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The Case of the Speluncean Explorers[80]

(1949)

In the Supreme Court of Newgarth, 4300

THE defendants, having been indicted for the crime of murder, were convicted and sentenced to be hanged by the Court of General Instances of the County of Stowfield. They bring a petition of error before this Court. The facts sufficiently appear in the opinion of the Chief Justice.

TRUEPENNY, C. J. 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. . . . While they were in a position remote from the entrance to the cave, a landslide occurred.

[76] *Cf.* Kuhn, *ante*, 40.

[77] *Cf.* R. Pound, *post*, 568.

[78] For an argument as to the desirability of importing subjective factors into the definition of law, see H. Kantorowicz, *op. cit.*, pp. 72–73.

[79] *Cf. post*, 321.

[80] Reprinted from 62 *Harvard Law Review* 616.

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 . . . a rescue party. 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. It was also Whetmore who first proposed the use of some method of casting lots, calling the attention of the defendants to a pair of dice he happened to have with him. . . .

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 Whetmore's turn, the dice were cast for him by 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 had no such objections. The throw went against him, and he was then put to death and eaten by his companions.

After the rescue of the defendants . . . they were indicted for the murder of Roger Whetmore. . . . [T]he trial judge ruled that the defendants were guilty of murdering Roger Whetmore. The judge then sentenced them to be hanged, the law of our Commonwealth permitting him no discretion with respect to the penalty to be imposed. 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 communicaton to the Chief Executive. . . .

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 statute 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 of no exception 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 colleages that we follow the example of the jury and the trial judge by joining in the communications they have addressed to the Chief Executive. There is every reason to believe that these requests for clemency will be heeded, coming as they do from those who have studied the case and had an opportunity to become thoroughly acquainted with all its circumstances. It is highly improbable that the Chief Executive would deny these requests unless he were himself to hold hearings at least as extensive as those involved in the trial below, which lasted for three months. The holding of such hearings (which would virtually amount to a retrial of the case) would scarcely be compatible with the function of the Executive as it is usually conceived. I think we may therefore assume that 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 spirit of our statutes and without offering any encouragement for the disregard of law.

FOSTER, J. I am shocked that 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 us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of this Commonwealth no longer pretends to incorporate justice.

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 inapplicable to this case, and that the case 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. We are not accustomed to applying the maxim *cessante ratione legis, cessat et ipsa lex* to the whole of our enacted law, but I believe that this is a case where the maxim should be so applied.

The proposition that all positive law is based on the possibility of men's coexistence has a strange sound, not because the truth it contains is strange, but simply because it is a truth so obvious and pervasive that we seldom have occasion to give words to it. Like the air we breathe, it so pervades our environment that we forget that it exists until we are suddenly deprived of it. Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common. When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.

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. We recognize that jurisdiction rests on a territorial basis. The grounds of this principle are by no means obvious and are seldom examined. I take it that this principle is supported by an assumption that it is feasible to impose a single legal order upon a group of men only if they live together within the confines of a given area of the earth's surface. The premise that men shall coexist in a group underlies, then, the territorial principle, as it does all of law. Now I contend that a case may be removed morally from the force of a legal order, as well as geographically. If we look to the purposes of law and government, and to the premises underlying our positive law, these men when they made their fateful decision were as remote from our legal order as if they had been a thousand miles beyond our boundaries. Even in a physical sense, their underground prison was

separated from our courts and writ-servers by a solid curtain of rock that could be removed only after the most extraordinary expenditures of time and effort.

I conclude, therefore, that at the time Roger Whetmore's life was ended by these defendants, they were, to use the quaint language of nineteenth-century writers, not in a "state of civil society" but in a "state of nature." This has the consequence 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.

