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# Book Review [Cannibalism and the Common Law]

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## BOOK REVIEW

CANNIBALISM AND THE COMMON LAW. By A. W. Brian Simpson. Chicago, Ill.: University of Chicago Press. Pp. xiv + 354. Hardbound. \$25.00.

*Reviewed by* Michael Dillon

The waves rose like mountains round the poor shipwrecked crew,  
Starving and thirsty, oh, what could they do,  
They thought of their children, their homes and their wives,  
They killed the poor boy to preserve their own lives.<sup>1</sup>

The saga of the *Mignonette* provides a source of both macabre fascination and intellectual challenge for legal scholars and first-year law students alike. While professors query whether necessity can be a defense to murder, students are captivated by the story of the ill-fated voyage.

On September 5, 1884, a German sailing vessel docked at the port of Fallmouth. On board that day were three sailors who had been found adrift at sea a month earlier. These men were the only survivors of the yacht *Mignonette* which had sunk under mysterious circumstances on July 5, 1884.

Four men were able to escape in a dingy when the yacht went down. They were: Tom Dudley, captain of the *Mignonette*; Edwin Stephens, ship's mate; Ned Brooks, able seaman; and the young Richard Parker, ordinary seaman. For more than two weeks, the men had languished near death, surviving on little or no food, and often drinking sea water. Finally, on the twentieth day, they reached their climactic decision. With Parker near death, they decided to kill him to supply nourishment for the others.

As the author points out in his chapter "The Law of the Sea," incidents of cannibalism were not uncommon among mariners during this period. It was an era absent of regulations concerning maritime shipping. There were no minimum standards as to safety or to the supply of food, water and accommodations. In fact, seamen were prohibited from questioning the seaworthiness of a ship after joining

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1. A. SIMPSON, CANNIBALISM AND THE COMMON LAW 85 (1984).

its crew. Consequently, the arrest of Dudley, Brooks, and Stephens upon their landing in Fallmouth was greeted with great surprise by both the survivors of the *Mignonette* and the public. Despite the substantial number of cases which involved maritime cannibalism, legal proceedings had seldom been brought in the past.

The author establishes the legitimacy of cannibalism in dire situations through his extensive research of the practice at sea and on land. The story of the Donner party, trapped in the high Sierra during the winter of 1846-47, is recounted; so too are the stories of Liver-Eating Johnson and Alfred Parker. The latter was a Colorado guide who, while lost during the winter of 1864, ate the party he was leading.<sup>2</sup> Until the nineteenth century, cannibalism at sea was an almost common occurrence. In some cases the victim died a natural death before he was eaten. However, in most situations lots were drawn to make the choice. Perhaps, not so mysteriously, in the majority of these cases the short lot tended to fall on the youngest or the weakest. For example, survivors of the wreck of the British sailing vessel *Francis Spaight* admitted to eating several young apprentices who were chosen by lot.<sup>3</sup> The author states after a review of these cases, "The incidents I have described were all public knowledge . . . . What sailors did when they ran out of food was to draw lots and eat someone."<sup>4</sup> The fact that the *Mignonette* survivors did not use this method distinguished their case from many of the prior maritime tragedies and was a major reason for their prosecution.

Some precedent was available for charging Dudley, Brooks, and Stephens with the murder of Parker. Such support originated in the case of *United States v. Holmes*,<sup>5</sup> in which the defendant and his crew were tried for murder after they arbitrarily threw passengers off an overloaded longboat. Unfortunately, although the court in that case recognized the defense of necessity, they felt whether necessity existed was a decision for the jury. As a result, no legal determination on the issue had been made by the time Dudley, Brooks, and Stephens went to trial.

Baron Huddleston was appointed as presiding judge over the

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2. The author's research has also turned up an occasional humorous side to this otherwise dour subject. For example, Judge Gerry's legendary sentencing of Parker: "There was seven democrats in Hinsdale County, and you've ate five of them, God damn you. I sentence you to be hanged by the neck until you is dead, dead, dead as a warning against reducing the democrat population of the state. Parker, you Republican cannibal, I would sentence you to Hell but the statutes forbid it." *Id.* at 158.

3. *Id.* at 131.

4. *Id.* at 140.

5. *United States v. Holmes* (1842) 1 Wallace Junior 1, 26 F. Cas. 360.

trial in Exter and his desire to use *Mignonette* to set legal precedent. His endeavors to this end are the most interesting facet of the book. After entering several questionable rulings during grand jury proceedings, Huddleston proposed the use of a special verdict at trial to avoid the possibility that the jury would use the defense of necessity to mitigate the murder charge to manslaughter. Under this antiquated procedure, the jury would decide the facts of the case and leave to the judge the legal conclusion. The jury was not informed of their right to reject such an unusual procedure. Nor was there any objection when Huddleston steamrolled the jury into selecting his wording of the verdict. This language undoubtedly affected the outcome of the case. For example, in one paragraph of the special verdict, Huddleston changed a finding to read that the defendants "*probably*" would not have survived unless they fed on Parker. The jury's version read that the defendants "*would have died.*"

Further procedural irregularities were adopted at the appellate level where Huddleston also served. To avoid the possibility that their judgment would be viewed as usurping the right of the jury to decide guilt or innocence, an amendment was mysteriously added to the special verdict. The effect of this action was to change the special verdict to a conditional one under which the jury would agree to find in accordance with the court.

The final result of this legal travesty was that, despite immense popular support, the defendants' convictions were affirmed. Brooks received immunity for serving as a witness for the Crown. Dudley and Stephens were sentenced to death. These sentences were later commuted to six months imprisonment.

Too often authors of legal works slice with surgeon-like precision the legal issues from the environment in which they arise. The result is a rather dry perspective of "The Law," without contemplation of the actual history or people involved. The author of *Cannibalism and the Common Law* has ignored this trend. His book is not a treatise on the technical status of the defense of necessity, but rather a panoramic view of the setting in which the defense was first advocated. The book is rich in the characters, places, and politics that surrounded the case. If one were to cite fault with this work, the complaint would be that it often contains an overabundance of background detail. However, given the state of most current legal writings this is not a fault, but rather a refreshing change.

God bless all poor seamen their children and wives,  
In trying to get their bread how they venture their lives,

So now to conclude what I've mentioned is right,  
God protect all poor seamen by day and by night.<sup>6</sup>

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6. A. SIMPSON, *supra* note 1 at 317, from a 19th century ballad entitled "The Shipwreck of the Essex."