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## Homicide by Necessity

John Alan Cohan

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## Homicide by Necessity

*John Alan Cohan\**

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I observe a famine at sea, I observe sailors casting lots  
who shall be kill'd to preserve the lives of the rest,

. . . .

. . . [A]ll the meanness and agony without end I sitting  
look out upon,

See, hear and am silent.

—WALT WHITMAN, *I Sit and Look Out* (1860), reprinted in THE  
PORTABLE WALT WHITMAN 190 (Michael Warner ed., 2004).

### INTRODUCTION

In philosophy we sometimes consider the question, put by way of hypothesis, of how we should act in the midst of a calamity, disaster, or other danger, if it is apparent that we can save our own life only by the destruction of another's. We can hardly imagine that such a question would have much practical importance, or that a court would ever need to rule upon conduct under such circumstances, or, for that matter, that we would ever personally encounter an ordeal in which we face a dilemma between self-sacrifice and the sacrifice of another.

In fact, there have been numerous instances of homicide by necessity, some of which have resulted in murder or manslaughter convictions, and others which have passed quietly into history with no action taken by the authorities. This topic, homicide by necessity, refers to the killing of innocents in order to produce a greater good or avert a greater evil—usually to save a greater number of lives.

At the outset, we immediately run into a problem. At common law and almost universally in modern law, the necessity defense has been consistently denied in cases where the actor commits intentional homicide in order to avert a greater evil. Virtually all other categories of crimes and torts, even treason, are eligible for the necessity defense, provided that all of the elements of the defense are proven; but intentional homicide is not. Numerous statutory enactments of the necessity defense specifically preclude the defense in connection with intentional homicide.<sup>1</sup>

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<sup>1</sup> For example, the Missouri necessity statute justifies conduct that “would otherwise constitute [a] crime other than a class A felony or murder.” MO. ANN. STAT. § 63.026 (West 2006). See also KY. REV. STAT. ANN. § 503.030 (West 2003) (“[N]o justification can exist under this section for an intentional homicide.”).

On the other hand, from a philosophical standpoint, the intentional killing of innocents, as in the Trolley Problem,<sup>2</sup> may well be *morally* permissible, based on utilitarian and other philosophical arguments. The strictly philosophical view is that if we must choose between killing a few and letting many die, it is better to kill the few.<sup>3</sup> But from a legal standpoint, as we will see, courts have come to the opposite conclusion in real, rather than hypothetical, cases. Courts have suggested that it is difficult to see how there is a benefit to society in the intentional kill-

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<sup>2</sup> Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985); see also Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19 (1978). Judith Jarvis Thomson describes the Trolley Problem essentially as follows:

Edward is the driver of a trolley whose brakes have failed. On the track ahead of him are five people; the banks are so steep that they will not be able to get off the track in time. The track has a spur leading off to the right, and Edward can turn the trolley onto it. Unfortunately, there is one person on the right-hand track. Edward can turn the trolley, killing the one; or he can refrain from turning the trolley.

If Edward does nothing, the trolley will proceed on its path and run over and kill the five people on the track ahead. If he throws the switch, thereby diverting the trolley to the right track, the trolley will instead run down and kill one person.

Thus, we have a situation of imminent harm threatening the lives of five people. The actor can eliminate the danger only by inflicting harm on another interest, namely on the innocent worker located on the other track. The action is sure to kill that person. The question is whether it is *morally* permissible, or indeed morally required, to turn the trolley so as to avert a greater evil, but end up killing someone who was not otherwise in harm's way.

It seems that most everyone would agree that the trolley operator is permitted to, or even justified in choosing the lesser evil by throwing the switch and diverting the trolley, thereby averting the imminent death of five, in preference for the death of one.

It is hard to say why most of us would agree that the right thing to do in the trolley case is to divert it to the right track and, in effect, affirmatively, actively, kill one person rather than, by doing nothing, passively allow five to die. Clearly, Edward would be violating the right to life of the one who is killed. Still, our intuitions are that throwing the switch is the right thing to do. His motives are excellent in that he acts with a view to saving five, but it is an intentional killing all the same.

Another element of the problem involves the distinction between killing and letting die. The trolley, being out of control, and left to its own devices, will cause the death of five people. Human intervention, however, can change its course, in which case instead of passively letting the five die, the actor will "kill" the one person instead. If letting die were so much better than killing, regardless of the numbers involved, then the proposal that Edward turn the trolley would be out of the question.

*Id.* The trolley problem is not just hypothetical. Railroad officials in Los Angeles county reported a decision to divert a runaway freight train onto a side track—knowing derailment was likely—rather than let it continue on course to downtown Los Angeles. See Kurt Streeter et al., *Runaway Train Jumps Tracks in Commerce*, L.A. TIMES, June 21, 2003, at A1.

<sup>3</sup> See, e.g., GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 198–200 (1957).

ing of innocents even though the action results in the saving of lives. Lives are not amenable to ready quantification, and therefore courts are just not comfortable with allowing defendants to assert a necessity defense by “measuring the comparative value of [life].”<sup>4</sup> At the same time, there is a minority view that the defense is or should be available in cases involving intentional homicide. Yet again, the overwhelming majority of courts are particularly reluctant to entertain the necessity defense to justify intentional homicide because of the deontological sense that it is morally repugnant to balance two harms when one of them involves killing an “innocent and unoffending”<sup>5</sup> person.

This constraint on the application of the necessity defense is similar to the common law principle that duress is not available as a defense to a defendant accused of murder. On this point Blackstone said that someone under duress “ought rather to die himself than escape by the murder of an innocent.”<sup>6</sup> It seems intuitive that, since neither duress, coercion, nor compulsion are defenses to murder, and these defenses are in the nature of excuses, then much less could necessity, a justification, be advanced as a defense to murder.<sup>7</sup>

It should be noted that the necessity defense *is* available in cases of criminally negligent homicide such as second degree ve-

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<sup>4</sup> John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 405 (1999). Indeed, the dilemma of choosing who and how many innocents to kill is so unsettling an issue that sometimes it is evaded or avoided in judicial opinions. For example, in *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273 (U.K.), discussed below, the jury took the unusual step of rendering a special verdict that only found the facts, and submitted the question of guilt or innocence for the judge to decide.

<sup>5</sup> *Dudley & Stephens*, 14 Q.B.D. at 286.

<sup>6</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES \*30.

<sup>7</sup> In the law there is a difference, sometimes not entirely clear, between an act that is excused and an act that is justified. Justification focuses on the act itself under the circumstances. The defense will seek to prove that while that conduct appears to be a prima facie violation of the law, the conduct is not wrongful because the act is appropriate for policy reasons. If an act is justifiable for one person, it is justifiable for anyone else in the same circumstances. For example, the justification of self-defense is available to all actors in the same circumstances.

Excuse, on the other hand, focuses on the actor rather than the act. With excuse, we admit that an actor's conduct is wrongful but we do not hold the actor responsible for the behavior. A successful defense of excuse represents a legal conclusion that the act was wrong, but liability is inappropriate because of some circumstances inhering in the actor, such as insanity, duress, infancy, or mistake. One asks whether an actor should be excused only after one has determined that the act was not justified. If the act were justified, there would of course be nothing to excuse. If the conduct of an actor is excused under the law, only the particular person is excused. For example, an insanity defense is not available to all those who commit similar acts, but only to the actor in the particular circumstances considered. The perpetrator who is incapable of perceiving right from wrong due to insanity, or the person who labors under a mistake of fact, the sleepwalker, and so forth, are actors of whose actions we may disapprove intensely, but whom in appropriate circumstances we excuse rather than punish.

hicular manslaughter. For instance, in the New York case *People v. Maher*,<sup>8</sup> the defendant was involved in a minor traffic accident.<sup>9</sup> The driver of the other vehicle became belligerent and started to reach into the back seat of his car. The defendant feared that he was going to produce a weapon, so he returned to his car and fled the scene. The defendant, while speeding down the street, struck and killed a pedestrian. At trial he sought to justify his speeding on the grounds that this conduct was necessary as an emergency measure to avoid a perceived attack that was about to occur.<sup>10</sup> The Court of Appeals held that the defendant was entitled to have the jury consider whether his speeding was justified under the necessity doctrine.<sup>11</sup>

The cases discussed in this article involve people in extreme circumstances: faced with imminent peril of death by starvation; death by drowning in an overloaded, rickety lifeboat; and other exigencies. The choice of evils is either for everyone in the group to die, or to kill one or more members of the group in order to save a greater number. In the shipwreck cases, the killing is in order to cannibalize the remains of the victim, so that the greater number of survivors may have sustenance and avert their own deaths by starvation. We see in these extreme situations that people caught up in the crisis will inevitably kill one or more of their group, either by democratic lot-drawing, or by the sheer principle of the stronger overcoming the weaker.

#### I. ELEMENTS OF THE NECESSITY DEFENSE

The necessity doctrine states that certain conduct, though it violates the law and produces a harm, is justified because it averts a greater evil and hence produces a net societal gain.<sup>12</sup> Granville Williams expressed the necessity defense this way: “[S]ome acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils.”<sup>13</sup> He offers this example:

Suppose that a dike threatens to give way, and the actor is faced with the choice of either making a breach in the dike, which he knows will result in one or two people being drowned, or doing nothing, in which case he knows that the dike will burst at another point involving a whole town in sudden destruction. In such a situation, where there is an unhappy choice between the destruction of one life and the destruc-

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<sup>8</sup> 594 N.E.2d 915 (N.Y. 1992).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 916.

<sup>11</sup> *Id.*

<sup>12</sup> See Joseph J. Simeone, “Survivors” of the *Eternal Sea: A Short True Story*, 45 ST. LOUIS U. L.J. 1123, 1140–41 (2001).

<sup>13</sup> WILLIAMS, *supra* note 3, at 198.

tion of many, utilitarian philosophy would certainly justify the actor in preferring the lesser evil.<sup>14</sup>

The utilitarian idea is that certain illegal conduct ought not to be punished because, due to the special circumstances of the situation, a net benefit to society has resulted.<sup>15</sup> This utilitarian rationale is sometimes criticized as “ends-justifying-the-means.”<sup>16</sup> The doctrine finds it justifiable, especially under exigent circumstances, to break the letter of the law if doing so will produce a net benefit to society.

Another commentator has observed: “[T]hese [justified] acts are ones, as regards which, upon balancing all considerations of public policy, it seems desirable that they should be encouraged and commended even though in each case some individual may be injured or the result may be otherwise not wholly to be desired.”<sup>17</sup> It has been opined that the necessity doctrine “represents a concession to human weakness in cases of extreme pressure, where the accused breaks the law rather than submitting to the probability of greater harm if he does not break the law.”<sup>18</sup>

English and American courts have long recognized the defense of necessity.<sup>19</sup> The idea, in its simplest form, is that it is unjust to penalize someone for violating the law when the action produces a greater good or averts a greater evil. Had the unlawful action *not* taken place, society would have endured a greater evil than that which resulted from violating the law. Therefore, under the necessity doctrine, those who violate the law in certain circumstances are justified in doing so.

With the necessity defense there will always be a *prima facie* violation of the law, and in our discussion the violation will be the intentional killing of innocent people.

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<sup>14</sup> *Id.* at 199–200.

<sup>15</sup> *Id.*

<sup>16</sup> As Justice Brandeis said in his famous dissent in *Olmstead v. United States*:

In a government of laws, existence of the government would be imperiled if it fails to observe the law scrupulously. . . . Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

277 U.S. 438, 485 (1928).

<sup>17</sup> JUSTIN MILLER, *HANDBOOK OF CRIMINAL LAW* 189 (1934).

<sup>18</sup> A.J. Ashworth, *Reason, Logic and Criminal Liability*, 91 L. Q. REV. 102, 106 (1975).

<sup>19</sup> Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY, 289, 291–96 (1974).

There is a six-prong test for someone to invoke the necessity defense. The defendant must prove “(1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a direct causal relationship between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.”<sup>20</sup> The fifth prong is that “the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.”<sup>21</sup> Finally, a sixth prong generally has been held to require that the circumstances occasioning the necessity were not caused by the negligent or reckless acts of the defendant in the first instance.<sup>22</sup>

In our discussion I will refer to these six prongs as follows: (1) the choice of evils prong; (2) the imminence prong; (3) the causal nexus prong; (4) the legal way out prong; (5) the preemption prong; and (6) the clean hands prong. In the context of intentional homicide, we might frame the prongs as follows:

(1) The choice of evils prong. In these cases the choice of evils is either death of the entire group by starvation (or by drowning) or killing someone in order to cannibalize his flesh (or ejecting someone from the boat in order to lighten it and save the others from drowning). There is a clear cost-benefit calculus in that the action will result in a net saving of lives. Since the necessity doctrine is based on a cost-benefit analysis, it would seem that this prong would be satisfied in situations where killing a few innocents will result in saving a greater number of innocent lives.

(2) The imminence prong. This is perhaps the most problematic prong. How imminent is the threat of death in situations where one faces starvation? Is it possible to go on a bit longer without sustenance? Perhaps it will be feasible to catch a sea creature and eat it. Perhaps a rescue ship will soon appear on the horizon. To what extent do the tensions and panic in the group provoke a kind of riot or anarchy? How imminent is the threat of death in situations where a lifeboat is overloaded? If people are able to bail out water to stabilize the boat, is that not a sign that the situation is not truly imminent?

(3) The causal nexus prong. The action taken in the cases

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<sup>20</sup> United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989).

<sup>21</sup> Commonwealth v. Brugmann, 433 N.E.2d 457, 461 (Mass. App. Ct. 1982); *see also* Missouri v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986) (quoting similar language).

<sup>22</sup> United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979) (holding that the necessity defense “will not constitute a valid legal excuse when the defendant has recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct]”).



considered all appear to meet this prong in that the action of killing will usually have the direct result of saving a greater number of lives. For example, by cannibalizing the flesh of the victim, or by ejecting people from an overloaded or rickety lifeboat, the remainder of the group will then be in a condition to survive.

(4) The legal way out prong. If people in a lifeboat are facing imminent death unless some of their party is sacrificed, it would seem that there is no legal solution to the situation. The parties are, as it were, in a state of nature where ordinary vehicles of the law are inaccessible. There is no opportunity to seek a court injunction. If a lifeboat is in imminent danger of sinking, there simply may be no reasonable "legal" alternative than to randomly eject passengers to lighten the boat, thereby saving a greater number.

Alternatively, if people in such a situation anticipate the danger, then, time permitting, should they take to drawing lots to select who should be ejected before the boat begins to sink? As we will see, the drawing of lots ("sortition") has been advanced as a kind of legal protocol to which participants may bind themselves. If so, might sortition absolve the actors from a charge of murder? If so, this would seem to contradict the common law principle that consent is no defense to intentional homicide. What if some members of the group object to the drawing of lots? Might lots be drawn for them by proxy? If the person selected refuses to be killed, might he be justified in using self-defense to prevent the others from ending his life? If the only legal means of avoiding killing is for everyone to go down with the boat or for everyone to starve to death, from society's perspective is the latter the preferable result?

(5) The preemption prong. The weight of authority precludes a defendant from asserting the necessity defense in intentional homicide cases. Thus, in the cases considered, this is the decisive prong in preventing the actors from being acquitted. We might question whether the refusal of courts to allow the necessity defense in such cases has any deterrence value. That is, will the prospects of being prosecuted for murder deter people in actual emergencies from killing some of their group in order to save a greater number, when otherwise all will perish? If not, should the law punish where punishment is not likely to be an effective deterrent?<sup>23</sup>

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<sup>23</sup> See generally Walter Harrison Hitchler, *Duress as a Defense in Criminal Cases*, 4 VA. L. REV. 519, 521-22 (1917) ("Punishment for deterrence should be inflicted only where it is possible to deter."); Newman and Weitzer, *Duress, Free Will and Criminal Law*, 30 SO. CAL. L. REV. 313, 313 (1954) ("If a person commits an act under compulsion, responsibility for the act cannot be ascribed to him . . . . Punishment of the actor would be misdi-

(6) The clean hands prong. In some instances, certain individuals may have been reckless or negligent in bringing about the necessitous circumstances in the first place—by recklessly navigating the ship and causing it to founder, by setting to sea in an unseaworthy vessel, by failing to repair rickety lifeboats before embarking on the voyage, by failing to provide an adequate number of lifeboats, or by failing to provide adequate provisions that might be transferred to the lifeboats.

## II. HISTORICAL EXAMPLES OF HOMICIDE BY NECESSITY

The Greek historian Herodotus reported that during a great famine in Egypt in 1201 AD, some people killed and ate little children.<sup>24</sup> In turn, they were held accountable and burned at the stake.<sup>25</sup> The corpses were, in turn, devoured by the starving population.<sup>26</sup>

A seventeenth-century account of cannibalism in connection with a shipwreck was reported by Dutch physician Nicholaus Tulpius.<sup>27</sup> The ship, carrying seven Englishmen, had set sail from the Island of St. Christopher in the Caribbean for an overnight cruise to a nearby island. A storm drove them so far out to sea that they could not get back to port for seventeen days, and they had inadequate provisions. After eleven days, the men agreed to draw lots to decide who should die to satisfy the hunger of the others; lots were also cast to select an executioner. The man who had suggested the idea turned out to be the victim once the lots were drawn. He was killed; the crew drank his blood and ate his body. The boat was cast on the shore of the Isle of St. Martin after seventeen days at sea. Upon their arrival, the Governor pardoned the survivors without any trial.<sup>28</sup>

The international law commentator, Pufendorf, remarked on this “story of some Englishmen” as follows:

To feed on man’s flesh, in the desperate extremity of famine, when no other sustenance can be procured, is a lamentable, indeed, but not a sinful expedient. But as for those instances when in distress and want of all provisions, men have been killed to preserve their fellows, either by compulsion, and against their consent, or else by the determination of lot, the decision of them is a point of some difficulty and uncertainty. Inasmuch as whatever the law against [murder] suggests on one side, the sharpness of hunger pleads as loud on the other;

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rected and futile since it would deter neither him nor others . . .”).

