THE CASE OF THE SPELUNCEAN EXPLORERS

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 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 remove 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 indications 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. It was necessary to supplement the forces of the original party by repeated increments of men and machines, which had to be conveyed at great expense to the remote and isolated region in which the cave was located. A huge temporary camp of workmen, engineers, geologists, and other experts was established. 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. The treasury of the Speluncean Society was soon exhausted in the rescue effort, and the sum of

eight hundred thousand frelars, raised partly by popular subscription and partly by legislative grant, was expended before the imprisoned men were rescued. Success was finally achieved on the thirty-second day after the men entered the cave.

Since it was known that the explorers had carried with them only scant provisions, and since it was also known 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. A similar machine was promptly installed in the rescue camp and oral communication established with the unfortunate men within the mountain. They asked to be informed how long a time would be required to release them. The engineers in charge of the project answered that at least ten days would be required even if no new landslides occurred. The explorers then asked if any physicians were present, and were placed in communication with a committee of medical experts. 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 re-established 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 answered 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. 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. The defendants were at first reluctant to adopt so desperate a procedure, but after the conversations by wireless related above, they finally agreed on the plan proposed by Whetmore. 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 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, 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. At the trial, after the testimony had been concluded, the foreman of the jury (a lawyer by profession) inquired of the court whether the jury might not find a special verdict, leaving it to the court to say whether on the facts as found the defendants were guilty. After some discussion, both the Prosecutor and counsel for the defendants indicated their acceptance of this procedure, and it was adopted by the court. In a lengthy special verdict the jury found the facts as I have related them 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 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 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 of error.

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 colleagues 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 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. Sophistical 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 per-

mits 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. There is much that is fictitious about this conception even when it is applied to the ordinary relations of society. We have an illustration of this truth in the very case before us. Ten workmen were killed in the process of removing the rocks from the opening to the cave. Did not the engineers and government officials who directed the rescue effort know that the operations they were undertaking were dangerous and involved a serious risk to the lives of the workmen executing them? If it was proper that these ten lives should be sacrificed to save the lives of five imprisoned explorers, why then are we told it was wrong for these explorers to carry out an arrangement which would save four lives at the cost of one?

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 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 positive 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. Again, in *Fehler v. Neegas* there was before this Court for construction a statute in which the word "not" had plainly been transposed from its intended position in the final and most crucial section of the act. This transposition was contained in all the successive drafts of the act, where it was apparently overlooked by the draftsmen and sponsors of the legislation. No one was able to prove how the error came about, yet it was apparent that, taking account of the contents of the statute as a whole, an error had been made, since a literal reading of the final clause rendered it inconsistent with everything that had gone before and with the object of the enactment as stated in its preamble. This Court refused to accept a literal interpretation of the statute, and in effect rectified its language by reading the word "not" into the place where it was evidently intended to go.

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.

There are those who raise the cry of judicial usurpation whenever a court, after analyzing the purpose of a statute, gives to its words a meaning that is not at once apparent to the casual reader who has not studied the statute closely or examined the objectives it seeks to attain. Let me say emphatically that I accept without reservation the proposition that this Court is bound by the statutes of our Commonwealth and that it exercises its powers in subservience to the duly expressed will of the Chamber of Representatives. 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. No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told "to peel the soup and skim the potatoes" her mistress does not mean what she says. She also knows that when her master tells her to "drop everything and come running" he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence

from the judiciary. The correction of obvious legislative errors or 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. 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 on this tragic case I find that my usual resources fail me. On the emotional side I find myself torn between sympathy for these men and a feeling of abhorrence and disgust at the monstrous act they committed. I had hoped that I would be able to put these contradictory emotions to one side as irrelevant, and to decide the case on the basis of a convincing and logical demonstration of the result demanded by our law. Unfortunately, this deliverance has not been vouchsafed 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." 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 our 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 (we know not how, perhaps by pounding him with stones) 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.

On the face of things this demonstration seems very convincing indeed. My brother's interpretation of the rationale of the excuse of self-defense is in fact supported by a decision of this court, *Commonwealth v. Parry*, a precedent I happened to encounter in my research on this case. Though *Commonwealth v. Parry* seems generally to have been overlooked in the texts and subsequent decisions, it supports unambiguously the interpretation my brother has put upon 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. *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 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. Indeed, until I happened on *Commonwealth v. Parry* I had never heard of the explanation given by my brother. The taught doctrine of our law schools, memorized by generations of law students, 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, especially since the point is a great favorite of the bar examiners.

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 recognize the relevance of the precedents cited by my brother concerning the displaced "not" and the defendant who parked overtime. But what are we to do with one of the landmarks of our jurisprudence, which again my brother passes over in silence? This is *Commonwealth v. Valjean.* Though the case is somewhat obscurely reported, it appears that the defendant was indicted for the larceny of a loaf of bread, and offered as a defense that he was in a condition approaching starvation. The court refused to accept this defense. If hunger cannot justify the theft of wholesome and natural food, how can it justify the killing and eating of a man? Again, if we look at the thing in terms of deterrence, is it likely that a man will starve to death to avoid a jail sentence for the theft of a loaf of bread? My brother's

demonstrations would compel us to overrule *Commonwealth v. Valjean*, and many other precedents that have been built on that case.

Again, 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 realize 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, 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 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.

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.

Now, of course, my brother Foster does not admit that he is 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.

