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Book Review

On the Decision to Make New Law: The Needs of Society Versus the Rights of the Accused. Cannibalism and the Common Law

By A. W. Brian Simpson.* Chicago: The University of Chicago Press 1984. Pp. ix, 353. $25.00.

Reviewed by Robert M. Jarvis†

The year 1984 marked the one hundredth anniversary of perhaps the most celebrated of all murder cases in Anglo-American jurisprudence. In *Regina v. Dudley & Stephens*,[1] an English court[2] held that the defendants, a captain and a sailor who had killed a fellow crew member after their ship had been capsized and their food had run out, were guilty of murder. The defense's excuse that the killing had been undertaken as a necessary act of self-preservation was rejected as being insufficient under the law.

The received wisdom of the opinion is that it prohibits a human being from legally killing another human being where the

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1. 14 Q.B.D. 273, 287-88 (1884).

2. The defendants were tried before Baron Huddleston at Exeter assizes and were found guilty upon a special verdict. The opinion that is always cited and relied on, however, is that of Lord Coleridge, 14 Q.B.D. 273 (1884). The special verdict at Exeter assizes was sent to the Queen's Bench Division for review under the terms of the Judicature Act of 1873, which completely reorganized the English central courts. The question of whether the Queen's Bench Division was the proper court to hear the review (for it was not strictly an appeal) is taken up in A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW, 218-23 (1984).

person killed presented no threat of harm to the killer.[3] The case has generated a number of writings,[4] and the matter was authoritatively reviewed by Donald McCormick's lengthy *Blood on the Sea.*[5] Thus it seems curious that yet another book has been thought necessary, and one may legitimately wonder whether any writer could usefully add to the vast literature already produced.

Professor Simpson's book, however, admirably answers both concerns. Backed by painstaking research,[6] his *Cannibalism and the Common Law* provides new information regarding the facts surrounding the voyage of the *Mignonette*, the ill-fated fishing boat that gave rise to the proceedings against Dudley and Stephens.[7] As for the issue of usefulness, Professor Simpson's book often achieves the purpose set out for it in the preface: to place

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3. The defense of self-preservation should not be confused with self-defense. The former relates to the killing of another human being even though he does not pose a threat, while the latter refers to the killing of another human being who does pose a threat. Of course, such distinctions are somewhat metaphysical, for it could be argued that by continuing to live (rather than being dead and providing food) the person to be killed does pose a threat. In addition, there is always the possibility that unless the other person is killed he will kill so as to obtain food for himself. Thus, killing can be seen as a pre-emptive act that crosses over into the field of self-defense. Courts have generally rejected the notion that a person may raise a defense of "anticipatory" self-defense. In State v. Schroeder, 199 Neb. 822, 822, 261 N.W.2d 759, 761 (1978), a 19 year old inmate stabbed his cellmate while the cellmate was asleep. The reputation of the deceased was a violent one, and he had threatened the killer with rape. The majority of the court, however, found no error in the trial court's refusal to instruct the jury on self-defense.

4. *See, e.g.*, Mallin, *In Warm Blood: Some Historical and Procedural Aspects of* Regina v. Dudley and Stephens, 34 U. CHI. L. REV. 387 (1967). Indeed, Professor Simpson himself, in preparation for his book, wrote on the case in Simpson, *Cannibals at Common Law*, 77 U. CHI. L. SCHOOL REC. 3 (1981).

5. D. MCCORMICK, BLOOD ON THE SEA (1962). McCormick's book is cited in SIMPSON, *supra* note 2, at 44-45, 59, 70, 291-94. Professor Simpson is, however, quite critical of McCormick's scholarship. McCormick suggested in his account of the story that a key figure was a transvestite girl named Otilia Ribeiro, alias Ricardo Parker and Jack Straw. Professor Simpson argues that such a figure never existed, and that McCormick's account of the defendant Dudley as a man in moral decline is incorrect. SIMPSON, *supra* note 2, at 292-94.

6. As part of the preparation for his book, Professor Simpson signed on as a sailor on the brigantine *Eye of the Wind*. SIMPSON, *supra* note 2, at xi.