It has from antiquity been recognized that the most basic principle of law or government is to be found in the notion of contract or agreement. Ancient thinkers, especially during the period from 1600 to 1900, used to base government itself on a supposed original social compact.[*] Skeptics pointed out that this theory contradicted the known facts of history, and that there was no scientific evidence to support the notion that any government was ever founded in the manner supposed by the theory. Moralists replied that, if the compact was a fiction from a historical point of view, the notion of a compact or agreement furnished the only ethical justification on which the powers of government, which include that of taking life, could be rested. The powers of government can only be justified morally on the ground that these are powers that reasonable men would agree upon and accept if they were faced with the necessity of constructing anew some order to make their life in common possible.

Fortunately, our Commonwealth is not bothered by the perplexities that beset the ancients. We know as a matter of historical truth that our government was founded upon a contract or free accord of men. The archeological proof is conclusive that in the first period following the Great Spiral the survivors of that holocaust voluntarily came together and drew up a charter of government. Solphistical writers have raised questions as to the power of those remote contractors to bind future generations, but the fact remains that our government traces itself back in an unbroken line to that original charter.

If, therefore, our hangmen have the power to end men's lives, if our sheriffs have the power to put delinquent tenants in the street, if our police have the power to incarcerate the inebriated reveler, these powers find their moral justification in that original compact of our forefathers. If we can find no higher source for our legal order, what higher source should we expect these starving unfortunates to find for the order they adopted for themselves? I believe that the line of argument I have just expounded permits of no rational answer. I realize that it will probably be received with a certain discomfort by many who read this opinion, who will be inclined to suspect that some hidden sophistry must underlie a demonstration that leads to so many unfamiliar conclusions. The source of this discomfort is, however, easy to identify. The usual conditions of human existence incline us to think of human life as an absolute value, not to be sacrificed under any circumstances. . . .

Every highway, every tunnel, every building we project involves a risk to human life. Taking these projects in the aggregate, we can calculate with some

[*] [Also modern thinkers such as Rawls: see *post*, 413.]

precision how many deaths the construction of them will require; statisticians can tell you the average cost in human lives of a thousand miles of a four-lane concrete highway. Yet we deliberately and knowingly incur and pay this cost on the assumption that the values obtained for those who survive outweigh the loss. If these things can be said of a society functioning above ground in a normal and ordinary manner, what shall we say of the supposed absolute value of a human life in the desperate situation in which these defendants and their companion Whetmore found themselves?

This concludes the exposition of the first ground of my decision. My second ground proceeds by rejecting hypothetically all the premises on which I have so far proceeded. I concede for 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 postiive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose. This is a truth so elementary that it is hardly necessary to expatiate on it. Illustrations of its application are numberless and are to be found in every branch of the law. In *Commonwealth* v. *Staymore* the defendant was convicted under a statute making it a crime to leave one's car parked in certain areas for a period longer than two hours. The defendant had attempted to remove his car, but was prevented from doing so because the streets were obstructed by a political demonstration in which he took no part and which he had no reason to anticipate. His conviction was set aside by this Court, although his case fell squarely within the wording of the statute. . . .

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 to be found in the following line of reasoning. One of the principal objects underlying any criminal legislation is that of deterring men from crime. Now it is apparent that if it were declared to be the 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 accept without reservation the proposition that this Court is bound by the statutes of our Commonwealth. . . . The line of reasoning I have applied above raises no question of fidelity to enacted law, though it may possibly raise a question of the distinction between intelligent and unintelligent fidelity. . . . The correction of obvious legislative errors on oversights is not to supplant the legislative will, but to make that will effective.

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. . . . 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." I am not clear why this is so, whether it is because of the thickness of the rock that imprisoned them, or because they were hungry, or because they had set up a "new charter of government" by which the usual rules of law were to be supplanted by a throw of the dice. Other difficulties intrude themselves. If these men passed from the jurisdiction of our law to that of "the law of nature," at what moment did this occur? Was it when the entrance to the cave was blocked, or when the threat of starvation reached a certain undefined degree of intensity, or when the agreement for the throwing of the dice was made? These uncertainties in the doctrine proposed by my brother are capable of producing real difficulties. Suppose, for example, one of these men had had his twenty-first birthday while he was imprisoned within the mountain. On what date would we have to consider that he had attained his majority—when he reached the age of twenty-one, at which time he was, by hypothesis, removed from the effects of our law, or only when he was released from the cave and became again subject to what my brother calls our "positive law"? These difficulties may seem fanciful, yet they only serve to reveal the fanciful nature of the doctrine that is capable of giving rise to them.

