



RDL

REDE BRASILEIRA  
DIREITO E LITERATURA

## AT THE EXECUTIONERS' ROOM – THE LAST ACT OF THE SPELUNCEAN EXPLORERS DRAMA?

VOLTAIRE DE FREITAS MICHEL<sup>1</sup>  
MARC ANTONI DEITOS<sup>2</sup>

TRANSLATED BY FELIPE ZOBARAN

**ABSTRACT:** The article presents a speculative fiction dealing with the philosophical problem posed by Lon L. Fuller in 1949, in his book *The Case of the Speluncean Explorers*. From the facts narrated by the author, the death of one of the explorers by their fellow prisoners in a cave, the original text presents the simulation of a trial in a dystopian future scenario, in the year 4300, in the hypothetical country Newgarth. In this work, the proposal is to continue the discussion, this time putting the decision on the execution of the explorers by the hands and minds of their executioners – the fictional characters Thomas, Helmut and Ronaldo. From the discussion between the executioners on whether or not to comply with the court's decision, new questions arise about the institutional role of the Judiciary and the nature and purpose of the Law. The methodology used is fictional, based on the original article by Lon L. Fuller; the original text is complemented with an investigation into what would have been the discussion between those responsible for complying with the final order.

**KEYWORDS:** Judiciary Power; Legal hermeneutics; Judicial decisionism.

---

<sup>1</sup> Master's degree and Ph.D. in Law at Universidade Federal do Rio Grande do Sul (UFRGS). Professor of the Law School at Faculdade Meridional (IMED), in Porto Alegre. Attorney of the State of Rio Grande do Sul. Porto Alegre (RS), Brazil. CV Lattes: <http://lattes.cnpq.br/4052037774909476>. ORCID: <https://orcid.org/0000-0001-9828-2664>. E-mail: [voltairmichel@hotmail.com](mailto:voltairmichel@hotmail.com).

<sup>2</sup> Master's degree in International Relations and Ph.D. in Law at Universidade Federal do Rio Grande do Sul (UFRGS). Professor of the Law School at Faculdade Meridional (IMED), in Porto Alegre. Campus Principal at IMED Porto Alegre (RS), Brazil. CV Lattes: <http://lattes.cnpq.br/0342843343545592>. ORCID: <https://orcid.org/0000-0003-4475-2469>. E-mail: [marc.deitos@imed.edu.br](mailto:marc.deitos@imed.edu.br).

## INTRODUCTION

Roger Whetmore was murdered by his fellow cave explorers. According to the records of the criminal case against the survivors, the five explorers were surprised by an accident, which prevented them from leaving the cave in which they were. Desperate, and without any prospect of help, Roger himself proposed to his fellow explorers to pick one of the members of the group to be killed and feed the others. Everyone agreed. Just before the draw, Roger gave up, but it was too late. The others threw the dice for him and, unlucky, Roger was drawn. Roger was killed by his colleagues, and soon after, the rescue arrived inside the cave.

The explorers were tried and convicted of murder in the first degree of jurisdiction. An appeal was lodged by the High Court of Newgarth in the year 4300. The judges, by majority, ruled that the conviction should be upheld.

This is a brief summary of the article published by Lon L. Fuller in 1949 entitled *The Case of Cave Explorers*. Almost seven decades after its publication, the case continues to haunt and instigate professors, students and lawyers in general.

In the original work, several intriguing details are provided by Lon L. Fuller. In his court, five judges presented divergent positions, ranging from the strictest legalism, such as Judge Keen's vote, to a more voluntarist or naturalist interpretation, such as that proposed by Judge Foster, or a historicist view, such as Judge Handy, who suggested that the trial should take into account the claim of the people on the streets.

Several works have been published over the last decades proposing new interpretations, new votes to solve the case of the cave explorers. In 1980, Professor D'Amato published a paper suggesting that the Head of State, in view of the request for clemency of the explorers, requested the help of three university professors: Wun, Tieu and Thri. The article goes on to present the votes of these three scholars. In 1993, William Eskridge Jr. published an introductory study on the divergences present in the original votes, followed by seven other new votes. In commemoration of the 50th anniversary of the article's publication, David L. Shapiro published a new introductory study to the case in 1999, presenting six

different possibilities of solution proposed by several authors. In Brazil, in 2010, Professor Dimitri Dimoulis, analyzing another Lon L. Fuller fiction article, proposed a similar exercise: starting with five original votes regarding the controversy of the envious denouncers, published in *The Morality of Law*, Dimoulis added another five votes, increasing the controversy regarding the concept of transitional justice.

