

1. Summarise each of the rulings above. Characterise each as one of the three interpretation of law above and justify.

The fact of speluncean case - This is a story about five explorers who were bound to kill one of their members to save four lives when they were trapped in a cave for 32 days without food. After their rescue, the three survivors stood on trial for murdering their colleague, named Rodger Whetmore by casting lots. It is allegedly said that Whetmore first proposed the lot casting and later refused to participate in it, claiming for more days to wait for rescue. However, the other members urged him to join the casting and unfortunately he was appointed to death. On the basis of this verdict in court, the trial judge ruled that the defendants were guilty of murdering Rodger Whetmore. The judge sentenced to be hanged. After the release of the jury of the court, however, its member joined in a communication to the Chief Executive asking the sentence be commuted. The trial judge addressed a similar communication to the Chief Executive.

With this case, there are still many arguments whether and why the three defendants are innocents or guilty. In here, there are 5 Chief justice, Truepenny, Foster, Tatting, Keen and Handy who have different opinions on this matter with different views on law.

1) Truepenny, C. j

Truepenny thinks the jury and the trial judge followed only the law of Commonwealth in dealing with this extraordinary case without wise and fair consideration on the tragic situation which the defendants were put in, According to the letter on Commonwealth statute , whoever willfully take the life of another shall be punished by death. That is , there's no exception applicable to this case under this law. However, Tr-upenny thinks the principle of executive clemency seems suited to allay the rigors of law and propose to his colleagues to join in the communications to the Chief Executive. He firmly believes some clemency will be granted to the defendants. Because it's highly unlikely that the Chief Executive would deny the requests unless he were to hold hearings as extensive as those involved in trial. So, if the clemency were granted, the justice in this case will be well accomplished without violating the law or impairing the spirit of the statute.

Trupenny's assertion on clemency to the defendants can be viewed by the perspective of positive law. Although it doesn't fully implement the law related to this murder, it doesn't deviate from it, either. Trupenny knows that the defendants kills their colleague, which is definitely murder under the criminal law in Commonwealth Statute and he also has sympathy toward them and their tragic fates. So he decided to ask Chief

Executive to communication who is to be believed to have a authority to reduce the sentence. In this way, he thinks we can observe our law and also save the defendants out of death. Incidentally, Truepenny insists considerations on the situation of the explorers are needed before the executions are conducted.

2) Foster, J

For starters, Foster objects to the clemency proposed by Truepenny. Because he thinks more reasonable standards are needed than sympathetic emotion toward the fates of these unfortunate explorers. He thinks appealing to a dispensation resting within the personal whim of the Executive is equal to the admission that the law of Commonwealth no longer play its role as a incorporate justice.

Now Foster explain two independent grounds to justify the acquittal of the @y defendants. Th e first of these ground os enacted or positive law of Commonwealth, including all statute and precedents, is inapplicable to this case and this case is governed instead by "the law of nature." Because the positive law is based on the possibility of men's coexistenceand regularity the rel@tions of human lives

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of natiu@rea@laW@LhOI7L4iliscpca@s"e is the tac jurisdiction rests on a territorial basis, too. The premise of men's coexistence in a group underlines the territorial principle. In this case, the explorers were as areremote from our legal order when they made their fateful decision as if they had been a thousand miles away from our territory.

Foster acknowledges the decision to take Whetmore's life by the defendants were made in a late of nature. Therefore, The law applicable to them is the law derived from those principles that were appropriate to their condition. Under these principle(natural law and geographic confin@, they are innocent of any crimes. Foster's second ground starts from rejecting all the premise so far proceeded. In the second ground, the consolidated constitute of Commonwealth has the power to penetrate five hundred feet of rock and to impose the starving explorers in the cave. So it is clear these men violated the literal words of the constitute, saying "Whoever willfully take the life @ another is murder." But he also dredge up a4c-ient legal wisdom which says "a man may break the words of the law without breaking the itself." This indicates that centuries ago killing in self-defense was acce@@le The problem is that there's no words of the modern statute suggesting this e,<ception. To overcome this problem Foster claims that the exception in favor of self-defence cannot be reconciled with the words of the statute, but only with its purpose. That is, one of the principle objects of criminal law is@ men from crime. Now i-t comes to be apparent that the same reasoning is applicable to this case which the defendants and no way but to kill and eat one of their members to survive, And so they are innocent by the self-defense theory. Foster's two explanation above are viewed by the natural law and social science,