But it is not necessary to explore these niceties further to demonstrate the absurdity of my brother's position. Mr. Justice Foster and I are the appointed judges of a court of the Commonwealth of Newgarth, sworn and empowered to administer the laws of that Commonwealth. By what authority do we resolve ourselves into a Court of Nature? If these men were indeed under the law of nature, whence comes out authority to expound and apply that law? Certainly *we* are not 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, furthermore, 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.

The principles my brother expounds contain other implications that cannot be tolerated. He argues that when the defendants set upon Whetmore and killed him . . . they were only exercising the rights conferred upon them by their bargain. Suppose, however, that Whetmore had had concealed upon his person a revolver, and that when he saw the defendants about to slaughter him he had shot them to death in order to save his own life. My brother's reasoning applied to these facts would make Whetmore out to be a murderer, since the excuse of self-defense would have to be denied to him. If his assailants were acting rightfully in seeking to bring about his death, then of course he could no more plead the excuse that he was defending his own life than could a condemned prisoner who struck down the executioner lawfully attempting to place the noose about his neck.

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 into 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 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.

The gist of my brother's argument may be stated in the following terms: No statute, whatever its language, should be applied in a way that contradicts its purpose. One of the purposes of any criminal statute is to deter. The application of the statute making it a crime to kill another to the peculiar facts of this case would contradict this purpose, for it is impossible to believe that the contents of the criminal code could operate in a deterrent manner on men faced with the alternative of life or death. The reasoning by which this exception is read into the statute is, my brother observes, the same as that which is applied in order to provide the excuse of self-defense. . . .

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. . . . It has also been said that its object is the rehabilitation of the wrongdoer. . . . Other theories have been propounded. Assuming that we must interpret a statute in the light of its purpose, what are we to do when it has many purposes or when its purposes are disputed?

A similar difficulty is presented by the fact that although there is authority for my brother's interpretation of the excuse of self-defense, there is other authority which assigns to that excuse a different rationale. . . . The taught doctrine of our law schools, . . . runs in the following terms: The statute concerning murder requires a "willful" act. The man who acts to repel an aggressive threat to his own life does not act "willfully," but in response to an impulse deeply ingrained in human nature. I suspect that there is hardly a lawyer in this Commonwealth who is not familiar with this line of reasoning. . . .

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 discussing 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. This perplexity is in this case compounded, as it were, for we have to set off one explanation, incorporated in a virtually unknown precedent of this Court, against another explanation, which forms a part of the taught legal tradition of our law

schools, but which, so far as I know, has never been adopted in any judicial decision. . . .

. . . I have difficulty in saying that no deterrent effect whatever could be attributed to a decision that these men were guilty of murder. The stigma of the word "murderer" is such that it is quite likely, I believe, that if these men had known that their act was deemed by the law to be murder they would have waited for a few days at least before carrying out their plan. During that time some unexpected relief might have come. I realize that this observation only reduces the distinction to a matter of degree, and does not destroy it altogether. It is certainly true that the element of deterrence would be less in this case than is normally involved in the application of the criminal law.

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 refused 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. Or again, that a plan of selection was followed but one based on a different justification than the one adopted here, as if the others were atheists and insisted that Whetmore should die because he was the only one who believed in an afterlife. These illustrations could be multiplied, but enough have been suggested to reveal what a quagmire of hidden difficulties my brother's reasoning contains.

