FURTHER DEVELOPMENTS

ANY WHICH WAY BUT LOOSE: INTERPRETIVE STRATEGIES AND ATTITUDES TOWARD VIOLENCE IN THE EVOLUTION OF THE ANGLO-AMERICAN “RETREAT RULE”

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I

INTRODUCTION

If any one be in danger of receiving a buffet, or the like evil, some hold that he has a right to protect himself by killing his enemy. If merely corrective justice be regarded, I do not dissent. For though a buffet and death are very unequal, yet he who is about to do me an injury, thereby gives me a Right, that is a moral claim against him, in infinitum, so far as I cannot otherwise repel the evil. And even benevolence per se does not appear to bind us to the advantage of him who does us wrong. But the Gospel law has made every such act unlawful: for Christ commands us to take a buffet, rather than hurt our adversary; how much less may we kill him? . . . Hence it appears also that that is wrong which is delivered by most writers, that defense with slaying is lawful, that is by Divine law (for I do not dispute that it is by Natural Law,) when flight without danger is possible: namely, because flight is ignominious, especially in a man of noble family. In truth there is, then, no ignominy, but a false opinion of ignominy, to be despised by those who follow virtue and wisdom. . . .

On the Rights of War and Peace
Hugo Grotius

A traveler on a dark road is set upon by an armed stranger. The stranger's assault threatens death or atrocious physical harm. The traveler pulls out a knife or a gun and kills the assailant. Has the traveler done something wrong—or, more precisely, something for which the legal system should punish him or her? Most contemporary Americans, faced with the facts above, would likely say that the traveler has killed in self-defense and thus has committed no crime. Further, most would likely perceive the scene described above as an easy case. H. L. A. Hart writes, “Killing in self-defence is an

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exception to a general rule making killing punishable; it is admitted because the policy or aims which in general justify the punishment of killing (for example, protection of human life) *do not include cases such as this.*"¹

But easy cases may make bad law. Two problems arise in the analysis of the uncomplicated narrative above. First, the very ease of the case conceals a contradiction: If "protection of human life" is a paramount goal of the criminal law, the incident on the highway, so far from falling outside the policy, must fall squarely within its purview. An act of violence has been committed, human life has been taken by another human being, and a legal system sincerely concerned with protecting human life should explain the exception in more rigorous terms than Hart admits. The case above seems easy to contemporary thinkers only because considerable historical grappling has been done by the legal system over half a millennium.

Second, the case cited above, in its very archetypality, has the potential to distort legal analysis of actual cases. Available evidence suggests that most killings, even those in which the killer successfully pleads self-defense, are not of the "pure" variety cited above, in which an unknown assailant begins an unprovoked assault on a surprised victim. Instead, the majority of homicides take place after ambiguous confrontations between persons who know each other and have a history of involvement and conflict.² The criminal justice system must assess the culpability of the survivor and decide what, if any, atonement is to be exacted for the act of killing. This complex investigation is powerfully shaped, and often distorted, by the belief of those in the system that they are comparing the actual case before them with the archetype cited above. Our "intuition" about the "easy case," which is in fact a historically shaped perception about a troubling moral dilemma, leads us to view actual events as instances of that case. If there were different "easy cases" available—for example, the now forgotten archetype of "chance-medley" from the common law³—the outcome might often be different.

One aspect of the doctrine of self-defense has proved unusually problematic for theoreticians and courts. What if the traveler, menaced by the stranger's assault, could escape by dashing into a nearby house and closing a sturdy oaken door? To what extent should the law, if satisfied that the opportunity existed and that the traveler knew of it, penalize the traveler for using deadly force instead of running away?

1. H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 13 (Oxford U Press, rev ed 1978) (emphasis added).

2. According to official crime reports, "[o]ver half the murder victims in 1989 were related to (15%) or acquainted with (39%) their assailants. Thirteen percent of the victims were murdered by strangers, while the relationships among victims and offenders were unknown for 33% of the murders." Federal Bureau of Investigation, *Crime in the United States: Uniform Crime Reports for the United States* 12 (1989). These same figures show that 35% of murders in 1989 arose out of arguments, while another 4% grew out of "brawls while offenders were under the influence of alcohol or narcotics." *Id.* at 13. At most, 22% of murders were committed during felonies. *Id.* at 12. These figures remained roughly stable from 1985 to 1989, although felonies, on average, accounted for less than 20% of murders. *Id.* at 13.

3. See notes 32-39 and accompanying text.

The law's answer to this is most authoritatively stated by the Model Penal Code:⁴

The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . except that . . . the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be. . . .⁴

But at the time they adopted the "retreat rule," the drafters of the Code recognized that "American jurisdictions [are] divided on the question . . . with the preponderant position favoring the right to stand one's ground."⁵ In fact, the "retreat rule" has spawned a strong argument—one that has attained the status of law in many jurisdictions—for the contrary rule, a rule of "no retreat."

Proponents of both rules face difficulty in even formulating the rules they favor, and even greater problems in applying them. This is so, at least partly, because of the tangled historical origins of the law of self-defense. Contemporary criminal law attempts to justify morally a number of doctrinal contradictions that arise because the contemporary law of self-defense represents the uneasy yoking together of principles that arose at different times and for different reasons.⁶ They also arise because the distinctions set up by the law—between the "initial aggressor" and the "innocent victim," for example—are in practice unusually hard to make when dealing with actual deadly conflict between real people.

The roots of the retreat rule lie in the distinction made by the medieval legal mind between justifiable and excusable homicide. Contemporary law does not recognize a practical difference between these two categories, but in the early common law they had significantly different elements and practical effects.

Questions of justification and excuse concern the level of responsibility of criminal defendants for the actions with which they are charged. The moral and legal ramifications of responsibility formed the core of a symposium published in *Law and Contemporary Problems* in 1986.⁷ This note constitutes further research into the topic of justification and excuse examined in that issue in an exchange between Professors Kent Greenawalt and Donald Horowitz.⁸

Professor Greenawalt argues that a justified action is "warranted" and "morally appropriate," while an excusable action is merely "not

4. Model Penal Code 3.04(2)(b) (American Law Inst, 1985).

5. Model Penal Code commentaries 3.04(c) (American Law Inst, 1962).

6. See part II.

7. *Responsibility*, 49 L & Contemp Probs (Summer 1986) (Martin P. Golding, special editor).

8. Kent Greenawalt, *Distinguishing Justifications from Excuses*, 49 L & Contemp Probs 89 (Summer 1986); Donald L. Horowitz, *Justification and Excuse in the Program of the Criminal Law*, 49 L & Contemp Probs 109 (Summer 1986).

blameworthy" because the person who commits it is not "fully responsible."⁹ He further argues that unlike moral philosophy, the law "ought not attempt to delineate bright-line distinctions between justifications and excuses."¹⁰ "Legal categorization must usually be responsive to facts discoverable in the legal process," he argues. "One reason, for example, not to require retreat even if the actor knows he can retreat with perfect safety is that it is so difficult for an outsider to appraise whether the actor realized that retreat would be safe."¹¹ Professor Greenawalt concludes that the game is not worth the candle: "A scholar may well be able to develop a comprehensive distinction between legal justification and legal excuse, but he should not expect the necessarily crude materials of statutes and opinions to endorse that distinction."¹²

Professor Horowitz responded to Professor Greenawalt's moral analysis of the distinction with a historical review of its origins.¹³ Because of their disparate historical origins, he argues, excuse relates largely to whether the defendant had free will, while justification relates to whether a defendant had a social status or authority that permitted him or her to commit the challenged action. Professor Horowitz argues that, "[i]t is important to keep straight what is excused and what is justified."¹⁴

This note elaborates upon this difference of opinion as it relates to the issue of retreat and self-defense. Of the two perspectives, I am more in agreement with Professor Horowitz. The law could profitably use finer distinctions, and the line between justification and excuse would be far more useful if it were clearer. To explore the issues raised by the question of retreat, this note will examine the evolution of the "retreat rule," from its origins in the medieval common law of England through contemporary applications of it and its twin in the decisions of American courts. For the sake of focus, the inquiry will center purely on the issue of the duty to retreat. Equally important questions—such as the possibility of an exception to the duty when a person is attacked in his or her dwelling, and the extremely controversial "co-tenant" exception to this "castle doctrine"—will of necessity be slighted in the present inquiry.¹⁵

9. Greenawalt, 49 L & Contemp Probs at 91 (cited in note 8).

10. Id at 99.

11. Id.

12. Id at 108.

13. Horowitz, 49 L & Contemp Probs 109 (cited in note 8).

14. Id at 120.

15. For a highly critical feminist analysis of the "castle doctrine" and "co-tenant exception," see Cynthia K. Gillespie, *Justifiable Homicide: Battered Women, Self-Defense, and the Law* 77-87 (Ohio State U Press, 1989). Gillespie sees both as an expression of pervasive patriarchal and misogynistic thought. The current inquiry is not conducted along feminist lines, but is not intended to slight the importance of the issues she raises.

