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BOOK REVIEW

CANNIBALISM AND THE COMMON LAW; by A.W. Brian Simpson.†
Chicago: University of Chicago Press, 1984. Pp. xiv, 353. \$25.00.

Reviewed by Robert C. Berring ‡

Cannibalism and the Common Law is a book one can really sink one's teeth into.¹ Professor A.W. Brian Simpson, one of modern legal literature's most prolific and stylish authors,² has given us a fascinating study of the circumstances surrounding one of the most famous cases in the common law, *Regina v. Dudley and Stephens*.³ The case involves the prosecution of two starving and dehydrated seamen, who were adrift in a lifeboat, for the killing of a fellow castaway whom they subsequently ate. Its tantalizing factual situation, the fundamental issues of necessity that it encompasses, and its air of adventure have made *Regina v. Dudley and Stephens* a staple of most criminal law texts.⁴ The case has lived on not only in the pages of first-year casebooks; it has been cited five times in the decisions of American courts in the past ten years alone.⁵

The facts are extravagant enough to constitute a promising television miniseries (pp. 13-72). Four crewmen set out from England on a small yacht, the *Mignonette*, intending to sail to Australia, when a vicious storm battered their fragile boat and sank it at an alarming rate (pp. 45-48). Through the forceful and resourceful action of Captain Dudley, the four crewmembers (Dudley, Stephens, Brooks, and Parker) escaped the sinking yacht in a small dinghy. Having thus avoided a

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1. Having perpetrated this pun, the temptation to employ such phrases as "the heart of the matter," "the meat of the argument," "food for thought," and "consumed with fervor" will be resisted. Mostly.

2. As a bibliographical observation, it should be noted that this is the first time Professor Simpson has used the name "A.W. Brian" instead of "A.W.B." What this indicates is unclear, and probably irrelevant.

3. 14 Q.B.D. 273 (1884), *supplemented by* 14 Q.B.D. 560 (1885), 1 T.L.R. 29 (Assizes 1884).

4. Some current examples are: G. DIX & M. SHARLOT, *CRIMINAL LAW* 609 (2d ed. 1979); C. FOOTE & R. LEVY, *CRIMINAL LAW* 80 (1981); P. JOHNSON, *CRIMINAL LAW: SUBSTANTIVE CRIMINAL LAW IN ITS PROCEDURAL CONTEXT* 726 (2d ed. 1980); S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 182 (4th ed. 1983); J. VORENBERG, *CRIMINAL LAW & PROCEDURE* 372 (2d ed. 1981).

5. See *United States v. Mowat*, 582 F.2d 1194, 1208 (9th Cir. 1978); *United States v. Barker*, 514 F.2d 208, 236 n.41 (D.C. Cir. 1975); *Commonwealth v. Averill*, 12 Mass. App. Ct. 260, 423 N.E.2d 6, 6 (1981); *State v. Tate*, 194 N.J. Super. 622, 627, 477 A.2d 462, 465 (1984); *State v. Metcalf*, 60 Ohio App. 2d 212, 215, 396 N.E.2d 786, 789 (1977).

quick death by drowning, the seamen managed, through skill and luck, to weather the rest of the storm but were able to save only two tins of turnips and no fresh water. What followed was an agonizing struggle for survival that sapped the castaways' energies and spirits (pp. 49-60). While there was no solution at hand for the tortures of exposure, the prospect of imminent dehydration and starvation brought to mind the possibility of using as sustenance the only resource at hand, themselves. In the end, after weeks of torture and fearful of the death of all four, Dudley and Stephens determined that one of the men must give his life so that the others could live (p. 62). Richard Parker, the young cabin boy, appeared closest to death. Dudley and Stephens, who held the belief, common among sailors at the time, that blood could be safely drunk only from a body not yet dead, slit the cabin boy's throat, collecting his blood before he expired (pp. 66-67). After Parker's death they used his flesh as food. The fourth crewmember, Brooks, remained passive concerning the murder, but did participate in the grisly feast that followed (p. 68). Fueled by the unfortunate Parker, the three survived until rescued by a German ship (pp. 69-70). Dudley, a model of probity, frankly described the whole ordeal to his rescuers and, on arriving in England, to government officials. Clearly, Captain Dudley's attitude was that such things happen. The State, however, took a different view, and Dudley and Stephens were arrested and tried for murder.

