What is the Law?

The following is taken from the Harvard Law Review Association, Copyright 1949, and is used as a case study to critically reflect our views of law. The point of this exercise is considered what you would do in these circumstances. Various attitudes towards the law surface through this process, as well as ambiguities and contradictions.

The case, although fictional, is based on a real trial.

The Case of the Speluncean Explorers

The four defendants are members of the Speluncean Society, an organization of amateurs interested in the exploration of caves. Early in May of 4299 they, in the company of Roger Whetmore, then also a member of the Society, penetrated into the interior of a limestone cavern of the type found in the Central Plateau of this Commonwealth. While they were in a position remote from the entrance to the cave, a landslide occurred. Heavy boulders fell in such a manner as to block completely the only known opening to the cave. When the men discovered their predicament they settled themselves near the obstructed entrance to wait until a rescue party should move the detritus that prevented them from leaving their underground prison. On the failure of Whetmore and the defendants to return to their homes, the Secretary of the Society was notified by their families. It appears that the explorers had left indication at the headquarters of the Society concerning the location of the cave they proposed to visit. A rescue party was promptly dispatched to the spot.

The task of rescue proved one of overwhelming difficulty...The work of removing the obstruction was several times frustrated by fresh landslides. In one of these, ten of the workmen engaged in clearing the entrance were killed...Success was finally achieved on the thirty -second day after the men entered the cave.

Since it was known that the explorers had carried scant provisions, and since it was know that there was no animal or vegetable matter within the cave on which they might subsist, anxiety was early felt that they might meet death by starvation before access to them could be obtained. On the twentieth day of their imprisonment it was learned for the first time that they had taken with them into the cave a portable wireless machine capable of both sending and receiving messages...The imprisoned men described their condition and the rations they had taken with them, and asked for a medical opinion whether they would be likely to live without food for ten days longer. The chairman of the committee of physicians told them that there was little possibility of this. The

wireless machine within the cave then remained silent for eight hours. When communication was reestablished the men asked to speak again with the physicians. The chairman of the physicians' committee was placed before the apparatus, and Whetmore, speaking on behalf of himself and the defendants asked whether they would be able to survive for ten days longer if they consumed the flesh of one of their number. The physicians' chairman reluctantly answer this question in the affirmative. Whetmore asked whether it would be advisable for them to cast lots to determine which of them should be eaten. None of the physicians present was willing to answer the question. Whetmore then asked if there were among the party a judge or other official of the government who would answer this question. None of those attached to the rescue camp was willing to assume the role of advisor in this matter. He then asked if any minister or priest would answer their question, and none was found who would do so. Thereafter no further messages were received from within the cave, and it was assumed (erroneously, it later appeared) that the electric batteries of the explorers' wireless machine had become exhausted. When the imprisoned men were finally released it was learned that on the twenty-third day after their entrance into the cave Whetmore had been killed and eaten by his companions.

From the testimony of the defendants, which was accepted by the jury, it appears that it was Whetmore who first proposed that they might find the nutriment without which survival was impossible in the flesh of one of their own number...After much discussion of the mathematical problems involved, agreement was finally reached on a method of determining the issue by the use of the dice.

Before the dice were cast, however, Whetmore declared that he withdrew from the arrangement, as he had decided on reflection to wait for another week before embracing an expedient so frightful and odious. The others charged him with a breach of faith and proceeded to cast the dice. When it came to Whetmore's turn, the dice were cast for him one of the defendants, and he was asked to declare any objections he might have to the fairness of the throw. He stated that he hand no such objections. The throw went against him, and he was then put to death and eaten by his companions.

Timeline of the events in the cave

The timeline is more subtle than it might appear on first

reading Justice Truepenny's statement of the facts. I've

sorted it out here for those who are interested. But for those who aren't, let me assure you that you may skip this section with impunity. These subtleties are not material to the holding on virtually any theory of the facts or law.

Day 0. The men enter the cave.

Day *x*. The landslide occurs.

- We are never told how many days after Day 0 this occurs. However, we can deduce that it is at most 3. See the timeline notes below.

Day *x* + 20. Radio contact is established (p. 7, line 31).

Day 23. The men hold the lottery and kill Whetmore (p. 8, line 27). Note that this is Day 23, not Day *x* + 23.

- Whetmore would have waited another week to hold the lottery (p. 8, line 40).
- To know just how long the men had gone without food at the time of the lottery and killing, we'd have to know both (1) the value of *x* and (2) how long it took them after Day 0 to exhaust the provisions they carried in with them. Unfortunately we don't know either of these key facts, but see the timeline notes below.

Day *x* + 30. Earliest estimated rescue date (p. 8, line 5).

