

## Is Eating People Wrong?

backs when they present it as anything more than that. The common law is more tentative than teleological, more inventive than orchestrated, more fabricated than formulaic, and more pragmatic than perfected. And great cases are the best testimony to the common law's depiction as an exciting and boisterous work-in-progress.

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#### The Law and Lore of the Sea

**A**s does life itself, law has a long and intimate relationship with art and literature. Although it is often assumed that there is one-way traffic from law to literature, there is something of a both-ways street between law and art. Most times, art relies on and follows law as a source of inspiration. Whether it is Charles Dickens's *Bleak House*, Harper Lee's *To Kill A Mockingbird*, or television's *Law and Order* or *Dixon of Dock Green*, art distills and portrays law and its cast of characters in both flattering and demeaning ways. But on some rare and memorable moments, the trade has been reversed – law and life have followed and echoed the styling of art and literature much to the benefit of most concerned.

One name that has made regular appearances in the annals of law and literature is Richard Parker. More often

than not, the sea has been the important background for his many exploits and occasional infamy. A Richard Parker was on board the *Francis Speight* when it sank in 1846. On the law's side of the historical tableau, perhaps the most infamous Parker was the eighteenth-century one who was hanged for his decisive part in the Dore mutiny. However, a more telling legal role was played a few decades later by a lowly cabin boy. Although he met with an unfortunate and gruesome end out in the unforgiving Atlantic Ocean, this Richard Parker went on to be part of a cause célèbre that has achieved storied status as one of the defining moments in the rich life of the common law.

Yachting has always been a pastime of the rich. Less a means of transport, it remains a symbolic activity of conspicuous opulence. And John Henry Want was only too aware of this. A tall man who cut a showy figure with his rugged features and extravagant moustache, "Jack" made his fortune in Australia as a successful maritime lawyer who dabbled in a variety of dubious commercial ventures; his political connections proved invaluable in consolidating his wealth. However, uncomfortable with forever being labeled the arriviste, he sought ways to acquire added prestige and improve his standing in society. In 1883, he traveled to England to purchase a suitable vessel and have it sailed back to Sydney, where he could impress his fellow yacht-club members in the waters off the New South Wales harbor.

An Aldous-built, fifty-two-foot, twenty-ton boat constructed in 1867 caught his eye. It was as much a cruiser as a yacht, but it had won several races a few years earlier. He purchased the *Mignonette* – a French term for something that is cute and adorable – for the relatively cheap price of £400. Delighted with his purchase, the new owner looked around for a crew to sail her on the long trip back to Australia: Want himself planned to return the way he came, by more conventional and spacious means.

Hearing of this opportunity, Captain Tom Dudley came forward. He was short of stature with reddish hair and beard. A self-made man of thirty, he had earned himself quite a reputation as a dependable and intrepid mariner; he brought distinction to his home port of Tollesbury in Essex, on the southeast coast of England at the mouth of the river Blackwater. He was a religious man, ran a tight ship, and insisted that his crew remain dry. His wife, Philippa, was a local schoolteacher, and Tom was always on the lookout for ways to improve his financial condition for the benefit of his wife and three children. Although he did not relish being away from his family for such a long time, the trip to Australia offered substantial remuneration and a chance to check out possible business opportunities on that burgeoning continent. He seemed an ideal choice as captain for Want and the *Mignonette's* sixteen-thousand-mile, 120-day voyage.

Want engaged Dudley on a generous contract. For £100 on signing up and a further £100 on delivery of the

*Mignonette* to Sydney, Dudley was to hire and pay a crew, provide all provisions on the trip, and keep her in good repair. It seemed a wonderful deal and one that would leave Dudley with a handsome profit. However, he had problems securing the crew he required. The boat was considered light and small for such an arduous trip through some of the world's most treacherous waters, especially around the Cape of Good Hope. After some initial failures, he recruited a three-man crew of Edwin "Ed" Stephens (as mate), Edmund "Ned" Brooks (as able seaman), and Richard "Dick" Parker (as cabin boy).

