1968 TURNER MEMORIAL LECTURE*

"Necessity Knows No Law"

delivered by

RUPERT CROSS†

As I am about to deliver a lecture containing nothing whatsoever of practical value, I had better begin with what lawyers call a 'plea in mitigation.' I have chosen for my subject the case of men *in extremis* associated in the minds of lawyers with the defence of necessity, the case of ship-wrecked mariners or polar explorers of whom one must die if others are to be saved. Situations of this kind have provoked discussion since classical times and, even if it is unlikely that anything new could be said about them, the interest which they arouse makes it proper to reconsider them from time to time. There is, however, a further reason for their reconsideration at this moment; an examination of the situations in question may throw light on the respective spheres of law and morality. This is a subject which has recently been discussed in the light of the justifications contained in the Wolfenden Report, published in England in 1957, and its recommendation that certain homosexual practices should no longer be punished by the criminal law. I do not wish to make any comment on these proposals, but I would stress the advantage of an occasional consideration of such questions as the propriety of punishing conduct simply because it is commonly regarded as immoral, or of condemning conduct as either illegal or immoral simply becaues it arouses disgust, in a context which is less charged with emotion than that of the Wolfenden proposals.

The Cases to be Considered.

The three cases which I invite you to consider are surely sufficiently remote to guarantee that our examination of questions of the type which I have just mentioned will be entirely dispassionate. The cases are the American case of *U.S.* v. *Holmes*,[1] the English case of *R.* v. *Dudley and Stephens*,[2] and the hypothetical case, discussed from early times, of the two mariners on a plank which is only large enough to support one.[3]

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* The E. W. Turner Memorial Lecture for 1968, delivered in Hobart on 6 August 1968. The literature on the cases covered by this lecture is extensive; most references will be found in the course of the full treatment of the subject of necessity in Chapter II of Jerome Hall's *Principles of Criminal Law* (2nd ed.).

† Vinerian Professor of English Law in the University of Oxford.

1 26 Fed. 360.

2 (1884) 14 Q.B.D. 273.

3 Bacon's *Maxims*, Reg. 25.

Holmes was a member of the crew of the *William Brown*, a ship which foundered after striking an iceberg in the course of a voyage from Liverpool to the United States in 1841. Together with eight other members of the crew and thirty-three passengers he was adrift in a life-boat which was sinking fast owing to chronic overcrowding. Holmes assisted in carrying out the command of the mate to throw male passengers overboard, and fourteen men met their death in this way. He was charged with manslaughter and, upon conviction, received a sentence of six months imprisonment with hard labour together with a fine of twenty dollars.

Three propositions emerge from the summing-up of the Pennsylvanian judge Baldwin J.;

1. provided all ordinary means of self-preservation have been exhausted, there are cases of necessity which the penal laws pass over in silence. 'For example, suppose that two persons who owe no duty to one another that is not mutual should, by accident not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would he commit a crime in saving his own life in a struggle for the only means of safety.'

2. there are, however, situations, such as those involving a member of the crew and a passenger, in which one person is under a pre-existing duty to make his safety subordinate to that of the other, and the duty continues to exist notwithstanding the imminent peril. 'While we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that if a passenger is on the plank even the law of necessity justifies not the sailor who takes it from him.'

3. where there is time, the different parties should consult and endeavour to fix some mode of selection 'by which those in equal relations may have equal chance for their life.' There is no rule of general application. 'There is, however, one condition of extremity to which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted and the sacrifice of one person is necessary to appease the hunger of others the selection is by lot. This mode is resorted to as the fairest mode and in some sort an appeal to God for the selection of the victim.'

Although I do not agree with its every word, I am prepared to accept each of the three propositions contained in this much-abused summing-up. This means that I disagree with almost every word of the judgment of Lord Coleridge in *R.* v. *Dudley and Stephens.*[4]

[4] I have derived some background information from *Unfair Comment on some Victorian Murder Trials*, by Jack Smith Hughes and M. G. Mallins, 'In Warm Blood: Some Historical and Procedural aspects of *Regina* v. *Dudley and Stephens*,' (1966-1967) 34 *U.Chi.L.Rev.* 387.