7. One of the most illuminating passages in the book concerns why the vessel foundered. Professor Simpson explains that the most likely cause for the disaster was improperly fitted planking below the waterline, which sprung loose from the frames. Previous explanations had centered on "stress of weather" and the stiffness of her handling due to her lead ballasts. *Id.* at 50-53.

the case in the social and historical context in which it was tried.[8]

Professor Simpson's thesis is that the practice of survival cannibalism,[9] which was common among sailors following marine casualities in the eighteenth and nineteenth centuries,[10] so shocked Victorian morality that English law enforcement officials felt compelled to bring this bewildering custom of the sea to task before a court of law.[11]

Professor Simpson lays out his thesis in ten chapters, but these chapters can conveniently be divided into four separate parts. The first part, made up of chapters one through four, recounts the voyage of the unfortunate vessel and her equally unlucky crew.[12] We learn of the perilous journey that was charted,[13] the capsizing of the vessel while running in heavy seas, and the reduction to starvation of the crew. Finally, Profes-

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8. In the Preface, Professor Simpson explained his goal by writing:

> McCormick's *Blood on the Sea* . . . did not set out to relate the story (which he imaginatively elaborated) to legal and maritime history generally. The isolation of a leading case from its historical context may be acceptable for certain legal purposes, but an exploration of the strange world of survival cannibalism and its conflict with Victorian parlor morality and the common law will, I hope, make it clear that no real understanding of the story of the yacht *Mignonette* and the leading case to which its loss at sea gave rise is really possible without journeying well outside orthodox legal sources.

Id. at x.

9. Survival cannibalism is the practice of eating human flesh solely for the purpose of saving oneself, when no other source of food is available. It is to be distinguished from cannibalism, which is practiced for other reasons, such as part of a religious ceremony. *See id.* at 112-14.

10. The practice surely evolved earlier, yet the lack of records makes it difficult to document accurately the origins of marine survival cannibalism. Although Professor Simpson describes an incident that occurred sometime between 1629 and 1640, the leading incidents are all from the 18th and 19th centuries. *See id.* at 122-40.

11. The officials responsible apparently were members of the Home Office and the treasury solicitor. *Id.* at 195.

12. We also learn, however, that three crew members of the *Mignonette* were, in fact, very lucky. William and Jim Frost had agreed to serve as members of the crew, but for reasons not entirely clear, never sailed on the ill-starred voyage. *Id.* at 29. Likewise, James R. Haynes was employed as ship's mate, but he deserted the vessel early in the voyage. *Id.* at 31.

13. The purpose of the journey was to go from England to Australia. *Id.* at 20. The voyage was between 14,000 and 16,000 miles long. The *Mignonette* was to use a route along the Cape of Good Hope. In addition to the length of the voyage, the path chosen would keep the vessel away from shipping lanes, where it could be spotted by a passing ship. *Id.* at 40-41.

sor Simpson relates the decision of the crew, which had been driven nearly mad from hunger and thirst,[14] to kill Richard Parker, the seventeen year-old ordinary seaman[15] who was sailing for only the second time in his life.[16]

These chapters also provide a description of the arrest of the survivors, who, following the practice of the day, freely admitted to the killing.[17] There is Captain Tom Riley Dudley, a sailor since the age of nine,[18] who was the first to suggest that someone would have to die in order to provide food for the others,[19] and the one who actually performed the killing. We also meet Edwin Stephens,[20] the mate, who helped to kill Richard Parker by holding him down.[21] Finally there is "Ned" Brooks,[22] who demurred to the killing and was later induced to turn Queen's evidence.[23]

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14. That the castaways would have been driven mad without food is understandable. That they would have been driven mad for lack of water needs some explanation. In 1884, the conventional wisdom was that drinking seawater would kill a man after causing a period of insanity; thus, the survivors did not dare drink seawater. Today, however, it is known that seawater can be consumed safely, if only a small amount is swallowed at a time and the practice is begun before the body has been allowed to become overly dehydrated. *Id.* at 57-61.