The sailing was delayed for a few weeks because the *Mignonette* was in far from shipshape condition. Although many timbers were rotten and needed replacing, the parsimonious Dudley opted to make only minimal and make-do repairs. After extended and agitated negotiations with the Board of Trade over acquiring the necessary documents to certify the ship's seaworthiness, the *Mignonette* and her crew were finally cleared to leave (or, at least, not prevented from leaving). Like most seamen, Dudley was of a suspicious temperament. Although he was ready to sail on a Friday, he chose to wait until the following, less ill-starred Monday. Consequently, the ship set sail for Australia from Southampton on May 19, 1884.

The first weeks were smooth sailing and went off without incident. The crew members were gelling well — the mate, Ed Stephens, a thirty-seven-year old father of five, was a seasoned campaigner who had a few scrapes with shipping

authorities a decade or so earlier; the seaman, Ned Brooks, was an old companion of Dudley's and saw the voyage as a cheap way to emigrate to Australia; the cabin boy, Dick Parker, was an orphaned seventeen-year old who hoped that the voyage would make a man of him and open a new life for him. Picking up fresh supplies at Cape Verde on June 8, the *Mignonette* sailed into the windier and rougher seas of the South Atlantic. They avoided the more populated shipping lines to benefit from the strong southeast trade winds and made good time. However, on July 3, the winds fell and, in the proverbial calm before the storm, the ship was briefly becalmed.

The winds soon picked up, and a couple of days later, on July 5, they were in the teeth of a full-scale storm. Dudley ordered his edgy crew to heave to and go below deck. As the ship was now located about 1,600 miles northwest of the Cape of Good Hope and 680 miles from the nearest land on the island of Tristan da Cunha, Dudley's decision to scrimp on repairs no longer seemed like such a good idea. The ship was hit by an enormous wave, and a large hole appeared in the lee bulwarks, some of which had deteriorated further since leaving Southampton. Dudley knew that this was a devastating blow and made the only decision available to him — to abandon ship.

The ship's lifeboat, a flimsy thirteen-foot craft that was more like a dinghy, was lowered and preparations were made to leave the *Mignonette* to its watery fate. Buffeted by the storm and beginning to panic, the four of them were unable

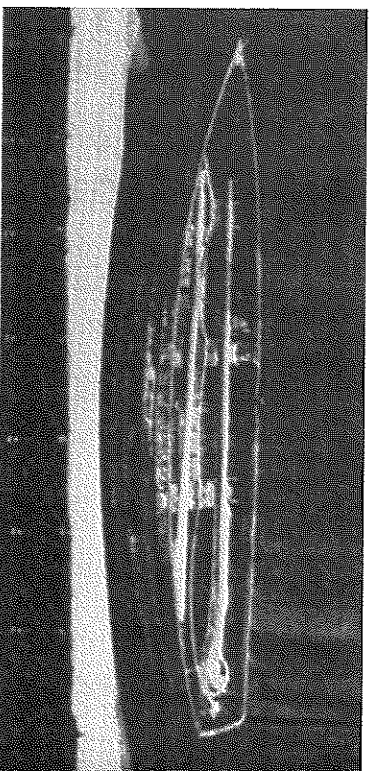


Figure 2.1. The *Mignonette*'s lifeboat on display.

to take much with them by way of equipment or provisions into the lifeboat. A cask of water and some tins of food were lost to the crashing waves. As they pushed off and left the sinking *Mignonette* to its final five minutes of existence, they had managed to salvage only two tins of food, one by Dudley and the other by Parker; they had no drinking water at all. So poorly resourced, their prospects looked very bleak. No one, not least themselves, would have given them much chance of surviving long in their makeshift vessel and off normal trade routes.

The first night, the foursome had to fight off the attentions of a persistent shark. But this was only the first of their ordeals. Aside from having only two cans of turnips and no water, they had no shelter from the elements and no implements with which to fish. After a day or so, the storm subsided and they gratefully shared one can of the turnips. A couple of days later, they managed to haul on board a

sleeping turtle whose meat, along with the remaining tin of turnips, offered respite for a little longer. A week into their ordeal, they were much the worse for wear and began drinking their own urine. With little help in sight, or even likely, they began to explore any options available to them.