Dudley, Stephens, Brooks and a boy named Parker were cast adrift in an open boat when the yacht *Mignonette* foundered in the South Atlantic on 5 July 1884. They were the yacht's entire crew. The only provisions in the life-boat were two tins of turnips. After these had been consumed, the party succeeded in catching a little turtle, but it had been eaten by the twelfth day. At some stage Dudley suggested that lots should be drawn in order to determine which of them should be killed so that the others could feed on his flesh, but Brooks and Stephens dissented, Brooks expressing the view that they should all die together. By the twentieth day, the party had been without food for eight days and without water for six days. Then Dudley, acting with the consent of Stephens, killed Parker. Although he was in no condition to resist, Parker did not in any way consent to his death. Brooks was not a party to the killing but, together with Dudley and Stephens, he lived on Parker's flesh until they were rescued four days later. Although Dudley offered up a prayer at the time, it appears that neither he nor Stephens thought that they had done wrong. They talked fully and openly to their rescuers, and it seems that it was partly their frankness on landing at Falmouth which led to their apprehension on a charge of murdering Parker.

When the case came up for trial at Exeter, the judge allowed the jury to follow the unusual course of returning a special verdict. The gist of this verdict was that, had they not done what they did, the accused would probably have died within four days, and that it appeared to them that there was every probability that they would die unless they fed on one of their number. The case was then referred to the Queen's Bench Division in London for a decision whether, on the facts found by the jury, the accused were guilty of murder. The decision was that they were, and, after a considerable display of reluctance, the death sentence was pronounced; it was commuted to six months imprisonment with hard labour. Lord Coleridge's judgment in this case represents one of the high water marks of heroics in law and morals for the principle of the decision is that it is always murder to kill an innocent man in order to save your own life.

> To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. . . . It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors from Horace, from Juvenal, from Cicero, from Euripides, passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. It is not needful to point out the awful danger of admitting the principle which is being

> contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which would justify him in deliberately taking another's life to save his own.[5]

United States v. *Holmes* had already been disposed of as a:

> case in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote on the subject by ballot, [which] can hardly, as my brother Stephen says, be an authority satisfying to a court in this country.

The difficulty of the problem of selection inspired Cardozo J., one of the great American judges of this century, to rhetoric which I can only describe as even emptier than that of Lord Coleridge:

> Where two or more are overtaken by a common disaster, there is no right on the part of some to save the lives of some by the killing of another. There is no rule of human jettison. Men there will often be who when told that they are going, will be the salvation of the remnant, will choose the nobler part, and make the plunge into the waters. In that supreme moment the darkness for them will be illumined by the thought that those behind will ride to safety. If none of such mold are found aboard the boat, or too few to save the others, the human freight must be left to meet the chances of the waters. Who shall choose in such an hour between the victims and the saved? Who shall know when masts and sails of rescue may emerge out of the fog?[6]

The hypothetical case of the plank has assumed various forms in the course of the long history of its discussion. The one which I invite you to consider is that in which two mariners, adrift in circumstances in which there is nothing else to support them, come simultaneously upon a plank which is only capable of supporting one. Would it be morally or legally wrong for the stronger to force the weaker to his doom?

So far as the law applicable to all three cases is concerned, it is arguable that *R.* v. *Dudley and Stephens* justifies the assertation that in England, if not also in Tasmania,[7] Dudley, Stephens, Holmes, and the stronger of the two mariners on the plank would even now be convicted of murder. In neither State, however, is the law of necessity in any sense settled. Not only is this statement warranted by

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5 (1884) 14 Q.B.D. 273 at 287.
6 *Law and Literature,* 113.
7 As there is no provision about necessity in the Tasmanian Code the question would simply be whether a Tasmanian court was prepared to follow *R.* v. *Dudley and Stephens.*

the paucity of authority but it is also justified by the fact that it does not appear to have occurred either to Lord Coleridge, or to any other member of the court in *Dudley's* case, or to Sir James Stephen who discussed these problems in his *Digest of the Criminal Law,*[8] that the proper verdict might have been one of manslaughter, and this notwithstanding the fact that manslaughter was the offence with which Holmes had been charged. Although it had been recognised for more than two centuries that provocation by blows or by the sight of a spouse in adultery would reduce murder to manslaughter, no lawyer who considered the case seems even to have thought of the possibility that the predicament in which Dudley and Stephens found themselves was a far greater mitigation than provocation. This bears eloquent testimony to the rigidity of the Victorian legal mind which evidently considered that the categories of manslaughter were closed.

In the circumstances I feel fully justified in propounding legal as well as moral solutions to the three cases I have mentioned; but I must first say a little about law, morals, and the purpose of punishment.

