

2010

The Speluncean Explorers--Further Proceedings

Anthony D'Amato

Northwestern University School of Law, a-damato@law.northwestern.edu

Repository Citation

D'Amato, Anthony, "The Speluncean Explorers--Further Proceedings" (2010). *Faculty Working Papers*. Paper 98.
<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/98>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Working Papers by an authorized administrator of Northwestern University School of Law Scholarly Commons.

The Speluncean Explorers—Further Proceedings by Anthony D'Amato*,
32 Stanford Law Review 467-485 (1980)

Abstract: Lon L. Fuller's *The Case of the Speluncean Explorers* is a classic in jurisprudence. The case presents five judicial opinions which clash with each other and produce for the reader an exhilarating excursion into fundamental theories of law and the state and the role of courts vis-i-vis legislatures and executives. Though the issues articulated by Fuller are timeless, the past thirty years in jurisprudential scholarship have produced at least one major new vantage point—the "rights thesis".

Tags: Jurisprudence, Legal Theory, Rights Thesis, Case of the Speluncean Explorers

[pg467]** Lon L. Fuller's *The Case of the Speluncean Explorers* [FN1] is a classic in jurisprudence. Set in the Supreme Court of Newgarth in the year 4300 the case presents five judicial opinions which clash with each other and produce for the reader an exhilarating excursion into fundamental theories of law and the state and the role of courts vis-i-vis legislatures and executives. Though the issues articulated by Professor Fuller in 1949 are timeless, the past thirty years in jurisprudential scholarship have produced at least one major new vantage point—the "rights thesis" as advanced by Professor Dworkin and others. [FN2] Simply stated, the rights thesis holds that there is a "right" answer, and only one right answer, in every case. The litigants have a "right" to that and finally—to add one more shade of meaning to the comprehensive term "right"—the answer thus arrived at is dictated by general requirements of justice. Since justice is a branch of morality, the "right" answer is not only correct but also right in a moral sense.

My purpose here is to examine how the rights thesis would apply to the Speluncean Case, and to do so in the spirit of my former teacher's presentation. Therefore, let us imagine that, right after the decision in the Speluncean Case was handed down, the Chief Executive of Newgarth constituted a Special Commission of three law professors at the University of Newgarth School of Law to present a recommendation on the question whether executive clemency should be extended to the convicted defendants.[FN3]

[pg468] OPINION OF PROFESSOR WUN

When I received news of the decision in this case, I was relieved that the Court had reached the only proper result. But later, as I read the opinions of the Justices, I realized how fragile the Court's decision really was. To recap the vote, Justices Handy and Foster voted for acquittal, Tatting withdrew from the case, and although Keen and Truepenney voted to affirm the finding of guilty they engaged in powerful pleas to the Chief Executive to extend clemency to the convicted defendants. Not one of them came even close to believing, as I do, that the defendants were clearly guilty of murder. Perhaps the most egregiously bankrupt opinion illustrating the Court's true feeling is that of Justice Keen, who found it necessary to resort to the old and discredited theory of positivism to prop up his conclusion. He insisted upon a separation between law and

morality, holding that "the law" required a finding of guilty even though his own morality would lead to a different result. Without repeating familiar arguments against this positivistic stance, it may suffice to ask what morality compels Justice Keen to insist upon a separation between law and morality.

Since I believe that matters of right cannot be separated from [pg469] matters of law, I might most efficiently begin by showing that what these defendants did is murder as a matter of morality, and only after that turn to the legal conclusion that murder was committed. As moral arguments are often best proved by analogies, let us consider four persons on the brink of death due to, respectively, a defective heart, diseased lungs, a destroyed liver, and a nonfunctioning kidney. Since their lives are at stake their "need" to have these organs replaced by healthy ones could not possibly be greater. We will assume that there are no replacement organs available. The four persons thereupon decide that they will kidnap a stranger who is in good health, take him to a medical office where they have several highly paid doctors waiting, kill the stranger, and have the doctors transplant his four healthy organs into the four conspirators. Four lives will thus be saved at the cost of only one, and the result can be said to have been objectively compelled by "necessity" and not by any personal malice toward the stranger or any wish to harm him.

I will assume that anyone would immediately conclude that these four persons would be morally guilty of murdering the stranger (and, consequently, that they should be prosecuted under the law for murder). But then, of course, we must ask whether there is any significant difference between the hypothetical and the Speluncean explorers. Certainly not because the victim was a stranger whereas Whetmore was known to the explorers. For the case would not be morally improved if the four persons needing organ transplants had instead selected a victim who had been friendly with them. But, one might object, Whetmore was involved in the same enterprise as the other explorers; that surely makes a difference. Yet consider the following alteration: The four persons, partners in a research team, had their vital organs damaged because their machine had broken and emitted omicron rays. A fifth coworker was also present, but miraculously she was not hurt. Are the four damaged individuals thereby entitled to kill her and transplant her organs simply because she was involved in the same enterprise and at the same time as they?