- On Day *x* + 20 (p. 7, line 31), the engineers predicted at least a 10 day rescue (p. 8, line 5).
- The doctors predicted that the men could live at least to this day if they ate one of their companions (p. 8, line 17), and would almost

certainly not live to this day without some additional food (p. 8, line 11).

Day 32. The men are rescued (p. 7, line 25). Note that this is Day 32, not Day $x + 32$.

Notes on the timeline

- Radio contact is established on Day $x + 20$, and Whetmore is killed on Day 23 (not Day $x + 23$). If x were greater than 3, then the radio contact would have occurred after the killing, which we know is false. Hence x must be less than or equal to 3.

- If $x = 0$, the minimum, then the rescue was two days *slower* than the engineers predicted (12 days rather than 10). If $x = 3$, the maximum, then the rescue was one day *faster* than predicted (9 days rather than 10). Either way, the men were rescued 9 days after the killing.

- Another way to put this: Assume that the doctors were right that from the day of radio contact the men could not have lived 10 more days without food, and assume that the men had *not* killed a companion to eat. If $x = 0$, then the men would have starved to death before being rescued, but if $x = 3$, then they would have been rescued before starving to death.

- Is there any textual evidence to help us decide whether x is 0, 1, 2, or 3? I don't see anything explicit. But here's a possibility. On the day of the killing, Day 23, Whetmore wanted to wait another week before killing anyone. Why a week exactly, especially if they were already close to death by starvation? If $x = 0$, then the predicted date of rescue (Day $x + 30$) would be exactly one week from the date on which Whetmore wanted to wait a week. By contrast, if $x = 3$, then waiting a week would still put them three days short of the predicted date of rescue. Hence, if Whetmore picked a week thinking of the predicted rescue, then that suggests that $x = 0$.

1. What would happen when the defendants were rescued? Why?

After the rescue of the defendants, and after they had completed a stay in a hospital where they underwent a course of treatment for malnutrition and shock, they were indicted for the murder of Roger Whetmore...In a lengthy special verdict the jury found the facts as I have related above, and found further that if on these facts the defendants were guilty of the crime charged against them, then they found the defendants guilty. On the basis of this verdict, the trial judge ruled that the defendants were guilty of murdering Roger Whetmore. The judge then sentenced the defendants to be hanged, the law of our Commonwealth permitting no discretion with respect to the penalty imposed.

2. Do you agree that this sentence is fair? Why?

After the release of the jury, its members joined in a communication to the Chief Executive asking that the sentence be commuted to an imprisonment of six months. The trial judge addressed a similar communication to the Chief Executive. As yet no action with respect to these pleas has been taken, as the Chief Executive is apparently awaiting our disposition of this petition.

3. If you were a member of the Supreme Court, what would be your ruling? Why?

Three Views

A good working **definition of the Law** is the following: "the enterprise of subjecting human conduct to the governance of rules." (Lon Fuller)

In a similar vein, the **function of the Law** can be defined as: "To maintain a system of social control while facilitating social life."

Law is not the only technology for social control: Others include: morals, ethics, culture, tradition, habit, manners, and fashion, not to mention clandestine operations and information control practiced by to-day's corporate class.

The law functions as a systematic way to resolve disputes between individuals

Understanding of the Law can be characterized in three basic ways:

Natural Law - The legal system is to reflect fundamental and absolute principles of justice that are inherent in human life. Proponents of natural law do not believe that legal principles should be the product of reasoning. Rather, they believe that law is derived from an absolute moral and ethical scheme. Murder is inherently wrong because it is universally regarded as a bad act. Natural Law can be contrasted with conventional laws, such as the age of majority. Think of the Ten Commandments. The focus of this kind of interpretation is the content of law.

Positivist Perspective - A law is truly a law if it has the form of a law, i.e., it can be enforced. A bad law is as much a law as a good one. "The existence of law is one thing; its merit or demerit is another," John Austin

Think of "the Letter of the Law." In this interpretation of the law, the focus is on the process of the law.

Social Science- The practicality of the results of the application of the Law is to be considered as primary. Consider the precedent setting case of Brown vs. Board of Education (1954) which found that racially segregated schools were illegal. This decision was based on the sociological studies which showed that Blacks learned more in integrated schools than in segregated schools, and therefore the existing law was unfair and had negative results.

Sociological Jurisprudence is based on the belief that the law is human and therefore never absolute. It is based on experience, not logic.

In this interpretation of the law, the focus is on the pragmatism of the results.

- *With respect to various approaches, be sure to refer to the Sources which is in the latter part of this material.*

4. How would you characterize your ruling from question 3? Why?

The Rulings

Truepenny, C.J.

It seems to me that in dealing with this extraordinary case the jury and the trial judge followed a course that was not only fair and wise, but the only course that was open to them under the law. The language of our statue is well known. "Whoever shall willfully take the life of another shall be punished by death." N.C.S. A. (N.S.) § 12-A. This statute permits no exemption applicable to this case, however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves.

