
I

At about 10 o'clock on the cold, wet night of April 19, 1841, in the North Atlantic some 250 miles southeast of Cape Race in Newfoundland, the Philadelphia-bound frigate *William Brown* struck an iceberg. Those on board—65 Scots and Irish emigrants and a crew of 17 including 3 officers—were in immediate peril of their lives. The *William Brown* carried only two lifeboats, a so-called jolly-boat that could safely hold 10 and a longboat adequate for perhaps two dozen. The captain, the second mate, six crewmen, and two passengers (a woman and a boy) quickly filled the smaller boat. Into the larger boat clambered the first mate, eight crewmen, and 32 passengers—far more than the boat could safely hold. Left on board with no hope of survival were the remaining 31 passengers; within an hour and a half of the collision, the ship went down and they drowned.

As dawn turned into morning the two lifeboats with their

exhausted and terrified survivors began to drift apart, but not before the captain in the jolly-boat ordered the crew in the longboat to obey the first mate just as they would him. The first mate, for his part, reported to the captain that in his judgment the longboat was (in the words used later by the court reporter) "unmanageable"—the rudder was broken, water was leaking in through various holes, and the gunwales of the overloaded boat were dangerously near the water. If the boat were to have any chance of staying afloat, "it would be necessary to cast lots and throw some overboard" (again, I quote the court reporter's words). The captain (as later court testimony established) replied, calling across the water, "I know what you'll have to do. . . . Don't speak of that now. Let it be the last resort." With that, the two boats parted company.

The weather turned foul during the day; rain fell steadily, and in the longboat the passengers struggled to bail the water while the crew worked the oars. But by 10 in the evening, just twenty-four hours after the collision with the iceberg (again, in the words of the court reporter), "the wind began to freshen, the sea grew heavier, and once, or oftener, the waves splashed over the boat's bow so as to wet, all over, the passengers. . . . Pieces of ice were still floating around, and . . . icebergs had been seen. . . . [T]he rain falling rather heavily . . . and the boat having considerable water in it, the [first] mate, who had been bailing for some time, gave it up, explaining 'This work won't do. Help me, God. Men, go to work.' Some of the passengers cried out, about the same time: 'The boat is sinking. . . . God have mercy on our poor souls.' But the crew did not respond to the mate's order. A few minutes later, the mate shouted to the crew, 'Men, you

must go to work, or we shall all perish.' They then went to work; and . . . before they ended, 14 male passengers, and also 2 women" were thrown overboard to certain death by drowning.

It appears from the court testimony of the survivors that the selection and casting overboard of the 14 men took many hours; the last two consigned to a watery grave were not dispatched until dawn. The weather improved and early in the morning the longboat with its remaining occupants were seen and rescued by a ship. The survivors in the jolly-boat were saved by another ship, but not until after they had spent six days and nights adrift on the high seas.

A year later, in 1842, in federal court in Philadelphia, one and only one member of the crew was indicted under the provisions of a federal statute to the effect that "the punishment for certain crimes against the United States" shall be imprisonment for not more than three years and a fine of not more than a thousand dollars. The crime in question was "manslaughter on the high seas" committed by any "seaman" or other person. In the aftermath of the sinking of the *William Brown*, the sole person charged under this statute was not the ship's captain, not the first mate, but a mere crewman, Alexander William Holmes by name.

Holmes was 26, Finnish by birth, a sailor since his youth, and—once more, in the words of the court reporter—with a "frame and countenance [that] would have made an artist's model for decision and strength." He was the last crew member to leave the sinking ship, having performed heroically in rescuing passengers who otherwise would have drowned trying to escape. While in the longboat he had given to the women on board "all his clothes except his shirt and pan-

taloons." It was he who spotted the rescue vessel, and thanks to "his exertions the ship was made to see, and finally to save them." At the trial, the captain testified that Holmes "was always obedient to officers. I never had a better man on board ship. He was a first rate man." And so he seems to have been.

II

So much for the facts. Let us begin by identifying the principle of selection on which the crew acted in deciding whom to throw overboard (this and other principles to be mentioned have been listed on p. 35). According to testimony in court, the first mate ordered the crew "not to part man and wife, and not to throw over any women." (Whether the two sisters who went overboard did so in a futile attempt to save their brother or out of despair over his imminent death was never resolved.) Evidently, the mate ignored his own earlier proposal to the captain, if proposal is what it was, to hold a lottery to determine who would be thrown over. Except for the mate's admonition about spouses and women mentioned above, the court reporter tells us, "[t]here was no other principle of selection. There was no evidence of combination among the crew [that is, no conspiracy to drown some passengers]. No lots were cast, nor had the passengers . . . been either informed or consulted as to what was [to be] done." The result of following the mate's order was that all the male passengers were thrown overboard except for two married men whose wives were in the longboat and a small boy.