What of another possible distinction: that Whetmore was going to die shortly of malnutrition anyway, whereas the stranger in the hypothetical case was in good health? Does that fact give the explorers a moral right to kill Whetmore? What if the persons needing transplants read in the papers that doctors had informed a certain individual that he had only six more months left to live? Would they be justified in kidnaping and killing that individual because his interest in living only six months is negligible in comparison with the four [pg470] of them surviving for many years if they can have his organs? But even the six months can be questioned. The doctors might have been in error as to his good health; or the doctors may have been correct but a month later a cure could be discovered. Possibilities always exist, and they existed even for Whetmore. For the explorers trapped in the cave could not be *certain* that they would not be rescued the next

day or even the next hour. Suppose the engineers had been wrong or that another entrance to the cave had been found and the defendants had been rescued two hours after they had killed and eaten Whetmore; would the Justices of our Supreme Court have been as sympathetic about the murder?

Let us look more deeply at estimating the possibility of survival for the four defendants trapped in the cave and the four persons needing organ transplants in the hypothetical case. Surely we cannot coerce *them* to be optimistic about the chance of rescue or of some dramatic medical breakthrough. They have the right to assess the odds for themselves. My contention is simply that they cannot force their version of the odds for survival upon Whetmore or upon the individual who was told he had six months to live.

But such a conclusion does not mean that we should give them a privilege of acting "out of necessity" to harm or kill someone else. At the very most they might decide upon a procedure to save most of their own lives at the expense of one or more of their own number. For example, since each of the four persons needing transplants needed a different organ, any three of them could survive with the healthy organs of the fourth. Suppose the four of them are in the medical office and they put on the table four identical-looking pills, three of which are placebos and the fourth an instantaneous deadly poison. If each selects a pill one would die and his or her organs could immediately be transplanted to the others. Such a procedure, incidentally, would not involve any of them actually killing any of the others; at worst they would each be guilty of attempted suicide and the victim would be guilty of actual suicide. But from a moral point of view, I tend to believe at the present time—unless someone persuades me that I have not refined my personal code of morality sufficiently and that further thought would lead to a different conclusion—that the four persons had a moral right to decide that three survivors would be better than no survivors and that such a procedure would thus be justifiable. Note that the decision to go ahead with the pill-taking was the result of the informed consent of all four persons, each of whom arrived independently at the conclusion that [pg471] the odds of survival if no action was taken were negligible. The willingness to go ahead with this desperate procedure would prove the genuineness of each individual's decision as to the odds of survival.

Let us apply analogous reasoning to the explorers. Roger Whetmore, for his own reasons, which may have included optimism in a greater degree than any of the other explorers about the chances of an early rescue, did not want to participate in the cannibalism scheme. To be sure there are complicating elements: Whetmore first proposed such a scheme, he carried the dice used to cast lots, and he initially agreed to participate. Yet surely none of these points either in themselves or when taken together estops Whetmore to withdraw, or set up some sort of reliance by the others such that Whetmore could not fairly withdraw from the scheme. Their charging him with a "breach of faith" is outrageous. Such a charge might properly be levelled at one who attempted to withdraw from the scheme *after* being designated the victim, but it cannot be applied to a person who withdrew prior to the throw. Although the Justices of our Supreme Court have glossed over the significance of Whetmore's withdrawal, to me the point is of

critical importance. By withdrawing, Whetmore both avoided the risk of being killed by the others and denied himself the chance to survive if the others went ahead with their plan. He chose to risk nothing and had nothing to gain. Certainly such an action cannot be labelled as unfair to others.

The others, however, *did have something to gain* by including Whetmore. To be sure, by including Whetmore, the others were taking a risk that Whetmore might end a winner. Curiously, however, when we examine the odds involved, the fact that Whetmore could be a winner is not as significant as the fact that he could be the loser. Consider the: four men only. If one of them is to die so that the others will be saved, then each man's chance of dying is one in four, or 25%. If we include Whetmore, each man's chance of dying now becomes one in five, or 20%. In short, each of the four defendants in this case calculated—and they certainly did so calculate, for we know from the testimony that there was much discussion of the mathematical problems involved—that his own chance of survival *increased* by five percentage points from 75% to 80% if Whetmore was included. The forcible inclusion of Whetmore was distinctly in their self-interest. The motive for murder is clear.

Additionally we should not lose sight of the fact that the others had to *kill* Whetmore. A suicide procedure analogous to the pill-taking hypothetical might have been preferable in itself, but *such a [pg472] procedure was not available to them*. We know Whetmore refused to throw the dice. Clearly he would have refused to take a pill. By his refusal to participate, Whetmore placed the burden of action upon the others. They had to kill him. In fact, they murdered him.