There was a time in this Commonwealth when 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. That was a time when the accepted principles of political science did not designate with any certainty the rank and function of the various arms of the state. We all know the tragic issue of that uncertainty in the brief civil war that arose out of the conflict between the judiciary, on the one hand, and the executive and the legislature, on the other. There is no need to recount here the factors that contributed to that unseemly struggle for power, though they included the unrepresentative character of the Chamber, resulting from a division of the country into election districts that no longer accorded with the actual distribution of the population, and the forceful personality and wide popular following of the then Chief Justice. 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, 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 for-

bids 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. Anyone who has followed the written opinions of Mr. Justice Foster will have had an opportunity to see it at work in every branch of the law. I am personally so familiar with the process that in the event of my brother's incapacity I am sure I could write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he liked the effect of the terms of the statute as applied to the case before him.

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.*

My brother Foster's penchant for finding holes in statutes reminds one of the story 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 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 any 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 if they are protected against the threat of violent assault. Bearing in mind that the victims of murders are often unpleasant people, we might add some suggestion that the matter of disposing of undesirables is not a function suited to private enterprise, but should be a state monopoly. All of which reminds me of the attorney who once argued before us that a statute licensing physicians was a good thing because it would lead to lower life insurance rates by lifting the level of general health. There is such a thing as overexplaining the obvious.

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? My brother Tatting has revealed an understandable, though perhaps slightly exaggerated revulsion to cannibalism. How do we know that his remote ancestors did not feel the same revulsion to an even higher degree? Anthropologists say that the dread felt for a forbidden act may be increased by the fact that the conditions of a tribe's life create special temptations toward it, as incest is most severely condemned among those whose village relations make it most likely to occur. Certainly the period following the Great Spiral was one that had implicit in it temptations to anthropophagy. Perhaps it was for that very reason that our ancestors expressed their prohibition in so broad and unqualified a form. All of this is conjecture, of course, but it 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. It is of course true that in *Commonwealth v. Parry* an obiter dictum justified this exception on the assumption that the purpose of criminal legislation is to deter. It may well also be true that generations of law students have been taught that the true explanation of the exception lies in the fact that a man who acts in self-defense does not act "willfully," and that the same students have passed their bar examinations by repeating what their professors told them. These last observations I could dismiss, of course, as irrelevant for the simple reason that professors and bar examiners have not as yet any commission to make our laws for us. But again the real trouble lies deeper. 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 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 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 hodgepodge of verbalisms and metaphysical distinctions that have emerged from the judicial and professorial 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. My only disappointment was that someone did not raise the question of the legal nature of the bargain struck in the cave — whether it was unilateral or bilateral, and whether Whetmore could not be considered as having revoked an offer prior to action taken thereunder.

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 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 concede, 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 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 ob-

serving 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. One of our university experts has made a study of this group and has found that its members fall into certain patterns. A substantial portion of them are subscribers to "crank" newspapers of limited circulation that gave their readers a distorted version of the facts of the case. Some thought that "Spelunccean" means "cannibal" and that anthropophagy is a tenet of the Society. But the point I want to make, however, is this: although 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 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 with 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 would 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.

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 may remark, incidentally, that the advice of Private Citizen Keen will appear in the reports of this court printed at taxpayers' expense.)

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. As a matter of fact, by a kind of sad rounding of the circle, I encountered issues like those involved here in the very first case I tried as Judge of the Court of General Instances in Fanleigh County.

A religious sect had unfrocked a minister who, they said, had gone over to the views and practices of a rival sect. The minister circulated a handbill making charges against the authorities who had expelled him. Certain lay members of the church announced a public meeting at which they proposed to explain the position of the church. The minister attended this meeting. Some said he slipped in unobserved in a disguise; his own testimony was that he had walked in openly as a member of the public. At any rate, when the speeches began he interrupted with certain questions about the affairs of the church and made some statements in defense of his own views. He was set upon by members of the audience and given a pretty thorough pommeling, receiving among other injuries a broken jaw. He brought a suit for damages against the association that sponsored the meeting and against ten named individuals who he alleged were his assailants.

When we came to the trial, the case at first seemed very complicated to me. The attorneys raised a host of legal issues. There were nice questions on the admissibility of evidence, and, in connection with the suit against the association, some difficult problems turning on the question whether the minister was a trespasser or a licensee. As a novice on the bench I was eager to apply my law school learning and I began studying these questions closely, reading all the authorities and preparing well-documented rulings.

As I studied the case I became more and more involved in its legal intricacies and I began to get into a state approaching that of my brother Tatting in this case. Suddenly, however, it dawned on me that all these perplexing issues really had nothing to do with the case, and I began examining it in the light of common sense. The case at once gained a new perspective, and I saw that the only thing for me to do was to direct a verdict for the defendants for lack of evidence.

I was led to this conclusion by the following considerations. The melee in which the plaintiff was injured had been a very confused affair, with some people trying to get to the center of the disturbance, while others were trying to get away from it; some striking at the plaintiff, while others were apparently trying to protect him. It would have taken weeks to find out the truth of the matter. I decided that nobody's broken jaw was worth that much to the Commonwealth. (The minister's injuries, incidentally, had meanwhile healed without disfigurement and without any impairment of normal faculties.) Furthermore, I felt very strongly that the plaintiff had to a large extent brought the thing on himself. He knew how inflamed passions were about the affair, and could easily have found another forum for the expression of his views. My decision was widely approved by the press and public opinion, neither of which could tolerate the views and practices that the expelled minister was attempting to defend.

Now, thirty years later, thanks to an ambitious Prosecutor and a legalistic jury foreman, I am faced with a case that raises issues which are at bottom much like those involved in that case. The world does not seem to change much, except that this time it is not a question of a judgment for five or six hundred frelars, but of the life or death of four men who have already suffered more torment and humiliation than most of us would endure in a thousand years. 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 reexamine 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 problems of the human race.

*Lon L. Fuller.**

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