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respectively. The first claim is the defendant were in a state where the Commonwealth law can not operate morally and geographically. And the power of government can only be justified on the ground that the reasonable men would agree upon and accept if they were faced with the necessity of constructing a new some order to make their life possible. So this case must be dealt with under the natural law. The second ground, application of self-defence, is characterized by social science. Sociological jurisprudence is based on the belief that the law is human and never absolute. It's based on experience like precedent case. Foster makes an example for the excuse using commonwealth v. staymore. In this case, the punishment on the defendant skwtd set aside

the judge make an allowance on defendants at the scene of arrest. So the withdrawal of this speluncean case from the effect of the statute is justified by precisely the same conditions applied by predecessors to the case of the case of self-defense.

3) Tatting, j

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Put simply, Tatting, @withdrawal from the decision of this case. Because, when he tries to accept Foster's view, he is repelled by the absurdity that these men be put to death at the cost of the lives of the workmen who saved the lives of the defendants. Ayldhe concludes it had better not to indite them if there's no proper and suitable charges to the fact of this case.

Tatting, j raised a question, if the defendants passed from the jurisdiction of the commonwealth statute to the law of nature, at what moment did that occur? And by

@at authority do we resolve ourselves into a court of nature? All the judges@f the **are -Me A'pporn@@LO@**

commonwealth of the Newgarth and sworn to administer the law of commonwealth , not the natural law. Although the defendants were under the law of nature, the judges

are not in a state of nature. Therefore, there's a absurdity between,,the natural law. **the -Wgps uxder4e@@ffi-**

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@i s more fundamental than the *law* of murder, Foster looked over Whetmore's withdrawal. He was reportedly attempt to withdrawal, but the others enforce the contract to him by violence. Therefore, there are m@ uncertainties in the first doctrine proposed by Foster. In the second part, Foster claims the application of excuse of self-defense to this case, citing the purpose of the law. However, Tatting says the excuse of self-defense only usable for the man who repels an aggressive threat or attack to his life unwillfully in response to an impulse deeply ingrained in him. Now the excuse of self defense can not be applied to this case. Because these defendants acted not only willfully but with@great deliberation after discussing for hours what they should do. Speaking to the precedent case supposed by Foster, Tatting shows us the case of Commonwealth v.Valjeanin which the court refused to accept the defence conducted by a famine-ridden defendant when he tried to steal a

bread. If hunger can not justify the theft, how can it justify the killing and eating of a man? And many other precedents

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have been built on this case afterward.

Like this, Tatting's critique on Foster's two independent opinion can be characterized by positive law and social science, respectively. He points out several problems rising from the gap between natural law and positive law and the defects of natural law. In the second view, Tatting strikes back against Foster's self-defense principal by detailing condition for the excuse of self-defense and the precedent case.

4) Keen, J

Keen focuses on the question of whether these defendants did willfully take the life of Rodger Whetmore. The exact language of the statute says, "Whoever shall willfully take the life of another shall be punished by death." With this, now everyone admit that these defendants did willfully take the life of Roger Whetmore. However, Foster doesn't accept the fact that the written law requires the conviction of the defendants by stressing on the purpose of the Commonwealth statute and suggesting the self-defense. And Tatting opposes to the Foster's opinion in the perspective of positive law. Both Foster and Keen do not like the fact the written law requires the conviction of the defendants. But unlike Foster, Keen thinks he has to respect the obligation of an office which requires him to put personal prejudice out of his mind when he interpret and apply the law of Commonwealth. And the difference between Tatting's opinion and Keen's opinion on the excuse of the self-defense whether there is a consideration on the scope of the rule. Keen thinks, as in dealing with the statute, so in dealing with the exceptions, the question is not the conjectural purpose of the law, but the scope of it. Self-defence applies **to** the case of resisting an aggressive threat to the party's own life. And it is clear that Whetmore made no threat against the lives of the four defendants. Therefore, this case doesn't fall within the scope of the exception.

Keen's new opinion on the scope of the rule throws new sight into this case. Foster first proposed this principle by muddling through the issue of the purpose of law and Tatting's disregard on the letter of the written law. Keen added the explanation of the scope of the law on Foster's opinion. So Keen's view also characterized as a positivist perspective.