So it looks as if the first mate's order and the crew's actions rested on a selection principle we might call *Save Families*,

Women, and Children. However, this is not so. For we also learn from the court reporter that "[N]ot one of the crew was cast over"—which provoked the reporter to add, somewhat ominously, "One [of the crew], the cook, was a negro." The failure to cast out of the boat any of the crew cannot have been accidental; it must have been intentional. If so, it looks as if the crew interpreted—indeed, significantly revised—the selection principle implied by the mate's original order. Their conduct amounted to acting on a principle we might call *Save Families Plus Crew* (construing families here to include single women and children as well as married couples). We should note, however, that there is no evidence that the mate protested this interpretation or revision of his principle, and so it may well be that *Save Families Plus Crew*—below, I shall refer to this as the *operative selection principle*—did in fact express his unstated intention.

Why were Holmes and the other crew members willing to act on this principle? It is plausible to understand the first mate's order and the crew's compliance with it as their best judgment in the circumstances of how to achieve the goal of saving the most possible lives. The point of the selection principle was to achieve this goal. Other possible goals suggest themselves, admittedly, but the goal I shall call *Save the Most Possible* seems to me the right way to describe the end to which the mate's order and the operative principle were understood to be the means.

Another principle is also at work here. We cannot understand what Holmes and the other sailors did unless we grant that they were also acting in compliance with a principle we might call *Sailor's Duty to Obey Orders*. The mate, it will be recalled, told the crewmen to "go to work, or we shall all

perish." Without some such direction from the mate, it is difficult to understand Holmes's behavior. At the trial (if we can trust the court reporter), no one suggested that Holmes took it upon himself to decide *when* to throw passengers overboard, or *whether* to throw them overboard, or even *whom* to throw overboard. We can reasonably suppose that if the first mate had ordered Holmes to act according to some other principle of selection, Holmes would have done so in the same resolute manner in which he acted on the operative selection principle.

The principle of Sailor's Duty to Obey Orders, understood as a principle of justification of questionable conduct, has its reciprocal in the *Defense of Superior Orders*. We know from the Nuremberg Trials in the 1940s and the My Lai court martials in the 1960s, as the court that tried Holmes also knew, that this defense cannot be invoked without careful qualification. But Seaman Holmes was no Gauleiter Julius Streicher, or even a Lieutenant William Calley. Crimes against humanity committed by those officers cannot be justified on the ground that they were merely carrying out superior orders. Even if they did not know that what they did was criminal, they should have known, for they had adequate time in the circumstances to reflect on their orders and sufficient intelligence and information to cause them to realize the nature of their deeds. Can we say as much of Holmes—that he, too, should have known the first mate's order was unlawful and immoral, assuming for the moment that it was? I do not think we can. To do so implies that Holmes had time to reflect on and weigh the mate's order, that a mere sailor ought to be able to tell the difference between a legitimate and an illegitimate order issued in the direst of circumstances, and

that he ought to be able to decide whether to obey or disobey an order of doubtful legitimacy. These are unacceptable implications. So, even if we are inclined to judge the mate's order as unlawful and immoral, that would not suffice to find fault with Holmes for obeying it and interpreting it as he did.

III

We come now directly to the question of the legitimacy of the operative selection principle. The question divides into two parts: On what ground was *this* principle chosen over alternative selection principles? and On what ground was *any* principle of selection chosen? Let us address the second question first.

Much, even if not quite everything, in this case hinges on whether it really was *necessary* to cast anyone overboard. The question is obviously crucial, because if the answer is in the affirmative then there is a strong argument in support of what Holmes did. Not, to be sure, an argument wholly exonerating him, because it could still be objected that the wrong selection principle was used to determine who should be sacrificed—a point to which I shall return shortly. In any case, the question of the necessity with which Holmes acted cannot be answered straightforwardly, as though it were like the question, Is it necessary for a body unsupported in space to fall toward the earth's surface? or like the question, Is it necessary that every vixen is a female fox? For no natural law or semantic rule, as in these cases (respectively), governed the lives and deaths of those in the longboat. Any necessity for some in the boat to die was itself a contingent necessity, a necessity, that is, contingent on the prior acceptance of the goal of saving

some lives and contingent on the absence of any other mode of flotation for those ousted from the longboat. So the question that needs to be answered here is, rather, this: Was it necessary for some to be cast overboard and thus to die by drowning so that others in the longboat could have an improved chance of survival?

The answer depends on two very different considerations. One is the facts of the matter, that is, the circumstances of the sea; the weather; and, especially, the condition of the longboat; and the beliefs about these matters held by the first mate, the crew, and the passengers. The other is the acceptability of the selection principle connecting the end of survival to the means of survival. At its most abstract, this principle of justification declares that if not all can survive and if the deaths of a few are a necessary (although not a sufficient) condition of the survival of many, then those deaths are justified. Let us call this the *Sole Means Necessary to the End* principle. What I have called the operative selection principle, Save Families Plus Crew, is just a mode of implementation of the much more fundamental principle of justification, the Sole Means Necessary to the End principle. Let us look more closely both at the facts and at this new principle.