Academic comment on self-defense and retreat generally is less profuse than one might expect. The classic article on this subject is Joseph H. Beale Jr., *Retreat From a Murderous Assault*, 16 Harv L Rev 567 (1903), advancing an unusual interpretation of the historical common-law rule of self-defense, critiquing the 19th-century leading cases, and advocating stricter adherence to the common-law rule of retreat. Beale's article is critiqued in Rollin M. Perkins, *Self-Defense Re-Examined*, 1 UCLA L Rev 133, 139-44 (1954). The legal literature on this subject also includes A. J. Ashworth, *Self Defence*

Part II will discuss the historical roots of the retreat rule as formulated in the common law of England. Part III will show how the rule was modified in the United States during the nineteenth century, drawing on leading cases to illustrate the roots of the American rule of "no retreat." Part IV will particularize the interpretive strategies American courts have evolved in their application of the new American jurisprudence, then illustrate these strategies by analyzing selected cases in three court systems: the United States Supreme Court, which adopted the "no retreat" rule in 1895¹⁶ but has been ambivalent in its subsequent applications of the rule; Alabama, which adopted the retreat rule from the common law in 1847¹⁷ and has remained officially faithful to it ever since, elaborating upon its meaning in an unusually rich jurisprudence; and Illinois, which in 1902 followed the lead of the Supreme Court in adopting the American rule of "no retreat"¹⁸ and has consistently been counted as a "no retreat" jurisdiction ever since. The conclusion will tentatively suggest specific reforms to contemporary jurisprudence of retreat and self-defense.

II

ROOTS OF THE RETREAT RULE

Saxon law was a rough and ready construct, which treated homicide in "open quarrel" as a matter to be resolved by the payment of damages and fines.¹⁹ The closest analogue of our crime of murder was the secret killing of an enemy by poison or witchcraft, which was punished by delivering the malefactor to the victim's family.²⁰

But by the thirteenth century, a more complex jurisprudence of homicide was in place, including a fully developed differentiation between justifiable and excusable homicide. Justifiable homicide was the killing of a human being in furtherance of royal justice. This category included the execution of a felon sentenced to death or of "an outlaw or hand-having thief or other manifest

and the Right to Life, 34 Camb LJ 282, 293-96 (1975); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 Cal L Rev 871 (1976); and George P. Fletcher, *Rethinking Criminal Law*, § 10.5.4 at 864-75 (Little, Brown & Co., 1978). In addition, Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan L Rev 591 (1981), while not concerned specifically with the issues of self-defense, is an invaluable guide to the strategies courts use to interpret issues in criminal cases.

Shortly before this note was published, Professor Richard Maxwell Brown of the University of Oregon published *No Duty to Retreat: Violence and Values in American History and Society* (Oxford U Press, 1991). Brown, a social historian, traces the evolution of the American rule of "no retreat" from Blackstone, see *id* at 3, to the Bernhard Goetz case, *id* at 174-75. Brown's book is an invaluable resource for any reader interested in the theme of this note or in the larger questions about violence and society it is intended to raise.

16. *Beard v United States*, 158 US 550 (1895).

17. *Pierson v State*, 12 Ala 149 (1847).

18. *Hammond v People*, 199 Ill 173, 64 NE 980, 983 (1902).

19. Frederick Pollock & Frederick W. Maitland, 1 *The History of English Law before the Time of Edward* 52 (Cambridge U Press, 2d ed 1923).

20. *Id* at 52-53.

felon who resists capture."²¹ In opposition to this class of homicide was killing "by misadventure or in self-defence."²² A defendant who killed to save his own life would be convicted and sentenced to death, and would then be required to apply to the king for a pardon. Historical records suggest that such a pardon was routinely given—but that even when it was, the defendant was required to forfeit his chattels.²³

An offense not clearly covered by either doctrine was the killing of a housebreaker by the householder. This ambiguity was clarified in the sixteenth century by a statute moving these killings, in effect, into the group of those committing justifiable homicide.²⁴

The distinction, both conceptually and in practical effect, between justifiable homicide and killing in self-defense continued in English law until the eighteenth century. Blackstone, in 1769, set forth the requirement that "the law must require [the killing], otherwise it is not justifiable."²⁵ The classic example of such a requirement, again, is a lawful sentence of death.²⁶ No killing by private citizens is justifiable unless it is done "for the prevention of any forcible and atrocious crime,"²⁷ because, he explained, "the one universal principle that runs through our own and all other laws seems to be this—that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting."²⁸

Against that class of homicides, Blackstone grouped "excusable homicide, the very name whereof imports some fault, some error or omission."²⁹ This class of killing fell into "two sorts: either *per infortunium*, by misadventure, or *se defendendo*, upon a principle of self-preservation."³⁰ The latter type of killing is "that whereby a man may protect himself from an assault or the like,

21. Pollock & Maitland, 2 *History of English Law* at 478 (cited in note 19). The term "hand-having" is a modernization of "handhabend," a Saxon law designation for a thief who had not yet disposed of or hidden the stolen goods. *Black's Law Dictionary* 644 (West, 5th ed 1979).

22. Pollock & Maitland, 2 *History of English Law* at 479 (cited in note 19).

23. *Id.* at 481.

That a man who kills another in self-defence should require a pardon will seem to us even more monstrous than that pardons should be needed where there has been misadventure, for the 'misadventure' of this age covers many a blameworthy act. But the author of the *Leges Henrici*, if we read him rightly, would demand a *wer* [fine] from the self-defender. . . . *Id.* at 483 (footnote omitted). See also note 41 and accompanying text.

24. [I]f any person or persons, at any time hereafter, be indicted or appealed of for the death of any such evil disposed person or persons attempting to murder, rob, or burglarly to break mansion-houses, as is abovesaid, that the person or persons so indicted or appealed thereof, and of the same by verdict so found and tried, shall not forfeit or lose any lands, tenements, goods or chattels, for the death of any such evil disposed person in such manner slain, but shall be thereof, and for the same fully acquitted and discharged, in like manner as the same person or persons should be if he or they were lawfully acquitted of the death of such evil disposed person or persons.

24 Henry VIII, ch 5 (1532), quoted in Perkins, 1 *UCLA L Rev* at 138 (cited in note 15).

25. William Blackstone, 4 *Commentaries on the Law of England* *178 (Welsh & Co., W. Lewis ed 1902) (emphasis in original).

26. *Id.*

27. *Id.* at *180.

28. *Id.* at *181.

29. *Id.* at *182.

30. *Id.*

in the course of a sudden broil or quarrel, by killing him who assaults him."³¹ A conflict of this sort was called "chance-medley."³² Blackstone explains that the term "[i]s properly applied to such killing as happens in self-defence upon a sudden encounter."³³ Because the right of self-defense (as opposed to the right to execute the King's justice) did not include the right of attacking, "to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant."³⁴ If the quarrel was a case of mutual combat, then the defendant must either not have begun the fight, or, if he did, must have attempted to decline further struggle.³⁵ And "[t]he party assaulted must therefore flee as far as he conveniently can, either by reason or some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him."³⁶

Blackstone's explanation of the different treatment of the two offenses was that

the law sets so high a value upon the life of a man that it always intends some misbehavior in the person who takes it away, unless by the command or express permission of the law. [T]he law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed; and since, in quarrels, both parties may be, and usually are, in some fault, and it scarce can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless. . . . The law, besides, may have a further view: to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment, by ordaining that he who slays his neighbor, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.³⁷

Chance-medley was at the heart of the common law interpretive scheme of homicide. Dating from at least the fifteenth century, the word means "a casual killing of a man, not altogether without the killer's fault, though without an evil intent."³⁸ Because homicide in self-defense rarely arises without fault on both sides, the courts would not fully balance rights and wrongs; instead, the killer would be given the opportunity to show, first, that he acted in furtherance of justice by killing a "manifest felon" who was engaged in a capital crime against him (which would produce an acquittal as justifiable homicide) or, failing that, that he killed in reasonable defense of his own life on a quarrel, however begun, so long as (1) he did not unambiguously begin it himself and (2) he retreated as far as he could before using deadly force (which would produce a conviction, a pardon, and a forfeiture or fine as chance-medley). As Sir Matthew Hale explained,

for though in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and

31. Id at *184.

32. Id.

33. Id.

34. Id.

35. Id.

36. Id at *185.

37. Id at *187.

38. 3 *Oxford English Dictionary* 13 (Oxford U Press, 2d ed 1989).

his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.³⁹

This rationale was compressed into a series of relatively rigid rules, which Hale summarized in 1678:

Homicide, Excusable *Se Defendendo*, which though it save the life, yet the Goods are forfeited; this requires these things: 1. It must be an inevitable necessity. In case of a justifiable Homicide, as of a Thief that comes to rob me, or by an officer resisted in Executing an Arrest, the Party need not give back to the Wall. But in this Homicide *se defendendo*, the Party that is assaulted is not excused, unless he give back to the Wall. But if the assault be so fierce, and in such a place that giving back would endanger his life, then he need not give back.⁴⁰

More than a century later, Edward East noted that the practice of forfeiture had been abandoned, and that even though "the party killing is not altogether free from blame . . . it has been more frequent . . . for the court to direct a verdict of acquittal."⁴¹

The common-law doctrine of homicide can be analyzed as giving the king, and through him the law, a proprietary right in the use of deadly force against his subjects. Justifiable killing was only that done by express or implied order of the king. It was lawful for a subject to execute another subject by the king's command; and execution was the paradigm against which all other acts of homicide were measured. If a subject killed another to prevent an obvious felony, which was by definition a capital offense, then he had killed only in a kind of execution.⁴² But Blackstone's analysis suggests that in cases of mutual quarrel, where the assailant and the defender were known to each other, the common law considered that only rarely would the fault be all on one side, and that the administrative difficulty of finding those few cases outweighed the benefits.

A quick reading of a few contemporary cases of self-defense⁴³ suggests that this is a highly useful analysis indeed. But as the common law moved into the New World, the courts began to discard it.

