THE CASE OF THE SPELUNCEAN EXPLORERS: REVISITED

KOZINSKI, J.*

[I]n the days when the judges ruled, a great famine came upon the land . . . .

Ruth 1:1

The statute under which defendants were convicted could not be clearer. It provides that "[w]hoever shall willfully take the life of another shall be punished by death." N. C. S. A. (N. S.) § 12-A. These thirteen simple English words are not unclear or ambiguous; they leave no room for interpretation; they allow for no exercise of judgment. (It would be different, of course, if the statute contained such inherently ambiguous terms as "is," "alone," or "have sex" — which might mean anything to anybody — but fortunately it doesn't.) Statutory construction in this case is more accurately described as statutory reading. In these circumstances, a conscientious judge has no choice but to apply the law as the legislature wrote it.

As the jury found, Roger Whetmore did not die of illness, starvation, or accident; rather, he was killed by the defendants. And the killing was not the result of accident or negligence; it was willful homicide. Indeed, defendants thought long and hard before they acted, even going to the trouble of consulting physicians and other outside advisors. Under the law of Newgarth, which we have sworn to apply, we must affirm the conviction.

Defendants argue this result is unjust and ask us to make an exception because of the difficult and unusual circumstances in which they found themselves. They claim it is perverse, possibly hypocritical, to punish them for acts that even the best among us might have committed, had we found ourselves in the same predicament. These are good arguments, presented to the wrong people.

There was a time in our history, during the age known as the common law, when judges did not merely interpret laws, they actually *made* them. At common law, when the legislature was seldom in session and statutes were few and far between, judges developed the law on a case-by-case basis. One case would announce a rule that, when applied to unanticipated facts, reached an absurd result. The judges would then consult their common sense — their sense of justice — and modify the rule to take account of the novel circumstances. At com-

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mon law, justice meant tweaking a harsh rule to reach a sensible result.

But we are not common law judges; we are judges in an age of statutes. For us, justice consists of applying the laws passed by the legislature, precisely as written by the legislature. Unlike common law judges, we have no power to bend the law to satisfy our own sense of right and wrong. As a wise jurist once observed, "judicial discomfort with a surprisingly harsh rule is not enough to permit its revision." *United States v. Fountain*, 840 F.2d 509, 519 (7th Cir. 1988) (Easterbrook, J.). That we may feel sympathy for the defendants — that any of us might be in their place but for the grace of God — gives us no authority to ignore the will of the citizens of Newgarth, as embodied in their duly enacted laws. (Unless, of course, the laws violate the Newgarth Constitution — which the law here does not.)

This case illustrates why justice is too elusive a concept to be left to judges. Before us stand sympathetic defendants, represented by silver-tongued lawyers who argue that their clients had no choice but to kill Whetmore. "If they had to eat, you must acquit," they tell us. The reality is more doubtful. Defendants were told there was "little possibility," *supra*, at 1852 (Truepenny, C.J.) — not "no possibility" — they would survive for the ten more days it would take to rescue them. The human body can be strangely resilient and oftentimes surprises us. For example, in late twentieth-century America, Karen Ann Quinlan lived for nine years after life support systems were removed from her comatose body — contrary to doctors' predictions that she would die at once if life support were removed. *See Cruzan v. Harmon*, 760 S.W.2d 408, 413 & n.6 (Mo. 1988), *aff'd sub nom. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

Had defendants not taken Whetmore's life, everyone in the group might have survived. And if all had not survived, one surely would have died first, and that unfortunate fellow's body could have been eaten by the rest. Whetmore himself seemed to think that survival for another week was possible; why were the others in such a rush to shed blood? Whether the deliberate killing of a human being under these circumstances should be criminal is a difficult question. It must be answered by the conscience of the community, and that conscience is better gauged by the 535 members of the Newgarth legislature than by six unelected, effectively unremovable judges.

Defendants also argue that the Newgarth legislature could not have meant what it said — that it must have overlooked a case such as theirs. But defendants are not the first to have suffered this predicament. More than two millennia have passed since *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884), which raised precisely the same question, and *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383), which dealt with a closely analogous situation. Unfortunate incidents like these do happen from time to time, and we

must presume the legislature was aware of them, yet chose not to make an exception.

But even if this were a case of legislative oversight, it would make no difference. We are not free to ignore or augment the legislature's words just because we think it would have said something else, had it but thought of it. Next week we may have a case in which a man is sentenced to death for killing his dog. Could we affirm the sentence if we were persuaded that the legislature would have made canicide a capital offense, had it but thought of it? Surely not.

If putting these defendants to death is unjust — if it offends the sense of the community — relief must come from the organs of government best equipped to judge what the community wants. Contrary to defendants' claim that they have widespread support among the population, elected officials have been strangely deaf to their pleas. The Newgarth legislature — which is almost always in session nowadays — could have amended N. C. S. A. (N. S.) § 12-A to make an exception for defendants' case. Any such law could have been made expressly applicable to the defendants, as the Newgarth Constitution contains no reverse ex post facto or bill of attainder clauses. Then again, the Attorney General could have chosen not to prosecute, or to prosecute for a lesser offense. The grand jury — sometimes referred to as the conscience of the community — could have refused to indict, but indict it did. And the petit jury could have exercised its power of nullification by returning a not guilty verdict if convicting defendants offended its collective conscience. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 700–01 (1995). It would be arrogant for us to pretend that we know better than all these other public officials what justice calls for in this case. The political process may yet come to the defendants' rescue, or it may not. But it is in the political arena that defendants must seek relief if they believe the law, as applied to them, has reached an unjust result. We serve justice when we apply the law as written.

* * *

Although this concludes my analysis, I pause to comment on the views expressed by my colleagues. Some of them, *see infra*, at 1913 (Easterbrook, J.); *infra*, at 1884–85 (Sunstein, J.), infer judicial authority to read exceptions and defenses into N. C. S. A. (N. S.) § 12-A from the fact that the statute, if read literally, would condemn willful killings by police, executioners, and those acting in self-defense. This presupposes that section 12-A is the only statute bearing on this issue, which it surely is not. In a statutory system, the definition of murder is written in categorical terms, as in section 12-A, while other provisions define justifiable homicide, such as legal authority and self-

defense (archaic examples dating from as far back as the twentieth century include sections 196 and 197 of California's Penal Code, Cal. Penal Code §§ 196–197 (West 1988), and section 35.05 of the New York Penal Law, N.Y. Penal Law § 35.05 (Consol. 1998)), and excusable homicide caused by accident or misfortune during a lawful activity (to give another twentieth-century example, section 195 of California's Penal Code, Cal. Penal Code § 195). Defendants have not cited any of the provisions dealing with justification or excuse, doubtless because they do not apply. But that doesn't mean they don't exist, or that the legislature gave judges blanket authority to cut holes into the statute whenever the spirit so moves them.

The folly of this approach is perhaps best illustrated by Justice Easterbrook, who finds justification here based on an easy calculus: the killing is justified if there is a net savings in lives. *See infra*, at 1915 (Easterbrook, J.). But, as Justice West ably demonstrates, there are many situations where one could offer such a justification — the case of the conscripted organ donor for example. *See infra*, at 1896 (West, J.). Justice Easterbrook offers a "negotiation" rationale for his conclusion — he infers that the spelunceans would have preferred to enter the cave under a regime where one would be sacrificed to feed the rest rather than under a regime where all would starve. *See infra*, at 1915–16 (Easterbrook, J.). One could just as easily hypothesize a negotiation as to organ donation: any group of five people (one healthy and four needing his organs) could be supposed to have made a pact, while they were all still healthy, to sacrifice the one among them whose organs would be needed to save the rest. Under Justice Easterbrook's rationale, the four would be justified in hunting down a fifth and ransacking his body for vital organs.

The parties here did negotiate but failed to reach agreement because Whetmore refused to go along with the bargain; he, at least as of that time, thought that a one in five chance of being killed and eaten was worse than the alternative. My brother Easterbrook rejects this actual negotiation in favor of a hypothetical one where the outcome is dictated entirely by his personal preferences, but he gives no satisfactory reason for doing so. The negotiations actually conducted between the parties — where death was imminent and the risks concrete — are surely a better indication of what agreement would be reached by people in dire straits than Justice Easterbrook's musings about what imaginary explorers, faced with a remote and hypothetical risk, would decide if they took the trouble to think about it. This is a case of a judge who will not let mere facts stand in the way of a perfectly good theory. It demonstrates, better than anything I might say, the danger of appointing academics to the bench.

I am more sanguine about the approach taken by my brother Sunstein, though he dithers mightily before he gets to the point. Unlike Justice Easterbrook — who lightly undertakes to weigh life and death

whichever way his fancy strikes him — Justice Sunstein at least announces a constraining principle: where the statute is clear, we can ignore its plain meaning only when it reaches an absurd result. *See infra*, at 1883–84 (Sunstein, J.). And he rightly concludes that application of the statute to this case does not reach an absurd result. *See id.* at 1889. Though Justice Sunstein makes the case harder than it need be, I agree with Parts II and III of his opinion because they articulate a workable principle of law that does not depend unduly on the value system of the judge applying it.

Which is more than I can say for the opinion of my sister De Bunker. Aside from the fact that she is a Godless heathen — for which she will suffer the tortures of the Ghenna until the coming of the Messiah (which won't be too much longer now if we keep writing opinions like these) — her rationale is, not to put too fine a point on it, odd. As I understand her position, she believes that the defendants acted lawfully because the legislature did not specifically prohibit the killing and eating of someone under these circumstances. *See infra*, at 1912 (De Bunker, J.). The general prohibition against willful killing is not enough, De Bunker tells us; the legislature had to enact an affirmative prohibition. *See id.* at 1905. But the legislature also did not affirmatively prohibit killing on Tuesday, or killing for the purpose of harvesting body parts, or killing by someone who can achieve sexual gratification only when his partner succumbs. Nor did the legislature pass laws that specifically prohibit stealing from the rich to give to the poor, though many people believe it's entirely justifiable and have since the days of Robin Hood and Goldilocks.

Were Justice De Bunker's rationale to become the law of the land, the legislature would spend its entire time reenacting every law it has already passed, only to say: Yes, we really mean for it to apply in this circumstance or that. And who can tell what special circumstances require affirmative legislative action? Not until the matter is brought before our Court will the legislature learn whether a particular situation is covered by the general rule or requires a specific prohibition — in which case the misconduct suddenly becomes lawful.

Nor is this the only danger. Once the legislature is forced to abandon general statutes in favor of multiple specific prohibitions, the problem arises of how to deal with the interstices. If the statute prohibits theft of currency, and theft of bullion, and theft of negotiable securities — rather than merely theft of property — what happens when someone steals something not covered by one of the specific prohibitions, like ancient Krugerrands? *Inclusio unius est exclusio alterius*, will argue the defendants. Even though Krugerrands are in all material respects the same as bullion and currency, the listing of the latter two raises the inference that the third was meant to be omitted. Surely, the legislature must be permitted to outlaw a generic evil and then create specific exemptions where they appear to be warranted.

Justice De Bunker's system would quickly devolve into such chaos that a party who could afford a battery of clever lawyers would get away with murder.

But for two reservations, I would be inclined to join my sister West's opinion. The two reservations, however, are substantial. Although I agree with much of what she says about the need for the law to be applied equally — and with her trenchant observation that failure to prosecute certain crimes is a species of discrimination visited upon the *victims* of those crimes, *see infra*, at 1894–95 (West, J.) — I believe she goes too far. The clear implication of Justice West's opinion is that the legislature here could not have passed a statute authorizing the killing of Whetmore under the circumstances of this case, because to do so would have posthumously withdrawn from Whetmore the right to equal protection of the laws. Presumably, she also believes it would have been a denial of equal protection for the Attorney General not to prosecute the defendants or for the Chief Executive to grant them a pardon, because each of these actions (or inactions) would deny Whetmore (and future Whetmores) the protection of law when they need it most.

With this I cannot agree. As I said earlier, I believe that the legislature could properly conclude that the conduct here should not be criminal — and indeed could still do so. I do not agree that this would amount to a withdrawal of equal protection; it would merely adjust rights and responsibilities to reflect conflicting values. Because, as Justice Sunstein explains, this is not an absurd (or, I might add, invidious) choice, *see infra*, at 1888 (Sunstein, J.), I would leave it open to the legislature. The matter would be different for me if the legislature made a wholly irrational or invidious exception to a generally applicable law, such as legalizing murder or theft in poor neighborhoods.

My other reservation about Justice West's opinion, of course, concerns her ruling as to the sentence. I need not dwell on our standing dispute as to whether the imposition of a sentence — particularly a death sentence — must be conditioned on the implementation of a mitigation principle that allows the sentencer to grant defendants "merciful justice," *infra*, at 1899 (West, J.). I find even more troubling the remedy she adopts, namely the remand for a mitigation hearing. What exactly will happen during the course of such a hearing? Presumably the defendants will try to persuade the judge or jury not to impose the death sentence. But what if they succeed? Our law authorizes death as the only punishment for violating N. C. S. A. (N. S.) § 12-A. What can the sentencer do if it is persuaded that the death penalty here is too harsh? May it order whatever other punishment it believes fits the crime, such as whipping, nailing defendants' ears to the pillory, community service, amputation, or exile? My colleague may believe that the judge or jury would order defendants imprisoned, but I don't see where that punishment is authorized any more than

those listed above. The statute provides only one punishment for the crime of willful homicide, and imprisonment is not it. Were the jury to impose a term of years, we would be required to set defendants free because they would be held without legal authority.