First, the facts. Testimony in the court record on the condition of the sea, the weather, and the boat is not unambiguous; there is no certainty about the actual state of the weather and some uncertainty about just how bad the first mate, crew, and passengers thought the weather was. But put yourself for the moment in the soaking wet and bitterly cold shoes of the first mate in the longboat. You are in charge, and the lives of all turn on your judgment. You have no way of knowing whether the seas will worsen, perhaps rapidly, and no way of knowing whether the leaky boat will leak more extensively or

how much more water over its bow and gunwales the overloaded boat will take on if the wind freshens, and how much more it can take on without becoming swamped. In acting on any principle of selection the margin of error is very slim indeed. Better to err on the safe side, if error there must be—or so the first mate may well have thought. And while it is true that within a few hours the weather did improve, it will forever remain uncertain whether the leaky and overcrowded longboat could have survived the half-dozen or so hours from 10 o'clock to dawn if the boat's load had not been lightened of some of its human cargo. Keeping in mind the perilous condition of everyone in the longboat, I think many would be ready to agree with me that it was necessary—or at least reasonable for experienced seamen to believe it was necessary—for some to get out of the boat if any in the boat were to have a chance of surviving the night.

If we reach such a judgment, however, we are sharply at odds with the court of law in which Holmes was tried. The prosecutor, George M. Dallas, argued that none of the homicides Holmes caused was necessary, and the trial judge, Circuit Justice Henry Baldwin, going by his charge to the jury, seems to have agreed. The law on the defense of necessity, according to Baldwin, requires that "[t]he peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person." The clear but tacit implication of this remark was that the jury should conclude on the facts as shown that the defense of necessity should fail. And the jury eventually agreed, finding Holmes guilty of manslaughter as charged.

However, before we agree with the prosecutor, the judge, and the jury, we need to consider two objections to their view. By defining necessity as he did, Judge Baldwin seems to

imply that if Holmes really had acted in necessity, he could not have acted on the principle he did act on, namely that of Save Families Plus Crew. Instead, the judge implies, Holmes would have had to act on a very different selection principle, one we might call *First Reached, First Overboard*. This is a better principle on which to act in the face of a "peril [that is] instant, overwhelming," and "leaving no alternative." Under this principle of selection, Holmes, and whichever fellow crewmen were handy, when threatened with imminent swamping in the overloaded boat pitching among the waves in the black of night, would have simply thrown over whom-ever they could reach first, not bothering about niceties of gender or marital status and not stopping to ascertain who was crew and who was passenger. So the fact that Holmes did not act on the principle of First Reached, First Overboard virtually proves that his defense of acting out of necessity ought to collapse. Or so this argument implies. This is reinforced if, as testimony in court alleged, the time from which the first person to the last was cast over the side was six hours or more.

One consequence of this reasoning is that Judge Baldwin must view the defense of necessity as an excuse for homicide, not a justification. One *excuses* oneself from blame for the harm one has done to another by conceding that it was wrong to cause the harm, but that nevertheless in the circumstances it couldn't be helped and that therefore one can't really be blamed for it. Thus, if one cannot help but strike out to save one's own life, circumstances preventing any deliberation and reflection, then one ought to be excused by the law. One *justifies* oneself for causing harm to another by showing that one did it deliberately and after due reflection, because in the

circumstances it was the right (or the best) thing to do. Judge Baldwin in effect advised the jury that although there could be no justification for what Holmes did, he could be excused if he acted of necessity. But he couldn't be excused since he did not act of necessity, as necessity is defined in the law.

I do not find this reasoning convincing, any more than I find myself in agreement with the jury that there was no necessity facing those in the longboat to lighten the load as promptly as possible. As for the aspect of the argument that turns on the facts, I see no way to settle it to general satisfaction. It seems to me the mate must have believed the overloaded longboat faced danger from swamping at every minute; why else would he have ordered the crew to throw anyone overboard? And if it was reasonable for Holmes to believe the mate, who by hypothesis believed the danger of swamping was imminent, then it really doesn't matter whether swamping was imminent. Holmes, the first mate, and the rest of the crew in effect acted on the Sole Means Necessary to the End principle, and that principle, had they thought of it, would have assured them that the deaths they caused were justified by the even greater number of deaths their actions averted.

IV

Deferring for the present any closer scrutiny of that principle of justification, let us shift our attention to the operative selection principle, Save Families Plus Crew, and start by considering some alternatives to it. Consider first a scheme that might seem to obviate any need for a selection principle at all. This scheme requires us to distinguish between lightening the

boat's load and throwing persons overboard to drown. Why not (so this scheme suggests) lighten the load by the expedient of everyone taking turns in the water? Surely, under the crew's supervision, a regular rotation could have been set up so that a dozen or so in the boat would climb out, hang on to the gunwales for half an hour, and then climb back in as others climbed out to take their turn in the cold water. Couldn't all have survived this way—or at least more than did survive? Shouldn't the necessity to lighten the longboat be kept distinct from any necessity for some to drown?

But trying to undermine the necessity for casting some overboard by appeal to a scheme of rotation in and out of the longboat stretches credulity to the breaking point; it is hopelessly unrealistic, and in this regard is like several other selection principles alternative to the operative principle.