Since at least the times of the Greeks, it had apparently been maritime tradition that, in such desperate circumstances as the *Mignonette*'s crew found themselves, a cannibalistic solution might be mooted. The theory was that it was better that a couple of men sacrificed themselves in order that the remainder might survive. First, the blood would be drunk and then the flesh consumed; the bodily extremities, like the head, were to be spared and buried at sea. Although the bodies of those who died would be used first, the preferred method of selection was by drawing lots. However, manipulation was often practiced and the alleged number of higher-ranked crew who avoided pulling the short straw was far greater than any normal statistical pattern would expect. Although Dudley was willing to move ahead with such a plan, Stephens and Brooks thought that it was still too premature for such a drastic measure.

After another few days and over two weeks of drifting in the lifeboat, Parker became seriously ill. He had likely been drinking seawater at night and the resulting diarrhea was simply worsening the parlous condition of his already-dehydrated body. He became delirious and was drifting in and out of consciousness. It had been eight days since they had eaten anything, and Stephens was also beginning to

deteriorate quickly. Dudley again raised the possibility of drawing lots. Stephens was better disposed to this possibility, but Brooks wanted no part of the macabre scheme. Parker was barely hanging on and in no condition to contribute to their sparse and sporadic exchanges.

On the nineteenth day of their ordeal, Dudley announced that, if no vessel appeared by the next day, then they should kill Parker. As he was already on death's door, Dudley considered that such a course of action was entirely warranted. With no vessel in sight, Dudley assumed responsibility for killing Parker or, as he preferred to think of it, simply accelerating his death by a day or so in order that the other three of them might have a better chance of surviving and being rescued. After all, Dudley maintained that Parker was the obvious choice, as he not only was the weakest and closest to death but also had no wife or children. Stephens reluctantly agreed, but Brooks remained silent at the other end of the boat, neither agreeing nor protesting.

So with a prayer, but with little other ceremony, Dudley slit Parker's throat. Dudley and Stephens were joined by Brooks in drinking Parker's blood: slaking their burning thirst was the first priority. Driven by their hunger, they had little compunction from feeding on his body for the next three days, eating his more digestible inner organs first. But four days after killing Parker and now twenty-four days after abandoning the *Mignonette*, the remaining trio of seafarers began to lose all hope.

Unlike so many other sailors who had simply perished on the open seas, Dudley and his two crew were to get the first and only stroke of luck that they needed. On July 29, their prayers were answered by the arrival of the German freighter, the *Montezuma*, which was on its way from Chile to Hamburg with a cargo of nitrate. Under the command of the solicitous Captain P. H. Somsen, its crew rescued the lifeboat's occupants. Brooks was able to climb on board himself, but Dudley and Stephens were so weak that they had to be hauled up by rope. Not surprisingly, they were in a pitiable condition with wasted bodies, blackened lips, and swollen limbs. However, in a telling gesture, Dudley did not try to hide what had happened. He insisted that the lifeboat should be brought aboard and the scant remains of Parker, a rib and some flesh, should also be preserved. His plan was to give Parker a decent Christian burial back in England.

It took a good month or so before Dudley, Stephens, and Brooks and Parker's remains made it home to England. They arrived back in Falmouth on September 6, having been picked up a few days earlier by a pilot in the English Channel. From the first moment that they returned, Dudley was open and candid about what had happened; he told Collins, the pilot, that a fourth man had been killed and eaten. Apart from bringing back Parker's remains, they were also entirely forthright in their reports to the authorities.

As required by the Merchant Shipping Act of 1854, they made statements at the local customhouse to the shipping master, a Mr. Cheesman. He was a roguish fellow who was as interested in filling his own pockets by conveniently turning a blind eye to smuggling as fulfilling his more mundane and less profitable official duties. The three-some gave details about the wreck as well as Parker's death. For both Dudley and Stephens, the events were regrettable, but in line with expected standards of maritime conduct in such fraught circumstances: "on the twentieth day the lad Richard Parker was very weak through drinking salt water. [I], with the assistance of Mate Stephens, killed him to sustain the existence of those remaining, they being all agreed the act was absolutely necessary." Dudley related the tale with an enthusiasm and such detail that it verged on the unseemly.