15. An Ordinary Seaman (O.S.) is a member of the crew who, although subordinate to an Able-Bodied Seaman (A.B.), has learned part of his trade. After a specified length of time, and upon the passing of an examination, the O.S. can sign on as an A. B. R. de Kerchove, International Maritime Dictionary 554 (2d ed. 1961).

16. Previously, Richard Parker sailed aboard the *Daphne* in 1883. He came from a long family tradition of sailors and sailing. Simpson, *supra* note 2, at 37-38.

17. The subject of the defendants' candor in admitting the crime is taken up at length in Chapter 1. *See id.* at 10-11.

18. Dudley's sailing career prior to captaining the *Mignonette* is recounted *id.* at 21-27.

19. *Id.* at 60-61. By the time-honored tradition of the sea, the victim is chosen by drawing lots. The man who picks the shortest lot becomes the victim; and the man selecting the second shortest lot serves as executioner. In this case, it is not clear whether lots were drawn at all. Some stories suggest lots were drawn, others indicate that a sham lot, rigged to select Parker, was drawn, while others suggest that no lots were drawn. *Id.* at 66.

20. For a description of Stephens' life, see *id.* at 31-35. Stephens was a particularly unfortunate man. While he was sailing aboard the *European* as first officer, that vessel sank in 1877. Although Stephens escaped formal censure (his captain did not) after this event, he admitted his liability and thereafter found it difficult to locate work. *Id.* at 32-35.

21. *Id.* at 66-67.

22. Ned Brooks' real name was Edmund James. For biographical information on James, see *id.* at 35-36.

23. On the issue of the decision to use Brooks as a witness for the prosecution, see

The next part of the book, consisting of chapters five and six,[24] provides an understanding of the sailors' grisly custom of practicing cannibalism, seemingly without remorse or reservation.[25] We read in grim detail of a number of ships that fell to cannibalism,[26] and of the even more grisly fact that the survivors were often spotted by other ships who would not come by to rescue them, thus causing or furthering the cannibalism.[27] We also learn about land-based cannibals, a curious collection of individuals with such colorful names as Liver-Eating Johnson.[28] We meet, for instance, Alferd Packer,[29] whose distinctions include having eaten most of the Democrats in a Colorado county[30] and being the namesake of the student grill in Boulder, Colorado.[31] We also become acquainted with Alexander Pearce, a fugitive from a Tasmanian penal colony,[32] and, in a modern encounter, with the Uruguayan rugby team that was forced to

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id. at 90-91. Professor Simpson suggests that a vital deposition that would have implicated Brooks in the murder, and thus made him useless as a witness for the Crown, might have been discreetly suppressed.

24. It would have been better if these two chapters began the book, rather than appearing in the middle as they do. They are wonderfully written and provide an excellent introduction into the whole subject of cannibalism and civilized society's revulsion to the practice.

25. Chapter Five also provides an excellent discussion of the grim conditions of a sailor's life, which may have made him less squeamish about the idea of cannibalism. *See id.* at 101-10.

26. Professor Simpson lists more than a dozen ships that fell to cannibalism, an amazingly large number even when it is remembered that the 18th and 19th centuries were filled with maritime disasters. *Id.* at 98-99.

27. As Professor Simpson explains: "Merely to be spotted was at this period absolutely no guarantee of salvation; rescue might be too dangerous or even pointless if the other vessel had no provisions to spare." *Id.* at 118.

28. Apparently Johnson only ate the livers of his victims. *Id.* at 145.

29. For a discussion of Packer's life, see *id.* at 150-59.

30. *Id.* at 157-58. Larry Dolan, a Saquache barkeeper and a former drinking companion of Packer's, was reported to have explained the court's decision to hang Packer in the following manner:

> There were seven democrats in Hinsdale County, and you've ate five of them, God damn you. I sentence you to be hanged by the neck until you is dead, dead, dead, as a warning against reducing the democrat population of the state. Packer, you Republican cannibal, I would sentence you to hell but the Statutes forbid it.

Id. at 158.