To illustrate the point, let us consider two among the many such alternative principles. One we might call *Save the Best*, an elitist principle that tells us to protect from drowning those most fit among the passengers and crew, according to some criterion of fitness. The other principle is familiar from its applications in layoff and redundancy judgments, the principle of seniority, or *Last In, First Out*. Trying to act on either of these selection principles would certainly have proved completely unmanageable in the circumstances, for reasons I trust need not be spelled out. We must put them and other abstractly attractive but functionally futile principles entirely out of mind. In our judgment about relevant and appropriate principles, we must keep firmly before us the conditions of the boat and the weather, the terror of the passengers, the uncertain loyalties of the crew, and the apparent necessity of quickly lightening the human cargo in the longboat, even

elitist
rotation

though doing so meant virtually certain death by drowning for those cast overboard. Whatever may in the end be said against the operative principle, one cannot object that it is not a feasible principle on which to act in pursuit of the goal Save the Most Possible.

Notice, by the way, a certain inescapable vagueness in the actual application of whatever selection principle is chosen. Given that some must exit the boat to certain death, no matter what principle of selection is chosen, the question remains, How many should be forced to do so? Why more than a dozen, 16, to be exact (or 14, if you prefer to believe the two sisters went overboard voluntarily)? Why not only 10? Or eight? Or six? We have no answer to this question. No hint of a reason is given for the decision—apparently Holmes's, as he interpreted the first mate's order, and as was at least acquiesced in by the mate—to throw overboard *all* the unmarried male passengers. Perhaps we may conjecture that Holmes and the first mate thought along these lines: First, to ensure that a real margin of safety for those remaining in the boat had been obtained by sacrificing some, it was desirable to sacrifice one or two more rather than one or two fewer, and, second, the only way to be fair to all the unmarried men was to not choose among them but to sacrifice them all. Not very convincing reasons, perhaps, but if there are better ones they have not occurred to me—any more than they apparently occurred to the mate or the crew.

V

Returning now to the operative principle, Save Families Plus Crew, we must notice that this principle—as well as any alter-

native to it on which Holmes might have acted—has a feature widely thought to condemn it as unfairly applied in such circumstances: Those who were to live and die by the application of the operative selection principle never consented to be judged by it. No agreement was signed by all the passengers when they boarded the ship that, were the ship to sink and necessity indicate the need to sacrifice some, they would be sacrificed according to the principle Save Families Plus Crew. Nor was any poll taken of the passengers in the longboat to see whether all subscribed to this principle. So one must wonder with what right the captain and the first mate gave orders to the crew to implement a principle that no one could be sure all the passengers accepted. Surely, some will say, it is no more up to the officers of the ship to decide what principle to act on than it is for the passengers to decide on their own.

Why might we insist on explicit unanimous consent to a principle of selection before it is applied? Because there is no other way to respect the equal rights of all the persons involved. No one has the right to use me as a means to the ends of others without my voluntary and informed consent, or so many philosophers have said, beginning with Kant—and for that reason I will call this the *Kantian Condition*. If we accept the Kantian Condition, we must reject the operative selection principle as applied in the longboat. More than that, if it is a necessary condition of justifiably applying a principle of selection that there be explicit unanimous consent to that principle, then no selection in the longboat was morally permissible. So we must also reject what I have called the principle of the Sole Means Necessary to the End, because that principle justifies the death of some when it is a necessary condition to the survival of others, whether or not they consent. Such a principle clearly flouts the Kantian Condition.

So we see that the first mate and the crew ignored the Kantian Condition. They acted on a principle of selection not knowing whether any, much less all, of those to whom it would be applied had consented to it. In so acting, they did what many would call violating the rights of others—albeit in a good cause. We can also say that the court, in trying Holmes for manslaughter, also ignored the Kantian Condition, as will become evident when we consider the court's somewhat equivocal endorsement of a lottery as the proper principle of selection.

Earlier, I said that if one accepts the Kantian Condition as a necessary constraint on any acceptable principle of selection, then no principle of selection is available to those in the longboat. That is a hard conclusion to accept. Perhaps we could evade it by arguing that the operative principle ought nevertheless to be accepted, for two reasons. First, it is a better principle than any competing principle in the circumstances, as we will see after identifying and evaluating the competing principles. Second, if all principles of selection are rejected, because all violate the Kantian Condition, that forces us to embrace what we might call the principle of *Shared Disaster*: Where not all can survive, although most could (or at least could have an increased likelihood of survival), but only at the expense of others, none of whom will volunteer for a sacrificial role, it is better for none to survive.

VI

To act on the principle of Shared Disaster, the first mate would have had to ask for volunteers to go overboard, and, getting no response, would then have had to inform everyone in the boat that since there were no volunteers, and since no

one would be selected for being cast overboard without his or her consent to the principle of selection, and since there was no consent to any principle of selection, everyone should understand that under the prevailing conditions the boat would probably sink and all would drown, Amen. Obviously, Shared Disaster is not a principle of selection at all; rather, it is the default position when all principles of selection have been rejected.

