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"SURVIVORS" OF THE ETERNAL SEA: A SHORT TRUE STORY

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"Good Skipper" use him truly,
For he is ill and sad
"Hush! Hush!" he cried, then cruelly
He kill'd the little lad.

BALLAD OF THE MIGNONETTE[†]

One of the more popular television shows last year was *Survivor*. Several persons lived on a remote island and the last survivor won a million dollars.

The tale of the *Mignonette* is a real-life story of survivors who endured a terrible ordeal on the eternal sea. It happened in the latter part of the nineteenth century. Today, survivorship takes on a much broader spectrum. Modern issues of life and death, whether in the form of abortion, partial-birth abortion,[1] euthanasia, the death penalty or violence in the schools have not only captured the attention of our people, but have had a long and fascinating history. A cultural war is currently being waged in our society. The divide among its citizens is enormous: some believe all "life" should be greatly respected, whether in the form of humans, other animals, or even plants; some believe that life may be taken at some point and under certain circumstances. The "twain," unfortunately, shall never meet.

One such survivor story involving the value of human life is told in the famous English decision, *Regina v. Dudley and Stevens*.[2] The case involved the taking of a human life, that of a young lad at sea, to save the lives of other sailors who were stranded, without food and water, on the vast sea for many days.

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[†] The *Ballad of the Mignonette* is a folk ballad written originally by F. Morgans and reprinted at A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW 253-54 (1984).

1. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (2000) (striking down a Nebraska partial-birth abortion statute). *But see* George Will, Opinion, *Media Censoring the Tragedy of Partial-Birth Abortion*, DETROIT NEWS, Aug. 21, 2000, at A10 (criticizing the media for refusing to run a cartoon ad graphically depicting a late-term abortion).

2. 14 Q.B.D. 273 (1884); 14 Q.B.D. 560 (1885).

It is not only an important legal case, it is a fascinating adventure tale. It is a tale that is not only very emotional when played out, but the story strains the very legal and moral fabric of society—it would make a great movie—and it is a modern tale because the principles embodied in that famous case are applicable to our modern society.

What do men and women do to save themselves when faced with impending death? How far will they go—how far can they go, legally and morally? If they kill to save themselves, is it murder? These are some of the same questions raised by the saga of the *Mignonette*, a small sailing ship, fifty-two feet long, which sailed from England to Australia.[3]

I. THE MIGNONETTE

In the latter part of the nineteenth century, it was quite fashionable in England to belong to a yachting club. It was, and still is, an English and American tradition. In the 1880s, a nationally known yachting center was the village of Tollesbury in Essex.[4] Private yachts and yachting were symbols of wealth, courage and success. Membership marked differences in social structure. Queen Victoria and Prince Albert fostered such clubs, and to be a member of the Royal squadron was the height of success. Many owners sailed their own ships, while others hired professional crews with captains, or "sailor masters."

One of the many yachts in England during the 1880s was the *Mignonette*. She was built in 1867 in Essex by the Aldhous brothers and launched August 12, 1867.[5] The yachts built by the Aldhous brothers "were well known in the racing world."[6] The ship was built mainly as a cruiser and fishing boat. It was fifty-two feet long, twelve and one-half feet wide and seven feet, five inches deep. She had a mainmast and a small mizzenmast aft. Her rig rose some sixty feet above the deck, and she carried a small dinghy: thirteen feet long, four feet wide and twenty inches deep.[7]

In 1883, the *Mignonette* was sold to a flamboyant Sydney lawyer by the name of John Henry Want. Want was a member of the Royal Sunday Yacht Squadron. "Jack" Want was a sporting man, "over six-foot in height, with a rugged jaw and flashing eyes."[8] Jack Want came to England in 1883 to purchase a "fast 40-ton yacht" to take back to Sydney. He bought the

3. The tale of the *Mignonette* is graphically and excellently told by Professor A.W. Brian Simpson in his book CANNIBALISM AND THE COMMON LAW (1984). I have drawn upon his book and give him full credit for certain portions of it.

4. *See id*. at 13.

5. *See id.* at 17.

6. *Id*.

7. *See id*. at 19.

8. *See* SIMPSON, *supra* note 3, at 20.

Mignonette and arranged for it to be sailed in the spring of 1884.[9] Thomas Riley Dudley, one of the principals of our story, was hired to sail the vessel back to Sydney.

Tom Dudley was born on April 14, 1853 at Tollesbury, the son of George and Susannah Carter Dudley. Tom's mother died when he was six. When Tom was about ten years old, his life began at sea. He signed on as a boy on the Royal Charter on which he worked for nearly six years. When he was sixteen, he joined the schooner *Iris*, ultimately working as an able seaman. He soon earned a reputation for courage and seamanship.[10]

Tom Dudley was a short man with reddish hair and a beard. He spoke with a broad Essex accent. He was an experienced, courageous seaman. One newspaper described him as "possessing the character of a bold and fearless man . . . much sought after by owners of yachts."[11] It was no wonder, then, that Tom Dudley was drawn to sailing the *Mignonette* to Sydney. The terms of the contract between Tom Dudley and Jack Want were generous, and there was a possibility that, in Sydney, Tom would be the captain of Jack Want's new yacht.

In May 1884, at Southampton, the *Mignonette* was repaired and outfitted for the long, 16,000-mile journey to Sydney. Tom sought a crew of three and signed James Robert Haynes, Edmund (Ned) Brooks, age thirty-nine, and Richard Parker, age seventeen.[12] On May 15, 1884, Tom went with the three men to the customs house and signed the ship's articles. Haynes was an experienced sailor with a mate's certificate who had apparently known Dudley before signing. Ultimately, however, Haynes had a change of heart and deserted the ship the next day.

To replace Haynes, Dudley signed Edwin Stephens. Stephens was born in 1847, was thirty-seven at the time of sailing and lived in Southampton. Stephens went to sea at fourteen as a "boy." He became a seaman in 1863 and a master mariner in 1876. Stephens' career was a rocky one, especially after a sea disaster while serving on the *European* of Africa. He had difficulty locating a position in England. He was tempted into signing by Dudley's offer to make him the captain of the *Mignonette* in Sydney.[13]

Edmund James Brooks, known as "Ned," "Neddy" or "Teddy," was born May 18, 1846. He, too, went to sea at an early age, became a yacht hand and had known Tom Dudley for several years. He had worked on racing vessels.

9. *Id.* at 21.
10. *See id*. at 23.
11. *Id*. at 27.
12. *See id*. at 30.
13. *See* SIMPSON, *supra* note 3, at 35.