31. *Id.* at 282. Packer's exploits have achieved a far-ranging fame, if it can be called fame. The public's fascination with Packer is recounted in some detail. *See id.* at 271-82.

32. For a discussion of Pearce's life, see *id.* at 147-50. Professor Simpson says Pearce is the only known example of a recidivist cannibal. *Id.* at 150.

cannibalism after their plane crashed high in the Andes in 1972.[33]

The third part of the book, chapters seven, eight, and nine, discusses the proceedings against Dudley and Stephens.[34] Chapter Seven is perhaps the most interesting chapter in the book; it is certainly the best written and most illuminating. It recounts two cases decided prior to *Regina v. Dudley & Stephens*[35] in which attempts to have maritime survival cannibalism declared illegal failed. It is through these cases that we come to understand that Dudley and Stephens were prosecuted in order to put the practice of survival cannibalism at sea on trial.

The earlier of the two cases is *United States v. Holmes*.[36] Eight crewmen and thirty-three passengers were cast adrift on the high seas following the wreck of the *William Brown*. Eighteen passengers in the lifeboat, almost all of whom were male,[37] were forced by members of the crew[38] to jump into the icy waters to certain death. The purpose of the crew was to make enough room in the little boat[39] so that efforts could be made to navigate her properly and to bail water.[40]

A passing ship eventually picked up the remaining survivors. Once back in the United States, Alexander Holmes, one of

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33. *Id.* at 110-11. The Fairchild F-227 airplane, which had been carrying the team, crashed in the Andes on October 13, 1972. It should be pointed out that the survivors of the crash did not kill any of their victims. They lived off the bodies of those who had died because of the extreme harshness of the mountain weather. *See generally* P. READ, ALIVE (1974).

34. For those who have read the actual decision against Dudley and Stephens, the material presented in these chapters is even more fascinating, because it explores the many steps which were taken to ensure that the decision came out against the defendants.

35. 14 Q.B.D. 273 (1884).

36. 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

37. SIMPSON, *supra* note 2, at 167-68. Some of the passengers appear to have thrown themselves overboard voluntarily.

38. Only five of the eight crewmen aboard took an active part in the forcing of the passengers out of the boat. Those five were: Charley Smith, Alexander Williams (Alexander William Holmes), Joseph Stetson, Henry Murray, and Isaac Freeman. *Id.* at 168.

39. The boat was said to be 22 ½ feet long. *Id.* at 164. Although the captain rated the chances of survival for the lifeboat to be one percent, *id.* at 166, Professor Simpson points out that there were earlier instances of small boats that made near-miraculous voyages to safety, such as Captain Bligh's 3,600 mile voyage following the mutiny aboard the *H.M.S. Bounty*. *Id.* at 164.

40. *Id.* at 170.

the crewmen, was charged with manslaughter after the grand jury refused to return an indictment for murder.[41] Holmes was particularly unlucky — although at least five of the crewmen had participated in the jettisoning of the passengers,[42] only Holmes ever stood trial for the deaths.[43]

Holmes was convicted of the charge of manslaughter, and was also fined twenty dollars.[44] Although accounts of the case have always cited the decision for the proposition that no one has the right to take the life of another human being who poses no threat,[45] Professor Simpson ably advances an alternate theory.[46] Judge Baldwin, the presiding judge in the case,[47] gave the

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41. For a discussion of the case, see F. HICKS, HUMAN JETTISON (1927). *See also* SIMPSON, *supra* note 2, at 164-66.

42. *See supra* note 38. Interestingly enough, Francis Rhodes, the mate who commanded the boat, did not stand trial. It has been suggested that Rhodes gave the actual order that began the jettisoning, although, as Professor Simpson points out, there is considerable doubt as to whether Rhodes gave such an order. SIMPSON, *supra* note 2, at 168.

43. Holmes did throw a number of men overboard, and called out for help to throw over Frank Askins, the only passenger seriously to resist the attempt to be thrown overboard. *Id.* at 168. On the other hand, Holmes had the foresight to order everyone to lie down when a passing ship was spotted, lest the large number of survivors scare away the potential salvor. *Id.* at 170. As has been explained, *see supra* note 27, it was commonplace for a salvor to turn away from passengers in distress.