Although I believe that the preceding arguments establish the defendants' moral guilt, I recognize the possible objection that my position against the "necessity" excuse in criminal law proves too much. Surely there are situations where necessity is a legitimate excuse. What if Whetmore discovered on the twentieth day that his pickaxe, which he purchased with his own money, had a hollow handle filled with condensed food pills to be used in case of emergency. Assume that there are enough pills so that Whetmore and his companions could survive for another two weeks. Assume further that Whetmore had come to loathe his companions and offers only to sell them food pills at astronomical prices. When his companions *accept* his price, Whetmore decides that they could not be trusted to pay once they are freed from the cave, and so he asks for immediate payment in cash. At this point, would his companions have the moral right to take some of the pills away from Whetmore by force? I would say yes. But the distinguishing feature of this hypothetical is that a *property right* is being sacrificed to save one or more lives, whereas in the real case we are considering that a *life* can be sacrificed to save other lives. In short, property-for-life involves rights on a different level, whereas life-for-life involves rights on the same level. And when we operate on the same level, necessity is not a justification. Even in a property-for-property case, for example, a man facing bankruptcy cannot justifiably steal money from someone else so that he can save his own property.

At first blush my analysis may appear to be challenged by *Commonwealth v. Valjean*, a case cited by Justice Tatting, which refused to accept the excuse that the

defendant stole a loaf of bread because he was starving. I suppose the court paused seriously over the trade between property and life in that case, but must have decided as it did because a decision in the defendant's favor would have had enormous disruptive consequences for society. For if the law were to allow the theft of property by a starving man, many people might soon put themselves into a condition approaching starvation (for example, by first squandering their money in a gambling parlor) and then use that condition as an excuse for stealing food or money without restraint. Thus the harshness of the result to the defendant in *Valjean* is dictated by the need to deter others from exploiting such [pg473] an "excuse." In contrast, the facts of the speluncean explorers clearly preclude the possibility of general exploitation for the purpose of obtaining nutriment.

Suppose we alter my hypothetical so that Whetmore finds enough pills only to keep one person alive for two weeks. Then if the others force him to share the pills, each will be kept alive for two or three days, but not until the rescue team breaks in ten days later. In that case, Whetmore would be justified in keeping all the pills for himself. But then this is not a case of property winning over lives, it is still a life-for-life case. For if the others forcibly took away from Whetmore the pills he needed to survive, they would be killing him, even though they may have then redistributed to Whetmore a two- or three-day supply equal to each of theirs. Thus even the *Valjean* case, upon further reflection, may be seen as a life-for-life case and thus explainable as directly analogous to the real case of the speluncean explorers. For if hungry people could steal loaves of bread, farmers would not grow as much wheat and bakers would not make loaves of bread for sale to others. The shortage of food would mean that all would starve, including the farmer, since starving men would take away all of his wheat. Allowing theft not only destroys the incentive to produce in order to sell to others, but also destroys the ability to grow wheat for one's own consumption, since as soon as it is grown it will be stolen by hordes of starving people. In brief, it may be very hard to find a true "necessity" case. And if my first pickaxe hypothetical example is such a case, it is different from that of the speluncean explorers.

Let us turn now to the legal analysis, which is coincident with the moral argument previously given. Clearly the statute under which the defendants were convicted covers the present case. Section 12-A of the Consolidated Statutes of Newgarth, N.C.S.A. (N.S.) § 12-A, provides: "Whoever shall willfully take the life of another shall be punished by death." I do not have to explore the question whether this statute admits of exceptions, and I need not repeat the arguments of the Justices of our Supreme Court on the question whether self-defense is one such exception. Suffice it to say that if the statute does allow for exceptions, "necessity" is not one of them since it is a life-for-life and not a property-for-life case.

Nor am I troubled by Justice Foster's argument that the explorers, trapped in the cave, were removed from the jurisdiction of Newgarth and hence the law cannot be applied to them. For one thing, the explorers are nationals and citizens of Newgarth, and on that [pg474] basis our criminal laws may be extended to them even if they were outside the territorial limits of Newgarth. (Of course they were not; they were in a cave

within the Commonwealth.) Second, they killed a national of Newgarth and thereby harmed the Commonwealth itself; accordingly Newgarth has a right of vindication through its criminal law process. Third, the defendants expected to be rescued by citizens of Newgarth, and hence their "captors"—the first persons who would have jurisdiction over them—would be persons subject to our laws. Fourth, the taking of the life of another is the gravest possible violation of a human right enjoyed by everyone wherever located. Even if Judge Foster were correct that legislative power did not reach these explorers in their cave, our laws would provide a statutory" and administrative basis for enforcing the universal prohibition against murder whenever perpetrated.