Rumors indicated that he had been married but that he deserted his wife. The trip to Sydney with Dudley may have been his escape.[14]

Richard Thomas Parker was born the year the *Mignonette* was built—1867. Known as "Little Dickey," he was the son of "Old Chick" Parker, a yacht skipper, and Mary Parker. Richard was young when his father died, and he and his two older brothers had to fend for themselves. Richard was illiterate; he could not sign the ship's articles, but loved to travel, and he joined the Dudley crew to go to Sydney when he was seventeen years old. He signed on, allegedly for £1 a week.[15]

In May 1884, the crew was set. On Monday, May 19, 1884, they set out from a village near Southampton. The voyage was to be a long one—between 14,000 and 16,000 miles around the Cape of Good Hope.[16] Dudley decided to sail first to Madeira and pass close to the Cape Verde Islands. After a short stop at Madeira he would sail on to Cape Town and then to Sydney. In following this route, Dudley followed other captains who sailed small vessels.[17] Tom Dudley and Edwin Stephens, the navigator, hoped to reach Sydney in 110 or 120 days. May 22, 1884, was their last sight of the English shore. On June 1, they reached Madeira. There, they took on water, fruit, meat, vegetables and fish. They left Madeira on June 2. On June 17, they crossed the equator and moved thereafter into the South Atlantic, where winter comes early. They expected strong winds and seas. On July 3, the vessel lay in the eye of a severe storm. By July 5, they were in heavy cross-seas.

On that fateful day, Dudley, according to his own account, "saw a very high sea about to brake [sic] over us" and heard the mate cry out that "her side [was] knocked in and she [was] sinking."[18] Stephens later recalled crying out, "My God! Her topsides are stove in; she is sinking."[19] Dudley gave orders to lower the dinghy. Parker got some water from the *Mignonette*, but had to throw half the cask overboard because lowering it into the dinghy would have been too risky. Dudley, as captain, was the last man aboard; he obtained the sextant and chronometer, and descended into the cabin below. He threw tins of food toward the dinghy, but only two cans of turnips were obtained. Stephens, Brooks and Parker called out to Dudley to "[c]ome up, Captain!"[20] Dudley got into the dinghy and, within five minutes, the *Mignonette* sank, sending three men and a boy out into the open sea.

14. *See id*. at 36.
15. *Id.* at 37-38.
16. *See id*. at 40.
17. *See id*. at 41.
18. *See* SIMPSON, *supra* note 3, at 47.
19. *Id*.
20. *Id*. at 48.

II. THE ORDEAL

The sea was raging. Able seamen that they were, the four castaways righted the dinghy, brought its head toward the sea, and rode out the storm. The men never recovered the cask of water; all that remained on board were the sextant, the chronometer and two tins of turnips. Dudley described the awful scene:

> [I]t was a very bad sea like a mountain at times and water coming in faster than we could bail it out and night was coming on . . . we had only one [bailer] on board . . . about 11 p.m. I should think by the moon a large shark came knocking his tail against our frail boat which made me think our time was near for him to be dining off our bodis [sic] but I prayed that we might be speared [sic] to see all at home if possible live a better life in the future.[21]

The dark night came; the dinghy was tumbled to and fro, and the men prayed. They were some 1600 miles southeast of the Cape of Good Hope, and some 700 miles from the nearest islands. Dudley surveyed the scene. "Men, let us get on our knees and pray." The three men and Parker knelt. "Oh, God and Lord, take us this through this ordeal. We have nothing to sustain us, no water and two tins of turnips. With Thy help, we will be rescued."[22]

When dawn broke on Sunday, July 6, they assessed the situation. They had no water, little food, an oar and an improvised anchor. That day, the sea calmed; the wind veered to the southeast. Dudley scribbled a note to his wife that read, "Mignonette foundered yesterday. Weather knocked side in. We had five minutes to get in boat without food or water."[23] Dudley asked the men for their shirts. A makeshift sail was made. The first day was spent sailing a calm sea.

Monday, Tuesday and Wednesday came and went. Dudley rationed the two tins of turnips. A rain shower came, and the men caught water in their clothing. During the middle of the week, Dudley spotted a turtle. Stephens bent over the Dinghy and grabbed it by the fins and drew it in the boat. Brooks, the cook, was elated. "I can tell you," he said, "we were very pleased with the prospect of having something to eat, and you can have nothing better at sea in the shape of a fish than a turtle."[24] When the turtle was pulled into the dinghy, the captain killed it with his pocketknife. They caught the blood in the chronometer cases. Dudley cut the turtle into small strips and hung them around the dinghy to dry. They lived on the turtle for days—eating the bones and chewing at its skin. Between the turtle and rationing the turnips, they managed to survive through July 17. Their water, however, was gone. They began to drink their own urine. Their lips and tongues were parched and black;

21. *Id.* at 48-49.
22. *Id.* at 50.
23. SIMPSON, *supra* note 3, at 56.
24. *Id*. at 57.

their feet and legs were swollen; their skin developed sores.[25] By July 16, the remains of the turtle were gone—there was no food, and the castaways became desperate. The lad, Richard Parker, began drinking seawater. On the night of July 20, he drank a large quantity of it. He became ill. He lay groaning and gasping. He became delirious and then comatose.[26] The three men comforted the lad. "Cheer up, Dickey, it will come out all right," said Brooks.[27] By now the men knew that Richard was not long for the world. Hope began to fade. On July 21, Dudley wrote what he thought to be his farewell letter to his wife:

> We have been here 17 [sic] days; have no food, we are all four living, hoping to get a passing ship. If not we must soon die . . . . I am sorry, dear, I ever started on such a trip, but it was doing it for our best . . . . I should so like to be spared. You would find I should live a Christian life for the rest of my days. If this note ever reaches your hands, you know the last of your Tom and loving husband . . . . Goodbye and God bless you . . . . Your loving husband, Tom . . . .[28]

On that same day, Parker was very ill and even commented, "We shall die."[29]

Although he had thought about it for some time, perhaps as early as July 16 or 17, Dudley brought up the issue of drawing lots to determine who should die so that the others might be saved. "We shall have to draw lots, boys." But the unanimous response was, "No, we had better die together."[30] Brooks was always against drawing lots to determine who should die to save the others. The matter was dropped. Later, Tom raised the question of drawing lots again. Parker was lying in the bottom of the boat, groaning but not moving. Dudley said, "[I]f three of us are to live, one has to die."[31] But Brooks and Stephens demurred, "We shall see a ship tomorrow."[32] Dudley persisted on drawing lots. Brooks refused, but Stephens concurred. During that night, while Brooks was steering, Dudley asked Stephens, "What is to be done? I believe the boy is dying. You have a wife and five children, and I have a wife and three children. Human flesh has been eaten before."[33] Stephens said, "See what the daylight brings forth."[34]

At dawn, Stephens relieved Brooks at the helm. No sail or ship was in sight. Then, both Dudley and Stephens made a pact whereby Richard, who was at the time lying in the bottom of the boat with his arm over his face, was

25. *See id*. at 58.
26. *See id*. at 59.
27. *Id*. at 59-60.
28. *See* SIMPSON, *supra* note 3, at 60.
29. *Id.* at 61.
30. *Id*. at 61.
31. DONALD MCCORMICK, BLOOD ON THE SEA 57 (1962).
32. SIMPSON, *supra* note 3, at 62.
33. *Id*.
34. *Id*.

to be killed. Brooks was told by Tom Dudley, "You had better go forward and have a sleep."[35]

Parker gasped for breath. About 8:00 a.m., July 24, Dudley looked around; nothing was to be seen on the open sea. He told Stephens to be ready to hold Richard's legs if he struggled. In Dudley's own words, this is what happened next:

