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I. PROLOGUE

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter; all his force dares not cross the threshold of the ruined tenement![1]

A law-abiding woman living alone is suddenly awakened and confronted in her bedroom by a serial rapist. She reaches for her pistol only to find it locked and unloaded as state law requires. She is raped and stabbed. Finally the rapist leaves. The woman manages to dial 911, but bleeds to death on her bedroom floor.

Suppose that, contrary to the state law, she had kept a loaded firearm in her nightstand, resisted the rapist, and shot and killed him when he turned his back to her. She could then face conviction under firearm control laws for having illegally possessed the firearm. She would also face prosecution for using force that was not “immediately necessary for the purpose of protecting [herself] against the use of unlawful force by [the rapist] on the present occasion.”[2]

How did the criminal law deviate so far from the common law that even a freed medieval serf[3] had greater rights to possession of personal arms for self defense than many Americans today? Does the United States Constitution have room for state laws that casually impose legal demands for human sacrifice upon totally blameless crime victims? Do such laws “shock the conscience”[4] and cry out for a federal remedy?

To answer these questions, one must mine seven centuries of English common law to excavate the fundamental principles undergirding the law of self-defense in the home. For hundreds of years, judges in England and the United States were well grounded in the castle doctrine. Its precepts were the touchstones for which common law jurists consciously or reflexively reached in cases involving the special status of home defense.

In the face of seven centuries of entrenched common law experience, postmodernists, in the moral torpor of deconstructionism,[5] have subverted the fundamental principles that had previously assured the home as a complete sanctuary and fortress against criminal attack. Postmodern legal deconstructionism became fashionable in the last third of the twentieth century, and spurred many states to embrace Model Penal Code (“MPC”) type departures from the common law. Those withdrawals from the common law and American
colonial law heritage shook the foundations of, and all but demolished, that sanctuary.

At the time of the framing of the United States Constitution, all common law authorities upheld the unvarnished, absolute, unqualified right to keep arms in the house for home defense against thieves and stranger-intruders.[6] This Article shows how and why this right is inextricably enmeshed with the home privacy castle doctrine.[7] The castle doctrine and the right to have arms to defend that sanctuary are “fundamental” and “implicit in the concept of ordered liberty” as described in Palko v. Connecticut.[8] Consequently, these are bedrock fundamental rights that are embedded in the core of the Fourth Amendment and substantive due process of law.[9] The due process clauses of the Fifth and Fourteenth Amendments protect these rights, as they stood at the time of the framing, from deprivations, infringements, erosion, or chilling by either the federal or the state governments—whether by legislative, executive, or judicial acts or decrees.[10] In a variety of contexts, the U.S. Supreme Court has held that the common law at the time of the framing of the United States Constitution sets minimum standards for Fourth Amendment privacy rights.[11] This Article also illustrates that, while in the last half of the twentieth century the United States Supreme Court was actively elaborating upon the umbras and penumbras[12] that emanate from the absolute home-castle-privacy doctrine, the Model Penal Code,[13] as well as similar caselaw and statutes, were actively dismantling and undermining the very foundations of the Court’s home-privacy umbras and penumbras. Post-Hurricane Katrina the country has reaped the whirlwind of that dismantling and undermining in the total disintegration of human dignity to say nothing of individual human rights. The chaos, anarchy and barbarism that attend the collapse of civilization followed.[14]

II. THE ROOTS OF PRIVACY: THE CASTLE DOCTRINE

A. The Fourth Amendment, the Payton Decision, and the Titanic Influence of Lord Coke on American Law


   The U.S. Supreme Court’s leading decision in Payton v. New York[15] was a capstone of seven hundred years of legal evolution, stretching from the present all the way back to fourteenth century precedents. In Payton, the Court traced the roots of the Fourth Amendment classic home privacy rights.

   A prime consideration of the Payton Court was the long radiance emanating from the castle doctrine, fructifying the original individual rights and freedoms articulated in the common law at least as early as the fourteenth century. These rights were firmly embedded in American law at the time of the framing of the U.S. Constitution.

   American pre-revolutionary common law of course derives wholesale from England.
An eminent array of colonial lawyers were trained in British common law, which was the legal system transported to the colonies.

Between 1760 and the American Revolution, more than one hundred colonial lawyers were admitted to the Inns of Court in London; several of them later attended the 1787 constitutional convention and signed the Constitution. These delegates included John Rutledge, “one of the most influential at the Constitutional Convention.” The English legal education—comprising case reports and common law treatises—of these colonial lawyers, who later became the Founders and the participants in the 1787-1788 debate on ratification, informs our understanding of their legal outlooks and mindsets.

The Payton Court reviewed the contents of colonial libraries and the authorities used by colonial courts. Quoting a work by the noted legal historian and constitutional law authority A. E. Dick Howard as the source of its information, the Court noted that a study of the contents of approximately one hundred private libraries in colonial Virginia revealed that “the most common law title found in these libraries was Coke’s Reports.” The Court also utilized a second study mentioned by Howard, by Rodney L. Mott, which revealed that of the inventories of forty-seven libraries throughout the colonies between 1652 and 1791, Coke’s Institutes were located in twenty-seven of the forty-seven libraries. It was by far the most common treatise on law or politics found in these colonial libraries. The Payton Court further noted that the second most common title, Grotius’ War and Peace, was a poor second; it was found in only sixteen of the libraries. Even Locke’s Two Treatises of Government appeared in only thirteen libraries.

The Mott study alluded to in the Payton opinion indicated that Dalton’s Country Justice was second in the list of common law treatises. Dalton’s work was in thirteen of the inventoried colonial libraries not far behind Grotius’ War and Peace, which was not a common law treatise. Dalton’s Justice enjoyed more than twenty editions in the course of the seventeenth and eighteenth centuries; the Massachusetts General Court ordered two copies in 1647. The authority that colonial courts cited the most often was Coke’s Institutes. Other works cited by these courts included Bacon’s 1786 Abridgment, Viner’s 1741-1743 Abridgment, Rolle’s 1668 Abridgment, Brooke’s 1586 Abridgment, Hawkins’s 1728 Abridgment and Blackstone’s 1765-1769 Commentaries. Hawkins’s Abridgment, as its title implies, was a two-volume summary of Hawkins’ earlier two-volume A Treatise of the Pleas of the Crown. Hawkins’s Treatise was inventoried in colonial libraries such as the Newport, Rhode Island, Public Library (1750 inventory), the 1757 catalogue of the Library Company of Philadelphia, and the 1764 catalog of books listed in the Laws of the Redwood Library Company. It was in the library of John Adams (1790 inventory). Hawkins Treatise was advertised for sale by the Boston bookseller Henry Knox in his 1773 catalog of imported books. Hawkins’s Pleas of the Crown was in the curriculum of law courses given in several law offices prior to the framing of the United States Constitution.

In addition to the foregoing, the 1757 catalogue of the Library Company of Philadelphia included a copy of Hale’s two-volume treatise History of the Pleas of the Crown, and the 1790 inventory of the Library of John Adams indicated that Adams 3
had two copies of this work. A study of private colonial libraries in Virginia revealed that the second-most frequently found volume of reports was that of Sir George Croke.[43] Croke’s reports of *Cook’s Case*[^44] and of *Cooper’s Case*[^45] are conspicuous in American understanding of the castle doctrine at the time of the framing of the U.S. Constitution.[^46] Pre-1787 Americans studied *Pulton’s De Pace Regis et Regni*[^47] which Yale College listed in its 1743 catalogue.[^48]

The colonial legal profession also resorted to *Foster’s Crown Law*,[^49] and *Burn’s Justice of the Peace*,[^50] all of which were comprehensive treatises on criminal law. Colonial lawyers following Coke’s advice were conversant with the following early additional works among others strongly endorsed by him: Fitzherbert’s *Abridgment*,[^51] and two works by William Staunford.[^52] Coke advocated that familiarity with Staunford and Fitzherbert, “are most necessary and of greatest Authority and Excellency in penetrating the common law.”[^53] Colonial lawyers also studied *Lambard’s Eirenarcha*[^54] if they followed Blackstone’s recommendation.[^55]

2. Titanic Influence of Lord Coke on American Law

Edward Coke is the colossus of the common law. The commanding prominence of Coke’s works in both colonial libraries and colonial decisions was appreciated by the Payton Court. *Payton* gave great, if not conclusive, weight to Coke. Coke was “widely recognized by the American colonists ‘as the greatest authority of his time on the laws of England,’” proclaimed the Payton Court.[^56] The views on privacy expressed by Coke as well as works mentioned in the Mott study, and the views of additional common law authors available to the Framers of the U.S. Constitution will be explored in this article.

Most eminent common law authorities who wrote within a century after Coke’s *Institutes* copied and published his words nearly verbatim. These additional commentators were in concordance with Coke’s views on the castle doctrine, many of them embellishing upon, clarifying, and explaining the reasons for his views.

The protean influence of Coke upon the Framers is obvious from the omnipresence of his *Institutes and Reports* in colonial libraries.[^57] It is clear as well from the extensive deference of treatise writers to Coke’s works.[^58] This influence cannot be overestimated. His prodigious case reports and commentaries had seminal importance in informing and shaping the thinking of Englishmen on both sides of the Atlantic.[^59] A 2004 accolade typifies the monumental esteem accorded Coke and his accomplishments to this day:

He is the earliest judge whose decisions are still routinely cited by practicing lawyers, the jurisprudent to whose writings one turns for a statement of what the common law held on any given topic. His discussion of a phrase from Magna Carta,[^60] *nisi legem terrae*,[^61] is one of the earliest commentaries to give a deeply constitutional resonance to the phrase “due process of law.” For his defense of liberties and property rights, for his assertion of judicial independence,
for his active, careful role in adjusting law to the demands of litigants and the interests of society, few figures have deserved more honor.[62]

3. The Fourth Amendment, Payton and Lord Coke’s Four Root Castle Doctrine Cases

The bedrock of the Fourth Amendment was inspected by the Payton[63] Court. The common law castle doctrine is that bedrock.

The American castle doctrine was founded upon a portion of Coke’s report of a 1603 decision, Semayne’s Case.[64] Semayne, in turn, relied upon four root fourteenth century common law cases. These were originally reported in Law French, the legal parlance in England in the medieval era.

A half-century earlier than Coke, the first three cases had been singled out as core cases and highlighted by William Staunford, a scholar and jurist who wrote in Law French. Coke praised Staunford’s work as “most necessary and of greatest Authority and Excellency.”[65] In his treatise on criminal law,[66] originally published in 1557, Staunford discussed the security aspect of the castle doctrine and the individual right one’s home as one’s castle.[67] After reciting and discussing the facts of the first three root cases referred to by Coke, Staunford recorded the portentous maxim: “ma meson est a moy come mon castel [my house is to me like a castle]”[68] which has echoed and reverberated down seven centuries in an unbroken line.

The Payton Court quoted from and again confirmed the place of Semayne’s case in the American Constitutional scheme.

Thus, in Semayne’s Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1603), the court stated: “That the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose; . . . and the reason of all this is, because domus sua cuique est tutissimum refugium.”[69]

The Payton Court reconfirmed that the castle doctrine is part and parcel of ordered liberty in American law:

The common-law sources display sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repetition of the adage that a “man’s house is his castle,” made it abundantly clear that both in England and in the Colonies “the freedom of one’s house” was one of the most vital elements of English liberty.[70]

In support of the castle doctrine, the Payton Court also invoked John Adams, the eminent colonial lawyer, jurist, and founder: “Now one of the most essential branches of
English liberty is the freedom of one’s house. A man’s house is his castle.”

This Article will discuss the four root castle doctrine cases cited in the Payton decision[71] which constitutes the original taproot from which the castle doctrine with all of its branches burgeoned. The cases will be discussed in the following order:

(1) 3 E. 3. Coron. 305, also known as F. Coron 305 (1330);[72]
(2) 3 E. 3. Coron. 3305, also known as F. Coron 330 (1330);[73]
(3) Y.B. 26 Ass. Pl. 23 (1353);[74]
(4) 21 H. 7. 39 (1499).[75]

These four cases are the ur-text for the castle doctrine. They are constantly cited by case reports, scholars, and other common law authorities, both before and after the framing of the U.S. Constitution. Legal authorities continue to cite them as controlling on the subject of using force, especially deadly force, in defense of habitation.

B. Coke’s Root Castle Doctrine Cases

1. The Castle Doctrine: Coke’s First Root Case

Coke’s first root case, decided in 1330, has been translated by a modern authority as follows: “It was presented that a man killed another in self-defense in his own house. It was asked [by the court] whether the man who was killed had come to rob the householder, for in such a case a man may kill even if it is not [necessary] in self-defense.”[76]

In this first root case, the English court articulated the unqualified sanctity of and privacy in, the home by holding, as a modern authority states: “The owner of a house may lawfully kill one [a thief] who enters the house to rob him.”[77] From then on, if not earlier, the common law would not allow juries or judges to second-guess the householder in the throes of an alarm precipitated by a housebreaker.[78]

The first root case also demonstrates that the key threshold question was whether it appeared to the householder that the intruder “had come there to rob the householder.”[79] If robbery appeared to the householder to be the housebreaker's intent, then “in such a case a man may kill even if it is not [necessary] in self-defense.”[80] Coke’s interpretation of the second and third root cases, which is equally applicable to the first, is definitive.[81] “He who kills a man se defendendo [in self-defense] . . . by the common law shall forfeit his goods: but he who kills one that would rob him and spoil him in his house shall forfeit nothing.”[82]

The first root common law case was such a mother-lode of common law that it was cited
directly or indirectly as controlling in practically all major common law criminal law commentaries prior to the framing of the Constitution.[83]

2. Coke’s Second Root Case on the Unrestricted Right to Home Privacy

The second of the four root cases, 3 E. 3 Coron. 330,[84] cited in Payton,[85] translated from the Law French reads:

It was presented that thieves entered a man’s house intending to rob him. The servant of the house killed one of the thieves and cut off his head. [Judge] Louth said that the servant did well and that he would receive from the law nothing but good; for even though he should be arraigned of the killing, if the facts were found as stated he would be acquitted by judgment.[86]

This case again illustrates that the common law’s urgency that housebreakers be disabled. A householder’s slaying of home-breakers removed a “threat to the entire community.”[87] The householder had no way of knowing if the housebreaker was armed or not. The common law supported the use of deadly force to terminate the crime. The occupant was urged to resist the housebreakers, whether or not it appeared on the spot or after the fact that the offender was armed.[88] The second root case was also cited as controlling law in most common law commentaries prior to the framing of the U.S. Constitution.[89]

3. Attempted Home Attack: Deadly Force Right Absolute to Thwart Home Invasions Confirmed in Coke’s Third Root Privacy Case and Commentaries and in Other Common Law Authorities

The third root case,[90] decided in 1353, translated from the Law French,[91] completely supported a householder’s rushing out of his home to dispatch someone who was attempting to, but had not yet, set his home afire. The court laid down the absolute right to use deadly force against an attempted arsonist. That protective right safeguarded the home and simultaneously spared society from house burnings that could ignite community-wide conflagrations. This third root case was also seminal; most common law scholars prior to the framing of the Constitution relied upon it.[92]

The absolute, unqualified right of householders to protect home privacy against attempting house intruders was confirmed by Parliament in a 1532 statute. The statute, passed to confirm existing common law, emphasized that attempts at housebreaking were intolerable:

[I]f any evil disposed person or persons do attempt feloniously to rob or murder any person or persons . . . in their . . . dwelling places, or . . . do feloniously attempt to break any dwelling house, . . . should happen . . . to be slain
by him or them that the said evil doers should so attempt to rob or murder, or by any person or persons being in their dwelling house which the same evil doers should attempt burglary to break [and] if the said person so happening in such cases to slay any such person, so attempting to commit such murder or burglary . . . be indicted or appealed of[93] or for the death of any such evil disposed person or persons, [then] the person or persons so indicted or appealed of . . . 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 the said evil disposed person or persons.[94]

On its face and as interpreted by the courts, the statute approved householders’ use of deadly force against an attempting unknown intruder, even if he had not yet broken into the home.[95]

Coke believed that the 1532 statute was needed to cover cases of resisting attempted burglaries and attempted highway robberies because the actual events could appear murky to the fact-finder.[96] Other authorities, including Hale, Lambard, and Dalton, maintained that the statute was necessary to clarify the law concerning attempted highway robbery but not attempted burglary, as they considered the latter issue settled.[97] They opined that Coke’s third root case had already justified the use of deadly force to resist an attempted attack on the home.[98]

Numerous common law authorities cited the 1532 statute as controlling[99] and merely declaratory (in affirmation) of the common law.[100] As late as its 1964 edition, the standard text Russell on Crime, concerning justifiable homicide continued to utilize the following language: “In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands, but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable.”[101] Astoundingly, Russell’s language nearly identically tracks, the 1532 statute’s wording “so happening in such cases to slay . . . reflecting over four centuries of unbroken common law precedent.”[102] This ingrained common law standard for self-defense in the home remained the law of England until 1967.[103]

4. Defending the Castle with Armed Family and Friends: Coke’s Fourth Root Case

The fourth root case, relied upon by Coke and the U.S. Supreme Court in Payton, was originally decided in 1499 and reported in 1506.[104] This case endorses a householder gathering armed friends and neighbors at his home to meet a threat of simple assault, even if the threat is from a known person and at a future time. Semayne’s Case as cited by Payton confirmed armed home defense. An authoritative translation reads:

If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not
assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace. But a man’s house is his castle and defense, and where he has a peculiar [special] right to stay.[105]

This case protected the right of a householder to gather family, neighbors and friends in the home for defense, even upon merely hearing of a possible future intrusion.[106] The fourth root case was fundamental for home defense and was cited in most all law books relied upon by the American colonists as a controlling authority in the common law.[107]

Coke interpreted the fourth root case as supporting the right to keep arms in the house for home defense as part and parcel of the castle doctrine:

And yet in some cases a man may not only use force and arms, but assemble company also. As any man may assemble his friends and neighbors, to keep his house against those that come to rob him, or kill him, or to offer violence in it, and is by construction excepted out of this Act [the 1328 Statute of Northhampton][108] . . . for a man’s house is his castle, & domus sua cuique est tutissimum refugium;[109] for where shall a man be safe, if it be not in his house?

Arma in armatos sumere jura sinunt. [And the laws allow arms to be taken against an armed foe.][110]

But he cannot assemble force, though he be extremely threatened, to go with him to Church, or market, or any other place, but that is prohibited by this Act [the Statute of Northhampton].[111]

Coke cites in the margin of this passage, inter alia, the first, second, and third root cases discussed above, demonstrating the inherent linkage and consequent identity between the right to use force in defending one’s home and the right to keep arms suitable for that purpose.[112] The fourth root case, along with Coke’s comments on it, corroborates that when the common law speaks of “safeguarding” a person, the safety measure is not limited to using bare hands but includes having and using arms as well.

C. Public Policies Underpinning the Root Castle Doctrine Cases

1. The Castle Doctrine Philosophy

A man’s house is his fortress for peace, privacy and quite repose. This common law philosophy, which underpins the four root cases, is a maxim robust and vital from the medieval to post-modern eras. Without this basic building block of civilization, it is easy to get lost in well-intentioned platitudes that result in the pictures described in the Prologue and which traumatized the United States in the aftermath of Hurricane Katrina.[113]

All legal systems have underlying assumptions generalizing the types of human behavior society seeks to prevent and which if overtly performed, punish.[114] The Common
law system was simply a human attempt to control behavior with language, and to compel obedience. [115] “English common law rested upon broad principles just described. It is a refraction of the struggle to achieve social ends; the satisfaction of social desires.”[116] Blackstone’s work was one of the main “conduits”[117] through which the English criminal law took root in American jurisprudence. Blackstone was greatly influenced by natural law.[118]

John Locke, the father of “Liberalism,” was a foremost synthesizer and popularizer of natural law:[119]

And that all men may be restrained from invading others’ rights and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, . . . would . . . be in vain. If there were nobody [who] . . . had a power to execute that law, and thereby preserve the innocent and restrain offenders.[120]

This elementary, first and foremost responsibility of government is to protect the innocent from criminal attack, i.e., “keep the peace,” without which “any system of law or government becomes untenable and impossible.”[121] Government’s first and most important welfare program is to secure the physical survival of its members.[122] The government takes to itself the punishment and takes it out of the hands of the relative of the accused, as was primitive practice:

[B]y the right he hath to preserve man-kind in general, may restrain, or, where it is necessary, destroy things noxious to them, and so may bring such evil on any one who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and by his example others, form doing the like mischief.[123]

The common law’s objective was to line up all its presumptions in favor of civilized society, the body politic. A stranger intruder was considered by natural law to be an attacker of society because:

a thief . . . I may kill, when he sets on to rob me but of my horse or coat; because the law which was made for my preservation where it cannot interpose to secure my life from present force, which if lost is capable of no reparation, permits me my own defence, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable. Want to a common judge with authority puts all men in a state of nature; force without right upon a man’s person, makes a state of war, both where is, and is not, a common judge.[124]

Unfortunately the United States has recently undergone a graphic relearning of the verities of Locke’s natural law insights. Even without criminal mayhem, a crime-terrified citizenry cowering behind triple locked doors and windows, cannot be happy, free, or assets to themselves and the community at large. They cannot exercise their constitutional rights. A
terrified public flees the source of their terror, leaving behind blight, decay and neglect. Even one stranger intruder into a home is a broken window of the edifice of civilization, a chink in the levee that the common law was hyper-vigilant about eliminating on-the-spot.

The common law judges were not cavemen. The common law, matured and mellowed over seven centuries was keen on protecting ordinary citizens, and was ever conscious, as many persons are now, post-Katrina, that thugs and brigands must be given no quarter, the veneer of civilization being extremely thin.[125] In twenty-first century United States many efforts to curtail criminality have been met with deconstructionist-inspired objections[126] that keeping the peace, either by private citizens or the government, staunches social change, is a reversal of progress, is anti-American and anti-civil rights,[127] or is impossible.

There were reports that a little girl had her throat cut in the aftermath of anarchy following Hurricane Katrina; another was reportedly raped on the floor of the New Orleans Superdome.[128] The legal philosophical question presented is whether the law will see such crimes from the perspective of the slasher and rapist or from the viewpoint of the child victims bleeding and dying on the New Orleans Superdome floor. This is the basic legal issue the common law wrestled with. To borrow a phrase from the medieval Jewish scholar Hillel, everything else is commentary. It is true that the slasher and rapist themselves were likely an abandoned children growing up in a crack house, possibly raped and surely brutalized themselves. Yet, should such a scarred and pitable life context shift the law’s viewpoint from the victim to that of the attacker? The answer to that question has to be no, if standards of humanity are to be maintained. It is of course repulsive to have to execute or sentence to long prison terms, young persons in the prime of life who never had any of life’s advantages or even humane treatment. The sheer waste of human potential is staggering. Until recently the law has not been concerned with what disposition will make the academic and the legal profession comfortable; it is about what needs to be done so the Superdome horrors are not repeated. Perhaps the common law solutions are harsh; however the New Orleans experience shows that they are only time-tested proven solutions available today.

The common law has been criticized for legitimizing vengeance and being retrograde, bloodthirsty, ridiculous and racist. Yet, when the above stated horrific criminality is kept firmly in mind, it is obvious the classic common law rules are the only safeguards for the preservation of civilization for the progeny of today’s populace.

2. Housebreaker as a Mortal Threat to Occupant and to Civilized Society

Coke’s four root castle doctrine cases were templates for the common law’s canonization of the home’s special status as an absolute refuge, retreat, and safe haven from criminal attacks by intruding strangers. Coke stated:

    As if a thief offer to rob or murder B . . . in his house, and thereupon assault him, and B defend himself . . . in his house, and thereupon assault him, and he defends himself; [and] kills the thief, this is not felony.[129]

Coke employed the term “thief” in a “broadened sense as a synonym for scoundrel.[130]
The common law conclusively and automatically presumed that an unknown intruder intended from the beginning of his act of breaking-in, that if confronted he would kill the occupant in order to consummate his crime.[131] A stranger, housebreaker was presumed to be an out-of-control robber or murderer.

Thus, in *Semayne’s Case*,[132] the court stated that “if thieves come to a man’s house to rob him, or murder, and the owner . . . kill any of the thieves in defence of himself and his house, it is not felony.”[133]

Coke used the term “thieves” in connection with justifying the use of deadly force to thwart a house-thief. He apparently meant to convey the idea that the thief expected and would plan at the outset, that the instant the householder would become aware of his presence in the householder’s home, she would not stand idly by but would confront him.[134] Coke demonstrates his philosophy by referring to a 1349 case, later named *Memorandum* in the margin of his *Institutes*, as well as by citing the Latin version of *Exodus 22*[135] but he uses the Latin “vir” [man] rather than the fourth century Vulgate’s “fur” [thief] to describe the home-breaker.[137] When the identity and intentions of any intruder was not known to the householder, the latter could lawfully presume that the former was a dangerous felon who came to rob.[138]

Attempts to violate home integrity were considered a public menace, and in 1532[139] Parliament enacted a statute to confirm the common law on attempted housebreakings:

[I]f any evil disposed person or persons do attempt feloniously to rob or murder any person or persons . . . in their . . . dwelling places, or . . . do feloniously attempt to break any dwelling house, . . . should happen . . . to be slain by him or them that the said evil doers should so attempt to rob or murder, or by any person or persons being in their dwelling house which the same evil doers should attempt burglarly to break [and] if the said person so happening in such cases to slay any such person, so attempting to commit such murder or burglary . . . be indicted or appealed off[140] or for the death of any such evil disposed person or persons, [then] the person or persons so indicted or appealed of . . . 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 the said evil disposed person or person.[141]

At the time of the framing of the United States Constitution, the common law conclusively presumed that an unknown home-breaker came to rob and could be expected to murder the householder.[142]

3. **Common Law Wall of Separation Between Justifiable and Excusable Homicide**

   a. **Justifiable Homicide**

Justifiable and excusable are the dichotomous classes of common law non-felonious
homicide. The common law recognizes as justifiable the necessary killing of another in the performance of a legal duty, or the exercise of a legal right, where the slayer is not at fault.\[143\] “[I]f thieves come to a man’s house . . . and the owner . . . kill . . . any of the thieves in the defense of himself or his house it is not felony.”\[144\]

In his *Institutes*, Coke described the common law ideas pertaining to justifiable homicide:

Some [justifiable homicides] without [retreating] to a wall, etc., or other inevitable cause. As if a thief offers to rob or murder B either abroad or in his house, and thereupon assault him, and B defends himself without any giving back, and in his defense kills the thief, this is not a felony for a man shall never give way to a thief, &c. \[145\]

Coke clarifies this presumption by citing the Latin version of *Exodus* 22.\[146\] As Blackstone succinctly observed, “it is clear that where I kill a thief that breaks into my house, the original default can never be upon my side.”\[147\]

From 1330 on, if not earlier, the common law would not allow juries or judges to second-guess a householder in the throes of a housebreaking alarm. “Homicide is justifiable . . . In defense of house or goods; as if I kill a man who sets my house on fire; or a thief who . . . comes to rob me.”\[148\]

Announcement in plain sight of the occupant of the nature and purpose of the would-be entrant is required by the castle doctrine.\[149\] If a home-approacher did not extend this reassurance, the common law encouraged the occupant to move into position to ward off the worst possible outcome, like taking a firearm in hand.\[150\]

Any rupture or breakage on the outside of the home, especially at the apertures, triggered the occupants’ right to use any available means, including deadly means to meet the threat. One version of the law stated that if anyone even “feloniously attempted to break any dwelling house”\[151\] such touching triggered whole array of individual’s rights and also responsibilities to the community. The outhouse\[152\] was included in the legal definition of the occupant’s premises but a detached barn was not.\[153\] Modern confirmation of the home sanctity and privacy has been extended to public phone booths which are not, of course, owned or rented by the user.\[154\]

The castle doctrine means that the threshold of the householder may not be crossed.\[155\] This ancient right to ward off home invaders did not require the occupant to wait until the homebreaker actually put his feet across the threshold of her house before taking decisive action.\[156\] If any part of the physical body of the criminal attacker obtruded into the householder’s premises, her individual right to defend her home was clearly activated.