Of course I realise on reflection that I may be concerning myself with a problem that will never arise, since it is unlikely that any group of men will ever again be brought to commit the dread act that was involved here. Yet, on still further reflection, even if we are certain that no similar case will arise again, do not the illustrations I have given show the lack of any coherent and rational principle in the rule my brother proposes? Should not the soundness of a principle be tested by the conclusions it entails, without reference to the accidents of later litigational history? Still, if this is so, why is it that we of this Court so often discuss the question whether we are likely to have later occasion to apply a principle urged for the solution of the case before us? Is this a situation where a line of reasoning not originally proper has become sanctioned by precedent, so that we are permitted to apply it and may even be under an obligation to do so?

The more I examine this case and think about it, the more deeply I become involved. My mind becomes entangled in the meshes of the very nets I throw out for my own rescue. I find that almost every consideration that bears on the decision of the case is counterbalanced by an opposing consideration leading in the opposite direction. My brother Foster has not furnished to me, nor can I discover for myself, any formula capable of resolving the equivocations that beset me on all sides.

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 for 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, if 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 this tribunal. I declare my withdrawal from the decision of this 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. This is a confusion of governmental functions—a confusion of which the judiciary should be the last to be guilty. I wish to state that if I were the Chief Executive I would go farther in the direction of clemency than the pleas addressed to him propose. I would pardon these men altogether, since I believe that they have already suffered enough to pay for any offense they may have committed. I want it to be understood that this remark is made in my capacity as a private citizen who by the accident of his office happens to have acquired an intimate acquaintance with the facts of this case. In the discharge of my duties as judge, it is neither my function to address directions to the Chief Executive, nor to take into account what he may or may not do, in reaching my own decision, which must be controlled entirely by the law of this Commonwealth.

The second question that I wish to put to one side is that of deciding whether what these men did was "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. In putting this question to one side I think I can also safely dismiss without comment the first and more poetic portion of my brother Foster's opinion. The element of fantasy contained in the arguments developed there has been sufficiently revealed in my brother Tatting's somewhat solemn attempt to take those arguments seriously. . . .

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.

Now, of course, my brother Foster does not admit that he actuated by a personal dislike of the written law. Instead he develops a familiar line of argument according to which the court may disregard the express language of a statute when something not contained in the statute itself, called its "purpose," can be employed to justify the result the court considers proper. Because this is an old issue between myself and my colleague, I should like, before discussing his particular application of the argument to the facts of this case, to say something

about the historical background of this issue and its implications for law and government generally. . . .

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, and to interpret that 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 statutes 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 group: his way of dealing with statutes is exactly that of a judge living in the 3900's.

We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. . . .

The process of 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 this imagined "purpose," overlooked something 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*. . . .

One could not wish for a better case to illustrate the specious nature of this gap-filling process than the one before us. My brother 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 my ordinary sense of the term. Primarily, such a statute reflects a deeply felt human conviction that murder is wrong and that something should be done to the man who commits it. If we were forced to be more articulate about the matter, we would probably take refuge in the more sophisticated theories of the criminologists, which, of course, were certainly not in the minds of those who drafted our statute. We might also observe that men will do their own work more effectively and live happier lives of they are protected against the threat of violent assault. . . .

If we do not know the purpose of § 12-A, how can we possibly say there is a "gap" in it? How can we know what its draftsmen thought about the question of killing men in order to eat them? . . . [I]t remains abundantly clear that neither I nor my brother Foster knows what the "purpose" of § 12-A is.

Considerations similar to those I have just outlined are also applicable to the exception in favor of self-defense, which plays so large a role in the reasoning of my brothers Foster and Tatting. 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 this Court is plain: it applies to cases of resisting an aggressive threat to the man'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 re-making 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 statute as it is written and remake it to meet your own wishes at the same time.