39. Matthew Hale, *History of the Pleas of the Crown* 481 (O. Lynch, 1778), quoted in Beale, 16 Harv L Rev at 574 (cited in note 15). The Latin phrase means "the protector against wrong."

40. Matthew Hale, *Pleas of the Crown: A Methodical Summary* 41 (Professional Books, Ltd, P. R. Glazebrook ed 1972) (written in 1678).

41. Edward H. East, 1 *Pleas of the Crown* 220 (Professional Books Ltd, P.R. Glazebrook ed 1972) (written in 1803).

42. The "manifest felony" doctrine allowed a large area for interpretive maneuver by courts and juries, who could interpret one assault as a "mere (that is, non-felonious) assault" and another as a manifestly "murderous (that is, felonious) attack." Nonetheless, the word "manifest" at least set up an objective standard. In the 19th century, this objective standard was replaced with a subjective one, in which the "felonious attack" exception to the retreat rule was triggered if a court decided the attack was made with "felonious intent"—a subjective inquiry that obviously allowed more room for interpretation. See, for example, note 61 and accompanying text.

43. See, for example, *Rowe v United States*, 164 US 546, (1896), discussed at notes 92-100 and accompanying text. The only close substitute for chance-medley at present in most jurisdictions is voluntary manslaughter, which represents a "catch-all category which includes homicides which are not bad enough to be murder but which are too bad to be no crime whatever." Wayne K. LaFave & Austin W. Scott, *Criminal Law* § 7.9 at 652 (West, 2d ed 1986). Voluntary manslaughter is usually defined as intentional killing while "in a state of passion engendered . . . by an adequate provocation." *Id.* Chance-medley need not entail any showing of passion, however, and may involve a defendant who made a quite rational decision to kill in defense of his or her own life. Faced with a

III

THE DOCTRINE IN THE NEW WORLD

The duty to retreat, and leave the law to vindicate injuries, fit poorly into a political ideology that saw individuals as possessing natural rights, including the right to violent recourse even against the state if it exceeded the bounds allotted to it by political theory. In addition, chance-medley, with its implication of mixed fault, was difficult to harmonize with nineteenth-century doctrines of individualism. Accordingly, post-revolutionary American courts began to weave their interpretive nets more finely in order to find one party at fault and the other faultless.

In 1855, the Georgia Supreme Court overruled a trial judge who had instructed the jury in orthodox terms about the difference between justifiable and excusable homicide. The judge had further instructed that "[i]f [the defendant] could have retreated and did not, in the opinion of the Court, this is not justifiable homicide."⁴⁴

Haynes had been convicted of shooting a neighbor during a quarrel about the water from a well adjoining their property. In Blackstone's analysis, it seemed a classic example of chance-medley, in which the defendant could not be acquitted unless he was not at fault and had attempted to retreat. But in setting aside the conviction, the state Supreme Court recast the question in terms of property rights. "[I]nstead of charging the Jury that Haynes was bound to retreat as far as he could in safety, we think they should have been instructed 'to inquire, first, as to the right of Haynes to the enjoyment of the well in common with [the deceased]'"⁴⁵ The concept of fault in the encounter, too, was recast in terms of precise legal rights and obligations: "The slayer, too, must be faultless; he must owe no duty to the deceased; be under no obligation of law to make his own safety a *secondary* object; otherwise, he is answerable to the law of the land, without any immunity under the shield of necessity."⁴⁶

Twenty-one years later, the North Carolina Supreme Court reversed a conviction of manslaughter in which the trial judge had ruled that there was no construction of the facts by which the jury could have found that the defendant acted in self-defense.⁴⁷ The defendant, George Dixon, kept a country store in his house. One Sunday morning, while the store was crowded with customers, he decided to attend church and ordered the customers to leave. When the crowd did not disperse fast enough to suit him,

defendant they do not wish to convict of murder or acquit altogether, of course, many juries are likely to eschew careful parsing of the elements of the offense and settle on a verdict of manslaughter as a compromise. Unlike killing by chance-medley, of course, manslaughter is not a pardonable crime, but entails a criminal sentence. Many of the appeals considered below are from convictions of voluntary manslaughter.

44. *Haynes v State*, 17 Ga 465, 473 (1855).

45. *Id* at 483.

46. *Id* at 484 (emphasis in original).

47. *State v Dixon*, 75 NC 275 (1876).

Dixon shoved the deceased toward the door. The deceased then got a club and advanced on the defendant, who shot him with a pistol.⁴⁸

Here was an even clearer case of chance-medley: the defendant admitted being the initial assailant, provoking the quarrel not with words but with an actual assault. The deceased had been invited implicitly into the store, and was attempting to leave when the incident occurred. But the court used the defendant's property right in the store as the grounds for holding that he had not provoked the incident in a way that would have triggered the common-law duty of retreat:

Was the prisoner himself without fault? That depends upon several considerations. Did the prisoner use more force than was necessary to remove the deceased from his house? He had ordered the crowd out as many as seven or eight times, and they "moved slowly." Was this from sullenness and on purpose? If so, the prisoner had the right to use the necessary means of enforcing compliance with his orders. Was the deceased 'shoved' at all? The witnesses do not agree as to that.^[49] But if he was, what was the character of the shove? Was it in a rude, angry or insulting manner, so as to constitute it an assault or battery and put the prisoner in fault? These were questions for the jury.⁵⁰

Faced with a common law rule requiring that the defendant be faultless, or at least not the first assailant, the court redefined the defendant's act in such a way that its violent or provocative character vanished. Here, the shove is not actually a shove unless delivered in a "rude, angry or insulting manner." With the shove out of the way, the court went on to explain, the case would then have been changed into one of felonious assault by the deceased, and thus of justifiable homicide, with no obligation to retreat: "where the attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground and kill his adversary, if need be."⁵¹

Also in 1876, the Ohio Supreme Court extended the logic of *Haynes* in a decision that became the leading American case on the right to stand one's ground.⁵² Erwin shot his son-in-law, who was also his tenant; the occasion was a long-standing dispute over the use of a tool-shed "[b]etween their houses, but not within the curtilage of either."⁵³ The deceased threw the defendant's tools out of the shed. When the defendant broke open the locks and entered, the deceased approached the shed with an axe, disregarding the defendant's warnings. The defendant killed him with a pistol.⁵⁴ The

48. *Id.* at 277.

49. A rather generous construction of the testimony. In fact, one witness had not seen a shove. None testified, according to the record, that there had actually not been one. *Id.*

50. *Id.* at 278.

51. *Id.* at 279. Note the subjective test of "murderous intent," which has by now been replaced in most decisions by the common-law objective test of "manifest felony." The court distinguished murderous assaults from those in which the assailant had no intent to kill. In the latter case, the defendant might respond with force, but might not kill his attacker. *Id.*

52. *Erwin v State*, 29 Ohio St 186, 192-200 (1876). At the same time, courts in many jurisdictions continued to affirm the old common law analysis of excusable and justifiable homicide and to affirm the duty of retreat in cases of self-defense. See, for example, *Pond v People*, 8 Mich 149 (1860), for a particularly good explanation of the rule of retreat as applied in 19th-century American law.

53. *Erwin*, 29 Ohio St at 192.

54. *Id.* at 192-93.

defendant was convicted of murder in the second degree after the trial court instructed the jury that the defendant could use deadly force to protect himself,

provided he use all means in his power otherwise to save his own life or to prevent the intended harm; such as retreating as far as he can, or disabling his adversary, without killing him, if it be in his power. But if the attack upon him is so sudden, fierce, and violent, that a retreat would not diminish, but increase, his danger, he may kill his adversary without retreating.⁵⁵

The Ohio Supreme Court ruled that the instruction was in error:

The question, then, is simply this: Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have safely done so? The law, out of tenderness for human life and the frailties of human nature, will not permit the taking of it to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.⁵⁶

The doctrine of *Erwin* marked the complete disappearance of the concept of chance-medley from American jurisprudence. Under the emerging American rule, every case of self-defense was now adjudged by the standard of the encounter between a "true man" and an unprovoked assailant, with the "duty" to retreat assessed after the case had been thus measured. Similar reasoning prevailed in a Mississippi case in 1876,⁵⁷ in which the conviction was reversed in part because the court had instructed the jury that the defendant had the duty to retreat. No such duty existed, the appellate court asserted, even though the defendant had engaged in a long-running quarrel with the deceased, had borrowed a pistol, and had gone behind the building with the deceased for the apparent purpose of settling their differences. Because the deceased had been physically advancing toward the defendant at

55. Id at 193.

56. Id at 199-200. The *Erwin* court's "true man" formulation has become the most famous statement of the American rule of no retreat, and was quoted with approval by the Supreme Court in *Beard v United States*, 158 US 550, 560-61 (1895), see notes 81-83 and accompanying text. It is important to put it in context, as the locution is antique and confusing to contemporary ears. Indeed, there is reason to believe that terminological confusion may have permitted the court in *Erwin* to reach the result it did. Cynthia Gillespie lampoons the "true man" doctrine as embodying "nineteenth-century hairy-chestedness," on the apparent assumption that a "true man" is a brave or manly one. Gillespie, *Justifiable Homicide* at 80 (cited in note 15). Richard Maxwell Brown, who has written a particularly useful account of the circumstances surrounding *Erwin*, see Brown, *No Duty to Retreat* at 8-10 (cited in note 15), also finds the phrase a comic repetition of an "innocuous" phrase used by Hale. Id at 9. He suggests that the *Erwin* court assumed that "there was, or should be, no other kind." Id at 10. But the term "true man" historically, from whatever source the *Erwin* court derived it, does not refer to courage but to freedom from legal fault. Like the phrase "good men and true" to describe those eligible to serve on juries, the term "true man" dates to the 13th century as a term for men not themselves guilty of felony: "an honest man (as distinguished from a thief or other criminal)." 8 *Oxford English Dictionary* 608 (Oxford U Press, 2d ed 1989). It is in this sense that Shakespeare's Sir John Falstaff says of the robber Gadshill, "[t]his is the most omnipotent villain that ever cried 'Stand!' to a true man." William Shakespeare, 1 *Henry IV*, I, ii, 109. The term thus takes us back to the first half of the common-law dichotomy between justification and excuse: An innocent citizen assaulted by a manifest felon, being "true," might kill without retreating. But a person who had engaged in chance-medley was not considered to be true. See note 37 and accompanying text. Thus the *Erwin* court had, knowingly or not, elided the key distinction in the case before it.