Because the *Mignonette* was a small vessel with no passengers or cargo and no substantial loss of life, Mr. Cheesman showed little interest. With no prospect of receiving any perks himself, he determined that there was little more to do and that matters should rest. His mandate was improving safety, not pursuing criminal sanctions. Cheesman sent his report to the Board of Trade in London. Unsure how to proceed, Board of Trade officials forwarded the file to the Home Office, which had ultimate authority for the administration of the courts and criminal prosecutions. As it was a Friday, no decision was expected until after the weekend, and only by Monday at the earliest.

However, from Dudley and Stephens's point of view, it was at this point that events took an unexpected turn for the worse. Just when they thought that their troubles were coming to an end, the person who many consider the villain of the piece came on the scene. While Dudley and Stephens were being interviewed and giving their statutory depositions to Cheesman, the local police officer, James Lavery, was in attendance. He was a sergeant with the Falmouth Harbour Police Force. In contrast to the delinquent Cheesman, he was a rather sanctimonious Methodist who took a by-the-book approach. Rankled by the customs officer's licentious ways, the sergeant had likely had enough of this official connivance with all manner of petty criminals, like stevedores, prostitutes, thieves, cutpurses, and pirates. Word had spread quickly of the *Mignonette* crew's shipwrecking, and so Lavery had decided to be part of their official debriefing.

Lavery listened intently to Dudley's bold account. When Dudley went into great detail about how he had killed Parker with his knife and actually produced the knife, Lavery asked to take possession of it. Again, confident that he had done nothing wrong and that he was not vulnerable to any criminal action, Dudley handed it over and cautioned Lavery that he wanted to be sure that he got it back as a "souvenir" of their nightmarish experience. This was too much for the officious and ambitious Lavery.

Sergeant Lavery found Dudley to be insufferable in his arrogant recounting of what went on aboard the *Mignonette*'s

lifeboat. Rather than wait to see whether Cheesman took further action, Lavery contacted his superiors and sought instructions on whether to bring criminal proceedings against both Dudley and Stephens or either. On his own initiative, Lavery sought to obtain warrants for all three men's arrests on the charge of murder on the high seas. He was first rebuffed by the clerk of the justices, John Genn, who insisted that Lavery obtain the approval of the chair of the local magistrates. This was the mayor of Falmouth, Henry Liddicoat. Although the populist mayor was reluctant to intervene because of the public sentiment on the seamen's side, he felt obliged to at least grant permission to Sergeant Lavery to hold Dudley and Stephens at the police station until their appearance before the magistrates court on the Monday morning. Apparently, the three survivors were being treated to a celebratory dinner by Captain Jose, the superintendent of the sailors' home at which they were staying, when Lavery arrived to arrest them. Dudley in particular was most perturbed at this turn of events but was confident that they would all be released on the Monday and on their way home to the families for a well-earned period of extended convalescence.

The fly in the ointment was that all local magistrates had received strict instructions to defer to the advice of the Treasury Solicitor in all murder cases. Prompted by the clerk of the court, Lavery had, therefore, requested that the men be detained until such guidance was received. A local solicitor, Harry Tilly, was prevailed on to act for the seamen and to

seek bail. But the magistrates determined that their hands were tied and that they had no option other than to keep them in custody for a few more days until they received instructions from London.

By Wednesday, the *Mignonette* file had made its way through different levels of bureaucracy at the Home Office. Unclear how to proceed, senior officials had referred the matter directly to the desk of the Home Secretary himself, Sir William Harcourt. By this time, public opinion had begun to voice itself squarely and loudly on the side of the detained men; they had done no wrong and had acted entirely in accord with the tried-and-tested customs of the sea. To depict these embattled men as common criminals rather than as reluctant heroes was considered outrageous. The fact that they had survived such an ordeal was a matter for celebration and condolence, not persecution and prosecution.