5) Handy, j

Handy, j approaches this case in a easy way. Within the practical wisdoms and realities, he introduces certain realities that judges above had ignored. The first one is this case attracted enormous public interest within here and abroad. One of the famous newspaper made a poll on the question, " what do you think the supreme court should do with the speluncean explorers?" About 90% agreed that the defendants should be pardoned or let off with a kind of token punishment. This poll tells what the judges should do and what they must do to preserve reasonable and decent accord between

judge as government official and public opinion. There's possible attack against this, say, public opinion is emotional and capricious. However, given there're four general ways to escape punishment in criminal law - determination by a judge, a decision by prosecutor not to ask for an indictment, an acquittal by the jury and a pardon or commutation of sentence by the executive - no one can assert that these decisions prevent factual errors, exclude emotional and personal factors and guarantee that all the forms of the law will be observed. Secondly, unlike precedent judges, Handy, j adopts the sensible down with the Executive, who firmly determined not to commute defendants are found to have violated the law, going over this case out what his views are and working out a program for handling the once solved case applying common sense to problems of law and he was a judge of the court of General Institute. Handy thinks defendants are ruled well when the ruler understand the feelings and conceptions of the mass. More governments have wrecked and more human misery

caused by the lack of this accord between ruler and the ruled than by any other factor. In that respect, he disagrees that his brother doesn't see that government is human affair and he believe men are ruled not by words or paper but by other man. And he says Foster's natural law and keen's written law are not avail us.

Handy's opinion can be viewed in a social science perspective. The trial to keep up with common sense in this case and the success in the previous case with this approach make it possible that the defendants who have already suffered from incomparable torment and humiliation are innocent and so sentence on them should be set aside.

course of setting sentence if these with him, finding situation. He had government when

2. Review Question

1) What is law?

Lon Fuller says law is " the enterprise of subjecting human conduct to governance of rules." He emphasized on the legislator's concern and the principal of social orders and rationality in the process of registration, while criticizing positivism. He thinks law is an activity and an outcome of continuous effort to achieve certain purpose. And he claims the morality law exists inside the law itself.

2) What 's the function of law?

Generally, the function of law can be said to maintain a system of social control while facilitating social life. The general function of law can be stated like below.

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(1) Law preserves social order. - Law protects individual's life, property, personality and other rights from violating and further protects the interests of a society or a nation to secure the safety and orders of the community. (2) Law performs control function. - Law puts order, enforcement and prohibition on the behaviors of individual under the power of authority to achieve its purpose.

Law plays guidance role. - Law must be in consistence with people's internal value standard.

Law assesses human's behavior. - Law evaluates whether a certain behavior is reasonable and whether it is legal or illegal.

5 Law makes institution. - All the policies and institutions are established under the rule of law in a legal society.

(B) Law guarantees the predictability. - Law makes it possible to predict and expect the result of a behavior relatively exactly. This is derived from its regularity on the social relationship.

3) List five forms of social control and describe how they operate.

(1) Law - Law keeps the orders and security with external enforcement provisions. (2) Moral - Moral appeals to individual's consciousness to preserve social orders and triggers social criticism on bad behavior.

Religion - Religion pursues the ideal state of human social justice and freedom and offers its followers a certain commandment to reach there. So it can control its follower's behavior on the basis of belief of God, an absolute power. (3) Custom - Custom is the pattern of unconscious behaviors in a group of people for a long time. If one violates the custom, he gets social criticism. So people are forced to keep the silent code of society which they are belong to. (4) Culture - Culture means favorable ethics and moral during a certain period in a society. And law reflects this and is establish on the basis of socially favorable moral and ethics.

4) Describe three views of the law and indicate the focus of each. Illustrate each view with an example.

(1) **Natural law** - Natural law is a system of right and justice held to be common to all human kind and is derived from nature rather than from the rule of society. It applies universally to all cultures and times.

ex) Law against murder - After discerning the right of nature to be the liberty, each man has to use his own power for the preservation of his own nature, that is to say, of life.

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(2) **Positive law** - Positivism is a variation of philosophical theory called empiricism. The theory states that all knowledge is based on experiences. Positive law was established on the basis of historical and empirical facts. Under the positive law, a law is a law if it has the form of law, no matter what the law is wrong or right. And so anyone in a society must obey the law.

ex) National security law in Korea is also a law in positive law perspective, although it is under attack as a draconian law.