Although Professor Simpson does not mention it, the problem was aggravated by the fact that at this time a ship that picked up castaways did not receive any compensation for her efforts, although such compensation was explicitly required for the salving of cargo. This unhappy state of affairs caused "a natural temptation to save property first and look around for survivors later." G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 8-1, at 532 (2d ed. 1975). The problem was somewhat ameliorated in 1910 with the enactment of an International Convention on Salvage, which provided that life savers were to share in any award received by property salvors. Life salvage unaccompanied by property salvage, however, still went unrewarded. Despite the fact that numerous articles criticized this approach, *see, e.g.*, Friedell, *Compensation and Reward for Saving Life at Sea*, 77 MICH. L. REV. 1218 (1979); Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L. J. 779 (1954), no change was made in the recently finalized Draft Salvage Convention prepared by the Comitê Maritime International (CMI). The Draft, which was approved by the CMI during its thirty-second meeting in Montreal in the spring of 1981, is reprinted in 57 TUL. L. REV. 1448 (1983) (The key provision, Article 3-5, appears at 1453.).

44. In addition to the fine, Holmes was sentenced to six months' imprisonment at hard labor. Because he had been in prison for six months already, he did not serve any additional time. The fine was remitted. SIMPSON, *supra* note 2, at 175.

45. *E.g.*, B. CARDOZO, LAW AND LITERATURE 110-114 (1930). Writing in his usual elegant style, Justice Cardozo asked: "Who shall choose in such an hour between the victims and the saved? Who shall know when masts and sails of rescue may emerge out of the fog?" *Id.* at 113.

46. *See* SIMPSON, *supra* note 2, at 174-76.

jury a complex charge.[48] Under the instruction, the jury was told that it could find Holmes innocent if it found that casting away passengers was necessary in order to preserve the sailors who worked the boat. As Professor Simpson notes, this charge potentially permitted a defense of necessity to succeed if it could be shown that the choice of who was to die was done in a rational manner.[49] Because the jury found Holmes guilty on a general verdict[50] it is impossible to say whether they rejected the idea of rational selection entirely, or merely found there was no need in the particular circumstances to save the sailors in preference to the passengers.[51] This ambiguity in the result, according to Professor Simpson, "deprived *U.S. v. Holmes* of the chance to become the central case" on the question of maritime survival cannibalism and the defense of necessity.[52]

The other incident recounted at length in Chapter Seven

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47. The case was also heard by Justice Randall of the Circuit Court for the Eastern District of Pennsylvania. *Id.* at 174. The circuit courts were abolished in 1911 after years of complaint and controversy. Act of March 3, 1911, 36 Stat. 1087 (1911), *repealed by* Revised Judicial Code of 1948, 62 Stat. 869.

48. According to the charge, a defense of necessity would be a complete defense if all of the following factors were found: (1) a case of necessity existed; (2) the slayer was faultless; (3) the slayer owed no duty to the victim; and, (4) the slayer was under no legal duty to make his own safety secondary. Although (1) certainly existed and (2) might have existed, Holmes could hardly have hoped to succeed in proving the third and fourth requirements. The accepted wisdom was that members of the crew owed a duty to the passengers. Nevertheless, Holmes' jury asked that mercy be shown to Holmes. SIMPSON, *supra* note 2, at 175.

49. *Id.* Some argue, however, that no measure is rational, although if lots are drawn fairly, such a method is at least just because it gives each drawer an equal chance. As has been pointed out, *see supra* note 19, the lots drawn were often sham lots. In addition, it is not entirely correct to say that drawing unrigged lots gives each drawer an equal chance to be picked or spared. As each lot is drawn, every subsequent drawer's chances improve or worsen depending upon the draws that precede his own. This point is made in cases where the accused has played Russian roulette. *See, e.g.*, Commonwealth v. Atencio, 345 Mass. 627, 189 N.E.2d 223 (1963).