In a case like this the principle of executive clemency seems admirably suited to mitigate the rigors of the law, and I propose to my colleagues that we follow the example of the jury and trial judge by joining in the communications they have addressed to the Chief Executive...I think we may therefore assume some form of clemency will be extended to these defendants. If this is done, then justice will be accomplished without impairing either the letter or the spirit of our statutes and without offering any encouragement for the disregard of law.

Foster, J.:

I am shocked by the chief Justice, in an effort to escape the embarrassments of this tragic case, should have adopted, and should have proposed to his colleagues, an expedient at once so sordid and so obvious. I believe something more is on trial in this case than the fate of these unfortunate explorers; that is the law of our Commonwealth. If this Court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved in this petition of error...

For myself, I do not believe that our law compels the monstrous conclusion that these men are murderers. I believe, on the contrary, that it declares them to be innocent of any crime. I rest this conclusion on two independent grounds, either of which is of itself sufficient to justify the acquittal of these defendants.

The first of these grounds rests on a premise that may arouse opposition until it has been examined candidly. I take the view that the enacted or positive law of this Commonwealth, including all of its statutes and precedents, is governed instead by what ancient writers in Europe and America called "the law of nature."

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

Had the tragic events of this case taken place a mile beyond the territorial limits of our Commonwealth, no one would pretend that our law was applicable to them...

I conclude, therefore, that at the time Roger Whetmore's life was ended by these defendants, they were, to use quaint language of nineteenth-century writers, not in a "state of civil society" but in a "state of nature." This has the consequences that the law applicable to them is not the enacted and established law of this commonwealth, but the law derived from those principles that were appropriate to their condition. I have no hesitancy in saying that under those principles they were guiltless of any crime.

What these men did was done in pursuance of an agreement accepted by all of them and first proposed by Whetmore himself. Since it was apparent that their extraordinary predicament made inapplicable the usual principles that regulate men's relations with one another, it was necessary for them to draw, as it were, a new charter of government appropriate to the situation in which they found themselves...

My second ground proceeds by rejecting hypothetically all the premises on which I have so far proceeded. I concede for the purposes of argument that I am wrong in saying that the situation of these men removed them from the effect of our positive law. And I assume that the Consolidated Statutes have the power to penetrate five hundred feet of rock and to impose themselves upon these starving men huddled in their underground prison.

Now it is, of course, perfectly clear that these men did an act that violates the literal wording of the statute which declares that he who "shall willfully take the life of another is a murderer. But one of the most ancient bits of legal wisdom is the saying that a man may break the letter of the law without breaking the law itself. Every proposition of

positive law itself, whether contained in a statue or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose...

The statute before us for interpretation has never been applied literally. Centuries ago it was established that a killing in self defense is excused. There is nothing in the wording of the statute that suggests this exception. Various attempts have been made to reconcile the legal treatment of self defense with the words of the statute, but in my opinion these are all merely ingenious sophistries. The truth is that the exception in favor of self defense cannot be reconciled with the words of the statute, but only with its purpose.

The true reconciliation of the excuse of self defense with the statute making it a crime to kill another is found in the following line of reasoning. One of the principle objects underlying any criminal legislation is that of deterring men from crime. Now it is apparent that if I were declared to be a law that a killing in self defense is murder such a rule could not operate in a deterrent manner. A man whose life is threatened will repel his aggressor, whatever the law may say. Looking therefore to the broad purposes of criminal legislation, we may safely declare that this statute was not intended to apply to cases of self defense.

When the rationale of the excuse of self defense is thus explained, it becomes apparent that precisely the same reasoning is applicable to the case at bar. If in the future any group of men ever find themselves in the tragic predicament of these defendants, we may be sure that their decision whether to live or die will not be controlled by the contents of our criminal code. Accordingly, if we read this statute intelligently it is apparent that it does not apply to this case. The withdrawal of this situation from the effect of the statute is justified by precisely the same considerations that were applied by our predecessors in office centuries ago to the case of self defense...

I therefore conclude that on any aspect under which this case may be viewed these defendants are innocent of the crime of murdering Roger Whetmore, and that the conviction should be set aside.

Tatting, J.:

In the discharge of my duties as a justice of this Court, I am usually able to dissociate the emotional and intellectual sides of my reactions, and to decide the case before me entirely on the basis of the latter. In passing this tragic case I find that my usual resources fail me...

As I analyze the opinion just rendered by my brother Foster, I find that it is shot through with contradictions and fallacies. Let us begin with his first proposition: these men were not subject to our law because they were not in a "state of civil society" but in a 'state of nature."...