For instance, in a thirteenth century case an intruder made holes in several walls of an abode.\[157\] He then stuck his head through one of the openings although his feet remained
outside the house. The frightened occupant was adjudicated “justified” in killing the intruder. The occupant’s privacy zone was off limits to all but those on the premises by invitation (guests, repair persons, delivery persons). *Payton v. New York*[^158] reemphasized that the U.S. Supreme Court “has not simply frozen into constitutional law those . . . practices that existed at the time of the Fourth Amendment passage.”[^159] Therefore, nowadays, a “break” in the perimeter of a home would probably include cutting telephone wires or disabling a security alarm system.[^160]

No retreat in the slightest degree of any manner or description was ever prescribed for occupants facing a housebreaker by the common law. Coke declared that a person in his home did not have to “give back.”[^161] That terminology means that the householder under attack was not under obligation in any way, shape or manner to accommodate the housebreaker, no matter what the housebreaker’s age or condition.[^162] The common law’s attention was riveted on the frightened, invaded householder and solely upon the invaded householder.

Abandonment of the “place of refuge” was unthinkable in common law jurisprudence.[^163] In cases of a murderous though non-robbery assault in the home there was also no retreat mandate. Coke stated: “an occupant could legitimately dispatch a housebreaker” without inevitable cause.[^164] Whatever means an occupant utilized to stop a housebreaker in his tracks were applauded by the common law which never Monday morning quarterbacked home defense. Evacuation of abode to accommodate a felonious intruder was totally unheard of:

> When a man is indoors and is assaulted by persons who have no authority, he cannot [be required to] leave his house to get away from them, nor may They justify the assault . . . the law wills that every man shall be as safe and sound in his own house as he shall be in the king’s presence.[^165]

The occupant was not expected to accommodate the threat in any fashion, but to confront it. The doctrine of no-retreat-from-the-home is another facet of the castle doctrine. Any retreat requirements in the common law were limited to situations of spontaneous domestic fights and disputes among people who were keeping company with one another and have nothing to do with the castle doctrine as applied to home invaders. Judge Cardozo nailed it:

> It is not now, and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his grounds and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.[^166]

As discussed below, the MPC’s squeamish “higher morality” mandating “necessity” to dispatch a stranger-intruder-housebreaker are devastating to householders security.[^167]

A justifiable homicide was a surety against serial criminals. It was a component of citizenship and considered to be a salutary community service. The duty to arrest felons,
stemming from time immemorial can also be found in a medieval book known as *Fleta*, which was probably written in the early fourteenth century. Fleta wrote:

> In order that all men may enjoy sure peace, it has been enacted that all are to be ready, at the order of the sheriff and at the [hue and] cry of the countryside, to purse and arrest felons, . . . and the king will deal grievously with him who does not do this.[168]

Hawkins elaborated on the victim’s duty to her community:

> As to the first Point it seems clear, That all Persons whatsoever who are present when a felony is committed, or a dangerous Wound given, are bound to apprehend the Offender, on Pain of being fined and imprisoned for their Neglect, unless they were under Age at the Time.[169]

A person who slew a home-breaker was considered by the common law to be “an executor of the peace,” by contributing to public safety, public peace, public comfort, and public convenience.[170]

The common law always protected and stood by a householder who slew a home-breaker—the householder in such instances was “therefore to be totally acquitted and discharged, with “commendation rather than blame.”[171] A justifiable homicide protected future victims. Dispatching a violent felon was considered to be not only a prerogative of the victim but also a duty of citizenship and a welcome service to the community.

A 1749 American summary of justifiable homicide reads: “Homicide is justifiable . . . . In defense of house or goods; as if I kill a man who sets my house on fire; or a thief . . . comes to rob me.”[172]

The views and language expressed in the American *Conductor-Generalis* track those of Staunford and Coke. Before the time of the framing of the Constitution, in addition to English treatises and caselaw known to the colonists, treatises published in America had clearly also demarcated the common law’s massive wall of separation between justifiable and excusable homicides.[173]

b. **Excusable Homicide—and the Two Safety Checks on the Use of Fatal Force**

> [A]lthough the life of main is a thing precious and favoured in law, so that although a man kills another in his defense, or kills . . . without any intent, yet it is a felony . . . for the great regard which the law has to a man’s life. [174]

Spontaneous fights, disputes and brawls among people who associated with one another were placed by the common law in a distinctive disfavored category. The common law took a very dim view of fatalities occurring in fights and brawls.[175]

Pure self-defense[176] or excusable homicide rules were totally different from those for
justifiable homicide. The overriding factor in the common law’s philosophy regarding non-felonious combatants was that they were both considered to be “loyal”[177] and “valuable.”[178] They were contributing to the social order as workers, artisans, clerics or soldiers. They might have lashed out at each other in a moment of anger or be out of their right minds during and after a bout of drinking. Paramountly, they were not habitual criminals or even a first offender staging an atrocious attack—a housing-breaking. They were part and parcel of society. They were not “unconnected to society’s moral values,”[179] “anti-linked”[180] to them, or committing “fashionable”[181] atrocities. They were not foisting chaos and criminality on the community. This bottom line relevant to any social architecture[9] is to draw a bright line between the segment of the population which is partaking in the social order and those who are warring with it.

In medieval terms, this was recognized by pronouncing the combatants and incidentally deceased “true” citizens. The sovereign had “contempt”[182] for the killings of his most-of-the-time responsible and productive subjects.

The common law was scrupulous, even fanatic, to preserve the lives of combatants, regardless of who or what provoked the altercation, so long as the contention was not a violent felony situation like housebreaking. No matter what degree of poverty disease, previous condition of servitude, race, ethnicity, gender or sexual orientation of the deceased, the common law held the slayer to strict accounting.

i. The Retreat Requirement—The First Safety Rule to Prevent Excusable Homicide

The persons threatened in a brawl or fight that did not involve another felony such as housebreaking was required to retreat. He had to attempt to get out of the way or away from the threat as far as he possibly could: “Se defendendo [In pure self-defense]. This homicide is excusable . . . and he must give back as far as he can without endangering his own life.”[183]

Giving back here meant to give ground or move away from the adversity. Only if he had his back to wall, or was facing a body of water, could he wield injuring force.

ii. The Second Safety Check on Excusable Homicides

In an ordinary brawl or confrontation, the killer’s escalation to deadly force had to have been necessary. The level of force used had to match the nature of the threat so that if the attacker could have been overcome by other than fatal means, the slayer would not be excused.

Even after retreating to an impediment like a wall or a ditch, the common law still did not permit the use of deadly force by brawling or simply hot-tempered combatants: “Se defendo [In pure self-defense]. This homicide is excusable, but then it must be done only upon an inevitable necessity.”[184]

The common law required formal court applications from those who wanted to be
excused from manslaughter convictions demonstrating to the court that the deadly force escalation was appropriate to the nature of the threat. The level of force used had to match the nature of the threat. It had to be for “inevitable cause.”[185] If the attacker could have been overcome by other than fatal means, the slayer would not be excused and would be guilty of manslaughter. Especially if the confrontation escalated to deadly violence, the slayer would have the burden of showing the court that the fatality was absolutely necessary in self-defense. The slayer had to demonstrate to the court that the adversity could not have been tempered by any non-fatal means.

The third fundamental distinction was that even if a fatality was entitled to be excused, the slayer was obliged to make a court application to the King for a pardon. “[L]e Roy ad un home de son realme occide . . . pur ceo cause il conviant aver son charter de le Roy.”[186]

To be released from jail, the slayer needed a pardon.[187] In medieval times, pardons typically came at a price, sometimes quite high, or on condition of serving in the military for a while; consequently, the king was often favorably disposed to granting pardons.

The fourth distinction was also major, and again illustrated that the philosophical separation between excusable and justifiable homicide was a difference in kind and not degree. Even though pardoned, the slayer in self-defense incurred punishment. The rationale of forfeiture was that it was compensation to the king for having lost a productive subject. This rationale, of course did not apply at all to justifiable homicides which concerned those considered to be public menaces and who were committing outrages upon society.

Frequently, the king took possession of all the homicides’ lands and chattels.[188] No doubt the procedure helped keep the king’s peace, because subjects knew that if they participated in deadly brawling, their lands and possessions might be escheated to the crown.

Most states never followed the English practice of forfeiture for excusable homicide, and by the Civil War none of them did so.[189] On the federal level, one of the first orders of business of the framers of the U.S. Constitution[190] and the first Congress[191] was to ensure that federal forfeitures would never be enacted.

The bright line distinguishing moral culpability in “excusable” homicides as opposed to “justifiable” homicides established in English common law can be found in a contemporary dictionary. The Shorter Oxford English Dictionary defines “excusable homicides” as those “incurring blame, but not criminal liability because in self-defence or by misadventure,” “justifiable homicides” as those “incurring neither blame nor criminal liability because in the execution of one’s duty.”[192] Nevertheless, because of the abolition of forfeiture for excusable homicide early in American history, the terms “justifiable” and “excusable” have been used interchangeably.[193] Modern American criminal law discussions continually indiscriminately interchange the terms “justification” and “excuse,” thereby missing constitutionally vital and public policy distinctions. For example, a leading contemporary criminal law treatise,[194] citing and quoting Exodus 22:1,[195] recognizes it as the source of Western civilization’s right of householders to dispatch stranger intruders, but then proceeds to equate justification with self-defense,[196] thereby missing crucial distinctions having
prime public policy and constitutional importance, particularly concerning home defense.

iii. Right to Have Arms in Home Suitable to Repel Attacks: Part and Parcel of Privacy and Castle Doctrines

If a householder does not have appropriate arms for self-defense, her home hardly constitutes her “fortress,” let alone her castle for “defense against injury and violence.”[197] A thirteenth century decision, Alice and Richard’s Case, involved housebreakers coming to Alice’s house, in which Richard “killed one [and] cut off another’s head,”[198] indicating that he or she had previously possessed an edge weapon in the house. This case was decided in 1221, only six years after King John’s Great Charter of Liberty (1215), which presupposed that all free subjects possessed arms.[199] Moreover, the second root case similarly states: “The servant of the house killed one of the thieves and cut off his head.”[200] Both cases indicate prior possession of the ordinary personal arm of the day, a sword.

Inherent in the right to use deadly force to defend one’s home, one’s castle,[201] is the right to have suitable and effective means to do so.[202] In modern times, effective self-defense implies a handgun; long-guns can also be very effective and likewise implied, but in some homes they may be unwieldy or awkward to use. The householder must have the discretion, since she is in the best position to judge. “[No] hand-carried weapons commonly used by individuals . . . for personal defense [can] logically be excluded from this term [‘arms’].”[203]

A constitutional right implies the ability to have and effectuate that right.[204] The well established home-defense right, which was the law when the Constitution was written, necessarily includes ordinary hand-held firearms to preserve a meaningful right. Requiring hand-held firearms to be locked away, trigger-locked, “personalized,”[205] or requiring that ammunition be kept separately from the firearm interferes with emergency use. Constitutionally protected home defense necessarily includes keeping firearms loaded so as to be quickly available and hence effective in time of pressing need.

Even in ordinary self-defense cases not involving home defense, several state courts as well as federal circuit courts have carved out an exemption allowing convicted felons to lawfully possess a firearm on a temporary basis. Despite provisions in federal and state firearm statutes flatly prohibiting convicted-felon-possession of firearms without any exceptions,[206] courts read an emergency exception into the statutory schemes.[207] These cases emphasize the fundamental importance of possessing arms for self-defense, especially in the home. If courts give convicted felons an emergency privilege, then ordinary householders logically have a permanent right.[208]

D. Castle Doctrine Home Privacy Confirmed by Other Common Law Cases and Authorities

1. Presumption of Continuing Attack Underpins Leading Fourteenth Century Case’s Approval of Use of Deadly Force by Homeowner to Arrest Apparently
Disengaging Felon

At common law, a householder’s right to dispatch an unknown home-breaker did not suddenly evaporate when the perpetrator seemed to disengage. In a 1349 case, later styled *Rex v. Compton* by modern scholars, the court tacitly presumed that although the culprit might appear to be leaving, if afforded the opportunity he might resume his attack or escape to prey upon others. Therefore, the court supported the victim’s use of deadly force to capture a housebreaker seeming to leave the scene. Justice Thorpe stated the law in that case as follows: “And in many other cases [such as slaying manifest felons] a man may kill another without impeachment, as if thieves come to rob him, or to burgle his house, he may safely kill them if he cannot take [capture] them.” The attacker could have feigned his flight in order to gain an advantage or call upon an accomplice. The right to use deadly force did not disappear instantaneously upon the perpetrator’s appearing to flee, reappear upon his resumption of the attack, and then again instantaneously disappear upon his flight, and so forth. This decision, inter alia, encouraged the victim to use deadly force to capture a housebreaking felon fleeing from the scene and was considered controlling by eminent common law authorities as a case of justifiable, and not merely excusable, homicide.

In a passage on armed robbers outside the home—which applies with even greater force to unknown housebreakers armed or unarmed, especially in the kinds of situations described in the Prologue to the present Article — Professor David Hume, Professor of Law of Scotland, Edinburgh, again writing in 1797, graphically described the issues facing the victim in such cases:

> But it were quite unreasonable to exact the same temperance [as in pure self-defense] and moderamen tutelæ [moderation of defense]. There is in such a case no manner of possible or imputable wrong on the part of the person assailed, for which he should make amends by retreating: In duty to himself, he is rather called on, instantly, and without shrinking, to stand on his defense, that the assailant may not continue to have the advantage of him, but be terrified from the farther prosecution of his felonious purpose. To what greater lengths he may carry the attempt, or what other means he may have prepared to accomplish his end . . . . He is entitled to suppose the worst of that which has been begun in so base a fashion; and, by the law of nature, has therefore [the] right to put himself in security by the only certain means, the instant slaughter of the assailant; who is no true man, that his innocent victim should contend with him on equal terms, but a great criminal, taken in the commission of a known felony, and the fit object therefore of immediate and summary justice.

> It seems also to be true . . . [and] it may even be maintained, that though the assailant give back on the resistance, yet the innocent party is not for this obliged immediately to desist, (since it may be a feigned retreat, in order to call associates, or to renew the assault with better advantage), but may pursue and use his weapons, until he be completely out of danger.

Hume maintained that in justifiable homicides, the lives of attacker and victim “are not,
Another common law authority, Michael Foster, likewise flatly declared that a victim of a dangerous felony, such as of a housebreaking by an unknown invader, need not retreat. Moreover she may pursue the perpetrator until she finds herself “out of danger, and if in a conflict between them [she] happens to kill, such killing is justifiable.”[217] In such cases, Foster maintained that the right of self-defense “is founded in the law of nature, and is not nor can be superseded by any law of society;”[218] therefore, “nature and social duty cooperate,”[219] as she has a public duty to arrest the felon. If she kills him while he is leaving the scene, it is justifiable homicide.[220]

The common law’s design protecting householder’s use of deadly force was in no way dependent upon the sentencing practices of bygone eras. Deployment of deadly force by householders repelling intruders was not considered to be merely a precipitate consummation of the inevitable. Executions pursuant to court judgments, though more common than today, were far from preordained. Foster pointed out in 1762 that to assume the fleeing felon would receive capital punishment when caught constituted “a presumption against fact.”[221] Excerpting almost verbatim from Coke’s report of Foxley’s Case,[222] Foster’s support for the slaying of departing fleeing felons centers on the idea that dangerous criminals should not remain at large, free to continue to endanger society.[223] After the capture and conviction, all felons were not actually punished with death at the common law even in its early stages. They could, for instance, suffer the milder punishment of “outlawry” and depart the realm with their lives, or get royal pardons by serving in the military, which occurred quite often when the Crown needed troops.[224]

The public policy embedded in the common law on arresting fleeing dangerous felons was cogently summarized in 1927 by the North Carolina Supreme Court: “Ordinarily the security of person and property is not endangered by a [non-violent offender], while the safety and security of society require the speedy arrest and punishment of a [dangerous] felon.”[225] The court stressed that a person attempting to arrest a dangerous felon, in order protect herself from physical harm, should not be “required, under such circumstances, to afford the accused equal opportunities with [her] in the struggle.”[226] She “need not therefore engage with the felon on equal terms.”[227] Earlier, the Illinois Supreme Court had similarly articulated the fundamental principle that “[t]he safety of the public is endangered while such felon is at large.[228]

2. Resisting a Burglar with Deadly Force Placed on Par with an Officer’s Overcoming Resistance to Lawful Arrest

The same unrestricted power of lawful arrest by a law enforcement officer using deadly force against a resisting felon[229] applied to a householder’s slaying of a housebreaker, according to another continually cited case decided in 1349[230] and later titled Memorandum by scholars. An authoritative casebook on criminal law translated it as follows:
Where a man justifies the death of another, as by warrant to arrest him, and he
will not obey him, or that he comes to his house to commit burglary and the like,
if the matter be so found, the justices let him go quit without the king’s pardon; it
is otherwise where a man kills another by misfortune’, etc.[231]

The case put home privacy rights on a par with the duty of the king’s officers to arrest
felons. Dispatching an overt criminal intruder by a householder was considered as being “on
behalf of the law.”[232] This case was a touchstone; numerous common law authorities cited
it as controlling.[233]

The stricture moderamine inculpaæ tutelæ[234] with the moderation of blameless
defense, limiting a person to using the minimum defensive force needed for the
occasion, appears in Coke’s Institutes—but in connection only with an altercation between a
landlord and his tenant in arrears of rent payments.[235] This stricture is not found
anywhere in Coke’s treatments of home defense.

The grim dangers inherent in the presence of housebreakers were pointed out by David
Hume:

[T]he thing [house-breaking] is done with that contrivance and deliberation, to
which none but the practiced offender is equal; and in thus venturing his person
to take the thing from within the very sanctuary assigned for keeping it, and
notwithstanding all the obstacles contrived for its safe detention, he shows a
resolute and daring spirit, from which even the inhabitants of the house, or any
who shall try to seize or stay him in his purpose, must, by reasonable inference,
be held to be in danger of their lives and persons.[236]

Nor is it necessary that the felon have carried his assault so far, as clearly to
show which of these several felonies [breaking into a house to steal, to commit
murder, rape, . . . or to set fire to the house] was his purpose, if either he has
entered the house, or has broke the safeguard of the building, so that he may enter
when he will, and is in the act, or immediate preparation so to do. Because this is
an assault of so bold and so deliberate a nature, and in which [he] has already so
much the advantage, as warrants those within to dread the worst designs, and
such as are not to be prevented but by superior force; as well as that all they can
do on this sudden alarm is no more than sufficient to put them on an equal
footing with the felon, who comes cool and prepared for the adventure. Tenderness
for the life of another may indeed suggest to one to make trial, by
cries or otherwise, to deter him from his purpose, before proceeding to the use of
higher means. But how commendable soever this generosity in those who have
sufficient presence of mind to employ it; still it is what the law cannot absolutely
enjoin, or hold a person to be culpable for omitting. The main consideration in all
such cases is the alarm, surprise, and danger of the true man, who . . . in his place
of surest refuge, . . . finds his safeguard broken, and his person in the power of a felon, who thus has a favorable opportunity to accomplish his purpose, and escape unknown.[237]

3. The Right to Keep Arms at Home, as Read into the 1328 Statute of Northhampton Banning Going Armed in Public

The 1328 Statute of Northampton[238] literally banned the carrying of all arms in public. Common law judges, however, had read in the limitations that all indictments under the 1328 statute specify not only that the offense had taken place outside the home, but also that the manner of carrying the arms had terrorized the public.[239] Viner’s Abridgment recited a view typically held at the time of the drafting of the U.S. Constitution: “Tho’ a Man may ride with Arms, yet he cannot take [two] with him to defend himself even tho’ his Life is threatened [if he would go outside his home].”[240] Coke’s Institutes and other common law authorities stressed that, for an indictment under the statute to be valid, it had to recite, “In quorundam de populo terrorem [to the terrorization of certain of (our) people].”[241] English case law prior to the drafting of the U.S. Constitution mandated that a conviction be supported by evidence of terrorization of the public.[242]

The 1328 Statute of Northampton has special importance for Fourth Amendment purposes because the Framers were well versed in common law commentaries, interpreting the 1328 Statute as covering only the carrying of arms to terrorize the community and not applying it to peacefully having ordinary firearms at home. The statute, as well as caselaw applying it, did not encroach upon but validated the Fourth Amendment right of the people to possess ordinary personal arms in their houses.[243]

Twentieth century federal appellate cases have frequently misapplied the common law prohibition against causing public panic outdoors with weapons. For example, a 1976 a Sixth Circuit Court of Appeals decision, involving the mere possession of a firearm in the home, quoted a 1942 Third Circuit Court of Appeals decision—which also involved the mere possession of a firearm in the home—stating “[w]eapons bearing was never treated as anything like an absolute right by the common law.”[245] But, as shown above, the common law indeed treated keeping certain weapons at home as an absolute right.

4. Common Law Decisions Preserving the Individual Right to Keep Arms at Home Read into the Game Laws

During the reign of Queen Anne (1702-1714), Parliament passed the Game Laws.[246] Taken literally, these laws would have banned the private possession of all implements that could be used to kill game, including guns. Nevertheless, in 1722 King’s Bench excluded the simple possession of a firearm from the 1705 Game Law, because a person might keep a gun “for the defense of his house.”[247]

In 1738, King’s Bench again refused to apply the Game Laws to household possession of firearms, holding that the mere keeping of such arms was no offense under the game laws;[248] Judge Page noted “these Acts restrain the liberty which was allowed by the
common law.”[249] Further, in 1752, King’s Bench decided that even the lord of a manor could not recover in trover a servant’s gun merely because the servant kept it on the lord’s premises.[250] The court reasoned that “as a gun may be kept for the defense of a man’s house and for divers other lawful purposes”[251] the indictment had to allege that the gun had actually been used for killing game.[252]

The drafters of the American Constitution were familiar with the narrow reading of the Game Laws by the common law courts animated by their concern for the safety and security of householders. As noted above,[253] colonial libraries contained many of the legal treatises referred to in this Article, including Viner’s *Abridgment*, which explicitly cited and summarized the 1738 game-law case.[254] Prior to the framing of the American Constitution, English courts were vigilant in guarding the common law right to keep firearms for defending the home, even as the Game Laws threatened the possession of such arms.

5. **Mistaken or Accidental Homicides Inside the Home**

The common law had such deference and respect for the privacy of householders that even when a householder mistakenly believed a stranger intruder was in her home, the law protected her. If a person wrongly thought to be a felonious intruder by a householder had conducted himself with the least negligence so as to produce alarm or cause the householder to form a mistaken impression that a felony was about to occur, then the householder could wield deadly force. Mistaken homicides of the wrong person, or of innocent persons, by a householder in her own abode were treated by the common law as excusable if a wrongly supposed intruder had committed the least negligence. This point was illustrated in *Levet’s Case*[255] in which a household servant had secretly hired the deceased Frances Freeman to help out. Late at night, the servant informed householder William Levet that she thought thieves had broken in.[256] The case was summarized in Hale’s *History of the Pleas of the Crown*:

> [Levet] rising suddenly, and taking a rapier ran down suddenly; Frances hid herself in the buttery,[257] lest she should be discovered; Levet’s wife spying Frances in the buttery, cried out to her husband, “Here they be, that would undo us.” Levet runs into the buttery in the dark, not knowing Frances, but thinking her to be a thief, and thrusting with his rapier before him hit Frances in the breast mortally, whereof she instantly died.[258]

The court held that the death was not even manslaughter—Hale stating that the court had ruled that it had been “neither murder, nor manslaughter, nor felony [but justifiable].”[259] Hale questioned whether the slaying should not instead have been ruled excusable because it was done “per infortunium” [by misfortune or misadventure].[260] Hawkins believed that Levet had not shown even the “Appearance of a Fault”[261] and accordingly classified the homicide as justifiable. It can be argued, especially under modern views of negligence, that Levet appeared to be guilty of acting in undue haste, hence, with at least negligence if not recklessness. On the other hand, Frances had acted with negligence in hiding late at night in the buttery. The decision exonerating Levet from any punishment indicates that his act had been ruled justifiable, simply because he had committed the
homicide “without intention of hurt to [an innocent person]”[262] and the slaying had occurred in Levet’s own home.

The general policy of excusing or at least justifying homicide in cases of home mistakes or accidents was explained by Michael Foster. In connection with an accidental homicide occurring in the home—where the householder discharged his pistol while examining it, wrongly presuming that it could not fire—Foster stated:

It is not the part of judges to be perpetually hunting after forfeitures where the heart is free from guilt.

Accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall amongst the nearest friends and relations. And in such a case the forfeiture of goods rigorously exacted would be heaping affliction upon the head of the afflicted, and galling an heart already wounded past cure.[263]

Levet’s Case demonstrates that the common law excused, if not justified, a homicide by mistake occurring within the confines of one’s own home in every case or at least when the deceased had contributed to the homicide in the slightest.[264] The common law cut off any liability to the other party, especially in one’s home, one’s refuge.[265] This branch of the castle doctrine thus has constitutional gravitas.[266] However, the Model Penal Code disregards it.[267] The Code, for example, fails to impose the duty of the highest degree of care on person approaching a dwelling to do circumspectly and transparently to manifest to the occupant that the approaches is present for legitimate reasons only.

6. Attack Inside the Home with Known Non-Felon

If in a spontaneous dispute a householder was attacked inside the home by a person known in advance not to be a felon and the home occupant killed his opponent because it became necessary to save his own life, the rules were complex. They were similar to the rules outside the home except that the householder had no obligation to retreat.[268] The fatality could be excusable homicide or manslaughter, depending upon the circumstances.[269] If the slaying was not needed to save his life without retreat, then the slayer could be guilty of manslaughter.[270]

7. Fights Outside Home with Known Non-Felon

In a spontaneous altercation outside the home with a clearly known non-felon, again the rules were complex, but here a person was required to retreat as far as possible with safety to himself before using deadly force.[271] If, after retreating as far as possible he killed his opponent, the slayer would be guilty of excusable homicide.[272] If he killed his opponent without retreating when he could have done so, then he would be guilty of manslaughter, but not murder provided that the slaying had not been premeditated but had occurred during a spontaneous dispute.[273] Blackstone informs us that the rules governing the difference
between excusable homicide and manslaughter were quite complex[274] resulting in a division among the authorities in certain instances.[275] These rules concerning retreat requirements outside the home were designed to prevent unnecessary injury among contending non-felons. They have often been imported to require retreat from-room-to-room in confrontations between overt criminals and householders, skewing the law in favor of felonious attackers.[276]

8. Altercation with Known Claimant of Right of Entry to Dwelling or with Trespasser

The common law did not permit a homeowner to use deadly force against a person who had a colorable claim to enter the home. When a person claiming title (“un que pretend title”) known to be non-felonious together with a group of his associates tried to enter a home, and one of them shot an arrow into a home to gain entry, and the householder nevertheless killed him, the householder was found guilty of a felony (manslaughter at the time of the case).[277] The same outcome would follow if an intruder was a law enforcement officer, or was any other non-felon known to the homeowner to be trying to get back his goods under a claim of right: the householder could also lawfully use non-deadly force to resist the intrusion.[278] If the householder knew that a trespasser did not approach to commit a felony or under any claim of right, then again the householder could use only non-deadly force; but if the intruder resisted, the householder could lawfully escalate her use of force.[279]

Although the king’s officers were barred from entering a private home at will, the householder was required to admit them if they satisfied the legal prerequisites such as obtaining a warrant.[280] On the other hand, if a law enforcement officer sought entry but did not follow proper procedures, the householder then had a limited right to resist. Cook’s Case involved a bailiff breaking in to a home. The bailiff had a warrant only for a civil case, which did not allow home-entry by force. The householder saw the bailiff and knew him to be a law officer, but nevertheless killed him. The court found the householder guilty of manslaughter but not murder, the bailiff having committed an unlawful act in attempting to break into a home without a warrant pertaining to a criminal case:

[H]e ought not to break open the house, for that is not warranted by law; . . . and everyone is to defend his own house . . . . Yet [the judges] all held, that it was manslaughter, for he might have resisted him without killing him; and when he saw him and shot voluntarily at him, it was manslaughter . . . [281]

But here [the judges] held clearly, that it was manslaughter, because he, seeing and knowing him, shot at him voluntarily and slew him. Whereupon they all resolved, it was not murder, but homicide only.[282]

This case demonstrates that the common law allowed force, but not deadly force, to resist an officer whose identity and intentions the householder knew, while the officer was illegally breaking into his home. If a householder used deadly force without its use being
necessary to thwart the illegal entry, he was guilty of manslaughter. *Cook’s Case* also indicates that if the slaying of the officer by the householder had not been necessary, but instead by accident or mistake (here mistaken identity), then the householder would not have been guilty of manslaughter but of excusable homicide.

**E. Interplay Between the Second Amendment and the Absolute Common Law Right to Keep Ordinary Personal Arms at Home**

As previously discussed, the common law drew a bright line between the right to have arms in the home as opposed to wantonly carrying them in public—the former being an absolute right—but the latter being a qualified right that government may regulate. In the context of the Second Amendment, this distinction between the absolute, unqualified right to keep arms—as opposed to the qualified right to carry them—provided the basis for the decision of the United State’s Supreme Court in the 1939 *Miller* case.[283]

The Court in *Miller* relied solely on an 1840 Tennessee case[284] for its central holding that the Second Amendment protected the individual right to possess any and all arms suitable for militia service.[285] The Court held that the Second Amendment guarantees private possession of arms whose possession “at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia.”[286] The Tennessee case had emphasized that, under that state’s constitutional provision for the right to keep and bear arms, “The citizens have the unqualified right to keep [militia arms] . . . as being intended by this provision. But the right to bear arms is not of that unqualified character.”[287]

The continued private possession by individual citizens, who comprise the unorganized militia,[288] of ordinary personal arms enables them to gain proficiency in their use of these arms. In case of emergency, these individuals can join governmentally sponsored organized militias. Especially in cases of emergencies, these citizens can be more quickly and more fully trained for active duty. Privately keeping and practicing with ordinary personal firearms as “an unqualified right”[289] enables them to more quickly gain proficiency with heavier arms, such as stinger missile launchers, upon joining governmentally sponsored militias and thereby further contributes to “the preservation or efficiency of a well regulated militia [and] assure[s] the continuation and render[s] possible the effectiveness of such forces.”[290] The questions of what other and further personal rights and privately owned arms are protected by the Second Amendment, as well as the origin and further meanings of the Amendment, fall outside the scope of this Article.[291]

**III. NINETEENTH AND EARLY TWENTIETH CENTURY AMERICAN AUTHORITIES CONFIRMING THE RIGHT TO KEEP ARMS AND TO DEFEND THE HOME**

**A. Fourth Amendment Discussions by Judge Thomas M. Cooley and Henry Campbell Black Confirming Common Law Deadly Force Rules**
The Fourth Amendment is based upon the privacy of the home and the right to exclude others. Judge Thomas M. Cooley, writing on the origin of the Fourth Amendment in his influential nineteenth century work, *The General Principles of Constitutional Law*, stated:

[The Fourth Amendment is most commonly violated] in a disregard of that maxim of constitutional law which finds expression in the common saying that every man’s house is his castle. The meaning of this is that every man under the protection of the laws may close the door of his habitation, and defend his privacy in it, not only against private individuals merely, but against the officers of the law and the state itself.[292]

Judge Cooley added, “[I]n general, the owner may close the outer door against any unlicensed entry, and defend it even to the taking of life if that should become necessary.”[293] Judge Cooley referred to all unwanted unlawful intrusions, even by a known non-felon, such as a landlord; hence he included his proviso limiting the use of deadly force to cases in which “if that should become necessary.”[294] The Fourth Amendment, as developed from common law standards on unwanted intrusions by unknown housebreakers, specifically protects the absolute right to use any degree of force to get rid of housebreakers, whether the degree of force used was later considered to have been necessary or not. Judge Cooley was cited and quoted by the Payton Court[295]

Henry Campbell Black, in his *Handbook of American Constitutional Law*, echoed Judge Cooley’s views on the right to privacy protected by the Fourth Amendment.[296] He wrote:

SEARCHES AND SEIZURES

155. The fourth amendment to the federal constitution . . .

Security of the Dwelling.

It was the boast of the English common law that “every man’s house is his castle.” . . . Such, therefore, is the jealous care with which the law protects the privacy of the home, that the owner may close his doors against all unlicensed entry and defend the possession and occupancy of his house against the intruder by the employment of whatever force is necessary to secure his privacy, even, in extreme cases, to the taking of life itself.[297]

Here again the limitation to “necessary” force applied to all unwanted illegal entries, whether or not being attempted by a person known in advance to be a non-felon. Other authorities later echoed Cooley’s and Black’s views on the right to use deadly force to defend home privacy from unwanted unlawful invasions.[298] Home privacy has a special status.

B. Nineteenth Century Pre-Civil War American Criminal Law Authorities
Confirming Right to Use Deadly Force for Home Defense

Modern authorities upholding the right to use deadly force for home defense are legion and well known. Perhaps less known is that nineteenth century pre-Civil War authorities, in addition to pre-Revolutionary War English authorities, relied upon the 1532 statute for affirming that right, though not mentioning the Fourth Amendment in this context. These authorities serve to show the intent of the drafters of the Fourteenth Amendment, and hence demonstrate the meaning of the Due Process Clause contained in this Amendment.

1. Russell’s Treatise on Crimes

The highlights of common law authorities on the castle doctrine were set out in the American editions of Russell’s two-volume Treatise on Crimes. It restated the right to have arms in the home as part and parcel of the castle doctrine, emphasizing that “no one will incur the penalty of the statute [of Northhampton], for assembling his neighbors and friends in his own house, against those who threaten to do him any violence therein, because a man’s house is his castle.” Russell quoted the 1532 Statute of Henry VIII and commented, “But although the statute only mentions certain cases, it must not be taken to imply an exclusion of other instances of justifiable homicide which stand upon the same grounds of reason and justice.” He also cited and discussed such cases as Levet’s Case and Ford’s Case, and contrasted the legal definitions of justifiable and excusable homicide based on such authorities as Hale’s History of the Pleas of the Crown, Hawkins’s Pleas of the Crown, Foster’s Crown Cases and Crown Law, and Blackstone’s Commentaries. In addition, Russell stipulated that the 1328 Statute of Northampton did not ban even public wearing of arms unless done in such a manner as “to terrify the people; from which it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons.”

2. Bishop’s Criminal Law

In his 1858 treatise on criminal law, which went through seven editions during his lifetime and was kept up-to-date until 1923, Joel Prentiss Bishop discussed the castle doctrine. Under the subheading “Defense of the Castle” he quoted Hale’s summary of the three points made in Cook’s Case confirming that nineteenth century pre-Fourteenth Amendment drafters were fully conversant with the well-established common law axiom that before a householder could be convicted of any crime for dispatching a housebreaker, the prosecution had to prove that she knew his identity and non-felonious intentions.

3. Wharton’s Criminal Law

Francis Wharton (1820–1889) published nine editions of his treatise on criminal law. It is kept up-to-date with supplements to this day. Wharton undertook an extensive discussion on justifiable, as opposed to excusable, homicide. He asserted that dispatching serious criminals on the spot was an imperative. In addressing the issue of
resisting attempts to commit certain crimes, he stated: “where an attempt is made to commit . . . burglary on the habitation, the owner, or any part of his family, or even a lodger with him, may lawfully kill the assailants for preventing the mischief intended. Here, likewise, nature and social duty co-operate.”[317] Wharton’s language quite closely tracks that of Foster’s eighteenth century treatise on criminal law.[318] Wharton also reiterated Foster’s formulation of justifiable homicide in the following terms:

A [woman] may repel force by force in the defense of [her] person, habitation, or property, against one or many who manifestly intend and endeavor, by violence or surprise, to commit a known felony on [her]. In such a case [she] is not obliged to retreat, but may pursue [her] adversary till [she] find [herself] out of danger; and if, in a conflict between them [she] happeneth to kill, such killing is justifiable. The right of self-defense in cases of this kind is founded on the law of nature, and is not, nor can be superseded by any law of society. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force.[319]

Wharton also quoted from and discussed the 1328 Statute of Northampton.[320] He concluded that under this statute one cannot excuse wearing arms in public merely by alleging that somebody threatened him if he would go outside to meet the threat and that he wears it for the safety of his person, nevertheless that the gist of the crime of going armed in public was doing so in a manner calculated to terrorize “good citizens.”[321] He also concluded “it is clear that no one incurs the penalty of the statute for assembling his neighbors and friends in his own house, against those who threaten to do him any violence therein, because a man’s house is his castle.”[322]

4. Other Pre-Civil War Nineteenth Century American Treatises

Another and oft-cited pre-Civil War American treatise was Dane’s nine-volume General Abridgment and Digest of American Law.[323] In it, he paraphrased almost verbatim a portion of Foster’s treatment of justifiable homicide, including the phrase “happens to kill.”[324] This language tracked the 1532 statutory phrase “happening in such cases to slay.”[325] Dane’s treatise also cited and summarized the facts and holding of Cooper’s Case, the case that had dealt with a home break-in by a person known to the householder to have murderous intentions.[326] Dane noted that the court had exonerated Cooper and had held the slaying to have been “justifiable homicide pursuant to [the 1532 statute] made in confirmation of the common law.”[327]

Yet another and oft-cited pre-Civil War treatise, East’s two-volume Pleas of the Crown,[328] originally published in London in 1803 and re-published in Philadelphia in 1806, quoted from the 1532 statute 24 Hen. 8, c. 5,[329] and noted that the same rule of justifiable homicide included “breaking in the daytime.”[330] East also opined that although the 1532 statute mentions only certain situations of justifiable homicide, “it must not be taken to imply an exclusion of any other instances of justifiable homicide,” and cited inter alia the third root case in support of this conclusion and as controlling law.[331] He explained the distinction between justifiable as opposed to excusable homicide on the following basis:
“[J]ustification is founded upon some positive duty; excuse is due to human infirmity.”[332] East cited many authorities for the duty to use one’s “best endeavours”[333] to apprehend a fleeing felon and “if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable.”[334] East opined that the slaying described in Levet’s Case[335] was probably only excusable, but he noted that Hawkins believed that it was justifiable.[336]

Still another pre-Civil War American treatise, a ten-volume edition of Matthew Bacon’s treatise titled A New Abridgment of the Law, cited and summarized the 1532 statute 24 Hen. 8, c. 5, as well as cited and summarized the views of Hale and Hawkins on justifiable homicide.[337] This treatise enjoyed several editions during the pre-Civil War period.

Finally, a six-volume 1811 American edition of Jacob’s Law Dictionary[338] cited, inter alia, as controlling law both Cooper’s Case[339] and 22 Assize pl. 55.[340] This work’s entire exposition on the justification rules[341] explicitly relied upon such sources as those authored by Coke,[342] Hale,[343] Hawkins,[344] Staunford,[345] Crompton,[346] and Dalton,[347] as well as the 1532 statute of Henry VIII.[348] In particular, this work reiterated the common law rule that shooting at game even by a person not qualified to do so by the Game Laws[349] and accidentally killing someone was not manslaughter but was excusable.[350]

C. Justice Oliver Wendell Holmes’ Twentieth Century Decision in Support of the Home Possession of Firearms and Use of Deadly Force

Although not specifically invoking any clause of the Constitution, in an opinion written by Justice Oliver Wendell Holmes, Jr., the Court held that in a case in which a state game act prohibited any alien from possessing a shotgun or rifle, the act was not unconstitutional because the prohibition did not “extend to weapons such as pistols.”[351] The Court’s rationale was that pistols “may be supposed to be needed occasionally for self-defense.”[352]

IV. THE RIGHT TO PRIVACY, EXPANDED BY JUSTICES WARREN AND BRANDEIS

As early as 1670, John Ray’s popular Collection of English Proverbs foreshadowed one of the core ideas in the landmark article The Right to Privacy by Samuel D. Warren and Louis D. Brandeis.[353] Ray wrote: “A mans house is his castle. Jura publica favent privato domus [Public laws favor the privacies of a house.]”[354] The Warren and Brandeis article presented an argument for extending the common law’s presumption of an individual’s “right to life”[355] and its later “recognition of man’s spiritual nature, of his feelings and his intellect” to create a new right: protection from the mental stress and emotional travail caused by unwanted publicity of events in one’s home.[356] Warren and Brandeis explicitly based this new idea of personal privacy upon several doctrines: (1) the “right to life”;[357] (2) “what Judge Cooley calls ‘the right to be let alone’”;[358] (3) “the right to enjoy life”;[359] and (4) the common law’s recognition of “a man’s house as his castle, impregnable . . . .”[360]
Judge Cooley had introduced the doctrine of the right to be let alone in the context of freedom from physical assaults—to be free of suddenly being put “in fear, [creating] a sudden call upon the energies for prompt and effectual resistance. . . . [and] a shock to the nerves.”[361] Nothing could more aptly describe the plight of a woman beset by a rapist in the privacy of her own bedroom as described in the Prologue.

As had been stated by Judge Cooley,

The right to one’s person may be said to be a right of complete immunity: to be let alone. The corresponding duty is, not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury. In this particular the duty goes beyond what is required in most cases; for usually an unexecuted purpose or an unsuccessful attempt is not noticed. But the attempt to commit a battery involves many elements of injury not always present in breaches of duty; it involves usually an insult, a putting in fear, a sudden call upon the energies for prompt and effectual resistance. There is very likely a shock to the nerves, and the peace and quiet of the individual is disturbed for a period of greater or less duration.[362]

Warren and Brandeis based their entire argument upon these ideas—the right to life, the right to enjoy life, Judge Cooley’s right to be let alone, and the common law castle doctrine—as being fundamental to an ordered society. Warren and Brandeis urged that home privacy principles be extended to include a cause of action against unwanted publicity, such as public disclosure in the newspapers of activities taking place within the confines of the home. Freedom from the mental turmoil caused by media gossip was part and parcel of castle doctrine, they thought. These legal concepts of emotional sanctity, integrity, and especially home privacy are very much alive today of course, having been constitutionalized many times.[363]

The common law castle doctrine pertained to resisting physical assaults in the home. If the privacy principle, which safeguards emotional serenity, does not also guarantee actual physical existence and physical inviolability in the home, can the right to remain free of unjust mental disturbance survive in a vacuum? If the common law castle doctrine, particularly as formulated by Coke and approvingly quoted by the U.S. Supreme Court in 1980[364] is abandoned, the more rarified right to satisfy “intellectual and emotional needs in the privacy of his own home”[365] might well collapse into an empty shell or would become a fragile castle delicately built in the air.

V. THE RIGHT TO KEEP ORDINARY PERSONAL ARMS IN THE HOME AS PART AND PARCEL OF ORDERED LIBERTY IN THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS

The U.S. Supreme Court in Planned Parenthood v. Casey[366] reviewed a number of its prior substantive due process decisions, noting that the “most familiar of the substantive
liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights.”[367] The Court has never accepted the view that “liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution.”[368] In support of this doctrine, the Court cited a number of its precedents,[369] notably Griswold v. Connecticut,[370] which had dealt specifically with home privacy. The Griswold Court reaffirmed the right to privacy that it had upheld in Boyd v. United States[371] by stating, “The Fourth and Fifth Amendments were described in Boyd v. United States, as protection against all governmental invasions of the sanctity of a man’s home and the privacies of life.”[372] The Griswold Court added: “Various guarantees [in the Bill of Rights] create zones of privacy.”[373] In Planned Parenthood the Court went further and declared in no uncertain terms: “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter,”[374] adding:

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is “implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U.S. 319, 325 (1937). Three years earlier, in Snyder v. Massachusetts, 291 U.S. 97 (1934), we referred to a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”[375]

The Planned Parenthood Court reiterated the second Justice Harlan’s dictum in Poe v. Ullman[376] that “the full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.”[377] Among these specific guarantees listed by Justice Harlan, the Planned Parenthood Court reiterated “the right to keep and bear arms.”[378]

After reviewing a number of substantive due process decisions, the Court in Roe v. Wade[379] laid down the criteria for determining whether an individual right falls within the constitutionally protected zone of privacy as a fundamental right or is implicit in the concept of ordered liberty.[380] Here, the Court noted, “These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ . . . are included in this guarantee of personal privacy.”[381]

The Court also referred to privacy rights in Mapp v. Ohio:[382]

Seventy-five years ago, in Boyd v. United States, 116 U.S. 616, 630 (1886), considering the Fourth and Fifth Amendments as running “almost into each other” on the facts before it, this Court held that the doctrines of those Amendments “apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.”[383]

In 1969 the Court invalidated a state statute prohibiting the possession even of clearly pornographic materials in the home, stating, “Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.”[384] Four years later the Court explained that the 1969 decision had been based “on
the narrow basis of the privacy of the home, which was hardly more than a reaffirmation that a man’s home is his castle.”[385] The use of force, including deadly force, to defend home-privacy against house thieves surely reflects “an exercise of basic constitutional rights in their most pristine and classic form.”[386]

In order to see whether the possession and use in the home of ordinary personal firearms, suitable for successfully resisting dangerous housebreakers, come under the umbra of federally protected rights as a consequence of the substantive aspects of the Due Process Clauses of the Fifth and Fourteenth Amendments absorbing or incorporating the Fourth Amendment, an analysis of protected personal privacy rights is crucial. An examination of state court decisions interpreting their state constitutional provisions for the right to keep arms is highly relevant, as the U.S. Supreme Court often employs state law trends in seeking answers to federal constitutional questions.[387]

“The right of defense of self, property and family is a fundamental part of our concept of ordered liberty,”[388] declared the Ohio Supreme Court in 1993. The court added: “To deprive our citizens of the right to possess any firearm would thwart the right that was so thoughtfully granted by our forefathers and the drafters of our Constitution.”[389] The Ohio Supreme Court categorically declared: “[G]iven the history of our nation and this state, the right to possess certain firearms [in the home] has indeed been a symbol of freedom.”[390]

In 2003, the Wisconsin Supreme Court in State v. Hamdan[391] underlined the validity and importance of the 1993 Ohio Supreme Court decision discussed above, declaring, “As the Ohio Supreme Court stated, ‘The right of defense of self, property and family is a fundamental part of ordered liberty . . . . For many, the mere possession of a firearm in the home offers a source of security.’”[392] The Hamdan court went on to expound upon the meaning of that security in the context of the constitutional right to keep arms as follows: “If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of [her] private residence.”[393]

The Wisconsin Supreme Court in Hamdan further noted that a law that forbids the concealment of a pistol “in a nightstand within reach of the homeowner’s bed . . . is simply not enforced in this situation.”[394] The Hamdan court also approvingly noted that an Oklahoma appeals court had recently reaffirmed the principle that “a citizen enjoys a common law right to carry a concealed weapon in the citizen’s own home.”[395] The Hamdan court also approvingly quoted from cases in Maryland, Indiana, and Oregon that had distinguished on constitutional grounds the distinction between the right to keep at home concealed arms as opposed to carrying them outside, and had excluded keeping at home from flat bans on carrying arms without a license.[396] After considering various public policy and constitutional aspects of the right to keep arms, the Wisconsin Supreme court in Hamdan summed up these considerations as follows: “Based on the foregoing considerations, we conclude that a citizen’s desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one’s home or privately owned business.”[397]
In 2004, explicitly on the basis of the branch of the castle doctrine permitting no retreat when attacked in one’s home, the Rhode Island Supreme Court declared in no uncertain terms, “Of course, . . . one has an absolute right to keep firearms in one’s home.”[398] The Rhode Island Supreme Court distinguished between this absolute right to keep arms in the home, “the *sine qua non* of the individual right”[399] under the Rhode Island constitution, from the qualified right to carry them concealed outside the home. In particular, the court upheld a statutory requirement of a license to carry a pistol or revolver concealed upon the person in public places. The statute required a “proper showing of need”[400] for such a license; and the court held that granting the license could be discretionary with the licensing officials without a due process hearing.[401] More recently, the Oregon Supreme Court adhered to a line of its decisions starting with its 1980 decision in *State v. Kessler*[402] that had upheld an individual right to keep any and all ordinary personal arms, including firearms, under the Oregon constitution’s provision for the right to keep and bear arms.[403] The Oregon Court rejected the prosecution’s contention that the term “right of the people” contained in that constitutional provision limited the right to a collective right of the “community as a whole.”[404]

These state cases,[405] especially when combined with the above-discussed *Payton* decision,[406] along with its ramifications in the common law, compel the conclusion that there exists an absolute right to keep at the very least ordinary personal firearms in the home as a matter of due process of law.

**VI. INTELLECTUAL INFLUENCES ON THE MODEL PENAL CODE’S LIMITATIONS ON HOME DEFENSE, AND TWENTIETH CENTURY CULTURAL CLIMATE PROMOTING THEIR WIDESPREAD ACCEPTANCE**

The Model Penal Code—first promulgated in 1962[407] and widely adopted in one form or another in the last third of the twentieth century[408]—was devised independently of the constitutional and common law considerations summarized above; so it is pitted and marred with constitutional and public policy blemishes insofar as lawful self-defense by home occupants is concerned. The Code imposes upon all crime victims, including those living quietly in their homes, a rule and duty of meticulously careful reaction to, and imperturbable forbearance of, criminal intruders. It insists that the householder precisely guess the possible intentions of such marauders, even if the householder hears her front door crashed down, or wakes up to find a strange man hovering over her bed. These departures from the common law—imposing on a crime victim the requirement of other-worldly virtue and calm circumspection even upon the sudden appearance of a stranger in her bedroom or “in the presence of an uplifted knife”[409]—interestingly echoed medieval canon law concepts.