> No vessel appearing on the morning, I made signs to Stephens and Brooks that we had better do it, but they seemed to have no heart to do it, so I went to the boy, who was lying at the bottom of the boat with his arm over his face. I took out my knife—first offering a prayer to God to forgive us for what we were about to do and for the rash act, that our souls might be saved—and I said to the boy, 'Richard, your time has come.' The boy said, 'What me, Sir?' I said, 'Yes, my boy.' I then put my knife [into the side of his neck.] The blood spurted out, and we caught it in the bailer and we drank the blood while it was warm; we then stripped the body, cut it open, and took out his liver and heart, and we ate the liver while it was still warm. Stephens at that time was in the stern of the boat and Brooks in the bow.[36]

They drank the blood and ate the heart and liver. During the next few hours, Richard's body was dismembered, using the dinghy's brass oar locks. Brooks later described the scene as "a horrible sight and no mistake."[37] Dudley talked about the scene, "I can assure you I shall never forget the sight of my two companions over that ghastly meal . . . we was all like mad [sic] wolfs."[38]

The men lived on Parker's body for four days; Dudley and Brooks consumed most of the carcass, Stephens very little of it. Dudley was quite convinced that this had saved their lives. They were now stronger and quite different men.

On the morning of Tuesday, July 29, a sail was sighted. According to Dudley, "[O]n the 24th day as we was having our breakfast we will call it[,] Brooks who was steering shouted a sail true . . . a sail it was we all prayed . . . ."[39]

It was about 6:30 a.m. and Brooks shouted, "Oh, my God, here's a ship coming straight towards us."[40] Stephens waved a shirt. The ship saw them. Dudley shouted, "[F]or God's sake help us . . . . Help us on board."[41] The rescue ship was the sailing ship *Moctezuma*, a 442 ton ship on a return voyage from Chile. When the ship came close enough, the captain of the vessel, P.H. Simonsen, a German, spoke to them in his native tongue. He sent two of his

35. *Id*. at 63.
36. Queen v. Dudley and Others, 14 Q.B.D. 273, 1 T.L.R. 29, 30 (1884).
37. SIMPSON, *supra* note 3, at 68.
38. *Id*.
39. *Id*. at 69.
40. *Id*.
41. *Id*.

crew down to help the three men in the dinghy. Dudley and Stephens were hauled up by ropes. They were wrapped, given a small glass of water, brandy and food. As the men were being rescued from the dinghy, it still contained the remains of Richard Parker—some ribs and a few pieces of flesh.[42]

The men were treated with kindness, and their respective conditions—swollen feet, emaciated bodies, blackened mouths and lips, and skin sores—were treated. The day after the rescue, Tom Dudley suffered a strange mishap. While he was sitting on a chamber pot relieving himself, the pot shattered and lacerated his buttocks so severely that he had to stand for some period of time.

The *Moctezuma* arrived at Falmouth in England on September 5, 1884. At the time, Falmouth was a seaport with some 11,000 inhabitants. When the sailors arrived, Tom Dudley voluntarily told the customs officials that he had killed Parker, and word of the sailors' plight spread like wildfire throughout the English countryside. The men were regarded as heroes for what they went through. The Falmouth mayor and other officials contacted London on what should be done. Despite Dudley's insistence that he was the ringleader and that Brooks and Stephens were innocent, all three sailors were arrested.[43]

III. THE PRELIMINARY LEGAL PROCEEDINGS

Once the three were arrested, they were brought before the Falmouth borough Magistrates. This was a preliminary inquiry to determine whether charges against the men should be proceeded with or whether the men should be set free. Tom Dudley was quite optimistic that he and the others would be freed for, after all, he had saved three lives at the expense of one who was, for all practical purposes, dead.[44]

The three men appeared before the mayor and his colleagues on the bench and were charged with *murder*. The penknife used in the killing was introduced. Defense counsel, Harry Tilly, pointed out how the men had cooperated, as they had hidden nothing, and he emphasized their weakness of body and confusion of mind during the ordeal. The defense was carefully considered, but the judges eventually held the men in custody for a further hearing.

In London, meanwhile, judicial wheels were spinning. The Home Secretary discussed the case with legal officers of the Queen, the attorney general and the solicitor general. The Home Secretary concluded, "This is a very dreadful case. The law must decide what is the character of this terrible act. I presume these men will [be held for trial.] I should wish the Public

42. *See* SIMPSON, *supra* note 3, at 70-71.

43. *See* MCCORMICK, *supra* note 31, at 78-79.

44. *See* SIMPSON, *supra* note 3, at 74.

Prosecutor to take charge of the case so that it may be properly dealt with."[45] Appropriate memoranda were sent to the Prosecutor.

Later, the three prisoners again appeared in court. There was a great crowd, as the courthouse was "densely packed."[46] Daniel Parker, Richard's older brother, was in the courtroom. Counsel for Dudley, Stephens and Brooks made application for bail. Counsel urged the judges to consider "the great universal principle of self-preservation which prompts every man to save his own life preferably to that of another."[47] He supported his argument by citing Sir Francis Bacon, Sir William Blackstone and Sir James Fitzjames Stephen, a great English judge and author of the *History of the Criminal Law of England*.[48]

The magistrate granted bail, even though murder was a capital offense, and the crowd applauded. Dudley was released on £200 bail, and the other two at half that amount. John Burton, a local character, stood as surety for the three men. Thus, all three were now free on bail.

The townspeople were delighted, as public opinion was in favor of the three "heroes." A special benefit night was arranged to raise money. The dinghy with its bloodstains was exhibited in the town. Newspaper editorials were favorable toward the men. The local news 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."[49] Newspapers also printed Tom's letter to his wife that he had written in the dinghy.

By now, the "Terrible Tale of the Sea" was filling the world's press.[50] Ballads were written and sold to raise money for their defense. Mementos of the dinghy were displayed. Yacht clubs also raised money for their defense.

But, notwithstanding, the prosecution proceeded. The prosecution was placed in the hands of William Danckwerts, a young barrister of the Inner Temple. He faced some formidable obstacles and needed a witness for the prosecution. Dudley, Stephens and Brooks were the only eyewitnesses to the event. He concluded that one of them must be used by the Crown. The prosecutor chose the obvious one, Brooks, who took no active part in the killing of Parker.

45. *Id*. at 77.

46. *Id.* at 78.

47. *Id*. at 80.

48. *Id.* at 81.

49. SIMPSON, *supra* note 3, at 81 (citing a long editorial in *Lake's Falmouth Packet and Cornwall Advertiser* (Sept. 13, 1884)).

50. *Id.* at 83.

In his opening case before the magistrates, he announced his intention to have Brooks be a witness for the Crown, and asked the Court to dismiss all charges against him. The Court acquiesced in dismissing the charges against Brooks. The decision was met with an outburst of applause. "I must ask the public to suppress their feelings either way, or I must order the court to be cleared," said the presiding chairman.[51] The prosecutor also called two of the sailors of the *Moctezuma* and a Board of Trade official at Falmouth as witnesses.