What is proposed in this article is to advance in the sequence of facts about the destiny deferred to the cave explorers; they have already been tried, clemency has been denied by the Head of State and now they are awaiting execution in a Newgarth prison. They will be executed by three men, named Ronaldo, Helmut and Thomas. The names with which they were baptized mean something about their positions. Perhaps it is a prerogative of the author to provoke readers with suggestions and signs of this kind.

The strategy adopted in this essay is aligned with an attempt to expose “law in literature”, not just “literature on law”, taking into account, between the lines, the dogmatic discussion about the limits of the judicial decision, and the composition between legal text and hermeneutical meaning. In addition, the format is partly inspired by earlier papers that sought to depart from the standard structure of scientific articles. It is a discussion that converges with the reflections on the role of the Judiciary Power, the Legislative Power and, finally, the Executive Power itself, in the execution of Law.

To maintain the original style of Lon L. Fuller, bibliographic or explanatory notes were suppressed. At the end, a list of bibliographic references may guide the reader to a more in-depth search.

It is likely that the executioners seem too enlightened. As there are no reports on their intellectual formations, it was not possible to evaluate them. However, perhaps because of the peculiarity of the profession, due to the drama of their day-to-day activities, there is a possibility that the executioners may worry about criminal matters above the average citizen. In any case, it was the most resourceful solution found to recover the antecedent events.

\*\*\*

It is 06 o'clock in the morning, on April 2, 4300, Friday. The facilities for the execution of the condemned men resemble an old hospital, with walls tiled in green, and fluorescent lamps, granting inconstant and cold illumination. In the preparation room, three executioners are seated around a table, they are the ones to whom shall compete ending the life of the cave explorers. The smell of the place is a mixture of coffee, disinfectants, and humans. The most experienced character, the executioner Thomas, is the one who takes the word initially, and will assume, in this fantasy, the role of resuming the events that had happened hitherto.

### **Executioner Thomas**

My friends, my colleagues. For many years we have worked together in this unfortunate but necessary task of putting an end to the lives of our compatriots who, for some reason or another, by intrinsic wickedness or by the influence of the environment practiced horrid acts. We execute, with the instruments at our disposal, robbers, rapists, murderers. I have lost count of how many times we have done our duty together: to find the condemned ones, to put them in the appropriate suit, to lead them to the execution room, to prepare the scaffold, to put the mask and the rope around the neck and, finally, to release the device that sustains them and still holds them to life. Maybe this routine has brutalized our sensitivity. After we have done our duty, we return home, go back to our families, play with our children, and return to this building where we often do our duty. I remember when Helmut was appointed to work with us: still young, timid and frightened. After a few months, he was already adapted to the emotional weight of this peculiar activity. Ronaldo and I started at the same time, we faced the formation period together.

You all know that the execution scheduled for today is different. Those who are about to lose their lives are not criminals as we are accustomed to see. In general, we are aware of the crimes committed by our convicted, and although we do not perform our duties as avengers, we know that in one way or another, they deserve the sanction to which, as fate wanted, we will be the executors. And for the first time in several years in this prison, I have to confess to my colleagues: I am in doubt.

All of you have followed the trial of the cave explorers, especially when the case became popular when submitted to the Newgarth Court of Justice. The judges, notwithstanding their thorough knowledge of the law, did not reach a unanimous decision. Everyone is reminded of the controversy surrounding the votes, is not it?

**Executioner Ronaldo**

Of course we remember! The votes were widely publicized by the media, and all citizens, from the humblest to the most powerful, only talked about it for weeks. I was particularly impressed with Judge Keen's vote, which simply stated that the best application of the law would be to convict the explorers in their strict terms, dismissing Judge Foster's case.

**Executioner Helmut**

Yes, it's true. Judge Foster's argument that the explorers were in a state of necessity, which would allow them to commit the murder, or alternatively that inside the cave the explorers would have regressed to a state of nature, it seemed, at least for me, as I do not have much education, a little farfetched.