<sup>24</sup> NEIL HANSON, *THE CUSTOM OF THE SEA* 121 (John Wiley & Sons, Inc. 1999) (1999).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 126.

<sup>28</sup> *Id.*; Herbert Stephen, *Homicide by Necessity*, 1 L. Q. REV. 51, 57 (1885); see also A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984).

and the belly, that advocate without ears: especially considering that unless this *unhappy* means was made use of, the whole company must have inevitably perished. This is one of those cases in which a man ought to die rather than commit the fact, it being directly contrary to the laws of both God and nature. To this purpose we have a story of some Englishmen, who being tossed in the main ocean without meat or drink, killed one of their number on whom the lot fell, and who had the courage not to be dissatisfied, assuaging in some measure with his body their intolerable and almost famished condition: whom when they at last came to shore, the judges absolved of the crime of [murder].<sup>29</sup>

Thus, Pufendorf suggests that one should prefer to die rather than to kill an innocent in the face of death by starvation, but that the act of murder might be “absolved.”

Soldiers of Napoleon’s army on the long retreat from Moscow killed some of their own in order to survive.<sup>30</sup> Cannibalism among escaped convicts in Australia and explorers in remote regions has been documented.<sup>31</sup> There were no survivors of Sir John Franklin’s expedition to the Arctic in 1845, but rescuers reported mutilated corpses and the contents of kettles that indicated cannibalism had occurred.

In 1765, the *Peggy* ran into incessant storms in the Atlantic that destroyed its sails.<sup>32</sup> The food and water ran out, and the crew began to starve. The crew told the captain that they had drawn lots and that an Ethiopian slave, who was being transported in slave trade, drew the short straw. The slave was shot dead, cooked and eaten. About four days later the crew was rescued by a passing ship.<sup>33</sup>

A famous painting in the Louvre, *Radeau de la “Méduse”* (*The Raft of the Medusa*), by Theodore Gericault, painted for the Paris Salon in 1819, depicts a historical event.<sup>34</sup> In June, 1816, the French frigate “*Medusa* sailed with a four-ship convoy to establish a garrison in Senegal, which had been repatriated to France . . . after the defeat of Napoleon . . . at Waterloo.”<sup>35</sup>

*Medusa* was originally built as a 44-gun frigate. With the end of the Napoleonic Wars in 1815, she was converted to a troop transport, and 30 of her guns were removed. . . . The captain of the convoy, . . . de

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<sup>29</sup> Stephen, *supra* note 28, at 56 (quoting SAMUEL PUFENDORF, *JUS NATURAE ET GENTIUM* (Basil Kennett trans., London 1729) (1672)).

<sup>30</sup> HANSON, *supra* note 24, at 122.

<sup>31</sup> *Id.* at 122–23.

<sup>32</sup> *Id.* at 126.

<sup>33</sup> *Id.* at 126–27.

<sup>34</sup> SIMPSON, *supra* note 28, at 116; LINCOLN P. PAINE ET AL., *SHIPS OF THE WORLD: AN HISTORICAL ENCYCLOPEDIA* 333 (1997).

<sup>35</sup> PAINE, *supra* note 34, at 333.

Chaumareys, . . . [had] no previous command experience. . . [and was] [p]ressured for a quick passage by the new governor of Senegal.<sup>36</sup>

De Chaumareys, sailing with 400 passengers and crew, pressed ahead of his squadron (in violation of the Naval Ministry's orders), then crossed the treacherous Arguin Bank off the coast of West Africa, where the ship ran aground. The ship did not sink, but stuck in a sandbar. De Chaumareys made efforts to refloat the ship, but this failed because he refused to jettison any of her fourteen three-ton cannons. A gale on July 5 only worsened the ship's predicament.

About half of the ship's passengers then boarded the ship's six lifeboats, and eventually made it to Saint-Louis. For the remainder, a huge raft was constructed from spars, planks, barrels, and loose rigging, and approximately 157 people boarded it with limited provisions. The raft was crudely constructed, about sixty-five feet by twenty-three feet, had no oars and no means of navigation, and was hopelessly overcrowded.<sup>37</sup> They set off for the African coast but encountered rough seas and difficulty staying afloat. Over a two-week period, there was general panic and mutiny, and wholesale killings occurred. Many engaged in cannibalism. In the next few days, more acts of panic and violence occurred, following which only thirty men remained, fifteen of whom were wounded from the melee that had occurred. The fifteen men who were injured were thrown overboard by the other fifteen men who were somewhat more able-bodied. On the seventeenth day adrift, the remaining fifteen were rescued.<sup>38</sup>

The episode caused a major political scandal in France. The scandal focused on accusations of "incompetence, callousness and cowardice" on the part of de Chaumareys.<sup>39</sup>

De Chaumareys was tried on five counts but acquitted of abandoning his squadron, of failing to refloat his ship and save her cargo of gold, and of abandoning the raft. He was found guilty of incompetent and complacent navigation and of abandoning *Medusa* before all her passengers were off. The last verdict carried the death penalty, but de Chaumareys was sentenced to only three years in jail. In 1980, the remains of the *Medusa* were identified by divers on the Arguin Bank some 50 kilometers off the coast of Mauritania.<sup>40</sup>

In 1829, an instance of shipwreck and cannibalism was reported in connection with a British ship, the *Granicus*, which had

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<sup>36</sup> *Id.*

<sup>37</sup> J. B. HENRY SAVIGNY & ALEXANDER CORREARD, NARRATIVE OF A VOYAGE TO SENEGAL IN 1816, at xiii (The Marlboro Press 1986) (1818).

<sup>38</sup> HANSON, *supra* note 24, at 125–26.

<sup>39</sup> PAINE, *supra* note 34, at 333.

<sup>40</sup> *Id.*

founded off an uninhabited island in the Gulf of St. Lawrence.<sup>41</sup> A party of explorers later came upon a crude hut where the survivors had found shelter:

Inside were the carcasses of four human beings with their heads, legs, and arms cut off and their bowels extracted.

A cooking pot over the long extinct ashes of a fire contained more human flesh. The blood-spattered walls and ceiling suggested that the victims had not gone quietly to their deaths.<sup>42</sup>

There were no survivors. A body, possibly the last of the crew to live, was found intact but dead, in a hammock.

An account of the American whaling ship, the *Essex*, inspired Melville to write *Moby Dick*.<sup>43</sup> The ship sank in the South Pacific in November 1820, after being rammed repeatedly by a whale. The crew took to three small boats, and the occupants of each boat later engaged in the custom of drawing lots.<sup>44</sup> In addition, some of the men died of natural causes and their bodies were eaten. It has been suggested that the deaths from "natural causes" were in fact murder, and that the majority of "instances of lots being drawn were rigged or fabricated afterwards to conceal the murder of a disliked or disposable member of the company."<sup>45</sup>

It was relatively common for ships to catch fire in the nineteenth century. The fires were caused by carelessness in the lighting of matches, or by passengers smoking their pipes in their berths, perhaps falling asleep. While smoking below deck was generally against shipboard rules, it nonetheless was frequently done.<sup>46</sup> Many fires were caused by stevedores smoking recklessly among bales of cotton in the cargo. Cotton will smolder for days if excluded from the air before it bursts into flames. A large number of ships were destroyed from the igniting of tar, oil, or cotton waste in the storerooms.

There appears to have been in many such cases some difficulty in deploying lifeboats. They were often stowed in positions that required great skill to get them out free of damage, and there were never enough lifeboats for more than a fraction of the passengers. People would violently rush the boats; there would be lack of discipline, trampling down of the weak, and boats

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<sup>41</sup> HANSON, *supra* note 24, at 123.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 131.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 132.

<sup>46</sup> See *The Dangers of the Sea, by the Captain of an Ocean Steamer*, THE ECLECTIC MAGAZINE OF FOREIGN LITERATURE, May 1875, at 623.

would often be overloaded and, consequently, would capsize.<sup>47</sup>

For example, in 1874, the *Cospatrick*, a 1200 ton teak-hulled ship carrying 433 crew and passengers, caught fire and sank in the seas off New Zealand.<sup>48</sup> The lifeboats could only accommodate half of the people, and there was such great difficulty getting them launched that only two of them got off, carrying only eighty-one passengers and crew. Those who did not get onto lifeboats ended up dying. It was reported that the captain threw his wife overboard to drown rather than burn, and leaped in after her to drown as well.

Of the two lifeboats, one, containing forty-two people, became lost in a gale and was never seen again. The people in the second boat soon started to suffer from extreme thirst and exposure. Some were thrown overboard to reduce overcrowding. Others were sacrificed and then their flesh was eaten. After ten days adrift they were picked up by a British ship, with only five survivors, two of whom died within a couple of days. It appears that the remaining three were not prosecuted for any crimes.<sup>49</sup>

Also in 1874, a coal ship, the *Euxine*, caught fire.<sup>50</sup> When all attempts to control the fire failed, the crew of thirty abandoned ship in lifeboats. The captain and crew set out in a convoy of three boats for St. Helena. The boats soon parted from one another and some of the survivors ended up casting lots for a sacrifice. An Italian sailor drew the fatal lot and meekly allowed himself to be killed; his starving associates drank his blood and ate his flesh.<sup>51</sup> A legal proceeding was brought in Singapore, but the parties were released.<sup>52</sup>

In 1893, three of the four survivors who had been clinging to the waterlogged hulk of the *Thekla* for thirteen days drew lots and killed the fourth.<sup>53</sup> Upon being rescued, the Norwegian authorities investigated the matter, but did not institute formal charges. In 1899, the *Drot* foundered in a hurricane on the Mississippi River.<sup>54</sup> “Six of the crew constructed a raft from the wreckage and cast themselves adrift. One [crew member] went mad and threw himself overboard. Another, apparently dying, was killed and his blood drunk, and the same fate befell a third man shortly afterwards.” The three remaining men then agreed

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<sup>47</sup> *Id.* at 625.

<sup>48</sup> HANSON, *supra* note 24, at 128.

<sup>49</sup> *Id.* at 128–29; *Sayings and Doings*, HARPER'S BAZAAR, Feb. 13, 1875, at 111.

<sup>50</sup> SIMPSON, *supra* note 28, at 176–80.

<sup>51</sup> *The Dangers of the Sea*, *supra* note 46, at 626.

<sup>52</sup> HANSON, *supra* note 24, at 134.

<sup>53</sup> *Id.* at 300.

<sup>54</sup> *Id.*

to cast lots and the loser accepted his fate and bared his breast to the knife. After the two survivors were rescued, the German consul later sought to extradite them for murder, but the United States authorities delayed and then dismissed proceedings.<sup>55</sup>

The doctrine of necessity supports action taken by a ship captain in closing off certain parts of the vessel to save the ship from flooding, even if that means certain death for the seamen who are trapped. For example, on May 23, 1939, while the United States submarine *Squalus* was practicing a crash dive, the main induction valves failed to close and water poured into the engine rooms.<sup>56</sup> The submarine sank to the ocean floor more than 200 feet below the surface. The two engine rooms and the after torpedo room were closed off in order to prevent the water from pouring into the rest of the vessel. Twenty-six men were trapped in those rooms, and they drowned. The remaining thirty-three in the other parts of the submarine were eventually rescued.<sup>57</sup> The man who actually closed the bulkhead door is reported to have said when rescued, "I wish to make it clear that I acted according to the requirements of my duty in closing the bulkhead door. I have the utmost sorrow for my shipmates who died, but I would not hesitate to do the same thing if similar circumstances required . . ."<sup>58</sup> The action of closing the bulkhead door had the clear consequence of trapping the men inside, with the certainty that they would drown, but this choice was the lesser evil in that it resulted in a net saving of lives.

In 1987, an incident occurred during the sinking of the ferry *Herald of Free Enterprise* at Zeebrugge, during which an Army corporal and dozens of other passengers were trapped on the sinking ferry.<sup>59</sup> Their only means of escape was via a rope-ladder, but a man was blocking it and was frozen in panic in the midst of rising waters. "After repeatedly shouting at him to move, the corporal ordered those below him to pull the man off the ladder" because his immobility was seriously jeopardizing the safety of others who were in danger of drowning. "They did so and he fell into the water and drowned, while the others made their escape."<sup>60</sup>

The coroner reported that the killing appeared to be "a reasonable act of what is known as self-preservation . . . that also includes in my judgment, the preservation of other lives; such kill-

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<sup>55</sup> *Id.*

<sup>56</sup> NAT A. BARROWS, BLOW ALL BALLAST! 286 (1940).

<sup>57</sup> See CARL LAVO, BACK FROM THE DEEP ch. 5 (1994).

<sup>58</sup> BARROWS, *supra* note 56, at 172.

<sup>59</sup> HANSON, *supra* note 24, at 301.

<sup>60</sup> *Id.*

ing is not necessarily murder at all.”<sup>61</sup> No criminal charges were brought.

### III. HOMICIDE BY NECESSITY: THE MINORITY VIEW

The minority view was expressed in dictum in an early federal case. Supreme Court Justice H. Brockholst Livingston, sitting as a circuit court judge, wrote:

If the necessity which leaves no alternative but the violation of law to preserve life, be allowed as an excuse for committing what would otherwise be high treason, parricide, murder, or any other of the higher crimes, why should it not render venial an offence which is only *malum prohibitum*, and the commission of which is attended with no personal injury to another.<sup>62</sup>

Here, in dictum, Justice Livingston apparently presumed that the necessity defense is available for “treason, parricide, murder” and other high crimes, so that in the case at bar, involving a less serious crime of violating an embargo by entry into a forbidden port, necessity was allowed as a defense.

In modern times, the view that necessity ought to be available as a defense to intentional homicide is explicitly mentioned in the Model Penal Code, based upon a utilitarian cost-benefit analysis assessing whether the killing results in the net saving of lives, hence producing a greater good for society.<sup>63</sup> The Model Penal Code, which seeks to inform and influence state lawmakers, supports the intuitive view that intentionally killing an innocent is legally justifiable under certain circumstances where the result is the net saving of innocent lives.<sup>64</sup> This minority view suggests that it is counterintuitive to deny the necessity defense when killing a few may help avert the killing of many others. The Commentary to the Model Penal Code says:

It would be particularly unfortunate to exclude homicidal conduct from the scope of the defense. For, recognizing that the sanctity of life has a supreme place in the hierarchy of values, it is nonetheless true that conduct that results in taking life may promote the very value sought to be protected by the law of homicide. Suppose, for example, that the actor makes a breach in a dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be taken in such a case to be of

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<sup>61</sup> *Id.*

<sup>62</sup> The William Gray, 29 F. Cas. 1300, 1302 (C.C.D. N.Y. 1810) (No. 17,694).

<sup>63</sup> MODEL PENAL CODE § 3.02 cmt. 3 at 14–15 (1985).

<sup>64</sup> *Id.*



equal value and the numerical preponderance in the lives saved compared to those sacrificed *surely should establish* legal justification for the act.<sup>65</sup>

Thus, it is advanced by the Commentary that homicidal conduct to increase the number of people remaining alive should be regarded as justifiable under the necessity doctrine.<sup>66</sup> The last sentence of this section was modified from the 1958 Tentative Draft of the Model Penal Code. The earlier version said: "The life of every individual must be assumed in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed *surely establishes an ethical and legal justification for the act.*"<sup>67</sup>

Evidently, the newer version of the Commentary backed off from ascribing *ethical* approval of intentional homicide in the context of the necessity defense, and softened its approach by changing "surely establishes" to "surely should establish."

The Commentary to the Model Penal Code supports the view with a chilling hypothetical known as the Mountaineer Case<sup>68</sup>: Suppose two people are climbing a mountain. The climbers are held together by a rope. At one point, they both slip and slide over a precipice. The rope, still holding them both, becomes dangerously frayed. It clearly will not hold both of them much longer. Both face imminent death if nothing is done. Should the upper climber cut loose the lower climber, letting him fall to his death, and thus enable himself to climb up to safety? By doing so, the one climber will accelerate the death of the other slightly, but also avoid the greater evil, namely, the certain death of both.

The Commentary says this:

[A] mountaineer, roped to a companion who has fallen over a precipice, who holds on as long as possible but eventually cuts the rope, must certainly be granted the defense that he accelerated one death slightly but avoided the only alternative, the certain death of both. Although the view is not universally held that it is ethically preferable to take one innocent life than to have many lives lost, most persons probably think a net saving of lives is ethically warranted if the choice among lives to be saved is not unfair. Certainly the law should permit such a choice.<sup>69</sup>

Here, the comment specifically notes there is a lack of unanimity as to the *ethics* of killing an innocent to save a greater number of lives, but that "most persons probably think" it is ethi-

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<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> *Id.* at 14–16.

<sup>67</sup> MODEL PENAL CODE § 3.02 cmt. 3, at 8 (Tentative Draft 1958) (emphasis added).

<sup>68</sup> MODEL PENAL CODE § 3.02 cmt. 3, at 14–15 (1985).

<sup>69</sup> *Id.* at 15.

cally permissible, presumably on utilitarian grounds, and that in any event the law ought to “permit such a choice” under the circumstances.