The judges then bound the prisoners over for trial, at Exeter, at the next term of court before a judge and jury. In due time it was announced that the trial would be held in November before Baron Huddleston. Arthur Charles, Queens Counsel (Q.C.) was to prosecute for the Crown, and Henry Clark was to represent the defendants.[52]

IV. THE TRIAL

On October 28, 1884, less than two months after the *Moctezuma* brought the sailors to Falmouth, the *Times* announced that the trial would begin on November 1 at Exeter.[53] The trial judge, Baron Huddleston, was a very colorful individual. A clerk of the court commented that the Baron was in the habit of wearing gloves in court—"black gloves for murder, lavender for breach of promise and white for conventional cases."[54] The real reason the judge probably wore gloves, as was the reason why judges sat in high top rounded chairs, was simply because English courtrooms were cold. He was known as a "strong judge."[55] Prior to becoming a judge, he had a successful criminal law practice. In 1875 he became judge of the Court of Common Pleas and later served on the Court of Exchequer, becoming Baron just before the English Procedural Judicature Acts (1873-76).[56]

The trial took place on November 6, 1884 in the Courtroom in Exeter castle. Exeter was buzzing, and a considerable crowd gathered for the trial. Seating was by ticket only.

The prosecution opened with a statement by Arthur Charles, Q.C. Mr. Charles began by expressing the deepest sympathy for Dudley and Stephens. He told the jury that

> considerations of compassion and sympathy might well justify a favorable plea for the remission of the extreme [death] penalty of the law; but it could not be allowed to interfere with the performance of their duty, or prevent their finding

51. *Id*. at 91.
52. *See id*. at 93.
53. Ultimately, however, the trial was continued until Monday, November 3.
54. SIMPSON, *supra* note 3, at 196.
55. *Id*.
56. *Id.*

> these men guilty of murder . . . if [the defendants'] crime amounted to murder by the law of England.[57]

Mr. Charles repeated the facts of the charge in the indictment. Dudley, age thirty-one, Stephens, age thirty-six, Brooks, age thirty-eight and Parker, age seventeen, were adrift. He told them that there were traces of the crime in the dinghy, and that statements had been made by Dudley and Stephens. He argued that the question to be determined as far as he could tell, could only be answered one way. "Murder [is] the unlawful killing of anyone by a person of sound mind, with malice aforethought. Malice aforethought implied deliberation and intention, not spite or anger, and in this case it was evident that the act was committed deliberately and after full consideration."[58]

Mr. Charles first argued that the "McNaghten Rules"—those that require a guilty defendant know the difference between right and wrong—would not apply.[59] Charles then turned to the principles of justifiable and excusable homicide. He argued:

> No doubt such cases were known to the English law, but there was no trace of any circumstance which would warrant such a conclusion in this case . . . . The law allows a man to kill his assailant in order to prevent himself from being killed, but in this case, these men ran no danger at Parker's hands.[60]

Mr. Charles relied on Blackstone—"that when assailed a man ought rather to die himself than escape by the murder of an innocent."[61] The issue of two men on a plank had never been determined by law, but in any event that was not the situation here. He referred to the previous cases of drawing lots, and the proposed argument that a man selected and killed by lot would absolve the survivors of murder, but contended he could find no authoritative case, nor "anything to show that that was the law of [England.]"[62] He asked the jury for a special verdict on the facts so that points of law could be settled on review by the court above.

The prosecution evidence presented by the Crown proceeded. The statements made by Dudley and Stephens at Falmouth were introduced; Brooks testified as to the facts as an eyewitness and "gave evidence as to the

57. Queen v. Dudley and Others, 14 Q.B.D. 273, 1 T.L.R. 29, 32 (1884).

58. *Id*.

59. *See* SIMPSON, *supra* note 3, at 206. The McNaghten Rules were "laid down by judges in answer to the questions put to them by the House of Lords in 1843 in connection with the trial of one Daniel McNaghten." *Id*. The rules permitted a defense of insanity, but only if it could be shown either that the defendants "had not known what they were doing at all or had not known that what they did was 'wrong.'" *Id*. Dudley and Stephens' own statements ruled out the former claim, and "the fact that Dudley had admitted to saying a prayer for forgiveness was relied on to show that he knew what he did was 'wrong.'" *Id.*

60. Queen v. Dudley and Others, 14 Q.B.D. 273, 1 T.L.R. 29, 32 (1884).

61. *Id*. at 32-33.

62. *Id*. at 33.

terrible sufferings they all endured."[63] He stated that at the time the deed was done he considered that there was no reasonable prospect of relief coming to them. Testimony was also given by some of the members of the *Moctezuma*, but Ned Brooks was the star. When asked, "[w]hen this all took place about casting lots, what did you say?," he replied, "I said, 'Let us all die together. I should not like anyone to kill me, and I should not like to kill anyone else.'"[64]

After Mr. Charles made his opening, Baron Huddleston turned to defense counsel, Arthur Collins. He said, "Mr. Collins, I presume you traverse the law [meaning, disagree with the view of the Crown]?"[65] Collins replied that he did and relied on the cases of necessity in the Report of the Criminal Law Commissioners. Huddleston replied that he would lay down as a matter of law that there was no justification and said, "I shall lay that down distinctly and absolutely."[66] Collins replied that he would address the jury "upon my view of the case."[67] He then gave his argument.

Collins began by reminding the jury no "[g]overnement of any civilized country had in any case prosecuted the unhappy survivors on a charge of *murder*."[68] He contended that the facts were clear; that the defendants were respectable, God-fearing men and "had been driven by the direst straits to do that which was utterly repulsive and abhorrent to their minds in order to save their lives."[69] He contended that, under the evidence, there was an "inevitable *necessity* that one life should be sacrificed in order that the other three might be saved, and that they were justified in so doing in selecting the weakest."[70] He concluded by saying that "these men, on their return to this country, did not dream that they had committed any criminal offense in doing, under the circumstances of the most awful peril, that which had undoubtedly saved their lives."[71] Collins never suggested that the defendants should be completely excused, only that the crime was not murder, but manslaughter, a reduced offense.

Baron Huddleston then summed up and charged the jury. He told them that they were bound "to accept the law of the land as laid down by him, and were not at liberty to disregard his ruling, though invited to do so by the learned counsel for the defense."[72] He asked them to return a special verdict, meaning, a procedure commonly used at the time to ensure that the case would

63. *Id*.
64. SIMPSON, *supra* note 3, at 210.
65. *Id*. at 206.
66. *Id*. at 207.
67. *Id*.
68. Queen v. Dudley and Others, 14 Q.B.D. 273, 1 T.L.R. 29, 33 (1884) (emphasis added).
69. *Id*.
70. *Id*. (emphasis added).
71. *Id*.
72. *Id*.

be reviewed by a higher court. He said that, although counsel for the defense contended that the law of necessity would justify such a deed, he "felt bound to say that on all grounds of law or morality[, I dissent] from that argument . . . . There was no such doctrine in the law any more than that necessity was a justification for theft, though it might be a very good reason for imploring the clemency of the Crown."[73]

The jurors retired and deliberated. They returned a special verdict and expressed their strong "expression of sympathy and compassion for the sufferings the prisoners had undergone . . . ."[74] The special verdict, curiously enough, was drafted by Baron Huddleston. The special verdict was intended to become the definitive account of the facts on which the guilt or innocence of Dudley and Stephens turned. Also, curiously, the special verdict contained no finding as to whether it was "necessary" to sacrifice the life of Richard Parker.