Finally, legal analysis requires us to consider the purpose of the statute. The purpose of the present or any other criminal statute is not primarily to punish someone for a past act, but to deter the act from ever taking place. Such statutes institutionalize rights—the rights accorded to every person to *not* be the victim of criminal acts. The purpose of the statute in the present case, therefore, is to give to potential murder victims the protective power of the state. We might imagine Roger Whetmore saying something like the following to the four explorers as they advanced upon him: "What you are about to do is to commit murder. If you do so, and you survive and are rescued from this cave, the Commonwealth of Newgarth will try, convict, and execute you for murder. So do not attempt to kill me. I have not participated in your casting of lots, and you have no rights against *me*. Either try to hold out a while longer, as I have decided to do, or else do whatever you feel you must among the four of you alone. But do not include me; the law protects me against death at your hands."

Some such statement, I submit, is the only protection that the Whetmores of this Commonwealth may have when they are outnumbered and cannot protect themselves. As I have said earlier, the situation need not be so rare as explorers trapped in a cave; it includes my organ-transplant hypothetical, and any situation where a potential victim must rely on the law for protection. Our Supreme Court has upheld the law. Certainly as Chief Executive you should not undercut the sanction provided by the statute by commuting the sentence. What the defendants did in this case they did willfully. They acted out of self-interest, to increase the odds of their individual [pg475] survival by forcibly including Whetmore. Now each defendant should pay fully for the murder he committed to advance his self-interest at the expense of the life of another.

OPINION OF PROFESSOR TIEU

As my colleague Professor Wun knows, I have always found it difficult to accept any conclusion he reaches. The present case is the clearest example so far. I believe that the four defendants are innocent of any crime. Since I disagree with Professor Wun's conclusion but not his logic, the difficulty must lie in his premises. His position rests upon a common, unstated, and usually unchallenged assumption that we are all discrete individuals and that the laws of murder provide an essentially nonrational zero-sum game rule for individual players competing with each other. I disagree with his implied definition of human life.

At the most fundamental level, the possibility of human life on earth rests upon the fate of the group, not the individual. The truism that "man is a social animal" tends to hide under a mask of triviality the ultimate fact that for the human species to survive, the individual must be subordinated to the welfare of the group. If, for example, a terrible disease destroyed all but a very few members of the human race, and left only a handful of these capable of reproduction, nothing would be more immoral than to sacrifice these fertile survivors before the others.

Because people have minds of their own, they tend to think that their own welfare has supreme value. Yet the desire for group preservation, over and above individual preservation, has stronger roots. To fully appreciate this point, we might profitably consider two kinds of behavior observed in other species: the warning behavior and the leadership phenomenon.

An impala will warn the rest of the herd if it spots a nearby lion; the repeated warning snorts enable the herd to run away, but the warner risks its life. A gazelle warns its fellows by leaping repeatedly stiff-legged on all four feet. Yet this permits an approaching pack of predatory dogs to catch up with the gazelle that gives warning even though the rest of the herd escapes. What is noteworthy about these and other instances that have been reported of the "warning" function is that, under standard evolutionary theory, the warners should have been "selected out" eons ago. Clearly what is happening is that the *group* is being saved by an hereditary characteristic that causes the death of some of the members of the group. Species survival [pg476] exceeds the survival of individuals, and it is not extinguished even though the individuals who give the warning are sacrificed.

As a further behavioral example, within a given territory or grouping of like animals, a particular animal is deferred to as the leader of the group. The leader is easy to identify; it is usually given the best food, choice of mate or mates, and the other animals respond to its movements as if they are commands. Should the leader be killed, the group will find an individual animal—who previously had only been a follower—to inherit the leadership mantle and assume that position. From an evolutionary point of view, the problem here is not the extinction of the leadership characteristic as it was in the case of warners, but rather why the leadership trait has not become dominant. The leader of the group typically has the most offspring (due to choice of mates and other perquisites of leadership) and yet, over the centuries, the group's "follower" characteristic has not been extinguished. The answer, again, must be that leading and following are not individual characteristics but rather are functions of the group.

The "warning" and "leadership" behaviors have always been a part of human society. We have many words that indicate behaviors similar to the sacrificial warning behavior of animals: courage, heroism, martyrdom, nobility, gallantry, altruism, and so forth. When a group of people—or a nation—is endangered, these traits blossom forth in some individuals so that the group may be protected. Yet self-sacrifice is not selected out; courage and heroism never die. Similarly, leadership—not only political but also in

the arts and sciences and in social groupings—is a commonplace event. We are in fact *so* accustomed to these behaviors that their importance has to be stressed here.