One of the foremost exponents of canon law (church law) on the legally permissible use of deadly force was Henri de Bracton, a thirteenth century cleric and judge.[410] Bracton’s clerical ideals as expressed in his magisterial mid-thirteenth century work, *De Legibus et Consuetudinibus Angliae* [On the Law and Customs of England],[411] when applied to temporal affairs, “set an extremely high standard, one much too severe to supply a suitable model for the secular authorities to adopt” for the common law justification rules.[412] Canon law was concerned with “divine forgiveness.”[413] Church authorities did not consider
every homicide to be sinful, “yet there was need to do penance for [every] slaying” regardless of justification.[414]

Church law on justification was addressed to the issue of “whether one in lower orders was thereby debarred from promotion, or a priest incurred demotion: was the slaying such that he could no longer fitly minister at the altar.”[415] This standard was designed to guard appropriate clerical inhibitions against blood-shedding but was not meant to govern ordinary secular human affairs.[416] Nevertheless, from time to time during the past hundred years or so, churchly standards were wrested out of their original context applying to priests and other clerics and found their way into many criminal law treatises, court decisions, and statutes, effectively watering down the right to home defense.[417] Bracton was a major judicial exponent of applying priestly self-defense inhibitions to lay persons.[418] While he did not distinguish self-defense against unknown housebreakers from thieves outside the home,[419] there appears to be no recorded case in which he applied clerical self-defense restrictions to defending against unknown housebreakers. The Model Penal Code’s design, in this respect, was a philosophical throwback to canon law constraints on the employment of deadly force by clerics. The Model Penal Code uniformly applies similar restrictions to all self-defense in the home, almost totally suppressing the common law right to the safety and quiet privacy of habitation.[420]

The Model Penal Code drafters, Professors Herbert Wechsler, Louis Schwartz, and Sanford Kadish, saw their role not as codifiers of existing law but as reformers, inventors, and imparters of a claimed “enlightened morality.”[421] They had no patience with natural law and natural rights,[422] “nonsense on stilts in Bentham terms.[423] Professor Wechsler[424] was lauded by his peers for being a “monumental force in shaping the criminal law,” and for having “transformed” the criminal law.[425] Professor Schwartz saw the Code’s mission as “constrain[ing]” punishment,[426] and Professor Kadish thought the Code’s purpose was “controlling the exercise of discretion by those who exercise power.”[427] The mindset of the Code’s drafters was displayed by Kadish, who saw the Code architects as liberal “humanitarians” in the spirit of the legal reform advocate and utilitarian Jeremy Bentham (1748–1832).[428] Kadish noted approvingly that Bentham had a “strong antipathy to the common law.”[429] Codifiers of the common law, whom Kadish thought did “nothing more than the reduction to a definite and systematic shape of the results obtained and sanctioned by the experience of many centuries,”[430] were caricatured by him as “profoundly conservative, . . . legitimized vengeance, [and] bloodthirsty.”[431]

An “ideal” model code should accomplish a complete “rewriting” and “radical restructuring” in contradistinction to [merely] a “consolidation” of existing law, insisted Kadish.[432] He dismissed previous American criminal law codification attempts for “not propos[ing] a radical rethink[ing] as not being sufficiently “daring,” and stigmatizing them for having had “limited aspirations” and simply “rearranging the attic.”[433] By contrast, he pronounced the Model Penal Code a “root and branch . . . rethinking [and] reformulation” in collaboration with other disciplines toward a “more just . . . criminal law.”[434] He commended the subterfuge employed by contemporary English codifiers, who were under political pressure not to deviate from the common law because of its popularity, “in doing a very sophisticated job” in making their codification “seem” to be “if not be, a comprehensive
statement” and spoke ruefully about the “hostility [and] apathy” that often greeted well-intentioned refashioning of the common law.[435] Kadish believed that if a criminal code was to serve one of its major political purposes of “controlling . . . those who exercise power,”[436] it required “subtlety and complication” not conducive to “easy and quick comprehension.”[437]

Model Penal Code proponents deemed it to embody “the best of current social science knowledge”[438] and found the level of acceptance of the Code’s ideas “stunning.”[439] They asserted that their greatest achievement was not codification but their “intellectual contribution” to the criminal law.[440] They triumphed in their successful dismissal of “fundamental premises of the criminal law”[441] in favor of an “agenda” of “doctrinal correctness.”[442] They achieved their “crusade to eradicate . . . ancient concepts”[443] and satisfied their quest for an “academically satisfying recitation of theory.”[444]

The ideological engine that drove the widespread acceptance of the Model Penal Code’s onslaught on crime victims’ deployment of deadly force, as well as of similar restrictions decreed by statutes and case law, was rampant with the philosophy of deconstruction.[445] Developed and popularized chiefly by Jacques Derrida (1930-2004) and Michel Foucault (1926-1984),[446] deconstructionist philosophy was transdisciplinary.[447] Both of these philosophers’ writings were peppered with frontal attacks on Western judicial systems. Such arrangements were considered to be post-colonial[448] bourgeois hierarchical oppressive power structures that “privileged” or imposed a false order on society, and deconstructionists agitated for subversion of that hegemony from within.[449]

Deconstruction had a profound impact in the United States. One of its founders, Jacques Derrida, was active in the United States starting in 1956.[450] Derrida was the “principal exponent of . . . deconstruction [and] one of the leading figures in poststructuralism and postmodernism,”[451] and urged juridico-political revolutions in his law review piece, Force of Law: The Mystical Foundation of Authority.[452] At the core of Derrida’s deconstructionist thought was the credo that the “religion of capital” and bourgeois mentality must be subverted and dismantled.[453]

Foucault viewed the twentieth century legal system as the handmaiden of modern capitalism.[454] He believed the existing capitalist and social structure required a “punitive Utopia which would be economically and socially invaluable. . . . [T]he model for this may be seen in the military camp. . . . It permeated and remains visible in spheres like urban development . . . and the control of criminals.”[455] Sociology Professor Roy Boyne, Vice-Provost of the University of Durham, Queen’s Campus, Thornaby, England, summed up Foucault’s views on criminals:

The delinquent is not the author of a criminal act pure and simple, rather the delinquent is a life, a collection of biographical details and psychological characteristics. The delinquent is also “an object” in a field of knowledge, a field patrolled by experts—jurists, but also psychologists, social workers, in short a whole series of professional biographers, whose task has been to change the reference point of criminality from the act to the life.[456]
Deconstruction theory insisted that the state itself is a criminal enterprise because all logical systems were deemed to be merely constructs for the powerful to maintain their hegemony, the legal system being a prime example of such a construct.[457] Because all rational, hierarchical systems—particularly the justice system—simply manifest power relations, to the deconstructionists, there can be no clear good and evil.[458] “[R]esponsibility, sensitivity, justice, law—these were all empty ideas, tokens of ideology, repressive, misleading, pernicious.”[459]

Deconstruction, freighted with sensitivity toward the offender—the “Other”[460]—and coupled with a panoply of newfound constitutional and statutory rights of overt criminals, rapidly became entrenched toward the end of the twentieth century.[461] The notion of the criminal as a new Nietzschean man, even heroic, pervaded the writings of Foucault and Derrida, and became fashionable.[462] At the same time that criminals were being portrayed sympathetically as heroes, they were also championed both as victims of a patriarchal power system and guerilla fighters battling against an oppressive justice system which they were correctly subverting.[463]

Most American intellectuals did not label themselves deconstructionists or consciously subscribe to deconstructionist dogma.[464] Nevertheless, undermining capitalism and preoccupation with fringe elements of society had long been prevalent in circles entertaining existentialist, Marxist, and Maoist ideals. These themes were amplified by deconstructionist philosophy which insinuated itself into almost every intellectual field. [465] It did so both directly and indirectly by filtering through cross-disciplinary interfaces, as illustrated by the effects of philosophy, psychiatry and social sciences on the legal community.[466]

Deconstructionist motifs underlay the notion that “society is responsible for creating the injustices in which crime can percolate.”[467] Sociological chatter— describing a “bad social environment” as influencing criminal activities and abandoning “terminology rooted in concepts of evil” and “archaic verbiage suggesting evil and wickedness”—became mainstream.[468]

The temper of the times was suffused with deconstructionist fancies even though individual intellectuals popularizing such notions—as, for instance, that the criminal was heroic and admirable—would not necessarily identify with deconstructionist philosophy. Smitten with the notion that “transgression”[469] was the path to break the shackles of the existing order, the American literati embarked upon a love affair with criminals, adopted convicted murderers as pets and commemorated their lives in print, while questioning the arrogance and presumptuousness of the legal system that had judged them.[470] The novelist Norman Mailer wrote a thousand-page tome identifying with the serial murderer, Gary Gilmore, whom he befriended.[471] A national best-seller, it was discussed in a law review in connection with the “[m]oral regeneration” of criminals.[472] The cossetting of killers was not confined to the Left; the conservative William F. Buckley Jr., also had his favorite serial murderer, William Smith.[473] The best selling chronicle of the 1971 Attica prison riot, A Time to Die by Tom Wicker, an editorial writer for the New York Times, was a sympathetic and nuanced portrait of the prisoners, and celebrated the “solidarity” of the
rioting felons.[474]

Deconstructionism infiltrated the legal community and spawned Critical Legal Studies jurisprudence.[475] This movement adopted Foucault’s and Derrida’s ethos clothed in legal jargon, maintaining that the existing order is neither “natural” or “necessary,” but “the most important intellectual restraint on progressive social change.”[476] Convinced they were crusading for “a more humane, egalitarian and democratic society,[477] the Critical Legal Studies school “trashed”[478] evolved common law jurisprudence as an undesirable “social product.” Like the Model Penal Code enthusiasts, they distained Blackstone[479] and were shot through with a strong dose of nihilism.[480] They embraced violence as means of bringing about their vision of a better democracy.[481] Using the hermeneutic method[482] of interpretation, they endeavored to discover the deep structures[483] of law, the better to undermine the “central ideas of modern legal thought” and successfully put their conception of a more perfectly democratic law in its place.[484]

The canon of Critical Legal Studies is that the “claims to rationality of current legal practice and legal theory are baseless,”[485] “contingent [and] indeterminate.”[486] “Most critical legal scholars believe that our society can become just only if transformed according to the insights of socialism, syndicalism, or radical feminism.”[487]

Swept along by the high tide of Deconstructionism, many lawyers and judges began to view the value of the lives and emotions of innocent crime victims on the same plane with, and equivalent to, the lives and feelings of their felonious attackers, as typified by the following excerpts:

[M]any criminals have experienced exceptionally harsh lives: abusers frequently were abused as children . . . . [O]ther persons have committed crimes after a psychologically traumatic event “generally outside the range of human experience.” . . . Many urban offenders, especially the young ones, are not only unconnected to society’s moral values but, as Robert Nozick puts it, are “anti-linked” to them.

The brutality and senselessness of many crimes makes most of us unwilling to search . . . for an explanation of the wrongdoer’s aberrant behavior . . . . Exceptionally compassionate persons . . . refuse to make moral judgments about wrongdoers without placing their actions in their richest factual context. [T]hey search the criminal’s often tragic life for the factors that shaped his character or they take note of the social circumstances, including economic inequality, in which the wrongdoing occurred. The victimizers, they conclude, are also victims.[488]

These remarks—contained in a Rutgers Law Journal Symposium issue commemorating the twenty-fifth anniversary of the Model Penal Code—illustrate how criminal-friendly attitudes informed the mindset of the legal profession in effectuating the tectonic shift of
presumptions of peaceful intentions from innocent crime victims to confirmed criminals. The issues of causation and proper post-conviction treatment aside, such sympathetic approaches spilled over to inhibit meaningful self-defense by crime victims and equated the value of the victim’s well-being with that of the predator. Many present-day legal treatises on criminal law, following the lead of the Model Penal Code, interchange the original crime victim with the original criminal: the person resisting attack becomes the “actor” while the criminal remains a “person.” The ordeal of a householder confronted by an unknown housebreaker and the human right of such a victim in her own home to repel the attack by any means necessary is given short shrift.

Professor Joshua Dressler lamented the fact that the focus on offenders’ sociological backgrounds soon morphed from being a sentencing factor to a movement for a growing array of affirmative defenses to criminal acts. He discussed Manchild in Harlem, by Claude Brown, an article that appeared in the New York Times Magazine in 1984, commenting, “Manchild,” one observer of the urban street criminal has written, “is a product of a society so rife with violence that killing a . . . robbery victim is now fashionable.” The notion that leniency should be extended to a murderer of an unresisting robbed convenience store clerk gained currency. The stated rationale was that the killer lacked free choice in the matter because of his bad social environment and because of a ghetto vogue for “killing a . . . robbery victim.”

The proposition that society has robbed offenders of free will is also an artifact of deconstructionism. The well known physician and psychiatric therapist, Thomas S. Szasz, described Foucault’s Rivière study in the following terms: “A spell-binding account—not only of the murder of a family by a ‘madman,’ but also the murder of free will and responsibility.”

The Model Penal Code crusade was launched prior to the dissemination of deconstructionist ideas in both intellectual and popular culture. Nevertheless, the Code’s reformist and visionary concern and good will toward offenders, even inside the homes of their victims, played into the deconstructionist moral ether prevailing in the United States toward the end of the twentieth century, accelerating the “stunning” acceptance of its criminal friendly provisions.

VII. CONSTITUTIONAL AND FUNDAMENTAL PUBLIC POLICY DEFECTS IN THE MODEL PENAL CODE’S HOME-DEFENSE RESTRICTIONS

For centuries the hallmark of the common law was that it was developed for the protection of, and from the perspective of, the victim of crime, as previously described in this Article. During the late twentieth century—in the moral quagmire of deconstructionism, postmodernism, and under the direction of the MPC’s “doctrinal correctness”—criminal law was restyled and accommodated the outlook of predators. The life “context” of felons was validated as worthy as the physical life and emotional integrity of his quarry. The special doctrine of the home castle was silently jettisoned by much of American jurisprudence, setting the stage for appalling denouements like those posited in the Prologue.
A. The Model Penal Code Represents a Radical Departure from Its Antecedents: The Common Law and Biblical Law

Common law commentators—from seventeenth century (Coke), to eighteenth (Blackstone), to contemporary (Fletcher)—have referred to the Bible and Jewish law in their discussions of permissible use of deadly force. Medieval common law justices, as well English and American judges and legislators until recently, focused on the well-being of crime victims, experientially and instinctively, as did the ancient rabbis of the Talmud. For millennia the Jewish view has been in tune with the physiological needs of crime victims, and in many respects parallels English common law on the question of self-defense. In his introduction to Maimonides’ Book of Damages, Rabbi Touger explains that the Jewish laws of damages as explicated by Maimonides “teach fundamental principles regarding respect for our lives, our persons, and our property, reflecting how the judgments within are . . . active, spiritual principles that point toward the refinement of ourselves and our society.”

Basing himself on the Hebrew Bible and the Talmud, Maimonides wrote on the law of breaking into a home in the following definitive terms in his renowned work Mishneh Torah [The Second Torah]:

7. When a person breaks into [a home]—whether at night or during the day — license[503] is granted to kill him. If either the homeowner or another person kills him, they are not liable. The license to kill him applies both on the Sabbath and during the week; one may kill in any possible manner.[504] This is [all implied by Exodus 22:1], which [literally] reads: “He has no blood.”

8. [The license mentioned above] applies to a thief caught breaking in or one caught on a person’s roof, courtyard or enclosed area, whether during the day or during the night. Why does the Torah mention “breaking in,” because it is the general practice for thieves to break in at night.[505]

Thus, the codification of Jewish law by Maimonides laid down standards of justification identical to those of the common law.

B. The Code Does Not Comport with Modern Biological Knowledge

Modern biological knowledge supports the social desirability of common law justification rules on using deadly force in the home. In response to sudden attacks by a stranger, the victim can almost “actually feel adrenaline jetting into action.”[506] Her fright-fight reaction pumps the fighter’s adrenaline molecule (C₉H₁₈NO₃) in copious quantities into her bloodstream, but the adrenaline does not dissipate instantly when the attack ceases.[507] As with any human response, adrenaline dissipation times vary from individual to individual, as does the chemically induced compulsion to kill for survival.[508] Yet the Model Penal Code makes no allowance for these innate wide variations; instead it insists that the victim must not grossly deviate from “the standard of care that a reasonable person would observe in [her] situation.”[509]
Fueled by postmodern sensibilities, much current criminal law, adopted from the Model Penal Code, imposes upon victims the duty of nuanced self-control while affording the criminal attacker an unlimited range of first-options with every presumption of benign intent and of cessation of attack. It forces the victim into a macabre psychological minuet with her attacker; she must put herself into his mind from moment to moment to divine his intent.

C. The Code Restricts Victims to Using Only Non-Negligent, Proportionate Force Even Against Dangerous Home Intruders

In their zeal to be “fair” and “compassionate” to offenders, many states have adopted the justification rules of the Model Penal Code or similar approaches. They have required by statute, case law, or both that a householder exercise precaution against using excessive force. She must not use force in any amount more than that for which she can later articulate the existence of facts justifying her belief that such force was “immediately necessary to protect [her]self against the use of unlawful force” even when she uses that force against a clearly felonious home intruder.[510] Since the victim does not know in advance the criminal background of her attacker, it cannot enter the justification equation even though it has great relevance to his physical movements and body language. Deadly force is prohibited unless she (non-negligently)[511] believes that such degree of force is “necessary to protect [her]self against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.”[512]

It is one thing to say that the life of a burglar is not completely without value; it is quite another to say that the law must judge the victim by the same standards as the overt criminal during a confrontation between them. The victim on the spot is best able to judge the criminal’s voice, movement, and body language. After the fact, however, she may not have the ability to recall or articulate precisely the basis for her belief in the necessity for using force against him. The common law did not cast a suspicious eye on the victim of a crisis thrust upon her, as is the tendency of the Model Penal Code and many jurists in this postmodern era.[513] Rather, the common law conclusively presumed that the victim of a housebreaker was blameless.[514]

The Model Penal Code requires that a burglary victim being attacked even in her own home not use any protective force in excess of what she “non-negligently” believes is “essential to relieve [her] peril.”[515] The Code further specifies that if her belief in the existence of any justifying facts was based upon mere “negligence,” then she is guilty of “negligent” homicide.[516] A law that commands victims to cease and desist from further resisting the culprit immediately upon his apparent (and possibly merely temporary) turning of his back, does not comport with modern endocrinological knowledge. Such a law empowers criminals to subject victims of their choosing to terrorization and then to complex tests on the law of “non-negligent”[517] use of force. The victim’s use of force too soon, or too much, lands her in bankruptcy court or jail; and force too little, or too late, lands her in the hospital or the grave.

In addition to its hazy requirement that all actions by the victim must be “non-negligent,” the Model Penal Code adds insult to injury by requiring that the degree of force
used satisfy its ambiguous test of being “immediately necessary” to protect the victim from harm.\[518\] By contrast, the Code insists upon precise standards rather than the ephemeral standard of negligence or recklessness when dealing with the provision justifying the use of deadly force by police for effectuating arrests. The official commentaries to the Code state: “To leave the matter [of justification of deadly force] to an assessment of recklessness or negligence, . . . was deemed to leave the rule that ought to govern law enforcement in too vague a state.”\[519\] Although the authors of this Article do not recommend that police standards be applied to civilians, this comment on the Code’s precise police-arrest provision demonstrates that “negligence” and “recklessness” constitute vague standards. By stark contrast, the common law at the framing of the U.S. Constitution conclusively presumed that the use of deadly force against a burglar was automatically justified without further inquiry.\[520\]

A major linchpin of the Model Penal Code’s restrictions on justifiable deadly force was its fixation on the chance that the victim might conceivably injure the wrong person. Outside the home such a concern may have some merit; it is not an issue when the victim’s own home is invaded by a dangerous intruder. The common law considered such homicides to be excusable.\[521\]

In its concentration on preventing mistakes and preserving the life of even an overt, dangerous felon, the Model Penal Code upturned settled law and lost sight of the original social purpose of criminal law: protecting law-abiding persons from criminal attacks. Although the Code grants a crime victim in her own home the circumscribed privilege “to use defensive force to prevent an assailant from going to summon reinforcements,” in the same sentence it conditions this prerogative upon her non-negligently formed belief that facts exist “that it is necessary to disable him to prevent an attack by overwhelming numbers.”\[522\] Query: How in the world is she to non-negligently ascertain such facts in order to non-negligently form such a belief of such necessity?

**D. Resisting an Unknown Housebreaker Under the Code**

1. Requires Retreat from Room to Room and Within a Room

The common law did not expect, let alone require, a law enforcement officer to retreat when faced with any resistance. Coke stated in his *Institutes*, in the paragraph immediately following the one reciting the rules for justifiable deadly force: “So if any officer, or minister of justice, that hath lawful warrant, and the party assault the officer or minister or justice, he is not bound by the law to give back [retreat].”\[523\] The 1353 *Memorandum* case discussed above\[524\] put a householder utilizing deadly force against a burglar on a par with an officer resorting to deadly force against one who was resisting a lawful arrest. The common law did not expect a householder, faced with an unknown home-breaker in her home, to retreat within a room, let alone from room-to-room.

Justifiable defense of the home by “the owner of [the] house, or any of his servants, servants, or lodgers, etc.” was defined in Hawkins’s Abridgment, with which the Framers were well acquainted.\[525\] Hawkins detailed: “And it seems that in all these cases one may justify 42
killing the assailant without giving back at all.”[526] Even Professor Joseph H. Beale, to whom the drafters of the Model Penal Code gave great deference and reliance regarding its justification rules on retreat from a murderous attack, had written: “It follows, therefore, that one may stand [her] ground and repel a murderous assault by one who is already in the [dwelling] house, even one rightfully there.”[527] Yet, the Model Penal Code, as part of its standards for judging the necessity of using deadly force, while not requiring retreat “from the home” tacitly does require retreat in the home from room to room, and within a room.[528]

2. Prohibits the Use of Deadly Force if Attacker Appears to Be Withdrawing

The Model Penal Code flatly bans a crime victim using deadly force against an allegedly retreating attacker, even if he is still in her home,[529] unless she is assisting a police officer on the scene.[530] “The M.P.C. never permits a private citizen, acting on [her] own to use deadly force to effectuate an arrest.”[531] The Code reached this total ban by first limiting the situations in which peace officers could turn to deadly force to arrest fleeing felons, basing the new police curbs on two main propositions:

The common law rules in the arrest cases also created difficulties . . . . The arrest rules were broader than those that evolved to justify the use of deadly force to prevent the commissions of felonies. . . . As a result of these difficulties and the awareness that the reckless use of firearms by peace officers can create a social problem of no mean proportions.[532]

The Code’s official Commentaries then defended its flat ban on private citizens having recourse to deadly force but was silent on the castle doctrine and the special receptivity of common law toward disabling burglars and aborting homebreaking. The Code expressed the following broad rationale, which does not remotely apply to a crime victim’s use of deadly force to apprehend dangerous intruders in her own home:

Where the purpose to be served is the apprehension of persons to answer criminal charges, it has seemed important, in an age of firearms, to restrict the use of the use of deadly force to situations where official personnel are involved, or at least are believed to be involved.[533]

Immobilizing a private citizen, by forbidding her to use deadly force to effect an arrest in her own home unless she is under direction from a peace officer, defies logic. It also lacks empathy for the true victims of crime, the next victims, and lacks deference to the U.S. Constitution.

To objections that the Code’s ban contravenes the public policy imperative against leaving dangerous felons at large, the official response of the Code’s commentaries was phlegmatic: “No perfect principle of limitation can be formulated.”[534] Query: Do we need any limitation when it comes to a householder incapacitating a home-breaker fleeing from her own home aside from not intentionally harming someone else? Why should the law leave her fate to the indeterminate intentions of her adroit attacker for the sake of preventing the 43
remotest possibility of damage to a bystander—or if she survives, to the tender mercies of the police, prosecutor, or jury as the Code’s commentaries suggest? The Code’s edict against using deadly force to arrest a dangerous fleeing home invader in order to arrest him, prevent further depredations, and speedily surrender him to justice, once again seems “wholly irrational.”[535]

**E. The Model Penal Code Does Not Acknowledge the Lack of Universal Police Presence in Democracies**

Even with the most modern cutting-edge technological equipment, police forces in a democracy are not omnipresent and are not able to be effective everywhere at once to protect victims or apprehend criminals. Police have no constitutional duty to protect any individual person, even a person who has called 911.[536] In *DeShaney v. Winnebago County Department of Social Services*,[537] the Court spelled out that neither the federal nor state governments have any affirmative constitutional duty to protect the life, liberty or property of a private citizen from private wrongdoers: “But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”[538] Recently, in a 7–2 decision, the U.S. Supreme Court held that, even though a state statute apparently made police enforcement of a restraining order against her estranged husband mandatory, a mother did not have a Fourteenth Amendment property interest or entitlement to such enforcement of the restraining order.[539] Therefore, as a representative of her deceased three daughters, she could not successfully sue the city or the police under the federal civil rights laws in an action for damages against them, even though she proved that the police failed to promptly respond to her repeated reports that her estranged husband had taken their daughters in violation of the order, and as a result had murdered them sometime during his violation of the order.[540]

Serial housebreaking rapists and robbers are at large, and not merely in tiny numbers. The police cannot apprehend the bulk of such violent offenders before commission of a second, third, or even fourth and fifth, horrific crimes.[541]


The New York Court of Appeals long ago put the issue of imposing vague standards in home-defense situations in the following apt terms:

[I]t would only be by the use of unnecessary or wanton violence and the infliction of unnecessary or wanton injury to the person of the criminals, that the [burglary-victim] could become a wrongdoer. Without undertaking to define the boundary line which separates the law and authorized, from the unauthorized and illegal acts of individuals in the protection of property, the prevention of crime and the arrest of offenders, it is enough that the law will not be astute in searching for such line of demarcation, as will take the innocent citizen, whose property or person are in danger, from the protection of the law, and place [her] life at the mercy and discretion of the admitted felon. They will not be made to change
places upon any doubtful or uncertain state of facts.[542]

In cases of house-robberies, the facts are always doubtful and uncertain, just as they are in any emergency situation, especially those involving violence and surprise. As every law professor who has tried this experiment knows, five eye witnesses will give five widely differing stories of the precise sequence of events confronting a householder weighing instantaneous decisions to shoot or not to shoot. Victims of crime face a terrible dilemma not of their own making. Any house-robbery automatically satisfies the New York Court of Appeals test of “any doubtful or uncertain state of facts.”[543] A victim-conscious law requires the house robber to take his chances on, and assume the risk of, the speed and intensity of his victim’s autonomic nervous system, as well as the speed of her system’s termination of her adrenaline hormone survival secretions to, and their elimination from, her bloodstream.[544]

The Code’s proponents themselves admit that the issue of negligence is “vague.”[545] Every first-year law school student learns that different juries will return widely different verdicts in negligence cases upon the same set of facts. As to the Code’s requisite for justifying using deadly force, an immediate threat of “serious bodily injury,”[546] the official proponents of the Code themselves acknowledge that the term is “somewhat open-ended.”[547]

A procedural due process issue is triggered by the critical vagueness problem inherent in the Model Penal Code’s deadly force strictures. The issue of vagueness has been defined by the U.S. Supreme Court in the following terms: “Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.”[548] The Court has repeatedly explained: “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”[549]

Even in connection with civil tort law—in particular, with vague or no standards for awards of punitive damages—the Court has disapproved of delegation of this “basic policy matter to individual juries ‘for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’”[550] A householder in extremis needs clear and well defined standards in advance: after-the-fact comes too late, fatally too late.

In addition to vagueness, The Model Penal Code also suffers from an overbreadth problem. The issues of overbreadth and vagueness have been explained by the Court in the following terms:

In a facial challenge to the overbreadth and vagueness of a law,[551] a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.[552] If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct,
should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.[553] A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.[554]

The Court added a point applicable to the issues at hand: “Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.”[555] By reason of its innovations and inroads on the common law, the Model Penal Code's justification rules as applied to resisting householders—and similar statutes and court decisions, as well as prohibitory firearm laws[556]—inhibit exercise of a major privilege of the U.S. Constitution and one of the most ancient major privileges of civilization concerning the use of deadly force in the home.