With the long-time popularity of *Regina v. Dudley and Stephens*, it would seem that little has been left unsaid about the decision. Simpson, however, takes a new tack. He provides neither extended commentary on the legal doctrines that relate to the decision nor elegant disquisition on the moral issues involved. Instead he sets out a deeply probing study of the factual situation surrounding the decision. The book provides the type of information and analysis that will stimulate the minds of those interested in understanding the human forces that led to the formation of a "landmark" legal precedent.⁶

Resembling nothing so much as a classic Victorian biography in which the reader is introduced to the subject by an excruciatingly careful exploration of the main character's grandparents,⁷ Simpson begins his exploration of *Regina v. Dudley and Stephens* by describing the origins of yachting and the history of the building of the *Mignonette* (pp. 13-21). After this introduction, the reader comes to understand what the *Mignonette* was, how she came to be at sea, and the traditions and beliefs of the men who sailed her. While in general I find nautical literature to

6. An example of this genre is Professor John T. Noonan's *PERSONS AND MASKS OF THE LAW* (1976), which attempts to place several famous decisions in their social context.

7. A splendid example of such treatment is U.S. GRANT, *PERSONAL MEMOIRS OF U.S. GRANT* (1885).

be tedious in the extreme, Simpson creates a bond between the reader and the lives of these sailing men by focusing one's attention unrelentingly upon the complexities of the people and institutions involved. He is also a talented and indefatigable researcher and is meticulously careful in acquainting the reader with exactly what can be documented and what cannot. He follows certain clues down circuitous but always fascinating avenues.⁸ When forced to speculate he does so in ironic asides that both telegraph the fact that they are the product of his own interpretation and consistently delight the reader.

Simpson is a master of the bizarre fact. Some researchers possess the talent to find tiny items of interest in what would seem the most banal of situations. Every few pages one of these small treasures is revealed and it can bring a smile to the face of the diligent reader. It is reflective of a certain set of mind that one finds minor detail of interest, particularly if it reflects the idiosyncracies of people and institutions. The reviewer is of such a mind. Readers uncertain about their own sensitivity may be guided by the following passage, one of many possible examples:

The judge selected to conduct the trial, Baron Huddleston, was a somewhat colorful if unattractive individual . . . F.W. Ashley, Horace Avery's clerk, records of him that he was in the habit of wearing gloves in court, suiting their color to the case: "There were black gloves for murder, lavender for breach of promise, and white for the more conventional cases." (P. 196).

In the end, by combining a historian's patience and a novelist's flair, Simpson breathes life into a case that has appeared in the textbooks all these years. He does this without taking the liberties with fact that could so easily accompany a subject of this kind.⁹

Indeed, it is hard to imagine a subject more likely to capture the imagination and horror of the reader than cannibalism. Herodotus long ago tantalized his readers with strange images of "Man-eaters" who lived on the Scythians' borders.¹⁰ Strabo reports stories of anthropophagous practices on an island north of Briton.¹¹ Both of these authors lamented the fact that they had no trustworthy witnesses for their reports nor any other way to verify accuracy.¹² Simpson is not so constrained. He was

8. His discussion of his attempts to track down a model of the *Mignonette* or its dinghy illustrate the care with which Simpson examines every lead (p. 18).

9. For a book about the *Mignonette* in which such liberties are taken freely, see D. MCCORMICK, *BLOOD ON THE SEA* (1962).

10. Although Herodotus is widely reported to have said the Scythians were cannibals, he actually describes a group of "Man-eaters who are . . . by no means Scythians." HERODOTUS, *HISTORY OF THE PERSIAN WARS*, Book IV, 18 (A. Godley trans. Loeb ed. 1971). A small point, without great significance to non-Scythians, but now the record's straight.