One could object at this point that I have only *described* behavior in some animals and some humans that points to the paramountcy of group survival, and that we cannot derive from this description a normative statement that would govern how all humans *ought* to behave. In other words, an "is" cannot produce an "ought." My reply is twofold. First, I deny that an "ought" does not follow from an "is." Our entire normative mode of reasoning rests upon our conviction that some things, as a consequence of their existence, should be maintained. For example, our life-supporting environment is a fact; from it we derive the proposition that we have a duty to maintain the environment not only for all humans in existence but for future generations as well. The very notion of a normative principle can have [pg477] no meaning if it excludes the most fundamental imperative of all: that since human life exists, it ought to be maintained. If we cannot conclude from the fact that human life exists the proposition that it ought to continue to exist, then, I submit, we do not really know what is valuable, and without this, we cannot know the meaning of the term "ought" at all. In my previous examples, we saw that a group of animals could owe its continued existence to the genetic trait manifested in some of them who, at sacrificial cost, warned the rest of imminent danger. The only one who could conclude that the warning behavior was valueless would be one who denies that there is any value whatsoever in living. Such a person could not give any meaning to the term "morality," much less comment on whether morality can be derived from fact. Those who understand what "morality" means ultimately trace their understanding to observations of fact. Second, even if I must assume for the moment that "ought" cannot be derived from "is," my previous examples reduce to highly suggestive claims. Anyone looking dispassionately at the warning behavior in a social grouping of animals would have to concede that nature is trying to tell us something! And what nature is saying, rather unambiguously, is that "life" consists of the continued existence of the group rather than any of its members.

So far I have been somewhat abstract in defining the "life" of a group, and the definition should be made precise. Each particular animal is the manifestation of the blueprints of its genes, and the carrier of those genes. Bodies are in reality only the temporary supporters of the genes. The living genes are truly immortal, so long as the species which supports them continues to survive.

From this last observation I derive the ultimate moral imperative: that one may not destroy the possibility of reproduction. I think we have always perceived this fact even though it tends to go unnoticed in the routine of our lives. What are our laws but expressions of concern for group survival? From the lowliest traffic ordinance to the prohibition against genocide, the laws bespeak social preservation. If the perceptions of how society is best preserved change, the laws will surely change as well—even laws which seem clear and unchangeable. As an example, we might briefly reflect upon the history of abortion.

In the period following the Great Spiral, there was a perceived fear that human life might be snuffed out completely. Our numbers were small and the conditions of living were harsh. At that time a human fetus was considered a "life in being" and hence abortion was [pg478] universally condemned as "murder" under the laws. But after several centuries of population growth and normal conditions, the laws against abortion were honored more in the breach than in the observance. Although religions continued to consider abortion a grave sin, hardly anyone was criminally prosecuted. Finally, in the modern era, overpopulation, and not underpopulation, is considered a grave threat to human survival. As the peril of overpopulation has become perceived and absorbed by the public and by the lawmakers have witnessed the total legalization of abortion. We have witnessed a historic change in the popular conception of a human fetus; it is longer a "life," but rather, the mere possibility of one. Although religious institutions have been the slowest to react, we are also seeing changes in their doctrine. The very definition of "life" for the purpose of our laws against murder thus reflects a differential societal perception of the danger to human survival.

What of the more typical case of "murder"? Why does our statute provide that a human being who kills another shall forfeit his own life? If capital punishment is appropriate in our modern age of an overpopulated world, how could it ever have been appropriate in conditions of perceived underpopulation? Capital punishment was conceived for the purpose of deterrence. Even in an underpopulated society, the best way to ensure the minimum number of intentional killings is to threaten the killer with the loss of his own life. Unfortunately, in those few cases where the threat fails, society must exact capital punishment *not* because it has "promised" to do so or because vengeance is necessary, but rather—and only—to ensure the threat's credibility to future potential murderers. We have historical examples where, despite the statute, the penalty is not exacted. In time of war, when there have been severe shortages of military personnel, a convicted murderer will not be executed but will be sent into the front lines. Society does not want to "waste" even convicted murderers when, by being sent to the front fighting lines, they will contribute to its survival.

The foregoing considerations serve to indicate the narrowness of my colleague Professor Wun's individualistic approach to the present case. He views the law of murder as analogous to the rules of a game. He is afraid that the game will be impaired if the game rule is not applied to the four men who killed Whetmore. But why does he not inquire into the purpose of this game? Why do we have a *law* against murder? What values are at stake? These are the questions [pg479] that go totally ignored in the one-dimensional approach of my colleague.

Under the view that I have outlined, we should consider the five explorers trapped in the cave as a total society. We do not have to do this in the same somewhat artificial sense expressed by Judge Foster. Rather, we can consider as a fact that the group existence of the five men would be terminated entirely unless they undertook strong action.