What can I say about my sister Stupidest Housemaid's opinion, as she has retreated into one of her occasional "other voices" methods of analysis? While I find her methodology refreshing and wish the rest of us had the courage and imagination to forsake our "whereases" and "wherefores" for a more colloquial form of discourse, in the end I believe she errs even on her own terms. If I understand Justice Studpidest Housemaid's approach, she is voting to reverse the conviction because she does not feel bound by the terms of N. C. S. A. (N. S.) § 12-A. And she does not feel bound because she believes that there is no such thing as a rule of law — in her words "the law can often be argued every which way but up." *Infra*, at 1920 (Stupidest Housemaid, J.). My sister instead judges this case by her moral sense.

Justice Stupidest Housemaid also recognizes, however, that "it would be useful for the rule of law to exist," and that "[i]t may even be true that the servant needs a rule of law more than the master." *Id.* at 1922. Yet she does not take the opportunity to announce how the rule of law should apply in these circumstances, or to try to persuade a majority of the court to do so. Rather, she revels in what she sees as the absence of a rule of law, in a raw exercise of judicial power.

This is too bad, because it might be useful to hear Justice Stupidest Housemaid's explication of how a fair and neutral law might be applied in this case. She gives us tantalizing hints, but fails to follow through. For example, she observes that the spelunceans' activities resulted in a great expenditure of resources and the death of ten workers. She says that defendants ought to be held responsible for those deaths. *See id.* at 1919. Perhaps so, yet Justice Stupidest Housemaid abandons that thought without bringing it to its logical conclusion. I don't understand why. Defendants, after all, stand convicted of murder. The conviction is based on the record developed at trial, which includes information about the ten dead workers. Because Justice Stupidest Housemaid has abandoned the statute as a guide of decision and, instead, uses her moral sense as a compass, she could well affirm the convictions on the ground that defendants caused the deaths of the workers.

Such analysis would proceed along the lines of Justice Stupidest Housemaid's opinion. She should start by asking whether what defendants did was morally reprehensible. *See id.* at 1918. I infer she would say yes: Defendants went into the cave, exposed themselves to danger, knowing full-well that if they got into trouble great efforts would be made to rescue them — wasting valuable resources and endangering the lives of the rescuers. As Judge Cardozo said long ago,

"Danger invites rescue." *Wagner v. International Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921).

Second, my sister Stupidest Housemaid would look to deterrence. You can bet that if these defendants were convicted of murder for the death of the rescuers, that would make future billionaires think twice and three times about risking their lives in balloons and the like. In terms of incapacitation, we need not worry about those same billionaires doing it again. As for rehabilitation, the death penalty probably would not achieve that end, but three out of four ain't bad.

Of course there are some gaps to fill, like the fact that defendants were not charged with killing the workers. But these are the kind of meaningless legal formalisms that my sister Stupidest Housemaid disdains. As she is fond of saying, "When you is sittin on top, you can spit on them below and they can't spit back." (Actually, she says something very close to this, but I changed one little word out of a sense of decorum.) To which I would add, "If you gonna spit, don't spit in the wind." Which is by way of saying: How does it help the cause of the poor, of the oppressed, of the people of color, to let these four rich white guys walk when the law pretty clearly says they're guilty? It seems to me that my sister Stupidest Housemaid got bit by the white man's bug: "[W]hen white folks sacrifice white lives for the greater good, it's a big confusing problem." *Id.* at 1923. But Justice Stupidest Housemaid doesn't need to make "a big confusing problem" out of it. She can simply apply the white folks' law to these white folks and — according to her own lights — they'd get their just deserts. Why should the stupidest housemaid work so hard to pull her master's chestnuts out of the fire?

SUNSTEIN, J.* The defendants must be convicted. Their conduct falls within the literal language of the statute, and the outcome is not so absurd, or so peculiar, as to justify this Court in creating, via interpretation, an exception to that literal language. Whether a justification or excuse would be created in more compelling circumstances is a question that I leave undecided. I also leave undecided the question whether the defendants might be able to mount a separate procedural challenge, on constitutional grounds, to the death sentence in this case.

In the process of supporting these conclusions, I suggest a general approach to issues of this kind: Apply the ordinary meaning of statutory language, taken in its context, unless the outcome is so absurd as to suggest that it is altogether different from the exemplary cases that

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account for the statute's existence, or unless background principles, of constitutional or similar status, require a different result.

I

I confess that I am tempted to resolve this case solely by reference to the simple language of the statute that we are construing. The basic question is whether the defendants have "willfully take[n] the life," N. C. S. A. (N. S.) § 12-A, of another human being. At first glance, it seems clear that the statutory requirements have been met. Perhaps we should simply declare the case to be at an end.

An approach of this kind would have the benefit of increasing certainty for the future, in a way that reduces difficulty for later courts, and also for those seeking to know the content of the law. This approach enables people to plan and keeps the law's signal clear; the increased certainty is an important advantage. Such an approach also tends to impose appropriate incentives on the legislature to be clear before the fact and to make corrections after the fact. I would go so far as to suggest that a presumption in favor of the ordinary meaning of enacted law, taken in its context, is a close cousin of the void-for-vagueness doctrine,[1] which is an important part of the law of this jurisdiction with respect to both contracts and statutory law. By insisting on the ordinary meaning of words, and by refusing to enforce contracts and statutes that require courts to engage in guessing games, we can require crucial information to be provided to all relevant parties, and in the process greatly increase clarity in the law.

Nor is this a case in which a statutory phrase is properly understood as ambiguous or unclear. We do not have a term like "equal," "reasonable," or "public policy," whose content may require sustained deliberation or even change over time. It may be possible to urge that the statutory term "willfully" creates ambiguity, but I cannot see how this is so. There is no question that the defendants acted willfully under any possible meaning of that term. There is nothing wooden, or literal in any pejorative sense, in saying that the words here are clear.

I have been tempted to write an opinion to this effect and to leave it at that. But both principle and precedent make me unwilling to take this route. As a matter of principle, it is possible to imagine cases that fit the terms of this statute but for which the outcome is nonetheless so peculiar and unjust that it would be absurd to apply those terms literally or mechanically. In any case, our own jurisprudence forbids an opinion here that would rest entirely on the statutory text. For centuries, it has been clear that the prohibition in N. C. S. A. (N. S.)

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[1] The presumption in favor of plain meaning and the void-for-vagueness doctrine are cousins because both are designed to promote rule of law values and, in particular, to give the legislature an incentive to speak clearly.

§ 12-A does not apply to those who kill in self-defense, even though there is no express statutory provision making self-defense a legally sufficient justification. Our conclusion to this effect is based not on literal language, but on the (literal) absurdity of not allowing self-defense to count as a justification. Those justices who purport to be "textualists" here are running afoul of well-established law; I cannot believe that they would remain "textualists" in a genuine case of self-defense.

Nor is it clear that the statute would apply, for example, to a police officer (or for that matter a private citizen) who kills a terrorist to protect innocent third parties — whether or not there is an explicit provision for justification or excuse in those circumstances. Where the killing is willful, but necessary to prevent a wrongdoer from causing loss of innocent life, a mechanical or literal approach to this statute would make nonsense of the law. A statute of this breadth creates a risk not of ambiguity, but of *excessive generality* — the distinctive sort of interpretive puzzle that arises when broad terms are applied to situations for which they could not possibly have been designed and in which they make no sense.

A possible response would be that to promote predictability, excessive generality should not be treated as a puzzle at all; we must follow the natural meaning of the words, come what may. But as I have suggested, our self-defense jurisprudence makes this argument unavailable in the current context. But put the precedents to one side. In ordinary parlance, people routinely counteract excessive generality, and thank goodness for that. For example, a parent may tell his child: "Do not leave the house under any circumstances!" But what if there is a fire? A judge may tell his law clerk: "Do not change a single word in this opinion!" But what if by accident, the word "not" was (not?) inserted in the last sentence? Interpreting statutes so as to avoid absurdity could not plausibly undermine predictability in any large-scale or global sense. Nor is it clear that absurdity would be corrected by the legislature before or after the fact. Whether the legislature would correct the absurdity is an empirical possibility, and it is no more than that. Even the most alert people have imperfect powers of foresight, and even the most alert legislature cannot possibly anticipate all applications of its terms.

I conclude that when the application of general language would produce an absurd outcome, there is a genuine puzzle for interpretation, and it is insufficient to invoke the words alone. The time-honored notion that criminal statutes will be construed leniently to the criminal defendant strengthens this point. I am therefore unwilling to adopt an approach that would, in all cases, commit our jurisprudence to taking statutory terms in their ordinary sense.

II

As I will suggest, the key to this case lies in showing that the best argument for the defendants is unavailable, because a conviction here would not be analogous to a conviction in the most extreme or absurd applications of the statutory terms. But before discussing that point, I pause to deal with some alternative approaches. Troubled by a conviction in this case, the defendants and several members of this Court have urged some creative alternatives. It is suggested, for example, that under the extreme circumstances of the collapse of the cave opening, the law of civil society was suspended and replaced by some kind of law of nature. *See supra*, at 1855 (Foster, J.). To the extent that this argument is about a choice of law problem, I do not accept it. There is no legitimate argument that the law of some other jurisdiction applies to this case, and I do not know what is meant by the idea of the "law of nature." The admittedly extreme circumstances themselves do not displace the positive law of this state. Extreme circumstances are the stuff of hard cases, and what makes for the difficulty is the extreme nature of the circumstances, not anything geographical. The question is what the relevant law means in such circumstances, and to say that the law does not "apply" seems to me a dodge. The view that extreme circumstances remove the law's force is a conclusion, not an argument.

Nor is this a case in which a constitutional principle, or a principle with constitution-like status, justifies an aggressive construction of the statute so as to make it conform to the rest of the fabric of our law. When a statute poses a problem of excessive generality, a court may properly avoid an application that would raise serious problems under the Constitution, including, for example, the Equal Protection Clause, the First Amendment, or the Due Process Clause. If a legislature intends to raise those issues, it should be required to focus on them with some particularity. Though it cuts in a different direction from the "plain meaning" idea, this principle is also a close cousin of the void-for-vagueness doctrine, designed to require legislative, rather than merely judicial, deliberation on the underlying question. But there is no such question here.

Several members of this Court emphasize the "purpose" of the law. *See, e.g.*, *supra*, at 1857 (Foster, J.). They claim that the defendants should not be convicted because while their actions fall within the statute's letter, they do not fall within its purpose. I have considerable sympathy for this general approach, which is not terribly far from my own, and I do not deny that purpose can be a helpful guide when statutory terms are ambiguous. Statutes should be construed reasonably rather than unreasonably, and when we do not know what statutory terms mean, it is legitimate to obtain a sense of the reasonable

goals that can be taken to animate them and to interpret them in this light.

But there are two problems with making purpose decisive here. First, there is no ambiguity in the statutory terms; when text is clear, resort to purpose can be hazardous. Second, the purpose of any statute can be defined in many different ways and at many levels of generality; and at least in a case of this kind, it is most unclear which characterization to choose. Is the purpose of this statute to reach any intentional killing? Any intentional killing without sufficient justification? Any intentional killing not made necessary by the circumstances? To reach willful killings while at the same time limiting judicial discretion? To make the world better on balance? Any answer to these questions will not come from the statute itself; it is a matter not of excavating something but of constructing it. Where the statute is not ambiguous, we do best to follow its terms, at least when the outcome is not absurd. It is that question to which I now turn.

III

Thus far, I have urged a particular view of this case: the statute contains no linguistic ambiguity. At most, the statute raises the distinctive interpretive problem created by excessive generality. We have long held that self-defense is available by way of justification. It is unclear whether — and we need not decide whether — the statute would or should be inapplicable to some other cases in which a life was taken "willfully" in order to prevent the death of innocent people. For purposes of analysis let us assume, without deciding, that the statute would and should not be so applied. The question then is whether this case is sufficiently like such cases. If it is, then we will have to reach the difficult question of whether an exemption would be allowed in those extreme cases.

In cases that seem to raise a problem of excessive generality, it is often useful to proceed by identifying the exemplary or prototypical cases, that is, the cases that are most clearly covered by the statute. I do not mean to suggest that a statute's reach is limited to such cases; generally it is not. But an identification of the prototypical or exemplary cases can help in the decision whether an application is so far afield as to justify an exemption. The exemplary or prototypical cases within the purview of this statute include those of willful killing of an innocent party, motivated by anger, greed, or self-interest. It is also possible to imagine cases that are at an opposite pole but that seem covered by the statute's literal language: when a defendant has killed someone who has jeopardized the defendant's own life, we have a legally sufficient justification under our law, no matter what the statute literally says. And why would cases of this kind be at the opposite pole? The answer is that, in such cases, the victim of the killing is

himself an egregious wrongdoer, one whose unlawful, life-threatening misconduct triggered the very killing in question. In such a case, application of the ban on willful killing would indeed seem absurd. It is hard to identify a sensible understanding of the criminal law that holds a defendant criminally liable in such circumstances. In fact, the law recognizes a legally sufficient justification in such circumstances, despite the literal language of the statute. If this case were akin to those at this pole, I have suggested that we would have an exceedingly hard question.