From a *moral* standpoint the upper climber may feel that the action would be impermissible under any circumstances because it would be the intentional killing of an innocent person. One might prefer to die honorably rather than be a survivor at the cost of another’s life. Would the upper climber be in a better moral position if he asked permission of the lower climber to cut the rope? He might say, “Jim, there’s no hope, the rope is failing and we will both go down; if I cut the rope at your end I can climb to safety—what do you say?” From a legal standpoint, on the other hand, “consent” to intentional killing is almost universally unlawful, as we will explore below.

One might consider whether the climbers in the Mountaineer Case owe duties to one other. The climbers, by consenting to be roped together, at least impliedly agree to use due care in aiding one another in, as it were, a joint venture. The idea of implied consent involves “an inference arising from a course of conduct or relationship between the parties, in which there is a mutual acquiescence or a lack of objection under circumstances signifying assent.”<sup>70</sup> But the implied agreement between the climbers, one might plausibly argue, does not extend to exigent circumstances where their bodily integrity is in great jeopardy.<sup>71</sup> Moreover, in exercising due care, it is not entirely clear what the upper climber could do under the circumstances to aid the lower climber. It has been suggested that mountaineers who agree to rope themselves together when scaling mountains have an implied understanding that in the case of imminent peril, it is justifiable to cut the rope in order to save a greater number:

If one loses his grip, the rope may save a life by stopping the fall—but the rope also creates a risk, for the falling climber may take the others down with him. By agreeing to rope up, each member of the group exposes himself to a chance of death because of someone else’s error or misfortune. In exchange he receives protection against his own errors or misfortunes. Each accepts a risk of death to reduce the total risk the team faces, and thus his portion of the aggregate risk. Each agrees, if only implicitly, that if one person’s fall threatens to bring all down, the rope may be cut and the others saved.<sup>72</sup>

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<sup>70</sup> Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co., 195 S.E.2d 711, 713 (S.C. 1973).

<sup>71</sup> The right to bodily integrity is a fundamental tenet of common law. Related to this notion is the right of a person to consent to what another does to impact his bodily integrity. See, e.g., Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1061 (1999).

<sup>72</sup> Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV.

What about treating the Mountaineer Case as one of self-defense? The lower climber's tug on the rope is an unconsented invasion of the bodily integrity of the upper climber, and poses an imminent threat to the upper climber's life. The lower climber, albeit completely innocently and through no fault of his own, imperils the life of the upper climber by the tug of the rope. The upper climber had originally consented to be linked by the rope for the purpose of mutual safety, but did not agree to be pulled to his death under these circumstances. The tugging of the rope upon his body is, as it were, a trespass even though it was utterly involuntary on the part of the lower climber.

While it is the *rope* that directly poses the danger because it is coming apart, the lower climber, simply by being where he is at the time, is an innocent aggressor who poses an imminent threat to both the upper climber and himself. That is, the weight of the lower climber against the frayed rope exacerbates the frayed condition of the rope, and thereby imperils both of their lives. Under normal circumstances, the lower climber would not pose this threat, but in light of the rope's damaged state, the threat is real and present. The upper climber, however, can protect himself from imminent death by taking action in cutting the rope below him and then pulling himself up.

The aggressor is innocent of wrongdoing, and in a sense the aggression does not emanate from the lower climber, but emanates from the condition of the rope. On the other hand, as we noted above, it is arguable that the tugging of the lower climber's weight violates the agreement the climbers had to remain roped together. Thus, under the circumstances, the upper climber has a right to take defensive measures against what is, in a sense, *unlawful* aggression—aggression in violation of the scope of their mutual obligations in the mountain climbing venture.

Perhaps the Mountaineer Case is analogous to the situation of a viable fetus that threatens the mother's life. The pregnant woman is not expected to sacrifice her life to promote the well-being of the fetus inside her who needs her body at the expense of her own life.<sup>73</sup> Moreover, both the mother and fetus may likely die unless the fetus is sacrificed. Prior to *Roe v. Wade*, the doc-

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L. REV. 1913, 1916 (1999).

<sup>73</sup> This argument draws upon Judith Jarvis Thomson's defense of abortion rights because no woman has a moral obligation to consent to an imposition as demanding as pregnancy. See Judith Jarvis Thomson, *A Defense of Abortion*, in *RIGHTS, RESTITUTION, AND RISK 1* (William Parent ed., 1986). Moreover, the Supreme Court has ruled that the Due Process Clause protects an individual's right to bodily integrity. See, e.g., *Rochin v. California*, 342 U.S. 165, 172–73 (1952) (reversing the conviction of defendant for possession of morphine, based on evidence procured by forcibly administering an emetic, inducing him to vomit capsules of the drug swallowed during arrest).

trine of medical necessity provided a defense to the performance of an otherwise illegal abortion to save the life of the mother.<sup>74</sup> The rationale behind medical necessity in such cases was a kind of self-defense: the mother has the right to defend herself against the needy and life-threatening fetus within her by expelling the fetus, even at the cost of the fetus's life.

The Commentary concludes that the issue "is a matter that is safely left to the determination and elaboration of the courts."<sup>75</sup> The Model Penal Code approach has not been adopted by any state. Moreover, numerous states have rejected the Model Penal Code's approach, either by increasing the burdens on a defendant interposing the necessity defense,<sup>76</sup> or by disallowing the defense to a charge of intentional homicide in the first place.<sup>77</sup>

#### IV. THE NAZI HOLOCAUST CASE

Another situation involving the killing of a person who is an innocent threat is a chilling account from the Nazi holocaust. A group of Jews was hiding from the Nazis.<sup>78</sup> They sought to prevent the Nazis from discovering their hiding place, but a crying baby jeopardized their safety. The group smothered the baby to death in order to prevent the Nazis from discovering their hiding place and killing them all.<sup>79</sup> A rabbi was asked to analyze the facts, and rendered the opinion that the action was permissible "since the baby would have been killed along with all the others if the Nazis had found them."<sup>80</sup> The rabbi added that the action was not required, but permissible (i.e., excusable) and that it would have been an act of holiness not to kill the infant under the circumstances.

The baby was an innocent threat to the others. In the absence of action to suppress the baby's crying, all of the people in the group, including the baby, would die at the hands of the Nazis. The choice of evils was either to do nothing, and allow the Nazis to discover the entire group, with the inevitable outcome

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<sup>74</sup> *Roe v. Wade*, 410 U.S. 113, 117–18 (1973).

<sup>75</sup> MODEL PENAL CODE § 3.02 cmt. 3 at 14 (1985).

<sup>76</sup> Some states require that the defendant show that the threatened harm *clearly* outweighed the harm caused by the defendant. See 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 124(g) (1984). Others require that the defendant show by a preponderance of the evidence that the evil averted was greater than the evil caused. Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1151 n.193 (citing 2 ROBINSON, *supra*, § 124(c) (Supp. 1988)).

<sup>77</sup> See, e.g., SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 785 n.5 (1983) (collecting examples of states limiting the necessity defense).

<sup>78</sup> Marilyn Finkelman, *Self-Defense and Defense of Others in Jewish Law: The Rodef Defense*, 33 WAYNE L. REV. 1257, 1278–79 (1987).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

that they would all be killed, or to sacrifice the baby in order to save a greater number of people. The action to suppress the baby's cries (i.e., smother the baby, resulting in its death), in fact resulted in a greater number of lives saved.

If we compare the Nazi case to the Mountaineer Case, we will find significant similarities, and only a couple of differences. The entire group in the Nazi case, and both climbers in the Mountaineer Case, faced imminent death. In the Mountaineer Case, there was a net saving of one life; in the Nazi case, there was a net saving of several lives. The survival of the greater number could not occur without the sacrifice of the baby, who would die in any event. In the Mountaineer Case, the survival of the upper climber could not occur without the sacrifice of the lower climber, who would die in any event. Thus, in both cases, a net saving of life can occur only by killing someone. In both cases, the victim is a threat *in light of the circumstances*. In the Mountaineer Case, it is the *rope* that poses the danger because it is breaking, and this threat is exacerbated by the weight of the lower climber. In the Nazi case, it was not the baby itself, but the *crying* of the baby, that posed the threat. And this crying was not really the threat—it was the *Nazis* who posed the danger because they were close to finding the group's hiding place, and this threat was exacerbated by the presence of the crying baby.

In both cases, the action of killing results in the death of someone who otherwise would have died very soon. That is, in the Nazi case, if the group did nothing, the baby (and the entire group) would have ended up dying in short order. The death of the baby by smothering shortened the life of the baby by a short time; similarly, in the Mountaineer Case, cutting the rope shortened the life of the lower climber by a short time.

In the Mountaineer Case, the parties owed a duty to one another as a result of their agreement to be roped together but, as mentioned, that duty may well cease in the face of danger to their lives. In the Nazi case, duties are certainly owed by the parents to insure the proper health and welfare of the baby. It would be difficult to find authority for the proposition that parental duties might "cease" in exigent circumstances, but as noted above, the rabbi who considered the case, in ruling that the action was permissible, apparently excused the breach of parental duties in that instance.

We might consider whether the Nazi case is susceptible to analysis based on self-defense. This would lead us into murky terrain. A self-defense analysis in the Nazi case would be hard to support in part because the action of the baby's crying can hardly be said to be an act of "aggression," much less *unlawful* aggres-

sion against the others, as is customary in a standard case of self-defense. True, the crying posed an imminent threat of being detected by the Nazis, but this was hardly a *bodily* invasion or otherwise an act of physical aggression to the others. Much less is the crying in any sense *unlawful*. The crying was at best an indirect threat.

In the Mountaineer Case, as we argued above, the lower climber's tug on the rope is an unauthorized attack on the bodily integrity of the upper climber. This invasion, however innocent, when coupled with the frailty of the rope, posed an imminent threat to the upper climber's life. Of course, under normal circumstances, that is, if the rope were in sound condition, the lower climber's tugging on the rope over the precipice would not pose this threat.

The baby's crying would also not normally pose a threat to the life of the others. Only when coupled with the Nazis on the prowl did the crying become a danger. Still, the baby's crying under the circumstances seems causally removed from the real threat to the group. At least in the Mountaineer Case we can plausibly direct a defensive move by cutting the rope and, once that is completed, the danger ceases to exist. In the Nazi case, if the "defensive" move is accomplished (i.e., smothering the baby), the *real* danger does not go away—the Nazis might still find the group one way or another and end up killing them. Thus, killing the baby might not avert the real danger. It may enable the group to elude detection, but the slightest cough or movement or other noise by someone else in the group could lead to their doom. In the Mountaineer Case, cutting the rope *will* avert the real danger.

The Nazi case, like the Mountaineer Case, is best analyzed under the necessity doctrine, in part because the circumstances involve a weighing of evils, and the action taken resulted in a net saving of lives. The danger was imminent. There was no legal way out. The actors were not responsible for bringing about the necessitous circumstances. The action was calculated to be causally effective in averting the greater evil. The only impediment under the necessity doctrine is that under the majority view, the necessity defense is not available in cases of intentional homicide.

#### V. STATUTORY LAW ADDRESSING HOMICIDE BY NECESSITY

Most statutory enactments on the necessity defense are silent on the question of whether the defense is available in cases of intentional homicide. In the absence of statutory guidance,

courts that have considered the question invariably say, based on common law principles, that necessity is no defense to intentional homicide.<sup>81</sup>

Kentucky makes it explicit that necessity is not available as a defense in cases of intentional homicide.<sup>82</sup> The Kentucky statute reads in relevant part:

(1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, *except that no justification can exist under this section for an intentional homicide.*<sup>83</sup>

Missouri's statute also precludes the necessity defense in cases of murder, and precludes use of the defense in class A felonies: "[C]onduct which would otherwise constitute any crime other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury . . . ."<sup>84</sup>

Under the Wisconsin necessity statute, a defendant charged with murder is entitled to have the charges reduced to manslaughter if the elements of the necessity defense are proven. In that case, "if the prosecution [in which the necessity defense is invoked] is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide."<sup>85</sup>

It may seem counterintuitive to preclude the necessity defense in homicide cases when the result is a net saving of lives, because "in so many other areas of human life we believe that we have an obligation to ensure the survival of the maximum number of lives possible."<sup>86</sup> For instance, in triage where emergency workers seek to ensure the survival of the maximum number of lives, necessity dictates that workers focus on rescuing one group of innocents over another for utilitarian reasons.<sup>87</sup> Suppose two groups of mine workers are trapped in a mine shaft, and due to the exigencies of the emergency, and mindful of the safety of the rescue team, only one group of equally blameless people who are trapped can be saved. If one group consists of thirty people and

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<sup>81</sup> See, e.g., *R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949) ("[It] appears to be established . . . that . . . necessity will never excuse taking the life of an innocent person . . .").

<sup>82</sup> See KY. REV. STAT. ANN. § 503.030 (West 2003).

<sup>83</sup> *Id.* (emphasis added).

<sup>84</sup> MO. ANN. STAT. § 563.026 (West 1999).

<sup>85</sup> WIS. STAT. ANN. § 939.47 (West 2005).

<sup>86</sup> John Harris, *The Survival Lottery*, 50 PHIL. 81, 82 (1975).

<sup>87</sup> See, e.g., *id.*

the other consists of five people, most of us would think that there is no question but to rescue the larger group simply because that will save more lives. In choosing to rescue one group over another, the workers recognize that they are sacrificing a few so that a greater number of people may live. Some innocents will die, but we regard this as a benefit to society in light of the net gain in lives saved. One might consider whether the distinction in the triage case is one between killing and letting die, while in cases of homicide based on necessity, the defendants have killed an innocent victim by deliberate, direct action.

#### VI. THE LANDMARK HOMICIDE BY NECESSITY CASES

In this section we consider two court decisions that squarely deal with the deliberate killing of unoffending and unresisting persons. Both cases involve exigent circumstances on the high seas and survivors in lifeboats. The first, *United States v. Holmes*, is an 1842 case involving the charge of manslaughter on the high seas. The second is *Regina v. Dudley & Stephens*, an 1884 English case involving a charge of murder done in order to cannibalize the remains of the victim.

What these cases have in common is that survivors are cast together in a lifeboat with scant provisions, and they are adrift for several days or even weeks without any apparent rescue in sight. In the *Holmes* case, the lifeboat itself is unstable and overloaded, and bad weather threatens to capsize the boat. In both cases, either by rational deliberation or by chaotic frenzy, a decision is made to kill one or more of the group either to cannibalize the victim's flesh or to eject people from the group and thereby lighten the boat. Once the survivors are rescued, authorities evaluate the situation and decide to prosecute those who had a hand in the homicide.

##### A. *United States v. Holmes*

The most famous American case that considers the necessity defense in connection with the intentional killing of innocents was the 1842 case of *United States v. Holmes*.<sup>88</sup> The case evoked considerable sympathy in the press in favor of Alexander William Holmes, a crew member of the *William Brown*, who was charged with manslaughter on the high seas.

The *Holmes* case is notably the only one in Anglo-American law that explicitly suggests, in dictum, that the necessity defense might be appropriately invoked in the killing of innocents where

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<sup>88</sup> 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).



an imminent danger threatens the entire group with death, *provided a fair method of sacrifice is employed*. However, the court held that the necessity defense did not apply to the facts in this case.<sup>89</sup>

On April 19, 1841, an American ship, the *William Brown*, was en route from Liverpool to Philadelphia carrying seventeen crew and sixty-five passengers when it hit an iceberg 250 miles southeast of Cape Race, Newfoundland, and rapidly went down. There were two lifeboats, not large enough for everyone, and one of them was in a precarious condition.

The captain informed the passengers that they could not all be saved by the boats, but that whoever wanted to should immediately proceed to get in. In an interesting—and later a legally significant—twist, virtually all of the crew members saved themselves by boarding the lifeboats, together with thirty-nine passengers. The captain, the second mate, seven of the crew, and one passenger got into the smaller boat, filling it to capacity. The first mate, eight seamen, including Holmes, and thirty-two passengers got into the larger boat, known as the long-boat, filling it beyond capacity. There were about twice as many as the boat could hold under the most favorable conditions of wind and weather.

Just as the long-boat was about to pull away from the wreck, Holmes, hearing the agonized cries of a mother for her little daughter who had been left behind in the panic, dashed back at the risk of instant death, found the girl and carried her under his arm into the long-boat.<sup>90</sup>

The remainder of the passengers, thirty-one in number, remained on board the ship and perished when it sank. “The boat had provisions for about six or seven days, . . . [and] [t]he mate had a chart, quadrant and compass. The weather was cold, and the passengers, being half clothed, much benumbed.”<sup>91</sup>

The next day, at daybreak, the captain said that he would try to head in the direction of Newfoundland, and the long-boat, which was somewhat unmanageable, should fend as best as could be managed. He instructed the mate, one Rhodes, how to steer for land and told the crew to obey all his orders. Rhodes told the captain that the boat was unmanageable because it was in bad condition, and that he would have to cast lots and throw some of the passengers overboard. The captain replied, “[D]on’t talk of it

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<sup>89</sup> *See id.*

<sup>90</sup> EDMOND CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* 61 (1956).