To survive, they had to kill and eat one of their number. We might draw an analogy to an individual who has to amputate a diseased limb that would otherwise threaten to destroy his body. (Similarly, the "body politic" in the cave had to kill one of its members to preserve the corpus.) As important as a leg or arm is to an individual, he or she should not hesitate to amputate it if that is the only way to preserve the life of the body. And, I might add, it is not essential to my analogy that the arm or leg be diseased. If one's limb were hopelessly trapped beneath a railroad tressle, amputation to avoid being killed by an oncoming train would be gruesome, but entirely rational. No religious prohibition of self-mutilation could make any sense in such a case. But then how can Professor Wun think that what the explorers did was in any sense immoral?

To the contrary, the most immoral act that we can conceive would be to terminate the life of the group. Conversely, one of the highest acts of morality is to preserve the life of a group. The explorers trapped in the cave must have sensed the force of this moral imperative. Despite all their previous training and all their previous social experiences and learned taboos, they had to reach the decision to engage in cannibalism in order to survive.

I could end my argument at this point, but perhaps it might be helpful for avoiding misunderstanding to spell out the acceptable procedures for implementing this moral imperative. Had one of the explorers been the "leader" in the cave, I would see nothing wrong with that leader *selecting* the victim whose flesh would provide the life-saving nutriment to the others. I would not second-guess the selection. Fairness in selection is as unimportant when the life of the group is at stake as it would be absurd, in my self-mutilation hypothetical, to have to be "fair" to all one's fingers if one of them has to be sacrificed. Thus the leader in the cave might base his selection of a victim on a ground as arbitrary as that suggested by Judge Tatting: Kill the one person who believes in afterlife, since the harm to him would be the least. Or it might be to kill the oldest, or the poorest, or [pg480] the fattest. Or—to take care of Professor Wun's position—the decision might be to kill any individual who did not want to participate in the plan for group survival. Indeed, it would make no difference to me if the leader were to "reward" the person who *first proposed* the idea of cannibalism as a means of saving four out of five lives by selecting him as the victim.

Now, in fact, there was a "leadership" principle working in the cave, manifesting itself in the form of a democracy rather than an autocracy. The leadership was that of the group; its will became the ruling principle. It decided, in its wisdom, to give Roger Whetmore an even chance with the others in the throw of the dice. I do not consider that to have been a necessary part of the selection procedure, but the democratic nature of the proceedings in the cave certainly does not hurt my overall argument. Perhaps the "leadership" that emerged in the cave could only have emerged if it were grounded, as it was, upon conditions of fairness and equality. No matter. The fact is that four men survived. Had the leadership principle not emerged, the rescue party would have found in the cave five dead speluncean explorers. Would such a scene have been fair repayment for the tremendous efforts of the rescue party? Yet those who now want to execute the group for the crime of self-preservation would essentially recreate such a scene.

There has been no violation of N.C.S.A. (N.S.) § 12-A stating that "[w]hoever shall willfully take the life of another shall be punished by death," since we must construe "life" as the life of the group in the cave, as we would in a situation where the entire society's future existence is imperiled. It is with the greatest irony, then, that we must conclude that the only person in this case who could violate the statute would be the public executioner, if he is allowed to proceed to execute the four defendants. He *would* be "willfully taking the life of another." As Chief Executive, you need not be an instrumentality in the derivation of an immoral conclusion from absurd premises. I urge you to pardon the defendants.

OPINION OF PROFESSOR THRI

I recommend that you commute the sentence of the four defendants to several years' compulsory service in a hospital or similar place where they can help save the lives of others, for I believe that the defendants are neither guilty nor innocent of the crime of murder. Lest my position appear a compromise between those of my colleagues, I hasten to point out at the outset that no true compromise [pg481] between their extreme positions appears possible. They present a thesis and antithesis on what constitutes "life." Even so, I want to draw upon aspects of each of their separate opinions in constructing my own synthesis.

Let me start with Professor Tieu's argument that the relevant unit in this case is the group and not the individual. As she well knows from our many discussions, I reject the metaphysics upon which she leans in fashioning a larger-than-life portrait of the group or the state. But metaphysics aside, I find her present argument nothing other than the old, and I should have thought discredited, philosophy of utilitarianism,

A classic objection to this form of utilitarianism is that in practice it becomes the tyranny of the majority. A society may, for example, enslave members of a different race, and then justify the continued system of slavery on the ground that the harm to a minority (the enslaved) is outweighed by the happiness and luxury afforded to the majority (the citizenry). There is a similar danger in Professor Tieu's espousal of the arbitrary grounds for selecting the explorers' victim. If Whetmore were selected arbitrarily, the procedure would be as morally unjustifiable as the perversion of utilitarianism that justifies slavery. I think Professor Tieu's argument would be improved if she *required* that each person in the cave be subjected to an equal chance of being killed. In that permutation we might see utilitarianism in its pure form.