But — and now I arrive at the crux of the matter — we have here a quite different situation. The victim was not a wrongdoer, and he did not threaten innocent persons in any way. His death was necessary only in the sense that it was necessary to kill an innocent person in order to permit others to live. The question is not whether we would agree, if we were legislators, to apply the statute in such situations; to overcome the ordinary meaning of the statutory terms, the question is whether it would be absurd or palpably unreasonable to do so. The clear answer is that it is not.

It is hardly absurd to say that there is no legal justification or excuse for a willful killing in a situation like this one, even if more people on balance will live (or the killing is otherwise justified by some cost-benefit calculus). Many people who engage in killing can and do claim that particular excuse. To be sure, this case is different from the exemplary or prototypical ones in the sense that the killing was necessary to save lives. But there is nothing peculiar or absurd about applying the law in such circumstances. People with diverse views about the criminal law should be able to accept this claim. Those who believe in retribution and those who believe in deterrence should agree that the outcome, whether or not correct, is within the domain of the reasonable. Retributivists and Kantians are unwilling to condemn someone who has killed a life-threatening wrongdoer. But retributivists and Kantians could certainly condemn the defendants here, who, to save their own lives, took the life of a wholly innocent person, one who withheld his consent at the crucial moment. For the retributivist, those who have killed, in these circumstances, have plausibly committed a wrongful act, even if that act was necessary to save a number of lives. It is not unreasonable to say that the victim deserved to be treated as something other than a means to other people's ends. At the very least a conviction could not, for a retributivist, be deemed absurd.

For their part, those who believe in deterrence should concede that a verdict of "innocent" could, in the circumstances of this case, confuse the signal of the criminal law and hence result in more killings. Many people who willfully kill believe that the outcome is justified on balance, and we should not encourage them to indulge that belief. A judgment that N. C. S. A. (N. S.) § 12-A protects all blameless victims

creates a clear deterrent signal for those whose independent judgments may not be trustworthy. From the point of view of deterrence, applying the statute in this instance would, at the least, not be absurd, which is sufficient to justify my conclusion here.

I would not entirely exclude the possibility that the defendants would have had a legally sufficient excuse if the unfortunate proceedings had been consensual at all times. It is conceivable that the absurdity exception would apply in that event as well. But this case is emphatically not that one, because the victim's consent was withdrawn before the dice were thrown. At that point, the victim expressly said that he did not wish to participate in this method of deciding who would live or who would die. Where, as here, there was no consent to participate in the process that led to an unconsented-to death, the answer is clear: Those who killed acted in violation of the statute.

Thus, it should be possible for those with diverse views of the purpose of the criminal law to agree that there is nothing absurd about following the ordinary meaning of the statutory text here. Indeed, I do not understand any of those justices who disagree with my general conclusion to disagree with this particular point. Their disagreement stems not from a judgment of absurdity, but from a willingness to disregard the text and to proceed in common law fashion — a willingness that would, in my view, compromise rule-of-law values. For example, Justice West urges the need for an individualized hearing, not because she thinks the conviction absurd, but in order to ensure individualized justice. *See infra*, at 1899 (West, J.). Justice Easterbrook thinks this case is analogous to self-defense, *see infra*, at 1913 (Easterbrook, J.), but he seems to take our jurisprudence to mean that courts may make particularized inquiries into the circumstances of killings. He does not suggest that a conviction would be absurd. I do not understand Justice Stupidest Housemaid or Justice De Bunker to find absurdity here. And while I very much agree with Justice De Bunker's suggestion that criminal statutes should be narrowly construed, *see infra*, at 1902 (De Bunker, J.), I would apply that suggestion only in cases of genuine textual doubt.

Some members of this Court plainly believe that the killing was morally excusable, because it was necessary in order to ensure that more people would live, and because the victim originally designed the plan that led to his death. *See, e.g.*, *infra*, at 1916–17 (Easterbrook, J.). But that moral argument cannot be taken to override the natural meaning of the statutory terms, at least where the outcome is one that reasonable people could regard as justified. A serious underlying concern here is that to allow an exception on the claimed principle would be likely to undermine the statutory prohibition, either in principle or in practice. In principle, it is at least unclear that an exemption in this case could be distinguished from a claimed exemption in other cases in

which our moral judgments would argue otherwise. (Consider, for example, a case in which someone shot, in cold blood, a person whom the killer reasonably believed to be conspiring to kill others.) In practice, the deterrent value of the law might well be undermined by such an exemption, and it is at least possible that some people would kill in the belief or hope that they would be able to claim an exemption. Cost-benefit analysis has its place, but when a statute forbids "willful killing," we ought not to allow anything like a cost-benefit exception.

A kind of "meta" cost-benefit analysis may well support this judgment. If courts engaged in individualized inquiries into the legitimacy of all takings of life, law would rapidly become very complicated, and the deterrent value of the statute might start to unravel — especially if prospective killers are at all attentive to the structure of our jurisprudence. I have considerable sympathy for Judge Easterbrook's approach to this case; in most ways his approach tracks my own, and I have been tempted to accept his conclusion as well. We part company, I think, only because I am more concerned about the increased uncertainty and muffled signals, for courts and prospective killers alike, that would come from finding an "exception" here. *See id.* at 1914–15. I fear the systemic effects of his (not unreasonable) view about this particular case.

An implication of my general approach is that the interpretation of statutes, or rules, has an important analogical dimension. The difference between rule interpretation and analogical reasoning is far from crisp and clean. In the interpretation of rules, the ordinary meaning of the terms presumptively governs; but when the application at hand is entirely different from the exemplary or prototypical cases, the ordinary meaning may have to yield. In deciding whether the application is in fact different, we are thinking analogously. But because it is reasonable to think that this case is analogous to the exemplary ones — because it involved the taking of an innocent life — we do best to follow the statutory language.

It is for this reason that I do not believe that we should at this time consider legal challenges to the death sentence, as opposed to the conviction, in this case. Justice West has eloquently argued that the death sentence is constitutionally illegitimate. *See infra*, at 1897–99 (West, J.). I am not sure that she is wrong; nor am I sure that she is right. Most of the time, the Constitution does not permit litigants to "open up" rule-bound law by arguing that it is unreasonable as applied and asking for an individualized hearing on its reasonableness as applied to them. A doctrine that would permit frequent constitutional attacks on rule-bound law would threaten the rule of law itself — increasing unpredictability, uncertainty, and (because judges are merely human) threatening to increase error and injustice as well. There can be no assurance that judges will reach the right outcome once all the facts emerge for individualized decision. But the death penalty is a distinc-

tive punishment (to say the least), and the facts of this case are not likely to be repeated. Perhaps a degree of individualized judgment is constitutionally required before anyone may be sentenced to death. I would be willing to think long and hard about a separate challenge to the death sentence as applied; but I would not decide that issue where, as here, the defendants' challenge is to the conviction rather than the sentence.

IV

It is my hope that a decision of the case along the lines I am suggesting would impose some pressure on other institutions to design a statute that makes reasonable distinctions to which this provision, standing on its own, appears oblivious. This is in fact a virtue of the species of textualism that I have endorsed here: the creation of incentives for lawmakers, rather than courts, to make appropriate judgments about the numerous cases that fall within law's domain.

WEST, J.* Trapped in a cave, on the verge of starvation, with no credible hope of timely rescue, five speluncean explorers resolve that their only hope of survival is to eat one of their own. They determine to do so and to throw dice to identify who will be the sacrificial lamb. One member then denounces the plan and withdraws his participation. The group proceeds over his objection, with his dice being thrown for him by another. The dissenting member, by bad luck, loses the throw, is killed, and is eaten by his comrades. The group is soon rescued and hospitalized, but only after the accidental deaths of eight of the rescuers seeking to secure their release. The survivors are now charged with murder or, as defined by the relevant statute, with "willfully tak[ing] the life," N. C. S. A. (N. S.) § 12-A, of another human being, punishable in all cases by death.

Under our procedural rules, and acting within its discretion, the jury convened for this case requested that it be relegated only to the role of fact-finder, leaving this Court to determine the legal conclusions. The jury found the facts as briefly recounted above, and it is now our obligation to determine whether the defendants' conduct constitutes murder. If we decide that it does, then the mandatory punishment under the statute is death, unless commuted to a lesser penalty by the governor of the state.

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I

The defendants present two novel arguments that require a response. First, they argue that they were operating beyond the jurisdiction of this or any other legal system, not for the usual territorial reason, but rather, for a jurisprudential one: they claim that their very survival in this peculiar situation demanded a course of action, the morality or legality of which is beyond the legitimate power of law to judge. The purpose of law, they urge, is to facilitate cooperative social living and to maximize the fruits of that cooperation. Law, then, is predicated upon the possibility that cooperation will not only increase chances of mutual survival, but will also yield additional benefits to all. Here, cooperation among all would only guarantee their mutual demise; thus, the logical predicate for law was absent. The purpose of law could not be to condemn these actions. Rather, it was both legal and moral for these trapped men to establish their own council and take whatever actions were necessary to assure the survival of the greatest number possible. This they did by agreeing to the procedures of the lottery.

Second, the defendants argue that even if our law applies, they are not guilty of the crime of murder because they acted in their own self-defense. A killing is in self-defense, the defendants argue, whenever the situation is such that one life must be taken in order to save one's own. Such killings are basically non-deterrable, the defendants explain: there is no threat of punishment that could change the rational decision to kill. The purpose of our criminal laws against homicide is deterrence, but these acts were non-deterrable; hence, they were not crimes. There is no point in applying the criminal sanction of the law, and therefore, the law does not apply.

Are these arguments meritorious? Of course, there is no authority for the proposition that the "purpose" of either the rule of law or the laws forbidding murder, whatever those purposes may be, should determine the limits of the law's reach. Nor is there authority for the narrow proposition that the self-defense justification should extend as far as the defendants contend. But that lack of authority is not fatal to the defendants' argument — at most, it implies that we are not compelled by precedent to follow the course the defendants urge. We still need to decide, as a matter of first impression, whether the arguments they have presented have merit. In my view they do not.

The defendants' first claim is powerful, well reasoned, and rests on seemingly incontrovertible premises. Much of our law — particularly contract and property law — is indeed based on the assumption that cooperation through legal mechanisms can increase the benefits of cooperative social living, and hence on the further, typically unstated, assumption that cooperative social living increases rather than decreases the chances of mutual survival. It is also true that a blanket accep-

tance of our laws by the defendants in their natural cage would have done nothing to increase their chances of survival or the benefits of cooperation. We might agree that in order to insure the survival of the majority of them, or for that matter even one of them, they would have had to break one or more of this jurisdiction's laws. If the purpose of law is to secure the gains of cooperation, with the most significant gain being mutual survival, and if law should not extend beyond the limits of its defining purpose, then it does seem to follow that the defendants were beyond the law's reach. There is also a good bit of sense in the defendants' claim that law, or a law, should not extend beyond the limits of its defining purpose. To do otherwise is capricious and irrational, rather than lawful, and, in the case of capital crimes, forces the state to engage in acts that are themselves unjustified killings. That degree of hypocrisy is intolerable.

The problem with the defendants' argument is not the lack of authority for their bold assertion that the law should not be pressed beyond its purpose, or with the logic of that assertion itself. The problem is that they have misidentified the law's driving purpose. The core purpose of law, or of the rule of law, is not contract, but rather, the protection of *rights*, the most important of which is the individual's right to equal respect, and accordingly, equal protection under the law. The point of law is to protect *all*, equally, against the wrongful private aggression of others. Indeed, it is only within the umbrella of such equal protection and the individual rights that guarantee it that contractual freedom and contract law yield any benefits at all.

The insistence on the right of each individual to the enjoyment of equal protection by the state from the private aggression of others — particularly homicidal aggression — is the essence of what distinguishes a society living under the rule of law from a society living under the whimsical dictates of a state of nature. In the state of nature, an individual or group may, for any number of reasons, decide that its own chances of survival would be well served by killing, enslaving, or oppressing another person or group, and such a decision would quickly become a political reality. The point of the rule of law is essentially to create and then protect the individual's right not to be so treated and to sanction the conduct of the group or individual who attempts to do so.

The defendants are surely right that contract, and the protection of social gain that it facilitates, is at the center of a great deal of our law. But that body of law is only intelligible once the more fundamental right of equal protection against private assault is secured. An individual may exploit his natural talents and strengths in whatever way imaginable in securing gains through contract. What he may not do is exploit his strength — whether the source of that strength be a natural inheritance, a cultivated talent, or the strength of numbers — in such a

way as to violate the rights of others. The most central of those rights is, unquestionably, the right not to be killed, consumed, enslaved, or violently attacked for the benefit of his brothers. The individual has the right to expect the state to protect him against exactly this form of exploitation.

Much follows from this core purpose regarding the content of our law. For example, the common prescriptions against contracting oneself into slavery, contracting for the sale of a body part, or contracting for one's own death can be understood as stemming from our conviction that these rights to state protection against private aggression are so fundamental that they cannot even be voluntarily foresworn. Contract is predicated upon the provision of these core protections against private violence, and thus, these protections, in turn, define the limits of contractual freedom.