Distanced and insulated from such local sentiment, Harcourt was concerned with following the letter of the law. Or, more accurately, he saw this as a convenient occasion to have the letter of the law clarified by a superior court after several failed or lapsed prosecutions on similar facts around the Commonwealth. After consulting with Attorney General Sir Henry James and Solicitor General Sir Farver Herschel, he gave instructions to the Falmouth magistrates that they should proceed to prosecute.

However, upon the men's appearance on September 11, Tilly had managed to obtain bail for them. Surety was posted by John Burton, the proprietor of the famous Old



Curiosity Shop in Falmouth, in the amounts of £400 for Dudley, £400 for Stephens, and £200 for Brooks. Perhaps most startlingly and in a gesture that reinforced growing public opinion, Daniel Parker, the eldest brother of the unfortunate Richard, appeared in his yachtman's outfit and made a point of publicly shaking the hands of all three fellow seamen. So inflamed were people that a death threat was made against Mayor Liddicoat and ballads began to be sung about the threesome. Indeed, Dudley sent a letter to the *Times* of London in which he expressed his "thanks for numerous favours of sympathy to myself and companions for our past unparalleled sufferings and privation on the ocean, and our present torture under the ban of the law, being charged with an act which certainly was not accompanied by either premeditation or malice in the true sense of the word, as my conscience can affirm." None of this did anything to change the Home Secretary's stance. If anything, it merely galvanized Sir William Harcourt's determination to settle such matters once and for all.

The prosecution was entrusted to a young junior treasury counsel, William Danckwerts, who went on to become a king's counsel and whose son became an eminent judge. He decided that matters would be only further complicated and compromised by keeping Brooks as a defendant, even though he had also feasted on Parker's body. So he offered no evidence against him at the preliminary hearing, and Brooks was acquitted by the magistrates. Dudley and Stephens, however, were not so fortunate, and they were committed to

stand trial in November 1884, at the winter Devon and Cornwall Assizes in Exeter.

From the get-go, the trial was something of a sham; the fix was in. The judge who was scheduled to hear the case, Sir William Robert Grove, was required to step aside. In his place, the Home Secretary installed the more "reliable" Baron Huddleston. A brusque character, Huddleston had a reputation for bullying juries into his way of thinking. Although the son of a seafaring father and with some experience in maritime law, he was no friend to the common sailor. Unsympathetic to the crew's plight and keen to ingratiate himself to his superiors, he made it his task to ensure that Dudley and Stephens were not acquitted.

Still the beneficiaries of strong public support, Dudley and Stephens were represented by Arthur J. H. Collins, Q.C. A leading member of the bar and a local stalwart, this talented and costly lawyer had been paid for by a generous defense fund that had been established by the yachting community. Dudley was at first not inclined to take what he considered "charity" but agreed on the basis that any surplus would be used to create a trust fund for Richard Parker's younger sister. After the jury was impaneled and sworn, the accused pleaded not guilty to murder "by reason of necessity."

The prosecution case was entrusted to Arthur Charles, Q.C. He first laid out his legal case. Although he conceded



that the conditions on the lifeboat were dreadful and that the crew faced hopeless odds in trying to survive, he made forceful contentions that there was no necessity defense in English law. Although there had been much academic debate about whether necessity was or should be a defense, Charles was adamant that such a claim had no precedential authority. The necessary requirements of an *actus reus* (guilty act), in that they had taken the life of a living person, and *mens rea* (guilty mind), in that they had taken that life with calculated intentions, were present. A criminal conviction was required, even if clemency might not be unwarranted in such circumstances.

The prosecution's evidence was limited but compelling. A number of people from Falmouth were called to testify, including the relentless Sergeant Lavery, about what had been said and confirmed by Dudley and Stephens on their landing in Falmouth. But the star witness was Ned Brooks. Although a reluctant attester, he gave strong confirmation of what had happened on the lifeboat and recounted the leading role of Dudley and his own refusal to participate in killing Richard Parker. In his cross-examination by defendants' counsel, Collins did not seek to contradict or query this account but contented himself with having Brooks emphasize the dreadful conditions on the lifeboat, Parker's failing health and nearness to death, Brooks's own later cannibalistic feasting on the body, and the apparent hopelessness of their situation.