But even with the proviso of fairness in the selection of the victim, her argument would still be vulnerable. Suppose a crime is committed which causes great public outrage, and many lives will be lost in riots if the killer is not apprehended and brought to justice quickly. If the police cannot find the killer, utilitarianism requires that the authorities select an innocent person as a scapegoat, manufacture evidence, and convict him. Many lives would be saved at the expense of one, although the law is perverted. Similarly, utilitarianism would condone Professor Wun's organ-transplant hypotheticals,

which save several lives at the expense of one. Since all these examples are logically required by utilitarianism, we can only conclude that the philosophy does not express a moral system.

But despite my criticisms of Professor Tieu's philosophical premises, I want now to derive an important argument from her insistence upon the group as the relevant unit. Her simplistic vision of the "group" usefully summarizes a complex set of mutual reliances. The explorers were in fact engaged in a cooperative enterprise. In general [pg482] when a person decides to join a society to go spelunking in the company of its members he knows by the very nature of its being a joint expedition that the others will support him if a common danger or emergency arises. Indeed, this is why explorers tend to work in groups. A solitary explorer would be taking enormous risks of being disabled and being unable to summon help. Even in a two-person exploring team, if one is hurt and needs continuous attention, there would be no third person to summon assistance. We can readily see; that important safety increments may be added as each marginal person joins the group. We might well infer that in the absence of any other evidence, Whetmore's decision to go exploring with the others may have been critical in their decision to go exploring at all. They may have decided that safety considerations required five; and, impliedly, all five would have to undertake to pitch in to ensure group safety. In short, Professor Tieu is right in her criticism of Professor Wun's "zero-sum game" approach. Clearly the explorers were not engaged in a mutually antagonistic or competitive enterprise going into the cave or even when the landslide sealed off the passage.

It is in this sense that a coherent meaning can be given to the charge by the four defendants that Whetmore was guilty of a "breach of faith " when he withdrew from the lottery. Professor Wun assumes the charge was based solely upon Whetmore's withdrawing from the lottery after having suggested it was the right thing to do. But a more reasonable explanation of their charge is that Whetmore had no right not to contribute to the solution of the emergency that threatened all of them, just as he would have had no right to refuse to take his turn at chopping through the wall of the cave if that had been a feasible means of escape. When he joined the group, Whetmore knew that he was committing himself to *full participation* in the event of emergency. If Whetmore at the outset of the exploration had declared that if he was not in the mood when an emergency arose he would feel no obligation to do his share in helping to meet it, we can be quite certain that the others would not have accepted him as part of their group.

If Whetmore had no right to withdraw from the group's attempt to meet the emergency, does it follow that the defendants had a right to include him in their lottery and to kill him when he emerged the loser? If I could answer this question affirmatively, I would reach the same result as Professor Tieu and conclude that the defendants are innocent of any crime. However, the argument stops short of fully convincing me because of the following objection. [pg483] In joining the group Whetmore implicitly agreed to do his share of the work and to participate in the handling of emergency situations. Thus if the combined effort of five men could have moved the boulders that sealed the cave, he would have had no right to refuse to participate. But there are two

limits, each decisive, to the inferred agreement to participate in an emergency. First, joint exploration does not require that any person be required to risk his *life* to save the others. Such an act of moral altruism is rare in any circumstance and certainly has never been a part of normal expected behavior. A mountain climber, for example, might slip and be placed in mortal danger; the others in the group must do everything to help her save herself, but they are not expected to risk their lives to save hers. (Of course, I am talking of a meaningful risk of life, and not a negligible one which might indeed be present in any exploring venture; in fact, I am talking about a 20% risk of life, which was the chance in the lottery in the present case. Second, even if we concede that the explorers agreed to risk their lives to save another in an emergency, the situation in the cave was entirely beyond their agreement. In the normal case a risk is undertaken in which all might be saved. Rescuer and rescued combine to overcome a situation so that both will survive. But in the cave the explorers had passed that point. The boulders were unmovable. Nature had already won. Indeed, the exploring enterprise was over, for no amount of effort, no degree of risk against nature could make any difference. It was inconsistent with the idea of a lottery that everyone could survive. Therefore such a situation was not at all contemplated in the agreement to go exploring. Whetmore had not lost the right to choose not to be a part of a pact that would result in certain death ; “by inference” when he originally agreed to go exploring. It is clear that unless another argument is made on behalf of the defendants, the “group” argument is insufficient to exonerate them.

But such an argument can be made, I believe, if we examine closely the reasoning relating to the defense of “necessity” in Professor Wun’s I opinion. Professor Wun disclaims total opposition to the “necessity” argument. Clearly his own hypothetical example of Whetmore finding food pills in the pickaxe handle is a compelling case for allowing such a defense. This Commonwealth certainly recognizes that each human being has a privilege, if survival is at stake, to appropriate the property of another. It is a property-for-life case, and the defendants in the pickaxe hypothetical would have a legal [pg484] right to take the pills by force, so long as they left Whetmore enough pills so that *he* could survive.