Now I know that the line of reasoning I have developed in this opinion will not be acceptable to those who look only to the immediate effects of a decision and ignore the long-run implications of an assumption by the judiciary of a power of dispensation. A hard decision is never a popular decision. Judges have been celebrated in literature for their sly prowess in devising some quibble by which a litigant could be deprived of his rights where the public thought it was wrong for him to assert those rights. But I believe that judicial dispensation does more harm in the long run than hard decisions. Hard cases may even have a certain moral value by bringing home to the people their own responsibilities toward the law that is ultimately their creation, and by reminding them that there is no principle of personal grace that can relieve the mistakes of their representatives.

Indeed, I will go farther and say that not only are the principles I have been expounding those which are soundest for our present conditions, but that we would have inherited a better legal system from our forefathers if those principles had been observed from the beginning. For example, with respect to the excuse of self-defense, if our courts had stood steadfast on the language of the statute the result would undoubtedly have been a legislative revision of it. Such a revision would have drawn on the assistance of natural philosophers and psychologists, and the resulting regulation of the matter would have had an understandable and rational basis, instead of the hodge-podge of verbalisms and metaphysical distinctions that have emerged from the judicial and professional treatment.

These concluding remarks are, of course, beyond any duties that I have to discharge with relation to this case, but I include them here because I feel deeply that my colleagues are insufficiently aware of the dangers implicit in the conceptions of the judicial office advocated by my brother Foster.

I conclude that the conviction should be affirmed.

HANDY, J. I have listened with amazement to the tortured ratiocinations to which this simple case has given rise. I never cease to wonder at my colleagues' ability to throw an obscuring curtain of legalisms about every issue presented to them for decision. We have heard this afternoon learned disquisitions on the distinction between positive law and the law of nature, the language of the statute and the purpose of the statute, judicial functions and executive functions, judicial legislation and legislative legislation. . . .

What have all these things to do with the case? 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 this Court.

Before stating my own conclusions about the merits of the case, I should like to discuss briefly some of the more fundamental issues involved—issues on which my colleagues and I have been divided ever since I have been on the bench.

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 rulers understand the feelings and conceptions of the masses. They are ruled badly when that understanding is lacking.

Of all branches of the government, the judiciary is the most likely to lose its contact with the common man. The reasons for this are, of course, fairly obvious. Where the masses react to a situation in terms of a few salient features, we pick into little pieces every situation presented to us. Lawyers are hired by both sides to analyze and dissect. Judges and attorneys vie with one another to see who can discover the greatest number of difficulties and distinctions in a single set of facts. Each side tries to find cases, real or imagined, that will embarrass the demonstrations of the other side. To escape this embarrassment, still further distinctions are invented and imported into the situation. When a set of facts has been subjected to this kind of treatment for a sufficient time, all the life and juice have gone out of it and we have left a handful of dust.

Now I realize that wherever you have rules and abstract principles lawyers are going to be able to make distinctions. To some extent the sort of thing I have been describing is a necessary evil attaching to any formal regulation of human affairs. But I think that the area which really stands in need of such regulation is greatly overestimated. There are, of course, a few fundamental rules of the game that must be accepted if the game is to go on at all. I would include among these the rules relating to the conduct of elections, the appointment of public officials, and the term during which an office is held. Here are some restraint on discretion and dispensation, some adherence to form, some scruple for what does and what does not fall within the rule, is, I condede, essential. Perhaps the area of basic principle should be expanded to include certain other rules, such as those designed to preserve the free civilmoign system.

But outside of these fields 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. More governments have been wrecked, and more human misery caused, by the lack of this accord between ruler and ruled than by any other factor that can be discerned in history. Once drive a sufficient wedge between the mass of people and those who direct their legal, political, and economic life, and our society is ruined. Then neither Foster's law of nature nor Keen's fidelity to written law will avail us anything.

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 I shall have to introduce certain realities that my brothers in their coy decorum have been 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 an 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 explorers?" 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.