Law, Morals and the Purpose of Punishment.

Before conduct is condemned by the criminal law, there must, I submit, be some useful purpose which will be served by its punishment. In the present context, I am content that 'useful purpose' should be broadly construed for I do not wish to become involved in a discussion of retributive and utilitarian theories of punishment. All that I want to stress is that legal condemnation must be calculated to influence action in some way. This enables me to reduce to one head the possible justifications for punishing conduct of the kind I have been considering. I am going to call that head the 'maintenance of standards'; it is closely connected with what is sometimes spoken of as the 'denunciatory theory of punishment.'

The more common justification of retribution in its crude sense of revenge, and deterrence, whether it be preventive, individual or general, are inappropriate to the cases I have been considering. Surely no one would urge that Dudley, Stephens, Holmes or the strong mariner who maintained his position on the plank should be punished in order to assuage the outraged feelings of the relatives of the respective deceased. It would be equally implausible to argue that punishment was called for because the men in question were such social menaces that they had to be prevented by incarceration from repeating their conduct or because, having undergone punishment, they would be so frightened by the prospect of a repetition of the dose that they would behave differently if they ever found themselves in situations similar to those I have described; such a suggestion grossly overestimates the influence of punishment of those who undergo it. The same type of objection applies to arguments based on the deterrent

[8] Art. II.

effect of punishment on others situated like the men I have been considering. Apropos *R.* v. *Dudley and Stephens* it has been said that something must have deterred Brooks from co-operating with the accused in the killing of Parker;[9] but it is hard to believe that the 'something' was the thought that he might be hanged if and when he got home. Brooks, as we have seen, believed that they should all have died together, and it is far more likely that his preference for inaction as against homicidal action necessarily involving the slaughter of the innocent was the 'something' which deterred him from co-operating with Dudley and Stephens.

This brings me back to the maintenance of standards as a justification for punishment. When this theory is invoked, the sentence of the court must be treated as imposed, neither in order to deter the convicted person, nor in order to deter those contemplating action similar to his, but for the sake of the law-abiding citizen in order that his standards should not be lowered by the spectacle of a breach of the law going unpunished. The idea seems to be that these standards are maintained by means of a long-term build-up in which prohibitory law, prosecution, trial and punishment in the event of conviction, have essential parts to play. The theory is a difficult one, depending as it does on the unproved assumption of fact that standards will be lowered by the failure to punish even in cases in which punishment is not demanded by deterrent considerations; but it would be idle to deny that the theory is acted upon by judges from time to time.[10] One of the best known pronouncements is that of Lord Denning when giving evidence before the United Kingdom's Royal Commission on Capital Punishment. 'The ultimate justification for any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime'.[11] What standards are to be maintained by judicial punishment is of course the sole concern of the law.

Before conduct can be condemned as immoral it must, I submit, be shown to have been contrary to some ethical principle the infringement of which justifies censure. The censure may of course be private in the sense that it is not made known to anyone and allowance must be made for the case of self-censure.[12] It is, however, essential that the censure should be rationally justifiable by reference to a principle; a mere feeling of dislike for conduct, however general and however intense does not justify the description of that conduct as immoral in the absence of a justifying principle. One way of formulating the ethical principle governing the conduct with which we are concerned is simply to assert that innocent life must not be taken intentionally, in which case Dudley and Stephens, Holmes and the surviving mariner

9 Smith and Hogan, *Criminal Law*, 125.
10 See my note in (1968) 84 *L.Q.R.* 14.
11 Cited in para. 53 of the Report.
12 Kneale, *The Responsibility of Criminals* (O.U.P. 1967).

on the plank each acted immorally unless it can be said that Holmes and the mariner did not kill intentionally because the taking of their victims' lives was an essential means to the end of their own survival. Another way of formulating the ethical principle in question would be to assert that innocent life must not be taken intentionally and arbitrarily, *i.e.* without some attempt to justify the selection of the victim. As one who is as unsympathetic to casuistry and the doctrine of double effect as he is unsympathetic to completely rigid principles, I must admit to a preference for the insertion of some such qualifying word as 'arbitrarily.'

The Right Solutions.

I proceed to state my solutions of the three cases I have been considering and then to give my reasons for those solutions. I think that Dudley and Stephens should be held to have acted immorally, but not illegally; I think that Holmes should probably not be held to have acted immorally although I think it was probably right to hold that he acted illegally; I think that the mariner who struggled for and won the plank acted neither immorally nor illegally.