In reflecting on this outcome, we need to ask, Is it better for those in the longboat to accept the Kantian Condition, thus rejecting all principles of selection in favor of the principle of Shared Disaster? Or is it better for them to act on some selection principle, because *any* such principle is better in its outcome than Shared Disaster? If the criterion for acceptance of a principle is whether it would be accepted unanimously behind a veil of ignorance (where one imagines oneself deprived of all knowledge about one's own circumstances, for example, one's age or sex or talents), then Shared Disaster is inferior to any selection principle. For anyone could see—not knowing whether he or she was a passenger or crewman, adult or child, male or female, married with spouse present or not—that one had no chance of survival under Shared Disaster, whereas there was some chance of survival under any selection principle—and, a fortiori, a chance under the operative principle. All would prefer some (not necessarily the same) selection principle over Shared Disaster, purely on grounds of self-interest. Of course, all this reasoning proves at best, it might be argued, is that if the choice among principles is to be based on self-interest behind a veil of ignorance, then it is clear which of these two principles would be chosen. But this fails to show which principle is the better, since it is always possi-

ble that the better principle is not the one chosen out of self-interest behind a veil of ignorance.

As an example of a selection principle that is arguably better in this context than either the operative principle or the principle of Shared Disaster—but not more likely to be chosen behind a veil of ignorance—consider the principle we might call *Self-sacrifice of the Weak*: Where many can survive only if not all survive, then it is best if the few who are weak, infirm, aged, or otherwise burdensome choose to sacrifice themselves for the survival of others. (Do not confuse the principle of Self-sacrifice of the Weak with another principle, *Sacrifice the Weak*; the latter is functionally equivalent to Save the Best, and is no more applicable here than that principle is.) Self-sacrifice of the Weak comes close to the principle on which Captain Titus Oates acted in 1910 in the Antarctic when, sick and, as he probably believed, dying, he crawled out of the snowbound tent shared with his fellow explorers into a roaring blizzard and did not return, thereby deliberately lightening the burden on his comrades and giving them a better chance of survival. Although his act proved futile (everyone on the expedition eventually perished anyway), to this day Oates is celebrated as a selfless hero. The esteem in which he has been held for nearly a century is strong evidence, if not proof positive, that the principle on which he acted is morally superior to all alternatives that would have had him acting otherwise (or acting as he did but for different reasons). (Notice, by the way, that Oates's sacrifice does not flout the Kantian Condition, since he chose to make the welfare of others his own end—that is, he chose to act in a manner that made his action a means to further the survival of others, an end he freely and knowingly endorsed.)

This ought to encourage us to say that if you grant the paramount importance of some in the longboat surviving and the proposition that not all can survive in the circumstances, then you ought to agree that the best of the relevant principles for selecting who shall die was not the principle on which the crew acted in carrying out the first mate's order. But we must also say that the principle of Self-sacrifice of the Weak, however excellent it may be, was not a principle, apparently, on which anyone in the longboat was prepared to act. This is proved by their actual conduct. And this suggests that we need to search for a second-best selection principle, one we hope those in the lifeboat could have agreed, in principle, to act on in the circumstances, even if in practice their agreement to this or any other principle could not be obtained. This brings us right back to the operative principle itself.

VII

Given that a few in the longboat must get out and drown if the rest are to survive, one may nevertheless doubt whether Save Families Plus Crew was the best principle of selection in the circumstances. Surely, for us today this principle suffers from an overly sentimental devotion to "family values." Worse than that, it seems selfish beyond belief to protect the crew from any risk of being sacrificed for the greater good, especially if some of the crew (such as the cook) were no more adept at handling a small boat than we can assume at least some of the single male passengers were. Why not act on a principle we might call *Equal Risk*, under which all in the longboat would have roughly equal risk of being thrown

overboard? The way to have implemented that principle would have been by a fair and inclusive lottery, which was what the first mate, it will be recalled, had originally mentioned to the captain (although at the time he ignored it) before the two lifeboats separated. Surely, Equal Risk appears to be the principle most likely to withstand criticism for choice behind a veil of ignorance.

Perhaps not. In the case as reported to us, we hear no defense of the operative principle, Save Families Plus Crew. Speaking briefly on its behalf, I suggest it is defensible on three grounds. First, as to choosing only single male passengers, little or no problem arises in determining who in the lifeboat meets that description. So the principle is easy to apply consistently, although hardly uniquely so. Second, whereas a wife would be likely to come under the protection of her husband, and vice versa, no matter under what principle one spouse but not the other might have been chosen to be thrown overboard, no one in these circumstances was likely to come to the defense of a single male passenger. If, therefore, any were to be thrown overboard, it was best to throw overboard those most easily disposed of without interference, namely, the single male passengers. Finally, as to exempting the crew, is it not plausible to believe that without any crew there was little or no chance that any passengers would survive the unpredictable ordeal ahead? (No one could know that the ordeal would last only one night; recall that nearly a week passed before those in the jolly-boat were rescued.) To be sure, refusing for this reason to cast overboard all of the crew is not an argument for refusing to cast any of them overboard. Yet imagine the fight that might well have broken out among

the crew had Holmes and one or two other crewmen tried to oust the rest of the sailors. Surely, avoiding such a struggle was in everyone's interest.