The Model Penal Code’s blind eye toward utterly innocent crime victims was foreign to the common law. Nevertheless, fueled by the dioxin of deconstruction, the Code’s contrivance of an equal legal plane for both criminal attacker and his victim gained widespread popularity and sanction among academia bench, and bar, especially toward the end of the twentieth century.[557] Adoption of MPC-like justification rules by many states confirmed the seismic shift in the legal presumptions of the criminal law away from victim-oriented principles that had been established at the time of the framing of the Constitution. The Model Penal Code’s refitting of the common law advantaged the original felonious attacker—endowing him with legally protected options of escalating and de-escalating violence at his unfettered discretion without fear of serious immediate consequences.

VIII. CONCLUSION

In the sixteenth century, common law authority Roger Yorke elaborated upon the fear and terror robbers produce in their victims:

Note that if a man takes something from my person, even if it is only a penny, this is robbery. . . . because where he takes anything from my person it is robbery. . . . because of the fear which was caused to the party who was robbed—even if he took only a penny . . . . It is otherwise of felony [larceny], for there he must take twelve pence at least. Felony is where he takes goods feloniously and supposes in his mind that no one perceives this felony which he has committed; so that felony is always committed by stealth and not in the same way as robbery is done. Thus there is a distinction.[558]

John Locke explained why he would subject a robber, even outside the home, to the laws of war:

§ 18. This makes it lawful for a man to kill a thief, who has not in the least hurt him, nor declared any design upon his life, any farther than, by the use of force, so to get him in his power, as to take away his money, or what he pleases, from him;
because using force, where he has no right, to get me into his power, let his pretence be what it will, I have no reason to suppose, that he, who would take away my liberty, would not, when he had me in his power, take away every thing else. And therefore it is lawful for me to treat him as one who has put himself into a state of war with me, i.e. kill him if I can; for to that hazard does he justly expose himself, whoever introduces a state of war, and is aggressor in it.

§ 19. And here we have the plain difference between the state of nature, and the state of war, which however some men have confounded, are as far distant, as a state of peace, good will, mutual assistance, and preservation, and a state of enmity, malice, violence, and mutual destruction are from one another. . . . But force, or a declared design of force upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war: and it is the want of such an appeal [that] gives a man the right of war even against an aggressor, though he be in society and a fellow-subject. Thus a thief, whom I cannot harm, but by appeal to the law, for having stolen [solely by stealth] all that I am worth, I may kill, when he sets on me to rob me but of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defense, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case, where the mischief may be irreparable. Want of a common judge with authority puts all men in a state of nature: force without right, upon a man's person, makes a state of war, both where there is, and is not, a common judge.[559]

In his *De Doctrina Christina* [The Christian Doctrine], the pioneer crusader for press freedom John Milton went further and wrote that robbers are not entitled even to the laws of war: “There is, however, this difference between a robber and a national enemy, that with the one the laws of war are to be observed, whereas the other is excluded from all rights, whether of war or of social life.”[560] Outlawing handguns, requiring trigger-locks or that firearms be unloaded in the home—or mandating home use of any other device rendering handguns unsuited for quick emergency use—constitute barriers to the human right of self protection that Locke and Milton championed. The Model Penal Code's obstructionist stance on self defense gainsays the essence of their philosophy anchored in the common law and the U.S. Constitution.

John Wilder May, in his *Law of Crimes*, called justifiable homicide “in the interest of the safety and good order of society.”[561] Clark & Marshall's *Treatise on the Law of Crimes* stated: “In justifiable homicide the slayer was regarded as doing what was right, and no fault whatever was imputed to [her].”[562]

The Wisconsin Supreme Court philosophized:

Many times it pays and pays in solid rewards to follow the advice of Buddha when he urged: “Let a man overcome anger by love; let him overcome evil by
good,” or to follow the advice . . . ‘Resist not him that is evil, but whosoever smiteth thee upon thy right cheek, turn to him the other also.” But we have not arrived at such happy age.[563]

The hard-wired instinctive human responses of a person beset by traumatic home intrusions and put in fear for her life and sanity have been toyed with by academics, courts and legislatures. They have tried to manipulate the natural response to homebreaking, enabling frightening aggressors to become the victim’s judge, jury and executioner. In the survival context that she faces, deadly force restrictions and firearm bans turn good and evil upside down.[564]

Are we so far removed from the human experience crystallized since fourteenth century case law and sixteenth century statutes, which constitutionally underpin the defense of habitation, that their principles can be dismissed as retrograde vestiges of a more violent age? In 1967, England enacted a criminal law revision, which precluded the use of deadly force against even armed house robbers.[565] Since then, England has been plagued with not only a wave of home burglaries but also some sensational attacks upon home occupants, because of the chilling effect on home defenders imposed by a vague reasonableness standard. Even more shocking, resisting home dwellers have themselves been convicted of felonies, including murder, and have served jail sentences for “assaulting” their attackers.[566]

During the past several years, England and Wales, with a combined population of only 60 million, suffered more than a million burglaries each year.[567] The United States population is nearly five times greater (approximately 290 million); in 2003, its burglaries numbered 2.15 million.[568] less than one-quarter of the British rate. A legislative attempt to restore the English right of home defense has been met with denouncements that such a proposed measure was a “ludicrous, brutal, unworkable, bloodstained piece of legislation.”

“It cannot possibly be suggested,” British government attorneys have argued, “that members of the public cease to be so whilst committing criminal offenses.”[569] Here we see in pernicious practical application the outcome of laws that accommodate the well-being of criminals or even place their lives on par with that of their prey. Britain has embraced such concepts, and taken the modalities embodied in the justification rules of the Model Penal Code to their logical conclusions—outlawing self-defense, and criminalizing resisting crime victims.[570]

Has postmodern society arrived at a new apotheosis of fairness? Should it continue to extend such fastidious solicitude toward “members of the public” who are physically and emotionally burglarizing, raping and murdering peaceable householders? Should the law continue to abhor real world defense of home and family? It appears that our morally obtuse relativistic deconstructionist mentality has shifted the onus for the bloody consequences of criminal attack from the attacker, and become careless with the blood of the victim.

If the scenarios described in the Prologue do not shock the conscience, it would be impossible to locate a constitutional sense of fairness and justice in our postmodern
sensibilities. The “enlightened morality” of the Model Penal Code regarding justification is a travesty on the Fourth, Fifth, and Fourteenth Amendments. The common law justification rules at the time of the Framing are not just an historical curiosity. They illuminate the convergence of constitutional and moral requisites, and point the way to restoring that noble palladium of Anglo-Saxon civilization and bedrock constitutional liberties—the sacrosanct right of even the humblest and poorest citizen to the undisturbed peace and security of her habitation. Can American civilization and its constitutional jurisprudence muster the vitality and the will to reassert their moral authority on behalf of crime victims?

Judge Coffey’s dissent in Quilici v. Village of Morton Grove, 695 F.2d 261, 271-80 (7th Cir. 1982), inspired many of the ideas in this Article. That case upheld the constitutionality of a Morton Grove, Illinois, ordinance that flatly banned the possession of a pistol even in the home. No Fourth or Fourteenth Amendment issues were raised by the parties to that case. Recently the Illinois legislature overturned the type of local ordinance involved in Quilici. See infra note 566.

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[3] The laws of Henry I provided: “Anyone who emancipates his slave shall . . . bestow on him free ways and open doors, and shall place in his hands a lance and a sword or whatever are the arms of freemen.” LEGES HENRICI PRIMI [LAWS OF HENRY THE FIRST] 243, c. 78, 1 (L.J. Downer ed., Clarendon Press 1972). This provision of the Leges was derived from the laws of the Ripuarian (or Riparian) Franks. Id. at 394 (Downer’s Commentary on c. 78). Such an emancipation procedure was observed in England well before the 1066 Norman Conquest. JOHN RICHARD GREEN, A SHORT HISTORY OF THE ENGLISH PEOPLE 59 49
[4] Rochin v. California, 342 U.S. 165, 172 (1952). The following tests for violations of the Due Process Clause of the Fourteenth Amendment: were established by Rochin: “shocks the conscience;” “offend those canons of decency and fairness which express the notions of justice of English-speaking peoples;” or run counter to the “decencies of civilized conduct.” Id. at 169–73; see also Jeffrey Blum et al., Comment, Cases that Shock the Conscience: Reflections on Criticism of the Burger Court, 15 HARV. C.R.–C.L. L. REV. 713 (1980).

[5] The term “deconstructionism” is also denoted “deconstruction.” Deconstructionism is included in the more general categories of postmodernism and poststructuralism, all laden with the white male’s burden of guilt for the West’s colonial enterprises, and all anti-capitalist, as discussed below. Deconstructionism’s mission is to dismantle Western bourgeois capitalist hierarchical systems, particularly judicial systems. For further discussion of the ramifications of the Deconstructionist intellectual tidal wave, see infra Part V.

[6] As used hereinafter, the term “stranger-intruder,” “housebreaker,” or “home-breaker” means a home intruder whose identity and/or intentions the householder does not know in advance, and hence whom the common law conclusively presumed posed a mortal danger to the householder.


[8] After reviewing the holdings of a number of decisions, the Court in Roe v. Wade declared: “These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.” Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[9] The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[10] In Seegars v. Gonzales, 396 F.3d 1248 (D.C. Cir. 2005), a 2-1 split panel upheld the dismissal of a challenge to the District of Columbia’s ban on the private possession of a firearm in the home, even a long gun such as a shotgun, without a locking mechanism—specifically a trigger lock. The court’s decision was based solely on the ground that the plaintiffs were not threatened with immediate criminal prosecution and thus lacked standing. The plaintiffs in that case challenged the trigger-lock requirement only on the basis
of the Second Amendment; therefore, that case does not pertain to the Fourth Amendment approach of this Article. This Article focuses upon other topics including the Fourth, Fifth, and Fourteenth Amendments’ impact upon a trigger-lock requirement in the home and upon restrictions on keeping and using arms suitable for preventing and resisting home invasions by strangers.


[14] Alessandra Stanley, Cameras Captured a Disaster but Now Focus on Suffering, N.Y. TIMES, Sept. 2, 2005, at A1 (“‘There is nobody in charge.’ . . . [There is] despair and lawlessness in and outside the convention center. ‘It’s a complete free-for-all.’ . . . CNN and Fox News split the screen . . . [with] images of stranded refugees, looters, and a bare-chested man, knee-deep in water, battering a store window with a baseball bat . . . . [A]fter three days, Hurricane Katrina still looked nothing like what American are used to seeing. The morning began with reports of people shooting at rescue helicopters . . . . ‘It’s a scene out of another country’ . . . . At times, the scenes on television were so woeful they looked as if they could have been filmed in a former Soviet republic or Haiti . . . . ‘This is not Iraq, this is not Somalia,’ said Martin Savidge of NBC. ‘This is home.’”).


[18] Id. at 210.

[20] Payton, 445 U.S. at 594 n.36 (quoting HOWARD, supra note 16, at 118-19 (citing RODNEY L. MOTT, DUE PROCESS OF LAW 89 (1926))). Mott noted that “in the colonies a wide circulation was given to other authorities which were based quite largely, if not entirely, upon [Coke’s] Institutes.” MOTT, supra at 20.

[21] EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND. Except as specifically noted, this Article will cite Part III (Vol. 3) of the second edition, published in 1648. The first edition of Part III of Coke’s Institutes was published in 1640; the first edition of Part I was published in 1628; and the first edition of Part II was published in 1642. This Article will cite only the first and third Parts. Coke also is known as Sir Edward Coke.

[22] Payton, 445 U.S. at 594 n.36.

[23] Id.

[24] Id. (quoting HOWARD, supra note 16, at 118-19 (citing MOTT, supra note 20, at 89)).


[26] MICHAEL DALTON, THE COUNTREY JUSTICE (photo. reprint 2003) (1618). Unless otherwise indicated, the present Article will use the 1618 edition. Dalton’s Justice was issued in dozens of editions spanning two centuries. Beginning around 1690 the spelling of the title of this treatise changed from Countrey Justice to the modern Country Justice.

[27] MOTT, supra note 20, at 89 n.9.


[29] MOTT, supra note 20, at 89 n.10.

[30] MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW (Dublin, L. White 5th ed. 1786). Mott lists Coke’s Institutes as having been cited 294 times and Bacon’s Abridgment on 172 occasions. MOTT, supra note 20, at 89 n.10.


[33] ROBERT BROOKE, LA GRAUNDE ABRIDGEMENT (London, Richarde Totyl 1586). Robert Brooke’s name has the variant spellings Broke and Brook.
A giant among the Founding Fathers, Adams was one of the coterie of leaders who generated the American Revolution, for which his prolific writings provided many of the politico-philosophical foundations. Not only did he help draft the Declaration, but he also steered it through the Continental Congress. The subsequent career of Adams—as a diplomat and first Vice President and third President of the United States—overshadows those of all the other signers except Jefferson.

This work should be distinguished from Hale’s earlier and briefer one-volume work titled Pleas of the Crown: or, a Methodical Summary of the Principal Matters Relating to that Subject, which this Article will not cite. A way of distinguishing citations to these two different works is that citations to the two-volume work usually indicates which volume is being cited.
1640). The report of Cook’s Case in Croke’s Reports includes a discussion of an earlier case known as Levet’s Case. The report of Cook’s Case in W. Jones, however, does not mention Levet’s Case. For a discussion of Cook’s Case and its importance to the castle doctrine, see infra notes 229, 255, 259, 262, 266, 278, 280-282, 314 and accompanying text. For a discussion of Levet’s Case and its importance to the castle doctrine, see infra notes 255-262, 264, 266, 281, 305, 335, 521 and accompanying text.

[45] Cooper’s Case, 79 Eng. Rep. 1069 (K.B. 1640). For references to, and discussion of, Cooper’s Case see infra notes 77, 100, 326, 339 and accompanying text.

[46] For a comprehensive listing of works found in colonial libraries and book dealers, see COLBOURN, supra note 38, at 199–232.

[47] FERNANDO PULTON, DE PACE REGIS ET REGNI [ON THE KING’S AND KINGDOM’S PEACE] (photo. reprint 1978) (1609). In addition, Pulton’s treatise was prescribed in law courses given in Judge Parker’s office in Portsmouth, N.H., and/or Charles Chauncey’s office in New Haven, Conn. See, e.g., Simeon E. Baldwin, The Study of Elementary Law, The Proper Beginning of a Legal Education, 13 YALE L.J. 1, 3 n.* (1903); see also WARREN, supra note 39, at 181.


[49] MICHAEL FOSTER, CROWN (CASES AND) CROWN LAW 298 (photo. reprint 1982) (1762). The full title of Foster’s work is A Report of Some Proceedings on the Commission of Oyer and Terminer and Gaol Delivery for the Trial of the Rebels in the Year 1746 in the County of Surrey and of other Crown Cases. To which are added discourses upon a few branches of the Crown law. But this work is almost universally known by the shorter title(s) given here. The Framers were very familiar with this work. See, e.g., WARREN, supra note 39, at 163, 164. It was prescribed in law courses given in Judge Parker’s office in Portsmouth, N.H. and/or Charles Chauncey’s office in New Haven, Conn., before the Framing. See, e.g., Baldwin, supra note 47, at 3 n.*; see also WARREN, supra note 39, at 181.

[50] RICHARD BURN, JUSTICE OF THE PEACE, AND PARISH OFFICER (1755). The Framers were also very familiar with this work. It was also prescribed in Judge Parker’s apprentice lawyer readings, and/or Charles Chauncey’s. See, e.g., Baldwin, supra note 47, at 3 n.*; see also WARREN, supra note 39, at 181.

[51] ANTHONY FITZHERBERT, LA GRAUNDE ABRIDGEMENT [THE GRAND ABRIDGEMENT] (London, Richard Totyl 3d ed. 1577). For a further indication that the American colonists also knew of and used the works of Anthony Fitzherbert, see MOTT, supra note 20, at 88.

[52] WILLIAM STAUNFORD, LES PLEES DEL CORON [THE PLEAS OF THE CROWN] (photo. reprint, 1971) (1557); WILLIAM STAUNFORD, AN EXPOSITION OF THE KING’S PREROGATIVE (1567). The latter work went through at least five editions or reprints
after the first one. The former work similarly was issued in at least five editions or reprintings after the first one; it was highly respected in the legal profession, and was the first attempt to give a systematic account of the English criminal law. See PERCY H. WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 325 (1925). Part 3 of Coke’s Institutes, often referred to as Coke’s Pleas of the Crown, relied substantially upon Staunford’s Plees del Coron especially in Coke’s discussions of homicide.


[54] WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE (3d ed. 1588). Lambard’s Eirenarcha enjoyed at least a dozen editions from 1581 to 1619. See, e.g., WINFIELD, supra note 52, at 329. The second or third edition contained more explanatory material than the first.

[55] 1 BLACKSTONE, supra note 35, at 343 (recommending that the student peruse “Lambard’s eirenarcha”).


[57] See supra notes 19–22 and accompanying text.

[58] See also MOTT, supra note 20, at 89 (“Another conspicuous fact was the tremendous influence of Sir Edward Coke. . . . [W]e find in the colonies a wide circulation given to other authorities which were based quite largely, if not entirely, upon the Institutes.”).


[60] Chapter 39 of Magna Carta (1215) provided: “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”
Translation: “except by the law of the land”—the final phrase of Chapter 39 of Magna Carta (1215).


77 Eng. Rep. 194 (K.B. 1603). Coke’s original report, 5 Co. Rep. Fol. 91 a, indicated that Semayne’s Case had been decided in the regnal year of “ii Mich. Jac. Reg.”—that is, the autumn term of the second year of the reign of King James. Given that James I acceded to the throne in March 1603, it would seem that Coke assigned the decisional year of this case to be 1604. Nevertheless, since the Payton Court gave 1603, this Article will also use 1603.

[Preface] To the Reader, supra note 53 (capitalization modernized); see also supra note 53 and accompanying text.

STAUNFORD, LES PLEES DEL CORON, supra note 52, at fols. 14a-14b. Some editions of Staunford’s treatise appear to contain misprints in connection with the third root case; they make reference to “29 lib. ass. P. 23” instead of “26 lib. ass. P. 23.” The third volume of Coke’s Institutes apparently recognized this error by including the correct citation as well as the incorrect citation. 3 COKE, supra note 21, at 56. Perhaps Coke retained the original incorrect citation out of respect for Staunford.

STAUNFORD, LES PLEES DEL CORON, supra note 52, at fols. 14a-14b. The common law justification rules protected home occupants from even attempted housebreakings, day or night. Blackstone explained that the 16th century statute, 24 Hen. 7, c. 5 (1532), mentioned night time only to indicate its extension of justifiable homicide to merely “attempting to break open a house” at night even without an attempt to steal, and that the statute reached “breaking open of any house in the day time, [if] it carries with it an attempt of robbery also.” 4 BLACKSTONE, supra note 35, at 180. For a discussion of the 1532 statute, see infra notes 94–103 and accompanying text.

For a similar translation, see Radin, supra note 28, at 425 (quoting STAUNFORD, LES PLEES DEL CORON, supra note 52, at 14b).

Payton, 445 U.S. at 596 n.44 (quoting Semayne’s Case, 77 Eng. Rep. 194, 196 n.(c) (K.B. 1603)) (emphasis added). The Latin phrase at the end of the passage has been translated as “To every man his own house is his safest refuge.” BLACK’S LAW DICTIONARY 575 (4th ed. 1957).

[71] Id. at 596 n.44.

[72] 1 FITZHERBERT, supra note 51, at fol. 218a, pl. 305 (citing 3 Edw. 3 [1330]). The letter “F.” at the beginning of the alternative citation indicates Anthony Fitzherbert.

[73] Fitzherbert’s Abridgement, like all early abridgments, was a compilation of abstracts and sometimes full-texts of decided cases, without case names, collected under subject matter headings such as Corone & Plees del Corone and Trespas [Trespass]. The heading Corone & Plees del Corone corresponds to matters in which the Crown has an interest and modern criminal cases that carry titles such as “Rex v. _____,” “The Queen v. ______,” “State v. ______,” or “People v. ______.”

[74] See, e.g., BOOK OF ASSIZES, at fol. 123a, pl. 23 (1561); BOOK OF ASSIZES, at 123, pl. 23 (1679); 1 BROOKE, supra note 33, Corone & matters del Corone, at fol. 178a, pl. 100 (referring to Y.B. 26 Ass. Pl. 23).


[77] 98 SELDEN SOCIETY, THE EYRE OF NORTHAMPTONSHIRE 1329-1330, at 822 (Donald W. Sutherland ed., 1984). See the same source, id. at 875, for a concordance of Fitzherbert’s Abridgement, supra note 51, with the reports and translations found in 97 SELDEN SOCIETY, supra note 76.

Although this modern interpretation as well as the original version of the case speak in terms of only the “owner” of the house, by the time of the framing of the U.S. Constitution other common law cases made clear that any lawful occupant had the same privileges in this situation. See Cooper’s Case, 79 Eng. Rep. 1069 (K.B. 1640) (“lodger or sojourner”); Ford’s Case (ca. 1630), summarized in Kelyng, J. 51, 84 Eng. Rep. 1078 (K.B. ca. 1630) (marginal note stating “possessor of a Room in a Tavern” omitted in the version printed in English Reports, Full Reprint). For an indication that the Framers possessed Kelyng’s Reports, see WARREN, supra note 39, at 164.

[78] See, e.g., Alice and Richard’s Case (Worcestershire Eyre, 1221), reprinted and translated in 53 SELDEN SOCIETY, ROLLS OF THE JUSTICES IN EYRE FOR LINCONSHIRE (1218–1219) AND WORCESTERSHIRE 1221, at 557-58 (Doris M. Stenton ed., 1934) (acquittals for slaying housebreakers); see also Dhutti’s Case, printed in THREE EARLY ASSIZE ROLLS FOR THE COUNTY OF NORTHUMBERLAND, 88 PUBLICATIONS OF THE SURTEES SOCIETY FOR THE YEAR 1890, at 94 (W. Page ed., Durham, Andrews & Co. 1891) (40 Hen. 3 [1256]) (printed only in Latin, no printed translation available) (“Postea testatum per juratos et villatas propinquiores quod non percussit eum nequiter, immo quod credebat ipsum esse latronum, ideo inde quietus.” [Afterwards it was testified by the jurors and neighboring villagers that he did not pierce him [through the forehead] wrongfully, nay rather
that he believed him to be a thief, for that reason he is then and there acquitted.

For a summary of Dhutti’s Case, see 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW 478 (2d ed. reissued 1968) (full acquittal for slaying an unknown housebreaker). Professor Thomas A. Green correctly states that Maitland had asserted that full acquittal in Dhutti’s Case was an unusual one and that the defendant “was fortunate.” THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 82, n.50 (1985), citing 2 POLLOCK & MAITLAND, supra, at 78 n.3. However, in support of his view that the outcome was uncommon, Maitland ad loc. cites solely a case of an outdoor, not an in-home slaying—namely, William de Tysington’s Case, Staffordshire Assize Roll, 21 Edw. I, translated in 6 COLLECTONS FOR A HISTORY OF STAFFORDSHIRE, PART I, at 258 (The William Salt Archaeological Society, ed.) (London, Harrison and Sons 1885) (1293). Joseph H. Beale calls Dhutti’s Case “a strong case [for justifiable homicide] in the same eyre [circuit court].” Joseph H. Beale, Jr., Retreat from a Murderous Assault, 16 HARV. L. REV. 567, 568 n.7 (1903). The Model Penal Code’s official comments cited this article of Beale’s several times in support of its restrictive justification rules, including quoting from it at length in its main text. MODEL PENAL CODE AND COMMENTARIES, Part I, General Provisions §§ 3.01 to 5.07, at 53 n.4, 54 & n.53 (Official Draft and Revised Comments) (1985) [hereinafter MPC COMMENTARIES]. For a further discussion of the MPC’s reliance upon and approval of Beale, see infra note 527.

[79] 97 SELDEN SOCIETY, supra note 76, at 183 (citing 3 E. 3 Cor. 305 (1330)).

[80] Id.

[81] Lewis Bowles’s Case, 11 Co. Rep. 79b at 82b, 77 Eng. Rep. 1252, 1257 (1615) (citing 3E. 3 Corone 330 and [Y.B.] 26 Ass. 23). In this report, Coke cites the second and third root cases decided in the fourteenth century. Coke believed that forfeiture for killing would-be highway robbers was imposed before passage of the 1532 statute, 24 Hen. 8, c. 5, as discussed infra at notes 94-103 and accompanying text.

[82] Bowles’s Case, supra note 81 (citing “3 E. 3 Corone 330. & [Y.B.] 26 Ass. 23, &c.,” the “&c.” here referring to other physical impediments such as the sea or a ditch); see COKE, supra note 21, at 55-56.

[83] COKE, supra note 21, at 56, 161, 220 (citing and translating into Latin the passage contained in Exodus 22:2–3). For a discussion of the numbering scheme of Exodus, see infra note 136.

Most eminent common law authorities who wrote within a century after Coke’s Institutes copied and published his works nearly verbatim. For a description of Coke’s dominating influence, see supra notes 19-22 and 56-62 and accompanying text.

Other common law treatises cite this first root case as controlling. See, e.g., RICHARD CROMPTON, L’OFFICE ET AUTHERITIE DE JUSTICES DE PEACE fols. 21b, 22a (photo. 58
reprint 1972) (1584); DALTON, supra note 26, at 220, 221; 1 HALE, supra note 41, at 486; 1 HAWKINS’S ABRIDGMENT, supra note 34, at 77-78 (indirectly citing the first root case by indicating that homicide is justifiable “where the Owner of a house, or any of his Servants, or Lodgers, &c. kill one who attempts to burn it, or to commit any Felony in it.”); 1 HAWKINS’ PLEAS OF THE CROWN, supra note 36, at 71; LAMBARD, supra note 54 at 238, 257; PULTON, supra note 47, at fols. 121a, 122a (photo. reprint 1978) (1609); STAUNFORD, AN EXPOSITION OF THE KING’S PREROGATIVE, supra note 52, at fol. 46a (1567) (“But so shall not [need a pardon] he that kills one that would rob him in his house . . . .”) (spelling and capitalization modernized); STAUNFORD, LES PLEES DEL CORON, supra note 52, at fol. 14a. The Framers were familiar with the existence of this work. See supra note 53.