This makes it obvious, not only what we should do, but what we must do if we are to preserve between ourselves and public opinion a reasonable and decent accord. Declaring these men innocent need not involve us in any undignified quibble or trick. No principle of statutory construction is required that is not consistent with the past practices of this Court. Certainly no layman would think that in letting these men off we had stretched the statute any more than our ancestors did when they created the excuse of self-defense. If a more detailed demonstration of the method of reconciling our decision with the statute is required, I should be content to rest on the arguments developed in the second and less visionary part of my brother Foster's 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. They will tell you that the law surrounds the trial of a case like this with elaborate safeguards, designed to insure that the truth will be known and that every rational consideration bearing on the issues of the case has been taken into account. They will warn you that all of these safeguards go for naught if a mass opinion formed outside this framework is allowed to have any influence on our decision.

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 in which he may escape punishment. One of these is a determination 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?

In the case of the jury we do, to be sure, attempt to cabin their deliberations within the area of the legally relevant, but there is no need to deceive ourselves into believing that this attempt is really successful. In the normal course of events the case now before us would have gone on all of its issues directly to the jury. Had this occurred we can be confident that there would have been an acquittal or at least a division that would have prevented a conviction. If the jury had been instructed that the men's hunger and their agreement were no defense to the charge of murder, their verdict would in all likelihood have ignored this instruction and would have involved a good deal more twisting of the letter of the law than any that is likely to tempt us. Of course the only reason that didn't occur in this case was the fortuitous circumstance that the foreman of the jury happened to be a lawyer. His learning enabled him to devise a form of words that would allow the jury to dodge its usual responsibilities.

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.

This brings me to the concluding portion of my remarks, which has to do with executive clemency. Before discussing that topic directly, I want to make a related observation about the poll of public opinion. As I have said, ninety per cent of the people wanted the Supreme Court to let the men off entirely or with a more or less nominal punishment. The ten per cent constituted a very oddly assorted group, with the most curious and divergent opinions. . . . [A]lthough almost every conceivable variety and shade of opinion was represented in this group, there was, so far as I know, not one of them, nor a single member of the majority of ninety per cent, who said, "I think it would be a fine thing to have the courts sentence these men to be hanged, and then to have another branch of the government come along and pardon them." Yet this is a solution that has more or less dominated our discussions and which our Chief Justice proposes as a way by which we can avoid doing an injustice and at the same time preserve respect for law. He can be assured that if he is preserving anybody's morale, it is his own, and not the public's, which knows nothing of his distinctions. I mention this matter because I wish to emphasize once more the danger that we may get lost in the patterns of our own thought and forget that these patterns often cast not the slightest shadow on the outside world.

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 sentences. 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 with the reverse of the effect intended. . . .

Their scruple about acquiring accurate information directly does not prevent them from being very perturbed about what they have learned indirectly. Their acquaintance with the facts I have just related explains why the Chief Justice, ordinarily a model of decorum, saw fit in his opinion to flap his judicial robes in the face of the Executive and threaten him with excommunication if he failed to commute the sentence. It explains, I suspect, my brother Foster's feat of levitation by which a whole library of law books was lifted from the shoulders of these defendants. It explains also why even my legalistic brother Keen emulated Pooh-Bah in the ancient comedy by stepping to the other side of the stage to address a few remarks to the Executive "in my capacity as a private citizen." . . .

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 this 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 office 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.

TATTING, J. I have been asked by the Chief Justice whether, after listening to the two opinions just rendered, I desire to re-examine the position previously taken by me. I wish to state that after hearing these opinions I am greatly strengthened in my conviction that I ought not to participate in the decision of this case.

The Supreme Court being evenly divided, the conviction and sentence of the Court of General Instances is *affirmed*. It is ordered that the execution of the sentence shall occur at 6 A.M., Friday, April 2, 4300, at which time the Public Executioner is directed to proceed with all convenient dispatch to hang each of the defendants by the neck until he is dead.