**Executioner Thomas**

And do not forget the reasoning of Judge Handy, who wanted to absolve the cave explorers on the grounds that the general population had already acquitted them. In fact, the demonstrations on behalf of the explorers caused much uproar and pressure on the court. And there is no way to disregard the position of the other two judges, in which one abstained from voting, while the other handed the decision to the clemency power of the Head of State.

**Executioner Ronaldo**

As I recall, the Head of State was also in doubt, and summoned a commission of illustrious scholars to guide his decision, Professors Tieu, Thri and Wun. I still remember the television broadcast of the debates between these illustrious professors. Professor Wun, if you remember,

advised the Head of State not to grant leniency. According to him, law and morals are intertwined, and the action of the cave explorers was morally incorrect. In fact, according to Wun, the explorers, when they forced the victim Roger Whetmore to participate in the draw, compelled him to join a project he did not care about, for the sole purpose of increasing their own chances of survival. With Roger in the draw, each of the murderous explorers elevated, to a degree, the possibility of survival. I still remember Wun saying that the explorers' action was morally reprehensible, and that they should pay the price for the homicide they committed selfishly.

#### **Executioner Helmut**

Professor Tieu's vote was even more curious. I watched it very carefully. According to her, the greatest immorality would be the entire group perishing under the stones just for the preservation of an individual. According to Tieu, it was necessary to observe that small group as a species that needed to be sheltered, despite the interests and the preservation of the life of one of its components. Life, according to the teacher, consists in the continued existence of its members, and not only in the individual life of each member. That is, to protect and preserve the group, it was worth everything!

#### **Executioner Thomas**

We all remember Professor Thri's vote, to whom both the explorers and Roger Whetmore himself, at different times and circumstances, performed acts that would be morally reprehensible. Roger Whetmore, when giving up from the draw, was in fact trying to secure his own survival without any risk, since, with the sacrifice of another colleague, the others could not deny him some food, under pain of to be sacrificing another life (Roger Whetmore's) to preserve their property over the body of the sacrificed. They would be committing the crime of omission of help. At the same time, upon entering the cave and participating in this collective activity, Roger Whetmore was taking risks, even of protection of the group, but had he been asked if he would be willing to sacrifice his life for the preservation of the group, he would probably say no. So, the

mutual and temporary association in the cave exploration did not contemplate, and does not contemplate, the prospect of self-immolation in favor of the group, since Roger was not being selfish when he decided not to participate in the draw. In refusing, Roger Whetmore was just ratifying the limits of his adherence to that adventure. Professor Thri's position was for commuting sentences to three or four years of community service in a hospital or similar institution where they could be in a position to save the lives of people in need of help.

We all remember what happened. The Head of State, faced with the indecision of the professors, two for the conviction, one for the acquittal, made the decision to maintain the capital sentence and sent the cave explorers to prison for the execution of the prosecution. Execution is scheduled for 9am. It's 8 o'clock. We have to start the preparations in 30 minutes. The inmates are nothing like we are accustomed to. Shall we begin the preparations?

#### **Executioner Helmut**

Dear Thomas, just like you, something bothers me in this case. Judges, scholars, politicians, we all know, are in a position above ours. It is up to us to do the dirty work, to actually put the state hand on the body of an individual, to arrest him, to hang him, and to kill him. Perhaps it is simpler in the distance, in a carpeted and icy room, to make that decision. The decision to condemn to death penalty is limited to a word typed on a screen, a debate in which intellectuals have their arguments; After the arguments and discussions are closed, the court turns off the lights and senior officials leave for their happy hour, leaving behind the brutality of their decisions. For us, for the executioners, it is finally up to us to close the subject – metaphorically and literally. What scares me in this case is that the population in general is against the execution. Everyone says this execution is violence, it is a violation of the human rights of the convicted. Despite this popular pressure, the institutions remained immune to any pressure or leniency. Could it be that in the future, this population, our compatriots, our friends and neighbors will not be able to determine a change in institutions? Are not they, the general population, in the future,

new rulers, university professors, judges? And when that time comes, what will they think of our mechanical behavior, our simple compliance with the judgment based on a non-unanimous vote?