~ In sum, it may be excessive to say of the operative selection principle what defense counsel Edward Armstrong said when he described it as a "clear dictate of humanity" and "the only principle of selection which was possible in an emergency like theirs." But I would insist that Save Families Plus Crew is not bereft of reason, and that behind a veil of ignorance it might well triumph, after due reflection, even over Equal Risk as the best principle to apply in the circumstances. For the issue between the two principles, Equal Risk and Save Families Plus Crew, is this: Would you prefer a greater chance of staying in the longboat (offered by Equal Risk) or a greater chance of survival if you are lucky enough to remain in the longboat (offered by Save Families Plus Crew)?

VIII

The prosecution and the court, however, looked at the choice among selection principles very differently. Dallas, the prosecutor, in effect insisted on two major points. He argued, first, that several considerations governed the behavior of those in the longboat: the paramount goal of *Passenger's Safety First*, the principle of *Sailor's Duty of Self-sacrifice*, and the principle of Equal Risk. Second, Dallas implied that Holmes had violated all three. Let us look more closely at his arguments.

First, he argued that it was contrary to all the rules of the sea for the crew to be immune from fatal risk, as they were under the operative principle. "We protest," he declared, "against giving to seamen the power thus to make jettison of

human beings, as of so much cargo; of allowing sailors, for their own safety, to throw overboard, whenever they may like, whomsoever they may choose. . . . The seaman, we hold, is bound, beyond the passenger, to encounter the perils of the sea. To the last extremity, to death itself, must he protect the passenger. It is his duty." The judge echoed these sentiments, saying in part, "The sailor is bound . . . to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to call for the sacrifice of life, there can be no reason why the law does not still remain the same. The passenger, not being bound either to labour or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailor's."

On this showing, it appears that only crew members should have been thrown overboard if any persons were to be thrown, or at least that all crew members would have to be cast over before any passengers. But there are two objections to this course of action. First, as we have seen, Holmes and the other crewmen clearly believed it was their duty to obey the orders of the first mate. Are we to think that in the circumstances they should have realized that their duty to the surviving passengers overrode their duty to obey the ship's officers? As for Passenger's Safety First, no one will dispute that it is of paramount importance. But it is not clear that this principle is violated by acting on the operative selection principle. After all, in acting as they did, the mate, Holmes, and the other crewmen managed to save the lives of 18 passengers, as well as their own. As for the principle of Sailor's Duty of Self-sacrifice, no doubt there is much to be said for it. Yet one must wonder whether, when Holmes heard it in-

voked by Judge Baldwin in open court, it was the first time he had heard of it.

Second, if Holmes and the rest of the crew, including the first mate, acted on the principle Sailor's Duty of Self-sacrifice, how would the longboat then have been handled, with none but terrified and inexperienced passengers left on board? Indeed, the goal of Passenger's Safety First, coupled with the goal of Saving the Most Possible, arguably required rejecting Sailor's Duty of Self-sacrifice in the circumstances. This obvious possibility was simply ignored by the prosecutor. Judge Baldwin, however, was more cautious; he rightly said that "The captain [for whom in this context read the first mate] . . . and a sufficient number of seamen to navigate the boat, must be preserved." But this proviso effectively nullifies any reliance on the principle of Sailor's Duty of Self-sacrifice in this case, since even if all and only the eight crew members and the first mate had been thrown overboard, that might not have been enough to give the rest the added margin of safety plausibly believed to be required in the circumstances. It would also have introduced a new element of risk for the passengers lucky enough to be in the longboat but unluckily now required to fend for themselves in turbulent seas.

IX

This may be a natural point at which to ask whether the passengers had a right to their seats in the longboat, such that throwing any of them overboard would violate their rights. Consider the issue more abstractly. Suppose there is exactly one life preserver or one vacant seat in a lifeboat, and two

persons, a passenger and a crewman, claiming it. Which, if either, has a right to that life preserver or seat? Surely, in the absence of some special explanation, it is the passenger who has the right, exactly as Judge Baldwin implied. The principle discussed earlier, Sailor's Duty of Self-sacrifice, can be seen as a reflection of the fact that passengers have rights that entail duties for sailors, whereas passengers as such have no duties that arise from any rights of sailors.

But this is of little help in the context of our case. If any passengers have a right to sit in the longboat, then all do, and their rights are equal. Since in the longboat there was not enough space for all (and only) the passengers while maintaining the minimal margin of safety against swamping, the problem becomes one of fair allocation of seats among too many passengers with equal claims. Given the necessity to lighten the boat, some passengers or some crew must be thrown overboard. Accordingly, the prosecutor argued that if the principle of Sailor's Duty of Self-sacrifice proved unconvincingly demanding, then another principle of selection should have been used. "Common settlement," he said, "would . . . have fixed the principle of sacrifice, and, the mode of selecting involving all. . . . [A]t sea, sailor and passenger stand upon the same base, and in equal relations." In other words, the principle of selection should be Equal Risk and the method a fair lottery in which all would participate equally. Dallas did not connect his argument for a lottery to any claim of rights by the passengers, although he might well have done so. Again, however, Judge Baldwin was more cautious. He agreed with Dallas that, abstractly considered, that is, apart from circumstances, "selection . . . by lot . . . is resorted to as the fairest mode, and, in some sort, as

an appeal to God, for selection of the victim." But unlike the prosecutor, the judge conceded that in the actual circumstances it might have been unreasonable or even impossible to contemplate selection by lottery. Perhaps this is what the first mate thought, too; for, as we have seen, he did not in the end propose any such lottery in the actual circumstances.