Dealing first with the moral aspect of the three cases, I consider that Dudley and Stephens acted immorally in failing to face up adequately to the problem of selection. They are to be censured, not for taking innocent life, but for having taken it arbitrarily. The final suggestion of Baldwin J. in *Holmes'* case that the resort to lots in such a situation is 'in some sort an appeal to God for the selection of the victim' may be difficult to accept, but the rest of his summing-up on the question of selection seems to me to have been impeccable from the moral point of view. He begins by asserting that some principle of selection should be sought; he does not say that the drawing of lots is always the right method but only that it is the fairest method in such situations as that which confronted Dudley and Stephens. All that he seems to me to have been arguing for, and certainly all that I argue for, is a moral obligation to stave off the law, or more accurately the lawlessness, of the jungle and to continue to behave like human beings rather than animals as long as possible; I do not deny that a time comes when the law of the jungle must prevail, indeed that seems to me to be the point of the maxim 'necessity knows no law.'

If the problem of selection had been squarely faced by Dudley, Stephens, Brooks and Parker, various things might have happened. Brooks might have sacrificed himself for the others, this would have been heroism which we should admire, but I know of no one, except perhaps Lord Coleridge, who has ever hinted that we are morally obliged to be heroes; we cannot all be expected to act like Captain Oates. They might all have agreed to let nature take its course with the full knowledge that they were all likely to die soon; they might have agreed to draw lots, or they might have failed to come to any

agreement. In the latter event I would not be prepared to censure the one who resorted to homicide; nor would I be prepared to censure one who, having been singled out as the victim by lot, fought against the decision. I would, however, feel a little less uncomfortable when killing the victim selected by lot than I would in killing an innocent person without any previous consideration of the problem of selection. I would also like to confess to a total inability to perceive any moral distinction between those who, *in extremis*, are in favour of inaction and a peaceful death for all and those who are in favour of struggling lawlessly for survival. Those who commend Brook's attitude as compared with that of Dudley and Stephens seem to me to be expressing a preference based on taste rather than on an intelligible moral principle; the same would, to my mind, be true of those if there are any who express a preference for the attitude of Dudley and Stephens.

The reason why I have said that I think that Holmes *probably* ought not to be condemned morally is that it is not clear on the facts whether there was time to face up to the problem of selection. There certainly was quite a considerable lapse of time between the launching of the life-boat and the jettison of the passengers, but it is unreasonable to demand rational discussion among those striving to navigate and keep an overcrowded leaking life-boat afloat. If there was no time for a rational discussion I think that the occupants of the boat were morally under the law of the jungle from the moment of its launching. The crew, it seems to me, were morally released from their duty to the passengers provided of course that the case was clearly one of necessity.

It follows from what I have said that my reason for concluding that the surviving mariner on the plank is morally blameless is that he and his fellow sufferer were under the law of the jungle, *i.e.* the rule of *sauve qui peut*, from the moment they reached the plank.

Turning to the legal aspects of the cases we have been considering, I must begin by exposing what I consider to be some fallacies of Sir James Stephen. The first concerns the effect of the special verdict in *R.* v. *Dudley and Stephens*. Sir James Stephen was not a member of the court and showed as little sympathy towards Lord Coleridge's heroics as I have done, but he said that he agreed with the decision and would have based his judgment against the accused on the ground that the special verdict found only that if the boy had not been killed and eaten the survivors would 'probably not have survived'; he considered that, in this class of case, 'an error on the side of severity is an error on the good side.'[13] The fallacy lies in supposing that, in this class of case, a verdict of the nature of that demanded of the jury could be founded on anything other than probabilities. If Sir James Stephen was thinking of the distinction between probability and empirical certainty, all that need be said is that it is

[13] *Digest*, 10, n.2.

not a distinction which can readily be made intelligible to juries. As we are not told why, in the class of case under consideration, an error on the side of severity is an error on the good side, no comment is possible; but the observation may have been related to a second fallacy.

Sir James Stephen said that 'great danger would be involved in admitting a principle which might easily be abused.' In similar vein, Lord Coleridge spoke of the 'awful danger' of the principle contended for on behalf of the accused; he considered that it could become a legal cloak for 'unbridled passion and atrocious crime.' This may be termed the 'bogus defence' fallacy; the idea is that a defence which would be properly admissible if genuine must not be recognised by the law because it could easily be contrived. This is true of self-defence, but no one has objected to that particular head of lawful homicide. The bogus defence fallacy is responsible for a lot that is bad in criminal law; instances are provided by objective tests for criminal intent, the requirement that, as a matter of law, a mistake must be reasonable, and strict liability.