50. A general verdict provides only whether the defendant in a criminal case is innocent, guilty, or innocent by reason of insanity. Of course, juries are able to give their reasons if they are asked to return either a general verdict with interrogatories or a special verdict. *See* BLACK'S LAW DICTIONARY 1398-99 (rev. 5th ed. 1979). Thus, Professor Simpson's statement that "juries give no reasons" is wrong. *See* SIMPSON, *supra* note 2, at 176.

51. SIMPSON, *supra* note 2, at 175-76.

52. *Id.* at 176. An illuminating discussion of the issues raised in cases such as *Holmes* is found in Fuller, *The Case of the Spelunkean Explorers*, 62 HARV. L. REV. 616 (1949).

involves the sinking of a collier[53] known as the *Euxine* in 1874.[54] The vessel was lost after her cargo of coal spontaneously combusted,[55] a peril that still plagues modern ships.[56] The *Euxine* was lost on August 9th after extensive efforts to save her failed.[57] The survivors were then put into three boats. The third boat, which was under the command of James Archer, the second mate, held a total of eight men.[58] For the next three weeks Archer's boat (and her passengers) suffered in the stormy seas; two men drowned, although one has been suggested as being a suicide.[59] On the morning of August 31st, with no food or water remaining, the decision to kill Francis Gioffuss, an unpopular member of the crew,[60] was made.[61] Five hours later,[62] the Dutch barque *Java Packet* rescued the boat.[63]

Following the rescue of Archer and the other survivors, extensive efforts were made to bring the killers to trial.[64] In order to give the decision an unmistakable binding quality, an attempt was made to try the men in an English court.[65] When it proved

53. A collier is a vessel specially designed for the carriage of coal cargoes. The term is also loosely applied to any vessel that regularly engages in the coal trade, regardless of whether it is specially outfitted for such trade. R. DE KERCHOVE, *supra* note 15, at 164. The *Euxine* had originally been built as a paddle steamer, but in 1868 she was redesigned to carry coal. SIMPSON, *supra* note 2, at 176-77.

54. The *Euxine* disaster is recounted in SIMPSON, *supra* note 2, at 176-94.

55. *Id.* at 177.

56. *See, e.g.*, Tai Ping Insurance Co. v. M/V Warschau, 731 F.2d 1141 (5th Cir. 1984); Ente Nazionale Per L'Energia Elettrica v. Baliwag Navigation, Inc., 1984 A.M.C. 2858 (E.D.Va. 1984).

57. According to Professor Simpson, the coal overheated on August 5th, the vessel was abandoned on August 8th, and all hopes of saving her died on August 9th. SIMPSON, *supra* note 2, at 177.

58. *Id.* at 178.

59. *Id.* at 179.

60. The victim was selected by the drawing of lots. There is considerable dispute as to whether the lots were sham lots. *See id.* at 181.

61. Professor Simpson does not say what caused his unpopularity. *See id.* at 179-80.

62. The sighting of a vessel shortly after the killing, which obviated the need to kill Gioffus, makes Justice Cardozo's comment, *see supra* note 45, especially chilling. Perhaps Justice Cardozo's comments were based on the case of *Euxine*, which was still a quite famous matter, even in 20th century America.

63. SIMPSON, *supra* note 2, at 181.

64. For the efforts that were undertaken, see *id.* at 182-91.

65. Professor Simpson points out that a trial in London would have solved other problems as well. The original depositions in which the killers implicated themselves (recall the candor of seamen in admitting to cannibalism, as explained *supra* note 17) were held by the Board of Trade in London. Since at this time duplicates could not be

impossible for an English court to obtain jurisdiction over the men,[66] the men were not prosecuted.[67] The alternative course of prosecuting the men in a colonial court in Singapore was considered to be useless, because it would not result in an opinion by a respected (and thus binding) court.[68]

With the discussion of the *Euxine* complete, Professor Simpson turns to the proceedings of Dudley and Stephens' trial. In chapters eight and nine we are introduced to the prosecutors, defense attorneys and jurymen who heard the case. A fascinating picture of Victorian-era England emerges and we are able to catch glimpses of a now bygone world. We also are taken through the extensive efforts of the prosecution to insulate the proceedings from later charges that the trial was defective or rigged,[69] as well as through the many procedural irregularities which did, in fact, occur.[70] Finally, we learn of Dudley and Ste-

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admitted into evidence, the originals were absolutely necessary to try the men. For some incomprehensible reason, no suggestion was ever made to send the originals to the place where the men could be brought to trial. *Id.* at 188.