<sup>91</sup> *Holmes*, 26 F. Cas. at 362.

now, but leave it to the last resort.”<sup>92</sup>

The two lifeboats parted ways. The captain and the others in his boat were picked up after six days on the open sea, and brought to land.<sup>93</sup> The boat with Rhodes, Holmes and the others was continually in great jeopardy. It had started to leak upon being launched, and the passengers had to bail out water with buckets to make her hold her own. The plug came out more than once, was lost, and a makeshift plug was fashioned. The crew thought that the boat was too unmanageable to be saved. Even without the leak, the crew believed that the boat could not support even half her company. The slightest irregularity would have capsized the boat. “If she had struck any piece of ice she would inevitably have gone down. There was great peril of ice for any boat.”<sup>94</sup> The crew discussed among themselves that since the boat was unmanageable and overloaded, it would be necessary to cast lots and throw some overboard. Later, on the first day at sea and about twenty-four hours after the initial launching, heavy rain poured down, and winds and waves splashed over the boat’s bow. At about 10 p.m., Holmes “and the rest of the crew began to throw over some of the passengers, and did not cease until they had thrown over 14 male passengers.”<sup>95</sup> Not one of the crew was cast over.<sup>96</sup>

Two additional passengers, both women, apparently flung themselves overboard in an act of devotion and affection to their brother, whom Holmes had thrown overboard, thus making for sixteen people jettisoned.<sup>97</sup> These, with the exception of two married men and a small boy, constituted all the male passengers aboard.

In jettisoning the passengers, the only rule that Holmes followed was “not to part man and wife, and not to throw over any women.”<sup>98</sup> Apparently, he also followed a “rule” of sparing all of the crew. “No lots were cast, nor had the passengers, at any time, been either informed or consulted as to [the decision of Holmes and the other crew members to jettison the male passengers.]”<sup>99</sup> The next day, Wednesday, two men who were very stiff with cold, and who had hidden themselves, were thrown over despite there was no necessity for it, for the boat was no longer overloaded. Perhaps the greatest tragedy of this case was that

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<sup>92</sup> *The Case of the William Brown*, THE L. REP., Dec. 1842, at 339.

<sup>93</sup> See CAHN, *supra* note 89, at 61.

<sup>94</sup> *Holmes*, 26 F. Cas. at 360–61 (citing the Captain’s and second mate’s depositions).

<sup>95</sup> *Id.* at 361.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

later on Wednesday the long-boat was picked up by the ship, *Crescent*, and all the persons who had not been thrown overboard were thus saved. Had some semblance of order and prudence prevailed, and had the crew been willing to wait just another day before throwing over the fourteen passengers on Tuesday night, and the two others on Wednesday morning, all likely would have been saved.

The survivors were taken to Le Havre, and the crew was arrested, but after statements were made, they were released from jail and no charges were brought.<sup>100</sup> The *Times* of London remarked, "The frightful necessity of sacrificing part of the passengers for the safety of the rest is fully proved."<sup>101</sup> However, upon their return to the United States, a grand jury indicted Holmes under a 1790 federal statute for manslaughter committed upon the high seas.<sup>102</sup>

A great deal of publicity preceded and accompanied the trial, which took place one year after the incident.<sup>103</sup> There was considerable public consternation as well.<sup>104</sup> Holmes was thought to be a hero because, as noted above, he had rescued the little girl who had been left behind on the sinking ship, and he had taken over the direction of the lifeboat because the first mate, Rhodes, became increasingly unable to act decisively. In addition, Holmes was instrumental in sighting and signaling the ship that rescued them.<sup>105</sup> The case was tried before United States Supreme Court Justice Henry Baldwin, who was presiding as trial judge. The prosecutors were William Morris Meredith, who later became Secretary of the Treasury, and George Mifflin Dallas, later Vice President of the United States.

It was Holmes' defense that the homicide was necessary to avert the deaths of the entire group of survivors in the long-boat.<sup>106</sup> The prosecution argued that the crew had certain duties to protect the passengers, not jettison them; that the wholesale jettisoning of passengers by Holmes was indefensible; and that if the circumstances were so extreme that human sacrifice needed to be resorted to, a mode of selection should have been agreed

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<sup>100</sup> See HANSON, *supra* note 24, at 135.

<sup>101</sup> See *id.*

<sup>102</sup> See *Holmes*, 26 F. Cas. at 362–63. From the record of the case, it appears that Holmes was the only party indicted, though the record shows that other seamen participated in the throwing overboard of the passengers. Holmes was indicted only with respect to manslaughter against one passenger. The grand jury rejected an indictment of murder. See HANSON, *supra* note 24, at 135.

<sup>103</sup> See *Holmes*, 26 F. Cas. at 363.

<sup>104</sup> See LEO KATZ, *BAD ACTS AND GUILTY MINDS* 20 (1987).

<sup>105</sup> See *Holmes*, 26 F. Cas. at 362.

<sup>106</sup> *Id.* at 364.

upon by all:

We protest against giving to seamen the power thus to make jettison of human beings, as of so much cargo; of allowing sailors, for their own safety, to throw overboard, whenever they may like, whomsoever they may choose. If the mate and seamen believed that the ultimate safety of a portion was to be advanced by the sacrifice of another portion, it was the clear duty of that officer, and of the seamen, to give full notice to all on board. Common settlement would, then, have fixed the principle of sacrifice, and, the mode of selection involving all, a sacrifice of any would have been resorted to only in dire extremity. Thus far, the argument admits that, at sea, sailor and passenger stand upon the same base, and in equal relations. But we take . . . stronger ground. The seaman, we hold, is bound, beyond the passenger, to encounter the perils of the sea. To the last extremity, to death itself, must he protect the passenger. It is his duty. It is on account of these risks that he is paid. It is because the sailor is expected to expose himself to every danger, that, beyond all mankind, by every law, his wages are secured to him.<sup>107</sup>

The prosecution cited, among other things, a principle stated by Francis Bacon:

[T]he law imposeth it upon every subject that he prefer the urgent service of his prince and country before the safety of his life. . . . “[I]f a man be commanded to bring ordnance or munition to relieve any of the king’s towns that are distressed, then he cannot, for any danger of tempest, justify the throwing of them overboard; for there it holdeth which was spoken by the Roman when he alleged the same necessity of weather to hold him from embarking: ‘Necesse est et ut eam; non ut vivam [It is necessary that I go on, it is not necessary that I live].’”<sup>108</sup>

This seems an odd argument to throw into the equation. The principle stated in the quoted passage of Bacon appears in his discussion of the necessity doctrine concerning the jettisoning of cargo from a ship in distress.<sup>109</sup> Bacon made a distinction between the justified throwing of ordinary cargo to save the passengers and ship, and cargo in the form of munitions being transported in the pursuit of a war effort of the sovereign. No one in the long-boat was transporting munitions in “the urgent service of his prince and country,” so the Bacon quote was not germane to the facts at issue.

In arguing for acquittal, Holmes’ attorney said that since the jury was not present at the scene of the catastrophe, it would be

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<sup>107</sup> *Id.* at 363–64.

<sup>108</sup> *Id.* at 364 (citing SIR FRANCIS BACON, *A Collection of Some Principal Rules and Maxims of the Common Laws of England*, in *THE ELEMENTS OF THE COMMON LAWS OF ENGLAND*, Regula V at 32 (photo. reprint 2004) (1630)).

<sup>109</sup> See SIR FRANCIS BACON, *A Collection of Some Principal Rules and Maxims of the Common Laws of England*, in *THE ELEMENTS OF THE COMMON LAWS OF ENGLAND*, Regula V at 32 (photo. reprint 2004) (1630).

a precarious matter for them to second-guess the defendant's assessment of the imminent danger of death that existed at the time. Holmes' attorney cited *The Mariana Flora*,<sup>110</sup> in which the Supreme Court said, "It is a different thing . . . to sit in judgment upon this case, after full legal investigations, aided by the regular evidence of all parties, and to draw conclusions at sea, with very imperfect means of ascertaining facts and principles which ought to direct the judgment."<sup>111</sup> The argument here is that the necessity defense turns on the reasonableness of the actor's conduct at the time it occurred, based on conclusions drawn under imperfect circumstances. Therefore, it would be unfair to evaluate a defendant's acts at sea in hindsight, based on all the evidence scrupulously gathered after the emergency was over.

Holmes' attorney also argued, in concurrence with what the prosecution had asserted, that the custom of the sea prescribes the casting of lots in exigent circumstances, but that in this case there was no time for this mode of selection. Holmes' attorney argued that the evidence indicated that there was cry of the boat's sinking, that it was dark and rainy, that the plug was missing and that there was every reason to fear that she was fast filling with water.<sup>112</sup> The attorney argued:

Lots, in cases of famine, where means of subsistence are wanting for all the crew, is what the history of maritime disaster records; but who has ever told of casting lots at midnight, in a sinking boat, in the midst of darkness, of rain, of terror, and of confusion? To cast lots when all are going down, but to decide who shall be spared, to cast lots when the question is, whether any can be saved, is a plan easy to suggest, rather difficult to put in practice. . . . The sailors adopted the only principle of selection which was possible in an emergency like theirs,—a principle more humane than lots. Man and wife were not torn asunder, and the women were all preserved. Lots would have rendered impossible this clear dictate of humanity.<sup>113</sup>

The defense also asserted, in a novel and clever argument, that all in the boat were reduced to a state of nature so that Holmes (and presumably everyone else in the boat) was no longer a sailor, but a drowning man. Being in a state of nature, Holmes and the other sailors were no longer bound by any duty to the passengers, but instead everyone in the boat was on equal footing. Holmes' attorney argued this point as follows:

But if the whole company were reduced to a state of nature, then the sailors were bound to no duty, not mutual, to the passengers. The

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<sup>110</sup> *Holmes*, 26 F. Cas. at 365 (citing *The Mariana Flora*, 24 U.S. (11 Wheat.) 1, 51–52 (1826)).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 361.

<sup>113</sup> *Id.* at 365.

contract of the shipping articles had become dissolved by an unforeseen and overwhelming necessity. The sailor was no longer a sailor, but a drowning man. Having fairly done his duty in the last extremity, he was not to lose the rights of a human being, because he wore a roundabout instead of a frock coat. We do not seek authorities for such doctrine. The instinct of these men's hearts is our authority,—the best authority. Whoever opposes it must be wrong, for he opposes human nature. All the contemplated conditions, all the contemplated possibilities of the voyage, were ended. The parties, sailor and passenger, were in a new state. All persons on board the vessel became equal. All became their own lawgivers; for artificial distinctions cease to prevail when men are reduced to the equality of nature. Every man on board had a right to make law with his own right hand, and the law which did prevail on that awful night having been the law of necessity, and the law of nature too, it is the law which will be upheld by this court, to the liberation of this prisoner.<sup>114</sup>

The state of nature argument, well articulated by Holmes' lawyer, was that at some point in certain extreme circumstances, we are reduced to the "equality of nature," and we are no longer governed by rules, but by circumstances. He was suggesting that in the long-boat, the group was no longer subject to the social contract within which fundamental rights subsist. According to this argument, at the point where the boat was in imminent peril of going down, all of the people in the boat were on equal footing, with no one owing any duties to anyone else. The crew and passengers were free to engage in a melee in which the strongest would overcome the weakest, or by chance, some would hold on while others would be jettisoned.<sup>115</sup>

Justice Baldwin denied that the people in the boat were in a "state of nature" and no longer subject to the law or duties. However, he did say that a true state of nature case would divest the taking of life from unlawfulness:

For example, suppose that two persons who owe no duty to one another that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would either

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<sup>114</sup> *Id.* at 366.

<sup>115</sup> Hobbes theorized that, in a literal sense, a state of nature may have existed in the early development of the human species, and there was no system of law and order. It was a violent world. In a state of nature there are no values, rules, norms or laws, no contracts or agreements, and no duties. In that context, the brutishness of man's nature would have gone unrestrained because there was nothing to restrain it. The will to survive knew no bounds, under the maxim, "Every man for himself." In a state of nature, then, the situation is kill or be killed. If a conflict occurred in a state of nature, it was resolved by recourse to violence: "And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End . . . endeavour to destroy . . . one another." THOMAS HOBBS, *LEVIATHAN* 184 (C.B. Macpherson ed., Penguin Classics 1985) (1651).

commit a crime in saving his own life in a struggle for the only means of safety.<sup>116</sup>

Justice Baldwin here speaks of people “who owe no duty to one another,” and later in the opinion he points out that Holmes and the other sailors in fact owed certain duties to the passengers, and breached those duties by jettisoning the passengers. But in the above passage, Justice Holmes suggests that in a true state of nature situation, no one has the duty to save another’s life by sacrificing one’s own life, and it is not unlawful to save one’s own life in a struggle for the only means of safety.

Holmes’ attorney, in arguing that his client should be acquitted, offered the following impassioned description of the necessitous circumstances:

[T]his case should be tried in a long-boat, sunk down to its very gunwale with 41 half naked, starved, and shivering wretches,—the boat leaking from below, filling from above, a hundred leagues from land, at midnight, surrounded by ice, unmanageable from its load, and subject to certain destruction from the change of the most changeful of the elements, the winds and the waves. To these superadd the horrors of famine and the recklessness of despair, madness, and all the prospects, past utterance, of this unutterable condition. Fairly to sit in judgment on the prisoner, we should, then, be actually translated to his situation. It was a conjuncture which no fancy can imagine. Terror had assumed the throne of reason, and passion had become judgment.<sup>117</sup>

Justice Baldwin had no difficulty acknowledging the viability of the doctrine of necessity: “[T]here are certain great and fundamental principles of justice which, in the constitution of nature, lie at the foundation and make part of all civil law, independently of express adoption or enactment.”<sup>118</sup> Justice Baldwin added:

[I]t is the law of necessity alone which can disarm the vindicatory justice of the country. Where, indeed, a case does arise, embraced by this “law of necessity,” the penal laws pass over such case in silence; for law is made to meet but the ordinary exigencies of life. But the case does not become “a case of necessity,” unless all ordinary means of self preservation have been exhausted. The peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person. An illustration of this principle occurs in the ordinary case of self-defense against lawless violence, aiming at the destruction of life, or designing to inflict grievous injury to the person; and within this range may fall the taking of life under other circumstances where the act is indispensably requisite to self-

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<sup>116</sup> *Holmes*, 26 F. Cas. at 366; *see infra* note 129.

<sup>117</sup> *Id.* at 364.

<sup>118</sup> *Id.* at 368.

existence.<sup>119</sup>

It is worth noting that the language used, “instant, overwhelming, leaving no alternative,” appears to have gotten its initial imprimatur in 1837, with the words of then-Secretary of State Daniel Webster in the *Caroline* case.<sup>120</sup> Webster opined that to justify anticipatory self-defense in the law of war, a state must demonstrate the “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>121</sup> In this passage, Justice Baldwin also emphasizes that the necessity defense requires, among other things, evidence that “all ordinary means of self preservation have been exhausted.”<sup>122</sup>

Justice Baldwin found that the evidence fell short of what was required under the necessity doctrine, saying that the witnesses did not testify “in a manner entirely explicit and satisfactory in regard to the most important point, viz. the degree and imminence of the jeopardy at 10 o’clock on Tuesday night, when the throwing over began.”<sup>123</sup> It is hard to understand how he could have disputed the imminence of the danger, for the evidence revealed that the boat was overloaded, rain was falling, the passengers were overpowered by exhaustion and cold, the boat had a considerable amount of water in it, they were constantly working to bail out the water, the makeshift plug was not effective, and some men started yelling, “The boat is sinking. The plug’s out. God have mercy on our poor souls.”<sup>124</sup> Does it not seem clear from this evidence that “all ordinary means of self preservation” had been exhausted?

Justice Baldwin added that Holmes was an experienced seaman “who, from infancy, had been a child of the ocean,” and was not the sort of person to be “causelessly alarmed.”<sup>125</sup> The callous throwing out of the two men the morning after the initial jettisoning would seem to fall altogether outside the scope of the

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<sup>119</sup> *Id.* at 366.

<sup>120</sup> See SHARON KORMAN, *THE RIGHT OF CONQUEST* 103 (1996). The *Caroline* incident occurred during a Canadian insurrection against the Crown in 1837, when a British officer authorized an armed band of marauders to cross into the United States to burn the *Caroline*, a U.S. ship docked in port, and cut it loose, sending it crashing over Niagara Falls. The officer believed that the ship was going to be used to provide support for the insurrection. It is generally agreed that the British action was improper. Lord Ashburton sent Webster a letter of apology for the incident. *Id.* at 103–04.

<sup>121</sup> *Id.* Webster added a further caveat, which has come to be known as the proportionality test, that the state must do “nothing unreasonable or excessive: since the act, justified by the necessity of self-defense must be . . . kept clearly within it.” *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Holmes*, 26 F. Cas. at 361.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 365.



necessity doctrine in that the boat no longer was overloaded and clearly had been stable through the night, albeit not without difficulty, so that there was no longer imminent danger of sinking.