Let us look at the contents of this code of nature that my brother proposes we adopt as our own and apply to this case. What a topsy-turvy and odious code it is! It is a code in which the law of contracts is more fundamental than the law of murder. It is a code under which a man may make a valid agreement empowering his fellows to eat his own body. Under the provisions of this code further more, such an agreement once made is irrevocable, and if one of the parties attempts to withdraw, the others may take the law into their own hands and enforce the contract by violence - for though my brother passes over in convenient silence the effect of Whetmore's withdrawal, this is the necessary implication of his argument...

All of these considerations make it impossible for me to accept the first part of my brother's argument. I can neither accept his notion that these men were under a code of nature which this Court was bound to apply to them, nor can I accept the odious and perverted rules that he would read in that code. I come now to the second part of my brother's opinion, in which he seeks to show that the defendants did not violate of the

provisions of N.C.S. A. (N.S.) § 12-A. Here the way, instead of being clear, becomes

for me misty and ambiguous, though my brother seems unaware of the difficulties that inhere in his demonstrations...

Now let me outline briefly, however, the perplexities that assail me when I examine my brother's demonstration more closely. It is true that a statute should be applied in the light of its purpose, and that one of the purposes of criminal legislation is recognized to be deterrence. The difficulty is that other purposes are also ascribed to the law of crimes. It has been said that one of its objects is to provide an orderly outlet for the instinctive human demand for retribution. Commonwealth v. Scape. It has also been said that its object is the rehabilitation of the wrongdoer. Commonwealth v. Makeover. Other theories have been propounded. Assuming that we must interpret a statue in the light of its purpose, what are we to do when it has many purposes or when its purposes are disputed?...

Now the familiar explanation for the excuse of self defense just expounded obviously cannot be applied by analogy to the facts of this case. These men acted not only

"willfully" but with great deliberation and after hours of discussion what they should do. Again we encounter a forked path, with one line of reasoning leading us in one direction and another in a direction that is exactly the opposite...

There is still a further difficulty in my brother Foster's proposal to read an exception into the statute to favor this case, though again a difficulty not even intimated in his opinion. What shall be the scope of this exception? Here the men cast lots and the victim was himself originally a party to the agreement. What would we have to decide if Whetmore had refuse from the beginning to participate in the plan? Would a majority be permitted to overrule him? Or, suppose that no plan were adopted at all and the others simply conspired to bring about Whetmore's death, justifying their act by saying that he was in the weakest condition...

I have given this case the best thought of which I am capable. I have scarcely slept since it was argued before us. When I feel myself inclined to accept the view of my brother Foster, I am repelled by a feeling that his arguments are intellectually unsound and approach mere rationalization. On the other hand, when I incline toward upholding the conviction, I am struck by the absurdity of directing that these men be put to death when their lives have been saved at the cost of the lives of ten heroic workmen. It is to me a matter of regret that the Prosecutor saw fit to ask for an indictment of murder. If we had a provision in our statutes making it a crime to eat human flesh, that would have been a more appropriate charge. If no other charge suited to the facts of this case could be brought against the defendants, it would have been wiser, I think, not to have indicted them at all. Unfortunately, however, the men have been indicted and tried, and we have therefore been drawn into this unfortunate affair.

Since I have been wholly unable to resolve the doubts that beset me about the law of this case, I am with regret announcing a step that is, I believe, unprecedented in the history of the tribunal. I declare my withdrawal from the case.

Keen, J.:

I should like to begin by setting to one side two questions which are not before this Court.

The first of these is whether executive clemency should be extended to these defendants if the conviction is affirmed. Under our system of government, that is a question for the Chief Executive, not for us. I therefore disapprove of that passage in the opinion of the Chief Justice in which he in effect gives instructions to the Chief Executive as to what

he should do in this case and suggests that some impropriety will attach if these instructions are not heeded...

The second question that I wish to put to one side is that of deciding whether what these men did was s "right" or "wrong, " "wicked" or "good." That is also a question that is irrelevant to the discharge of my office as a judge sworn to apply, not my conceptions of morality, but the law of the land...

The sole question before us for decision is whether these defendants did, within the

meaning of N.C.S. A. (N.S.) § 12-A, willfully take the life of Roger Whetmore. The

exact language of the statute is as follows: "Whoever shall willfully take the life of another shall be punished by death." Now I should suppose that any candid observer, content to extract from these words their natural meaning, would concede at once that these defendants did "willfully take the life" of Roger Whetmore.

Whence arise all the difficulties of the case, then, and the necessity for so many pages of discussion about what ought to be so obvious? The difficulties, in whatever tortured form they may present themselves, all trace back to a single source, and that is a failure to distinguish the legal from the moral aspects of this case. To put it bluntly, my brothers do not like the fact that the written law requires the conviction of these defendants. Neither do I, but unlike my brothers I respect the obligations of an office that requires me to put my personal predilections out of my mind when I come to interpret and apply the law of this commonwealth...