More important, if less obvious, than the limits on contract that are implied by the priority of the individual's right to protection against violence, are the limits this principle places on actions or inactions *of the state*. A state may not decide, for good reasons, bad reasons, or no reason, simply to withdraw its protective shield from the vulnerable lives of some individual or group, leaving that individual or group to the mercies of his or her stronger co-citizens. Nor may a state decide not to extend its protection. A state may not decide, for example, to proceed with the execution of a wrongly accused criminal defendant out of the belief that such an execution might prompt a serial killer to stop killing children. Even if such a belief is fully justified — even if the state knew that the true killer would in fact stop killing after the execution in order to reinforce the false societal belief that the correct killer had been identified — such an execution of an innocent person would nevertheless be an intolerable violation of the accused's right to equal protection of the law. Nor may a state decide not to protect a particular group — for example, poor people who live in dangerous neighborhoods — against private violence and aggression, even for the reason that to provide such protection threatens an exceedingly high number of policemen's lives. Nor, of course, may a state decide not to protect a subgroup — a racial or sexual minority, for example — against violence out of a habitual, unconscious, or calculated attempt to enable a favored group to secure the exploitative gains or benefits that might follow from a withdrawal of such protection. Such scapegoating is inimical to the system of rights that is at the heart of our rule of law. Indeed, it is no exaggeration to say that the core meaning of the rule of law is precisely that scapegoating — whether for noble or ignoble reasons and whether prompted by state or private calculations of benefit and loss — is paradigmatically illegal. As citizens of a society governed by the rule of law, we should not deny to any individual or group of individuals the state's protection against private violence in situations in which that violence is intended to secure benefits to —

or even the survival of — the favored. All individuals have the right to be protected against violence, including violence that is premised upon the moral calculation that the sacrifice will save more lives than it will take.

It is thus apparent that the defendants' actions in this case are not merely within the scope of the rule of law, as defined by its purpose, but rather, *are at the very heart of it.* There are indeed different degrees of moral culpability in the motives that prompt different murders. Some such motives are more or less reprehensible than others. But from the perspective of the virtues and values central to the ideal of the rule of *law*, the defendants' jurisprudential and jurisdictional challenge only raises differences in degrees of moral culpability that are ultimately inconsequential: the violation of the individual's right to equal respect and regard, and accordingly his right to equal protection of the law, is not lessened by the strength of the justification for the killing. That he cannot be so sacrificed is precisely what it means to have a right: a right, virtually by definition, cannot be outweighed by individual or group-based calculations of moral or economic gain, even when the gain is measurable in lives saved. The right to equal protection of the law against private violence is violated when the state allows, promotes, or acquiesces in such calculations, and does nothing to prevent or deter the violence to which it leads.

This conclusion, it may be necessary to add, is not undercut by the victim's ambivalence regarding his own participation in the scheme that eventually took his life. Even had the victim's participation been consistently voluntary and enthusiastic, the killing would nevertheless have been a murder for the reasons given above. Our well established prescriptions against assisted suicide, suicide pacts, and mutual contracts of self-destruction make clear that our fundamental right to the state's protection against the assaultive conduct of others takes priority over schemes that waive that protection, even with our full consent. The facts here, however, do not even present us with the admittedly more difficult question of whether the ban on assisted suicide can be reconciled with our strong traditions of individual autonomy. The victim in this case initially was supportive of the plan and did concede the fairness of the procedures governing the throwing of the dice. Nevertheless, the victim clearly withdrew his support from the overall plan. This is not, then, a question of assisted suicide. There was no suicide. This victim was killed against his will and without his consent.

The defendants' second argument is more modest, but if accepted, would also challenge some of our most defining legal ideals. The defendants argue that the recognized excuse of self-defense should be extended to include all killings in which the victim, if dead, could supply biological matter that could potentially save the defendant's life — rather than confine the defense, as we presently do, to those killings in which the victim himself aggresses against the perpetrator. But this

we cannot do without inviting a lethal social chaos. Private violence, or even private ordering, cannot be given full sway whenever there are conditions of relative scarcity, rather than the conditions of abundance we have become accustomed to enjoying. To do so invites a slide to state-of-nature conditions, precisely when the need for law is greatest.

Contrary to the defendants' representations, we do not already accept such a limit on the criminal sanction, nor are the conditions or circumstances that might give rise to such a claim quite so rare or infrequent as the defendants suggest. For example, there are currently a sizable number of citizens in this country awaiting organ donations, bone marrow replacements, and blood transfusions. The profound scarcity of such organs, bone marrow, and non-contaminated rare blood types is the sad reality that all such patients (as well as those of us who may at any point become such a patient) are forced to endure. That scarcity prompts incomparable anguish among the needy donees, and tortured decisions by medical personnel. Clearly, some percentage of the total number of hopeful donees could conceivably identify potential donors whose organs, marrow, or blood might save their lives. If three, four, or five of those individuals could, in turn, identify the same potential donor — someone with the healthy liver, the matching bone marrow, or the requisite rare blood type — what is to prevent them, under the principle urged by the defendants here, from taking those organs by force, even at the cost of the donor's life? If we do not allow and should not allow such pillaging of another's organs in this not so fanciful scenario, why should we allow it here? The objective need for some body part is the same, whether the need is for the marrow within the bone or the flesh on the outside of it. The moral calculation is the same and comparably motivated: if one life is sacrificed, then a greater number will be saved. One could even imagine the killing in the medical transplant case being preceded by agreement, which was later withdrawn by the victim-donee, as was the case here. In both cases, nothing can excuse the subsequent murder. The broader principle, governing both the speluncean and the organ transfer cases, is simply this: that perpetrators require a part of a victim's body for the perpetrators' own survival does not make the killing that is so motivated one of "self-defense." No act of aggression is being defended. Rather, there is only a tragic dilemma of incompatible needs and scarce resources.

Nor is this action justified by the related doctrine of "moral necessity." The invasive, assaultive taking of the life or body parts of one individual is never "morally necessary," even if such body parts may be necessary to secure a greater number of lives of those in need. Even such an innocent creature as a full-term fetus, or, as some believe, an unborn child, is not permitted to pillage the bodily fluids and organs of the mother when the fetus's actions, although utterly involuntary, threaten 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 when that need is at the expense of her own life and the sacrifice is against her desires. Rather, it is in precisely these circumstances (and perhaps only in these circumstances) in the contested and difficult area of reproduction law that we have achieved a sort of societal consensus that the mother (not the fetus) 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.

This consensus is not surprising: surely if a born child — for example, an adult — who needed a parent's bone marrow, attempted to secure it from a non-consenting parent, the state would presumably help protect that parent against the child's aggression; the state would not grant the "moral necessity" of the child's action. Nothing here distinguishes the sacrificed speluncean from the pregnant woman whose life is threatened by the needs of the invasive fetus, or from the parent whose life is threatened by the child; indeed, the lack of a parent-child or mother-fetal relationship from which one might arguably infer a duty on the part of the parent or pregnant woman makes the spelunceans' predicament a much *weaker* case. In all three cases, the sacrificial life is biologically necessary for the aggressor's survival, but in none of them does that fact make the killing (or the letting die, in the case of the pregnant woman) *morally* necessary. The defendants' actions in the cave, in short, were neither taken in self-defense against unwarranted aggression, nor were they morally necessary. The killing was not justified.

II

Having rejected the defendants' contentions, it is nevertheless clear to me that these men should not be executed and that to carry out the executions would constitute an injustice — indeed, a killing perhaps as unjustified, ultimately, as the one they committed. The action they took was criminal, and the crime was murder. But does it follow that the punishment must be death by hanging? These defendants have not been given a chance to show this Court — either the jury or the justices — that their actions, although not justified, might be partially or totally excused by the harshness of their circumstances, or alternatively, that the harshness of the penalty applied should be mitigated by a judicial recognition of the extraordinary conditions of hardship under which they struggled. Nor has this Court — again either jury or judge — been permitted to make such a determination. We have not heard the mitigating evidence — whether about the men themselves, their character, the conditions in the cave, the altered states of consciousness those conditions might have brought on, or the feel or the force of the natural imperative of survival to which they eventually acquiesced. This evidence might prompt the Court to recognize the

unique horror that gripped these defendants and consequently impose a penalty that might be less severe than death for the all-too-human actions they took in response to that horror. But such an exploration — and possibly a recognition — seems to be precisely what this case requires for its just resolution. These men were in desperate circumstances and took desperate measures to survive. It is not obvious that any of us would have responded differently. Even though their action was a criminal homicide, it does not follow that the punishment of death is warranted.

These defendants are no threat to the survival of the state or the safety of the community. They have already suffered tremendously. Although not so unique as to remove them from the jurisdiction of our courts, their situation was surely peculiar — so much so that their execution would provide little in the way of general deterrence. Why kill them? Can it really be true that justice requires such a harsh conclusion, without even a hearing of facts or argument that might mitigate it?

Our criminal law, as presently constituted in 4300 A.D., seems to require as much. The judge and jury, according to theory, apply the law to the facts toward the end of *justice*; the Chief Executive, pursuing radically inapposite principles of mercy, can mitigate the punishment by reference to all that the Court, in its pursuit of justice, cannot hear: the stories of these defendants' lives, of their travails, of the pressures upon them, of their remorse, and of their fears and hopes for their future. But this bifurcation of justice and mercy, of "law" and mitigation, of the Court's province and the Chief Executive's office — so reminiscent of the antiquated split between law and equity, long ago abandoned in our civil jurisprudence — serves no one well. It forces defendants to make specious arguments. It forces the Court to make formalistic conclusions, and it tempts judges to make decisions for unstated reasons — an unstated hope, prayer, or expectation that the Chief Executive will or will not act in a certain way; an unsound argument accepted in defense of an action, when it is, in fact, a judge's imagined full accounting of the events in question that constitutes the real grounds of decision. The statute that seemingly requires this woodenness is classically and flagrantly overinclusive: it includes within its sweep acts and defendants whose differentiating circumstances are such that they ought to be treated differently. It also forces the ultimate decision of life or death upon an elected official who may or may not have the requisite popular support, and thereby the political power, to forego executions, even should he think it the morally right course of action. The statute puts the lives of these defendants at the dubious "mercy" of an elected official whose own political survival is beholden to the whims of majoritarian politics. In short, it makes our law unmerciful and the Executive's mercy lawless. The quality of

our law and the quality of the Executive's mercy both suffer when we pretend that justice and mercy can be severed.

For these reasons, I hold that the provision of the murder statute that requires death by hanging as the punishment for the intentional taking of another human life, without any possibility for the *judicial* mitigation of the punishment, is an unconstitutional deprivation of the defendants' right not to have their lives taken from them without due process of law, and a deprivation of their right to a rational application of law. Just as the victim of criminal violence has a fundamental right to the protection of law, the charged defendant in a criminal case has a right to an individualized determination of an appropriate punishment that reflects the degree of his culpability. In a rights-based system of law such as ours, we can no more neglect a defendant's right to be individually judged than a victim's right to be included in the community and under the law's protection. The choices that the unconstitutional provision now presents us — a judicial finding of guilt, followed by execution; a judicial finding of guilt followed by an Executive's decision to decrease the punishment to six months; or an acquittal on dubious grounds — are too stark. The statute prevents the Court from pursuing merciful justice, and it deprives the defendants of precious constitutional rights. These defendants should be given the opportunity to present their own story in their own defense and in mitigation of the punishment for their criminal action, and this Court should be given the opportunity to so decide. We need to hold a hearing to determine the appropriate sentence. Accordingly, the provision of the statute that denies such an opportunity should be struck, to allow this case to proceed to a fully merciful — and hence more just — resolution.

DE BUNKER, J.*

I. OVERVIEW

This case raises disturbing questions about the continuing influence of such anachronistic concepts as "natural law," "inalienable rights," and other legal fictions of ages past. We have yet to reject these irrational residues of the past even in the present fifth millennium (a system of dating which itself is based on what we now recognize to be a religious myth).

As is well known from the history disks, shortly after the beginning of the third millennium, the world became engulfed in religious warfare among fundamentalist Christians, Muslims, Jews, and others. Apocalyptic religious extremists obtained access to weapons of mass

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destruction. The result was the cataclysmic decimation of human life in the name of the various "gods" under whose symbols — crosses, crescents, and stars — the slaughters were implemented. The survivors of this apocalypse began to realize that the religious myths surrounding such deities as "the Holy Spirit," "Allah," and "Jehovah" were indistinguishable from those that had surrounded the gods of ancient Egypt, Greece, and Rome. Gradually, a new consensus emerged, at first questioning the existence of any supernatural god (the Agnostic Epoch or AGEP), and then, in the current age, disclaiming any such belief in deities (the Atheistic Epoch or ATEP).[1] Just as the Christian, Muslim, and Jewish primitives of the first and second millennia regarded the Greek and Roman myths of divinity, so too, our enlightened age regards the myths of the so-called monotheistic religions — myths such as the divine origin of the Bible, the divine paternity of Jesus, and the claim that Mohammed was a messenger of God.[2] We appreciate the poetry and occasional insights of the Bible and the often wonderful teachings of the so-called Hebrew prophets, Jesus, and Mohammed — much as the monotheists of the first and second millennia appreciated the religious art and literature of their polytheistic forebears — but we now know for certain that they are entirely of human origin.

We know, too, that the world has no "purpose," at least as imposed by some external superior force. Human beings are the product of es-

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[1] It is to be regretted perhaps, though understood, that many atheists remained whetted to prior tribal groups. There were Jewish atheists, Catholic atheists, Protestant atheists, Muslim atheists, and other smaller groupings, arguing vigorously over which God *not* to believe in.