Justice Baldwin instructed the jury that if there is a guilty verdict, the degree of punishment should be tempered by a sense of mercy towards those who acted under extremely difficult circumstances, but that giving a favorable interpretation to evidence in order to mitigate an offense is different from justifying the act. He charged the jury as follows:

In such cases the law neither excuses the act nor permits it to be justified as innocent; but, although inflicting some punishment, she yet looks with a benignant eye, through the thing done, to the mind and to the heart; and when, on a view of all the circumstances connected with the act, no evil spirit is discerned, her humanity forbids the exaction of life for life. But though . . . cases of this kind are viewed with tenderness, and punished in mercy, we must yet bear in mind that man, in taking away the life of a fellow being, assumes an awful responsibility to God, and to society; and that the administrators of public justice do themselves assume that responsibility . . . .<sup>126</sup>

Perhaps the decisive moment in the case was Justice Baldwin's next charge to the jury regarding the duties owed by owners of common carriers to passengers. He noted the general obligation of passenger-carriers to do everything for the safety of those who commit themselves to their care, and said that this obligation does not come to an end in a time of extreme peril. It is the obligation of the sailors to prevent the occurrence of death of passengers. An emergency or a situation that Holmes' attorney sought to characterize as a "state of nature" does not divest the crew of their very specific duty to attend to the safety of passengers. Indeed, as one commentator later said,

[T]hough the circumstances of the long-boat might appear so desperate as to cancel all other social conventions and civil obligations, this one they could not cancel because it was expressly conceived and designed to yoke him in just such a plight, to bind him in conscience and in law, and to drive him open-eyed and willing to whatever course might be necessitated, including his own extinction.<sup>127</sup>

Justice Baldwin said to the jury,

A familiar application of this principle presents itself in the obligations which rest upon the owners of stages, steamboats, and other vehicles of transportation. In consideration of the payment of fare, the owners of the vehicle are bound to transport the passengers to the place of contemplated destination. Having, in all emergencies, the conduct of the journey, and the control of the passengers, the owners

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<sup>126</sup> *Id.* at 366.

<sup>127</sup> CAHN, *supra* note 90, at 69.

rest under every obligation for care, skill, and general capacity; and if, from defect of any of these requisites, grievous injury is done to the passenger, the persons employed are liable. The passenger owes no duty but submission. He is under no obligation to protect and keep the conductor in safety, nor is the passenger bound to labour, except in cases of emergency, where his services are required by unanticipated and uncommon danger. Such . . . is the relation which exists on shipboard. The passenger stands in a position different from that of the officers and seamen. It is the sailor who must encounter the hardships and perils of the voyage. Nor can this relation be changed when the ship is lost by tempest or other danger of the sea, and all on board have betaken themselves, for safety, to the small boats; for imminence of danger can not absolve from duty. The sailor is bound, as before, to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to call for the sacrifice of life, there can be no reason why the law does not still remain the same. The passenger, not being bound either to labour or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailor's. The captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved; for, except these abide in the ship, all will perish. But if there be more seamen than are necessary to manage the boat, the supernumerary sailors have no right, for their safety, to sacrifice the passengers. The sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor . . . owes more benevolence to another than to himself. He is bound to set a greater value on the life of others than on his own. And while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even "the law of necessity" justifies not the sailor who takes it from him. This rule may be deemed a harsh one towards the sailor, who may have thus far done his duty, but when the danger is so extreme, that the only hope is in sacrificing either a sailor or a passenger, any alternative is hard; and would it not be the hardest of any to sacrifice a passenger in order to save a supernumerary sailor?<sup>128</sup>

This amazing passage in the annals of jurisprudence made it clear that if the exigencies in a lifeboat become so extreme that human sacrifice is necessary, there must still be some semblance of law and order in the matter. Thus, the captain and so many seamen as are needed to navigate the boat should be exempt, and if more sailors are in the boat than are necessary for its management, the sailors are to be sacrificed sooner than the passengers. Justice Baldwin went so far as to say, in this passage, that even should the circumstances come to a struggle between a sailor and a passenger over a plank which can save but one, the sailor has the legal duty to refrain from wresting it from the pas-

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<sup>128</sup> *Holmes*, 26 F. Cas. at 366–67.

senger.<sup>129</sup>

Holmes was found guilty of manslaughter on the high seas. The jury may well have determined that not all of the sailors were absolutely necessary for the preservation of the lifeboat, and that the crew ought to have selected among themselves those to be jettisoned, or that Holmes should have somehow selected members of the crew to be jettisoned instead of the passengers who were thrown out.

A legal commentator of the day disagreed with the superegregory duty that Justice Baldwin said the crew owed to passengers in time of overwhelming calamity. The commentator seemed to echo Holmes' lawyer's state of nature argument, by asking in a situation where the sailor's vessel has been annihilated whether it was not the case that

the sailor is . . . no longer a sailor, but a drowning son of humanity, valuing his life as dearly as any other's, and brought perhaps to his extreme peril by that very faithful discharge of duty which forbade him to quit his post till the last joints of the ship went asunder? Must a sailor consider his life the measure of damages for not carrying a passenger safely, when the winds, and waves, and icebergs forbid it?<sup>130</sup>

The commentator added this:

Sailors are not, to be sure, to desert the passengers in peril, and stealthily secure their own safety; but fairly and heroically having done their duty, then, if placed in a common peril, we say their rights as men are not to be lost sight of under the name of sailors. They are not to forfeit the privileges of a common humanity, because they have voluntarily submitted themselves to marine despotism . . . Heroism may dictate such a sacrifice on their part for those whom they consider under their care, but when that care can no longer be rendered without self-destruction, where is it written in the bond that it shall be required?<sup>131</sup>

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<sup>129</sup> Perhaps the best example of a state of nature case is that classic one known as two-men-and-a-plank, originally formulated by Francis Bacon, but also attributed to Cicero. See BACON, *supra* note 109, at 29–30. Cicero's prior version of this case is known as the famous "Plank of Carneades," in which he stated that if two sailors were cast adrift on a plank adequate to support only one until rescue came, each could try to be the survivor without criminal liability. Klaus Bernsmann, *Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal—Some Remarks*, 30 ISRAEL. L. REV. 171, 185 (1996). Here is Bacon's description of the case:

[I]f divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.

BACON, *supra* note 109, at 29–30. The Latin term *se defendendo* means "upon a principle of self-preservation" or self-defense.

<sup>130</sup> *The Case of the William Brown*, *supra* note 92, at 347.

<sup>131</sup> *Id.*

Another commentator, Supreme Court Justice Benjamin Cardozo, in a passage from his book, *Law and Literature*, seems to take an even stricter approach than Justice Baldwin does on the question of homicide by necessity:

Where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human jettison. Men there will often be who, when told that their going will be the salvation of the remnant, will choose the nobler part and make the plunge into the waters. In that supreme moment the darkness for them will be illumined by the thought that those behind will ride to safety. If none of such mold are found aboard the boat, or too few to save the others, the human freight must be left to meet the chances of the waters. Who shall choose in such an hour between the victims and the saved? Who shall know when the masts and sails of rescue may emerge out of the fog?<sup>132</sup>

Some years later, another commentator of the *Holmes* case opined that the killing was morally wrongful:

I am driven to conclude that otherwise—that is, if none sacrifice themselves of free will to spare the others—they must all wait and die together. For where all have become congeners, pure and simple, no one can save himself by killing another. In such a setting and at such a price, he has no moral individuality left to save. Under the terms of the moral constitution, it will be *wholly* his self that he kills in his vain effort to preserve himself. The “morals of the last days” leave him a generic creature only; in such a setting, so remote from the differentiations of normal existence, every person in the boat embodies the entire genus. Whoever saves one, saves the whole human race; whoever kills one, kills mankind.<sup>133</sup>

In sentencing Holmes, Justice Baldwin said that many circumstances in the dreadful affair were of a character to commend him, yet the case was such that some punishment was required; the court had the power to impose imprisonment of three years and a fine of \$1,000, but in view of all the circumstances, and especially since Holmes had already been confined for several months, the judge would make the punishment more lenient. Justice Baldwin then sentenced Holmes to six months imprisonment at hard labor, in solitary confinement, and a fine of twenty dollars.<sup>134</sup>

It has been suggested that in cases of this type executive clemency, or a pardon, may well be the only recourse.<sup>135</sup> There

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<sup>132</sup> BENJAMIN N. CARDOZO, *LAW AND LITERATURE* 113 (Fred B. Rothman & Co. 1986) (1931).

<sup>133</sup> CAHN, *supra* note 90, at 71.

<sup>134</sup> *United States v. Holmes*, 26 F. Cas. 360, 369 (C.C.E.D. Pa. 1842) (No. 15,383).

<sup>135</sup> See Lon L. Fuller, *The Speluncean Explorers*, 62 HARV. L. REV. 616, 619 (1949).

was considerable sympathy in favor of Holmes in the press. Efforts were made by the Seamen's Friend Society to obtain a pardon from President Tyler, but the President refused, apparently because Justice Baldwin failed to concur.<sup>136</sup> Later, however, the President issued a pardon that relieved Holmes of his fine.<sup>137</sup>

#### 1. Sortition—Drawing Lots to Decide Who Should Die

In the *Holmes* case, Justice Baldwin suggested to the jury that the crew and passengers recognized they were in grave peril, and that they may have had an opportunity to agree among themselves on some way of deciding who should be sacrificed to save the others. He instructed the jury that, had due deference been given to the different status of passengers and crew members, and had lots been used to select from each group, the defense of necessity might have been available.

Justice Baldwin in effect set forth a rule of lot-drawing among those in peril:

[I]f the source of the danger have been obvious, and destruction ascertained to be certainly about to arrive, though at a future time, there should be consultation, and some mode of selection fixed; by which those in equal relations may have equal chance for their life. By what mode, then, should selection be made? The question is not without difficulty; nor do we know of any rule prescribed, either by statute or by common law, or even by speculative writers on the law of nature. In fact, no rule of general application can be prescribed for contingencies which are wholly unforeseen. There is, however, one condition of extremity for which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim. . . . For ourselves, we can conceive of no mode so consonant both to humanity and to justice; and the occasion, we think, must be peculiar which will dispense with its exercise. If, indeed, the peril be instant and overwhelming, leaving no chance of means, and no moment for deliberation, then, of course, there is no power to consult, to cast lots, or in any such way to decide; but even where the final disaster is thus sudden, if it have been foreseen as certainly about to arrive, if no new cause of danger have arisen to bring on the closing catastrophe, if

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<sup>136</sup> The court reporter, John William Wallace, added the following to the end of the *Holmes* case:

NOTE. Considerable sympathy having been excited in favour of Holmes, by the popular press, an effort was made by several persons, and particularly by the Seamen's Friend Society, to obtain a pardon from the executive. President Tyler refused, however, to grant any pardon, in consequence of the court's not uniting in the application. The penalty was subsequently remitted.

*Holmes*, 26 F. Cas. at 369.

<sup>137</sup> See KATZ, *supra* note 104, at 22.

time have existed to cast lots, and to select the victims, then, as we have said, sortition should be adopted. In no other than this or some like way are those having equal rights put upon an equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict. What scene, indeed, more horrible, can imagination draw than a struggle between sailor and sailor, passenger and passenger, or, it may be, a mixed affray, in which, promiscuously, all destroy one another?<sup>138</sup>

The appeal to God in the above passage seems to hearken to the book of *Jonah*, where the throwing of lots suggests that a higher power (namely, God) is responsible for selecting the victim.<sup>139</sup> The procedure thus serves to deflect responsibility from the men who are the true actors in the killing. The procedure also seems to recall the medieval practice of trial by combat and other ordeals that men would agree to undertake in order to reach a determination of which party shall live and which one shall die—presumably at the hands of God, for whatever dispute may be at issue.

Thus, Justice Baldwin in effect confirmed the rule of drawing lots, or of engaging in some other fair procedure, to determine who should be sacrificed for the sake of the survival of a larger number. Only in this way could there be justification, or at least excuse, for homicide. The idea seems to be that if there is time for consultation, or if the circumstances could have been foreseen, and all might reasonably agree that killing one of the group under certain foreseeable circumstances would tend to maximize the number of lives saved, the group may then agree upon some mode of selection, and agree to be bound by it. They would then agree to forestall sacrificing the victim until a prescribed circumstance of extremity occurs. Justice Baldwin suggested that the people in the boat knew that they were in danger, and that they had time to cast lots before the danger became truly imminent. Therefore, there could have been a mutual consultation of all on board as to the necessity of throwing over some of their member. No one had a right to say who must be thrown out. The drawing of lots would eliminate the arbitrariness of leaving the life and death decisions to the stranded crew and passengers in a moment of panic, and remove the possibility of the decision being made by those who are physically able to overpower the weaker ones. Under this protocol, the selection of those to be sacrificed is legally permissible, and even commendable.

If the crew and passengers had agreed to cast lots and abide

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<sup>138</sup> *Holmes*, 26 F. Cas. at 367.

<sup>139</sup> See *Jonah* 1:7 (stating that lots were thrown to determine whose presence was the occasion for God's causing the storm).

by the results, suppose one of the victims changed his mind and resisted? According to Justice Baldwin:

When the selection has been made by lots, the victim yields of course to his fate, or, if he resist, force may be employed to coerce submission. Whether or not "a case of necessity" has arisen, or whether the law under which death has been inflicted have been so exercised as to hold the executioner harmless, cannot depend on his own opinion; for no man may pass upon his own conduct when it concerns the rights, and especially, when it affects the lives, of others. We have already stated to you that, by the law of the land, homicide is sometimes justifiable; and the law defines the occasions in which it is so. The transaction must, therefore, be justified to the law; and the person accused rests under obligation to satisfy those who judicially scrutinize his case that it really transcended ordinary rules.<sup>140</sup>

Once having accomplished the drawing of lots, the people must then wait until such time as they might be saved, or until the circumstances indicate no hope other than miraculous preservation, so that the time for lightening the boat would have arrived. The first to be sacrificed should submit to the fate ordained by the casting of lots, or else be forced to submit.

Justice Baldwin suggested that the passengers should be exempt from the sortition. Also exempt would be the captain or officer in charge of the lifeboat and so many of the crew as are needed to navigate the boat. Perhaps the captain or master in charge should pick those of the crew to assist in navigation, or if they are all eligible to navigate the vessel, a preliminary drawing of lots should determine which of the crew would be assigned to navigation and hence be exempt. Following that, all the nonexempt crew should submit to the drawing of lots so that, to use Justice Baldwin's words, "those in equal relations may have equal chance for their life." The passengers might draw lots amongst themselves, presumably exempting women and children, but only in the event the boat needed to be lightened to a further extent beyond the crew who were first in line to be sacrificed.

The case suggests that this protocol should be engaged in before an imminent emergency, so as to avoid the sort of melee and chaos that occurred. As to *when* a point of time comes that the danger to life and limb is "instant, overwhelming, leaving no alternative," presumably it would be up to the captain or officer in charge to decide and to order that the sacrifice be carried out forthwith, according to the sortition previously agreed upon. This way the result would minimize the infringement of others'

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<sup>140</sup> *Holmes*, 26 F. Cas. at 367.

rights and put all parties on a level playing field. The course undertaken by Holmes bypassed any semblance of consultation, and vested in him alone the right to say who should be thrown out. Moreover, Holmes unfairly singled out passengers for jettison instead of other sailors.

Unanswered in the opinion of this case are the following issues: If one or more people dissent from the drawing of lots in the first instance, would that have legal bearing on the drawing of lots? Or, if a dissenting minority objected to the drawing of lots, could the majority overrule the objection and proceed with the sortition? If someone refused to participate, could that person's lot be selected by proxy? Would it be lawful to take the life of a person who refused to draw lots? Would it be murder if someone who had refused to draw lots, but who was selected for sacrifice by proxy, in self-defense killed someone who was attempting to throw him overboard?

A mystery in this case is why Holmes threw over fourteen men rather than a smaller number, and why he jettisoned passengers only, thus sparing all of the crew. Once Holmes commenced with throwing out passengers, if the concern was that the boat needed to be lightened, he might have stopped during this engagement to see if the boat had become appreciably more stable as a result, to see if there was any reasonable chance of safety without the further destruction of lives. Was it because, as Holmes' lawyer argued, "having proceeded so far in the work of horror, the feelings of the crew became, at last, so disordered as to become unnatural?"<sup>141</sup> And finally, why did Holmes jettison the two additional passengers the following day, when by all accounts the boat had become stable, and there was no further necessity?

Whether Justice Baldwin's dictum on drawing of lots was an accurate summary of the law then, and whether it reflects the law today, are unsettled issues. The idea of consenting to the drawing of lots would seem to embody an established moral principle of the law: *volenti non fit injuria* ("No wrong is done to one who consents"). Conduct that would be tortious or criminal ceases to be wrongful if the person harmed has legal capacity and gives informed consent for the invasion. However, this legal maxim has its limits. For instance, a victim's consent to a criminal assault does not act as a bar to criminal prosecution:

[W]hatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of

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<sup>141</sup> *Id.* at 365.



the peace; so as to bar a criminal prosecution. In other words, although a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order . . . . He may compromise his own civil rights, but he cannot compromise the public interests.<sup>142</sup>

Justice Baldwin's dictum pertaining to the drawing of lots apparently is in conflict with the foregoing legal constraint. In addition, Justice Baldwin's dictum is in conflict with philosophical prohibitions stated by Kant and other deontologists. Kant asserts that human beings have unconditional value, and he therefore rejects homicide by necessity. He says:

This imagined right is supposed to give me permission to take the life of another person when my own life is in danger, even if he has done me no harm. It is quite obvious that this conception implies a self-contradiction within jurisprudence, since the point in question here has nothing to do with an unjust assailant on my own life, which I defend by taking his life . . . .<sup>143</sup>

Necessity killing is impermissible because an innocent person is "used" merely as a means to save the lives of others.<sup>144</sup> Necessity killing is wrong to Kant because "the victim deserved to be treated as something other than a means to other people's ends."<sup>145</sup> Since all human beings have unconditional value, it is always inappropriate to use any human being, even one's own being, merely as a means to some end. Kant has this to say:

Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person can not be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.

Accordingly, a man is not at his own disposal. He is not entitled to sell a limb, not even one of his teeth.<sup>146</sup>

<sup>142</sup> Regina v. Coney, (1882) 8 L.R.Q.B. 534, 553 (U.K.) (citation omitted).

<sup>143</sup> IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35 (John Ladd trans., 2d ed. 1999) (1797).