The special verdict recited the facts and found:

> If the men had not fed upon the body of the boy they would probably not have survived to be picked up and rescued . . . . [A]ssuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men; but whether upon the whole matter, [the killing of the said Richard Parker be felony and murder or not,] the jury are ignorant and refer to the court."[75]

Thus ended the trial. Dudley and Stephens were freed on bail, pending the legal review.

V. THE APPEAL

On December 4th and 9th, the case was argued and decided before an expanded panel of judges consisting of Lord Coleridge, Chief Justice Grove, and Judges Denman, Pollock and the trial judge Baron Huddleston. Dudley and Stephens came to London.

On the appeal, Mr. Collins for the defense first contended that there was really no finding by the jury of "guilty" or "not guilty." The Attorney General, Sir Henry James, argued otherwise and relied upon specific authority. Lord Coleridge stated that the cases cited were "wholly immaterial," and "mere form."[76] After the argument of the Attorney General, Lord Coleridge said, "The proposition that this is not murder is so entirely novel . . . that we think we had better hear what Mr. Collins has to say upon the point."[77] Collins argued for reliance on the case referred to in the medical work of Nicolas Tulpius, a Dutch writer, in which several seamen were stranded, cast lots to see

73. *Id*.
74. Queen v. Dudley and Others, 14 Q.B.D. 273, 1 T.L.R. 29, 33 (1884).
75. *Id*. at 34.
76. Regina v. Dudley and Stephens, 14 Q.B.D. 560, 52 L.T.R. 107, 109 (1885).
77. *Id*.

who would be sacrificed, and subsequently were "treated with kindness by the Dutch and sent home to St. Christopher."[78] Collins argued that the English law did recognize a defense of necessity that applied to the facts and which justified or excused the killing of Parker. It was with this contention that the Court was mainly concerned, and the case has ever since been known to deal with the principle of necessity in English and American law. Surprisingly, after Collins' statement, Lord Coleridge commented, "We need not trouble you, Mr. Attorney-General to reply, as we are all of opinion that the prisoners must be convicted."[79] The Attorney General then suggested that it was proper for the court to pronounce sentence.

Five days after the argument, the opinion and judgment of the court was handed down by the Chief Justice Lord Coleridge. After stating the facts, reciting the special verdict, and disposing of several procedural issues, the Chief Justice discussed the merits of the case. The Chief Justice stated, "There remains to be considered the real question in the case, whether killing, under the circumstances set forth in the [special] verdict, be or be not murder."[80] "It is said," he continued, that from "various definitions of murder . . . that, in order to save your own life you may lawfully take away the life of another, when the other is neither attempting nor threatening yours. But if these definitions are looked at, they will not be found to sustain the contention."[81] Lord Coleridge then examined the early English authorities. Bracton, who wrote in the time of Henry III, spoke of necessity. But "in the very passage as to necessity, on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense, the repelling of violence . . . ."[82] The defendants' contention was not supported by Lord Hale—"the great authority."[83] In Hales' view it was plain that

> necessity which justifies homicide is that only which has always been, and is now, considered a justification . . . . Necessity which justifies homicide . . . is of two kinds: "(1) [t]hat necessity which is of a private nature; (2) [t]hat necessity which relates to the public justice and safety. The former is that which obligates a man to his own defence and safeguard . . . ." It is not possible to use words more clear to show that Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one's own to be what is commonly called self-defence.[84]

Lord Coleridge analogized to the law of England which holds that "if a person, being under necessity for want of victuals or clothes, shall upon that

78. *Id*. at 109 n.(a).
79. *Id*. at 110.
80. *Id*. at 111.
81. Regina v. Dudley and Stephens, 14 Q.B.D. 560, 52 L.T.R. 107, 111 (1885).
82. *Id.*
83. *Id*.
84. *Id*. (citing 1 HALE P.C. 478).

account . . . steal another man's goods, it is a felony and a crime by the laws of England punishable with death."[85] Lord Coleridge reviewed other English authorities—Sir Michael Foster's *Discourse on Homicide*, Sir Edward East and Lord Russell—and concluded that no authority justified the deed committed by Dudley and Stephens. "Decided cases there are none."[86] He stated that the American case, *United States v. Holmes*,[87] in which sailors were found guilty for throwing passengers overboard to save others, was correctly decided. The one authority of former times, Lord Bacon, said in his *Commentary* that necessity is of "three sorts: necessity of conservation of life, necessity of obedience and necessity of the act of God."[88] But these comments had not been approved. If Lord Bacon meant "to lay down the broad proposition that a man may save his life by killing an innocent and unoffending neighbor, it certainly is not law at the present day . . . . [There was] no excuse in this case unless the killing was justified by what has been called necessity."[89] Lord Coleridge then, in his opinion, concluded with some beautiful prose:

> Though law and morality are not the same and though 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 defense of it. It is not so. To preserve one's life is generally speaking, a duty, but it may be the plainest and 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 this case a shipwreck, of a captain to his crew, of the crew to the passengers, or soldiers to women and children . . . imposes 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 England—will men ever shrink . . . . It would be a very easy and cheap display of common-place 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 which we profess to follow . . . . Was it more necessary to kill *him* than one of the grown men? The answer must be, No . . . . [I]t is quite plain that such a principle, once admitted, might be made the legal cloke 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

85. *Id.* (citing 1 HALE P.C. 54).
86. Regina v. Dudley and Stephens, 14 Q.B.D. 560, 52 L.T.R. 107, 112 (1885).
87. 26 F. Cas. 360 (E.D. Pa. 1842).
88. *Regina*, 14 Q.B.D. 560, L.T.R. 107, 112 (1885).
89. *Id.*

> verdict are no legal justification of the homicide; and to say that, in our unanimous opinion, they are, upon this special verdict, guilty of murder.[90]

After the opinion was read and handed down, Sir Henry James, the Attorney General, prayed the court that the sentences be imposed upon Dudley and Stephens. Dudley and Stephens were called to the bench and Lord Coleridge spoke, "You have been convicted of murder. What have you to say why the Court should not give you judgment to die?"[91] In a low voice, Dudley said, "I throw myself on the mercy of the court."[92] Lord Coleridge took the unusual action of not downing his black cap, then passed sentence on Dudley and Stephens, intoning:

> You have been convicted of the crime of wilful murder, though you have been recommended by the jury most earnestly to the mercy of the Crown; a recommendation in which, as I understand, my learned brother who tried you concurs, and in which we all unanimously concur. It is my duty, however, as the organ of the Court, to pronounce on you the sentence of the law, and that sentence is that to the crime of which you have been convicted, you be taken to the prison where you came, and that, on a day appointed for the purpose of your execution you there be hanged by the neck until you be dead.[93]

VI. THE AFTERMATH

The story does not end there. Although Dudley and Stephens were condemned men, popular opinion was in their favor. It had always been thought, throughout the trial proceedings, that if they were convicted, a pardon would be sought and granted. Soon after the trial, London solicitors sent to the Home Office a "massive engrossed petition" entitled "The Humble Petition of Thomas Dudley late Master and Edward [sic] Stephens late Mate of the Yacht Mignonette."[94] The Petition was received in the Home Office. The Home Office decided that the sentence should be commuted to six months imprisonment, but "not at hard labor."[95] Dudley and Stephens received the news the next day. Law and justice were thus both satisfied. On May 20, 1885, Dudley and Stephens were released from prison, a year and a day after the voyage of the *Mignonette* began.