66. The reason the English courts could not obtain jurisdiction was because there were local courts functioning in Singapore, where the *Java Packet* (and later the *Namoa*) had eventually let the men off. *Id.* at 181-82. Under a case known as the *Satsuma* the men had to be tried by the colony court of Singapore, despite protests that the matter should be tried in England. *Id.* at 183-85.

67. *Id.* at 189.

68. The matter was explained in the following terms:

> The law as laid down in an English Court would have more weight in all parts of the world and would probably be considered binding in all parts of the British Dominions, whereas the law as laid down by the Court here [meaning Singapore] would not be binding even upon the Court itself.

Id.

69.

> Frustrated 10 years earlier in their attempt to bring the custom of the sea before a court of law for condemnation [in the *Euxine* incident], the officials of the Home Office and that of the treasury solicitor may have taken particular pains over the prosecution of the latest cannibals to land in England, but most of the preparatory work is undocumented.

Id. at 195.

70. The major problem in the proceedings was the question of the proper procedure to follow under the Judicature Act of 1873, which had changed the entire structure of the English court system. *See id.* at 218-23. But, other problems also abounded. For example, we learn that Baron Huddleston, described as "the Devious Baron Huddleston" by Professor Simpson, made a critical blunder in describing the vessel in his draft of the special verdict that had been read to the jury. The Baron therefore had to quietly alter the special verdict; otherwise, there may have been no jurisdiction over the defendants. *Id.* at 218. For other problems which arose when the case was before the reviewing court

phens' fate: although convicted, they were quickly pardoned by Queen Victoria on the advice of the Home Secretary.[71]

The final section is also the final chapter of the book,[72] and it is here, if anywhere, that Professor Simpson lets his readers down. Throughout the prosecution and trial of the defendants, there was never any hatred for Dudley or Stephens. Indeed, there was great sympathy for both of them. An offer was made to defend them for free,[73] subscriptions were raised by the public for their support,[74] and their families suffered no indignities at the hands of the community.[75] Feelings ran so high for the two that the prosecution privately expressed serious doubt that a conviction could be secured.[76] Despite the goodwill toward Dudley and Stephens, the government decided to prosecute the case so that the law could declare that necessity was an insufficient defense to criminal homicide. Once this was done, and Dudley and Stephens were convicted, there was no need to hold the defendants; the royal pardon followed in short order.

There is something very disturbing in the idea that cases — especially criminal cases — are prosecuted by the sovereign in order to make new law. It is one thing to prosecute a

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see *id.* at 225-29.

71. *Id.* at 242-45. The pardon granted Dudley and Stephens was not a so-called free pardon, but merely a commutation of their terms to the time already served. This result is similar to that of the *Holmes* case. *See supra* note 44. Those arguing for a prison term equal to the time already served wanted to establish a principle, but did not want to turn public sympathies against the government by imposing a long prison sentence. Thus, the purpose of the exercise was not to punish Dudley and Stephens, but only to establish that marine cannibalism was unacceptable. *See id.* at 247. Whether the exercise was successful is an open question. *See* Glazebrook, *The Necessity Plea in English Common Law*, 30 CAMBRIDGE L. J. 87, 113-14 (1972) ("The Court simply held that the facts did not disclose a situation of necessity which would justify killing the lad. . . . Dudley and Stephens is not, as is sometimes supposed, an authority against the recognition of a necessity plea on a charge of murder."); J. STEPHEN, DIGEST OF THE CRIMINAL LAW 25 n.1 (5th ed. 1894) ("I can discover no principle in the judgment in R. v. Dudley. It depends entirely on its peculiar facts.").