The problem that I have with my colleague’s reasoning is his easy assumption that the speluncean explorers is a life-for-life case. My colleague argues that when Whetmore tells the others; that he has withdrawn from the scheme, they could have excluded Whetmore and proceeded to work out a suicide pact among themselves. Accordingly, one of the four would lose and would have killed himself. The three would be entitled to eat his dead flesh, and Whetmore, having excluded himself from the total arrangement, would not be so entitled. But here is the flaw in my colleague’s reasoning. At that point Whetmore *would* be entitled to eat the nutriment, since it is no longer a “life” but is merely the “property” of the other three explorers. The fact that his withdrawal from the lottery was conditioned upon his subsequent disinterest to partake of the nutriment is nothing other than a statement that the other three explorers have a property interest in the dead body. Yet this interest can legally be overcome when a life (Whetmore’s) is at stake, just as in the pickaxe example a property interest in the pills can be overcome when survival is at stake.

We can well imagine what would happen a day or two after one of the four explorers died and the others are surviving on his dead flesh. Whetmore might beg for food, he might repent his "ill-advised" decision not to participate in the lottery, and he would surely point out that there is ample food for all to survive for ten more days, and that their insistence upon excluding him now would mean that he would die when he could otherwise survive at no cost to them. An argument exists for Whetmore to the effect that the others will be guilty of murder if they deprive him of the nutriment. For if he has a legal right to the nutriment—a right based upon the property-for-life argument from "necessity"—then they have no right to deprive him of it. Such a deprivation would in fact amount to murder.

Thus we arrive at the conclusion that there was no way legally for the others to exclude Whetmore from surviving on the dead flesh of one of their number. Or to put it differently, at the moment Whetmore withdrew from the lottery, he was in effect, if not consciously, trying to ensure his own survival at no risk to himself. Clearly the law cannot single out one person for special treatment, requiring the others to risk their own lives to save Whetmore. Conversely, the others were legally justified in forcibly including him in their lottery.

[pg485] We now have the argument in behalf of the defendants. First, the "group" argument operates to show that they had a right *to some extent* to rely upon Whetmore's participation. Second, the "necessity" argument indicates that there was no reasonable nor fair alternative to their forcibly including Whetmore in the lottery. But while these two arguments distinguish the present case from Professor Wun's organ-transplant hypotheticals, the defendants are not completely innocent. They took a life, and they profited from it; technically, they violated the statute. Yet if it ever made sense to have a pardoning power, it makes sense to have it in a case of technical violation of a statute where a substantial justification can be advanced for the violation. And the pardoning power is not an all-or-nothing tool. The defendants' sentences can be commuted to *lesser* penalties. I would urge that the defendants be sentenced to three or four years' compulsory service in a hospital or similar institution where they may be in a position to save the lives of people who need help. In that fashion, I believe, exact justice will have been achieved.

Footnotes

*Copyright 1980 by Anthony D'Amato, Professor of Law, Northwestern University School of Law.

**Numbers in the format "pg467" etc. refer to the original publication.

[FN1] Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

[FN2] See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 163-210 (1975); *Jurisprudence Symposium*, 11 GA. L.

REV. 969-1424 (1977). *See also* D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63 (1979).

[FN3] Five members of the Speluncean Society—the four defendants and Roger Whetmore—left indications at the headquarters of the Society concerning the location of a cave they proposed to explore. Upon their failure to return, the Secretary of the Society organized a rescue party. The rescue party found that a landslide had blocked the only known entrance to the cave, sealing the explorers inside. The task of rescue proved to be greatly expensive, new landslides occurred, several rescuers perished, and success was only achieved on the thirty-second day.

On the twentieth day of their imprisonment the explorers established radio contact with the rescue camp. The engineers outside informed them that it would take at least ten days to release them even if no new landslides occurred. The explorers then asked for a medical opinion whether they would be likely to survive without food; the reply was that there was little possibility of survival. Whetmore, speaking on behalf of himself and the others, asked whether they would be able to survive for ten days longer if they consumed the flesh of one of their number. The physicians reluctantly answered in the affirmative. Whetmore then asked whether it would be advisable for them to cast lots to determine which of them should be eaten, but no one in the rescue camp was willing to answer. When the imprisoned men were released it was learned that on the twenty-third day Whetmore had been killed and eaten by his four companions.

Testimony established that Whetmore first proposed that cannibalism might make it possible for four members to survive. He also was the one who first proposed the use of some method of casting lots. The defendants were reluctant to adopt so desperate a procedure, but after deliberation, including much discussion of the mathematical problems involved, agreement was finally reached on a method of determining the issue by the use of dice.

Before the dice were cast, however, Whetmore 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 defendants cast the dice for him, 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 put to death and eaten by his companions. *See Fuller, supra* note 1, at 616-18.