VII. IMPLICATIONS OF THE CASE IN TODAY'S WORLD

First, the significance of *Regina v. Dudley and Stephens* lies in the fact that the English courts, for the first time, decisively and absolutely laid down the

90. *Id.* at 113 (emphasis in original).
91. Queen v. Dudley and Another, 1 T.L.R. 118, 128 (1884).
92. *Id.*
93. *Id.*
94. *Id.*
95. The Queen v. Dudley and Another, 52 L.T.R. 107, 113 (1885).

common-law, civilized principle that 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 the defense of necessity is no excuse; that life shall not, under such circumstances, be taken or sacrificed even to preserve one's own life. That is a great civilizing principle. This decision exemplifies the dichotomy between murder and manslaughter which goes back to the twelfth and thirteenth centuries.[96] The decision also repudiated the doctrine of "necessity" in cases such as this.[97]

The common law, by this decision, adhered to and approved the words of Shakespeare:

> What a piece of work is man! how noble in reason! how infinite in faculties! in form and moving how express and admirable! in action how like an angel! in apprehension how like a god! the beauty of the world! the paragon of animals![98]

But in these days of modern society, that civilizing principle laid down in *Dudley*—that all human life is precious, and that the law must, with mercy, punish the taking of any human life—is being weakened, ignored, and turned upside down.

Witness the present social scene. Millions of abortions, committed in the name of women's rights, occur each year.[99] The death penalty is being eroded each day, as groups clamor for its abolition, even though heinous murders and other felonies occur that damage the lives of not only the victims but their families as well. Those who deliberately take a life forfeit the right to life, yet demonstrations occur whenever a convicted murderer is to be executed.[100] Dr. Death (Dr. Kevorkian) has, in the name of mercy, "killed" several poor souls

96. See the excellent discussion of the distinction between murder and manslaughter in *Commonwealth v. Webster*, 59 Mass. 295, 305 (1850).

97. Today the defense of "necessity" has been used, unsuccessfully, in many cases of abortion. *See* People v. Alderson, 540 N.Y.S.2d 948 (1989); State v. O'Brien, 784 S.W.2d 187 (Mo. Ct. App. 1989) (opinion by Simeone, J.); State v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986).

98. WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2.

99. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (2000); Roe v. Wade, 410 U.S. 113 (1973). See also the Jewish faith's policy on abortion. The reasoning behind the Jewish rulings of no abortion (except to save the mother's life) is that a man may not destroy life—even potential life. As was seen with euthanasia, just as every part of a life has value, so even a person cannot say that it is his or her life to do with as he or she pleases. Since life belongs to God, a potential mother cannot say it is her fetus to do with as she wishes. The potential life also belongs to God and not just to the mother. *See* NACHUM AMSEL, THE JEWISH ENCYCLOPEDIA OF MORAL AND ETHICAL ISSUES (1993).

100. As in the case of Gary Graham in Texas. The actual case and the brutality of the crime, however, tell a different tale. *See* Graham v. Collins, 506 U.S. 461 (1993); State ex rel. Holmes v. Texas Bd. of Pardons, 860 S.W.2d 873 (Tex. Crim. 1993); Graham v. State, 671 S.W.2d 529 (Tex. Ct. App. 1984); Graham v. Johnson, 45 F. Supp.2d 555 (S.D. Tex. 1999).

without ever receiving any severe punishment. Older, senior citizens and others are now deciding when to die, that is, when life is no longer bearable.[101] Genocides occur in Rwanda and other third-world nations. School shootings, by even young children, are becoming ordinary. Movies and computer games show how to kill.[102]

In all this, life and the respect for life are being eroded in our modern society; life is cheapened—a far cry from the civilizing principles laid down in *Dudley*.

It is not hard to see the future. Life will continue to be less important—there may well come a day when the movie *Soylent Green*[103] becomes reality: in a world where old go to die in a beautiful setting, and their bodies are made into cookies to feed the young; in a world where groups, such as Jews, Catholics, Democrats or Republicans, can be done away with impunity. It has happened in our lifetime—who is to say that it will, under the present trend, not happen again!

Secondly, the *Dudley* decision places strict limits on the doctrine of "necessity." One cannot take another's life, even to preserve his or her own, except in cases of justifiable or excusable homicide, as those terms have been used throughout the centuries of the common law. That is how strong the common law viewed, for centuries, the high value of human life.

The defense of "necessity" to a criminal offense in the law of England and America has had a long and controversial history. While the defense was used in a very few circumstances, until recently the defense has lain dormant in the law. The principle in *Dudley* was whether the defense of necessity was available in circumstances where life was taken in order to preserve another's life. In the modern context, in this, the early twenty-first century, the doctrine of necessity which has sprung anew in numerous cases centers on whether the defense is available to preserve life—not sacrifice it. The principle is raised today in numerous cases involving the emotionally charged and politically divisive issue of abortion. Is the defense available to persons charged with criminal trespass arising out of protestors' attempts to halt the carrying out of abortions performed at an abortion clinic?

The defense of "necessity" is a justification defense. It is an affirmative defense which is often expressed in terms of a "choice of evils." "When the pressure of circumstances presents a person with a choice of evils, the law prefers that the person 'avoid the greater evil by bringing about the lesser

101. *See, e.g.*, Cruzan v. Director, 497 U.S. 261 (1990); Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).

102. *See* Editorial, *A Poisonous Pleasure*, ST. LOUIS POST-DISPATCH, July 30, 2000, at B2 (stating that "media violence is hazardous to our health" and that "we want relief").

103. *Soylent Green* (1973) (starring Edward G. Robinson, and Charlton Heston).

evil.'"[104] Thus, conduct which would otherwise be a crime is, under the pressure of circumstances, the lesser of two evils.[105]

The defense of necessity has long been recognized in the common law. At common law, the necessity defense was a social policy that recognized that individuals should be free from legal restraint "where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils."[106]

The requirements for the successful use of the defense have been stated many times and in various ways in judicial decisions. Generally, the criteria have been that: (1) the act charged must have been done to prevent a significant imminent harm; (2) there must have been no adequate alternative; and (3) the harm caused must not have been disproportionate to the harm avoided, or, to put the matter another way, the harm to be avoided must be greatly disproportionate to the harm caused.[107] In addition, the requirements that the defendant have a reasonable, objective belief in the urgency of the illegal conduct and that the threatened harm must arise through no fault of the defendant are essential.