Surely Judge Baldwin was right. Defense counsel Armstrong put it more strongly: "[W]ho has ever told of casting lots at midnight, in a sinking boat, in the midst of darkness, of rain, of terror, and of confusion? To cast lots when all are going down, but to decide who shall be spared . . . is a plan easy to suggest, rather difficult to put in practice." Quite so. The principle of Equal Risk, like the alternative principles Save the Best and Last In, First Out, is simply not a feasible principle on which to act in order to sacrifice some lest none survive, all the while endeavoring to save the most possible in the circumstances.

Again, two interesting points suggest themselves. First, we might imagine getting around the difficulty of holding a lottery in the longboat by deciding instead to rely on a different kind of arbitrary principle of selection, one well known to the armies of ancient Rome: the principle of *Decimation*. Here's how it would have worked: By counting, the first mate determines that there are (for simplicity's sake, let us say) 36 people in the boat and that 12 must be thrown overboard. Accordingly, he instructs Holmes and two crewmen to throw overboard every third person, regardless of who it is. Such a selection principle has the same features of randomness and fairness that recommend a true lottery, but it is far easier to administer. Whether it could be both judged superior to the operative selection principle, and implemented in the circum-

stances as effectively as that principle, I will not pause to consider.

The court, however, perhaps owing to an excess of enthusiasm for the principle of Equal Risk, overlooked a point that friends of the Kantian Condition would not: However fair a selection by lottery may be, acting on the principle of Equal Risk is only marginally better than selection by any other principle as long as not all consent to decision by lottery. Since the court failed to give any weight at all to the Kantian Condition, its support for a lottery places the court among those who accept without qualms the principle of justification I previously called the Sole Means Necessary to the End.

As for the equal rights of the passengers to seats in the lifeboats, one might argue that these rights entailed duties of the shipowners to see to it that before the ship left port it was suitably equipped with state of the art life-saving equipment, and that their failure to provide adequate lifeboats violated their passenger's rights. Unless, of course, there is reason to think—as surely there was—that the passengers in effect waived their rights to such safety measures, or tacitly consented to the lack thereof, because they knew full well the risk they were taking if the ship were to sink, and they chose to run this risk because they couldn't afford transoceanic passage on a ship more adequately outfitted.

X

More light is shed on the Holmes case if we look briefly at how Holmes's conduct might be judged under subsequent law. Critical to that is one final principle, *Choose the Lesser Evil*. This principle is familiar to lawyers as the one that gov-

erns cases in which, as here, there is a choice only between evils. For example, the Model Penal Code endorses the principle of Choose the Lesser Evil, and cites examples to illustrate the principle in action: "An ambulance may pass a traffic light. Mountain climbers lost in a storm may take refuge in a house or may appropriate provisions. Cargo may be jettisoned . . . to preserve the vessel. . . . A druggist may dispense a drug without the requisite prescription to alleviate grave distress in an emergency." In all such cases, the unlawful and harmful conduct is legally justified. It will be noticed, however, that all these examples are quite remote from conduct causing the death of an innocent person in order to save the lives of other innocents—the conduct of which Holmes was found guilty.

Lest you think that the choice of evils doctrine as presented in the Model Penal Code is of recent or peculiarly American development, unavailable to courts of the previous century, consider some remarks made a century ago by Sir James Fitzjames Stephen, an influential Victorian jurist and theorist on issues of law and morals. He cites "the choice of evils" as a justifiable ground for violating the law, and offers as an example of the application of this doctrine a case precisely in point, in which "A boat being too full of passengers to float, some are thrown overboard." Sir James would have instructed Holmes's jury to acquit, provided they accepted the defense's view of the facts.

However, a contrary voice heard midway in time between Judge Stephen and the Model Penal Code, that of the distinguished American jurist Benjamin N. Cardozo, deserves attention. Commenting on the Holmes case, Cardozo observed:

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

Justice Cardozo would have voted to convict Holmes, and whether he would have allowed any defense of superior orders, of necessity, or of choice of the lesser evil in homicide cases seems doubtful. The extreme caution of Justice Cardozo's counsel, however, is not the prevailing one, as the Model Penal Code's treatment of the same problem shows. In its commentary on the passage quoted above, the Code says this:

It would be particularly unfortunate to exclude homicidal conduct from the scope of the defense [of choice of evils]. . . . [C]onduct that results in taking life may promote the very value sought to be protected by the law of homicide. . . . The life of every individual must be taken . . . 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. . . . 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.