11. STRABO, *GEOGRAPHY*, 4.5.4.

12. W. ARENS, *THE MAN-EATING MYTH* (1979) is an attack on the veracity of almost all

able to muster the resources of the modern world, marshalling court reports, letters, ballads of the sea, and newspaper accounts to present a readable and detailed introduction to the concept of cannibalism and to the various recorded instances of its practice. He relates not only the story of Dudley and Stephens, but also includes a chapter on the "Man-Eaters of the Frontier" (pp. 147-60). This broadens his inquiry to include polar explorers (pp. 159-60), desperate convicts (pp. 147-50), and such historical notables as Alferd Packer, the Colorado man-eater (pp. 150-59). The story of Mr. Packer, an admitted consumer of human flesh who managed to become a living cultural artifact, may well be worth the price of admission alone.

It is, however, the stories of "survival cannibalism," the drama of members of civilized society forced by circumstance to choose between agonizing death and the grimmest methods of survival, that most strongly grasp our attention. Only a decade ago the saga of a group of young soccer players who, while marooned in the remote Andes, consumed their dead to survive was a major best seller.¹³ That story was an isolated incident of cannibalism, but Simpson establishes in his chapter devoted to the particular problems of cannibalism at sea that such practices were fairly common and accepted within the community of professional seamen (pp. 95-146). The era of the sailing ship presented recurrent opportunities for a ship's crew to confront the issue of starvation versus cannibalism and several recorded incidents plus a plethora of rumors provide interesting precedents. Simpson explores in detail two earlier cases, one involving British sailors,¹⁴ which evinced similar cannibalistic practices and which were not brought to any criminal prosecution.

So long and entrenched was the tradition of cannibalism on the seas that public sympathy in the sailing ports was unquestionably behind Dudley and Stephens. Even the consumed Mr. Parker's older brother sought out the defendants in jail to shake their hands in a symbolic gesture of understanding (p. 77). The only point that troubled the public mind was the failure to cast lots to determine the victim. The use of this impartial system instead of Dudley's more practical criterion of health

reported instances of cannibalism. Professor Arens asserts that such reports are generally second hand and concern peoples viewed as primitive or strange by the reporter. The book has caused great controversy. A more traditional treatment of the anthropological view of cannibalism can be found in 3 ENCYCLOPAEDIA OF RELIGION AND ETHICS 194-209 (1913).

13. P. READ, *ALIVE: THE STORY OF THE ANDES SURVIVORS* (1975). A theme that runs throughout this book is the reconciliation of the cannibalism of the team, the Old Christians, with the teachings of the Catholic Church.

14. The story of the *Euxine*, involving James Archer and August Muller, is described by Simpson as a leading case that never happened (p. 176).

would have even further legitimized the enterprise.¹⁵ Even so, opinion much favored Dudley and Stephens.

But the times and sensibilities, at least at an official level, were changing.¹⁶ The government of England decided that it was time to “create” a leading precedent and inform the world that sailors were *not* permitted to kill their fellow crewmen for any reason, even if it meant losing their only hope for survival. Public sympathy and tradition may

15.



**"Fair is fair, Larry . . . We're out of food,
we drew straws — you lost."**

16. Official British sensibilities may not always have been so finely honed. In her 1882 essays, Frances Power Cobbe notes that just two hundred years earlier in London the “physician in ordinary to the King recommended cannibalism to Englishmen without the smallest apology or hesitation.” F. COBBE, *THE PEAK IN DARIEN* 161 (1882). She goes on to describe the recommended “Mummial Quintessence” in detail.

have been on the side of the eaters, but the Home Office determined that it was time to protect the interests of the eatee. Hence, much to the surprise of the principals involved in the wreck of the *Mignonette*, the three survivors were arrested. By the device of turning the passive surviving crew member, Mr. Brooks, into a prosecution witness, enough evidence was garnered to bring charges for murder against Dudley and Stephens. Even then the universal assumption was that they would be pardoned if convicted. Though that assumption almost proved false it was frequently asserted throughout the proceedings.