[84] 1 FITZHERBERT, supra note 51, at fol. 218b, pl. 330.


[86] 97 Selden Society, supra note 76, at 199.

[87] GREEN, supra note 78, at 85.

[88] FOSTER, supra note 49, at 298 (citing a case in which a householder’s stabbing an unarmed thief assaulting the householder was ruled justifiable).

[89] 3 COKE, supra note 21, at 56, 161, 220; CROMPTON, supra note 83 at fol. 21b; DALTON, supra note 26, at 220; PULTON, supra note 47, at fol. 121a (where again “303” appears as a misprint for “330” especially since Pulton, supra note 47, at 126a, recognized that the “303” case involved the year-and-a-day statute-of-limitation rule, Pulton apparently having copied Coke’s wrong citation); 1 HALE, supra note 41, at 487, 493; LAMBARD, supra note 54, at 238; STAUNFORD, LES PLEES DEL CORON, supra note 52, at fol. 14a. Hawkin’s’s Abridgment indirectly cited this second root case as controlling law by including a discussion of justifiable homicide as that which happens “where the Owner of a house, or any of his Servants, or Lodgers, &c. kill one who attempts to burn it, or to commit any felony in it.” 1 HAWKINS’S ABRIDGMENT, supra note 34, at 77-78; see also 1 HAWKINS’S PLEAS OF THE CROWN, supra note 36, at 71 (similar language). Bacon’s Abridgment likewise indirectly cited this second root case as controlling law. BACON, supra note 30, at 675 (“It is clear, that the killing of a person in the defense of a man’s . . . house . . . . is justifiable . . . . as, where . . . the owner of a house, or any of his servants, or lodgers, etc., kills one who attempts to . . . commit in it murder, robbery or other felony . . . .”).

[90] Y.B. 26 Ass., Pasch (1353), pl. 23, printed in BOOK OF ASSIZES (1679), supra note 74, at 123, pl. 23, and in BOOK OF ASSIZES (1561), supra note 74, fol. 123a, pl. 23.

[91] The translation runs as follows:

Note that in an indictment for felony the defendant put himself upon the country [chose a jury trial by his countrymen rather than trial by battle]. And it was found that he was in his house and the man whom he killed and others came to his house
in order to burn it, etc., and surrounded the house but did not burn it [mes ils ne faisoient ceo], and he lepf forth, etc., and killed the other, etc. And it was adjudged that this was no felony.

FRANCIS P. SAYRE, supra note 76, at 565 (italics and brackets in Sayre’s translation). Sayre ad loc. assigns it the title “Anonymous” and ascribes the decisional year of this case as 1532. Thomas A. Green assigns it the year 1353. GREEN, supra note 78, at 83 nn.54 & 56. We adopt the year 1353 by reason of the kind of calculation shown in infra note 209.

[92] BACON, supra note 30, at 675; 1 BROOKE, supra note 33, at fol. 178a, pl. 100; 2 BURN, supra note 50, at 2 (“If a man come to burn my house, and I shoot out of my house, or issue out of my house, and kill him; it is not felony”); 3 COKE, supra note 21, at 220, 221; CROMPTON, supra note 83, at fol. 21b; DALTON, supra note 26, at 220; 1 FITZGERBERT, supra note 51, at fol. 215b, pl. 192; 1 HALE, supra note 41, at 39, 487, 488, 493; 1 HAWKINS’S ABRIGMENT, supra note 34, at 77-78 (indirectly citing this third root case as controlling law by including in his explanation of justifiable homicide that which happens “where the Owner of a house, or any of his Servants, or Lodgers, &c. kill one who attempts to burn it, or to commit any Felony in it”); 1 HAWKINS, PLEAS OF THE CROWN, supra note 36, at 71 (similar language and explicitly citing the third root case); PULTON, supra note 47, at fols. 121a, 121b, 122a; STAUNFORD, LES PLEES DEL CORON, supra note 52, at fol. 14a.

[93] An appeal was a private accusation, brought typically in a public court, by the victim of a felony or by the victim’s next of kin. See, e.g., GREEN, supra note 78, at 5, 9, ll. For a discussion of the lack of usefulness to the next of kin of such private accusations, see infra note 388.

[94] 24 Hen. 8, c.5 (1532) (Eng.), reprinted in STAUNFORD LES PLEES DEL CORON, supra note 52, at fol. 14b (spelling modernized).

[95] A householder would never be penalized, only encouraged in cases of justifiable homicide as occurs, for example, when the deceased housebreaker’s intent was unknown in advance. For a more detailed discussion of this point, see, for example, the discussion infra at notes 143-173 and accompanying text.

[96] 3 COKE, supra note 21, at 220. Attempted burglary was one in which the apparent house breaker had not yet entered the house, such as by sticking his head or foot inside the home although he had broken one or more building walls or windows. See, e.g., id. at 247.

[97] 4 BLACKSTONE, supra note 35, at 180; 2 BURN, supra note 50, at 1; CROMPTON, supra note 83, at fols. 21b, 22a; DALTON, supra note 26, at 220 (stating that homicide in such cases was “no felony but justifiable by the Common Law, before the Statute 24 H. 8. cap. 5.”); FOSTER, supra note 49, at 275–76; 1 HALE, supra note 41, at 486-87; LAMBARD, supra note 54, at 238; PULTON, supra note 47, at 121a, 122a; STAUNFORD, LES PLEES DEL CORON, supra note 52, at fol. 14b.

[98] See the discussion of the third root case at supra notes 90-92 and accompanying text, in
particular with reference to 1 HALE, *supra* note 41, at 486-87.


[102] 24 Hen. 8 c. 5 (1532) (Eng.).

[103] “A person may use such force as is reasonable in the circumstances in the prevention of crime . . . .” Criminal Law Act, 1967, Section 3 (1). For a discussion of the legal meaning of this provision, see *Rex v. Cousins*, 1982 Q.B. 526 [1982], 2 All E. R. 115 at 117-18. For a discussion of the baleful practical impact of the legislation saddling householders with the burden of using only “reasonable” force when attacked by an overt criminal, see infra notes 506-509 and 565-566 and accompanying text. For a discussion of a failed nineteenth-century attempt by a royal commission to have Parliament impose a similar standard in such cases, see infra note 212.


[105] JOSEPH H. BEALE, A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW 569 (2d ed. 1907).

[106] Since breaking into a home by a known person for the anticipated purpose of a non-fatal beating constituted a merely non-felonious trespass, Fitzherbert reported this case in the chapter Trespas. 2 FITZHERBERT, *Trespas [Trespass]*, *supra* note 51, at fol. 214a, pl. 246. On the other hand, since going in public places with a large number of armed people constituted a riot or at least a rout, Brooke reported this case in his chapter Riotts & Routs and Assemblies. 2 BROOKE, *Riottes & Routes, and assemblies*, *supra* note 33, at fol. 224b, pl. 1.

[107] See, e.g., 2 BROOKE, *supra* note 33, at fol. 224b, pl. 1; 3 COKE, *supra* note 21, at 56, 161, 162; 2 FITZHERBERT, *supra* note 51, at fol. 214a, pl. 246; 1 HALE, *supra* note 41, at 445, 484, 487, 493, 547; 1 HAWKINS, PLEAS OF THE CROWN, *supra* note 36, at 136, 158; LAMBARD, *supra* note 54, at 188; PULTON, *supra* note 47, at fols. 121a, 122a; 19 VINER, *supra* note 31, at 235. Hawkins’ *Abridgment* indirectly cited this fourth case by stating the law as follows: “It is no offence to assemble my friends in the defence of my house against those who threaten to do me a violence in it; for my house is my castle. Neither is it any offence to arm my self in order to suppress dangerous rioters . . . for the public good requires it.” 1 HAWKINS’S ABRIDGMENT, *supra* note 34, at 158 (spelling and capitalization modernized).
For a discussion of the 1328 Statute of Northampton, see infra notes 238-245 and accompanying text.

Translation: “To every man his own house is his safest refuge.” BLACK’S LAW DICTIONARY 575 (4th ed. 1951).


See id.

Patrick O’Driscoll, ‘The Looters, They’re Like Cockroaches,’ USA TODAY, Sept. 2, 2005, at 3A (“As scenes of fire, gunshots and looting exploded near downtown Thursday, residents of one of the city’s grand, oak-lined neighborhoods stood guard against deadly threats in the night. The Carrollton neighborhood is less than 3 miles from the Louisiana Superdome, where thousands of refugees from Hurricane Katrina grew hostile as they waited for buses to be evacuated. ‘Last night, I heard some of the gunshots. And I’ve heard stories that (the looters) are better armed than the police.’ . . . There was no ignoring the nearby mayhem . . . . ‘There’s a body floating there around the corner, with five shots in his head,’ . . . ‘And there’s two others around up there.’ . . . Armed law enforcement officers came to the neighborhood for the first time Thursday. A convoy of vehicles from the East Baton Rouge Sheriff’s Department and the Louisiana Department of Wildlife and Fisheries brought motorboats down the avenue to rescue dozens of people trapped at the water-logged northeast end of the neighborhood. All the officers were armed, many with shotguns and automatic rifles . . . . Other residents prepared to continue their stand in a beloved neighborhood of stately old homes near the Tulane and Loyola university campuses . . . . ‘We need some order, civil order. Maybe now, now that the guys in riot gear showed up.’ . . . ‘I’m afraid to leave until the National Guard arrives’ . . . . A ‘free-for-all’ of looting broke out nearby on Canal Street after the storm passed . . . and stores such as Macy’s and the Pottery Barn were stripped bare . . . . [S]quatters have broken into nearby hotels and taken up residence . . . . [A householder] fled his Garden District home Wednesday after two nights of scaring off thieves with a borrowed handgun . . . . ‘The last two or three days, the things I’ve seen, it’s absolutely terrifying that people can do the things they’re doing . . . . I could never have imagined the absolute disregard for life or property that’s going on.”


Id. at 6, 16.

Id. at 20.
[117] *Id.* at 5.

[118] See the inside front cover of JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE (Russell Kirk intro. 1955) (1690).


[124] See id. at 16-17.


[126] See infra Part V.

[127] The Model Penal Code would cause social problems of no mean proportions. See, e.g., Bloom v. City of New York, 357 N.Y.S.2d 979, 981 (N.Y. Sup. Ct. 1974) (“In the instant case the plaintiffs allege that the city by its officials encouraged and permitted the looting and destruction of plaintiffs’ property, prevented the plaintiffs from protecting their property and assured them that they would receive police protection. The complaint then alleges that the defendant stood by and permitted the looting and destruction to occur.”); John Podhoretz, *An Obscenity Charge; Left’s Vile Bid to Blame Racism for Relief Bungling*, N.Y. POST, Sept. 7, 2005, at 31 (“Indeed, the very confused rapper Kanye West, after accusing the president of failing to care about black people because he thought the early response was too slow, then turned around and said the administration’s efforts to save the suffering remnant of New Orleans from the predatory gangs that had taken over was an effort to kill black people. West’s remarks have been praised in many quarters on the liberal left.”).


[129] 3 COKE, *supra* note 21, at 56. Here, Coke cites not only the 1349 Memorandum case, discussed *infra* at notes 231-233 and accompanying text, but also *Rex v. Compton*, Y.B. 22 Ass. 55 (1349), discussed *infra* at notes 209-211, as well as the 1532 statute, 24 Hen. 8, c.5, which abolished the forfeiture penalty for dispatching attempted highway robbers. See, e.g., *supra* notes 94-103 accompanying text.

[130] RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW & PROCEDURE 1112 63
For clarity and brevity, as used hereinafter the term “home-breaker” or “unknown intruder” will refer to all home invaders or attempted home invader invaders whose identity was known to the householder (like a janitor’s relative) had no legitimate reason for physically touching i.e. or attempting to manipulate the locks, or “break” into the home or for his presence across the threshold of the occupant’s premises.


The Jewish law on housebreakers is predicated upon this same concept. See infra notes 500-505 and accompanying text.

3 FITZHERBERT, supra note 51, at fol. 217a, pl.261 (22 Edw. 3, Trin. [13490]). See infra notes 231-233 and accompanying text for a discussion of this 1349 Memorandum case, which placed resisting a burglar with deadly force on a par with an officer’s or minister of justice’s overcoming resistance to a lawful arrest.

In regard to justifiable homicide, Coke cites Exodus 22, “Si effringens vir domum sive suffodiens fuerit inventus, & accepto vulnere mortuus fuerit, percussor non erit reus sanguinis.” Id. King James translation: “If a thief be found breaking up, and be smitten that he die, there shall be no blood be shed for him.” Douay-Rheims translation: “If a thief be found breaking open a house or undermining it, and be wounded so as to die, he that slew him shall not be guilty of blood.” The Douay-Rheims translation adds the phrase “or undermining it” as an interpretative tool to indicate an alternative meaning of the Hebrew word נמחטח found in the Hebrew Bible ad loc. See also infra notes 500-505 and accompanying text for a discussion of the biblical presumption that a house-thief is a robber, (that is, one who takes property from another by putting the owner in fear, and an intrusion into the home puts the occupants in fear).

The chapter and verse numbering of the verse to which Coke refers corresponds to the Hebrew Bible’s Exodus 22:1; but these correspond to Exodus 22:2 in the English translations of the Geneva, Douay-Rheims, and King James versions. The first translation of the Bible into English was the Geneva translation in the year 1560, decades before the Douay-Rheims translation (1582-1609) and the King James translation (1611). For convenience and simplicity, hereafter the Geneva, Douay-Rheims, and the King James versions are referred to as the “English Bible” since all known English translations, except for all the Jewish versions, use the same numbering of the verse in question. However, all Hebrew bibles and their translations use the chapter and verse numbering Exodus 22:1.

The Hebrew Bible at Exodus 22:1 describes the housebreaker as נוענ , vowelized in modern printed Hebrew bibles as נוענ נ , which transliterates into “haganef” [“the thief”]. The word “ganef” has found it way into modern English dictionaries where it is described as having derived from the Hebrew and the

[138] According to William Staunford, only if the non-felonious intent of the intruder is known (“est conu”) in advance to the occupants were the above presumptions changed. STAUNFORD, LES PLEES DEL CORON, supra note 52, at fol 30a.

[139] Statute 24 Hen. 8, c.5 (1532) (Eng.).

[140] Id.

[141] Id., reprinted in STAUNFORD, LES PLEES DEL CORON, supra note 52, at fol. 14b (spelling modernized).

[142] For a further discussion of the issues involved here, see BOYCE & PERKINS, supra note 130, at 1122.

[143] See CLARK & MARSHALL, supra note 114, at 468, 469.

Homicides classed justifiable at common law include those where a person: (1) convicted of a capital offense, sentenced to death by a court of competent jurisdiction, is executed by the proper officer in accordance with such judicial order; (2) is necessarily killed, either by a peace officer or by a private person, in order to prevent him from committing a felony by violence or surprise; (3) is necessarily killed, either by a peace officer or by a private person, in suppressing a riot; (4) is necessarily killed in effecting an arrest for a felony committed by him, or in preventing his escape after he has been arrested and is in custody; (5) who is feloniously assaulted and who is himself without fault, kills his assailant to save himself from death or great bodily harm.

Id.


[145] Here, Coke refers to Semayne’s Case, as well as, inter alia, the four root cases which were cited by the Supreme Court in Payton in its excerpt from Semayne’s Case.

[146] BLACKSTONE, supra note 35, at 182, 187-88

[147] COKE, supra note 21, at 220. Regarding justifiable homicide, Coke here cites Exodus 22, “Si effringens vir domim sive suffodiens fuerit inventus, and accepto vulnere mortuus fuerit, percussor non erit reus sanguinis.” King James translation: “If a thief be found breaking up, and be smitten that he die, there shall be no blood be shed for him.” Douay-Rheims translation: “If a thief be found breaking open a house or undermining it, and be wounded so as to die, he that slew him shall not be guilty of blood.” The Douay-Rheims translation adds the phrase “or undermining it” as an interpretative tool to indicate an
alternative meaning of the Hebrew word נְחָטַח found in the Hebrew Bible ad loc.


[150] “[A] person invaded in this sudden manner cannot know, nor is obliged to consider in such a moment” to what greater length he may a carry the attempt. 1 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES 213 (Edinburgh, Bell & Bradfute, 2d ed. 1818); 1 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, WITH A SUPPLEMENT BY BENJAMIN ROBERT BELL 218 (photo. reprint 1986) (4th ed. 1844) (“He is entitled to suppose the worst of that which has been begun in so base a fashion; and, by the law of nature, has therefore [the] right to put himself in security by the only certain means, the instant slaughter of the assailant . . . his innocent victim should [ not] contend with him on equal terms.”).


[152] Id.

[153] Id.

[154] Id. at 591 n.33.

[155] Id. at 590.


[157] Dhutti’s Case, 40 H. III (1256) (printed only in Latin in THREE EARLY ASSIZE ROLLS FOR THE COUNTY OF NORTHUMBERLAND, supra note 78, at 94 (no printed translation available; author’s version and translation of an excerpt).


[159] Id. at 597 n.32.

[160] Id.

[161] COKE, supra note 21, at 56.

[162] Id.

[163] BOYCE & PERKINS, supra note 130, at 1122 & n.49 (citing Beale, supra note 78, at 66
For a discussion of the retreat question, including the requirement to retreat from room to room, see infra Part VI.D.1.

[164] Coke refers to Semayne’s Case, as well as, inter alia, the four root cases which were cited by the Supreme Court in Payton, 455 U.S. at 596 n.44, in its excerpt from Semayne’s Case.


[167] See infra Part VI.


[169] 2 HAWKINS, PLEAS OF THE CROWN, supra note 36, at 74; see also 4 BLACKSTONE, supra note 35, at 289 (similar language); 1 HALE, supra note 41, at 489 (similar language).

[170] GREEN, supra note 78, at 81 n.49 (citing a 1334 case acquitting the defendant and labeling him “ut executor pacis”). RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979), provides that an interference with a public right is unreasonable where “the conduct involves a significant interference with the public health, the public safety, the public comfort or the public convenience.” For a recent case using this standard for judging that the mere sale of firearms in the Chicago area under a dealer’s license does not constitute a public nuisance, see City of Chicago v. Beretta U.S.A. Corp., 84 N.E. 2d 1699 (Ill. 2004).

William Lambarde pointed out that whereas housebreakers terrorize the public, the use of deadly force to defend the home is socially beneficial since it protects the homeowner and acts a deterrent by causing “the more terror against offenders.” LAMBARD, supra note 54, at 236–37.

[171] 4 BLACKSTONE, supra note 35, at 182.

[172] PARKER, supra note 148, at 162 (capitalization and spelling modernized).

[173] CLARK & MARSHALL, supra note 114, at 470. A late nineteenth century hornbook nicely clarifies the issue involved here, namely the distinction between homicides in pure self-defense as opposed to with justification: “The principle of justification is broader than the mere idea of self-defense.” WILLIAM L. CLARK, HANDBOOK OF CRIMINAL LAW 147 (St. 67
Paul, Minn., West Publishing Co. 1894). The basis of justifiable homicide rests in the right and obligation to prevent a felony, such as in defense of the home not as property but as in prevention of a felony. *Id.* at 145.


[175] BOYCE & PERKINS, supra note 130, at 1112.

[176] BLACKSTONE, supra note 35, at 173, 189 (labeling pure self-defense as “se detendendo” as did other commentators).

[177] STAUNFORD, LES PLEES DEL CORON, supra note 52, at fol. 15a. The deceased was a “loial home” [loyal or law-abiding man]. *See also* LAMBARD, supra note 54 at 255.


[180] *Id.* at 685.

[181] *Id.*

[182] DALTON, supra note 26, at 221.

[183] *See also* Keilwey (or Keilway), pl. 27, tol. 108a, fol. 108b, 72 Eng. Rep. 273, 274 (1327?-1491?).

[184] PARKER, supra note 148, at 162 (capitalization and spelling modernized.)

[185] *Id.*

[186] *Keilwey*, 72 Eng. Rep. at 274 (Author’s translation: “... *because* the king has suffered the death of a subject of the realm ... for that reason, it is proper that he have a pardon from the king ... before he may be delivered from prison.”).

[187] POLLOCK & MAITLAND, supra note 78, at 479 (*deserves* but needs a pardon).

[188] Time immemorial English practice had provided that the Crown would not retain beyond a year and a day the lands of convicted of felons, but that the felon’s land would thereafter be returned to the lord (grantor) of the land. During that year and a day, however, the Crown was entitled to waste: all the land’s trees would be uprooted, all gardens destroyed, all meadows ploughed up, and all buildings leveled. When at last the landlord entered into possession of the escheated land, he would find a desert, and not a prosperous manor. This 68
destructive procedure had its justification in the idea that the landlord had used poor judgment in choosing a felonious grantee. It served as an incentive for future grantors to examine the credentials of honesty and trustworthiness of prospective grantees before granting them lands. See e.g., WILLIAM SHARP MCKECHNIE, MAGNA CARTA 337 (photo. reprint 1958) (2d ed. 1914); WILLIAM F. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 307 (1965). Chapter 32 of Magna Carta (1215) restored the grantor's right of return that King John had abused by not giving back the forfeited lands after lapse of the year and a day.

[189] 1 JOEL BISHOP, COMMENTARIES ON THE COMMON LAW 533-34 (Boston Little Brown 1856).

[190] U.S. CONST. art. III, §3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).


[195] For a translation and discussion of this biblical verse, see infra notes 501-502 and accompanying text.

[196] FLETCHER, supra note 194, at 132-33. “For example, if the force used in self-defense against an aggressor is both necessary and reasonable, injuring the aggressor is justified and therefore lawful.” Id. at 133.


[199] Chapter 61 of the Great Charter of Liberties (Magna Carta) provided for a temporary lawful armed uprising, under certain specified circumstances. The uprising would be conducted and directed by the entire community of the land led by a committee of 25 barons elected by all the barons. To be legal, the temporary uprising could have only the limited purpose and objective of coercing the monarch to cure a grievance(s) presented by the committee to the Crown in a petition for a redress of grievance(s) that had not been cured within 40 days after presentation of the petition. After correction of the grievance to the satisfaction of the committee of the 25 barons, chapter 61 provided that all the barons and
their followers would terminate the uprising and resume their obedience to the Crown. MAGNA CARTA, cl. 61 (1215); see also David I. Caplan & Sue Wimmershoff-Caplan, Magna Carta, in GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 371, 371–376 (Gregg Lee Carter ed., 2002) (discussing clause 61 of Magna Carta and its implications).

[200] The decision also came down forty years after the 1181 Assize of Arms, which allowed and required all free subjects to possess ordinary personal arms. For the text of the 1181 Assize of Arms, see, for example, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY: A SELECTION OF DOCUMENTS 85 (Carl Stephenson & Frederick George Marcham eds. & trans., 1937).


[204] Dorfman & Koltonyuk, supra note 202, at 391-92, 400-01.

[205] Personalization of a firearm requires that (1) a battery, and (2) software for analyzing fingerprints, palm-prints, or other signature—any one of which is notoriously unreliable—be connected to the firearm. See also Cynthia Leonardatos et al., Smart Guns/Foolish Legislators: Finding the Right Public Safety Laws, and Avoiding the Wrong Ones, 34 CONN. L. REV. 157 (2001).

[206] See, e.g., Dorfman & Koltonyuk, supra note 202, at 397-400.

[207] See id. For an in-depth discussion of the right to have firearms in general as an indispensable means for self-defense, see id. at 392-401.

[208] See id. at 400-01.

[209] Y.B. 22 Ass. pl. 55 (1349), printed in, e.g., BOOK OF ASSIZES (1679), supra note note 74, at 97, and in BOOK OF ASSIZES (1561), supra note note 74, at fol. 97b, translated in BEALE, supra note 105, at 500; SAYRE, supra note 76, at 563. Common law scholars often
abbreviate this case as Y.B. 22 Assize 55 or simply 22 Ass. 55 signifying 22 *Livre des Assises* [Book of Assizes] pl. 55. Here the number “22” signifies the 22nd regnal year of Edward III. Different writers assign this case different dates. Beale *ad loc.* assigns it the year 1347. Sayre *ad loc.* assigns it the year 1348. By contrast, a more modern work on the subject assigns it the year 1349, which this Article adopts. GREEN, *supra* note 78, at 83 n.54.


Even the thirteenth century Henri de Bracton (or Henry of Bratton)—whose views on justifiable deadly force were quite restrictive—opined in connection with resisting or fleeing outlaws found outside their designated areas: “For it is a just judgment that he who has refused to live by the law should perish without law and without judgment.” 2 HENRI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLÆ [HENRY BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND] 363 (Samuel E. Thorne ed. & trans., 1968) (ca. 1250). For more on Bracton, see *infra* notes 410-412 and accompanying text.


The 1879 *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (appointed in 1878) took the breathtaking position that *moderamine tutelæ* applied at common law to all cases of defense, including home defense. Curiously, the report went about it in an indirect route. On the topic, it first stated:

We take it one great principle of the common law to be, that although it sanctions the defence of a man’s person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and justify many of our suggestions. It does not seem to have been universally admitted [footnote omitted]; and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognized as the law in [the] future, but that it is the law at present. But as this is in the nature of an argument, we have thought it better to print it as a note. (See Note B to this Report.)
The law discourages persons from taking the law into their own hands. Still the law does permit men to defend themselves. Vim vi repellere lict modo fiat moderamine inculpatae tutelae, non ad sumendam vindictam, sed ad propulsandam injuriam [It is permitted to resist force by force, doing with the moderation of blameless defense, and not to accomplish revenge, but to prevent harm.]—Co. Lit., 162a. And when the violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified.

Id. at 45, reprinted in 6 IRISH UNIV. PRESS SERIES OF BRITISH PARLIAMENTARY PAPERS 413. Although the 1878 English codifiers conceded that their restrictive approach to the issue of deadly force justification, in particular regarding thwarting a housebreaker, was not “universally admitted” even in 1878, they totally overlooked Coke’s first three root castle doctrine cases. They relied upon only Coke’s discussion of the rules on excusable deadly force in cases of disputes between landlord and tenant that Coke dealt with in the first volume of his Institutes. The Commissioners never mentioned the extensive discussion of justifiable deadly force and especially the first three root castle doctrine cases contained in Coke’s third volume of his Institutes. Incredibly, the commissioners were relying solely upon the wrong volume of Coke’s Institutes.