57. *Long v State*, 52 Miss 23 (1876).

the precise moment he was shot, the court held, the defendant had no duty to retreat.⁵⁸

Flight is a mode of escaping danger to which a party is not bound to resort, so long as he is in a place where he has a right to be, and is neither engaged in an unlawful enterprise, nor the provoker of, nor the aggressor in, the combat. In such case he may stand his ground and resist force by force, taking care that his resistance be not disproportioned to the attack.⁵⁹

A year later, the Supreme Court of Indiana recognized that American jurisprudence had not simply interpreted the common-law rules on self-defense, but altered them:

[t]he tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defence. The weight of modern authority, in our judgment, establishes the doctrine, that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable.⁶⁰

The common-law view of violence as the property of the state had been replaced by a new, highly ambiguous standard in which violence was the right of all citizens if used "without fault" and "in a place where they had a right to be." The idea of chance-medley, with its implications of mixed fault ("fault in the air," so to speak⁶¹) had been replaced by a new, highly personalized view of fault, in which either victim or aggressor was implicitly held to be responsible for all the violence. These ambiguous standards were to prove singularly elusive in application.

IV

THE RULES IN SELECTED AMERICAN COURTS

A. Interpretations of Retreat: A Strategic Taxonomy

Adjudication of self-defense cases involves appellate courts in a complex exercise in interpretation. Violence and danger seem to be largely subjective matters in these adjudications. It is, however, possible to identify a number of interpretive strategies the courts use. These may be briefly summarized as follows.

1. *Rewriting the Facts.* Acts of violence may be interpreted as non-provocative, while non-violent provocations may be interpreted as violent. The courts manipulate the "fault" standard to place the fault for beginning the encounter on either the victim or the defendant. In cases where the

58. This interpretive strategy is of a kind discussed by Kelman, 33 Stan L Rev 591 (cited in note 15), under two headings: broad and narrow time-framings, *id* at 593-94, and broad and narrow views of intent, *id* at 595-96.

59. *Long*, 52 Miss at 35.

60. *Runyan v State*, 57 Ind 80, 84 (1877). A full discussion of the background to this case is to be found in Brown, *No Duty to Retreat* at 10-17 (cited in note 15).

61. Paraphrasing *Palsgraf v Long Island RR*, 248 NY 339, 162 NE 99 (1928).

defendant is given a new trial, the rule that the party invoking self-defense must be without fault is read narrowly. One such narrow reading is the "first assailant" rule: the "without fault" doctrine, which might ascribe fault to a defendant who behaved in a provocative way, is instead changed to state that the defendant must simply not strike the first blow.⁶² If the defendant did in fact strike the first blow, the act of violence is interpreted as non-violent, or the victim's non-violent provocation is recharacterized as violent.⁶³

Retreat courts are more likely to ascribe more violent behavior and intention to a party who actually threatens another with a gun.⁶⁴ Conversely, "no retreat" courts are more likely to deny the defendant the right to stand if the victim was not armed and the defendant was.⁶⁵ The reluctance of the courts to require retreat in the face of a gun is more reasonably based than many features of this area of law.⁶⁶

2. *Mind-Reading.* Subjective inquiries about the defendant's state of mind may be used to characterize objective physical actions. Since self-defense cannot be invoked without a "reasonable belief" that it is necessary, courts may approve or void a plea of self-defense by interpreting events to reveal the defendant's subjective state of mind. Thus, defendants who appear on the face of the record to have been in some apparent danger can be held not to have *perceived* sufficient danger,⁶⁷ while other defendants who are actually relatively safe can be held to have been *reasonably fearful* of harm.⁶⁸

62. See, for example, *People v Taylor*, 3 Ill App 3d 734, 279 NE2d 143 (1972). The defendant, who killed a bartender during a brawl that followed the bartender's attempt to expel him from the bar, did not need to retreat, even though he had entered the bar, displayed a pistol, and threatened a patron, because he was "not the first assailant." 3 Ill App 3d at 737, 279 NE2d at 145.

63. See, for example, note 96 and accompanying text.

64. See, for example, notes 118-123 and accompanying text.

65. See, for example, *People v Millet*, 60 Ill App2d 22, 208 NE2d 670 (1965). The defendant, who was standing in the street without cover, was denied a new trial after conviction for shooting a man who threatened to kill him and reached into his trunk as if to obtain a weapon. The defendant had a gun, and, after his death, the victim was found to be holding only a jack. 60 Ill App2d at 27, 208 NE2d at 673.

66. The doctrine of "retreat to the wall" had its origin before the general introduction of guns. Justice demands that its application have due regard to the present general use and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand to hand encounter with fists, clubs, and even knives, as a condition of justification for killing in self-defense; while it would be rank folly to so require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or to do great bodily harm. What might be a reasonable chance for escape in the one situation might in the other be certain death.

State v Gardner, 96 Minn 318, 327, 104 NW 971, 975 (1905). It is, however, important not to confuse an intelligible rationale for one rule or the other for a judicial commitment to the rule so justified. In fact, *Gardner*, which is one of the cases most cited by academic commentators, is largely an orphan case in its own jurisdiction. See *State v Austin*, 332 NW2d 21, 24-25 (Minn 1983) (restricting *Gardner* holding to its particular facts and affirming general duty to retreat). *Gardner* is discussed in Brown, *No Duty to Retreat* at 17-20 (cited in note 15).

67. In *Millet*, the court denied a new trial because "the fear experienced by defendant was not so great that defendant could take the life of another." 60 Ill App2d at 30, 208 NE2d at 675.

68. See, for example, notes 139-140 and accompanying text.

manner and in a brisk walk," Beard warned him to stop.⁷⁶ Will Jones continued toward him, cursing and "at the same time making a movement with his left hand as if to draw a pistol."⁷⁷ Beard hit him across the head with the shotgun. Jones died soon thereafter.⁷⁸

Beard testified of his careful mental processes before striking Jones:

Believing . . . from his demonstrations just mentioned that he intended to shoot me, I struck him over the head with my gun, to prevent him killing me. . . . I then at once jumped over the fence, caught Will Jones by the lapel of the coat, turned him rather to one side, and pulled his left hand out of his pocket. He had a pistol, which I found in his pocket, grasped in his left hand, and I pulled his pistol and his left hand out together. My purpose in doing this was to disarm him, to prevent him from shooting me, as I did not know how badly he was hurt. My gun was loaded, having ten cartridges in the magazine. I could have shot him, but did not want to kill him, believing that I could knock him down with the gun, and disarm him, and protect myself without shooting him.⁷⁹

Beard was tried by a jury in the Circuit Court of the United States for the Western District of Arkansas. The judge told the jury:

[W]as the defendant called upon to avoid [any] danger [from Will Jones] by getting out of the way of it if he could? The court says he was. The court tells you that he was. There is but one place where he need not retreat any further, where he need not go away from the danger, and that is in his dwelling house. . . . [I]f a man, while so situated, and upon his own premises, can do that which would reasonably put aside the danger short of taking life, he can do that, I say, he is called upon to do so by retreating. . . .⁸⁰

Beard appealed to the Supreme Court. The Court reversed his conviction. In his opinion, Justice Harlan in effect decided the case twice. In his first holding, Harlan wrote,

[W]e cannot agree that the accused was under any greater obligation when on his own premises, near his dwelling house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling house. The accused, being where he had a right to be, on his own premises, constituting a part of his residence and home, at the time the deceased approached him in a threatening manner, and not having by language or by conduct provoked the deceased to assault him, the question for the jury was whether, without fleeing from his adversary, he had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did. . . .⁸¹

The opinion then proceeds through a lengthy exposition of the evolving American law of retreat, citing many of the cases discussed above⁸² and then restating the holding in sweeping fashion, without reference to the "castle doctrine":

76. *Id.*

77. *Id.* at 552-53.

78. *Id.* at 553.

79. *Id.* This account of a careful, almost leisurely, thought process and a completely non-murderous intent, in the midst of a violent and angry confrontation, is an excellent example of the ways in which the legal system encourages and rewards parties who fit the stories they tell into the currently approved official stories.

80. *Id.* at 555.

81. *Id.* at 559-60.

82. *Id.* at 565-67.