Even prior to the great apocalypse, many thoughtful people understood that their religious "beliefs" and practices were based on myths similar to those of their polytheistic predecessors. But they also saw that religion was important to the lives of many of their friends and that it produced much good — like a placebo taken by one who believes it to be a potent medicine. They were content to regard religion as a pious and harmless fraud. But the great apocalypse demonstrated how dangerous such myths had become, and most citizens began to demand that religion be treated like other irrational belief systems such as astrology, tarot cards, and voodoo. Soon it became as unfashionable to believe in the supernatural doctrines of formal religion as it was to believe that the earth was flat.

Even prior to the Great Fundamentalist Wars of the third millenium, some courageous intellectuals began to challenge monotheistic dogma, but they had considerable difficulties in persuading the masses. Part of the reason for their hardship was that certain evil totalitarian regimes had forced atheism on their citizens, thereby associating disbelief in God with tyranny. It became voguish for prudent intellectuals to argue that science (empirical truth) and faith (belief) must be kept separate and that matters of faith should not be judged by scientific criteria. This, too, however, was a myth because many of the claims of faith — for example, that Moses parted the Red Sea, that Jesus walked on water, and that Mohammed ascended to heaven on a horse — are empirical and historical: they either happened or they were made up. Following the wars, more people began to insist on proof of such claims and concluded that they were fictional.

[2] Contemporary historians still cannot solve the intellectual puzzle of why, for more than 2,000 years, so many people concluded that belief in one supernatural being (monotheism) was regarded as an "advance" over belief in many supernatural beings (polytheism).

sentially random processes, such as evolution, genetic mutations, or other largely non-purposive factors.

We have long understood these self-evident truths, and we apply them to most areas of our lives, such as science, education, and literature. But when it comes to law, we have stubbornly resisted the necessary process of rooting out of our current legal system the anachronistic remnants of the divine mythologies of our past. We persist in speaking about "natural law," as if the physical "laws" of nature carried with them any normative corollaries. We continue to invoke "inalienable rights," as if we believed that they derived from some preexisting, supernatural, non-human source.

Because this case raises questions that challenge the very basis of our laws, I see it as an appropriate vehicle for considering the meaning of such concepts as "natural law" and "inalienable rights" in a world free of superstitions about divine beings, supernatural forces, and purposive creation.

I am convinced that in such a world — in our world — there can be no such meaningful concepts as natural law or inalienable rights. Natural law presupposes a view of nature — of the nature of human beings and of the world — that is demonstrably false. The nature of human beings is so diverse — ranging from the most amoral and predatory to the most moral and self-sacrificing — that all or no normative conclusions can be drawn from its descriptive diversity.[3] Inalienable rights presuppose an externally imposed hierarchy that makes no sense in the absence of an external law-giver. We must now ac-

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[3] To illustrate the point that principles of "natural law" can cut in different directions, consider the principle that every human life is of equal value. Justice West employs a variation on that principle to demand conviction in this case. Yet the American Law Institute cites precisely the same principle to justify the killing of one innocent person to save the lives of many: "The life of every individual must be taken in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act." Model Penal Code § 3.02 commentary at 14–15 (1962).

As a gay woman of color, I am particularly skeptical of deriving moral laws from the nature of human beings because history has shown that most such laws have been derived from the purported nature of "man" — in the past, usually a white, heterosexual man of the dominant group. I am also skeptical of inalienable rights because, for centuries, such rights did not include those of women, gays, or racial minorities. Today, of course, whites are the racial minority in most nations, including our own. The principle, however, remains the same. Of course, positive laws — such as those enacted in Nazi Germany in the second millenium — have been used to subordinate (and worse) many human beings, but natural law has been likewise abused. These are all powerful arguments for why we should *prefer* laws that entrench certain basic rights, such as equality, freedom of conscience and expression, due process, and other protections against the tyranny of positive, natural, or other kinds of law and lawlessness.

I also prefer a system that assures both religious freedom for those few dissidents who continue to insist that there is a god — who gave Moses the Torah, is Jesus's father, and inspired Mohammed — and the freedom to believe in and practice other irrational superstitions, so long as such practices do not interfere with the rights of the vast majority of rational people to base our lives on principles of human reason. Efforts to impose atheism by law have failed, as have efforts to impose religion by law. The marketplace of ideas and beliefs has proved to be the better option.

knowledge that all law must be positive law and all rights must merely be strongly held preferences that we or our predecessors have agreed to elevate over other positive law. This elevated status of particular laws — such as the guarantee of free speech — can be the result of a constitution (written or oral), an entrenched tradition, or another form of super-positive law. It cannot come from any claim of supernatural or natural forces external to the human processes of lawmaking. Thus, the only basis for preferring one set of laws or rights over another is human persuasion and advocacy.

In this opinion, I will try to persuade others to accept my approach, not by reference to some natural or supernatural authority, but rather exclusively by reference to human reason and agreed-upon principles. These principles may take the form of preferred imperatives, such as those proposed by ancient philosophers including Immanuel Kant, or they may take the form of preferred situational rules, such as those proposed by Jeremy Bentham and others. But they are all merely *human preferences*, even if often articulated in the language of natural law and inalienable rights.[4]

II. DISCUSSION

How then should a supreme court, unencumbered by concepts of natural law or inalienable rights, evaluate the actions that form the basis of this case? First, some preliminary observations are necessary: a civilized society could reasonably legislate either result advocated by my judicial colleagues. The legislature could have, if it had anticipated the current problem, written a clear, positive law explicitly prohibiting starving people from killing one of their number in order to save the rest. The arguments in favor of and in opposition to such a rule are fairly obvious and have been made over the ages.[5] Yet our legislature has never explicitly resolved this millennia-old debate by enacting legislation either prohibiting or permitting such life-saving killings. My preference in this situation is for the following rule of law: when a tragic choice is sufficiently recurring so that it can be anticipated, and when reasonable people over time have disagreed over whether a given choice should be permissible, the onus must be on the legislature to prohibit that choice by the enactment of positive law if it wishes to do so.

For those who argue that such a positive law would be ineffective because it is against the self-preservatory nature of human beings, there is a simple answer: legislate creative punishments that will be ef-

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[4] I, too, believe that certain rights should be accepted *by agreement* as inalienable, or at least as not subject to abrogation by a simple majority. This is my preference, and I hope to persuade others to agree with it.

[5] As the ancient Talmud rhetorically asked: "[W]ho knows that your blood is redder?" Sanhedrin 74a *in The Babylonian Talmud* 503 (I. Epstein ed. & H. Freedman trans., 1935).

fective. Such punishments might include posthumous shame,[6] deprivation of inheritance rights for offspring, or enhanced painful punishments for survivors. The point is that this is largely an empirical, rather than a moral, objection to prohibiting the eating of one starving human to save others.[7]

A civilized society could also legislate a positive law permitting (even requiring) the sacrifice of one starving innocent person to save several others. The arguments in support of such a law are also obvious and long standing. As Oliver Wendall Holmes reportedly wrote, "[A]ll society has rested on the death of men and must rest on that or on the prevention of the lives of a good many." Objections, such as the slippery slope, are also commonplace.

The point is that neither approach is more "natural" than the other. Nor can the case be resolved by reference to any inalienable right, such as the "right to life." Both approaches claim to be natural and to further the right to life. Both also have considerable moral and empirical advantages and disadvantages, and no one in our society is inherently better suited to choose one over the other than anyone else.[8] Yet a choice must be made. Accordingly, we move the argument from the level of substance to the level of process: who shall be authorized to make such decisions, on what bases shall they be made, and if there are gaps in the primary decisionmaking, who shall be authorized to fill the gaps in particular cases? These issues must also be matters of preference and persuasion.

The problem presented by this case has existed since the beginning of recorded history. There are examples — at differing levels of abstraction — in numerous works of history, religion, and literature. Why then did the representative body that was authorized to enact general laws not specifically address this recurring issue? To be sure, the issue does not occur with the frequency of self-defense, but it is widely enough known to be capable of specific inclusion in any modern code governing homicide. Indeed, one of the most ancient of legal

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[6] In the old days, the prospect of punishment in the afterlife — eternity in hell — could be threatened. Today, of course, few believe in such irrational "ghost stories." Even in the past ages of religions it is doubtful whether many people actually believed in heaven and hell because so many sins were committed by "believers." The threat of eternal punishment and reward did not dispense with the need for earthly punishments to deter crimes that were also sins.

[7] There may, of course, be moral objections if the penalties necessary to deter the conduct are too harsh or fall too heavily on innocent third parties. *See, e.g.*, *supra*, at 1897–99 (West, J.) (appearing to make such an argument in her rejection of the death penalty as a punishment for the defendants, although she does believe they are guilty under the statute).

[8] It could be argued that elite philosophers or jurists are better suited because of their intellect and education to make such decisions. Many millennia ago, a Greek philosopher named Plato proposed such an elitist theory of decisionmaking. Most democracies have rejected it, concluding instead that representative decisionmaking is preferable. Choosing who should decide the law, too, is ultimately a matter of preference and persuasion. However, the advocates of representative decisionmaking have generally prevailed over time.

codes — the *Talmud* — did include specific discussions of this and related questions.[9] Philosophers and legal scholars have also considered these issues over the years. Yet few, if any, criminal codes explicitly tell starving cave explorers, sailors, or space travelers what they may, should, or must do if they find themselves in the unenviable position in which these defendants found themselves. It is to be noted that this case is not unlike one that occurred in the ninth century of the second millennium in a nation then known as Great Britain. *See Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884). Yet even after the divided court in that case expressed considerable difficulty in arriving at a principled decision based upon those facts, the legislature did not enact a positive law to resolve the issue definitively. Nor can the legislature's silence in the face of the nominal affirmance of that conviction be deemed evidence of its intent to demand conviction in this case. The vast majority of comparable cases — both before and after that decision — resulted in acquittal or decisions not to prosecute, and the English case produced a pardon. The law is more than the isolated decisions of a small number of appellate courts.

What does this long history of legislative abdication of responsibility tell us about how *we*, a court, should resolve this case? It tells us that the people do not seem to want this issue resolved in the abstract by legislation. Our elected representatives apparently prefer not to legislate general approval or disapproval of the course of action undertaken by the defendants here. Our citizens cannot bring themselves to say that eating one's neighbor in the tragic situation presented here is morally just. Nor can they bring themselves to say it is unjust. They would prefer to leave the decision, as an initial matter, to the people in the cave (at least as long as they make it on some rational and fair basis). Then they would have a prosecutor decide whether to prosecute, a jury whether to convict, a court whether to affirm, and an executive whether to pardon or commute. That is the unwieldy process, composed of layers of decisionmakers, they seem to have chosen.

The question still remains: by what criteria should we, the Supreme Court, decide whether to affirm the jury's conviction (and recommendation for clemency)? The answer seems relatively obvious to me, and

[9] *See, e.g.*, David Daube, *Collaboration with Tyranny in Rabbinic Law* (1965); Marilyn Finkelman, *Self-defense and Defense of Others in Jewish Law: The* Rodef *Defense*, 33 Wayne L. Rev. 1257 (1987). Among the cases — some actual, others hypothetical — considered in the *Talmud* are the following: an enemy general surrounds a walled city and threatens to kill all of its inhabitants unless they turn over one individual for execution; two people are dying of thirst in the desert with enough water between them to save one but not both; a child, below the age of legal responsibility and thus deemed innocent, threatens the life of another innocent person and can be prevented from killing only by being killed (the filmmaker Alfred Hitchcock presented a variation on this theme in an episode from his television program); and a fetus endangers the life of a pregnant mother who can be saved only by killing the fetus (a variation is that during delivery, the baby endangers the life of the mother who can be saved only by killing the partially delivered baby).

I will try to persuade others to agree with the preferences on which it is based. I begin with my strong preference — a preference which I believe and hope is now widely shared — for a society in which any act that is not specifically prohibited is implicitly permitted, rather than for a society in which any act that is not specifically permitted is implicitly prohibited. As Johann Christoph Friedrich von Schiller similarly expressed, "Whatever is not forbidden is permitted."[10] The lessons of history have demonstrated why the former is to be preferred over the latter.

A general preference for freedom of action in the absence of specific prohibition does, however, raise some troubling problems. Innovative harm-doers often find ways to do mischief between the interstices of positive law, and old laws have difficulty keeping up with new technologies. Accordingly, this preference occasionally results in the failure to punish the initial group of creative criminals in any particular genre. Still, I would argue for a strong presumption in favor of freedom in the absence of a specific prohibition — even at the cost of letting some guilty go free.

In any event, the problem outlined above does not describe the situation we face. The actions committed by these defendants were not part of some technological innovation unknowable to the drafters of our positive law. Our drafters could easily have legislated against what the defendants did here. They did not. '*Why* they did not — laziness, thoughtlessness, cowardice, superstition, or an unwillingness to resolve an intractable moral dilemma — is in the realm of speculation. *That* they did not is not fairly open to doubt. Some may argue, of course, that the general prohibition against willful killing is enough to cover the conduct at issue here because this killing was willful.[11] But I do not believe that it can be reasonably maintained that the absence of an explicit exception to the broad prohibition against killing contained in the positive law must be interpreted as an implicit prohibition against the kind of killing done here. That mode of reasoning would substantially compromise the principle that what is not specifically prohibited is implicitly permitted, especially in the context of a widely reported and debated historical genre of alleged crime such as the killing under consideration here.