### **Executioner Thomas**

Why, Helmut, if that happens, we'll say we were taking orders. In fact, this is our duty, we will be in the strict fulfillment of our legal duty. The order was given by the highest court of Newgarth and ratified by our Head of State. Is it possible, in the future, that everything is reversed, and that we are held criminally responsible for this action? This perspective seems absurd. If one is blamed in the future for an alleged judicial error, let us all be: courts, Head of State and executioners. But, let me highlight it, this possibility seems very remote.

### **Executioner Helmut**

Thomas, I do not know if that will be enough, simply to claim that we were taking orders. The very fact that we are in doubt, discussing whether or not to comply with this sentence, already signals to the fact that something must be evident before us, and that can put our own life in danger in the future. We all studied the prehistory of mankind in school, facts from three thousand years ago, when a small town on that peninsula, then called "Europe", was divided in two by a wall, due to political differences. It was not enough having the physical division and the prohibition to move from one side to the other, which at the time did not seem absurd, the rulers on one side ordered the guards of the wall that, in case of attempted transposition without authorization, they shot to kill. The order was perfectly legal, and the institutions, supported by the Law. And the guards fired when they had the opportunity. But, as everyone knows, that political situation did not last, the absurdity of the order became evident, the shooters were tried and convicted. And you know what the early twentieth century judges said? That it was up to the shooters to evaluate and judge what they were doing, that there were standards beyond the positive law, and that shooters should be held accountable. My fear is that in the future we will be held accountable for

this execution, which we now call judicial order, and which our compatriots may qualify as a homicide in the future. And then the murderers will be us. And the executed ones, too.

**Executioner Thomas**

So, should we assume the consequences of disobeying the court order?

**Executioner Helmut**

Exactly. The consequences of disobeying a functional order are less drastic than those of committing a homicide. My position is that we should not kill the explorers. We must refuse. Judges, scholars, politicians, let them personally execute the order, and sue us for a functional fault.

**Executioner Thomas**

I'm sorry to say I cannot agree with you. It seems to me that there is something wrong in not performing the task entrusted to us. In the first place, we see that we are only the end of a sequence of institutions, we are just another cog in the penal system. Whether or not our activity is valuable, it ours to carry out, to obey the orders of those who are institutionally above us – for good and for evil. Imagine if at every trial, at every sentence execution, we decide that we must rethink the fundamentals and evaluate whether or not we should fulfill what is determined. This would culminate in a paralysis of the institutions, or even a discredit. We also execute murderers and thieves, people whose judgements we never even considered reviewing. But, if we now turn to a specific case, would we not be sending a message to the future criminals, saying that they may perhaps count on our indecision or mercy in the future? Moreover, the very fact that we are discussing this decision today does not reflect, in a way, a certain prejudice on our part in relation to the other executions? Now, it is no secret that we are about to execute people who look a lot like us: they all work, they have the same skin color, they belong to the middle class. And we, as public servants, also belong to this

same class. Are we not discussing whether we should execute these explorers out of class solidarity, and not by any doubt as to the justice of the original decision? I do not recall overthinking in the past the execution of other criminals.

### **Executioner Helmut**

In my defense, I say that I only know the race of those executed when we receive them here in the prison. I do not care much about their race.

### **Executioner Thomas**

I remember an old case, also on that peninsula, then called Europe, when a passenger plane (at that time people used to fly in aluminum “cigars” propelled by fossil fuel burning) was abducted by terrorists (then called terrorists) who threatened to throw him over a crowded football stadium in Munich. It is said that a pilot of the German Air Force, disobeying the orders of his superiors, decided, unilaterally, moments before the tragedy, to shoot down the airplane in flight, killing all its occupants. He was also tried and convicted for the murder of the passengers. Only in his interrogation, when asked why he disobeyed the superior orders, he stated that he did not recognize the decision of the courts, taken months earlier, that the law authorizing pilots to shoot planes under those conditions would be unconstitutional. The pilot, as I recall, dared to say that the courts had made a mistake, and that he had acted correctly with his personal conviction!