The defendant was where he had the right to be . . . and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he at the moment honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.⁸³

This second holding, couched as it is in terms of an abstract "right to be" in the place of confrontation rather than in specific property terms, had the potential to expand the "castle doctrine" to encompass almost all public space. A year later, when the Supreme Court was called upon to consider another self-defense case, it did seem to broaden the literal holding of *Beard*, though still keeping it tied, at least ambiguously, to a right of property.⁸⁴

Alberty v. United States involved a black defendant who had been a slave of a Cherokee Indian, and who became, when freed at the end of the Civil War, a citizen of the Cherokee nation. He had killed a man named Duncan, who, though married to a Cherokee woman, was "the illegitimate child of a Choctaw Indian, by a colored woman, who was not his wife, but a slave in the Cherokee Nation."⁸⁵

Alberty had separated from his wife, who went to live at the home of a Mr. Lipe, where Alberty worked by days. The cause of the separation appeared to be "attentions" paid to her by Duncan. On the fatal night, Alberty took his wife to church, then returned her to Lipe's. After she went inside, Alberty went back to check on the stock, where, he later testified, he found Duncan at his wife's bedroom window. Alberty testified that he accosted Duncan,

and then [he] made at me at that time. That is the first time I had seen him there. And then I knew his voice, and he made at me as if he had something and was going to kill me, and I had this little pistol in my pocket, and I run backwards toward the front yard, and told him to stand off. . . . I started to move, and this fellow says to me, he says, "I will kill you, God damn you," and made for me. . . . [S]eemed like he was going to cut me with something. I couldn't tell what it was, and I threw myself around that way [illustrating], and fired.⁸⁶

Alberty was convicted of murder at a trial in which the judge instructed the jury to acquit Alberty only if they found that he had been "so situated, so surrounded by danger, that he could not get out of the way of it, or he could not turn it aside by an act of less violence," and that he had "exercised reasonable means . . . to avoid the dreadful necessity of taking human life."⁸⁷

The Supreme Court reversed the conviction and ordered a new trial on the authority of *Beard*.⁸⁸ Although it had earlier cited *Beard* as authority only for the proposition that "a man upon his own premises . . . is not obliged to

83. Id at 564. The attention paid to Beard's mental processes is an example of judicial mind-reading. See part IV.A.2.

84. *Alberty v United States*, 162 US 499 (1896).

85. Id at 501.

86. Id at 506-07.

87. Id at 507.

88. Id.

retreat,"⁸⁹ it now asserted that "[t]he only difference [between *Beard* and *Alberty*] is that in *Beard* the attack was made with firearms, and this case it would appear that the defendant was about to attack him with a knife."⁹⁰

In fact, *Beard* had killed while on his own property; *Alberty* was not only on another person's land, but far from clearly in a place where he had "a right to be." The Court elided this property-right difference by suggesting that *Alberty* was exercising his right to control access to his wife, even though she was no longer living with him or on his premises:

We think that a man who finds another trying to obtain access to his wife's room in the nighttime, by opening a window, may not only remonstrate with him, but may employ such force as may be necessary to prevent his doing so; and if the other threatens to kill him, and makes a motion as if to do so, and puts him in fear of his life or of great bodily harm, he is not bound to retreat, but may use such force as is necessary to repel the assault.⁹¹

Six months later, the Court, in *Rowe v. United States*,⁹² seemed explicitly to extend the right to any public place. The victim, Frank Bozeman, was a white man; his killer, David Rowe, was a Cherokee Indian.⁹³ The confrontation between the two took place in a hotel in Pryor's Creek, Indian Territory (now Oklahoma). Rowe entered the dining room after drinking, carrying a pistol. Words passed between the parties and some onlookers about why Rowe would not speak to Bozeman. "Talk Cherokee to him," someone told the defendant, at which the victim said, "He has got too damn much nigger blood in him to talk anything with any sense."⁹⁴ The evidence showed that the defendant then

kicked at deceased, hitting him lightly on the lower part of the leg. That immediately deceased sprang at defendant, striking him with a knife, and cutting him in two places on the face. That, after deceased began cutting defendant, the latter drew his pistol, and fired, shooting deceased through the body.⁹⁵

By all accounts, including the defendant's, it was Rowe, not the victim, who began the fatal fight by kicking Bozeman. But to Justice Harlan, the author of *Beard*, the most important fact was not what Rowe did, but the unforgivable nature of what Bozeman said. "[T]he first real provocation came from the deceased when he used toward the accused language of an offensive character," and "the deceased used language of an offensive character for the purpose of provoking a difficulty with the accused, or of subjecting him to the indignity of a personal insult."⁹⁶ Harlan argued that the defendant's

89. *Id.* at 505.

90. *Id.* at 507-08.

91. *Id.* at 508. The word "remonstrate" is an example of rewriting the facts, see part IV.A.1. The Court interprets *Alberty's* ambiguous challenge to *Duncan*, which another court might have seen as provocation, as a resort to reasoned argument and moral suasion.

92. 164 US 546 (1896).

93. *Id.* at 547.

94. *Id.*

95. *Id.* at 547-48. Prosecution and defense agreed about the facts of the fatal tussle, except that Rowe insisted that after kicking, "he stepped back, and leaned up against the counter, and deceased sprang at him, and began cutting him with a knife." *Id.* at 548. The Court later found this withdrawal highly significant. *Id.* at 554-55.

96. *Id.* at 555, 554.

testimony suggested that "he did not intend to make a violent or dangerous personal assault upon the deceased, but only, by kicking at him or kicking him lightly, to express his indignation at the offensive language of the deceased."⁹⁷

Harlan held that the jury might have found that, by moving back a step and leaning against the bar, Rowe "withdrew in good faith from further contest."⁹⁸ If they did, then he was "entitled to the benefit of the principle announced in *Beard v. U.S.*, in which case it was said: 'The defendant was where he had a right to be when the deceased advanced upon him. . . .'"⁹⁹ To underscore the Court's apparent extension of the *Beard* rule to cover a public place, Harlan repeated, "The accused was where he had a right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon."¹⁰⁰

At this point, the Court seemed committed to the broadest possible reading of the right to stand one's ground. If Rowe, after striking first in a public place, was still entitled to an instruction as to his right not to retreat, it was difficult to imagine circumstances in which a retreat instruction would not be reversible error. But just seven days after deciding *Rowe*, the Court upheld a murder conviction appealed on exactly such grounds.

*Allen v. United States*¹⁰¹ has an unusually tangled history. The defendant, Alexander Allen, had been convicted, had appealed successfully to the Supreme Court,¹⁰² had then been reconvicted and had again won a new trial in the Supreme Court.¹⁰³ Allen was a "colored boy, of about fourteen years of age," who had killed an eighteen-year-old white named Philip Henson.¹⁰⁴ The two had taken part the day before in what seems to have been a racial incident. Henson's companions testified that Allen, encountering Henson the next day, had crossed a wire fence, holding a pistol, struck Henson with his hands, and then shot him twice. Allen and his friend testified that Henson attacked Allen, knocked him to the ground, and began beating him with a stick. Footprints in the soft ground seemed to support the whites' version of events.¹⁰⁵

Allen was now appealing his third conviction—this time on grounds, among others, that the trial court had instructed the jury that he was permitted to kill in self-defense "[p]rovided he use all the means in his power

97. *Id.* at 554. This rewriting of the facts, see part IV.A.1, represents a kind of interpretive double whammy: Bozeman's purely verbal insult is redefined as a "real provocation," while Rowe's physical assault—the first in the confrontation—is transformed into something not "violent or dangerous" at all, but merely the expression of an idea.

98. *Id.* at 557. This manipulation of time is an example of stopping the clock. See part IV.A.3.

99. 162 US at 557 (citations omitted).

100. *Id.* at 558.

101. 164 US 492 (1896) (*Allen III*).

102. *Allen v. United States*, 150 US 551 (1893) (*Allen I*).

103. *Allen v. United States*, 157 US 675 (1895) (*Allen II*).

104. *Allen I*, 150 US at 551.

105. *Id.*

otherwise to save his own life or prevent the intended harm, such as retreating as far as he can"106

The same court that had decided *Rowe* now asserted that it had never changed the common-law rule of retreat:

Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in *Beard v. U.S.* So, too, in the case of *Alberty v. U.S.*, the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the nighttime, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. *The general duty to retreat, instead of killing, when attacked, was not touched upon in these cases.*¹⁰⁷

It would be difficult to find a clearer example of the elasticity of legal "rules" than this bland manipulation of the *Beard* holding by the same court that decided it to fit four very different set of facts. The reasons for the Court's acrobatics are not entirely clear. Certainly it would be understandable if, after three juries had found Allen guilty, the justices simply wished to be rid of his case. In addition, Allen's version of events, which is the only one by which the right to stand his ground might have been suggested, was contradicted by the physical evidence of the footprints in the field.¹⁰⁸

It is also suggestive to consider the killer-victim racial lineup of the four cases: in *Beard*, both were white; in *Alberty*, both were black; in *Rowe*, the killer was an Indian, the victim a white who had insulted the killer by calling him black. In *Allen*, by contrast, the killer was black, the victim white.

After *Allen*, the flow of self-defense cases from Indian Territory dried up.¹⁰⁹ But the Court later offered another, subtly different formulation by Justice Holmes in 1921, in his famous opinion in *Brown v. United States*.¹¹⁰

Brown and Hermis were U.S. employees who had conducted a lengthy feud. Hermis had warned Brown that he would kill him. The final confrontation took place at a building site for a new post office, thus bringing the offense under the jurisdiction of the federal district court in Texas, where the killing occurred. Brown had retreated twenty-five yards from Hermis's attack before he shot him, but apparently shot the second time after Hermis had fallen. The trial judge instructed the jury that "the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm."¹¹¹

106. *Allen III*, 164 US at 497.