<sup>144</sup> *But see* Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1109–10 (1993) (arguing that a Kantian can support necessity killing on the ground that the affected person would rationally choose that result). Such presumed consent makes necessity killing compatible with the Kantian premise of respect for the choices of rational individuals.

<sup>145</sup> Cass Sunstein, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1883, 1888 (1999); *see also* David Shapiro, *Foreword: A Cave Drawing for the Ages*, 112 HARV. L. REV. 1834, at 1846–47 (describing the utilitarian justification for necessity killing).

<sup>146</sup> IMMANUEL KANT, *Duties Towards the Body in Respect of Sexual Impulse*, in *LECTURES ON ETHICS* 165 (Louis Infield, trans., Hackett Publishing Co. 1980) (1930).

This passage is directed to the idea that human beings cannot sell themselves into slavery or indentured service. If it is impermissible to sell oneself into slavery or to sell even a limb, then it would seem that consenting to the casting of lots in a lifeboat situation and thereby agreeing to being utterly destroyed would be even more strongly prohibited.

Kant also argued that we are trustees of our own lives in that we regard life as so precious and sacred that we naturally want to be guardians over it. Kant said that “our duties towards ourselves are of primary importance . . . [because] nothing can be expected from a man who dishonors his own person.”<sup>147</sup> In consenting to the sacrifice, the victim violates duties to himself by, in effect, agreeing to commit suicide: “But suicide is in no circumstances permissible. Humanity in one’s own person is something inviolable; it is a holy trust; man is master of all else, but he must not lay hands upon himself.”<sup>148</sup> In casting of lots to decide who should be sacrificed, the person sacrificed is treated as a thing or so much deadweight to be jettisoned from the boat, rather than respected as a rational agent.

However, Kant argued that the penal law would have no deterrent effect in such cases:

There could be no penal law assigning the death penalty to a person who has been shipwrecked and finds himself struggling with another person—both of them in equal danger of losing their lives—and in order to save his own life, pushes the other person off the plank on which he had saved himself. For no threatened punishment from the law could be greater than losing his life . . . [A] penal law applied to such a situation could never have the effect intended, for the threat of an evil that is still uncertain (being condemned to death by a judge) cannot outweigh the fear of an evil that is certain (being drowned). Hence, we must judge that, although an act of self-preservation through violence is not inculpable, it still is unpunishable . . .<sup>149</sup>

Kant’s idea is that the sanction of the law by way of future punishment cannot serve to deter one who acts to overcome the fear of immediate death. Accordingly, in such a case the law is incapable of controlling the accused’s conduct and responding to it with any punishment at all. Viewing the act as criminal will not serve to deter future acts, nor provide a rehabilitative function. So Kant appears to claim that on the one hand the killing is wrongful in cases of necessity, but on the other hand, self-preservation under the circumstances is so strong an instinct

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<sup>147</sup> IMMANUEL KANT, *Duties to Oneself*, in LECTURES ON ETHICS, *supra* note 146, at 117–18.

<sup>148</sup> IMMANUEL KANT, *Suicide*, in LECTURES ON ETHICS, *supra* note 146, at 151.

<sup>149</sup> KANT, *supra* note 143, at 36.

that no sanction of the law can be effective in preventing the wrong. To allow the wrong to go unpunished, while at the same time arguing that it is a culpable act, seems itself to be a contradiction.

We might compare the *Holmes* case to the Mountaineer Case. The Mountaineer Case seems analogous to the *Holmes* case in that, broadly speaking, the imminent danger to be averted emanated from the very people who were to be sacrificed. In *Holmes*, the excess weight of people in the rickety lifeboat, compounded by bad weather, endangered the lives of the whole group. The only way to save a larger number was to jettison some of the people from the boat. In the Mountaineer Case, too, the extra weight of the lower climber, compounded by the frailty of the rope, was the danger that posed an imminent threat to life and limb of both climbers.

A distinction between the Mountaineer Case and *Holmes* is that in *Holmes* there was a duty of the sailors to protect the lives of the passengers. This duty was not canceled in the midst of a disaster, and if anyone was to be sacrificed, it was the sailors' duty to go first, except for those needed to navigate the boat. Also, in *Holmes* there were apparently enough crew members whose sacrifice would have lightened the boat sufficiently to make it safe for the passengers and the remaining crew, without the need of throwing off *any* passengers. In the Mountaineer Case, whatever duties may have existed between the climbers based on their agreement to be roped together were discharged under the circumstances of the emergency the climbers faced. Moreover, there was but one person to be sacrificed, and it was plainly the lower climber. No method of choosing needed to be invoked because there was one, and only one, person whose sacrifice would result in a net saving of life.

#### B. *Regina v. Dudley & Stephens*

Let us now turn to another famous case, *Regina v. Dudley & Stephens*, in which the necessity doctrine was invoked in the context of cannibalism on the high seas.<sup>150</sup> This dramatic and emotional survivor story came some forty years after the *Holmes* case. The facts of the case reveal how far men will go to save themselves when faced with impending death.

The case is of tremendous importance in that it categorically rejects the necessity defense, under English law, with respect to intentional killing of an innocent even if it results in saving a

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<sup>150</sup> *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273 (U.K.).

greater number of lives. It specifically rejects the holding of the *Holmes* case regarding the drawing of lots. According to *Dudley & Stephens*, one has a duty to sacrifice oneself rather than to kill another.

There is a fundamental difference between the facts in the *Holmes* case and the facts in *Dudley & Stephens*. In *Holmes* the danger to the group emanated from the members of the group themselves—their number and weight, compounded by bad weather and the flimsiness of the lifeboat, created the danger that they would all drown. In *Dudley & Stephens*, no one in the lifeboat posed a threat to the safety of the others. The danger was the prospect of death by starvation, and the source of this threat was simply the lack of provisions in the boat. In both cases, however, the killing involved using a person or persons solely as a means to an end.

In *Dudley & Stephens*, two lifeboat survivors were charged with murder in connection with cannibalizing a young cabin boy who was stranded with them on a lifeboat. The facts of the case are as follows: Thomas Dudley was captain of a fifty-two foot yacht called the *Mignonette*, which sailed on May 19, 1884, from Southampton, England for a 16,000-mile journey to Sydney, Australia, to deliver the boat to its new owner. Also aboard were two crewmen, Edward Stephens and Edmund Brooks, and a seventeen-year-old cabin boy, Richard Parker.<sup>151</sup>

The crew set out into the South Atlantic. Everything went well until July 5, some 1600 miles from the Cape of Good Hope, when they encountered very strong winds and heavy cross-seas. The boat started to capsize and proceeded to sink very rapidly. They had only five minutes to get into the dinghy. They were not able to get any water or supplies into the dinghy other than a couple of cans of turnips. In the following days they managed to collect some rain water and caught a sea turtle which they dried out and ate.<sup>152</sup>

The group managed to survive by eating rations of the turtle and the turnips. On July 16, Dudley suggested that they may have to sacrifice one of the group so that the others might live to see a rescue. Brooks said he was against drawing of lots to determine who should die to save the others. The matter was dropped.<sup>153</sup>

On July 13, suffering from a lack of water, they began to drink their own urine. On July 20, Parker, the cabin boy, in an

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<sup>151</sup> SIMPSON, *supra* note 28, at 13–60.

<sup>152</sup> *Id.* at 46–48, 57–59.

<sup>153</sup> *Id.* at 58–61.

act of desperation, began drinking seawater, and became delirious and comatose.

On July 24, the nineteenth day, with no rescue ship in sight and believing that he and the others were on the verge of starvation, Dudley again broached the idea of sacrifice and proposed that they draw lots. Brooks again objected. Both Brooks and Stephens said that they believed they would see a ship the next day. Finally, on the morning of July 25, Dudley and Stephens agreed to kill Parker. Parker was lying on the bottom of the boat, groaning but not moving. Dudley went to him and told him that his time had come, offered a prayer, and put a knife into his throat, killing him. In the ensuing horrible scene, the three men drank Parker's blood and ate his still warm liver and heart. They fed upon Parker's body for four days. On the morning of July 29, a sail was sighted, and the men were rescued. The men made no secret of what had happened, and the gruesome, bloody remains of Parker's body lay in plain sight.<sup>154</sup>

On September 6, 1884, the survivors arrived at Falmouth, England, and they were closely questioned by officials about the incident. The survivors did not believe they had done anything criminal. Dudley told the people at the Customs House of their adventure with gusto, and insisted on keeping the knife that he had used to kill Parker. News quickly spread of the sailors' ordeal, and the men were regarded as heroes for what they had endured. The survivors were therefore stunned when they were placed under arrest and charged with murder. The mayor of Falmouth and the prosecutor both received death threats for their roles in prosecuting the survivors.<sup>155</sup>

The men were transferred to London, and were greeted by the public with respect. The local press editorialized:

It is utterly impossible that men can endure the tortures of nineteen days' starvation, the exquisite agony of a long continuing thirst, the anguish of mind and the prospect of excruciating death . . . without the mind becoming in a measure at least deranged; and without thus becoming to the fullest extent irresponsible for their actions.<sup>156</sup>

The matter filled the world's press.<sup>157</sup>

The men were tried for murder at Exeter:

Daniel Parker, Richard Parker's eldest brother, forgave Dudley in open court, and shook hands with him. Parker's family planted a

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<sup>154</sup> *Id.* at 58–70.

<sup>155</sup> KATZ, *supra* note 104, at 24.

<sup>156</sup> SIMPSON, *supra* note 28, at 81.

<sup>157</sup> *Id.* at 83.

tombstone on Richard's grave that read:

Though he slay me, yet I will trust him.

(Job, xiii, 15)

Lord, lay not this sin to their charge.<sup>158</sup>

The defendants contended that their cannibalism was not murder because it was necessary to preserve their own lives.<sup>159</sup> In a most unusual move, the jury returned a special verdict, specifying the facts that they found but indicating that they were not in a position to render a verdict as to guilt or innocence. The jury said,

[I]f the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men.<sup>160</sup>

Thus, the jury specifically made the factual finding that had the three crew members not fed upon the boy's body or someone else's body, they would very likely have died of starvation within the four days that it took until the rescue vessel sighted them. The jury also made clear that if there had been the need to sacrifice one, there was no basis to justify sacrificing the weakest of their number.

The matter was then referred to an appellate panel of five judges, headed by Chief Justice Lord Coleridge. Lord Coleridge authored the court's opinion. He flatly rejected the necessity defense under the circumstances of intentional killing of an innocent person. He was worried that allowing courts to formulate unclear or open-ended exceptions to criminal culpability would weaken the rule of law:

Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity." But the

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<sup>158</sup> KATZ, *supra* note 104, at 24.

<sup>159</sup> *See Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273, 281 (U.K.).

<sup>160</sup> *Id.* at 275.

temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children . . . impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink . . . . It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passage, in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. . . .

It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. . . .

. . . [A] man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder.<sup>161</sup>

In the above passage, Lord Coleridge referred to the general duty to preserve one's life, and to a special duty in a shipwreck situation imposed by moral necessity "not to live, but to die."<sup>162</sup> This self-sacrifice is compelled by "duty of dying for others" and according to Lord Coleridge is recognized in war and supported by the "Great Example" of Jesus.<sup>163</sup>

We might question the reasoning here. The self-sacrifice of soldiers in war, compelled by duty, is something that is anticipated by those who enlist; that is, it may be expected that some soldiers will not return, but that the war effort is undertaken to avert a greater evil, and thus the ultimate sacrifice of some sol-

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<sup>161</sup> *Id.* at 286–88.

<sup>162</sup> *Id.* at 287.

<sup>163</sup> *Id.*

diers results in a net benefit to society under the circumstances. In comparison, the men who embarked on the *Mignonette* were not engaged in a dangerous undertaking that would produce some benefit to society; the sacrifice of one or all of them would serve no beneficial societal purpose. The other example given by Lord Coleridge of a sacrifice compelled by duty, the sacrifice on the Cross, is a sacrifice that, for believers, resulted in the forgiveness of sin. The self-sacrifice alluded to by Lord Coleridge with respect to the men in the lifeboat would have had the consequences of saving no one.

Still, the opinion made clear that “[i]t is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one’s life.”<sup>164</sup> Lord Coleridge, in rejecting defense arguments, commented that the *Holmes* case,

in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly . . . be an authority satisfactory to a court in this country.<sup>165</sup>

Lord Coleridge also suggested that the necessity defense in the context of homicide would be unworkable. He questioned how the necessity defense could be invoked when it comes to measuring “the comparative value of lives.”<sup>166</sup> His worry was that the necessity defense in cases such as this would ask too much of the jury, who simply lack the ability to weigh the comparative value of lives. And, in fact, the jury in *Dudley & Stephens* was in such a quandary that by issuing a special verdict mentioned above, they left it to the judges to decide guilt or innocence.

Lord Coleridge also worried about the slippery slope, suggesting that allowing a necessity defense in this case could encourage people in other situations to take the law into their own hands. The defense of necessity “might be made the legal cloak for unbridled passion and atrocious crime.”<sup>167</sup> He was concerned about the potential for mistaken and self-interested judgments, both about the need for anyone to die, and about who was to be killed:

It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 285.

<sup>166</sup> *Id.* at 287.

<sup>167</sup> *Id.* at 288.



the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No" . . .<sup>168</sup>

Lord Coleridge characterized the jury's special verdict as implying that there was a good chance that the killing in fact was *not* necessary: "They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act."<sup>169</sup> This assertion is puzzling in that it seems to contradict the jury's findings. By saying the killing was "unnecessary and profitless," Lord Coleridge seems to suggest that the act had no causal efficacy in averting the danger of death by starvation. However, as mentioned above, the jury specifically said that, had the men not partaken of the flesh of one of their own, they very probably would have died within the four days before the rescue vessel came upon the scene, and the men had no reason to expect another vessel to appear on the horizon any time soon.

Lord Coleridge said that the necessity defense cannot be used to save one's life at the expense of another, and that this case is different from cases of justifiable or excusable homicide, as those terms have been used throughout centuries of common law. Even if the peril were imminent and the danger plainly apparent, and even though it resulted in the net saving of lives, the killing of Parker was not justified under the necessity doctrine. Coleridge thought that they ought to have refrained from killing, waiting instead until somebody died of natural causes and then consuming his flesh, or, if waiting would result in the death of all of them, they should simply accept their fate.

In pronouncing the defendants' sentence, Lord Coleridge said:

There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.<sup>170</sup>

Lord Coleridge then sentenced the prisoners to be executed by hanging.<sup>171</sup>

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<sup>168</sup> *Id.* at 287–88.

<sup>169</sup> *Id.* at 279.

<sup>170</sup> *Id.* at 288.

<sup>171</sup> *Id.*

The day after the trial, the *Times* said in an editorial:

The matter will be heard in the Court above, we may assume, with every disposition to give the prisoners the benefit of any doubt as to the law. Even should they be pronounced technically guilty of the offence charged against them, we may be sure that the prerogative of pardon will be exercised; in this instance it would be impossible, in view of the expression of opinion of the jury to allow the Law to take its course.<sup>172</sup>

Shortly thereafter, the prisoners obtained a reprieve from the Crown, which commuted the sentence to six months' imprisonment.<sup>173</sup> At the time, reprieves were exercised by the Home Secretary.

Lord Coleridge may have been incorrect in his slippery slope concern—that to allow the necessity defense in this case might result in people taking the law into their own hands and asserting necessity as a “legal cloak for unbridled passion and atrocious crime.”<sup>174</sup> The case did not involve chronic criminals who characteristically undervalue moral considerations or others' interests. Dudley and Stephens did not consider the issue lightly while they were castaways, but raised it carefully, discussed it, deferred it, and then acted when it seemed reasonable to suppose that they would otherwise starve to death. In addition, the fact remains that there was a net saving of lives.

Lord Coleridge might have disposed of the case by allowing the necessity defense, but finding that the actors failed to prove all of the elements of the defense. The clean hands prong holds that a person who has recklessly or negligently created a danger may not invoke the necessity defense to justify actions taken in a choice of evils situation. That is, the necessitous circumstances must not be brought about by negligence or recklessness on the part of the actor. Lord Coleridge could have found that Dudley, as an agent of the yacht's owner, was responsible for the circumstances that occasioned the yacht to sink because, before setting sail, he apparently refused to replace rotting wooden beams and made less costly repairs instead.<sup>175</sup> If he had replaced the beams, the yacht may well have withstood the storm.

It appears that Lord Coleridge simply found that on the basis of the choice of evils prong, it was unreasonable as a matter of law for Dudley and Stephens to decide that killing the innocent

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<sup>172</sup> Michael G. Mallin, *In Warm Blood: Some Historical and Procedural Aspects of Regina v. Dudley and Stephens*, 34 U. CHI. L. REV. 387, 396 (1967) (quoting an editorial that appeared in the *London Times* on Nov. 7, 1884).

<sup>173</sup> *Id.* at 288 n.2.

<sup>174</sup> *Dudley & Stephens*, 14 Q.B.D. at 288.

<sup>175</sup> PAUL H. ROBINSON, *CRIMINAL LAW CASE STUDIES* 15 (2d ed. 2002).

boy was a lesser evil than allowing the entire group to die of starvation. The judge decided that the men made a wrong value choice, that the value asserted was not greater than the value denied, because the value of each person's life is incommensurable.