At the end of the prosecution case and at the beginning of the defense's submissions, Baron Huddleston made a crucial, if damning, intervention. He held that he would not hear any further argument about the defense of necessity. As far as he was concerned, there was no law to support such a defense; this was a matter to be left to an appeal court. So chastised and hampered, Collins had little evidence to offer by way of rebuttal and the trial came to a close.

Baron Huddleston was not finished, however, in making his telling interferences from the bench. Mindful of the strong public sentiment still running in Dudley and Stephens's favor, he took innovative steps to ensure that the jury's hands were tied. Relying on his interpretation of the law, he told the men of the jury that they had two choices — they could find the two accused guilty of murder or they could agree to a “special verdict.” With little real choice, the jury returned a special verdict: this meant that they would simply state the facts of the case as they found them and leave it to a higher court to apply the relevant law. Consequently, the jury found that:

if the men had not fed upon the body of the boy, they would probably not have survived to be picked up and rescued, but would within the four days have died of famine; that the boy, being in a much weaker condition, was likely to have died before them; that at the time of the act in question there was no sail in sight, nor any reasonable prospect of

relief, that under the circumstances there appeared to the one prisoners every probability that, unless they fed, or soon fed, upon the boy or one of themselves, they would die of starvation; that there was no appreciable chance of saving life except by killing someone for the others to eat; that, assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men.

On receiving this special verdict, Huddleston renewed the defendants' bail and adjourned the assizes to London's Royal Courts of Justice for November 25. In the intervening days, there was much legal wrangling about the appropriate procedure to be followed. The reconvened assizes was further delayed until December 4, when a surprisingly large bench of five judges assembled as the Divisional Court of the Queen's Bench under the leadership of the Chief Justice, Lord Coleridge, a man of impeccable credentials and genuine power. The relative mild objections by defense counsel Collins to these unusual shenanigans suggested that some kind of deal for Dudley and Stephens was already in place.

The hearing went off with no more surprises or dubious legal maneuvers. Despite pressure from the bench, Collins spent his allotted time canvassing the different legal and ethical arguments that supported the recognition of a defense of necessity – extreme circumstances, the greater good, and a measure of last resort. He called in aid the

American decision of *Holmes* in 1842, which had left open the possibility of necessity in similar shipwrecked conditions. At the conclusion of Collins's submissions, after a short recess, Lord Coleridge announced a unanimous finding that a conviction should be entered with reasons to follow. A shocked Dudley and Stephens were immediately remanded to Holloway Prison to await their sentence.

The court reconvened on Tuesday, December 9, to deliver its reasons and its sentence. Speaking for his colleagues, Lord Coleridge recognized "how terrible their temptation was" and "how awful their suffering." However, he was unswerving in his conclusion that the prisoners had killed a "a weak and unoffending boy" for their own survival at the expense of his; the drawing of lots would have made no difference. Drawing on a rhetorical flourish that would be more at home in the pulpit, Lord Coleridge thundered:

To preserve one's life is generally speaking, a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die.... It is not correct, therefore, to say that there is an absolute and unqualified necessity to preserve one's life.... It is enough in a Christian country to remind ourselves of the Great Example which we profess to follow. It is not needful to point out the awful danger of admitting the principle which had been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to

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

With the court's reasoning concluded and a conviction for murder confirmed, sentence was passed. To Dudley and Stephens's initial horror, they were sentenced to death by hanging. However, in a sign that all was not as it seemed, the judges did not don the customary black hats in delivering their judgment. In closing, Lord Coleridge made what appeared to be a genuinely heartfelt plea to "the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it." It was the official confirmation that, in securing clarity about the law and ensuring that a defense was not made available that might become "the legal cloak for unbridled passion and atrocious crime," the judicial powers-that-be were willing to keep their side of the bargain.

A couple of days later, on the advice of the Home Secretary, Sir William Harcourt, Queen Victoria exercised mercy and commuted their sentence to six months' imprisonment. Although there were forces in government who pushed for life imprisonment, it was ultimately determined that the lesser and relatively mild sentence would best satisfy the ends of formal justice and appease public opinion.