There was a time in this Commonwealth when the judges did in fact legislate very freely, and all of us know that during that period some of our statutes were rather thoroughly made over by the judiciary...It is enough to observe that those days are behind us, and that in place of the uncertainty that then reigned we now have a clear-cut principle, which is the supremacy of the legislative branch of our government. From that principle flows the obligation of the judiciary to enforce faithfully the written law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice. I am not concerned with the question whether the principle that forbids the judicial revision of statues is right or wrong, desirable or undesirable; I observe merely that this principle has become a tacit premise underlying the whole of the legal and governmental order I am sworn to administer.

Yet though the principle of the supremacy of the legislature has been accepted in theory for centuries, such is the tenacity of professional tradition and the force of fixed habits of thought that many of the judiciary have still not accommodated themselves to the restricted role which the new order imposes on them. My brother foster is one of that groups; his way of dealing with the statutes is exactly that of a judge living in the 3900's...

The process of the judicial reform requires three steps. The first of these is to divine some single "purpose" which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the different classes of its sponsors. The second step is to discover that a mythical being called "the legislator," in the pursuit of the imagined "purpose," overlooked or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. Quod erat faciendum.

My brother Foster's penchant for finding holes in statutes reminds one of the stories told by an ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my brother feels about statutes; the more holes they have in them the better he likes them. In short, he doesn't like statutes.

One could not wish for a better case to illustrate the specious nature of this gap-filling process than the one before us. My brothers thinks he knows exactly what was sought when men made murder a crime, and that was something he calls "deterrence." My brother Tatting has already shown how much is passed over in that interpretation. But I think the trouble goes deeper. I doubt very much whether our statute making murder a crime really has a "purpose" in any ordinary sense of the term...

As in dealing with the statute, so in dealing with the exception, the question is not the conjectural purpose of the rule, but its scope. Now the scope of the exception in favor of self defense as it has been applied by the Court is plain: it applies to cases of resisting an aggressive threat to the party's own life. It is therefore too clear for argument that this case does not fall within the scope of the exception, since it is plain that Whetmore made no threat against the lives of these defendants.

The essential shabbiness of my brother Foster's attempt to cloak his remaking of the written law with an air of legitimacy comes tragically to the surface in my brother

Tatting's opinion. In that opinion Justice Tatting struggles manfully to combine his colleague's loose moralisms with his own sense of fidelity to the written law. The issue of this struggle could only be that which occurred, a complete default in the discharge of the judicial function. You simply cannot apply a statue as it is written and remake it to meet your own wishes at the same time...

I conclude that the conviction should be affirmed.

Handy, J.:

...The problem before us is what we, as officers of the government, ought to do with these defendants. That is a question of practical wisdom, to be exercised in a context, not of abstract theory, but of human realities. When the case is approached in this light, it becomes, I think, one of the easiest to decide that has ever been argued before the Court...

I have never been able to make my brothers see that government is a human affair, and that men are ruled, not by words on paper or by abstract theories, but by other men. They are ruled well when their leaders understand the feelings and conception of the masses. They are ruled badly when that understanding is lacking...

I believe that all government officials, including judges, will do their jobs best if they treat forms and abstract concepts as instruments. We should take as our model, I think, the good administrator, who accommodates procedures and principles to the case at hand, selecting from among the available forms those most suited to reach the proper result.

The most obvious advantage of this method of government is that it permits us to go about our daily tasks with efficiency and common sense. My adherence to this philosophy has, however, deeper roots. I believe that it is only with the insight this philosophy gives that we can preserve the flexibility essential if we are to keep our actions in reasonable accord with the sentiments of those subject to our rule...

Now when these conceptions are applied to the case before us, its decision becomes, as I have said, perfectly easy. In order to demonstrate this shall have to introduce certain realities that my brothers in their coy decorum have seen fit to pass over in silence, although they are just as acutely aware of them as I am.

The first of these is that this case has aroused enormous public interest, both here and abroad. Almost every newspaper and magazine has carried articles about it; columnists

have shared with their readers confidential information as to the next governmental move; hundreds of letters-to-the-editor have been printed. One of the great newspaper chains made a poll of public opinion on the question, "what do you think the Supreme court should do with the Speluncean explorer?" About ninety per cent expressed a belief that the defendants should be pardoned or let off with a kind of token punishment. It is perfectly clear, then, how the public feels about the case. We could have known this without the poll, of course, on the basis of common sense, or even by observing that on this Court there are apparently four-and-a-half men, or ninety per cent, who share the common opinion...

Now I know that my brothers will be horrified by my suggestion that this court should take account of public opinion. They will tell you that public opinion is emotional and capricious, that it is based on half-truths and listens to witnesses who are not subject to cross-examination...