I remember another curious case, which occurred at the time of Socrates’ execution. Do not be surprised that a hangman knows the story of Socrates. Even by professional deformation, everything that has to do with executions ends up attracting my attention. When the philosopher was already convicted and awaiting execution, he was visited by his pupil Crito, who proposed to him an escape plan. Crito was a wealthy and well-connected man; he would put Socrates in a boat and take him away from Athens. Socrates dissuaded Crito, on the grounds that the laws and institutions of Athens had hitherto protected them. Only then, when they were unfavorable to them, would the idea of disrespecting the law arise.

Socrates came to the conclusion that he should accept his fate, whether the decision was just or unjust.

Would the general disrespect for the institutions, especially those at the top, not lead us to a situation of greater injustice and instability? Sometimes I feel that a little injustice, or punctual injustice, can be borne by us, for the greater good, which is the maintenance of institutions. I am not aware that the Judiciary is bloody, or that the votes that determined the execution of the explorers were absurd or unfounded. At one time or another, the institutions spoke and determined, in the end, the death of the explorers. I repeat: we are not, in this prison, another resource instance to be provoked by the emotional impact. If we become a new recourse instance, then we will have to re-evaluate the format of our institutions and perhaps even improve our salary and not just choose the dubious cases. I am for the execution of the sentence. Let's prepare the gallows.

#### **Executioner Helmut**

Since we are positioning ourselves, I anticipate that I am not executing the sentence. In dubious cases such as this, let the magistrates execute directly. I do not feel comfortable killing people I deem innocent, supported by the population and acquitted by at least a few judges and scholars.

#### **Executioner Ronaldo**

Dear colleagues. I cannot agree with you. I do not think that we should immediately execute the sentence, nor should we refuse to consider it unjust. Thomas, really, we started this career together, and together we face all the doubts of conscience that accompany it. I do not remember discussing the merits of a conviction before. We discussed the mode of execution, the length of the proceedings, the consequences for the families of convicts and victims, but we never questioned a court decision. And that is where it seems to me that there is an insoluble obstacle.

**Executioner Thomas**

How come? So you understand that we should not execute the sentence but you do not consider it unfair? So why not do it?

**Executioner Ronaldo**

It seems to me to be absurd that we have to execute a judicial death sentence based on a majority of votes from a court of law. What do you mean, the majority decided? Is it possible, convenient or logical, that there is no right decision for the particular case? Is it possible that the most experienced jurists in the country, with dozens of career years, are able to diverge so sharply? These are the obstacles that bring me discomfort. Suppose the decision to kill the cave explorers was taken by popular vote. Everything indicates that the vote for absolution would win, at least from what we see in opinion polls. However, would it still be the correct, just decision in the specific case? Are the majorities right?

**Executioner Helmut**

I understand your concern and I think I know the answer. Really, most can vote wrong, decide unfairly. You can decide based on absolutely random and absurd criteria. They could vote, for example, against or in favor, based on the skin color, sex, or social class to which cave explorers belong. You're right, the majority vote does not mean justice in the outcome. Unless the majority vote was not intended to decide the final outcome, conviction or acquittal, but the choice of a criterion for deciding whether there would be a conviction or absolution...

**Executioner Ronaldo**

What do you mean?

**Carrasco Helmut**

The majority would decide the criteria we should use to condemn or absolve, but not the acquittal or condemnation itself. Sounds the same, but it is not. This way, there would be a principled choice that might prevent personal factors such as sympathy, race, affinity, physical appearance from influencing the decision.

**Executioner Ronaldo**

Got it. But even so, the choice of this criterion by the majority could prove wrong or unfair. Most can commit injustices, either by voting directly on acquittal or conviction, or by voting for a decision-making criterion. In fact, what surprises me is that institutions simply manage to live with that indecision or flexibility. Suppose one of the Newgarth Supreme Court judges retires tomorrow and another judge is appointed, with a different position. The court will change, the decisions will change, but will the law change? What law is this that depend on the composition of the courts? In my view, in fact, this insecurity occurs only because the judges are unable to recognize that there is, in fact, a law to be discovered, regardless of its origin. With this expression “origin”, I mean, whether it comes from nature, or customs, or the values of a certain society at a given time. I think there must be a right decision, “the” decision, otherwise we become mere perpetrators of the magistrates’ “whims”. Notice that the conviction decision was also taken by majority, which does not mean that it is fair or just. In fact, I know that the standard involves divergent interpretations, that there are no rules that are not interpretable. What surprises me is that a court can simply give up seeking, until the end, for a right decision.

