1999

The Case of the Speluncean Explorers: Revisited

Cass R. Sunstein

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

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

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

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

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

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

I

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

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

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