Parliament refused to adopt the recommendation of the commission to codify the criminal law in accordance with the report, or to adopt any codification for that matter. See, e.g., Kadish, supra note 2, at 531-33.

[213] The term “foul criminal” was used here in later editions of the same work. See, e.g., 1 HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, supra note 150, at 213; 1 HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, WITH A SUPPLEMENT BY BENJAMIN ROBERT BELL, supra note 150, at 218.


[215] Id. at 306.

[216] Id.

[217] FOSTER, supra note 49, at 273 (spelling and capitalization modernized). For the language “happening in such cases to slay” contained in the 1532 statute that Foster was paraphrasing, see supra note 94 and accompanying text.
[218] Id. at 273.

[219] Id. at 274.

[220] Id. at 271.

[221] Id. at 272 (capitalization modernized).

[222] “Interest reipublicæ ne maleficia remaneant impunita, & impunitas semper ad deteriora invitat.” Foxley’s Case, 5 Co. Rep. 109a, 109a, 77 Eng. Rep. 224, 225 (K.B. 1597). Authors’ translation: “It is in the public interest that malefactors not go unpunished, and lack of punishment always invites deterioration.” Coke pointed out that if the victim of a theft did not pursue the thief to apprehend him fleeing from the scene, then the property owner forfeited his goods to the Crown. Id.

[223] FOSTER, supra note 49, at 272 (“ne Malicia remneant impunita.”). Tennessee v. Garner, 471 U.S. 1 (1985), held that arrests using deadly force by law enforcement officers to arrest non-dangerous felons, such as burglar fleeing from an empty home, were unconstitutional despite the fact that common law standards at the framing would dictate otherwise. The decision treats a different topic from the focus of the present Article because it dealt with an officer’s arrest of a presumably non-violent felon.

[224] Legal escapes for convicted felons from condign punishment were the rule and not the exception. In the records of Pleas of the Crown for the year 1256, of 77 convicted murderers, only four received any punishment, in one case the murderer went into exile, and “in the remaining 72 cases the murderers escaped with the “slight punishment of outlawry.” William Page, Preface to Three Early Assize Rolls for the County of Northumberland, 88 PUBLICATIONS OF THE SURTEES SOCIETY FOR THE YEAR 1890 at xviii–xvix (1891). The punishment of “outlawry” meant forfeiture of all the convicted felon’s property and that if he was found outside certain regions of the country, typically only outside regions of the country where bandits controlled, anyone could capture him and kill him if he resisted; if captured, he could be hanged merely upon proof of the outlawry. See, e.g., PLUCKNET, supra note 168, at 430–31. In the same Northumberland Assize roll, there were recorded “78 cases of burglary, theft, etc., in twelve of which cases the felons were hanged, in fourteen they abjured the realm, and in the remaining 52 they escaped with only the punishment of outlawry.” Page, supra, at xviii–xvix. Moreover, benefit of clergy, the ability to read or recite the “neck verse” in the Bible (Psalm 51:1) enabled convicted felons to escape the death sentence at least for a first offence. In a famous example from literature, Shakespeare has Romeo sentenced to banishment form Verona for killing Tybalt:

And for that offence Immediately we do exile him hence:

I have interest in your hate’s proceeding,

My blood for your rude brawls doth lie bleeding:
But I'll amerce you with so strong a fine
That you shall all repent the loss of mine:
I will be deaf to pleading and excuses;
Nor tears nor prayers shall purchase out abuses:
Therefore use none: let Romeo hence in haste,
Else, when he's found, that hour in his last.
Bear hence this body and attend our will:
Mercy but murders, pardoning those that kill.

WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 2.


[226] Id. at 377.

[227] Id.

[228] People v. Klein, 137 N.E. 145, 148 (Ill. 1922).

[229] Here the arrest refers to an arrest under a proper warrant as opposed to the situation in Cook's Case, 79 Eng. Rep. 1063 (K.B. 1640). “[S]eeing him and knowing him shot at him voluntarily, and slew him: whereupon they all resolved, it was not murder, but homicide [voluntary manslaughter] only.” Id. at 1064. In case the identity and lawful intentions of the housebreaker were known, then the householder would be guilty of murder. Id.

[230] 22 Edw. 3, Trin., fol. 217a, pl. 261. Different authorities give slightly different dates for this case, probably because of two complications: (1) regnal year as opposed to calendar year, and (2) Julian calendar as opposed to Gregorian calendar, as well as the decisional term (court session). In his renowned casebook, Professor Beale assigns this case the year 1347. BEALE, supra note 105, at 533. Professor Francis B. Sayre in his casebook on criminal law likewise assigns it the year 1347. SAYRE, supra note 76, at 562. A more modern work on the subject assigns it the year 1349, which this Article adopts. See GREEN, supra note 78, at 83 n.54.

[231] BEALE, supra note 105, at 533. Here the “etc.” at the end of the case probably refers to pure self-defense.

[232] GREEN, supra note 78, at 80 (“pro lege”).
For an alternative translation, see BLACK’S LAW DICTIONARY 1155 (4th ed. 1957) (“regulation of justifiable defense”).

1 COKE, supra note 21, at 162. Coke used this term in his section titled “Of Rents” contained in the first volume of his Institutes, and not in his chapter titled “Of Homicide” contained in the third volume of his Institute—thereby clearly indicating the completely different set of rules pertaining to landlord-tenant relations as opposed to the rules concerning a householder confronting an unknown housebreaker. For Professor David Hume’s similar use of the term, in the context of not requiring only moderate defensive force for home defense, see supra note 212 and accompanying text.

1 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING THE DESCRIPTION AND PUNISHMENT OF CRIMES 128 (Edinburgh, Bell & Bradfurte 1797). In 1822 Hume was appointed to the position of Baron of the Exchequer.

Id. at 328-29.

2 Edw. 3, c. 3 (1328).

Rex v. Knight, 3 Mod. Rep. 117, 118, 87 Eng. Rep. 73, 74 (K.B. 1686) (“go armed to terrify the King’s subjects”). As early as 1718, colonial lawyers cited cases from Modern Reports. See, e.g., WARREN, supra note 39, at 160 n.1.

19 VINER, supra note 31, at 235 (indicating that both Dalton’s Countrey Justice and Hawkins’ Pleas of the Crown had cited the fourth root case in support of this doctrine). Blackstone emphasized that a conviction under the statute, or under the common law on banning riding with arms, required a showing that the accused had been “terrifying the good people of the land.” 4 BLACKSTONE, supra note 35, at 148. Hale and Hawkins specified that intent to terrorize the public was a key element of the offense of carrying arms in public contrary to the Statute of Northhampton and the similar common law offense. 1 HALE, supra note 41, at 487; 1 HAWKINS, PLEAS OF THE CROWN, supra note 36, at 135-36 (stating that in the exposition of the Statute of Northhampton and the common law offense described in it, “the following points have been holden: . . . that no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people”).

3 COKE, supra note 21, at 158. Coke wrote ad loc. that “the writ grounded upon this statute [of Northhampton] saith, In quorundam de populo terrorem [To the terrorization of certain of [our] people].” The authors are grateful to the Selden Society for its help in translating the word “quorundam” and explaining that it is the genitive plural of “quidam” (with the common medieval substitution of a middle n for what in classical Latin would be an 75
In quoting the Statute, Dalton’s *Justice* inserted the word “offensively” immediately after the phrase “or go armed” whereby the rendition of the opening statutory clause was “If any person shall ride, or go Armed offensively . . . .” DALTON, supra note 26, at 30; see also MICHAEL DALTON, *OFFICIUM VICECOMITUM*, THE OFFICE AND AUTHORITY OF SHERIFFS 29 (1682) (restricting the statute to cases in which the accused would “go or ride armed offensively . . . in affray of the Kings people”). Colonial lawyers possessed this work. See, e.g., WARREN, *supra* note 39, at 133.

Richard Burn relies upon 3 COKE, *supra* note 21, at 158, for the principle that the offense known as an “affray,” which was a terrorizing act and included going armed in public and in a terrorizing manner, cannot take place in “a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people.” 1 BURN, *supra* note 50, at 12; see also 1 HAWKINS, *PLEAS OF THE CROWN*, *supra* note 36, at 134 (similar language). Common law commentators likewise held that statute required the elements of carrying “dangerous and unusual weapons, in such a manner, as is apt to cause a terour to the people, which was an offence at common law.” 1 HAWKINS’S *ABRIDGEMENT*, *supra* note 34, at 157; see also 1 BURN, *supra* note 92, at 13 (similar language); 1 HAWKINS, *PLEAS OF THE CROWN*, *supra* note 36, at 136 (similar language).

In *State v. Bentley*, 6 Lea (74 Tenn.) 205 (1880), the Tennessee Supreme Court decreed that an indictment for going armed in public must allege that the defendant terrified at least one person.

[242] Rex v. Knight, 90 Eng. Rep. 330 (K.B. 1686). For a further discussion of *Knight’s Case*, see, for example, Caplan, *supra* note 203, at 794-95. For a further discussion of the meaning of the Statute of Northampton, see *supra* notes 108-111 and *infra* notes 238-245 and accompanying text. See also *State v. Huntly*, 25 N.C. 418, 422–23 (1843) (“[I]t is to be remembered that the carrying of a gun *per se* constitutes no offense . . . . For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry a gun. It is the wicked purpose—and the mischievous result—which essentially constitute the [common law crime of arming oneself] with dangerous and unusual weapons in such a manner, as will naturally cause a terror to the people.”).

[243] U.S. CONST. amend IV. For the text of the Amendment, see *supra* note 9.

[244] United States v. Tot, 131 F.2d 261, 266 (3rd Cir. 1942).


[246] 5 Ann. c. 14 (1705); 15 Ann. c. 14 (1714). Earlier, very restrictive game laws had been enacted under Charles II (1660–1685) and James II (1685–1688), intending not only to preserve the game but also to disarm the people. These laws were overridden by the 1689 English Bill of Rights. For details on these restrictive laws, see Caplan, *supra* note 203, at 76.
Rex v. Filer, 1 Strange 497, 497, 93 Eng. Rep. 657, 657 (K.B. 1722) (upholding conviction for keeping a [hunting] dog as opposed to keeping a gun). The Framers were familiar with Strange’s Reports. See, e.g., WARREN, supra note 39 at 164, 185.


Id. at 787 (Denison, J., concurring) (“it is not alleged that, the gun had been used for killing the game.”).

Id.

See supra Part I.A.1.

14 VINER, supra note 31, at 3 (“Whether [under the statute 4&5 Anne for the Preservation of Game] keeping a Gun barely without using, or Intention laid, is within this Act it seems not.”) (citing Gardiner, 95 Eng. Rep. 386).

The facts of Levet’s Case are known from the summary thereof given by Justice William Jones sitting on the bench in Cook’s Case. See Cook’s Case, 79 Eng. Rep. 1063, 1064 (K.B. 1640). Earlier, Justice Jones had sat on the bench in Levet’s Case and hence knew its facts first-hand.

Id.

A buttery is a place “where provisions (orig. liquor) are kept.” 1 THE SHORTER NEW OXFORD ENGLISH DICTIONARY at 308 (4th ed. 1993).

1 HALE, supra note 41, at 42-43 (spelling and punctuation modernized). Almost identical language is found in another section of Hale’s History of the Pleas of the Crown. See id. at 474.

Id. at 43, 474. The court in Levet’s Case had held: “and whether it were manslaughter, . . . it was resolved that it was not; for he did it ignorantly without intention of hurt to the said Frances: and it was there [in Levet’s Case] so resolved.” Cook’s Case, 79 Eng. Rep. at 1064.

1 HALE, supra note 41, at 474.

1 HAWKINS, PLEAS OF THE CROWN, supra note 36, at 73.

FOSTER, supra note 49, at 264 (capitalization modernized).

Id; see also Dhutti’s Case, supra note 78.

The reason for this rule apparently was that the slayer was attempting to perform a public service, though by mistake. See also GREEN, supra note 78, at 90 (noting that the allegation, by defendants accused of homicide, that the deceased “had been foolish, reckless, or at fault runs through the largest and, for legal theory, the most important class of cases identifiable as resulting in acquittal for misadventure”); id. at 89 (noting that the “deceased’s behavior—contributory negligence, as it were—had become a matter of great concern [by the late fourteenth century]”); id. at 95 (pointing out that early on the common law insisted upon “strict rules of self-defense” against “an attempted murderer” [outside the home] but not imposing such rules upon a slayer of “a burglar or robber”).

The fact pattern of Cook’s Case, where no mistake had occurred, involved another branch of the castle doctrine but similar to that of Levet’s Case which indeed involved mistake and which Cook’s Case narrates. The justices sitting on Cook’s Case were clearly focused on the castle doctrine.

At least one scholarly commentator has illuminated the source of the MPC’s mistaken approach to home defense: “Those in charge of drafting the Code were in error when they assumed that defense of the habitation is a ‘purely property concept.’” BOYCE & PERKINS, supra note 130, at 1153 (internal quotations taken from MODEL PENAL CODE 39 (Tent. Draft No. 8, 1958)).

In many self-defense cases, the common law assumed that the deceased had “slain himself” because of his contributory negligence and that therefore the slayer did not need a pardon. GREEN, supra note 78, at 123 & n.74 (citing STAUNFORD, LES PLEES DEL CORON, supra note 52, at fol. 16a). Staunford ad loc. has a marginal note reading “Felo de se. Luy mesme” [self-killing, by his own voluntary act]. Surely we can say that a home invader slain by the householder had chanced his life and had “slain himself” by his own actions.

Even shooting at birds or a target and accidentally killing a person in doing so was excusable homicide at the common law. See, e.g., 4 BLACKSTONE, supra note 35, at 182 (listing among excusable homicides those resulting “where a person qualified to shoot a gun [at wild game], is shooting at a mark, and undesignedly kills a man”) (citing 1 HAWKINS, PLEASE OF THE CROWN, supra note 36, at 74); 1 BROOKE, supra note 33, at fol. 180a, pl. 148 (citing, under chapter Corone, Y.B. 6 Edw. 4 [ca. 1428] fol. 7); FOSTER, supra note 49, at 259 (“For if it was a barely Malum prohibitum, as shooting at Game by a Person not qualified by Statute-Law to keep or use a Gun for that Purpose, the Case of a Person so offending will fall under the same Rule [of excusable homicide] as that of a qualified Man.”); 1 HALE, supra note 41, at 472 (likewise citing Y.B. 6 Edw. 4 fol. 7b); 1 HAWKINS, ABRIDGMENT, supra note 34, at 80 (listing among excusable homicides those caused by “a Gun discharged at wild Fowl”); 1 HAWKINS, PLEAS OF THE CROWN, supra note 36, at 74 (citing 1 BROOKE, Corone, pl. 78
Surely slaying a housebreaker has at least as great public utility as does shooting at birds or a target, and should be considered justifiable. Target shooting can serve a public purpose, enables gaining and maintaining firearms proficiency, better to perform a public service in constraining felons with accuracy, lawbreakers assisting authorities to maintain civil order during times of public disasters and emergency. Familiarity and facility in using firearms also enables a citizen to efficiently serve in the military. See also infra Part I.E.

[268] See CLARK & MARSHALL, supra note 114, at 494-95 (stating that the rule that a person who is assaulted without felonious intent . . . is bound to retreat . . . does not apply where a man is assaulted in his own house, even though by doing so he might manifestly secure his safety, but he may stand his ground and take his assailant’s life if it becomes necessary”) (citing 1 HALE, supra note 41, at 486).

[269] See, e.g., 4 BLACKSTONE, supra note 35, at 183-86; 1 HALE, supra note 41, at 479-85.

[270] See, e.g., 4 BLACKSTONE, supra note 35, at 183-86; 1 HALE, supra note 41, at 479-85.

[271] See, e.g., 4 BLACKSTONE, supra note 35, at 184-85; 1 HALE, supra note 41, at 479-82.


[273] 4 BLACKSTONE, supra note 35, at 184-85; 1 HALE, supra note 41, at 482; see also 3 COKE, supra note 21, at 55 (“As if A be assaulted by B, and they fight together, and before any mortal blow [is] given A giveth back [retreats], until he comes unto a hedge, wall, or other strait, beyond which he cannot pass, and then in his own defence, and for safeguard of his own life kills the other: this is voluntary and yet no felony and the jury that finds, it was done se defendendo, ought to find the special matter [special verdict].”) (spelling partially modernized).

[274] 4 BLACKSTONE, supra note 35, at 183-86.

[275] Id. at 185–86 & nn.u-v (noting the opinions of Hale and Hawkins regarding one feature of excusable homicide). In cases involving deaths of non-felons, as occurred during fights between neighbors or in drunken brawls—even if the slayer was not the initial aggressor and had retreated as far as possible with safety, and the killing was absolutely necessary to save the life of the attacked slayer—the killing was only excusable homicide and constituted a felony, and hence certainly not justifiable or encouraged. See, e.g., id. at 186-87. The common law justification rules, of course, developed centuries before Blackstone’s time. As noted by Blackstone, excusable homicide was a common law felony but was non-capital; petit larceny was also a non-capital common law felony. Id. at 97. At any rate, at the time of the framing of the U. S. Constitution, the issue of unavoidable or “inevitable” necessity did not arise in situations involving unknown housebreakers, nor did the issue of using excessive force against them.

[276] See also infra Part VI.D.1.
Harcourt’s Case, CROMPTON, supra note 83, at fol. 21a. The justices recommended, however, that the prisoner Harcourt be pardoned. Id. See also 1 HALE, supra note 41, at 485–86, for a discussion of Harcourt’s Case. Because one of those outside Harcourt’s house was claiming title, Hale explained that Harcourt “was in no danger of his life from them without.” Id. at 486. It would also seem that those claiming title were known as such to the inhabitants of the house.

Cook’s Case, 79 Eng. Rep. 1063, 1064 (K.B. 1640) (“seeing him and knowing him shot at him voluntarily, and slew him: whereupon they all resolved, It was not murder, but homicide [voluntary manslaughter] only”); 1 HALE, supra note 41, at 485, 486. The court in Cook’s Case suggested that the householder should have first tried to use non-deadly force. Cook’s Case, 79 Eng. Rep. at 1064.

See, e.g., 1 HALE, supra note 41, at 485.

Cook’s Case, 79 Eng. Rep. at 1063 (noting that in a criminal or other case in which the Crown has an interest, then the officer “is duly executing his office, by serving the process of law”).

At this juncture, Justice Jones narrated his recollection of the facts in Levet’s Case which involved mistake. For a discussion of Levet’s Case, see supra notes 255-262 and accompanying text.


Aymette v. State, 21 Tenn. (2 Hum.) 119, 122–23 (1840).

Miller, 307 U.S. at 177.

Id. The term “well-regulated” had, and still has, several meanings including fine-tuned, as is used in connection with a well-regulated pianoforte or a well-regulated clock.

Aymette, 21 Tenn. at 124.

Recently the Court has recognized the existence of the “unorganized militia [and] all portions of the ‘militia’—organized or no.” Perpich v. Dep’t of Defense, 496 U.S. 334, 341, 352 n.25 (1990).

Aymette, 21 Tenn. at 124. In 1871, the Tennessee Supreme Court elaborated upon the meaning and scope of “keeping arms” found in Tennessee’s state constitutional provision protecting the right to keep and bear arms as follows:

It necessarily involves the right to purchase them, to keep them in a state of
efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.


[291] For a clear case upholding an individual right to keep ordinary personal arms under the Second Amendment standing alone, see United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).


[293] Id. at 211.

[294] Id.


[296] HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 435–36 (1895). Black was also the author of the original Black’s Law Dictionary.

[297] Id.


[299] See, e.g., BOYCE & PERKINS, supra note 130, at 1109–12, 1148–54. “Those in charge of drafting the [Model Penal] Code were in error when they assumed that the defense of the habitation ‘is a purely property concept.’” Id. at 1153 (internal quotations taken from MODEL PENAL CODE § 316 (Tent. Draft No 8, 1958)).

[300] Statute 24 Hen. 8, c. 5 (1532) (Eng.). For a discussion on this statute, see supra Part I.B.3.

[301] WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS (Boston, Cummings, Hillard & Co., 2d Am. ed. 1831) (only starred paging indicated in this edition).

[302] 2 Edw. 3. c. 3 (1328). For a discussion of this statute, see supra notes 238-245 and accompanying text).
[303] 1 RUSSELL, supra note 301, at *272.

[304] Id. at *549-50.

[305] Id. at *550-51. For a discussion of Levet’s Case, see supra notes 255-262 and accompanying text.

[306] 1 RUSSELL, supra note 301, at *551. For a summary of the holding in Ford’s Case, see supra note 77.

[307] 1 RUSSELL, supra note 301, at *538-52 (citing 1 HALE, supra note 41).

[308] Id. at *538-52 (citing 1 HAWKINS, PLEAS OF THE CROWN, supra note 36). Russell noted that in addition to Hale’s History of the Pleas of the Crown, Hawkins’s Pleas of the Crown was “another book of great authority.” Id. at *551.

[309] Id. at *538-52 (citing FOSTER, supra note 49, passim).

[310] Id. at *538-47 (citing BLACKSTONE, supra note 35, passim).

[311] Id at *272.


[313] Id. at 366.

[314] Id. at 366-67 n.1. In identical language Hale summarized the three points in his History of the Pleas of the Crown. See 1 HALE, supra note 41.


[317] Id. at 389. Wharton took this almost verbatim from FOSTER, supra note 49, at 274.


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[320] Id. at 726-27 (citing 2 Edw. 3, c. 3 [1328]). For a further discussion of this statute, see supra notes 238-245 and accompanying text.


[322] Id. at 727 (citing 1 HAWKINS, PLEAS OF THE CROWN, supra note 36, at 136).


[324] Id. at 224.

[325] For the text of the 1532 statute, 24 Hen. 8, c. 5, see text accompanying supra note 94.

[326] 7 DANE, supra note 323, at 225 (citing Cooper's Case, 79 Eng. Rep. 1069 (K.B. 1640)).

[327] Id.


[329] 1 EAST, supra note 328, at 272.

[330] Id. at 273.

[331] Id. at 272.

[332] Id. at 221 (emphasis omitted).

[333] Id. at 298.

[334] 1 EAST, supra note 328, at 298. It is notable that here East used the term “overtaken” apparently to explain the meaning of earlier usages of the term “taken” in the context of arrests of felons fleeing from the scene of the crime. Id.

[335] For a discussion of Levet’s Case, see supra notes 255-262 and accompanying text.

[336] 1 EAST, supra note 328, at 275 (citing 1 HAWKINS, PLEAS OF CROWN, supra note 36, at Ch. 28, s. 27 [p. 73]).

[337] 7 BACON, supra note 30, at 210.

This work also reiterated the rule that if any one shoot at any wild fowl upon a tree, and the arrow kills any one by accident, then he would be guilty only of “misadventure” which was excusable homicide. *Id.* at 323. For a discussion of the constitutional import of this rule, see *supra* note 267 and accompanying text.

For a discussion of 22 Assize pl. 55, see *supra* note 210 and accompanying text.

For a discussion of the importance of Coke’s works see *supra* notes 56–62 and accompanying text.

For a discussion of the common law courts’ interpretation of the Game Laws insofar as keeping a firearm by a person not qualified by these laws to do so, see *supra* notes 246–254 and accompanying text.


Id. Soon after the *Patsone* decision, a Harvard Law Review article stated that that “the legislature [is] powerless . . . as to the simple possessing or keeping weapons [at home].” Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915). Lucilius A. Emery served as Chief Justice of the Maine Supreme Court from December, 14, 1906 until his retirement on July 26, 1911. See Maine Supreme Court Justices, Chronological List, available at http://www.state.me.us/legis/lawlib/judge-c.htm#Chief (last updated Nov. 21, 2002).

Warren & Brandeis, supra note 353 at 193. To Warren and Brandeis, the right of ordinary persons to life and the judicial system’s duty to safeguard that life were so indispensable and obvious, that they did not feel the need to give a source or explanation for their “right to life.”

[356] Id.

[357] Id. (internal quotes omitted).

[358] Id. at 195 n.4.

[359] Id. at 193.


[362] Id.


[365] Stanley v. Georgia, 394 U.S. 557, 565 (1969) (Fourth Amendment as incorporated by the Fourteenth Amendment invalidates state statutes banning the home possession of even rank pornographic materials.).


[367] Id. at 847.

[368] Id.

[369] Id. at 847-48.


[373] Id.

[374] 505 U.S. at 848.

[375] Id. at 951.


[378] Id.


[380] Id. at 152.

[381] Id. (internal citations omitted).


[383] Id. at 646-47.


[388] Arnold v. Cleveland, 616 N.E.2d 163, 169 (Ohio 1993) (concealed firearm carrying statute unconstitutional as applied). This case repeats the oft-cited reference to the fact that the privilege to defend oneself “has been recognized in both a civil and criminal context since about 1400 in England.” Id. (citing WILLIAM PROSSER & W. PAGE KEETON, THE LAW OF TORTS 124 (5th ed. 1984)). Apparently Wigmore originated this idea. See John H. Wigmore, Responsibility for Tortious Acts: Its History—III, 7 HARV. L. REV. 441, 446 & n.4 (1894) (“In civil actions of trespass . . . in 1400, and ever since, the plea [of self-defense] is accepted as a complete defence [no forfeiture].”). As implied by Wigmore himself, in cases involving even deadly force against burglars, the plea was accepted as a complete defense much earlier than 1400. Id. (citing inter alia FITZHERBERT, supra note 51, at pl. 261 (a case of justifiable homicide discussed supra at notes 230–233 and accompanying text). Although
in medieval times the next of kin of a homicide victim could have a right of “appeal of felony,”
this right had little chance of success even in excusable homicide cases. NAOMI HURNARD,
THE KING’S PARDON FOR HOMICIDE BEFORE A.D. 1307, xi (1969) (“the notion that the
bereaved family [of a victim of self-defense or mischance] had a moral right to some form of
compensation was soon obliterated”). Not until passage of Lord Campbell’s Act—The Fatal
Accidents Act, 1846, 9 & 10 Vict., c. 93 (Eng.)—and its 18th century equivalents in the United
States did a deceased’s estate have a right of action against any slayer. See, e.g., EDWARD
JENKS, A SHORT HISTORY OF ENGLISH LAW 307 (1913). This is not to say that a
statutory right action for a deceased’s estate is facially unconstitutional, but only as applied to
estates of attempted home-breakers. The argument here is that because such a right of action
was unavailable prior to the framing of the Fourth Amendment, the Fourteenth Amendment
absorbs or incorporates such unavailability and at the same time protects the constitutional
rights of householders in this respect just as it does in so many others. Besides, the 1532
statute, 24 Hen. 8, c. 5, cut of any right of the next of kin of an attempted housebreaker to sue
the householder by way of an “appeal” of the death of the housebreaker. See supra note 93
and accompanying text for the meaning of an “appeal” and the 1532 statute’s cutting off such
an “appeal” in such cases.