**Executioner Thomas**

As an older member, I force myself to summarize the discussion. I, as I said before, am for immediate execution. It is up to us to execute the decisions, not their revision. We do not compose a court. Mr. Helmut, however, is for suspension of the execution. According to him, in the face of the controversy over the case, we run the risk of being held accountable in the future for a manifestly illegal order, which is an insult to the human rights of the convicted. According to him, we cannot in the future say that we were simply following orders, because the controversy surrounding the case is what is delaying this execution. Finally, Ronaldo believes that there must be a correct decision, to be taken unanimously, and recognized by the entire legal community.

### **Executioner Ronaldo**

What do we do then?

### **Executioner Thomas – CONCLUSIONS**

Recognizing the preponderance of the majority, we should not comply with the decision now. We will return the order to the court, with a letter, stating our reasons, and await a final decision. I'll draft the letter.

Here it is:

“Your Honor, Mr. Head of State,

On the occasion of the execution of the cave explorers, condemned by the Supreme Court of Newgarth, we, the executioners, have decided to suspend the preparatory acts and return the order to the court, with the request that the decision is again debated until a unanimous sentence is reached for the conviction or acquittal of the accused.

We know that with this action we are disobeying the order given to us, but we assume the consequences of this conduct and we will not fail to fulfill our duty if the decision does indeed reflect the best law and justice.

Regards,

The Hangers of Newgarth.”

### **REFERENCES**

- CAHN, N. *et al.* The Case of the Speluncean Explorers: Contemporary Proceedings. *George Washington Law Review*, n. 61, p. 1754-1811, 1993.
- COVER, Robert M. Nomos e narração. *ANAMORPHOSIS – Revista Internacional de Direito e Literatura*, v. 2, n. 2, p. 187-268, julho-dezembro 2016. doi: [10.21119/anamps.22.187-268](https://doi.org/10.21119/anamps.22.187-268)
- D'AMATO, A. The Speluncean Explorers – Further proceedings. *Stanford Law Review*, n. 32, p. 467-485, 1980.
- DIMOULIS, D. *O caso dos denunciadores invejosos*. 6. ed. São Paulo: Revista dos Tribunais, 2010. 95p.
- ESKRIDGE, JR., W. The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a nutshell. *George Washington Law Review*, n. 61. p. 1731-1753, 1993.
- FULLER, L. *O caso dos exploradores de cavernas*. Porto Alegre: Sergio Antonio Fabris Editor, 1976. 64p.

NASCIMENTO, João Luiz Rocha do. Das Erínias às Eumênides: como as cadelas vingadoras ainda ladram um passado que não passa. *ANAMORPHOSIS – Revista Internacional de Direito e Literatura*, v. 3, n. 1, p. 39-72, janeiro-junho 2017. doi: [10.21119/anamps.31.39-72](https://doi.org/10.21119/anamps.31.39-72).

PLATÃO. *Apologia de Sócrates e Críton*. Lisboa: Edições 70, 2007. 87p.

RIBEIRO, Iara Pereira. A exceção e a regra: fragmentos de uma reflexão jurídico-literária. *ANAMORPHOSIS – Revista Internacional de Direito e Literatura*, v. 1, n. 1, p. 121-138, janeiro-junho 2015. doi: [10.21119/anamps.11.121-138](https://doi.org/10.21119/anamps.11.121-138).

SCHIRACH, F. *Terror: Ein Theaterstück und eine Rede*. Munique: BTB Verlag, 2016. 164p.

SHAPIRO, D. The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium. Foreword: A cave drawing for the ages. *Harvard Law Review*, n. 112, p. 1934-1923, 1999.

STRECK, Lenio Luiz. Resposta adequada à Constituição (resposta correta). In: STRECK, Lenio Luiz. *Dicionário de hermenêutica: quarenta temas fundamentais da teoria do direito à luz da Crítica Hermenêutica do Direito*. Belo Horizonte: Casa do Direito, 2017. p. 258-259.

**Original language: Portuguese**

**Received: 09 Oct. 2017**

**Accepted: 05 Apr. 2018**