But let us look candidly at some of the realities of the administration of our criminal law. When a man is accused of crime, there are, speaking generally four ways which he may escape punishment. One of these is determined by a judge that under the applicable law he has committed no crime. This is, of course, a determination that takes place in a rather formal and abstract atmosphere. but look at the other three ways in which he may escape punishment. These are: (1) a decision by the Prosecutor not to ask for an indictment; (2) an acquittal by the jury; (3) a pardon or commutation of sentence by the executive. Can anyone pretend that these decisions are held within a rigid and formal framework of rules that prevents factual error, excludes emotional and personal factors, and guarantees that all the forms of the law will be observed?...

My brother Tatting expresses annoyance that the Prosecutor did not, in effect, decide the case for him by not asking for an indictment. Strict as he is himself in complying with the demands of legal theory, he is quite content to have the fate of these men decided out of court by the Prosecutor on the basis of common sense. The Chief Justice, on the other hand, wants the application of common sense postponed to the very end, though like Tatting, he wants no personal part in it...

I come now to the most crucial fact in this case, a fact known to all of us on this court, though one that my brothers have seen fit to keep under the cover of their judicial robes. This is the frightening likelihood that if the issue is left to him, the Chief Executive will refuse to pardon these men or commute their sentence. As we all know, our Chief Executive is a man now well advanced in years, of very stiff notions. Public clamor

usually operates on him in the reverse of the effect intended. As I have told my brothers, it happens that my wife's niece is an intimate friend of his secretary. I have learned in this indirect, but, I think wholly reliable way, that he is firmly determined not to commute the sentence if these men are found to have violated the law.

No one regrets more than I the necessity for relying in so important a matter on information that could be characterized as gossip. If I had my way this would not happen, for I could adopt the sensible course of sitting down with the Executive, going over the case with him, finding out what his views are, and perhaps working out with him a common program for handling the situation. But of course my brothers would never hear of such a thing...

I must confess that as I grow older I become more and more perplexed at men's refusal to apply their common sense to problems of law and government, and truly tragic case has deepened my sense of discouragement and dismay. I only wish that I could convince my brothers of the wisdom of the principles I have applied to the judicial since I first assumed it...

I conclude that the defendants are innocent of the crime charged, and that the conviction and sentence should be set aside...

The Supreme court being evenly divided, the conviction and sentence of the Court of General Instances is affirmed. It is ordered the execution of the sentence shall occur at 6 A.M., Friday, April 1, 43000, at which time the Public Executioner is directed to proceed with all convenient dispatch to hand each of the defendants by the neck until he is dead.

5. Summarize each of the rulings above. Characterize each as one of the three interpretations of Law above and justify.

6. Which argument did you find most compelling? Why?

Sources

<Statutes and Precedents>

The following are statutes (enacted by the Newgarth Legislature) and Supreme Court Case Precedents that may be of use in this case:

Newgarth Uniform Statutes, Section 12-A: "Whoever shall willfully take the life of another shall be punished by death."

***Commonwealth v. Staymore* (4276):** Defendant left his car parked on a city street for four hours in violation of a statute making it a crime to leave one's car parked longer than two hours (the two hour limit was clearly posted). The defendant had attempted to move his car, but was obstructed by a political demonstration which he had no reason to anticipate. His conviction was set aside by the Newgarth Supreme Court, although his case fell squarely within the wording of statute.

***Commonwealth v. Thomas* (4255):** It is the province of the courts to interpret enactments in light of the legislative purpose underlying them. No statute should be applied in a way that contradicts its purpose.

***Commonwealth v. Parry* (4280):** Killing in self-defense is not a violation of N.C.S. Section 12-A.

Commonwealth v. Scape (4285): One of the legislative purposes underlying criminal law is to provide an orderly outlet for the instinctive human demand for retribution.

Commonwealth v. Makeover (4283): One of the legislative purposes underlying the criminal law is to provide for the rehabilitation of the wrongdoer.

Commonwealth v. Valjean (4291): Defendant was indicted for stealing a loaf of bread and offered as a defense that he was in a condition approaching starvation. The court refuses to accept this defense, and convicted him of larceny.

Fehler v. Neegas (4291): Court presented with interpretation of statute in which the word "not" had been plainly transposed from its intended position in the final and most crucial section of the act. Court refused to accept the literal interpretation of the statute, but interpreted the statute as it was intended (without the mistaken transposition).

Crane v. Snow (4295): Contract freely entered into by two parties may not be repudiated by one party at his/her discretion. The law recognizes the sanctity of contract. Nevertheless, contracts formed in contemplation of a crime are void as a matter of public policy.