This case specifically diverges from *Holmes* on whether drawing lots is a permissible measure to take in extreme circumstances. Justice Baldwin noted in *Holmes* that it has been the custom, almost universally practiced in cases of extreme hunger and thirst, for shipwrecked seamen to draw lots to determine who should be sacrificed to save the lives of the rest.<sup>176</sup> Lord Coleridge specifically said that this principle is not one recognized by English law.<sup>177</sup>

As mentioned, Dudley had suggested the drawing of lots, and Brooks refused to have anything to do with it. Might Dudley have been on better legal footing if instead he had insisted upon casting lots, over the protest of Brooks, rather than himself selecting Parker as the sacrifice? As noted above in the discussion of drawing lots, the custom of the sea holds that if the majority of the group agrees that the casting of lots is necessary, they may proceed to draw lots, and lots may be drawn by proxy for anyone who refuses to agree to the casting of lots.

Of course, the problem here was that Parker himself was in and out of consciousness and may not have been in a position to say if he agreed to the casting of lots. Brooks clearly said he was unwilling. That left Dudley and Stephens, which is only two out of four—not a majority. Perhaps this consideration is purely academic because Lord Coleridge clearly said that even if the victim had been selected fairly, the act would nonetheless be punishable as murder.

In a necessitous situation, those who oppose drawing lots may simply be willing to take a chance that a rescue will come upon the scene before death's grip takes hold. Those who would rather not participate may prefer to die than eat human flesh.

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<sup>176</sup> *United States v. Holmes*, 26 F. Cas. 360, 365 (C.C.E.D. Pa. 1842) (No. 15,383).

Cannibalism occurred so often among sailors that it became a customary practice, complete with its own rituals. As surely as they knew that drinking sea-water would send them mad and kill them, all seamen were also aware that if they were starving, one of their number must be killed and eaten.

The victim was to be selected by casting lots. He was then bled to death so that his blood might be drunk, for thirst rather than hunger was usually the greater peril. The heart and liver—which were full of blood and the most perishable meats—were eaten at once. The rest of the body was then butchered.

HANSON, *supra* note 24, at 123–24.

<sup>177</sup> *Dudley & Stephens*, 14 Q.B.D. at 285.

They would have nothing to gain by participating, as they would not consume the dead person's flesh if they won. They would not be acting unfairly to the others because they would be foregoing all possible benefit. Or, even if there is no chance of help arriving in time, they might wish to gamble on the charity of those who survive to share any flesh they cannot eat. But it would seem unfair to allow nonparticipants in the sortition to eat what they are given, because they had avoided the risk of dying by not participating in the lottery.

We might compare the *Dudley & Stephens* case to the Mountaineer Case. In both cases the victim was facing imminent death. In *Dudley & Stephens* the cabin boy was delirious, starving, dehydrated, and in a severely weakened state. His death might have come in a day or so. In the Mountaineer Case, the peril was almost instantaneous; death would come in a few seconds. In the Mountaineer Case it is supposed that the action would be permissible without the consent of the victim. In *Dudley & Stephens* the action was taken without the consent of the victim.

There is one major difference: the cabin boy in *Dudley & Stephens* was not a threat to the other men. The danger to the other men was the looming threat of death by starvation, owing to the lack of provisions on the boat and their inability to catch anything from the sea except for the turtle, which had already been consumed many days before. In the Mountaineer Case, the lower climber was a threat in light of his weight against the frail rope. In both cases, the act of killing violates Kant's injunction not to treat another solely as a means to an end. However, in the Mountaineer Case the action still seems excusable because it closely resembles self-defense, while in the *Dudley & Stephens* case the killing very specifically uses the victim as a means to an end—in order to obtain sustenance from his body—and the situation in no plausible way resembles self-defense. Indeed, during the trial the defense did not introduce any argument suggestive of self-defense.

The implication of *Dudley & Stephens* is that human life is very precious, that human life is to be protected at all costs except for the traditional defenses of justification and excuse, and that innocent life may not be taken or sacrificed even to preserve the lives of a greater number.

The issues raised by the *Holmes* and the *Dudley & Stephens* cases suggest that the fundamental question behind the defense of necessity pertains to a choice of values. As one commentator put it, "although the defence of necessity is subjective as to facts, it is objective as to values. . . . [and] involves deciding whether,

on a social view, the value assisted was greater than the value defeated.”<sup>178</sup>

The question may be asked whether in extreme circumstances the law of homicide serves any deterrent function. Where groups of people are faced with circumstances such as described in these two cases, in which they must grapple with the instinct for self-preservation, legal rules and the consequences of breaking the law are not likely to influence actual behavior. In other words, confronted with a choice between the possibility of future criminal punishment and a more certain and immediate death, it logically follows that most actors will choose the former. In such situations it is not obvious that any of us would have responded differently. The actors in such cases are not a threat to society because the circumstances are so unique. It is exceedingly unlikely that the offenders would ever be faced with another situation that might call for necessity killing. Thus, punishment in such situations would seem to do little by way of deterring future conduct of the same sort. That is likely what prompted the relatively light sentence of six months' imprisonment in *Holmes*, and the reprieve from the Crown in *Dudley & Stephens*.

#### VII. THE SPELUNCEAN EXPLORERS

We now turn to a different treatment of necessity in the context of homicide, articulated in a celebrated 1949 Harvard Law Review article, *The Speluncean Explorers*.<sup>179</sup> The article presents a hypothetical case in which five men who were trapped in a cave cast lots to determine who should be killed (and cannibalized) to save the others. It is a philosophical piece, or thought experiment, laid out in the form of an imaginary appellate decision of the “Supreme Court of Newgarth, 4300.”<sup>180</sup> The author states that the case “was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government.”<sup>181</sup>

The facts of the Speluncean Explorers Case are as follows: Five explorers are trapped in a cave with scant provisions. On the twentieth day of their plight, they find a radio that enables them to establish communication with the rescue party working to free them. Engineers in charge of the rescue effort advise them that the rescue will take at least ten more days to complete.

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<sup>178</sup> GLANVILLE WILLIAMS, *THE CRIMINAL LAW: THE GENERAL PART* § 239 (2d ed. 1961).

<sup>179</sup> See Fuller, *supra* note 135, at 616.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 645.

Physicians inform them that, considering the rations they have remaining and their state of health, they have very little chance of surviving to see the rescue. The lead physician also tells them that they will be able to survive until the rescue if they consume the flesh of one person.<sup>182</sup>

At the outset, we may observe that the explorers had a strong basis in fact for concluding that they were in imminent peril of dying by starvation. They were so advised by the committee of medical experts, which informed the explorers that if they did not eat, there was “little possibility” of their survival until day thirty, when the rescuers were expected to reach them. Under these facts, all five very likely would have died had they passively awaited rescue. Under the necessity doctrine, clearly the imminence of danger prong was satisfied. This is dissimilar to *Dudley & Stephens* in which Lord Coleridge refused to conclude that the situation justified killing anyone, much less the cabin boy: “They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act.”<sup>183</sup>

After the Speluncan explorers received the advisory from the medical experts, Roger Whetmore, a member of the group, suggested they roll dice to decide who should be sacrificed for the others. They all agreed to proceed, but then Whetmore changed his mind and said he would prefer to wait another week. On the twenty-third day, the others decided to roll the dice, but Whetmore refused to participate. The others rolled the dice for Whetmore and the throw went against him. The others promptly killed and consumed Whetmore. On the thirty-second day, the rescue team reached the four, and they were saved. In the rescue effort, ten workmen were killed in removing rocks from the opening of the cave.<sup>184</sup> As the story proceeds, the four were charged with murder, convicted and sentenced to death.<sup>185</sup>

The article goes on to set forth the text of the “appeal” of this case. There were several decisions rendered by the fictitious appellate judges. One of the judges wrote, “If this Court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved in this petition of error.”<sup>186</sup> But the judge went on to declare that the men should be

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<sup>182</sup> *Id.* at 617.

<sup>183</sup> *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273, 279 (U.K.).

<sup>184</sup> Fuller, *supra* note 135, at 616–18.

<sup>185</sup> *Id.* at 616, 618–19.

<sup>186</sup> *Id.* at 620.

vindicated because the explorers found themselves in a state of nature, and that the law was suspended:

This conclusion rests on the proposition that our positive law is predicated on the possibility of men's coexistence in society. When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When that condition disappears, then it is my opinion that the force of our positive law disappears with it.<sup>187</sup>

He further said:

The proposition that all positive law is based on the possibility of men's coexistence has a strange sound, not because the truth it contains is strange, but simply because it is a truth so obvious and pervasive that we seldom have occasion to give words to it. Like the air we breathe, it so pervades our environment that we forget that it exists until we are suddenly deprived of it. Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common. When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.<sup>188</sup>

The idea here is much the same as the one the defense sought to advance in the *Holmes* case, i.e., that the law of the realm no longer applies because the actors were in a state of nature.<sup>189</sup> The usual principles that regulate the relations of one person to another are absent.<sup>190</sup> The Speluncean explorers were

as remote from our legal order as if they had been a thousand miles beyond our boundaries. Even in a physical sense, their underground prison was separated from our courts and writ-servers by a solid curtain of rock that could be removed only after the most extraordinary expenditures of time and effort.<sup>191</sup>

The judge admitted that there are certain difficulties in determining at what point in time a group of individuals passes from a "state of civil society" to that of "the law of nature."<sup>192</sup> "Was it when the entrance to the cave was blocked, or when the threat of starvation reached a certain undefined degree of intensity, or when the agreement for the throwing of the dice was made?"<sup>193</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 620–21.

<sup>189</sup> *Id.* at 621.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 626.

<sup>193</sup> *Id.*

The judge went on to opine that because positive law no longer applied to them, it was necessary for the parties to draw “a new charter of government appropriate to the situation in which they found themselves.”<sup>194</sup>

Another judge in the “appellate” opinion strenuously objected to the state of nature defense. He said of the code that might be applied in a state of nature:

What a topsy-turvy and odious code it is! It is a code in which the law of contracts is more fundamental than the law of murder. It is a code under which a man may make a valid agreement empowering his fellows to eat his own body. Under the provisions of this code, furthermore, such an agreement once made is irrevocable, and if one of the parties attempts to withdraw, the others may take the law into their own hands and enforce the contract by violence . . . .<sup>195</sup>

If the Speluncean Explorers Case had come before Justice Baldwin in *Holmes*, it is likely that the state of nature argument would be rejected just as it was with respect to the men in the long-boat. However, Justice Baldwin may well have reversed their convictions on other grounds—that they undertook a fair mode to determine who should die, and that the necessity defense applies to killing in the circumstances described.

An interesting complication in the Speluncean Explorers Case is that Whetmore was opposed to the casting of lots, but the majority supported the plan. This brings into sharp focus the question of whether a majority should be permitted to override the objection, cast a lot for the dissenter by proxy, and enforce the result against him should he be the unlucky one. Justice Baldwin approached the issue in this way: “When the selection has been made by lots, the victim yields of course to his fate, or, if he resist, force may be employed to coerce submission.”<sup>196</sup> This suggests that if all the participants agree to the lottery in the first place, then the results may be enforced against the losing party, but does not address the situation in which a dissenter refuses to participate at all. The answer to this concern is that, as mentioned above, it simply seems fair that the majority can compel a dissenter to participate in the sortition, to cast lots for the dissenter by proxy if need be, and to enforce the result by force. This, of course, presupposes that all the other elements of the necessity doctrine are operative.

This would be fair in a situation where it is a question of jettisoning people from a lifeboat in order to lighten the load and

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<sup>194</sup> *Id.* at 622.

<sup>195</sup> *Id.* at 627.

<sup>196</sup> *United States v. Holmes*, 26 F. Cas. 349, 367 (C.C.D. Me. 1858) (No. 15,382).



save all of the remaining people. But if the necessity involves killing for the purpose of cannibalizing, it seems fair to exempt whoever does not wish to eat flesh, and to focus only on those who will partake. The dissenter would simply take his chances of surviving to see a rescue. Whetmore may have preferred to die rather than eat human flesh. If so, he would have had nothing to gain by participating, as he would not consume the dead person's flesh if he had won. His refusal to participate would not be unfair to the others because he would be foregoing all possible benefit.

The fact that Whetmore was an unwilling victim brought the following comment by another one of the fictitious judges:

Suppose, however, that Whetmore had had concealed upon his person a revolver, and that when he saw the defendants about to slaughter him he had shot them to death in order to save his own life. My brother's reasoning applied to these facts would make Whetmore out to be a murderer, since the excuse of self-defense would have to be denied to him. If his assailants were acting rightfully in seeking to bring about his death, then of course he could no more plead the excuse that he was defending his own life than could a condemned prisoner who struck down the executioner lawfully attempting to place the noose about his neck.<sup>197</sup>

This seems to be an accurate assessment of the way the necessity doctrine would operate under the circumstances, as noted in the above quote of Justice Baldwin.

It is worth remembering that in *any* situation in which the necessity doctrine applies, someone's rights are going to be violated. That is the starting point of the doctrine—that there is a choice of evils, and that in order to avert the greater evil the law is going to be violated; someone will be harmed, but this harm will be the lesser evil. The action taken pursuant to necessity is almost always against the will of someone whose rights are to be violated. For example, one who demolishes a house in order to make a firebreak and prevent a fire from spreading to an entire town may likely be met with resistance by the homeowner. But the action will be justified, third parties are permitted to help enforce the action, and the person whose rights are being violated is not entitled to resist.

Another of the fictitious judges who ruled that the Speluncean explorers were innocent said that in "usual conditions" we are inclined to think that human life has absolute value, but that

[t]here is much that is fictitious about this conception even when it is

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<sup>197</sup> Fuller, *supra* note 135, at 627.

applied to the ordinary relations of society. We have an illustration of this truth in the very case before us. Ten workmen were killed in the process of removing the rocks from the opening to the cave. Did not the engineers and government officials who directed the rescue effort know that the operations they were undertaking were dangerous and involved a serious risk to the lives of the workmen executing them? If it was proper that these ten lives should be sacrificed to save the lives of five imprisoned explorers, why then are we told it was wrong for these explorers to carry out an arrangement which would save four lives at the cost of one?

Every highway, every tunnel, every building we project involves a risk to human life. Taking these projects in the aggregate, we can calculate with some precision how many deaths the construction of them will require; statisticians can tell you the average cost in human lives of a thousand miles of a four-lane concrete highway. Yet we deliberately and knowingly incur and pay this cost on the assumption that the values obtained for those who survive outweigh the loss. If these things can be said of a society functioning above ground in a normal and ordinary manner, what shall we say of the supposed absolute value of a human life in the desperate situation in which these defendants and their companion Whetmore found themselves?<sup>198</sup>

Another judge noted that the action of the defendants may have lacked the requisite *mens rea* required of murder if they acted to kill Whetmore in self-defense: “The statute concerning murder requires a ‘willful’ act. The man who acts to repel an aggressive threat to his own life does not act ‘willfully,’ but in response to an impulse deeply ingrained in human nature.”<sup>199</sup>

The judge went on to say that self-defense “obviously” could not apply to the facts of this case: “These men acted not only ‘willfully’ but with great deliberation and after hours of discussing what they should do.”<sup>200</sup> The Speluncean explorers had ample time to coolly discuss their situation. They realized they were in peril, and deliberated on how to proceed should the threat of dying reach a certain threshold of imminence. They reached a majority consensus, and they decided to cast lots in the fairest possible way, with the lot for the dissenter, Whetmore, being cast for him by proxy. (As mentioned above, they might have been on stronger legal footing had they allowed Whetmore to opt out of the lottery.) Their action, preceded by careful deliberation, would seem to be precisely the kind of sortition that Justice Baldwin endorsed in the *Holmes* case.

Self-defense is an act to deflect an unlawful and aggressive threat against one’s person. The action of self-defense must be

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<sup>198</sup> *Id.* at 623.

<sup>199</sup> *Id.* at 629.

<sup>200</sup> *Id.*

directed to an aggressor who poses an imminent threat of an unlawful attack.<sup>201</sup> The means employed in self-defense must be reasonable, not disproportionate, in relation to the danger posed. Self-defense might not be justified or excused if there is an opportunity to retreat.<sup>202</sup> According to the Restatement (Second) of Torts, if the imminent danger might be avoided simply by retreating to a place of safety, the defense is not available, except that one ordinarily is allowed to hold one's ground if the unlawful attack takes place in one's home. Self-defense is not available to repel a *lawful* use of force, such as when police make a lawful arrest with the use of reasonable force. If the person claiming self-defense was responsible for bringing about or provoking the attack in the first instance, the defense will be denied. Self-defense is either a justification or an excuse, depending on the circumstances. If self-defense is asserted as a justification, then the aggressor whose interests are threatened by an act of self-defense may not claim self-defense against self-defense. Third parties may aid another in an act of justifiable self-defense.

The judge in the above passage, while conceding that self-defense does not apply to the Speluncean Explorers, seems to suggest that self-defense is an *involuntary* action. This is incorrect. While the decision to employ self-defense may be made in a split second in response to a threat, the law regards self-defense to be a volitional action.<sup>203</sup>

In any event, self-defense clearly does not apply to this situation. The danger that confronted the Speluncean explorers did not emanate from Whetmore any more than the danger in *Dudley & Stephens* emanated from the cabin boy. Whetmore was not an aggressor using unlawful force against the others. The threat was from the necessitous circumstances occasioned by their being trapped in the cave with no food. Whetmore was an innocent victim.

In both *Dudley & Stephens* and the Speluncean Explorers Case, the danger was not an unlawful act of aggression on the part of the victim, but was the imminent threat of death by starvation owing to the lack of provisions. Thus, in both cases the killing cannot be justified or excused based on self-defense. In both cases the killing was committed against an innocent party who not only did not consent to be killed, but who did not commit

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<sup>201</sup> 720 ILL. COMP. STAT. 5/7-1 (2006).