Postscript

Now that the court has spoken its judgment, the reader puzzled by the choice of date may wish to be reminded that the centuries which separate us from the year 4300 are roughly equal to those that have passed since the Age of Pericles. There is probably no need to observe that the *Speluncean Case* itself is intended neither as a work of satire nor as a prediction in any ordinary sense of the term. As for the judges who make up Chief Justice Truepenny's court, they are, of course, as mythical as the facts and precedents with which they deal. The reader who refuses to accept this view, and who seeks to trace out contemporary resemblances where none is intended or contemplated, should be warned that he is engaged in a frolic of his own, which may possibly lead him to miss whatever modest truths are contained in the opinions delivered by the Supreme Court of Newgarth. The case was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government. These philosophies presented men with live questions of choice in the days of Plato and Aristotle. Perhaps they will continue to do so when our era has had its say about them. If there is any element of prediction in the case, it does not go beyond a suggestion that the questions involved are among the permanent problem of the human race.

[pp. 616-688.]

G. RYLE[*]

The Theory of Meaning

(1957)[*2]

Let me briefly mention some of the consequences which successors of Mill actually drew from the view, which was not Mill's, that to mean is to denote, in the toughest sense, namely that all significant expressions are proper names, and what they are the names of are what the expressions signify.

First, it is obvious that the vast majority of words are unlike the words "Fido" and "London" in this respect, namely, that they are general. "Fido" stands for a particular dog, but the noun "dog" covers this dog Fido, and all other dogs past, present and future, dogs in novels, dogs in dog breeders' plans for the future, and so on indefinitely. So the word "dog," if assumed to denote in the way in which "Fido" denotes Fido, must denote something which we do not hear barking, namely, either the set or class of all actual and imaginable dogs, or the set of canine properties which they all share. Either would be a very out-of-the-way sort of entity. Next, most words are not even nouns, but adjectives, verbs, prepositions, conjunctions and so on. If these are assumed to denote in the way in which "Fido" denotes Fido, we shall have a still larger and queerer set of nominees or *denotata* on our hands, namely, nominees whose names could not even function as the grammatical subjects of sentences. . . .

[*2] [*From British Philosophy in Mid-Century* (ed. Mace), (1957), p. 239.]

Whenever we construct a sentence, in which we can distinguish a grammatical subject and a verb, the grammatical subject, be it a single word or a more or less complex phrase, must be significant if the sentence is to say something true or false. But if this nominative word or phrase is significant, it must, according to the assumption, denote something which is there to be named. So not only Fido and London, but also centaurs, round squares, the present King of France, the class of albino Cypriots, the first moment of time, and the non-existence of a first moment of time must all be credited with some sort of reality. They must *be*, else we could not say true or false things of them. We could not truly say that round squares do not exist, unless in some sense of "exist" there exist round squares for us, in another sense, to deny existence of. Sentences can begin with abstract nouns like "equality" or "justice" or "murder" so all Plato's Forms or Universals must be accepted as entities. Sentences can contain mentions of creatures of fiction, like centaurs and Mr. Pickwick, so all conceivable creatures of fiction must be genuine entities, too. Next, we can say that propositions are true or false, or that they entail or are incompatible with other propositions, so any significant "that"-clause, like "that three is a prime number" or "that four is a prime number," must also denote existent or subsistent objects. It was accordingly, for a time, supposed that if I know or believe that three is a prime number, my knowing or believing this is a special relation holding between me on the one hand and the truth or fact, on the other, denoted by the sentence "three is a prime number." If I weave or follow a romance, my imagining centaurs or Mr. Pickwick is a special relation holding between me and these centaurs or that portly old gentleman. I could not imagine him unless he had enough being to stand as the correlate-term in this postulated relation of being imagined by me.

Lastly, to consider briefly what turned out, unexpectedly, to be a crucial case, there must exist or subsist classes, namely, appropriate *denotata* for such collectively employed plural descriptive phrases as "the elephants in Burma" or "the men in the moon." It is just of such classes or sets that we say that they number 3,000, say, in the one case, and 0 in the other. For the results of counting to be true or false, there must be entities submitting to numerical predicates; and for the propositions of arithmetic to be true or false there must exist or subsist an infinite range of such classes.