Crucial to the application of the doctrine are the imminence of the danger and the existence of an emergency situation. One court stated:

> [T]he application of the defense [of necessity] is limited to the following circumstances: (1) the defendant is faced with a clear and imminent danger, not one which is debatable or; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.[108]

In a New York case,[109] the court discussed the issue:

> [T]he necessity defense cannot be used to "excuse criminal activity intended to express the protestor's disagreement with positions reached by the lawmaking branches of the government." . . . It is not for the courts to decide if an appropriate decision was made by the legislative or executive branches, among competing policy options. To extend the defense this far would violate the principle of separation of powers.[110]

This defense cannot be used even to save one's life at the expense of another. Life has always been, under the common law, precious. Cheapening it under our modern pressures and principles of morality is incompatible with centuries

104. St. Louis v. Klocker, 637 S.W.2d 174 (Mo. Ct. App. 1982).

105. *See* 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 (1974).

106. United States v. Bailey, 444 U.S. 394, 410 (1975).

107. State v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986).

108. *Id.*

109. People v. Alderson, 540 N.Y.S.2d 948 (1989).

110. *Id.* at 955 (quoting United States v. Dorrell, 758 F.2d 427, 432 (9th Cir. 1985)).

of the common law. Thus, the *Dudley* case has important implications for today's society. A return to those principles would be greatly beneficial.

Appendix

The Importance of a Trial and a Decision in *Dudley*

Why was it that a trial was held in the case of Dudley and Stephens? Public opinion was strongly in favor of these two sailors. They were "heroes" in the eyes of the "man on the street." But a great principle was at stake: when, and under what circumstances, might one take the life of another in the eyes of the law? Life is precious under the common law. The common law has always protected human life. The principal reason why the case attracted so much attention is that it involved the killing of a young lad.

One of the most famous sea disasters in America which faced the United States courts, similar to the *Dudley* case and those referred to therein, was the saga of the *William Brown*.[111] Some seventy years before the sinking of the *Titanic*, the first American sea disaster took place when the *William Brown* sunk off the coast of Massachusetts and many lives were lost.[112] The disaster resulted in much publicity, and Seaman Alexander Holmes was charged with murder for throwing overboard the men to save the women and children.

On April 19, 1841, the night was cold and the sky black, except for the sparkling stars. Icebergs dotted the cold Atlantic. The American vessel, *William Brown*, quietly sailed the waters some 250 miles southeast of Cape Race. The ship had left Liverpool the previous March 13. That night predated by some four score and ten years the sinking of the *Titanic*. Suddenly the *William Brown* was "jolted" when it struck an iceberg.[113] The vessel was in trouble and sank suddenly.

On board were some seventeen crewmembers and sixty-five passengers.[114] The captain and crew sprang into action. The captain, the second mate and the crew lowered a longboat, twenty-two and one-half feet long and two and one-half feet deep, and a small "jolly" boat.[115] The captain, the second mate, seven of the crew and one passenger slithered into the jolly-boat. The long-boat was filled with the first mate, eight seamen, and thirty-two passengers. Seaman Alexander Holmes was in the long-boat. In all forty-one people, men, women, and children, scurried into the long boat. They were half naked, cold, wet and "all crowded up together like sheep in a pen."[116] They were shrieking and calling to the captain in the nearby jolly boat. The mate pleaded "take some of the passengers in the jolly boat—otherwise we must cast lots and throw some

111. This saga is based on the actual facts of trial. *See* United States v. Holmes, 26 F. Cas. 360 (E.D. Pa. 1842).

112. *Id.* at 360.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Holmes*, 26 F. Cas. at 360.

overboard."[117] Replying, the captain shouted: "My God, don't speak of that now; let it be the last resort."[118] The captain thought to himself, "Poor souls! You're going down a short time before we do."[119]

The remaining passengers on the *William Brown* stayed on board and in one short hour it sunk, with its human cargo, into the eternal sea. Thirty-one passengers perished.[120]

The night was Monday, April 18, 1841. The two boats began drifting apart and soon parted. By Tuesday morning they had lost sight of each other. The captain's final words to the passengers in the longboat were orders to obey the seamen.

When the two boats parted company that Tuesday morning, the long-boat and all on board were in great jeopardy. The boat began to leak. Even without a leak it would not have been able to support one-half the people on board. A cold rain started; the water was icy; the sea grew heavier, the waves splashed over the bow and the passengers were soaked to the skin. Pieces of ice were floating all around. The long-boat was sinking.

By late Tuesday night, Seaman Holmes and the rest of the crew had to do something. The passengers had buckets and tins and, by constant bailing, reduced the water in the boat so as to make it "hold her own."[121] But the boat sunk further into the sea. In that dark hour, Holmes and the rest of the crew began throwing overboard some of the passengers—one at a time—against their wishes. Fourteen male passengers were literally physically and violently thrown into the sea. No remarks were made, only a few words were spoken. Each man quietly accepted his fate. Only the mate called out, as they were bailing, "This won't work. Help us, God. The boat is sinking. God, have mercy on our poor souls."[122] Holmes ordered the crew not to part man and wife and not to throw over any women. No lots were cast. Only two married men and a fourteen year-old boy were not cast overboard. Not one of the crew was thrown into the sea.

Seaman Holmes took charge and was the leader of the crew who threw the male passengers overboard. The first was John Riley. Holmes told him to stand up; he did, and Holmes and the other crewmen threw him over.

Afterwards, they did the same to Duffy, who in vain beseeched them to spare him for the sake of his family. But he too was cast out. Then the crew seized a third man who told them his wife was in the boat. He was spared.

117. *Id.*
118. *Id.* at 361.
119. *Id.*
120. *Id.*
121. *Holmes*, 26 F. Cas. at 361.
122. *Id.*

They then came to Charlie Conlin. Conlin said to Holmes, "Holmes, surely you won't put me out." Holmes replied, "Charlie, you must go, too."[123]

Next was Francis Askin. Askin pleaded and offered Holmes five pieces of gold to spare his life until the next morning, and if no help came then, they would draw lots. Holmes said, "I don't want your money, Frank."[124] Holmes pushed him overboard.

McAvoy was next. He asked for five minutes to say his prayers. He was granted his request and was thrown over. Two men who tried to hide in the small boat were next. On and on it went until fourteen were thrown over.

When dawn broke the next morning, the remaining passengers began to complain that the crew should be made to die the death they chose for the fourteen. The crew did not heed these complaints. A food check was made: There were six gallons of water, bread, ten pounds of meat and a bag of oatmeal. Late in the morning, the weather cleared; and the vessel *Crescent* in nearby waters rescued the passengers in the long-boat and all the passengers and crew remaining in the long boat were saved.

During the course of the whole ordeal, Seaman Holmes was calm and collected; he parted with his clothes except for undergarments to shelter others; he tried to raise a quilt for a sail; he saved a young woman who had fallen overboard and he ordered everyone to be seated while the *Crescent* was attempting to rescue them. He told them, "Lie down, every self of you and be still; if they see so many of us on board, they will steer another way and pretend they have not seen us."[125] Holmes threw the male passengers overboard to save the remaining passengers—men, women and a young boy. If he had not, all would have been lost.

Some months later, Seaman Holmes was charged with "unlawful homicide" in a federal court in Philadelphia.[126] On April 13, 1842, he was brought to trial—a few days before the anniversary of the calamitous events.

