be brought unless a combination of persons to trespass is likely to cause a breach of peace or to affect the public interest."⁴⁴

The same attitude prevails in the law of homicide. Thus, even in recent years, the English courts have contrived to define both murder and manslaughter very broadly, in effect pushing each of them into the category below. In *Director of Public Prosecutions v. Smith*⁴⁵ and *Hyam v. Director of Public Prosecutions*,⁴⁶ the House of Lords held it to be murder not only where a person kills by acts intended to kill or cause serious injury, but also where he causes death by deliberately exposing another to a serious risk. Thus, shooting or driving at someone to scare him is put on the same footing as shooting or driving at someone to kill or maim, and murder covers most of what is in practice usually charged as manslaughter only. And in *Regina v. Seymour*,⁴⁷ the House of Lords said that manslaughter included not only killing by deliberate exposure to a known risk of harm, but also killing by exposure to an obvious risk of which the defendant is actually unaware.⁴⁸ Thus, manslaughter covers much of what is usually treated as accidental

⁴⁰ See *id.* at 172.

⁴¹ 1962 A.C. 528.

⁴² See *id.* at 569.

⁴³ *Regina v. Kamara*, [1973] 1 Q.B. 660 (C.A.).

⁴⁴ *Id.* at 668.

⁴⁵ 1961 A.C. 290.

⁴⁶ 1975 A.C. 55.

⁴⁷ 1983 A.C. 493.

⁴⁸ See *id.* at 503, 506.

death. Lest this seem overly severe, the House of Lords added that a manslaughter prosecution ought only to be brought in a "very grave case"⁴⁹ and reminded us that the defendant's failure to foresee harm was a factor affecting sentence.⁵⁰

The English judicial attitude toward defenses is, in the main, the converse of that shown by the House of Lords in *Seymour*. Thus, in *Buckoke v. Greater London Council*,⁵¹ the Court of Appeal told us that the driver of a fire engine who ran the traffic lights to save someone's life in a fire deserved to be congratulated, but that if he were prosecuted the law gave him no defense!⁵² Lord Denning recognized the irony of this but noted that the discretion not to prosecute "a technical breach of the law in which it would be unjust to inflict any punishment" was available "to mitigate the strict rigour of the law."⁵³ Given the English tradition of laying down rules that, in the usual case, no one is really expected to comply with or seriously expected to be prosecuted for breaking, Dudley and Stephens were bound to fail; once the government decided to prosecute, nothing that could be said on their behalf would prevent their conviction.

For this book Professor Simpson deserves the highest praise. Not only is it scholarly and thought-provoking, it is a very good read as well. The whole conception of such a book is highly original. In these days of ever greater specialization the author has written a book on a major legal topic—the defense of necessity, with particular reference to murder—that is easily accessible to the general reader. He has truly succeeded. The book can be read with equal profit and pleasure by lawyer and layman alike. I doubt that a more civilized book has ever been written about a more gruesome topic.

⁴⁹ *Id.* at 503.

⁵⁰ *See id.* at 505-06.

⁵¹ [1971] 1 Ch. 655 (C.A.).

⁵² *See id.* at 668.

⁵³ *Id.* at 668.