107. *Id.* at 498 (emphasis added) (citations omitted). This is an extreme example of flip-flopping the rule. See part IV.A.4.

108. See, for example, *Allen I*, 150 US at 562 (Brewer dissenting).

109. Oklahoma attained statehood in 1907, which gave it the right to try felonies in its own state courts.

110. 256 US 335 (1921). Richard Maxwell Brown relates Holmes's handling of *Brown* to the justice's experiences as a Union soldier during the Civil War. See Brown, *No Duty to Retreat* at 30-37 (cited in note 15).

111. *Brown*, 256 US at 342.

The Court reversed the conviction, citing *Beard* and *Rowe*.¹¹² In elucidating the *Beard* rule, Holmes uttered one of his more famous passages:

Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.¹¹³

But Holmes gave the *Beard* rule a new twist: "Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing."¹¹⁴ In this, he was perhaps only making explicit what the Court had been saying all along: that in this area there was no rule, neither a rule of retreat nor of a right to stand one's ground, but only a series of complex and highly subjective judgments to be made about whether specific fact patterns—involving the physical movements of the actors, their spoken communications at the time of the incident, and their prior relationships—justified a finding of self-defense.

C. The Doctrine of Retreat in the Alabama and Illinois Courts

As noted above,¹¹⁵ Alabama adopted the English common-law retreat rule early and has remained nominally faithful to it ever since.¹¹⁶ Alabama's self-defense jurisprudence managed to absorb the Supreme Court's decision in *Beard* without visible dismay—or, indeed, without seeming to notice that the nation's highest court had thrown its prestige behind the contrary rule.¹¹⁷

Two decades after *Beard*, the Alabama Supreme Court reversed a conviction in a case implicating the "manifest felony" exception to the retreat rule.¹¹⁸ Yank Beasley and Ephraim White had ridden together in a wagon for thirty-five or forty minutes when White arose to leave the wagon. Beasley testified that when White arose, he "clicked his gun twice, and . . . as he got about three-quarters up he turned his rifle towards defendant."¹¹⁹ Beasley then shot White dead. Beasley was sentenced to death after a trial at which

112. Id at 343.

113. Id.

114. Id. This formulation offers "no retreat" courts an invitation to flip-flop the rule. See part IV.A.4.

115. See note 17 and accompanying text.

116. Interesting Alabama cases applying the English rule during the 19th-century growth of the American rule include *Carroll v State*, 23 Ala 28 (1853) (setting forth the "co-tenant" exception to the "castle doctrine"); *De Arman v State*, 71 Ala 351 (1882) (law must show "equal regard" for life of assailant and defendant); *Jones v State*, 76 Ala 8 (1884) (denying the "co-tenant" exception); and *Perry v State*, 94 Ala 25 (1894). The state has retained its "retreat rule" even through the adoption of a new criminal code. See, for example, *Kyser v State*, 513 So2d 68 (Ala C App 1987). Richard Maxwell Brown sees in Alabama's adherence to the rule of retreat the influence of George Washington Stone, a justice of the state supreme court for a total of 27 years. Brown, *No Duty to Retreat* at 20-24 (cited in note 15).

117. See *Blankenship v State*, 11 Ala App 125, 65 So 860 (1914) (*Beard* cited only to show that right to stand one's ground does not apply unless the defendant did not provoke the assault and did not enter into mutual combat). *Blankenship* is apparently the only decision in Alabama case law to take any notice, however remote, of *Beard*.

118. *Beasley v State*, 181 Ala 28, 61 So 259 (1913).

119. Id at 260.

the judge refused to admit into evidence Beasley's testimony about threats and previous assaults by White, and further refused an instruction allowing the jury to find him not guilty if he shot in the belief that he was in "imminent danger."¹²⁰ The state supreme court denied the validity of the "imminent danger" instruction because it "pretermits the defendant's duty to retreat,"¹²¹ but nonetheless reversed the conviction, arguing that

[i]t may be true that the defendant's testimony was opposed by the great preponderance of the evidence, and that his version of the action of the deceased may have been inconsistent with the facts attending the trip from Montgomery to the place of the killing, both being in the same wagon, and no fuss or cross words passed between them, yet the undisputed evidence showed that deceased had a rifle across his lap, the defendant said he heard him cock it, and saw him attempt to change its position, and at the same time starting to turn upon him; and we think that the trial court erred in excluding the threats, as well as evidence of a previous difficulty, as it was a question for the jury as to whether or not this action was sufficient to reasonably indicate immediate danger, and whether or not the defendant could safely retreat.¹²²

The court thus insisted that it was not changing the requirement of retreat, while in effect giving a new jury a chance to approve a kind of preemptive strike. This hair-splitting prompted a concurrence by four judges, who insisted that the proper holding would be that "if defendant's version that the deceased was about to make a murderous attack upon him was true, he was under no duty to retreat."¹²³

The Alabama court consistently found it more expedient to change the retreat rule in order to benefit a sympathetic defendant than to mitigate the rhetoric with which it defended the rule against unsympathetic ones. Thus, in *Smith v. State*,¹²⁴ the court reversed the conviction that followed a disagreement between "two substantial citizens of Winston County" who "fell out over the failure of the dead man's son to be reelected as a teacher of the school in the community, of which school the defendant was one of the Trustees."¹²⁵ During the course of the disagreement, the dead man

struck the defendant over his eye with his fist and had his arm drawn back to strike him again when the defendant struck him one time with a knife, in a vital place in the neck, from which wound Drake died. . . . There was some evidence that after the blow was struck, Smith did everything he could to try to stop the flow of blood.¹²⁶

The trial court instructed the jury that "it must have been at the time he committed his act [sic] there was open to him no avenue of escape whereby he could retreat without increasing his peril."¹²⁷ The supreme court reversed the conviction on the grounds that the instruction "places too great a burden upon the defendant. The rule is that 'there must have been no other

120. Id at 259.

121. Id at 261.

122. Id at 260.

123. Id at 261. The majority had chosen to rewrite the facts, see part IV.A.1, while the concurring judges would have used the "murderous attack" language to flip-flop the rule. See part IV.A.4.

124. 29 Ala App 212, 195 So 290 (1940).

125. Id at 290-91.

126. Id at 291.

127. Id at 292.

reasonably safe mode of escape, by retreat or by avoiding the combat.' [A] defendant is not required to retreat where to do so would reasonably appear to increase his peril to life or limb."¹²⁸ The "imminent danger" to Smith was, of course, only that of assault. Under either the "manifest felony" or "murderous intent" doctrines, he would not have been freed of his duty to retreat. The court thereby interpretively inflated the danger of violence. Just as words may become blows or blows words, mere blows may thus become, when necessary, deadly force.¹²⁹

Unlike Alabama, Illinois quickly adopted the Supreme Court's *Beard* doctrine. The adoption was painless, as it came in a case, *Hammond v. People*,¹³⁰ in which no one was actually hurt or injured.

Hammond was charged with assault with intent to murder his brother-in-law, Joseph Dixon. The defendant's ex-wife, Dixon's sister, was living with Dixon and four of her children by Hammond. Hammond, who lived nearby, was standing outside Dixon's front yard talking to the children when Dixon emerged from the house and threatened to punch him. After this exchange, in disputed circumstances, Hammond drew a pistol and fired twice, missing both times. Police arrested both men.¹³¹ Hammond was convicted after the trial judge instructed the jury that he could sustain a self-defense plea only if "a reasonable and prudent man [would have] believe[d] that his life was in danger, or that he was about to receive great bodily harm, and that he could not escape therefrom without taking the life of the said Joseph Dixon, or doing him great bodily injury."¹³²

The state supreme court held that the instruction was error:

The ancient doctrine of the common law that the right of self-defense did not arise until every effort to escape, even to retreating until an impassable wall or something of that nature had been reached, has been supplanted in America by the doctrine that a man, if unlawfully assaulted in a place where he has a right to be, and put in danger, real or reasonably apparent, of losing his life or receiving great bodily harm, is not required to endeavor to escape from his assailant, but may stand his ground and repel force with force, even to the taking of the life of his assailant, if necessary, or in good reason apparently necessary, for the preservation of his own life, or to protect himself from receiving great bodily harm [citing *Beard*, inter alia] It is not necessary to the right of self-defense that the party having otherwise the right to exercise it cannot "escape" the danger by fleeing from an assailant.¹³³

The court omitted the customary language about freedom from fault, perhaps because, this being a classic chance-medley situation, it would have been difficult to imagine Hammond exercising any right that depended on his being faultless.

128. *Id* (citation omitted).

129. The court inflates the danger of violence by rewriting the facts, see part IV.A.1, and reduces the threshold of danger needed to make deadly force acceptable, thus flip-flopping the rule. See part IV.A.4.

130. 199 Ill 173, 64 NE 980 (1902).

131. *Id* at 981.

132. *Id* at 983.

133. *Id*, citing *Beard*, 158 US 550, among other authorities.