I consider that a third fallacy of Sir James Stephen is that there is a distinction between *R.* v. *Dudley and Stephens* and the plank case because the surviving mariner does no direct bodily harm to the other and leaves him the chance of getting another plank. Whatever the position may be in morals, it is surely impossible to make the legal distinction between criminality and total innocence turn on the difference between a foreseen direct and desired killing for the sake of survival, and an indirect unwanted but equally clearly foreseen causing of death by action taken for the sake of survival. The distinction is unacceptable to most lawyers even as something to differentiate murder from manslaughter.

I have said that I consider that Dudley and Stephens' conduct was immoral, but it is out of the question for the criminal law to enforce the vague moral obligation to go on trying to behave decently *in extremis* to which I have referred. The only other possible ground for refusing to recognise the defence of necessity in *Dudley's* case seems to be the theory of the maintenance of standards. It is on this ground that the author of an article in the *London Times*, a journal capable of being as facetious in 1884 as it is today, was opposed to the defence. 'It would be dangerous to tell sea-faring men that they may freely eat others in extreme circumstances, that the cabin boy may always be consumed if provisions run short.'[14] This particular appeal to the theory of the maintenance of standards is, however, nothing other than the fallacy of the bogus defence in different guise. If the defence of necessity is allowed, it may be abused by being raised although the moment of necessity had not arrived. This is a risk which

14 *The Times*, 7 November, 1884.

could well be taken, but the theory of the maintenance of standards applies with greater force where a pre-existing duty of protection and assistance was owed by the slayer to the slain.

This brings me to *Holmes'* case. Professor Howard has said:

> If the reason for admitting a defence of necessity . . . is that under extreme circumstances a man cannot be expected to act otherwise than in accordance with the instincts of self-preservation it can hardly make any difference that he happens to be a seaman and his intended victim a passenger. To seek to impose a duty of this kind at such a time is to take out of the law with one hand what has been put in with the other.[15]

There is much force in this, and that is why I have only said that it was probably right to hold Holmes legally liable. The argument against Professor Howard is that nothing must be done to weaken the high sense of obligation owed by crew to passengers and undoubtedly conceived of by the crew as extending beyond the moment of shipwreck. Would there be much point in talking about a duty if the law were to fail to punish altogether, or even to convict, in the case of what would certainly be regarded as a dramatic instance of its breach? I have said that the moral duty owed by a member of the crew to a passenger may be discharged by necessity. As in all cases where the law convicts those who are morally blameless, any punishment inflicted would have to be slight, and some may consider this to be a further argument against having a law which requires a conviction on facts such as those of *Holmes'* case.

I have said all that need be said in favour of the legal recognition of the defence of necessity in the case of the plank.

Conclusions.

Two matters of general purport emerge from the foregoing discussion. The first is that we must be on our guard against elevating matters of taste into moral principles; is not that exactly what we are doing if we applaud Brooks' quietism and condemn the drastic action taken by Dudley, Stephens, Holmes and the mariner on the plank? The second point is that heroics are to be avoided in law and morals alike. There may be those who consider that Lord Coleridge's judgment in *R.* v. *Dudley and Stephens* is an inspiration, but I am afraid that I regard it as a warning.

What of the maxim 'necessity knows no law'? Let it be granted that the law laid down by Lord Coleridge was bad law and that, even in the case of homicide, there is a defence of necessity at common law, the maxim is an empty one because the law had to tell us what necessity means in this context. Should this be left to the common law or should there be a statutory provision on the subject? Tasmania opted for the

15 *Australian Criminal Law*, 369.

common law in 1924, rejecting s.25 of the Queensland and Western Australian codes. It is all too easy to point to cases which appear to fall outside s.25 in which the defence of necessity should be available.[16] England is about to follow Tasmania's example in having a criminal code, perhaps she should take a further leaf from Tasmania's book and avoid all reference to the defence of necessity in her code.

16 S.25 reads as follows '. . . a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extra-ordinary emergency that an ordinary person possessing ordinary power of self control could not reasonably be expected to act otherwise.' It is doubtful whether any of the 'choice of evil' cases would be covered; see Stephen's *Digest* 10, n.2 and *R.* v. *Bourne* [1939] 1 K.B. 687.