Moreover, the law has long recognized justifications for taking actions expressly prohibited by the letter of the law when such actions are "necessary" to prevent a "greater harm." This principle has been

[10] Johann Christoph Friedrich von Schiller, *Wallenstein's Camp*, sc. 4 (1798), *quoted in Bartlett's Familiar Quotations* 365 (John Bartlett & Justin Kaplan eds., 16th ed. 1992).

[11] The killing was also premeditated, as are all judicial executions. The official death certificate in a famous death penalty case during the last century of the second millennium — the Sacco and Vanzetti case, *Commonwealth v. Sacco*, 151 N.E. 839 (Mass. 1926) — listed the cause of death of the defendants as "electric shock judicial homicide." Certificate of Death of Bartolomeo Vanzetti (1927) (on file with the Harvard Law School Library).

summarized by the quip, "Necessity knows no law."[12] It is a mischaracterization, however, because there is a well-developed, if imprecise, law of necessity that permits the choice of a lesser harm to prevent a greater harm.[13] Throughout history, philosophers and jurists have debated cases — both hypothetical and real — that tested this difficult principle. During the Nazi holocaust of the second millennium, a group of Jews who were hiding from Nazi killers smothered a crying baby in order to prevent the Nazis from discovering their hiding places and killing them all. When that terrible dilemma — which occurred in slightly differing contexts throughout the holocaust — was presented to distinguished religious leaders, the consensus was that the conduct could not be condemned. *See* Marilyn Finkelman, *Self-defense and Defense of Others in Jewish Law: The* Rodef *Defense*, 33 Wayne L. Rev. 1257, 1278–80 (1987). Nor do I believe that a secular court would have found these desperate people guilty of murder even if they willfully, deliberately, and with premeditation killed the innocent baby.[14]

Necessity as a general defense to crime "seems clearly to have standing as a common law defense."[15] Model Penal Code § 3.02 commentary at 10 (1962). Nearly all jurisdictions recognize the necessity

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[12] One of my judicial colleagues, whom I will not name, is sometimes referred to as "Necessity," because he too "knows no law."

[13] *See* Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and its Processes: Cases and Materials* 860–80 (6th ed. 1995). Surely the death of several people is a greater harm than the death of one person. *But see* Nezikin 5, *in The Babylonian Talmud* (I. Epstein ed. & H. Freedman trans., 1935) ("Whosoever preserves a single soul of Israel [it is] as though he had preserved a complete world.").

[14] Perhaps this decision would be influenced by the tragic reality that so many of those who created the dilemma — the Nazi murderers — got away with it.

[15] The necessity defense has been "anciently woven into the fabric of our culture." J. Hall, *General Principles of Criminal Law* 416 (2d ed. 1960), *cited in* Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. Rev. 79, 83 n.20 (1989). It can be found in caselaw dating as far back as 1551 in *Reniger v. Fogossa*, 75 Eng. Rep. 1 (K.B. 1551). Arguing that a captain who docked his ship to avoid a storm would not have to forfeit his goods as the statute would have required, the Court concluded:

> [A] man may break the words of the law, and yet not break the law itself .... And therefore the words of the law ... will yield and give way to some acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconvenience, or through necessity ....

Id. at 29. The *Reniger* court reached even further back to the New Testament example in Matthew 12:3–4 of eating sacred bread or taking another's corn through necessity of hunger. *See id.* at 29–30; *see also* 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 n.27 (1974) (citing *Reniger*). Arnolds and Garland enumerate many other older, *see* Arnolds & Garland, *supra*, at 291 nn.29–34, and modern, *see id.* at 291–92 nn.35–37, English cases that "recognize the general principle of necessity," *id.* at 291, as well as both federal, *see id.* at 292 nn.38–44, and state, *see id.* at 292 nn.45–50, cases in the United States. The court system's recognition of the necessity defense is also acknowledged in casebooks. *See, e.g.*, Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 860–80 (6th ed. 1995).

defense for crimes that are short of killing.[16] Thus, if our defendants had found a locked food-storage box in the cave with a sign saying "private, personal property, do not open under any circumstances," and they had broken open the lock and eaten the food, no one would deny they were acting lawfully. I doubt that any of my colleagues would convict such defendants of theft even if the words of the theft statute provided for *no* exception. The general law of necessity provides the requisite exception in cases in which theft is a lesser evil than multiple deaths. However, some jurisdictions have explicitly refused to extend the necessity defense to the killing of an innocent person that is necessary to prevent the deaths of several innocent people.[17] Other jurisdictions have not limited the necessity defense to non-killings.[18] Academic opinion is divided, and the weight of the American Law Institute is on the side of not limiting the defense as long as the killing is necessary and results in the saving of more innocent lives than are taken. "[T]he principle of necessity is one of general validity .... It would be particularly unfortunate to exclude homicidal conduct from the scope of the defense."[19] Model Penal Code § 3.02 commentary at

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[16] The necessity defense is part of the *Model Penal Code*, *see* Model Penal Code § 3.02, and has been incorporated into many state criminal codes, *see* Lawrence P. Tiffany & Carl A. Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 Denv. L.J. 839 (1975) (examining how many states included the necessity defense when they recodified their criminal statutes).

[17] *See, e.g.*, Ky. Rev. Stat. Ann. § 503.030 (Michie 1985) (stating that "no justification can exist ... for an intentional homicide"); Mo. Rev. Stat. § 563.026 (1994) (stating that "conduct 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"); Wis. Stat. Ann. § 939.47 (West 1997–98) (stating that necessity "is a defense to a prosecution ... except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide"); *Regina v. Pommell*, 2 Crim. App. 607, 608 (1995) (stating that the necessity defense does not apply to murder and attempted murder), *cited in* Alan Reed, *Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence*, 6 J. Transnat'l L. & Pol'y 51, 68 n.20 (1996).

Those jurisdictions that limit the necessity defense to crimes other than killing face the following conundrum: A person who was provoked into killing by seeing his wife in bed with another man can have the charges reduced from murder to manslaughter if he is deemed to have acted as a reasonable man would have acted under a similar provocation. But a man who kills one person to save multiple lives faces conviction for first-degree murder. Such cases and statutes also contradict the general principle found in the *Model Penal Code* commentaries that the defense is available [when] a person intentionally kills one person in order save two or more." 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.4, at 632 (1986).

[18] As Tiffany and Anderson conclude:

> The common law rejection [in *Dudley*] of the defense when the intentional killing of an innocent person was involved, appears now to be almost universally rejected itself. The most common statutory approach is to provide, merely, that if the other conditions of the defense are all satisfied, the actor's "conduct" is justified.

Tiffany & Anderson, *supra*, at 860 (footnotes omitted).

[19] The American Law Institute continued:

> 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

14. The reason that judicial decisions about this issue are "rare," *see id.* at 10, is that prosecutors almost never bring charges against people who have chosen the lesser evil of taking one life to save many others.

Our jurisdiction has not resolved this debate or even confronted this issue. Our own common law of necessity is thus written in terms as general as our murder statute: "Anyone who commits an act that would otherwise be a crime under circumstances in which it is necessary to prevent a greater evil shall not be guilty." The issue before us, therefore, is whether the legislative silence should be interpreted as acceptance or rejection of the limitation adopted by some jurisdictions and rejected by others. Compounding the complexity of the problem is the fact that in the absence of legislative resolution, these defendants sought authoritative guidance from various sources before deciding what to do — the best they could do under the circumstances. They were denied any such guidance. To hold them criminally liable is to convict them of guessing wrongly regarding what the unpredictable vote of this Court would be. Moreover, to convict them under these circumstances — especially in the face of our legislature's refusal to resolve the debate over the limits of the necessity defense — would be to prefer a rule of judicial interpretation that resolves doubts in favor of expanding the criminal law rather than of resolving "ambiguity concerning the ambit of criminal statutes . . . in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)) (internal quotation marks omitted).[20] The same rule of lenity must apply, as well, in construing the common law of crime. *See Bouie v. City of Columbia*, 378 U.S. 347, 352–54 (1964). Where does our Supreme Court get the authority to narrow the law of necessity and thereby to make criminal what the legislature has declined explicitly to proscribe? My brothers and sisters do not answer this question.

> 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 equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act. So too, 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.

Kadish & Schulhofer, *supra*, at 877–78 (quoting Model Penal Code § 3.02 commentary at 14–15 (1985)).

[20] *See also United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."); *Staples v. United States*, 511 U.S. 600, 619 (1994) (noting that under the rule of lenity, an "ambiguous criminal statute" should be "construed in favor of the accused").

Of course, if the legislature had explicitly considered the "choice of evils" presented by the case and expressly foreclosed the action taken, the necessity defense would not be available. But as I have shown, our legislature has not explicitly spoken to this specific problem, despite its prominent place in legal and philosophical discourse.[21] Accordingly, applying the salutary rule placing the onus on the legislature to prohibit questionable conduct by specific, targeted language, it follows that these defendants may not lawfully be punished.

III. THE VIEWS OF MY COLLEAGUES

Several of my colleagues point to the plain language of the statute, while acknowledging that there must be exceptions, such as self-defense and executions, that are recognized from time to time at common law. But necessity also has been recognized from time to time, and there has been a great debate over the millennia regarding whether necessity can excuse a killing done to prevent greater harm, such as multiple deaths. Renowned authorities have come down on different sides of this debate, and our legislature has refused to resolve it explicitly. It is in this context that the words included in, and omitted from, the statute must be interpreted. That process can be undertaken in different ways.

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[21] Indeed, it is fair to say that few lawyers get through law school without discussing this conundrum and its numerous variations. Most law students read *Dudley and Stephens* and *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383). Many also study the writings of the great twentieth-century philosopher Robert Nozick, who, in 1974, constructed the following prescient hypotheticals:

> If someone picks up a third party and throws him at you down at the bottom of a deep well, the third party is innocent and a threat; had he chosen to launch himself at you in that trajectory he would be an aggressor. Even though the falling person would survive his fall onto you, may you use your ray gun to disintegrate the falling body before it crushes and kills you? Libertarian prohibitions are usually formulated so as to forbid using violence on innocent persons. But innocent threats, I think, are another matter to which different principles must apply. Thus, a full theory in this area also must formulate the *different* constraints on response to innocent 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 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)?

Robert Nozick, *Anarchy, State, and Utopia* 34–35 (1974). Students have also debated the following hypothetical case: A doctor is experimenting with a deadly virus; the virus begins to spread (through no fault of the doctor); the only way to prevent the spread of the virus is to seal the room from which the doctor is trying to flee, thus dooming him.

One of my colleagues, Justice Kozinski, proposes an absolute rule of inclusion: unless there is an express exception, the literal words of the statute must apply, regardless of how absurd the result may appear to us. *See supra*, at 1876 (Kozinski, J.). Taken to its logical conclusion, this rule would punish the proper use of deadly force by policemen because the statute does not explicitly exclude such killings.

It is important to recognize that the legislation at issue here is an example of a "common law statute," prohibiting a general category of conduct — in this instance, willful killing — in the broadest of terms, while anticipating judicial narrowing. It cannot rationally be argued that the legislature intended the judiciary to recognize certain exceptions, such as self-defense, while precluding it from recognizing other defenses, such as necessity, that are accepted by numerous jurisdictions. Once it is agreed that this Court has the power to decide whether the defense of necessity is part of our law, it surely must follow that it has the power to define its parameters. It is plainly preferable to leave such decisions to the reasoned judgment of disinterested courts than to the unarticulated discretion of adversarial prosecutors.[22]

I am not suggesting that every possible category of crime be specifically mentioned in the statute, but rather that widely recognized defenses, such as necessity, cannot be deemed to have been abrogated by legislative silence, especially when the statute seems to invite inclusion of some recognized defenses that are not explicitly mentioned.

Another of my colleagues, Justice Sunstein, proposes an "absurdity exception" to the otherwise absolute rule of plain meaning. *See supra*, at 1883–84 (Sunstein, J.). This would permit prosecution in the following case: A train loses its brakes and heads in the direction of a fork. If the conductor does nothing, the train will hit a school bus full of children. If he takes the fork, it will hit a drunk sleeping on the track. There is no third alternative. He takes the fork, thus killing the drunk. Convicting him would be wrong because his beneficent *purpose* was to save lives, but it would not be "absurd" because he *intended* to kill the drunk.[23] Yet another of my colleagues tells us that all statutes must be interpreted by reference to a "right" whose source is nowhere identified, namely that "[a]ll individuals have the right to be protected against violence, including violence that is premised upon the moral calculation that the sacrifice will save more lives than it will take." *Supra*, at 1895 (West, J.). This rule would permit prosecution not only of the train conductor, but also of the hiding Jews who killed

[22] Justice Easterbrook premises his decision largely on the assumption that these defendants implicitly consented to the decision ultimately taken and the conclusion that "society should recognize th[at] agreement." *See infra*, at 1916 (Easterbrook, J.). The problem is that consent, even when explicit, has not always been accepted as a defense to willful killing, as evidenced by the ancient case of *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994).

[23] Indeed, under governing case law, his homicide was even premeditated because premeditation can occur in an instant.

the baby in order to prevent their apprehension and murder by the Nazis. Would my colleagues really support their preferred rules in the face of these testing cases?