Nonetheless, the enunciation in *Hammond* has remained Illinois law ever since. The courts preserve the rule while reaching different results either by rewriting the facts,¹³⁴ or by flip-flopping the rule, reinserting the fault standard when necessary, or even penalizing unsympathetic defendants for failing to retreat.¹³⁵

The court rewrote the facts to benefit John Williams, a cab driver who shot from his cab and killed a sixteen-year-old boy on a Chicago street in 1963.¹³⁶ Williams was driving by a traffic light when, he later testified, he saw a group of youths beating an old man. When he shouted to them to stop, someone threw a brick at his cab. Williams shot twice, and one of his bullets lodged in Kenneth Boatner's brain, killing him. Williams then drove away without attempting to aid Boatner or the mugging victim, and denied all knowledge of the incident when originally questioned by the police. When he finally admitted the incident, Williams' statement showed the traces of the kind of editing necessary to make it fit into an official story: " 'Well, [the muggers] were just standing—well, they started toward me.' " ¹³⁷

The evidence in this case did not fit neatly into an official story. Williams intervened to help a crime victim; but his shots were apparently fired after the muggers had left the victim alone. The court dealt with this by noting that "the gang could have returned and further assaulted the victim after defendant left."¹³⁸ In addition, Johnson himself was in no real danger, as he could have driven away. The court created an imminent danger to Johnson by expanding the time frame—" [d]efendant had been robbed several weeks before the incident "¹³⁹—and imagining what might have happened if the facts had been different—" [h]is cab was hit by a brick. . . . It is apparent that the throwing of bricks at defendant could have caused death or great bodily harm if defendant was struck by one of them "¹⁴⁰—even though the defendant was inside the cab and thus unlikely to be hit directly at all.

The case could be seen as one of a panicky, violent man who fired a gun at random on the street, without quite knowing why and without trying to take responsibility for the fact. But the court recharacterized the facts to fit a different official story—the story of the Good Samaritan:

The State contends that defendant could have driven away from the scene of the incident with his cab and thus the use of force was unnecessary. We disagree with this contention. When a defendant is where he has a lawful right to be, he has a right to stand his ground, and if reasonably apprehensive of injury is justified in taking the assailant's life. [citations omitted] Defendant was under no duty to flee. Furthermore, defendant testified that he had not left the area, because of his desire to help the victim of the assault, Joseph Bell.¹⁴¹ We will take judicial notice of the fact, that

134. See part IV.A.1.

135. See part IV.A.4.

136. *People v Williams*, 56 Ill App 2d 159, 205 NE2d 749 (1965).

137. *Id* at 752.

138. *Id* at 753.

139. *Id* at 754. This is an example of stopping the clock, see part IV.A.3., and of mind-reading, see part IV.A.2.

140. 205 NE2d at 754. This is an example of rewriting the facts. See part IV.A.1.

141. He did leave the scene of the injury without further helping Bell.

recently there have been a number of publicized assaults and homicides, in which the victims called upon their fellow citizens to render aid. In many instances these fellow citizens refused to get involved. Here we have a man who took it upon himself to get involved, when a victim called for help.¹⁴² In addition to the cases cited above, public policy forbids us to say a person must leave the victim of a brutal beating lie on the street when called upon to render aid.¹⁴³ A citizen must feel free to help the victim of an assault.¹⁴⁴

A remarkable pair of opinions by the appellate court illustrates the fine interpretive parsing of facts that goes into determining whether a defendant is entitled to the "right" to stand his or her ground. Louis Pirovolos appealed his conviction of voluntary manslaughter.¹⁴⁵ Pirovolos was an upholsterer who killed a fellow employee during an argument at a work site in the balcony of a Chicago theater. Pirovolos, a highly unsympathetic defendant, swore at the victim, then attempted to tell him how to do his job. The deceased replied that Pirovolos was "not the boss," at which Pirovolos left the room.¹⁴⁶ When he returned, he held out a knife and challenged the deceased. The two men scuffled, the deceased attacking with a small carpenter's knife and the back of a chair, the defendant striking back with a knife. Pirovolos was convicted in a bench trial:

At the conclusion of the evidence, the trial court made a finding that the deceased had made a certain assault on defendant, and that defendant was justified in the use of some force, but that his use of deadly force was unjustified. The trial court also found that defendant was in the process of retreating, but had the opportunity to retreat further.¹⁴⁷

The appellate court refused to set aside the conviction:

There was ample evidence that defendant aggressively initiated the conflict, was the first to arm himself, and retreated only after deceased emerged from the room in which he was working. . . . [I]t should also be noted that the record bears out the trial court's finding that defendant had an opportunity to retreat completely from the area without delivering the fatal wound.¹⁴⁸

Eight months later, however, the Appellate court heard facts that changed its mind.¹⁴⁹ After Pirovolos's conviction, his wife located a different eyewitness, who testified in a hearing on Pirovolos's motion for a new trial. The new witness testified that "[the] deceased 'came at' defendant with a knife, and defendant blocked the blow. Defendant swung his knife, and the deceased went down."¹⁵⁰ This new testimony could have altered the verdict, the court held:

[Previous] testimony did not indicate that the deceased used the knife or that he intended to use it in the altercation. However the testimony of Durand was that the deceased did, in fact, swing at defendant with the knife and that defendant then

142. Williams' willingness to get involved did not extend to furnishing first aid, calling the police, or telling a truthful story when finally questioned.

143. Williams did drive away, leaving the victim lying on the street.

144. *Williams*, 205 NE2d at 753 (citations omitted).

145. *People v Pirovolos*, 116 Ill App 2d 73, 253 NE2d 481 (1969).

146. *Id.* at 482.

147. *Id.*

148. *Id.* at 483. This is a classic example of flip-flopping the rule. See part IV.A.4.

149. *People v Pirovolos*, 126 Ill App 2d 361, 261 NE2d 701 (1970) (Supplementary opinion).

150. *Id.* at 702.

returned the blow Defendant's theory was that he was acting in self-defense. The additional testimony of Durand was corroborative of that given by defendant, and could have changed the result of the trial.¹⁵¹

Note here the shift from broad to narrow time-framing: Pirovolos's actions in arming himself and provoking the confrontation become less important.¹⁵² Accordingly, Pirovolos was given a new trial, even though the new testimony changed only slightly the facts indicating that he could have retreated if he wanted to.

A similar exception to the rule of "no retreat" was found for Jesse De Savieu, who shot Raymond Johnson after Johnson threw him onto the tracks at the 35th Street "L" station in Chicago.¹⁵³ DeSavieu testified that Johnson threw him onto the tracks and refused to let him climb onto the platform when a train approached. "[T]he electrified third rail and the traffic-filled Dan Ryan Expressway were behind him."¹⁵⁴ Other witnesses disagreed about whether Johnson had explicitly told DeSavieu he would not let him climb back onto the platform. Johnson was convicted of murder after the prosecution argued that "shooting Johnson from the 'L' tracks was not necessary because defendant failed to use available means of escape."¹⁵⁵ The court disagreed that these arguments implied a duty to retreat:

It appears that the prosecutor's arguments were directed toward the factual issue of whether, in the light of defendant's options, which included climbing up a nearby ladder or taking shelter under the platform edge, it was necessary to shoot Johnson in order to remove himself from the path of an oncoming train.¹⁵⁶

Here the duty to retreat has simply been smuggled back into the law under the guise of an aspect of necessity. Desavieu was required to make a sophisticated calculation in the path of an oncoming train; because he had not made it properly, his conviction was affirmed.¹⁵⁷

V

CONCLUSION

It would certainly be defensible to use the retreat cases as evidence for the proposition, advanced by legal realists, that courts do not use rules to decide cases, but simply to rationalize their own intuitive decisions;¹⁵⁸ and by critical legal scholars, that "the law" as a construct is inherently incoherent, self-contradictory, and unprincipled,¹⁵⁹ and that criminal-law rules cannot be drawn in a way that would successfully prevent courts from using their

151. Id.

152. This is an example of stopping the clock. See part IV.A.3.

153. *People v. DeSavieu*, 120 Ill App 3d 420, 458 NE2d 504 (1983).

154. Id at 508.

155. Id at 513.

156. Id.

157. Id at 514. This is an example of flip-flopping the rule. See part IV.A.4.

158. On legal realist theory about courts' use of rules, see, for example, Laura Kalman, *Legal Realism at Yale: 1927-1960*, 4-7 (U North Carolina Press, 1986); see also Joseph William Singer, *Legal Realism Now*, 76 Cal L Rev 465, 470 (1988).

159. See, for example, Kelman, 33 Stan L Rev at 671-72 (cited in note 15).

interpretive discretion to achieve results actually determined by class, race, or sexual bias.

However, the mental discipline involved in imagining both improvements to the current rules and, more ambitiously, new rules that might replace them is useful for two reasons. First, an inquiry into contemporary self-defense law is by its nature an investigation of the actual values contained within the contemporary criminal law. By imagining rules that attempt to capture values we wish to promote, we can see more clearly how the current law promotes values its practitioners may not fully acknowledge or comprehend.

Second, the bases of the criminal law are desperately in need of reformulation to meet the needs of contemporary society. Much criminal doctrine remains grounded in largely obsolete nineteenth-century notions of free will and individualism. Legal analysis uses rights theory to analyze interactions between persons who are members of a social context and for whom largely unconscious reciprocal relationships are often more important determinants of behavior than are rational calculations about rights. Ideas and attitudes formulated during the sparsely populated, heavily rural, expanding frontier culture of nineteenth century America serve badly a crowded, multiracial, technological, urbanized society trembling on the lip of the twenty-first century. One of the chief needs of the evolving society of the United States is a reduction in the use of violence, whether expressed as crime, unprincipled law enforcement and corrections, or war and militarism. The law need not necessarily play a passive rule in the attempt to wean our society from its uniquely violent mores; it could be used to restrict the tolerance and use of violence by all levels of society.