72. Chapter 10 is entitled "Aftermath." It is followed by a number of appendices, bibliographical notes and an index.

73. SIMPSON, *supra* note 2, at 195. As Professor Simpson explains, the prosecution insisted on the best defense lawyers available to avoid any suggestion that the defendants had been deprived of satisfactory counsel. *Id.* at 195-96.

74. *Id.* at 86.

75. Indeed, even the family of Richard Parker did not harbor anger against the men. *Id.* at 84.

76. *See id.* at 90.

case and have new law develop as a result. In these cases there is a perceived need to punish the individuals — a wish to bring the *specific* defendants to justice. These decisions are very different from ones in which defendants are prosecuted without any belief that the specific defendants should be brought to justice, in order to make new law.[77]

The idea that the state may choose a case because it presents an opportunity to formulate new law is frequently discussed.[78] Indeed, the choice is presented everyday to public prosecutors throughout the world, who must decide whether to continue a case, accept a plea bargain, or drop charges.[79] It is therefore not suggested that Professor Simpson should have covered the whole subject again in his work. But if his purpose, as stated in the preface, is to discuss the case of *Regina v. Dudley & Stephens*[80] in its proper historical prospective, then the subject of prosecutorial discretion and the choice that society faces in pressing or dropping charges clearly needs to be discussed. Although Professor Simpson sometimes touches the question in oblique ways,[81] there is no thorough discussion of the propriety of the decision to charge Dudley and Stephens in order to establish a common law precedent.

The power of any state, regardless of its political or social philosophies, is awesome, and nowhere is this power so starkly displayed as when it is arrayed against a small group of defendants in a criminal proceeding. How this power is wielded by

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77. Why a particular prisoner should be punished can be answered in any number of ways: to deter others, to extract retribution, to rehabilitate, and so forth. What is important to understand here is that Dudley and Stephens did suffer punishment — they were imprisoned for six month and lengthy legal proceedings were brought against them — but this punishment was not meted out to punish Dudley and Stephens individually, for they were not viewed as having done anything extraordinary.

78. The matter is discussed at length in Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 905-62 (5th ed. 1980).

79. *See* LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970).

80. 14 Q.B.D. 273 (1884).

81. *See* SIMPSON, *supra* note 2, at 239-42. But these few pages, coming toward the end of the text and representing roughly one percent of the book, hardly cover the subject. The matter is also mentioned during the discussion of the *Euxine* incident, *see supra* note 64 and accompanying text, but again in an incidental way. What is really needed is a chapter devoted to the question, with a comparison of prosecutorial discretion in non-maritime cases during the period of Dudley and Stephens.

those selected to dispense justice is a telling indication of how much progress a society has made towards civility and decency. Indeed, the amount of freedom a society enjoys can be measured by whether its people enjoy the "right to be let alone," which has been stated to be the first principle of individual freedom.[82]

It is submitted that Dudley and Stephens, and all of Victorian England, did not enjoy much freedom. It is not that Dudley and Stephens were right to kill Parker; indeed, perhaps they were wrong and deserved to die on the gallows for their act. What is shocking about the case (and the speedy, expected pardon from the Crown) is that Dudley and Stephens were mere proxies, in some ways wholly superfluous to the trial. The real defendant on trial in the courtroom in which Tom Dudley and Edwin Stephens were convicted was a tradition of the sea, a defendant that could not be brought into the courtroom.

The failing, then, of Professor Simpson's work, is that he hides from us what was the real tragedy of the sinking of the *Mignonette*. It was not her foundering, the incredible agony suffered by her crew, or the killing of Richard Parker. It was the abuse of the legal system that under the pretext of prosecuting Dudley and Stephens, was actually attempting to establish a principle of justice. Can justice really spring from such a proceeding?

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82. The "right to be let alone" is thought to have first been stated by Louis Brandeis while he was still in private practice in the now famous article, Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See H. CHASE & C. DUCAT, CONSTITUTIONAL INTERPRETATION 1126-62 (2d ed. 1979) for a further discussion of the right to be let alone.