Justice West also poses a provocative hypothetical case, which should be troubling to any thoughtful judge or legislator. She asks whether a reversal of this conviction would require the conclusion that a group of people in need of organs to live may properly kill one person in order to harvest his organs so that all in the group might live. *See id.* at 1896. It is a good question. One must begin with the conclusion that any general rule of law that would routinely permit the killing of a human being for his organs is a rule of law that should not be accepted by a civilized society. That certainly would be my strong preference. Our case can be distinguished from this one on several grounds. First, there is a universal consensus that killing for organs should be deemed unacceptable. I am aware of no dissent to this proposition in all of jurisprudence, philosophy, or even ancient religion.[24] There is considerable disagreement, however, concerning the speluncean case and its sister case involving the crying baby during the Nazi Holocaust. This difference in the level of agreement alone may distinguish the speluncean case from the organ case, though the reasons underlying it may bolster the difference in outcome. A second distinction between the organ donor case and this case is that in this case the victim would have died within days even if the defendants had not killed him. In the organ donor case, the murdered organ donee could have lived out his life. Thus, the issue in the instant case is not *whether* the victim would have died, but only whether he was to die at the time he was killed so that others could live or whether he would die a few days later in which case no one would have lived. Quite a difference! Third, among the most powerful reasons why we universally reject killing to harvest organs is that organ shortages are a widespread and continuing problem, as Justice West acknowledges.[25] *See id.* Were we to approve the killing of a potential organ donor, no one would be safe. Everyone with a healthy life-saving organ would be placed at risk by such a rule. The situation is quite different with our explorers or the crying baby. Although these rare situations recur throughout history, they are unlikely to be experienced more than once

[24] There are, however, some who justify using organs of prisoners condemned to death, despite the reality that this might result in more executions for the sole purpose of using the prisoner's organs to save others' lives.

[25] As Justice West states:

> [T]here are currently a sizable number of citizens in this country awaiting organ donations, bone marrow replacements, and blood transfusions. The profound scarcity of such organs, bone marrow, and non-contaminated rare blood types is the sad reality that all such patients (as well as those of us who may at any point become such a patient) are forced to endure. That scarcity prompts incomparable anguish among the needy donees, and tortured decisions by medical personnel.

Supra, at 1896 (West, J.).

in a long period of time. Whatever we decide in *these* unusual cases will have little or no impact on the future actions of the infinitesimally tiny number of people who may find themselves in the unexpected situation faced by our explorers or the Jews hiding from the Nazis. These are sui generis cases, about which, in the absence of explicit legislative resolution, we can afford to provide pure retrospective justice, without fear of establishing a dangerous precedent. To be sure, every case contributes to the corpus of precedents, and if the legislature disapproves of our decision, it may announce a rule of law that forbids killing in these situations. The reason the legislature has not explicitly done so for organ-donor killing, is that no one has ever tried — or, likely, would ever try — to raise a defense of necessity in such circumstances. Such a result would be "absurd," to paraphrase another of my colleagues, and legislators need not explicitly reject every "absurd" defense, especially when no one has ever tried to use it. The defense raised in our case, however, is not absurd and it has been raised and even accepted. *See* Kadish & Schulhofer, *supra*, at 877–78. These are the differences. Does Judge West believe that smothering the crying baby and killing the person for his organs are really the same case? If not, is not the instant case closer to the former than to the latter?

IV. CONCLUSION

I believe that those who would punish the conduct at issue here have the burden of acting to prohibit it explicitly and provide for the appropriate punishment.[26] That burden has not been satisfied by the inaction here.

Accordingly, I conclude that the principles expressed above require the conclusion that the killing committed by the defendants in this case cannot be deemed unlawful. The people in the cave could not look to the law for guidance. The statute was not explicit. The precedents cut both ways. They made every reasonable effort to obtain advance guidance from authoritative sources. In the end they had to decide for themselves. They did the best they could under the circumstances, selecting a process which was rational and fair. The end result was a net saving of lives. I cannot find it in my heart — and, more important, I cannot find it in the law — to condemn what they did. If there is disagreement with the preferences stated herein or with the conclusions derived therefrom, let the debate begin. I have

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[26] Another important indicium that our legislature did not intend to include the type of necessity killing under the general prohibition against murder is that it failed to specify an appropriate punishment for this kind of tragic-choice killing. Surely it would be wrong for a judge to be empowered to punish our defendants as severely as a defendant who killed for profit, thrill, or hatred.

an open mind, untrammeled by the "natural" and "supernatural" myths of the past.

EASTERBROOK, J.* "Whoever shall willfully take the life of another shall be punished by death." N. C. S. A. (N. S.) § 12-A. Defendants killed and ate Roger Whetmore; they did this willfully (and with premeditation, too). Were the language of the statute the end of matters, the right judgment would be straightforward, as Justices Keen and Kozinski conclude. *See supra*, at 1864 (Keen, J.); *supra*, at 1876 (Kozinski, J.). Then when the hangman had finished implementing the judgment, he too would be doomed, for the executioner takes life willfully; likewise we would condemn to death the police officer who shot and killed a terrorist just about to hurl a bomb into a crowd. Yet throughout the history of Newgarth such officers have been treated as heroes, not as murderers — and not just because the Executive declines to prosecute.

Language takes meaning from its linguistic context, but historical and governmental contexts also matter. Recall the text: "Whoever shall willfully take the life of another shall be punished by death." "[W]illfully *take the life* of another," not "*be convicted of* willfully taking the life of another." Yet the latter reading is one that all would adopt: in our political system guilt is determined in court, not by the arresting officer or the mob. The statute is addressed in part to would-be killers and in part to judges, who in adjudicating a charge apply the complex rules of evidence that may make it impossible to prove beyond a reasonable doubt the guilt of someone who actually committed a murder. No one believes that N. C. S. A. (N. S.) § 12-A overrides the rules of evidence, the elevated burden of persuasion, the jury, and other elements of the legal system that influence whether a person who committed a killing will be adjudicated a murderer. Like other criminal statutes, N. C. S. A. (N. S.) § 12-A calls for decision according to the legal system's accepted procedures, evidentiary rules, burdens of persuasion — and defenses.

For thousands of years, and in many jurisdictions, criminal statutes have been understood to operate only when the acts were unjustified. The agent who kills a would-be assassin of the Chief Executive is justified, though the killing be willful; so too with the person who kills to save his own life. Only the latter is self-defense; the case of the agent shows that self-defense is just one member of a larger set of justifications. All three branches of government historically have been entitled to assess claims of justification — the legislature by specifying the

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prohibition and allowing exceptions, the executive by declining to prosecute (or by pardon after conviction), and the judiciary by developing defenses. As a result, criminal punishment is meted out only when all three branches (plus a jury representing private citizens) concur that public force may be used against the individual. The legislature might curtail the role of the judiciary by enacting a closed list of defenses to criminal charges, but it has not done so. New statutes fit into the normal operation of the legal system unless the political branches provide otherwise. N. C. S. A. (N. S.) § 12-A does not provide otherwise. Our legislature could write a law as simple as N. C. S. A. (N. S.) § 12-A precisely because it knew that courts entertain claims of justification. The process is cooperative: norms of interpretation and defense, like agreement on grammar and diction, make it easier to legislate at the same time as they promote the statutory aim of saving life. The terrorist example proves the point.

"Necessity" is the justification offered by our four defendants. After the first landslide, all five explorers were in great peril, and the rescuers outside the cave confirmed that all were likely to starve by the time help came. The choice was stark: kill one deliberately to save four, or allow all five to die. The death of one was a lesser evil than the death of five, and it was therefore the path that the law of justification encouraged. Military commanders throughout time have understood this equation and have sent squads and platoons on missions from which they were not expected to return, so that a greater number might be saved.

Like all of the lesser-evil justifications, necessity is openly utilitarian. Self-defense may reflect uncertainty about the ability of the law to affect conduct by those in imminent fear of death, as Justice Tatting supposes, *see supra*, at 1862 (Tatting, J.) — though if this is so one wonders why the force used must be the least necessary to defeat the aggression, a restriction that makes sense only if the object of aggression is capable of rational thought and susceptible to influence of legal subtleties. But other lines of justification assume that the actor (our police officer, for example) is calculating and alert. The question is: what shall the law lead him to include or exclude from the calculation?

Allowing a defense of necessity creates a risk that people may act precipitately, before the necessity is genuine. Thus if the law allows a starving mountaineer to break into a remote cabin as a last resort to obtain food — if, in other words, necessity is a defense to a charge of theft — it creates a risk that wanderers will break doors whenever they become hungry, even though starvation is far in the future. The parallel risk is that a hungry and poor person surrounded by food may decide to bypass the market and help himself to sustenance. These risks are addressed by the rule that the evil must be imminent and the means, well, *necessary*; the departure from the legal norm must be (as

with self-defense) the very least that will avert the evil. *United States v. Bailey*, 444 U.S. 394 (1980), employs this understanding to conclude that a prisoner under threat of (unlawful) torture by the guards may defend against a charge of escape by asserting that the escape was necessary to avert a greater evil, but the prisoner loses that defense if he does not immediately surrender to a peace officer who will keep him in safe custody.

Allowing a defense of necessity creates a second hazard: the very existence of the defense invites extensions by analogy to situations in which criminal liability should not be defeated. That risk is met by the rule that all lawful or less hazardous options must first be exhausted. A prisoner must report his fears to the warden before escaping; and if the warden does nothing, the prisoner must escape rather than harm the guard. *United States v. Haynes*, 143 F.3d 1089 (7th Cir. 1998), which held that a prisoner who poured boiling oil over his tormentor rather than trying to flee could not assert a defense of necessity, illustrates this approach. The difference between the mountaineer case, in which breaking into a cabin is permitted, and *Commonwealth v. Valjean*, which held that a poor person may not steal a loaf of bread from a grocer, is that the poor person could negotiate with the grocer, or get a job, or seek public or private charity. A mountaineer who lacks other options to find food, and cannot negotiate with the cabin's (missing) owner, may break into the cabin because that is the last resource; theft is a lesser evil than death, though not a lesser evil than working.

Negotiation, actual or potential, offers a good framework with which to assess defenses based on utility. If a defense actually promotes public welfare, then people who are not yet exposed to the peril would agree that the defense should be entertained. Suppose the five speluncean explorers had stopped on the way into the cave to discuss what to do in the event they became trapped. Doubtless they would have undertaken to wait as long as possible for rescue; and it does not stretch the imagination to think that they would have further agreed that if starvation appeared before rescuers did, they would sacrifice one of their number to save the rest. Each would prefer a one-fifth chance of death, if calamity happened, to a certainty of death. Although they might find the prospect so revolting that they would abandon their journey rather than reach such an agreement, the alternative — entering the cave under a set of rules that required all five to starve if any did — would be even worse in prospect. We know that they *did* enter the cave, and did so under a legal regimen that some members of this Court believe condemned all to starve; it follows that they would have preferred an agreement in which each reduced that risk by eighty percent.

Hypothetical contracts are easy to devise; perhaps this accounts for endless philosophical debate about how people negotiate behind a veil

of ignorance. Judges should subject these speculations to a reality check. What do *actual* contracts for risk-bearing provide? I refer not to agreements reached after a disaster (such as the explorers' initial plan to cast dice on the twenty-third day, a plan that Whetmore later abjured in favor of waiting some more), but to agreements made before the fateful venture begins — agreements that encompass *all* of the relevant options, including the option of avoiding the risk altogether.

Before going underground, spelunkers, like their above-ground comrades the rock climbers, agree to rope themselves together when scaling or descending walls and chimneys. 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. What happened in the cave after the landslide was functionally the same: one was sacrificed that the others could live. That Whetmore turned out to be that one is irrelevant; the case for criminal culpability would have been equally strong (or weak) had any of the others been chosen. The explorers' *ex ante* agreement did not cover the precise form that the risk would take, or the precise way in which total loss would be curtailed, but it established the *principle* of mutual protection by individual sacrifice. Securing the reciprocity of advantage *ex ante* justifies the fatal outcome *ex post* for an individual team member. Society should recognize this agreement, and the way in which it promotes social welfare, through the vehicle of the necessity defense. To reject the defense is to reject the agreement itself, and to increase future loss.

To accept the necessity defense (that is, the risk-sharing agreement) in principle is not necessarily to accept that a given death is within its scope. Rock climbers who cut a dangling comrade's rope prematurely, without exhausting the options to save all, commit murder. Cicero opined 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. But what if they were mistaken, and the plank would support two for long enough? What if all five explorers could have survived until rescue (on day thirty-two), or could have found another exit by further exploration rather than encamping near the cave mouth? Ancient mariners consented to the practice of survival cannibalism in principle, but a broad defense of necessity would have led them to kill a comrade too quickly. Reports were remarkably consistent in relating that the youngest or most corpulent survivor drew the short straw. *See* A.W. Brian Simpson, *Cannibalism and the*

Common Law 124, 131 (1984). To prevent a lesser-evil defense from becoming a license to perpetrate evil, the necessity must be powerful and imminent — again following the self-defense model. But the prosecutor did not argue that the speluncean explorers should have looked for another exit from the caverns, and the jury found that a committee of medical experts had informed the men trapped in the cave that if they did not eat, then there was "little possibility" of their survival until day thirty. The danger that a necessity defense would lead people to magnify (in their own minds) the risk they are facing, and to overreact, did not come to pass. On the facts the jury found, all five very likely would have died had they passively awaited rescue. They acted; four lived. Putting these four survivors to death would be a gratuitous cruelty and mock Whetmore's sacrifice. The judgment of conviction must be reversed.

STUPIDEST HOUSEMAID, J.*

No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told "to peel the soup and skim the potatoes" her mistress does not mean what she says.