The prosecution was conducted by Mr. William N. Meredith and Mr. Dallas. Holmes was defended by Mr. David Paul Brown, Mr. Armstrong and Mr. Hazelhurst. The trial was held before Federal Judge Baldwin.[127]

At the beginning of the case, Judge Baldwin noticed a great number of newspaper reporters in the courtroom. He told the reporters that by an Act of Congress, adopted in 1831, the Court no longer had the power to punish as contempt the publication of testimony of a trial.[128] But, he told them that since the Court had the power to regulate the admission of persons within the bar,

123. *Id.*
124. *Id.*
125. *Id.* at 362.
126. *Holmes*, 26 F. Cas. at 362.
127. *Id.* at 363.
128. *Id.*

the Court "takes this occasion to state that no person or reporter will be allowed to come within the bar for the purpose of reporting, except on the condition that they will suspend all publication until after the trial is concluded."[129] The reporter expressed their acquiescence in this order of the court, and the "most respectful silence prevailed during the whole trial."[130]

Mr. Dallas argued the case for the prosecution. He argued that Holmes was charged with "unlawful homicide."[131] He said that Holmes' defense would be that the homicides were necessary to preserve the lives of all the others. But Dallas added:

> Was the danger instant, overwhelming, leaving no choice or means, leaving no moment for deliberations? For, unless the dangers were of this sort, the prisoner had no right to sacrifice the lives of sixteen fellow human beings without notice, without consultation or without drawing lots. Peril, even extreme peril, is not enough to justify a sacrifice such as this.[132]

Mr. Dallas continued:

> No man may take away his brother's life, except in self-defense. No law gives a crew; no law gives Holmes the right to decide life and death; we do not give a seaman the power to make jettison of human beings, or making them mere cargo. We do not allow sailors and American seaman to throw overboard, whomsoever they may choose, for their own safety or even for the safety of others. Holmes believed that the ultimate safety of the majority was at stake, then it was his duty to give notice to all on board or draw lots.[133]

When Mr. Dallas had finished, Mr. Armstrong rose in defense of Holmes.

> [Your honor, gentlemen of the jury,] . . . This case should be tried in that long-boat, sunk down to its very gunwale, with forty-one half naked, starved and shivering wretches the boat leaking from below, filling from above, a hundred leagues from land, at midnight, surrounded by ice and subject to certain destruction for the change of the most changeful of the elements, the winds and the waves. To those add the horrors of famine and despair, madness and all the prospects, of this unutterable condition.[134]

After the arguments, Judge Baldwin charged the jury. He told the jury that the law divides homicides into murder and manslaughter.

The jurors listened attentively to the Judge. He spoke slowly and deliberately. The lawyers and the prisoner sat quietly at the table. The judge continued in an unemotional manner.

129. *Id.*
130. *Id.*
131. *Holmes*, 26 F. Cas. at 363.
132. *Id.*
133. *Id.*
134. *Id.* at 364.

> On shipboard, the passenger stands in a different position from that of the officers and seamen. It is the sailor who must encounter the hardships and perils of the voyage. This relation is not changed when the ship is lost by tempest or other danger of the sea, and all on board are beside themselves. Imminence of danger cannot absolve from duty. The sailor is bound 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 labor or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailor's. But the seaman in charge of the boat, such as Holmes, and a sufficient number of seamen to navigate the boat must be preserved; for without them to navigate all will perish. However, the sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor owes more benevolence to another than himself. He is bound to set a greater value on the life of others than on his own. And while it is the law that seamen may lawfully struggle with each other for a plank which can save but one, we think that, if the passenger is on the plank, even 'the law of necessity' does not justify the sailor to take 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 it would be the hardest of any to sacrifice a passenger in order to save a sailor.[135]

After a few remarks upon the evidence, the case was given to the jury, and sixteen hours afterwards, and after having once returned to the bar unable to agree, the jury found a verdict of guilty. Holmes, however, was recommended to the mercy of the Court.[136]

On a Motion to Overturn the Verdict, the Court held the motion under advisement for some days and then overruled it. The Judge in his order overruling the motion said, "Notwithstanding all that has been said, no error has been perceived by the Court in its instructions to the jury."[137] "It is true," said the Court,

> as is known by every one, that we do find in the text writers and sometimes in judicial opinion, the phrase, 'the law of nature,' the 'principles of natural right,' and other expressions of the like; but, as applied to civilized men, nothing more can be meant by those expressions than that there are certain great and fundamental principles of justice which, in the constitution of nature, lie at the foundation and are made part of all civil law, independently of express adoption or enactment. And to give these expressions any other significance, to claim them as showing an independent code, and one contrary to those settled principles, which however modified, make a part of civil law in all Christian nations, would be to make the writers who use the expression lay

135. *Id.* at 366.

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

137. *Id.* at 368.

> down as rules of action, principles which admit of no practical ascertainment or application.[138]

When Holmes was brought before the Court for sentencing, the Judge said to him that many circumstances in the dreadful affair were of a character to commend him, yet the case was one in which some punishment was demanded; that it was in the power of the Court to inflict the penalty of an imprisonment for a term of three years and a fine of $1000, but in view of all the circumstances, and especially as Holmes had already been confined several months, the Court would make the punishment more lenient. Holmes was then sentenced to solitary confinement in the Eastern Penitentiary of Pennsylvania, at hard labor, for the term of six months, and was ordered to pay a fine of $20.[139]

During the course of the trial and afterwards, considerable sympathy was excited in favor of Holmes by the press; an effort was made by several persons, and particularly by the Seamen's Friend Society, to obtain a pardon from President Tyler, but the President refused to grant a pardon.[140]

The importance of the past events in the centuries before the incident on the *Mignonette* is that Dudley and the others, and indeed society, had precedents on what to do in an emergency situation on the high seas to sacrifice one in order to save the lives of others—a dangerous societal practice. The belief and myth was, at the time, that it was proper, moral and legal to sacrifice one to save many. Dudley knew what must be done; someone had to die so that the others might live. They knew how to obtain human blood to survive; they knew that living blood was vital. They knew the appropriate course of action was to draw lots. They knew that in times past, the emergency or necessity, at least in myth and folklore, permitted the killing of Parker to save their own lives. The custom of the sea, as well as other incidents on land, seemed to permit, or at least ignore, the practice of sacrificing one to save others. But could such a practice of killing and sacrificing a human being be authorized by law? Could the common law—that great tradition of protecting and placing the highest value on human life—legitimize such a practice? Such legitimacy would be a dangerous matter for society.

No case before *Dudley* except the *Holmes* case had gone to court. The 1880s were a time when civilization flowered. It would be difficult to condone a practice, whether on the high seas or not, of sacrificing a fellow human being to save others outside a context of war.

For the peace and dignity of the realm, therefore, it was essential that some affirmative, clear cut official ruling be made by the highest judges in England to put the *Dudley* matter of the practice at rest. That is why it was essential for

138. *Id.* at 369.
139. *Id.*
140. *Id.*

the Home Office, and for civilized society, to put Dudley and Stephens on trial. The Home Office was frustrated in earlier attempts to legally determine the custom of the sea in these cases, hence it was essential now that a clear-cut case was presented to obtain a definitive ruling on the issues of life and death on the high seas—which would be precedential for other similar situations.