(3) **Social science (Sociology)** - Social science is the study of the individuals, groups and institutions that make human society. The field of sociology covers an extremely broad range that includes every aspect of human social conditions. Sociologists observe and record how people relate to one another and to their environments. Sociologists formulate theories based on the observations of various aspects of society. Their ability to form indisputable conclusions is also limited by the diverse and changing nature of human being and society. So it is inevitable less precise than the other sciences. Sociological jurisprudence is based on the belief that the law is human and therefore never absolute. So the practicability of the results of the application of the law is considered as the most important thing. ex) Ten Commandments is a good example for sociological perspective, it was developed to protect the nomadic Israelites. This shows that society makes law to preserve society.

5) Socrates was convicted of sedition, specifically, corrupting the youth of

Athens because of his basic tenet, "Reject authority." Although he pleaded innocent of the charges, he was sentenced to death. He voluntarily drank the poison, which was his sentence, even though his follower had bribed the guards to facilitate his escape: Socrates died willingly rather than break the law, even though he maintained his innocence. Given that he was the wisest man in Greece, what do you think his attitude toward the law was? What then could he

have meant by the dictum, "Reject authority?"

Socrates once said all have to obey a nation to achieve true happiness and to obey the nation's positive law is the duty of people and the best way to get the justice. Socrates, defending the positive law, firmly believes that the bad law is as much a law as a good one if it has a form of a law. Contrary to the natural law which regard the law violating the justice as a bad law, positive law focuses on the process of law rather than the content. So Socrates willingly drank the poison, he maintained his innocence to

the end though.

The dictum, "Reject authority" in his words can be interpreted as "reject the authority which has a power to make the bad law go into effect." The existing law itself must be followed to stabilize the social order in the perspective of positive law. However, Socrates also recognized and acknowledged the law was wrong and so I think he thought the only way to rid of that law is to rid of the existing authority, not a law.

6) What do you think of the legalisation of Marijuana? Give three arguments, pro or con, using the three perspectives as discussed in class. Define each perspective and show why each argument fit its perspective.

I would like to stand on pro for legalisation of Marijuana.

(D Natural Law Perspective

The legal system is to reflect fundamental and absolute principle of justice that are inherent in human life. And natural law comes from an absolute moral and ethical scheme. In this issue, the purported dangers of Marijuana smoking have been overblown. The private use of Marijuana by adults should not be treated as a criminal matter. American place on the right of the individual to be free from the over-reaching power of government. Most agree that the government has no business knowing what book people read, the subject of telephone conversations. Similarly, whether one smoke marijuana or drinks alcohol to relax is simply not an appropriate area of concern for the government. That is, the freedom of act, as long as it doesn't hurt others, is the basic right of men. In this sense, I support the legalisation of marijuana.

(2) Positivist Perspective

Under the positive law, a law is a law itself whether it has a merit or demerit. The use of marijuana is now prohibited under the criminal law. However there's no evidence to vindicate the law, 'cause it doesn't have serious addictive effect like cocaine and harm other by using it. Prohibition on marijuana was made by misinformation and misconception about marijuana. So the use of marijuana must be permitted by careful re-research on the marijuana.

(3) Social Science Perspective

From the sociological standpoint, law is a part of human life and so it is changeable. The practicality of application of law is the primary concept of sociological view. Medical use of marijuana has been approved by the voters in every states where it has appeared on the ballot. The Maine State is the sixth state to legalize the medical use of marijuana by voter initiative, and the first state east of the Mississippi river. The other states are California, Arizona, Washington, Oregon and Alaska. In addition to that,

it is clear that marijuana is therapeutic in the treatment of a number of serious ailments and is less toxic and costly than many conventional medicines for which it may be substituted. Most recently, the National Academy of Science in the U.S.A determined marijuana's active components are potentially effective in treating pain, nausea, the anorexia of AIDS wasting and other symptoms. And in some cases, marijuana appears more effective than the commercially available drugs it replace. And according to the Gallup Poll conducted in 1996, March, 26, 73% of American support making marijuana available to doctors so they may prescribe it. Many other states is willing to legalize the marijuana. Law must be changed if it is proved wrong and people under it want to revise it. And the legalisation of marijuana is what people want.