Review Questions

1. What is law?

2. What is the function of law?

3. List five forms of social control and describe how they operate?

4. Describe three views of the law and indicate the focus of each. Illustrate each view with an example.

5. Socrates was convicted of sedition, specifically, corrupting the youth of Athens because of his basic tenet, "Reject authority." Although he pleaded innocent of the charges, he was sentenced to death. He voluntarily drank the poison, which was his sentence, even though his followers had bribed the guards to facilitate his escape: Socrates died willingly rather than break the law, even though he maintained his innocence. Given that he was the wisest man in Greece, what do you think his attitude toward the law was? What then could he have meant by the dictum, "Reject authority?"

6. What do you think of the legalization of Marijuana? Give three arguments, pro or con, using the three perspectives as discussed in class. Define each perspective and show why each argument fits its perspective.

Supplement

Variations on the law

Here are some variations on the basic assignment, in roughly increasing order of difficulty and sophistication.

- Decide the case morally, not legally. Ignore the law. Did these men do anything wrong? Or decide the case under the law as it ought to be, not under the law as it is.
- Decide the case under the law of the Commonwealth of Newgarth. This includes at least the murder statute and the precedents. Does "the law" include anything else? That's for you to decide.
    - Assume that you are a Newgarth Supreme Court Justice who has taken an oath to uphold and apply the laws of the Commonwealth of Newgarth.
    - If you feel a tension between your personal morality and the laws of Newgarth, then don't put the law aside in order to give effect to your moral convictions *unless you think a good judge would do so*.
- Focus on supporting your verdict with strong arguments, not on undermining the arguments for the opposite verdict (although that comes in another variation below). Decide the case under the law, support your verdict with arguments, and show the weaknesses in the arguments for the other verdict.
    - There are many arguments on both sides, so there will be much work to do no matter which verdict

you chose. However, if time is tight, simplify as follows. If you vote guilty, then how do you answer the necessity defense? If you vote not guilty, how do you interpret the statute?

- If you acquit, can you rebut the arguments of *each* judge who voted to convict? If you convict, can you rebut the arguments of *each* judge who voted to acquit?

- Decide the case under the law of the state where you live.
    - At first consult the murder statute where you live and forget the cases interpreting it. The statute probably contains degrees of murder and homicide, standard defenses (excuses and justifications), and some sentencing discretion for the judge. All these departures from the Newgarth situation give you room to explore issues you didn't have to explore when you used Newgarth law.
    - If you have time and ambition, also use the case law of your jurisdiction.
    - This version of the assignment is difficult insofar as it requires legal research outside Fuller's essay. But it is easier than some of the variations above because it doesn't force you to pick from a narrow range of options and justify your difficult selection.
- If you have read other cases on necessity, self-defense, or murder, assume that they are binding precedents in Newgarth. Take the force of those that are most applicable, distinguish those that are least applicable.

Variations on the facts

Decide the case under the real facts, as described by Chief Justice Truepenny, or decide it under one of the what-if scenarios below.

- What if the men had not used a lottery but killed Whetmore because he was the only one with no family, or the only one who believed in an afterlife? (This variation was suggested by Justice Foster.)
- What if Whetmore had not said the dice throw made on his behalf was a fair one?
- What if Whetmore had tried to defend himself but the survivors had succeeded in killing him anyway?
- What if Whetmore had defended himself by killing (say) Smith? As a result, the party ate Smith instead of Whetmore. (For this to work, we must suppose that Whetmore, at least, was prosecuted for murdering Smith.)
- What if a Newgarth judge had been on the scene at the rescue camp and had told the spelunkers by radio that the act they were contemplating would be considered murder under Newgarth law?
    - What if the judge on the scene had said that the killing would *not* be considered murder?
- What if a priest instead of a judge had given an opinion by radio? (You decide what the priest would have said.)
- What if the men were rescued earlier than the engineers predicted? What if later? (Fuller doesn't give us the facts to

decide this question; see the timeline above.)

- What if the exception for self-defense were not an ancient judicial invention, but an express part of the murder statute as written by the legislature?
- What if the men were not trapped in a cave, but in a collapsed building after an earthquake? They were not spelunkers pursuing a risky sport, but workers at work.

Variations in format

Decide the case or explore the issues in one of the following ways.

- Write a judicial opinion. Imagine that you have taken an oath to uphold the laws of Newgarth. Don't appeal to your personal morality unless the law and your oath allow you to do so. In my view, this is the best first assignment on the case, especially if the various judges can compare their views and discuss their differences before and after they write their opinions.
- Lead a discussion in which the group takes on the role of a committee of district attorneys deciding whether to prosecute the spelunkers for murder.
- Lead a discussion in which the group takes on the role of the jury. Hence your job is to reach consensus, if you can. You aren't bound by the constraints which bind judges and have the power, if not also the right, of nullification.
- Lead a discussion on the seven precedents concocted by Fuller (Staymore, Fehler, the ancient and nameless precedent creating the exception for self-defense, Parry, Scape, Makeover, and Valjean). Taking each precedent in turn, ask whether it supports the defense more than the prosecution, or

vice versa. How would the other side distinguish it, if it could? How do all the precedents, taken together, affect your judgment?