Simpson devotes a chapter to the progress of the case through the courts (pp. 195-223). It is a chronicle of judicial, if not political, manipulation. The redoubtable Baron Huddleston, sitting as a trial judge, refused to let the defense attorney argue the law of necessity (there was little else to assert) and coerced the jury into finding a special verdict that left the real decision to a special court of review (pp. 207-23). That court, also containing the good Baron, and convened via a highly irregular procedural gambit, examined the irregular special verdict and a frankly doctored trial record and proceeded to convict. Thus was created the great precedent on necessity that reflected not the custom and usages of the men of the sea, nor the weight of public opinion, but instead the judgment of the British government that sailors should not so blithely kill and consume their mates.

If the doctrine of necessity had been the *real* issue, an American case, *United States v. Holmes*,¹⁷ decided some forty years earlier, would have served well as a starting point. But *United States v. Holmes* involved sailors who threw passengers out of a lifeboat to lighten it—a sure case of necessity, but not one of cannibalism. (Simpson feels Baron Huddleston misconstrues *Holmes* so badly he must never have read it at all (p. 201).) And cannibalism, it appears, was very much the question in *Regina v. Dudley and Stephens*. Those generations of first-year law students who have centered their study of *Regina v. Dudley and Stephens* on the grotesqueness of the concept of eating one's compatriot, thus missing the neat legal issue of necessity, were probably right on mark. Just such grisly behavior *was* the point: the British government wanted no more of it. The arguments on the concept of necessity played little role in the case's progress; the outcome was predetermined.

Regina v. Dudley and Stephens may also represent a clash of developing senses of modern order with the existing practices of the sea. An interesting subtext running throughout the book is Simpson's description of the systematic regulation of sea trade through successive nineteenth-century legislative acts. Britain had built her empire on the voracious

17. 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

habits of her sea-going representatives, but with the civilizing influence of the Victorian century it became desirable to make sailors conform to more acceptable social mores. Clearly, one of these mores was that one should not eat one's fellow crewman, no matter how hungry one might be. Or at least one shouldn't frankly admit one has done so and expect no repercussions. It is the consistently honest behavior of Thomas Dudley that ensnares him in the web of the law. Had he been shifty enough to deny the deed, all the legal flap could have been avoided. No one expects legal maxims to mean much to starving, dehydrated men in a lifeboat, but once they are rescued they must fit their behavior within the accepted confines of civilized society. The State was not going to look the other way.

The one shortcoming in Professor Simpson's book, and it is one he would most forthrightly admit, is the failure to explore what lay behind the government's decisions. Other than describing the bizarre technicalities invoked by Baron Huddleston, Simpson does little to enlighten us as to the reasons that may have underscored the government's actions. Suppositions about the clash of morality and practice are as good a conclusion as can be drawn from the evidence presented. Simpson specifically did not wish to concern himself with legal niceties, and heaven knows that enough has been written about the legal implications of the necessity defense. Still, one wishes that the author had turned his elegant prose, just for an extra chapter, to speculation upon the motives of the Home Office and Baron Huddleston. Perhaps, however, the clearest conclusion one can draw from Simpson's data is that the case did virtually nothing except place the stamp of governmental disapproval upon a practice that was quickly disappearing as shipping practices changed. With the demise of the sailing ship the question of gustatorial indiscretion generally ceased to arise. The development of the steamship was the real solution to the castaway's dilemma.

Cannibalism and the Common Law is a fine piece of work, as sturdily and artfully constructed as the racing yachts that Professor Simpson so admires. The book provides one with an understanding and appreciation of the realities of a case that is now so thoroughly analyzed by scholars that we've lost all touch with what it really was about. The history is excellently written and the reader's interest is held throughout. Little more could be asked of any book—it even has good illustrations.