Supra, at 1858–59 (Foster, J.)

I. THE TRUTH

"O'yeah, O'yeah, O'yeah." Now comes the "stupidest housemaid" to clean up the mess the white folks have made. Of course the convictions should be reversed. The stupidest housemaid don't know nothin' 'bout the rule of law. Of all the pretty things she's seen in the Big House she ain't never run cross that. But she knows what she thinks is right. That is the basis of her judgment. As it is the basis of all the other judgments as well. The housemaid the onliest one stupid enough to admit it. Maybe 'cause she got the least to lose.

They call these things opinions for a reason. In the stupidest housemaid's opinion, the government should not stand a person on a platform, tie a rope around his neck, and then kick the platform out from under him. And invite guests to watch him vomit blood. In the first place, who but the stupidest housemaid gone be left to scrub the blood out the city square? She good at cleaning up white folks' ugly messes, but it hard work and it take a long time.

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Second, what the point? The government should kill people to prove that killing people is wrong? It don't make no sense to the stupidest housemaid. She know she sposed to separate the punishment from the crime but she cain't. She shouldn't. And most importantly she don't have to. Because, for once, she the judge! And so she won't. The conviction is reversed because the stupidest housemaid think the death penalty is wrong. It so ordered.

But it ain't over. Doing day work in the courthouse the stupidest housemaid watches the judges in their chambers. She know they reach they decisions exactly the same way that she just did. They decide what result they want. Then they "interpret" the law to get that outcome. They "opinion" ain't nothing but a big fantasy to explain they climax. But the stupidest housemaid different: she a squirrel that go right to the nut. So she gone tell the truth about her decisionmaking process. She reverse the conviction cause she do not feel what the defendants did was wrong. Maybe if she did she could "interpret" an excuse for the government to break necks.

But she sposed to write an opinion! So maybe the stupidest housemaid try that analysis foreplay and see if it get good to her. Her fantasies good as anybody's. Look here.

II. The Analysis

First of all, the stupidest housemaid would like to thank God, without Whom none of this would be possible. A "crime" is an expression of the moral condemnation of the community, or at least the jury, or, at least in this case, the judge. On her knees the stupidest housemaid prayed to God. God answered "I find nothing to condemn. Haven't you read Exodus? I told Pharaoh to let my people go. When he would not, I killed all the firstborn sons in the land. That changed Pharaoh's mind right quick. So when I consider these spelunceans and how they dealt with the obstacle they encountered on the way to their own promised land, all I can say is you gotta do what you gotta do. If life is holy — and it is — it is better that one person died rather than five."

Having determined no moral culpability in the defendants' actions, the stupidest housemaid finds no practical reason to punish them either. Certainly there is no justification from deterrence. People who believe that they are going to die immediately will not be prevented from saving they own lives by the threat of dying ultimately. The stupidest housemaid knows that if she found herself in the position that the spelunceans encountered she would have grabbed a butcher knife and commenced to stabbing with the quickness. Most anybody would. In *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884), Lord Coleridge, considering a similar case, voted for conviction saying, "We are often compelled to set up standards we cannot reach ourselves, and

to lay down rules which we could not ourselves satisfy." How very traditional, to support a law with which one has no intention of complying. The stupidest housemaid says "later for that bullshit."

The remaining justification of punishment — incapacitation — fails as well. There is no need to incapacitate these men because hopefully they will have more sense than to go poking around caves again without taking the appropriate precautions. And if they do, they will assume the risk that they might meet the same demise as their lost brother Whetmore. The stupidest housemaid knows that the law cannot stop a billionaire from trying to fly around the world in a hot air balloon. Rich men gone do what they want to do, regardless of the consequences. And when they finally reach they goal, they gone be lauded as heroes.

Regardless of the losses. Were it up to her, the stupidest housemaid would forbid the government from sending workmen to rescue any explorers who find themselves lost due to their own folly. Here's a killing that would make a nice prosecution. Her brothers were among the ten who died to rescue the four who survived. And everybody having fits and conniptions about whether the four explorers should be punished for the death of the fifth speluncean. Ain't nobody uttering a damn word about whether the law should avenge the killing of the workmen. Oh the government sent the families a plaque commemorating the sacrifice of true and faithful servants. But the prosecutor explained the law didn't fit right around the concept of crime and punishment for their deaths. Seemed to the stupidest housemaid like the criminal law was made to protect the spelunceans, not the workmen.

There was, hundreds of years ago, another justification of punishment: rehabilitation. This justification died in the last part of the twentieth century, in part because of the Negroes: they were difficult and expensive to rehabilitate and it was pleasurable to punish them. Accordingly, there is no need to consider here whether rehabilitation would be an appropriate reason to punish the speluncean defendants because no jurisdiction, including Newgarth, now recognizes rehabilitation as an appropriate justification.

All right, how they end it? What is the magical incantation you supposed to put at the conclusion? Oh yeah, here it go: "For the foregoing reasons, the convictions must be reversed."

III. The Whole Truth

Whee! That was fun! Habit forming, even. The stupidest housemaid start to like the smell of her own shit. But for real, even her own words just a bunch of sound and fury, signifying nothing. Leastways they do not signal a rule of law. Because the stupidest housemaid knows that the rule of law is a myth, something rich white folks made

up to keep everybody else from taking they stuff. Poor and colored folks sposed to shut up when the law tells them they cain't have what rich people have. They sposed to believe it ain't the rich folks making up shit — it's the rule of law.

But the law can often be argued every which way but up. And when a judge decides a hard case all he doing is choosing the argument he like the best. Or sometimes choosing his own argument instead. If he chooses another result, that would suit the law just as well. So in any case it ain't no "neutral" decisionmaking. The judge chooses, not interprets, and he chooses based on the result he wants. And the Supreme Court of Newgarth ain't never gone choose law to favor the poor and colored folks — at least not to the point that the rich white folks' richness and whiteness is threatened. They might, if they feeling expansive, put a stupid housemaid on the Supreme Court. But rich white folks gone handle they business. They gone protect their interests.

So that why it works out well for some people that there just ain't no rule of law. But even if folks wanted to follow one rule to get justice in every case, they couldn't. Laws made by human beings ain't that smart. Including the Newgarth murder statute. The stupidest housemaid don't care what All Knowing Bell Curve Topping white man thought them up, thirteen words ain't gone hold the just answer to every case, and nobody can believe that they do. For example, soon as the stupidest housemaid read the words, "Whoever shall willfully take the life of another shall be punished by death," she think, "Oh good. Now some of these trigger happy cops riding 'round shooting black and Hispanic folks in the line of duty gone get they just deserts." Then come to find out that ain't what the law means. The stupidest housemaid asks, "ain't that what it say?" "Yeah," rule of law shout back, "but that ain't what it mean."

Oh. So how you sposed to know what it mean? That old cracker Justice Foster say even the stupidest housemaid know how to read between the lines. Sometimes Miss Ann say fetch me *B* when she mean fetch me *C*. You bring her *B*, your ass gone get whipped, and what Miss Ann actually said ain't gone make a damn bit of difference. So old man Foster right about one thing: when you the servant on the bottom, you better learn how to read the mind of the master on the top. It's a survival skill. And knowing what the stupidest housemaid know, ain't one police officer who kills in the line of duty ever gone be hanged by the government, even though that what the law call for. 'Cause the law don't mean what its words say it mean. It mean what the judge say it mean. And Hallelujah, Stupidest Housemaid the judge right now!

She not the only judge, however. The stupidest housemaid ain't got too much to say about the opinions of the other judges, 'cause, for real, they opinions don't matter any more than hers. Onliest thing

that matters is they votes. So what we got? Two judges say the government should break necks, and four say the government should not, leastways not no speluncean necks. The non-breakers of necks prevail.

It funny though — all these masters of the legal universe and they couldn't agree on whether shit stinks. But they all write so pretty. They all persuade the stupidest housemaid. They all right about the law. They all wrong about it too.

Justice Kozinski onliest one say follow the words of the statute, 'cause they "clear." *See supra*, at 1876 (Kozinski, J.). Okay, so after he kill the speluncean, he gone kill the executioner? He gone kill the police officer who shoots in the line of duty? He gone kill the self-defender? 'Cause the law tell him to? He imply he will, but the stupidest housewife say that's a damn lie.

Justice Sunstein say follow the law less the outcome so "peculiar and unjust" it seem "absurd." *Supra*, at 1884 (Sunstein, J.). Just how you sposed to know what is "peculiar" and "unjust" and "absurd" the good Justice don't directly say. He do say if you kill a terrorist to save the "innocent" that's cool, but if you kill a speluncean to save your ownself you go directly to jail. *See id.* at 1885, 1888. Ok. But then he add if you kill a speluncean as part of a plan that the speluncean agreed upon, then you don't go to jail. *See id.* at 1889. Well he say you might not. He say that punishment in that case "conceivabl[y]" would be absurd. *See id.* I guess it depend on what the judge decides. That's cute, but what it got to do with the rule of law?

Justice West be making up stuff also. She go on and on 'bout the beauty of the rule of law and how in this case it means those spelunceans should be convicted. *See supra*, at 1893–95 (West, J.). Then she have the nerve to add, "[h]aving rejected the defendants' contentions, it is nevertheless clear" to her that the spelunceans should not be executed. *Id.* at 1897. She pick and choose the parts of the rule of law she like. So to hang the defendants would be "unjust." Apparently we ain't sposed to measure justice by what the legislature decided — we sposed to have a hearing about "mercy." The stupidest housemaid feels Justice West's pain, but sisterfriend, let's be real: you doing politics and religion here, not law. So take a deep breath and put that rule of law baggage down — it will set you free.

Justice Easterbrook done discovered some contract the speluncean made to share risk. *See supra*, at 1916 (Easterbrook, J.). The stupidest housemaid looked all over the Newgarth law books, but she ain't found no contract exception to the murder law. Even so, Easterbrook say killing the spelunceans would be "gratuitous[ly] cruel[]." *Id.* at 1917. So I guess he calling his boys Kozinski and Sunstein — who voted to break the spelunceans' necks — "gratuitously cruel." Ironic thing is Easterbrook is the main one claim to be applying science to

reach his result. So it seem if Easterbrook gone talk about his boys, he should call them stupid, not cruel. But he right. Kozinski and Sunstein ain't dumb — they just mean. And when Easterbrook call them cruel, he simply proves the stupidest housemaid's point and does what all the other justices do: religion, not science. They use words like "absurd" and "unjust" and "cruel" as an excuse to do as they damn well please.

The stupidest housemaid could trash her own opinion just as well. She claim she totally opposed to the death penalty but then she cite God's offing the Egyptians to prove that killing ain't necessarily wrong. She claim she don't like the Newgarth punishment for murder, but she also say she tried to get it applied to the people responsible for her brothers' deaths. Stupidest Housemaid re-read her opinion and she think she out to lunch when she wrote that shit. But at least she open about her purpose. She never claimed she was doing anything but politics.

IV. Nothing But the Truth

So what it all mean? Two things about the law: it can be argued both ways in hard cases; and, in the hands of rich white men, it can be a real bitch. Take the Declaration of Independence and the Constitution of the United States. Please.

You want to see a rebuke to the principle of rule of law, just look right there. Declaration of Independence say "all men are created equal," The Declaration of Independence para. 2 (U.S. 1776), and Constitution say bring in all the niggers you want as slaves until 1808. Then stop and just breed them. *See* U.S. Const. art. I, § 9, cl. 1. Thomas Jefferson is writing about freedom and liberty and fucking his slave and selling their children. There are schools named after this man where they teach you about the rule of law. The Fourteenth Amendment say every citizen has the right to equal protection of law, *see* U.S. Const. amend. XIV, § 1, and in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court say if some citizens receive the death penalty cause they black, what the hell can we do? Shit happens. *See id.* at 314–19.

It scare the stupidest housemaid, but she can look at the Fourteenth Amendment and read *Plessy v. Ferguson*, 163 U.S. 537 (1896), and think that opinion is rightly decided. It seems correct. The rationale make sense. Hell, Chief Justice Rehnquist said the same thing when he was a law clerk. But then to the relief of the stupidest housemaid, the *Brown v. Board of Education*, 347 U.S. 483 (1954), opinion make sense too. It seems right also. So much for the rule of law. And that scare her too.

Why? Because it is true that it would be useful for the rule of law to exist. It may even be true that the servant needs a rule of law more

than the master. But the stupidest housemaid knows that her needs and the way the world works are two different things. As necessary as it might be, the rule of law does not exist. Don't take it out on the stupidest housemaid. It ain't her radical assault on truth, it's the truth itself. When Pythagoras announced that the world is round, people fussed at him too. They said the world was easier to navigate if it was flat.

The pitifulest thing is that the main ones believing in the rule of law are the ones getting screwed by the myth of it the most. The stupidest housemaid finds those jurors who surrendered their power to this Court might be just a little more stupid than she. What this Court know any better than they? Why should its "opinion" be more respected? If you on the bottom, and you get a little bit of power, you ought to have more sense than to give it right back.

The stupidest housemaid laughs, considering how the chickens have come home to roost. White folks been sacrificing the lives of people of color for centuries — for the white folks' greater good. First they put them in ships and now they put them in cages. Reservations. Detention Centers. Send them back to Mexico, or the greedy killing fields. But when white folks sacrifice white lives for the greater good, it's a big confusing problem.