Bitter and unrepentant, Dudley and Stephens served their sentence and were released from Holloway Prison on May 20, 1885, almost a year to the day that they had left on their fateful voyage on the *Mignonette*.

The defense of necessity to a charge of murder has continued to occupy the attention and intellects of judges, lawyers, and theorists generally. The general response remains that the acknowledgment of such a defense will do more harm than good; it is preferable to treat it more as an excuse that goes to sentencing than a justification that goes to guilt or innocence. The fear remains that it will open up a whole can of worms and people will be running the defense in dubious and ever-broadening situations. As Lord Coleridge warned, it might become "the legal cloak for unbridled passion and atrocious crime." This sentiment has been echoed by other legal luminaries. In 1931, the American judge Benjamin Cardozo insisted that "where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another." And in 1979, the English Lord Denning went into moral overdrive when he cautioned that "if hunger were once allowed to be an excuse for stealing, it would open a door through which all kinds of lawlessness and disorder would pass. If homelessness were once admitted as a defence to trespass, no one's house could be safe. Necessity would open a door which no man could shut."

Nonetheless, necessity is not an issue that will go away or lie to rest; its contested popular meaning ensures that. In particular, the focus has been on whether it should be a justification that absolves a person of guilt or whether it should merely excuse the crime by a lesser punishment or penalty. The Supreme Court of Canada has waded into this question on several occasions. Rejecting any mere utilitarian calculus of cost and benefits, it insisted in 1975 that there is no general defense of necessity available to a doctor performing an abortion unless there is strong evidence of dire urgency and an impossibility to comply with the law. However, in a wide-ranging judgment in *Perka* in 1984, Mr. Justice Dickson decided that a narrow defense of necessity was available where its distinguishing feature was "the moral involuntariness of the wrongful action": drug-smugglers who felt compelled to enter Canadian waters to obtain necessary and life-saving repairs for their struggling ship were entitled to plead it as a defense to a charge of smuggling.

In its most recent decision, the Supreme Court took a strong line and confirmed that, though there did exist a defense of necessity, it was extremely limited in scope and availability. A father had intentionally killed his twelve-year-old severely disabled daughter; he claimed that he did this as an act of love so as to spare her from further and unbearable suffering. In upholding the father's conviction, the Court clarified that, to establish necessity, it must be shown that there was imminent peril, lack of reasonable

lawful alternatives to actions, and proportionality of harm caused and avoided. However, he was convicted of manslaughter, not murder, and he received a sentence of ten years' imprisonment rather than life. The judges were purposefully vague in reaching any conclusion about whether the defense might be available in *Dudley* and *Stephens*'s situation, although they did not rule out the possibility.

Although the English courts have for more than a century resisted any temptation to recognize a necessity defense, a crack in their united front appeared in 2000. Conjoined twins were born, but it was soon realized that, if they were not separated, the healthier one as well as the unhealthier one (who had an undeveloped brain and no functioning heart or lungs) would die. As staunch Roman Catholics, the twins' parents refused to give their permission to an operation to separate them, preferring for nature to take its course. On the doctors' application, a High Court judge gave permission for the operation to go ahead despite the parents' strenuous objections. The decision was appealed to the Court of Appeal.

After much soul-searching and emphasizing the "unique circumstances" of the case, the appeal court upheld the judge's decision. The judges began by agreeing with the outcome in *Dudley* and *Stephens*'s case; there was no rationale for allowing one person to kill another to save their own life. However, they insisted that the situation of the conjoined twins was different — the doctors had no personal gain; the

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ailing twin was “designated for death”; and the doctors were unable to act in the best interests of both patients. Ironically, the judges relied on a commentary by Sir James Stephens, who stated in the *Digest of the Criminal Law*, published in 1887, shortly after Dudley and Stephens’s case:

An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.

Whether this definition is persuasive and whether these conditions had been fulfilled in the case of the conjoined twins are still very much causes for debate and disagreement. Although the Supreme Court of Canada might come to a similar outcome to their English counterparts, it seems equally true that most American courts would not. In negotiating this fraught terrain, the judges have the unenviable task of ensuring that the demands of law and morality, though often complementary but occasionally antagonistic as in these necessity cases, are rendered sufficiently compatible to placate both popular and professional opinion. Whether contemporary judges have made a better job of

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doing this than Lord Coleridge and his colleagues remains an open question.