How does all this bear on what the law would say today about Holmes's conduct? I remind you that his counsel at trial did not offer a choice of evils defense, the prosecution did not introduce mention of such a defense in order to criticize it, and the trial judge did not instruct the jury either way on this defense. This line of argument thus played no explicit role in the proceedings against Holmes at all—although one could argue that it was buried in the controversy at trial over whether any of the deaths was really “necessary.”

But supposing it had been explicitly introduced by the defense—what then? Under the criteria afforded by the Model Penal Code, Holmes should have been acquitted—except, some might reply, for the clause in the commentary on the Code imposing the requirement that “the choice among lives to be saved is not unfair.” We have seen that it was essential to the court's reasoning that Holmes unfairly chose those to be sacrificed, first in exempting all the crew, and second in not choosing by a fair lottery those to be sacrificed. So, on closer look, it appears that under the Code Holmes might well have been convicted, as he was, although not quite for the reasons that Justice Cardozo implied he should have been.

However, I have previously argued that these two points—Holmes's failure to put any of the crew in the lifeboat at risk, and his failure to choose a fair system of sacrifice—on which the court seems to rest so much weight are not so conclusive against Holmes as the court seemed to think. (I note in passing that Judge Stephen, in a brief comment on the Holmes case, declared that the rationale resulting in the instructions to the

jury was “over refined”—just what one might expect from a card-carrying utilitarian such as he.) Indeed, once you grant that the choice of evils defense is legitimate in some cases, it will be difficult to refuse to apply it also in some cases of homicide. And once that is done, it will be extremely difficult to refuse to favor acquittal for Holmes. Of course, Holmes's actions represent the acting out of a terrible choice—a point blurred by any principle, theory, or reasoning that would too easily justify Holmes. But he is not to be faulted for trying to reduce the scope of the tragedy, any more than he is to be faulted for bringing about the circumstances in which a dreadful choice had to be made.

It will not have gone entirely unnoticed that the Model Penal Code appears to rest its support for the principle Choose the Lesser Evil on the weak fact—although it is a fact—that “most persons probably think a net saving of lives is ethically warranted if the choice among lives to be saved is not unfair.” Can we say no more on behalf of this principle than that “most people probably think” it is sound? Philosophers are tempted to solve this kind of problem by taking refuge in some more abstract and inclusive principle from which a derivative principle, such as Choose the Lesser Evil, can be deduced. That is not the path I will take here. For principles such as this one are no better than the results they dictate in application, and we have no independent standpoint from which to render any final assessment of those results apart from prior or concurrent adoption of the very principles we would test. The U.S. Supreme Court once remarked that the Constitution is not a “suicide pact.” Well, neither is morality. It is also not a conspiracy of assassins. Surely, the role of a moral code or of moral principles is to constrain our

choices in order to preserve our values, chief among which is equal respect for persons and for their lives, autonomy, and welfare. One way to do that in the circumstances in which Seaman Holmes found himself was to do just what he did.

XI

As I mentioned earlier, the prosecution prevailed; the judge virtually instructed the jury to bring in a verdict against Holmes of guilty of manslaughter as charged, and it did. However, noting that Holmes had already been in jail for several months and that there were many (in the words of the court reporter) "circumstances in the affair" (by which he meant what we would call mitigating factors), Judge Baldwin sentenced Holmes to six months of solitary confinement at hard labor and a fine of \$20. Although pardon was sought from President Zachary Taylor, it was denied. Thus was the majesty of the law and respect for human life upheld on the high seas, even in tragic circumstances.

In the end, I think Holmes had grounds for complaint at the way he was served. There is no reason to believe that he alone was guilty, if any were guilty, of manslaughter. There is no reason to believe that his interpretation of the first mate's orders, which had him acting on the principle of *Save Families Plus Crew*, was inappropriate; the record fails to show that the mate or any of the crew objected to acting on this principle as or after Holmes took the initiative to act on it. (The record does show that some passengers objected.) There is no reason for us to believe that he believed, or that he should have known, he was carrying out unlawful orders of his superior officer. Weight must surely be given to Holmes's good-faith belief that, in acting as he did, he was carrying out

the lawful orders of his superior officer, orders duly weighed in the circumstances and for which that officer must eventually answer, if anyone must. The selection principle of *Save Families Plus Crew*, under which Holmes acted, has a claim to be at least as good in the circumstances as any feasible alternative principle. And one might even try to outflank the way the Kantian Condition vetoes this principle by arguing that in accepting voyage on the high seas the passengers tacitly consented to abide by the judgment of the ship's officers in fair weather and in foul, and so they have no complaint on Kantian grounds for the decision by the first mate to select all and only single male passengers to be sacrificed for the good of the rest.

True, all this taken together does not erase the fact that Holmes did assist in causing more than a dozen homicides. He did throw and help others throw overboard a number of persons in full knowledge that they would soon die by drowning, even though he did it without malice or other obviously blameworthy motive. The fact that Holmes stood to gain (although not he alone) from the deaths he caused cannot be denied; but as it is not clear he stood to gain unfairly, we must not let this weigh too heavily against him. In sum, I cannot conclude that Holmes did the wrong thing in acting as he did, and so I cannot think his punishment—lenient though it must have seemed in its day—was deserved.



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