<sup>202</sup> RESTATEMENT (SECOND) OF TORTS § 65 (1965).

<sup>203</sup> *Contra* Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1412 (1986); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 783 (2004).

an act of aggression, much less unlawful aggression, against the others.

In both cases, the killing averted a greater evil resulting in the net saving of lives. However, the Speluncean Explorers Case offers a stronger set of facts than *Dudley & Stephens* to justify necessity killing, based on the *known* imminence of the danger. The imminence of the threat was ascertained with scientific certainty because the medical experts told the explorers they all would surely die before the rescue team reached them unless they ate the flesh of one of their group. The greater evil, namely the death of all five explorers, certainly would have occurred had it not been for the choice to sacrifice one of them. In *Dudley & Stephens*, according to Lord Coleridge, the men were not sure how much longer they could go without eating, and they had no knowledge of how soon they might be rescued.

Thus, in the Speluncean Explorers Case we might analyze the elements of the defense as follows: The explorers (1) weighed the choice of evils prong based on the information given them, and deliberated about how to avert the greater evil; (2) they were precisely apprised of how imminent the threat of death was and knew how much longer they had; (3) they saw that there would be causal efficacy in killing one of the group in order to eat his flesh and thereby survive; (4) they had no legal way out other than to engage in a fair method of selection to determine who should be sacrificed; (5) they knew, or should have known, that the law prohibited necessity killing, but this obviously had no deterrent effect; and (6) they apparently were free of negligence or recklessness in bringing about the situation that caused them to be trapped in the cave with insufficient provisions.

The Speluncean Explorers Case is helpful in bringing into sharper focus the principles that were laid out in both the *Holmes* and the *Dudley & Stephens* cases. In 1999, the Speluncean Explorers Case was revisited in a thought-provoking symposium published in *Harvard Law Review*.<sup>204</sup>

#### VIII. INNOCENT SHIELDS OF THREATS

Robert Nozick offers a discussion of the threat posed by *innocent shields of threats*:

Further complications concern *innocent shields of threats*, those innocent persons who themselves are nonthreats but who are so situated that they will be damaged by the only means available for stopping the threat. Innocent persons strapped onto the front of the tanks of

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<sup>204</sup> *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834 (1999).

aggressors so that the tanks cannot be hit without also hitting them are innocent shields of threats. (Some uses of force on people to get at an aggressor do not act upon innocent shields of threats; for example, an aggressor's innocent child who is tortured in order to get the aggressor to stop wasn't *shielding* the parent.) May one knowingly injure innocent shields? If one may attack an aggressor and injure an innocent shield, may the innocent shield fight back in self-defense (supposing that he cannot move against or fight the aggressor)? Do we get two persons battling each other in self-defense? Similarly, if you use force against an innocent threat to you, do you thereby become an innocent threat to him, so that he may now justifiably use additional force against you (supposing that he can do this, yet cannot prevent his original threateningness)?<sup>205</sup>

This scenario involves the unsettling situation of aggressors seeking to use hostages as shields in the process of launching an attack on others. The question from a choice of evils standpoint is whether one may knowingly injure or kill an innocent shield to stop an enemy from advancing.

The use of innocent shields of threats may take the form of a bank robber who takes a hostage to prevent police from shooting as he escapes. Police in such a case are faced with a daunting choice of evils: one choice is to let the robber flee with the hostage, with the hopes that after reaching a place of safety the hostage will be freed unharmed. The problem with this choice is that the fleeing felon may well kill or harm the hostage, and go on to further crime sprees. The other choice is to shoot at the robber using one's best efforts to aim carefully at his legs, with the result of bringing him down and freeing the hostage. With either choice, there is a good chance that the hostage will suffer grave harm or death. Thus, police may consider that shooting would be the lesser evil, since only that way could they be certain to capture the robber, and the hostage might die in either case. If the hostage might well die either way, it would be the lesser evil to shoot and capture the robber rather than allow him to be on the loose.

Ordinarily, when one takes a hostage as a shield, the logical purpose is to prevent law enforcement from shooting, and to thereby effect a getaway. In cases of hijacking, passengers have been held hostage because hijackers believed that they could be human shields to prevent the authorities from shooting down the aircraft, and the hostages serve as bargaining chips for demands made by the hijackers.<sup>206</sup>

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<sup>205</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 35 (1974).

<sup>206</sup> *History of Airliner Hijackings*, BBC NEWS, Oct. 3, 2001, [http://news.bbc.co.uk/1/hi/world/south\\_asia/1578183.stm](http://news.bbc.co.uk/1/hi/world/south_asia/1578183.stm).

The idea of innocent shields as threats took on a new meaning with the September 11th terrorist attacks. The “innocent shields” were actually part of the plan of committing suicide in spectacular explosions. After the World Trade Center was hit and it appeared that a terrorist hijacking was in progress, with United Flight 93 some eighty miles inbound from Washington, D.C., the Vice President, based on his prior conversation with the President, authorized Air Force fighter aircraft to shoot down the hijacked aircraft.<sup>207</sup> Officials believed that the plane was headed towards the U.S. Capitol or the White House. Innocent people who themselves were nonthreats were so situated that they were subject to an order to be killed in order to avert a greater danger.

Air Force pilots, meanwhile, did not have a clear understanding of the rules of engagement.<sup>208</sup> In any event, at 10:30 a.m., before the order could be implemented, United Flight 93 went down in a field in Pennsylvania. The passengers on board apparently took action to take control of the aircraft, and their actions no doubt saved the lives of many others.<sup>209</sup>

Terrorists can no longer regard passenger-hostages on an aircraft to be “shields” that might protect them, because the government may find it necessary to shoot down the plane if it appears that the hijackers are intent on using the aircraft as a missile to cause horrific destruction. Under the necessity doctrine, if a passenger jet is in the hands of hijackers, the choice of whether to shoot it down must be carefully weighed in light of all the circumstances available to officials at the time.<sup>210</sup>

Let us consider, along the lines of the necessity defense, how officials might decide whether to issue a shutdown order.

#### A. The Choice of Evils Prong

The choice is either to shoot down the plane and kill everyone on board, or to allow the plane to continue on its trajectory, with the probability that it will hit a target, possibly in a densely populated area, resulting in the deaths of a significant number of innocent persons on the ground as well as destruction of prop-

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<sup>207</sup> See Philip Shenon & Christopher Marquis, *Miscommunication Left Pilots Without Order on Downing Jets*, N.Y. TIMES, June 18, 2004, at A1, A17.

<sup>208</sup> See *id.*

<sup>209</sup> Subsequently, the German Parliament passed a law authorizing the military to shoot down civilian airplanes if it believes they are being used in a 9/11-style terrorist attack. See *World Briefing, Germany: New Air Security Law*, N.Y. TIMES, June 19, 2004, at A4. Poland enacted a similar law that allows the head of the Polish Air Force to order hijacked aircraft shot down as a last resort. See *World Briefing, Poland: Law Allows Hijacked Planes to be Shot Down*, N.Y. TIMES, Jan. 14, 2005, at A12.

<sup>210</sup> The justification for this type of action might be separately analyzed on the basis of military necessity in response to an armed attack.

erty. With either choice, the death of everyone on the plane is inevitable. Blowing up the aircraft with a missile before it reaches its target will simply shorten their lives by a few minutes.

In considering a shootdown order, it is not necessary to weigh the number of innocent lives on the plane compared to the number of lives on the ground that might be saved. When we consider the fact that the people on board are going to die in a few minutes regardless, then shooting down the plane would seem clearly justified. The action would prevent the plane from hitting a target which, in all likelihood, would result in the death of *some* people who otherwise would not be in harm's way. Even if only a handful of people were thus saved, there would be a net saving of lives.

By shooting down the aircraft, we are not infringing the rights of those on board because their rights are already taken from them—they are destined at that point for death.<sup>211</sup> To some extent, this is similar to the Mountaineer Case in that the lower climber will die in a few moments no matter what is done; cutting the rope will result in his death a few moments earlier than otherwise, but will likely result in the net saving of life.

Of course, a shootdown order may still produce injuries or death to innocent bystanders on the ground. The plane would likely break into pieces, and burning debris would fall to the ground over an extended region, jeopardizing life, limb and property. In this regard, it would seem prudent to execute the shootdown order, if at all, when the aircraft is flying over an area with the least possible population.

What if the apparent target of the hijacked aircraft is a significant cultural monument, such as the Statute of Liberty, at a time when it is closed? Suppose further that there are no human guards at the site, but an automated security system is in place, so that no one (other than those aboard the aircraft) would be killed by the impact. In that case, a significant cultural monument would be saved, but there would be *no* net savings of life by shooting down the plane. Would saving a significant cultural monument, in itself, be sufficient to justify the shootdown order? What if the target of the plane were an ordinary office building, again empty and with no lives in jeopardy (other than those on the aircraft)? Would that affect the decision? What if the action averts the destruction of an empty office building, but burning

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<sup>211</sup> This is a different situation from the trolley case, discussed *supra* note 2. Diverting the trolley results in infringing the rights of someone who otherwise was *not* in harm's way and would not have otherwise been killed.

debris from the fuselage kills a number of people on the ground or causes even greater destruction of property than the building that was saved? Would the decision, in either case, be influenced by the fact that all the people aboard the plane will die in a few minutes anyway? Should the choice of evils decision weigh the likelihood of collateral consequences (such as economic repercussions, terror and fear, etc.) if the terrorists succeeded in reaching their target, against the consequences of implementing a shoot-down order?

#### B. The Imminence Prong

The question is whether there is imminent danger that the plane will be used as an airborne missile to produce significant or very substantial destruction, possibly in a densely populated area. What degree of imminent danger must be evident? Are officials to assess the danger based on a reasonableness standard, drawing inferences based on the descending trajectory and speed of the aircraft, and the fact that it is in control of hijackers who refuse to communicate with air traffic controllers? Is it possible to predict what target the plane is headed toward? How close to a target should the aircraft be in order to make it reasonably clear that the threat is truly imminent? Is there more time to wait and see just where the plane is going? Does it really matter what specific target the plane is headed toward if it is descending upon a populated center?

What if officials are in communication with the hijackers, who say they mean no harm, and that they are going to fly the plane to a foreign city to make a demand for the release of political prisoners? Will that militate against the necessity of shooting down the plane?

#### C. The Causal Nexus Prong

If officials do nothing and simply allow the plane to proceed to the target, all the lives on board as well as the additional lives and property incident to the terrorist target will be lost. If officials shoot down the plane, all persons on board the plane will likewise be killed, albeit only a few minutes sooner than otherwise, but there will likely be a net saving of lives and property. Thus, the action would very likely be causally effective in averting a greater evil. On the other hand, if shooting down the plane causes it to crash into a densely populated area, there could be further casualties and destruction of property, perhaps even exceeding what would have been the case had the terrorists continued on to the intended target.



#### D. The Legal Way Out Prong

Officials may have no reasonable legal alternative to a shoot-down order. There is no time to seek a diplomatic solution. Terrorists in control of a hijacked aircraft may well refuse to communicate their intentions to officials, making negotiation impossible. In any event, as a matter of policy, most governments will refuse to negotiate with terrorists.

#### E. The Preemption Prong

As in any situation involving homicide by necessity, there is always the question of whether the action is wrong because, as a matter of law, the killing of innocents is unacceptable under any circumstances. One may debate whether it is morally required, morally permitted, or even morally prohibited to deflect the aircraft by shooting it down rather than to allow it to proceed to the target. In any event, officials would not likely be deterred by deontological constraints under the circumstances of a terrorist hijacking.

Key to the inquiry is that if nothing is done, a great many more lives will be lost than if the plane is shot down, and the people on board are going to die momentarily either way. In the final analysis, a shutdown order would not likely hinge on whether there would be a net savings of lives. Even if the hijacked aircraft were poised to hit an empty office building, with no people on the ground endangered, it would seem unrealistic to expect officials to watch the plane hit the target without doing the one thing within their power to prevent that from occurring.

#### F. The Clean Hands Prong

The clean hands prong holds that one who has been reckless or negligent in bringing about the necessitous circumstance may not justify action based on the necessity defense. If the government were reckless or negligent in causing the terrorists to hijack the aircraft, then the government would lack clean hands. Terrorists might argue that they are acting in response to the reprehensible acts of the government whose people they have targeted. The government is not likely to be dissuaded from issuing a shutdown order based on terrorist claims that the hijacking is justified.

### IX. HOMICIDE BY NECESSITY: THE FUTURE

A modern case from Maine, *State v. Thibeault*, seems to leave open the possibility of asserting the necessity defense in the

context of homicide.<sup>212</sup> This case involved a defendant charged with murder. He sought to introduce evidence of the necessity defense, which the judge rejected. The victim had threatened to kill the defendant's daughter, her husband and their two children (the defendant's grandchildren), and the threats were becoming more frequent and intense. As a result, the defendant was very worried about the safety of his relatives. He believed that the police were powerless to prevent the threatened harm from happening. The defendant and his son-in-law then kidnapped the victim, and the son-in-law shot him to death. The defendant said his sole intention was to kidnap the victim and frighten him into refraining from the imminent harm that had been threatened to his family members. The judge refused to instruct the jury on the necessity defense. The jury found the defendant guilty of murder.<sup>213</sup> On appeal, the defendant argued that it was reversible error for the judge to refuse to instruct the jury on the necessity defense. The appellate court held that nothing in the record indicated that the victim posed an imminent threat to the defendant's relatives or to anyone else, and affirmed the conviction. However, the decision suggested that had the defendant introduced evidence of imminent harm, the defense would be available with respect to a charge of murder.<sup>214</sup>

#### CONCLUSION

Perhaps the law should take a lesson from philosophy. All law is ineffective in extreme situations. In an emergency, most of us would agree that it is appropriate to take action that under ordinary circumstances would not be justified. In an emergency, we might even praise action that violates the law so long as it is done to produce a greater good or avert a greater harm. The necessity doctrine aids the courts in coming to grips with life-and-death moral dilemmas in which a defendant seeks to justify disobedience of the law for the purpose of avoiding a greater evil.

Many of the situations discussed in this article are real life cases of people acting in violation of the letter of the law in exigent circumstances, in order to avert the greater of two evils. In most necessity cases, the question of which evil is the lesser is not in dispute. No one in our society seriously disputes whether property may be destroyed to save human life or whether the crew of a disabled ship is justified in "resist[ing] the authority of the master" and stopping at a nearby port to obtain emergency

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<sup>212</sup> 621 A.2d 418, 423 (Me. 1993).

<sup>213</sup> *Id.* at 421.

<sup>214</sup> *Id.* at 423.

repairs.<sup>215</sup> But in homicide cases, the question of which evil is the lesser one comes up against deontological constraints: killing one innocent person in order to save a greater number of lives is very rarely a value choice that the law allows or recognizes. Courts have suggested that it is difficult to see how there is a benefit to society in the intentional killing of innocents, even though the action results in the saving of lives. Lives are not amenable to ready quantification, and therefore courts are just not comfortable with allowing defendants to assert a necessity defense by measuring “the comparative value of lives,” to quote Lord Coleridge.<sup>216</sup>

In a sense, the necessity defense allows us to act as individual legislators, amending a particular criminal or civil provision or crafting a one-time exception to it, when a real legislature would likely do so if presented with the same circumstances. Thus, the necessity doctrine contemplates that it is impossible to draft general laws that serve all situations.<sup>217</sup>

The necessity defense is inherently flexible, adjusting to general shifts in societal norms. This raises the prospect of unfairness where disagreement may exist on the extent to which a value is relative or absolute, that is, where the value question is not clear. Perhaps the most delicate question a judge has to determine is whether the defendant’s choice of evils and the action taken was in fact a reasonable choice, or whether the action conflicts with some higher value. The judge will also determine whether the defendant’s belief of necessity was reasonable or unreasonable under the circumstances.<sup>218</sup> The judge may decide that the defendant’s value choice was wrong and refuse to allow the matter to go before the jury. Yet the value choice is an ultimate question of fact that would be decided by the jury if it were allowed to hear the defense. A jury will revisit what the circumstances were and decide if the action was therefore necessary.

There is always the danger that a jury will second-guess the defendant, that it will be tempted to gain insight from hindsight that was not apparent at the time. Therefore, it is important for judges to instruct the jury to evaluate the evidence based on the circumstances at the time the defendant acted, and to resist the temptation to evaluate a defendant’s acts in hindsight, based on

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<sup>215</sup> See, e.g., *United States v. Ashton*, 24 F. Cas. 873, 874 (C.C.D. Mass. 1834) (No. 14,470).

<sup>216</sup> *Regina v. Dudley & Stephens*, (1884) 14 Q.B.D. 273, 287 (U.K.).

<sup>217</sup> See H.L.A. HART, *THE CONCEPT OF THE LAW* 121–50 (1961).

<sup>218</sup> See, e.g., *Graham v. State*, 566 S.W.2d 941, 952 n.3 (Tex. Crim. App. 1978); PROSSER & KEETON, *THE LAW OF TORTS* § 37 at 236 (W. Page Keeton et al. eds., 1984) (stating that a defendant’s conduct may be reasonable or unreasonable as a matter of law).

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all the evidence scrupulously gathered after the emergency was over.

Despite its potential shortcomings, the necessity defense should be allowed as a justification for homicide in extreme circumstances. When a person is faced with a choice of evils, the law should tolerate the better moral decision, rather than vainly attempt to oppose the human instinct of self-preservation.