At the very beginning of this century Russell was detecting some local unplausibilities in the full-fledged doctrine that to every significant grammatical subject there must correspond an appropriate *denotatum* in the way in which Fido answers to the name "Fido." The true proposition "round squares do not exist" surely cannot require us to assert that there really do subsist round squares. The proposition that it is false that four is a prime number is a true one, but its truth surely cannot force us to fill the Universe up with an endless population of objectively existing falsehoods. . . .

It was, however, not Russell but Wittgenstein who first generalized or half-generalized this crucial point. In the *Tractatus Logico-Philosophicus*, which could be described as the first book to be written on the philosophy of logic, Wittgenstein still had one foot in the denotationist camp, but his other foot was already free. . . .

. . . It was only later still that Wittgenstein consciously and deliberately withdrew his remaining foot from the denotationist camp. When he said "Don't ask for the meaning, ask for the use,"[3] he was imparting a lesson which he had had to teach himself after he had finished with the *Tractatus*. The use of an expression, or the concept it expresses, is the role it is employed to perform, not

any thing or person or event for which it might be supposed to stand. Nor is the purchasing power of a coin to be equated with this book or that car-ride which might be bought with it. The purchasing power of a coin has not got pages or a terminus. Even more instructive is the analogy which Wittgenstein now came to draw between significant expressions and the pieces with which are played games like chess. The significance of an expression and the powers or functions in chess of a pawn, a knight or the queen have much in common. To know what the knight can and cannot do, one must know the rules of chess, as well as be familiar with various kinds of chess-situations which may arise. What the knight may do cannot be read out of the material or shape of the piece of ivory or boxwood or tin of which this knight may be made. Similarly to know what an expression means is to know how it may and may not be employed, and the rules governing its employment can be the same for expressions of very different physical compositions. The word "horse" is not a bit like the word "cheval"; but the way of wielding them is the same. They have the same role, the same sense. Each is a translation of the other. Certainly the rules of the uses of expressions are unlike the rules of games in some important respects. We can be taught the rules of chess up to a point before we begin to play. There are manuals of chess, where there are not manuals of significance. The rules of chess, again, are completely definite and inelastic. Questions of whether a rule has been broken or not are decidable without debate. Moreover, we opt to play chess and can stop when we like, where we do not opt to talk and think and cannot opt to break off. Chess is a diversion. Speech and thought are not only diversions. But still the partial assimilation of the meanings of expressions to the powers or the values of the pieces with which a game is played is enormously revealing. There is no temptation to suppose that a knight is proxy for anything, or that learning what a knight may or may not do is learning that it is a deputy for some ulterior entity. [pp. 250–255]

G. WILLIAMS

International Law and the Controversy Concerning the Word "Law"[1]

(Revised version, 1956)

It will be seen . . . that the error as to the "proper" meaning of words and as to "true" definitions is still widespread. . . .

. . . Arising out of the proper-meaning fallacy is the idea that words have not only a proper meaning but a single proper meaning. This involves a denial of the fact that words change their meanings from one context to another. To illustrate the difficulties into which this idea lands one: we commonly speak of "early customary law," yet a municipal lawyer refuses to say that all social customs at the present day are law. Conventions of the constitution, for instance, are not usually called "law" by the modern lawyer. Now it is a fact that it is practically impossible to frame a definition of "law" in short and simple terms that will *both* include early customary law *and* exclude modern conventions of the constitution. If it includes the one it will include the other, and if it excludes the one it will exclude the other. This leads the single-proper-meaning theorists to argue among themselves whether conventions are to be put in or early custom to be left out. The misconception again comes from supposing that there is an entity suspended somewhere in the universe called "law," which cannot truthfully be described as

[1] [From (1945) 23 B.Y.B.I.L. 146, and reprinted in a revised version in *Philosophy, Politics and Society* (ed. Laslett) (1956), p. 134, to which present page references are given.]