- Lead a discussion on the written opinions rather than on the facts and law directly. Which Justice deals most sensitively with the statute and precedents? Which Justice best lives up to the oath of office? Which Justice has the most persuasive opinion?

    - Variation. Break a class into small groups and have each group try to reach consensus on each of these three questions. If they can't do so before the hour is up, then they should vote. Bring the names of the 'winning' Justices to the next class for a plenary discussion.

- Pick one of the factual variations from the section above. After discussion, have the group vote on it. Regard that vote as a precedent for the next variation. After you have a handful of new precedents in this way, return to the original facts. How do the new precedents affect your judgment?

- Assume that the Supreme Court divided, as Fuller showed. The jury verdict stands and the men are soon to be hanged. Lead a discussion in which the group takes on the role of a panel established to advise the executive on whether to grant clemency. (This variation was used by Anthony D'Amato in his *Stanford Law Review* article, vol. 32, 1980, pp. 467-485.)

- Assume that the Supreme Court divided and the defendants were hanged. Since 90% of the public favored acquittal or clemency, members of the Newgarth Parliament are feeling pressure to amend or replace the murder statute. Lead a discussion in which the group takes on the role of the legislative sub-committee charged with drafting the new statute. There are at least three issues: (1) What sort of intent or *mens rea* should we require for murder? (2) What

defenses or exceptions to the charge of murder should we recognize? and (3) What punishments other than death should we allow?

<Basic Approaches to the Law>

- Natural Law -- applies universally, to all cultures and to all times.
  - ex. laws against murder
  - Aristotle (cir. 350 BC): Justice could be discovered in a scientific manner (like the law of gravity).
  - St. Thomas Aquinas (cir. 1000 A.D.): Brought Aristotle into the Church in the sense that natural law is divine in nature and we can discover what justice is.

- Lord Justice Cooke (cir. 1500 A.D.): Brought the idea of justice and natural law into the English Common Law
- Thomas Hobbes (cir. 1640 A.D.): God gave Kings a just duty to protect subjects against state of nature. The divine right of kings to rule was accompanied by duties.
- John Locke (cir. 1750 A.D.): It is just to be able to keep the work of ones labors.
- Thomas Jefferson (cir. 1776 A.D.): We are born with certain natural (and inalienable) rights, among these are life, liberty, and the pursuit of happiness.
- Civil Disobedience
    - Henry David Thoreau (cir. 1860 A.D.).
    - Ghandi
    - Civil Rights Protestors (esp. Martin Luther King, Jr.) (cir. 1960s A.D.)
    - Viet Nam War Protestors (cir. 1970 A.D.)
    - Abortion Protestors (cir. 1989 A.D.)

♦ Positive Law

- Sovereign makes law that subject must obey.
- Javert (the policeman form Hugo's Les Miserables, cir 1870 A.D.)
- Any one who says, "The law is the Law! And it must be obeyed!"

– Utilitarianism (a form of Positivism)-- law should be made to maximize the utility of society.

- Jeremy Bentham (cir. 1790s): Maximizing the utility of society is better than the legislature making arbitrary laws.
- John Rawls (cir. 1970s): Maximize the utility of the " worse off " person in society.
- Judge Richard Posner (cir. 1975): Law and Economics approach -- law should be made to maximize the wealth of society.

– Law and Economics Approach (a form of Positivism)

- Maximize wealth of society

- What will happened to wealth if we allow
    - gambling
    - sale of kidney (or other organs)
    - sale of children
- Make sure you consider the gains from trade here (I.e. both parties are better off because they traded than if no trading was allowed.)

♦ Sociological School -- Society makes law to preserve society.

- ex. law against murder preserves society
- Karl Llewwllyn (Harvard Law School) and the UCC: The Uniform commercial code was based upon Llewellyn' s observations about how businessmen dealt with each other.
- Ten Commandments are a good example of rules developed to protect the nomadic Israelites.

♦ Legal Realism

- The law is what the judges say it is -- nothing more. Judges have different abilities, beliefs, feelings, etc and will decide cases based upon their own characteristics.
- Incubated at the Harvard Law School 1920's
- ex. John Delorean, O.J. Simpson, To Kill a Mockingbird

♦ Other Theories

- Feminist Legal Theory -- Law should have gender removed from its content and application.
- Critical Legal Studies -- The law is nothing -- only interpretation matters.
    - Harvard Law School (cir. 1970s-1980s)
    - Derived from critical literary analysis
    - Problem is that perception of the law changes as our biases change. Thus, the rule of law is hindered.