Richard Parker’s tombstone can be found at Jesus Chapel in Peartree Green Churchyard, near Southampton. It was erected and maintained by monies left over from Dudley and Stephens’s defense fund. Its inscription reads “Sacred to the Memory of Richard Parker, Aged 17, Who Died at Sea July 25th 1884 after Nineteen Days Dreadful Suffering in an Open Boat in the Tropics, Having Been Wrecked in the Yacht *Mignonette*.” However, it is perhaps the two biblical quotations at the end that are most telling — “Though he slay me yet will I trust in him: Job xii. 15” and “Lord lay not this sin to their charge: Acts vii. 60.” However, although Richard Parker might have come to a grisly and early end out in the South Atlantic, his fellow mariners did not fare as well as they might have hoped.

Both Dudley and Stephens benefited from their moment in the spotlight; they were extended the coveted honor of having wax sculptures in Madame Tussauds in London. Tom Dudley, though, was anxious to get on with his life, and though he had his sailing certificate restored, he struggled to find work. Making contact with the *Mignonette*’s owner, Jack Want, he prevailed on him to subsidize his family’s emigration to Australia. With the help of his wife’s aunt, he set up T. R. Dudley and Co. in Sydney and enjoyed success in sail making and yacht chandlery. He was known by the locals



Figure 2.2. Richard Parker's tombstone.

as Cannibal Tom. As fate would have it, his prosperity and good fortune were short lived, as he made history a second time — he was the first Australian to die when the bubonic plague hit Australia in 1900.

Turning down Want's offer of free passage to Australia, Ed Stephens settled near Southampton and supported himself through odd jobs. Although he returned to sea on occasion, he became an alcoholic and died in poverty in Hull at the age of sixty-five in 1914. Ned Brooks avoided prison and, for a short time, traded off his fame by taking part in fair-ground freak shows. But he was soon back at sea. He stayed close to home and worked on the Isle of Wight ferries and died in poverty in 1919. The only one to be untroubled by the *Mignonette* disaster was, not surprisingly, Jack Want. A yacht and only several hundred pounds poorer, he was elected to the New South Wales Legislative Assembly and went on to become the state's attorney general. He died a comfortable man in 1905.

And art and law continued their dance of imitation across the years. There is much in Tom Dudley's life that is the stuff of Greek tragedy. Like Agamemnon, he made sacrifices to save himself and his sailing companions. More recently, in the award-winning novel *Life of Pi*, a sixteen-year-old Pi Patel, the son of a zookeeper, is trapped for 227 days on a twenty-six-foot lifeboat with, among other beasts, a 450-pound Bengal tiger named Richard Parker. Fortunately, that fictional Richard Parker does not get eaten, although he does himself indulge in some man eating.





Figure 2.3. Tom Dudley.

But the most startling coincidence is one of those rare occasions on which life follows art. In 1837, almost fifty years before the *Mignonette* set sail, Edgar Allan Poe published his only novella, the relatively unsuccessful *The Narrative of Arthur Gordon Pym*. The story tells of a young man who is shipwrecked along with two others. They survive for several days on the ship's floating hull but soon realize that they can survive only if one of them sacrifices himself for the benefit of the other two. After drawing lots, the cabin boy loses out and is killed and eaten. In an uncanny omen of things to come, the cabin boy's name was none other than Richard Parker.

### 3

#### Bearing Witness

##### In Support of the Rule of Law

In modern societies, there are considerable feats of compromise that need to occur if a democratic government is to exist and thrive. Although power ultimately resides in the people and their representatives, it is important that this power is not exercised in a way that is willful or arbitrary. In particular, a commitment to genuine democracy demands that the majority is not permitted to ride roughshod over minorities. Any mode of responsible government, therefore, needs to maintain a series of checks and balances so that the frequently diverse and occasionally contradictory interests of different groups are maintained in political equilibrium. Among other things, this means that both popular sovereignty and political accountability must be combined in a stable and effective compact of just governance.