The law of self-defense is a logical place to begin this inquiry because contemporary thinkers tend to see the area of self-defense as one in which the general rules against violence simply do not apply.¹⁶⁰ But if, as this note suggests, cases of "self-defense" represent a fragile, socially mediated interpretive construct, a determined effort to bring them more closely within a general proscription of violence might serve the purpose of awakening legal thinkers to the ways we use such "exceptions" to negate the rules we claim to live by.

Accordingly, I close with a few suggestions for change in the self-defense area. These are intended, at least at present, more as "thought experiments" than as formal proposals for statutory reform.

(1) The most modest of the suggestions are intended to make the administration of the existing rules more consistent and comprehensible. They do not necessarily move the law in a less violent direction, but if properly drawn they might at least make its regulatory strictures on the use of violence clearer.

(a) "Retreat" jurisdictions should restrict the "imminent danger" exception to cases involving the actual or apparent display of a deadly weapon

160. See note 1 and accompanying text.

and a real or implied threat to use it. The "imminent danger" exception should not be used to justify killing in retreat jurisdictions where the defendant is sympathetic but faced nothing more dangerous than a punch in the eye. The courts might limit the elasticity of this exception by holding that, as a matter of law, it cannot arise unless the victim displayed a deadly weapon or acted in such a way that a reasonable person would have believed the victim had a deadly weapon, and either threatened to use it or behaved in such a way that a reasonable defendant would have believed the victim was about to use it. Obviously this restriction leaves a large area for interpretation, but it might inhibit courts from voiding the retreat rule entirely for "substantial citizens" or others they wish to favor.

(b) "No retreat" jurisdictions should replace the "without fault" rule with the "no first assault" rule in all cases. Courts in retreat jurisdictions are presently free to phrase the prerequisite for the right to stand either as a requirement that the defendant must be "without fault" in bringing about the fatal confrontation or that the defendant must simply not make the initial assault. These two variations can lead to different results, as an actual assault can be interpreted as not embodying fault, or mere words can be interpreted as if they were assaults. If "no retreat" jurisdictions were to require courts to ask whether the defendant physically began the encounter by touching or striking the victim or threatening the victim with a weapon, and to exclude evidence of insulting or provocative words as potential justifications for an initial assault, the area of indeterminacy in these cases might be reduced.

(c) "No retreat" jurisdictions should not smuggle the "retreat rule" into specific cases under the guise of "lack of necessity." A rule of "no retreat" represents a policy determination by courts or legislatures about the kind of behavior that will benefit society as a whole. I believe the policy embodied in the rule to be deeply flawed; but once the courts have enunciated it, the right to stand should not be officially extended to all citizens and then withdrawn *sub silentio* from those the courts find unsympathetic. Accordingly, statutes and case law in "no retreat" jurisdictions might define necessity as consisting of two elements only: (i) imminence of attack and (ii) danger of death or serious bodily harm. If both are present, the question of retreat would not arise.

(2) It is also possible to imagine more sweeping reforms to the current law that might more successfully embody a general policy against the use of violence.

(a) The rule of retreat could be replaced by an "avoidance of violence" standard. The problem with the idea of "retreat" is that it can direct the attention of the courts to the physical movements of the defendant and the victim in the seconds before the killing. A contemporary replacement might suggest that the right of self-defense does not arise unless the trier of fact, considering all the facts and circumstances of the case, concludes that the defendant made reasonable affirmative efforts to avoid the need for deadly force. Actual physical retreat might be one such effort; but a defendant who

created or escalated a violent encounter would not be adjudged not guilty for the sole reason that he or she physically retreated after the confrontation turned violent, nor would a defendant who attempted to defuse a confrontation be penalized simply because in the process he or she did not retreat or actually advanced. The standard should explicitly mandate the use of a broad time frame and a broad view of intent—hence the language about “all facts and circumstances.”

(b) The distinction between justification and excuse, and therefore the interpretive analysis of chance-medley, could be revived. To use the distinction in contemporary jurisprudence, justifiable homicide might be defined as covering those cases (i) where the victim was unknown to the defendant and the victim began the assault in circumstances that would convince a reasonable person in the defendant's situation that the victim intended to rob, murder, physically harm, or rape the defendant or (ii) where the assailant was known to the defendant but began the assault without previous interaction between them on the occasion in question under circumstances that would suggest that the victim intended robbery, murder, physical harm, or rape. Excusable homicide would cover all cases in which the assault began after interaction between the two parties.

The implications of this change are potentially quite wrenching, as they would require or at least imply a finding of legal fault on the part of defendants we are used to regarding as faultless. The most morally troublesome, from a contemporary perspective, would be the case of a woman attacked by a man in a “date rape” situation, or of a wife attacked by her husband after a long interaction between them from which she had at least theoretically the ability to withdraw. The new law of excuse would not necessarily punish such a defendant, but it would fit her actions into a different official story: I may have made errors in judgment during the events preceding the assault, but once the assault began, those errors became irrelevant; I had no choice but to kill. Such an interpretive change might work injustice (not all of those assaulted after interaction have in any sense contributed to the assault); but it might also permit the law to take a more honest attitude toward the actions of defendants who use force in self-defense against those with whom they have ambiguous prior relationships, and prevent the distortion involved in requiring that such defendants pretend to have been completely faultless in the encounter that led to the killing.¹⁶¹

161. One of the most repugnant characteristics of contemporary rape cases where the rapist is a person known to the victim (and thus of cases where a victim or potential victim of rape uses violence in self-defense) is an unspoken standard, enforced by legal arguments and believed by juries, of something like “contributory negligence” as negating the rapist's culpability (or voiding the victim's right to self-defense). See Susan Estrich, *Rape*, 95 Yale L J 1087, 1173-74 (1986). Much argumentation in rape cases that I have observed is directed to proving that the victim was completely faultless in entering the situation in which the attack occurred, or conversely, that she was guilty of something, even if only an error of judgment. A “mixed fault” standard might require the jury to separate the defendant's “contributory negligence” from the actions that required her to use force in self-defense.

(3) Finally, and most radically, the very idea of self-defense could be changed or negated altogether. Few things are more strange and threatening to the contemporary mind than a suggestion that the law should withdraw recognition of the "right" to use violence in any circumstances, even those historically recognized as self-defense. Self-defense is seen as a natural right, one that arises independently of the social context in which it is exercised and that can be recognized easily without reference to that context. I believe that what we call self-defense is in fact socially constructed and created by those who, after the fact, interpret events. And it is arguable that for every occasion on which the right of self-defense is invoked by a wronged party who has successfully resisted an aggressor, it is invoked at least once by an aggressive party seeking to justify unprovoked violence. Few aggressive wars are ever begun without a solemn declaration that the aggressor is defending itself against the weaker party;¹⁶² in daily life, few violent acts are undertaken in which the aggressor does not claim, and usually believe, that he or she was in some sense acting in self-defense. A world without a concept of permissible violent self-defense—in which all acts of violence are seen as culpable to some degree—is difficult to imagine. I have not successfully imagined it; I cannot confidently argue that it would be better or less violent than the world we currently live in. But contemporary ethical theories, and the traditions bequeathed to us by all the major world religions, uniformly reveal a deep ambivalence about the use of force in self-defense. The Judeo-Christian tradition is often unable to choose between "an eye for an eye" and "turn the other cheek." It might be useful to imagine what the law would be like if it began turning more cheeks and plucking fewer eyes.

162. In the Persian Gulf War, Iraqi President Saddam Hussein justified his invasion of Kuwait on the grounds that Kuwait, by allegedly pumping oil from a disputed oil field on the Iraqi-Kuwaiti border and selling oil at a price lower than that at which he wanted to sell, had commenced "economic warfare" against Iraq, which Iraq was justified in resisting by military force. "Some of the Gulf states, [Hussein] said, were keeping the price of oil too low by pumping too much of it. Since every dollar off the price of a barrel cost Iraq \$1 billion a year in lost revenues, this was an 'economic war' on Iraq. . . . [In a note to the Arab League,] Iraq accused Kuwait of planting military posts inside Iraq and stealing from an Iraqi oilfield. Both Kuwait and the U[nited] A[rab] E[mirates] were indeed, said the note, part of an 'imperialist-Zionist plot against the Arab nation.'" *Kuwait: How the West Blundered*, *The Economist* (Sept 29, 1990), reprinted in Micah L. Sifry & Christopher Cerf, eds, *The Gulf War Reader* 99, 103, 104 (Times Books, 1991). Saddam told the American ambassador to Iraq that "some brothers are fighting an economic war against us. And . . . not all wars use weapons and we regard this war as a military action against us." *The Glaspie Transcript: Saddam Meets the U.S. Ambassador*, reprinted in *The Gulf War Reader* at 122, 131 (cited in this note). After the invasion, the United States then justified its organization and leadership of a multinational force that devastated Iraq on the grounds, inter alia, that Iraq represented an economic and military threat to the West. "Our country now imports nearly half the oil it consumes and could face a major threat to its economic independence." George Bush, *In Defense of Saudi Arabia* (Speech of Aug 8, 1990), reprinted in *The Gulf War Reader* at 197, 198 (cited in this note). "While the world waited, Saddam sought to add to the chemical weapons he now possesses, an infinitely more dangerous weapon of mass destruction—a nuclear weapon." George Bush, *The Liberation of Kuwait Has Begun*, (Speech of Jan 16, 1991), reprinted in *The Gulf War Reader* at 311, 312 (cited in this note).