For a translation of the 1400 case, see for example, Chapleyn of Greye’s Inne, in JAMES
BARR AMES & JEREMIAH SMITH, A SELECTION OF CASES ON THE LAW OF TORTS 106
(1910). Rolle classified this 1400 case under the subheading Trespas. Assault & Battery, Que
voît être bon cause de Justification de battery [What would be good cause of Justification of
battery]. 2 ROLLE, supra note 32, at 547. The 1400 case involved the use of non-deadly
force by way of a pre-emptive strike.


[390] Id. at 170.


[392] Id. at 805 (ellipsis in original) (internal quote taken from Arnold v. Cleveland, 616
N.E.2d at 169-70).

[393] Id. at 808.

[394] Id. at 809 n.34.

2001)).

[396] Id. at 805 (quoting approvingly In re Colby H., 766 A.2d 639, 646–50 (Md. 2001);
1992)).

[397] Id. at 807.
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[399] Id. at 1042.

[400] Id. at 1047, 1049 (quoting the statutory language),

[401] Id. at 1051.

[402] 614 P.2d 94, 100 (Or. 1980); see also supra note 203 and accompanying text.


[404] Id. at 1110.

[405] See also David B. Kopel, The Licensing of Concealed Handguns for Law Protection Support from Five State Supreme Courts, 68 ALBANY L. REV. 305 (2005) (discussing these and other recent state cases interpreting state constitutional provisions on the right to keep and bear arms, as well as related issues).


[407] See, e.g., Kadish, supra note 2, at 521.

[408] See, e.g., BOYCE & PERKINS, supra note 130, at 1112.


[410] “Nearly all of what Bracton had to say about justifiable and excusable homicide was derived from Civil [Roman] or Canon Law, or both.” HURNARD, supra note 388, at 69-70.

[411] For more on Bracton’s De Legibus, see supra note 211.

[412] HURNARD, supra note 388, at 68.

[413] Id. at 69.

[414] Id.

[415] Id.

[416] Id.

[417] See, e.g., GREEN, supra note 78, at 81 n.52.

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See, e.g., id.

Id.

See infra Part VI.

MPC COMMENTARIES, supra note 78, at 34 (avowed purpose of Code’s drafters was to encourage “members of the community not to employ force when immediate emotional reaction might support its use but enlightened morality would reject it.”).

See supra notes 118-124 and accompanying text.

Kadish, supra note 2, at 522.

Low, supra note 13, at 539.


Id.

Kadish, supra note 2, at 522-23, 527, 532.

Id. at 527.

Id. at 532.

Id. at 531.

Id. at 532.

Kadish, supra note 2, at 536.

Id. at 537.

MPC Transcript, supra note 426, at 571.

See Kadish supra note 2, at 572.

Id.

Deconstruction philosophy, prevalent in the United States and other Western nations in the last third of the twentieth century, was prefigured by the moral relativism inherent in Nietzsche and his intellectual progeny. See, e.g., JAMES MILLER, THE PASSION OF MICHEL FOUCAULT 177, 179, 188, 218 (1993).

Michel Foucault was a passionate advocate of the amoral. See, e.g., id. at 201. Foucault had a lifelong obsession with death, suicide, drugs and sadomasochistic eroticism—even under the mounting threat of AIDS in the 1980s. Id. (on front-to-rear dust jacket).

Jack Trotter, Michel Foucault in 1 WORLD PHILOSOPHERS AND THEIR WORKS 667, 673 (John K. Roth ed., 2000).


Derrida’s philosophical studies were considered “distinguished enough to earn him a scholarship at Harvard University in 1956, which marked the beginning of his . . . association with the American intellectual community.” Ron West, Jacques Derrida, in 1 WORLD PHILOSOPHERS AND THEIR WORKS, supra note 444, at 466. He taught at Johns Hopkins University, Yale University, and the University of California at Irvine. Id.

Jeffrey L. Geller, Jacques Derrida in 1 WORLD PHILOSOPHERS AND THEIR WORKS, supra note 444, at 265. Deconstruction had a profound affect on almost every area of scholarship, impacting: “[d]isciplines as diverse as historiography, philosophy, political theory, geography, art history, literary criticism, sociology, and linguistics.” Id. The anti-establishment thrust of deconstructionist cannon was parallel to similar anti-western standards of thoughts in the early 20th Century Dadadist movement. The Dada name was
found in a lexicon—it means no king. This is the meaningful nothing, where nothing has any meaning. THE NORTON DICTIONARY OF MODERN THOUGHT 196 (1999). The advent of Deconstruction reprised the anti-establishment, nihilist bourgeoisie-baiting Dadaist movement. 8 THE DICTIONARY OF ART 434 (1996) (“Western Europe is still shit, but from now on, we want to shit different colors”). The rise of pop art reflected the neo-Dadaist movement. Id. at 439.


[456] Id. at 116.

[457] PATRICK, supra note 449, at 84, 132, 151; MILLER, supra note 445, at 200-05.

[458] The conceits of deconstructionists were prefigured in the earlier works in the fields of mathematics and physics. For example, in symbolic logic it had been known for a long time that nobody can prove the consistency of logic because paradoxes cannot be avoided. See, e.g., Kurt Gödel, Über formal unentscheidbare Sätze der Principia Mathematica und verwandter Systeme, MONATSHEFTE FÜR MATHEMATIK UND PHYSIK (B. Meltzer trans., 1931), in ON FORMALLY UNDECIDABLE PROPOSITIONS OF PRINCIPIA MATHEMATICA AND RELATED SYSTEMS (1962); ALFRED NORTH WHITEHEAD & BERTRAND RUSSELL, PRINCIPIA MATHEMATICA (1910). The development of symbolic logic in the twentieth century has been profoundly influenced by Kurt Gödel. See Stick supra note 476, at 398 n.282.


[460] BOYNE, supra note 455, at 82. “[M]odern thought is advancing toward that region where man’s Other must become the same as himself.” Id. at 84 (internal quotes omitted). Foucault “was underneath it all concerned with finding a conception of the self, and a conception of knowledge that was (to borrow Nietzsche’s phrase) ‘beyond good and evil.’ . . . A sense of outrage does . . . permeate [Derrida’s] work, and the object of Derrida’s resolutely theoretical attacks is the dishonest certitude that informs Western traditional rational thought. [H]e can expose the furtive assumptions which underlie its arrogance.” Id. at 91.

[461] Brewer v. Williams, 430 U.S. 387 (1977) (suppressing incriminating statements and evidence obtained by a police officer from defendant after the officer had stated to him during a drive to arraignment that they should stop and locate the murdered girl’s body because her 91
parents were entitled to a decent burial for the girl, and defendant directed the police to the girl’s body); Coolidge v. New Hampshire, 403 U.S. 44 (1971) (search warrant of murder suspect’s car invalidated on technicality); Griffin v. California, 380 U.S. 609 (1965) (guilt inference from defendant’s failure to testify regarding reasonably known facts violates due process); Massiah v. United States, 377 U.S. 201 (1964) (incriminating statements elicited by law enforcement deprived defendant of right to counsel); Gallegos v. Colorado, 370 U.S. 49 (1962) (oral waiver of counsel by confessing juvenile insufficient).

[462] See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1984); see also I, PIERRE RIVIÈRE, HAVING CUT THE THROATS OF MY MOTHER, MY SISTER, AND MY BROTHER: A CASE OF PARRICIDE IN THE 19TH CENTURY (Michel Foucault ed., Frank Jellinek trans., University of Nebraska Press, 1982) [hereinafter I, PIERRE RIVIÈRE]. This last work reproduces the written confession of a 19th century French peasant who killed his six-month pregnant mother, sister, and brother with a pruning hook. Id. It also includes a reprinting of the medical and legal records of the crimes, as well as contemporary newspaper accounts and subsequent legal proceedings—all collected by Michel Foucault, who also wrote a Foreword to the book and included his Note on “Tales of Murder.” Id. Foucault pronounced the multiple murders a “glorious crime,” and declared that the murderer “sought glory.” Id. at 209-10. Foucault extolled Rivière’s written confession as a thing of “beauty.” Id. at 199.

Professor James Miller, Director of Liberal Studies at the New School for Social Research, has summarized the thinking of Professor Foucault:

Popular justice would be best served . . . by throwing open every prison and shutting down every court. Instead of . . . rendering judgment according to laws, it would be better simply to . . . let the popular “need for retaliation” run its course. Exercising their power without inhibitions, the masses might resurrect a certain number of ancient rites which were features of pre-judicial justice.

MILLER, supra note 445, at 205 (internal quotes taken by James Miller from MICHEL FOUCAULT, Sur la Justice Populaire [On Popular Justice], in LES TEMPS MODERNE [Modern Times] 359-60 (1972), and from POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 6, 29 (Michel Foucault ed., 1980).

To Foucault, deaths on the battlefield and in cold-blooded killings are morally equivalent:

Murder it is that makes for the warrior’s immorality (they kill, they order killings, they themselves accept the risk of death); murder it is that ensures criminals their dark renown (by shedding blood, they have accepted the risk of the scaffold). Murder establishes the ambiguity of the lawful and the unlawful.

Id. (emphasis added).

[463] See, e.g., PATRICK, supra note 449, at 106, 144, 151; see also MILLER, supra note 445, at 165, 189, 202.
Deconstructionist ideas were reflected in diverse fields of scholarship such as “[h]istoriography, philosophy, political theory, geography [and] sociology.” *Id.* at 667.


Gainer, *supra* note 349, at 575.

BOYNE, *supra* note 455, at 80.

*See, e.g.,* TRUMAN CAPOTE, IN COLD BLOOD, A TRUE ACCOUNT OF A MULTIPLE MURDER AND ITS CONSEQUENCES (1965). The book recounts the savage murder of four members of the Cutter family by blasts from the muzzle of a shotgun serially held a few inches from each of their faces. The killers, Eugene Hickock and Perry Edward Smith, were hanged for their crimes on a gallows in the Kansas State Penitentiary in 1965. *In Cold Blood* includes Capote’s narration of the crime with special empathy for the murderers. Capote recounted the grisly specifics in exquisite detail, skeptically reexamining every shred of the overwhelming evidence of the guilt of the convicted killers. The book enjoyed numerous printings, the latest one being by Random House in 2002, was a Book of the Month Club selection, and declared a “masterpiece.” *Id.* at inside left-hand dust cover. *In Cold Blood* earned Truman Capote “solid literary acclaim” and even in 2004 was considered to be an “artistic triumph.” Daniel Mendelsohn, *The Truman Show: How Truman Capote Became a Legend in His Own Time*, N.Y. TIMES BOOK REV., Dec. 5, 2004, at 16.

In the 1970’s, William F. Buckley reported this conversation with Mr. Capote regarding celebrity killers:

“Well, . . . what do you think? Was he guilty?”

“Oh yes,” Capote giggled . . . “I’ve never met one who wasn’t.”


Dressler, *supra* note 179, at 690; *see also id.* at 690 n.98 (quoting from Mailer’s book).
See Buckley, supra note 470, at 186 (“my protégé”).

TOM WICKER, A TIME TO DIE (1975).


John Stick, Can Nihilism be Pragmatic? 100 HARV. L. REV. 332, 335 n.9 (1986).

Kennedy & Klare, supra note 475, at 461.

Id.

Duncan Kennedy, The Structure of Blackstone’s Commentaries, 28 BUFFALO L. REV. 205 (1979). Kennedy postulates that the Commentaries are: “an instrument of apology—an attempt to mystify both the dominators and the dominated by convincing them of the ‘naturalness,’ the ‘freedom’ and the ‘rationality’ of a condition of bondage.” Id. at 210; see also Kadish, supra note 2, at 530; MPC Transcript, supra note 426, at 569.


Id. at 563.

Id. at 563.

Stick, supra note 476, at 335 n.9.


See Stick, supra note 476, at 400.
Dressler, supra note 179, at 684-85.

For example, the Model Penal Code does not presume that a householder has reason to believe that an intruding stranger-housebreaker is a felon who threatens death or great bodily harm to the lawful occupant. See MODEL PENAL CODE § 3.04 (1985).

See id. §§ 3.04, 3.07; see also SANFORD H. KADISH & MONRAD G. PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 499 (3d ed. 1975); LLOYD L. WEINRAUB, CRIMINAL LAW: CASES, COMMENTS, QUESTIONS 203 (1980).

Dressler, supra note 179, at 672-73, 680.

Id. at 685 n.84 (citing Claude Brown, Manchild in Harlem, N.Y. TIMES MAG., Sept. 6, 1984, at 36, 44).

Dressler, supra note 179, at 713-15.

Id. at 685 (internal quotes omitted).

I, PIERRE RIVIÈRE, supra note 462, at back cover.

MPC Transcript, supra note 426, at 570.

See supra Parts II & III.

Zimring & Hawkins, supra note 442, at 774.

Dressler, supra note 179, at 685.

Rabbi Eliyahu Touger, Introduction to MAIMONIDES, MISHNEH TORAH [THE SECOND TORAH], SEFER NEZIKIN [BOOK OF DAMAGES] at 8 (Rabbi Eliyahu Touger ed. & trans., 1997). Maimonides is also known as “The Rambam,” which is an abbreviation for Rabbi Moses ben Maimon. Mishneh Torah is his codification of Jewish law. It has had hundreds of super-commentaries written on it.

Exodus 22:1–2 (Hebrew Bible numbering, English Bible numbering being 22:2–3) states: “If the thief is found breaking in and is smitten and dies, there is no blood-guiltiness for him. If the sun shone upon him, there is blood-guiltiness for him . . . .”

The rabbis of the Talmud did not read literally the clause concerning the sun shining upon the intruding thief. They held that the clause “if the sun rose upon him” cannot be taken literally because the sun did not rise only upon the burglar. TALMUD BAVLI [THE BABYLONIAN TALMUD], 2 TRACTATE SANHEDRIN 72a4–72b1 (The Shottenstein Edition, Mesorah Publications, Ltd. 1994). In Jewish law, the time of day was irrelevant and the householder had a religious duty to defend herself preemptively by killing the intruder. “If it is clear to you as the sun that the intruder is at peace and surely will not kill you if you try to
resist, do not kill him—but if it is not clear that he is at peace with you, then kill him.” *Id.* at 72a4. For an authoritative table of the Talmudic presumptions favoring the occupant in case the intruder’s intentions are unknown, see *id.* at 72b1 n.2. These rules were based upon the idea that the intruder puts the occupant at presumably lethal risk, and therefore the Torah tells the occupant: “If someone comes to kill you, anticipate him and kill him first.” *Id.* at 72a2.

Rashi (Rabbi Solomon ben Isaac (1045–1105)) was “the greatest commentator.” THE RISHONIM [THE FIRST ONES]: BIBLIOGRAPHICAL SKETCHES OF THE PROMINENT RABBINICAL SAGES AND LEADERS FROM THE TENTH–FIFTEENTH CENTURIES 124 (2d ed. 2001) [hereinafter RASHI, COMMENTARY]. He explained that because breaking-in was for the purpose of theft:

> It is as if [the thief] is already dead . . . for surely he knows that a person cannot restrain [herself] and remain passive when [she] sees [him] taking [her] property in [her] presence. Thus the thief came with the understanding that if the owner of the property were to stand up against him—he would kill [her].

*Id.* at 277. Maimonides (1135-1204) was very familiar with Rashi’s commentary.

Blackstone wrote: “So the Jewish law, which punished no theft with death makes homicide only justifiable, in case of nocturnal housebreaking . . . .” BLACKSTONE, *supra* note 35, at 180-81 (emphasis added) (translating *Exodus* 22:2). He was mistaken. It is true that some medieval rabbis—such as Ramban (Rabbi Moses ben Nachman Gerondi, known as Nachmanides or Nahmanides (1194–ca.1270)), Rashbam (Rabbi Samuel ben Meir, 1083–1174) and Ibn Ezra (Rabbi Abraham Ibn Ezra, 1089–1164)—interpreted *Exodus* 22:2 literally as limiting permitted slayings of a burglar to nocturnal thieves. See 2 THE BOOK OF EXODUS 365–365a (Judaica Press, 1997), and NEHAMA LEIBOWITZ, STUDIES IN SHEMOT (EXODUS) PART II MISHPATIM—PEKUDEI (EXODUS 21,1 TO END [OF EXODUS]) 374-76 (Aryeh Newman trans., World Zionist Organization, 1983). However, their views did not prevail. See, *e.g.*, 19 RABBI ADIN STEINSALTZ, THE TALMUD, TRACTATE SANHEDRIN, PART V 53 (1999) (the *Halakha* [Jewish Law] on slaying thieves breaking into a home agrees with the views of Maimonides). To the same effect is the entry under “burglary” in THE OXFORD DICTIONARY OF THE JEWISH RELIGION 143, 512 (R.J. Zwi Werblowsky & Geoffrey Wigoder eds., Oxford University Press, 1997).

[503] Authors’ interpolation based upon the fact that, for instance, the authoritative Artscroll® translation of the Talmud translates the equivalent Aramaic word as “permitted” where it appears in TALMUD BAVLI [BABYLONIAN TALMUD], 2 TRACTATE SANHEDRIN 72b2 (1994) (“That you are permitted to put him to death with any [method of] execution by which you are able to put him to death”).

[504] Rashi posited that the householder may use a sword, or shoot an arrow or throw a stone at him. RASHI, COMMENTARY, *supra* note 502, at 72b2 n.17 (author’s interpretation; no translation available).


[507] Id.

[508] Id.

[509] MODEL PENAL CODE § 2.02(2)(d) provides as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

*Id.* Query: How can a person act as a “reasonable person” in the situations presented *supra* in the Prologue?

[510] MODEL PENAL CODE § 3.04(1). This vague standard of “immediately necessary” enables jurors to second-guess the home defender. It fails to recognize that its criteria is a “dangerous innovation: Certainty is the mother of repose, and therefore the law aims at certainty.” Walton v. Tyron, 21 Eng. Rep. 262, 262 (K.B. 1753). Here the Walton court was paraphrasing Coke’s “certainty [is] the mother and nurse of repose and quietness, and [is] not like the waves of the sea.” 2 COKE, *supra* note 21, *Proeme* [Preface]. Lack of certainty in the law of justifiable homicide prior to the 14th century had the following socially undesirable human consequences: (1) *meticulosi* [meticulous ones] who felt needless guilt and fled in panic, and (2) those who fled from justice *pre timore* [in the face of fear] because, although the homicide was genuinely justifiable, they worried that they had used “excessive” force in capturing the fleeing felon. See HURNARD, *supra* note 388, at 135. The Statute 24 Hen. 8, c. 5 (1532) put an end to any remaining ambiguity regarding justifiably killing would-be burglars. See HURNARD, *supra* note 388, at 92.

[511] The Code provides that a homicide committed as a result of a belief negligently or recklessly formed constitutes a negligent homicide or manslaughter, respectively. MPC COMMENTARIES, *supra* note 78, at 36. The Code further muddles this ephemeral gauge by declaring that a person acts negligently when, inter alia, she “should be aware of a substantial and unjustifiable risk” and that her conduct involves a “gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” MODEL PENAL CODE § 2.02(2)(d). Question: How can the law expect a person to be aware of “a substantial and unjustifiable risk” when confronted by an unknown housebreaker? See *supra* Part VI, demonstrating the Byzantine complexity of the Code’s negligence standards as applied to confrontations with unknown housebreakers. The basic problem here is that the drafters of

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the Code attempted to sweep every situation under a single generalization in their enthusiasm for unification. In suppressing the use of force to prevent or thwart dangerous home attacks, the Code muddies the previously well-settled, victim-protecting jurisprudence. The common law justification rules governing pure self-defense in brawls and fights are totally distinct from those special rules pertaining to home preservation. Yet, the MPC decrees that even in a habitation any defensive force must be “immediately necessary.” MODEL PENAL CODE § 3.04(1) & (2); see also MPC COMMENTARIES, supra note 78, at 38 (“The law that governs the use of defensive force should be in a single rule, not varied when the case is viewed as one of self-defense or one of crime prevention.”); SINGER, supra note 2, at 520. By contrast, common law judges eschewed such oversimplifications which elided the castle doctrine.

[512] MODEL PENAL CODE § 3.04(2)(b). The Model Penal Code requires that all justifiable deadly force be “necessary to protect [her]self against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.” Id. According to the Code, deadly force can be justified only by an “Apprehension of Serious [physical] Injury.” MPC COMMENTARIES, supra note 78, at 47. “To give the law a measure of precision, force is divided into two categories, deadly and moderate. Force threatening only moderate harm may be inflicted by way of defense against any harm apparently threatened, while deadly force may be employed only by way of defense against . . . serious harm.” Id. at 47-48.

[513] Speculations regarding the possibility “of the promiscuous use of firearms,” even by victims who have never been convicted, or so much as suspected, of a crime, drive many contemporary prohibitions on employment of deadly force. Commonwealth v. Klein, 363 N.E.2d 1313, 1320 (Mass. 1977).

[514] BLACKSTONE, supra note 35, at 187. “But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side.” Id.; see also Ruloff v. People, 45 N.Y. 213, 220 (1871) (“[T]he law will not be astute . . . [to] take the innocent citizen . . . from the protection of the law, and place [her] life at the mercy and discretion of the admitted felon. They will not be made to change places upon any doubtful or uncertain state of facts.”).

[515] MPC COMMENTARIES, supra note 78, at 35.

[516] Id. at 36. “If the actor was reckless or negligent as to the existence of circumstances that would justify [her] conduct, [she] should then be subject to conviction of a crime for which recklessness or negligence, as the case may be, is otherwise sufficient to establish culpability. Negligence in this context would permit a conviction of negligent homicide rather than purposeful murder, while recklessness would permit a conviction of manslaughter.” Id.

[517] Hereinafter, the term “non-negligent” will be used in connection with the Model Penal Code approach to justification as a short-hand for the Code’s demand that for justifying the use of force the “actor” must form, in a non-negligent manner, her belief as to the immediate necessity for the use of the degree of force that she actually used.

[518] MODEL PENAL CODE § 3.04(1).
MPC COMMENTARIES, supra note 78, at 118-9.

See supra Parts I.C-I.E.

See supra notes 255-262 and accompanying text for a discussion of Levet’s Case.

MPC COMMENTARIES, supra note 78, at 40. By stark contrast, Professor David Hume accorded the victim the presumption that retreat by the dangerous felon was “in order to call associates, or to renew the assault with better advantage.” 1 HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, supra note 150, at 324-25. For the context of this presumption, see the fuller quote in the main text accompanying supra note 214.

3 COKE, supra note 21, at 56.

See supra notes 231-233 and accompanying text.

1 HAWKINS, PLEAS OF THE CROWN, supra note 34, at 77.

1 HAWKINS’S ABRIDGMENT, supra note 34, at 78 (emphasis added). Hawkins refers to his section on arrests by officers and ministers of justice in the same language as Coke. In turn, this language was taken from Mackalley’s Case, in Killing of a Sergeant, 9 Co. Rep. 61b, 77 Eng. Rep. 828 (K.B. 1610).

Joseph H. Beale, Jr., Homicide in Self-Defence, 3 COLUM. L. REV. 526, 541 (1903). The MPC’s deference to and dependence upon Beale is illustrated by the official MPC commentaries’ reliance upon Beale on the issue of retreat in the face of a murderous assault. Beale, however, clearly was writing solely about situations occurring out-of-doors. See Beale, supra note 78, at 581, cited and quoted in MPC COMMENTARIES, supra note 78, at 54 & n.53. The MPC commentary correctly quotes Beale, but out of the context of home invasions or robbery, as follows: “A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands.” MPC COMMENTARIES, supra note 78, at 54 (quoting Beale, supra note 78, at 581). The MPC commentary continues: “To the argument that the retreat rule cedes the field to any group of bullies prepared to make a show of deadly force, the answer has been that the proper and sufficient remedy is not a trial of strength but rather a complaint to the police.” MPC COMMENTARIES, supra note 78, at 54 (incorrectly citing page 681 of Beale’s article instead of page 581). Beale’s “proper and sufficient remedy of complaint to the police” does not fit situations of home intrusions and does not serve as a basis for justification rules in these cases. On other aspects of its justification rules, the MPC relies upon Beale’s Columbia Law Review article. See, e.g., MPC COMMENTARIES, supra note 78, at 39 & n.8, 50 & n.39.

MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (emphasis added). “[T]he actor is not
oblighed to retreat from his dwelling . . . unless he was the initial aggressor . . .“ Id.

[529] MODEL PENAL CODE §§ 3.07 (2)(b)(ii). The approach of the Model Penal Code regarding the use of firearms for arresting felons fleeing from the scene derives from its avowed considerations in a completely different context where a ban on the use of deadly force makes sense; departing from the common law, for example, could be recommended in certain other situations, as the Minnesota Supreme Court explained:

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.

State v. Gardner, 104 N.W. 971, 975 (Minn. 1905) (quoted approvingly in BOYCE & PERKINS, supra note 130, at 1134). Such situations do not remotely apply to shooting an apparently fleeing burglar still in the home or in immediate flight therefrom.

The Minnesota Supreme Court was interpreting the requirement to retreat in cases of pure self-defense and was not intending to relax the no-need-to-retreat-in-the-home rule. BOYCE & PERKINS, supra note 130, at 1134. The reasoning of the Minnesota Supreme Court would militate in favor of, and not against, the use of a firearm by a homeowner to arrest a felon leaving her home. In flatly banning the use of deadly force by a homeowner to arrest an apparently withdrawing housebreaker fleeing immediately after perpetrating a felony such as robbery or rape, the Model Penal Code § 3.07 would seem to have it backwards.

[530] MODEL PENAL CODE § 3.07 (2)(b)(ii) (permitting justifiable deadly force to arrest only if, inter alia, “the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom [she] believes to be authorized to act as a peace officer”). In Commonwealth v. Klein, 363 N.E. 2d 1313 (Mass. 1977), the court suggested that calling the police before shooting a fleeing felon would satisfy the requirement that a police officer be on the scene. But suppose, as in many if not most situations, there is no time or opportunity to call the police or they do not arrive immediately? Black-letter rule: “Firmly established in the common law of England was the privilege to kill a fleeing felon if he could not otherwise be taken [or overtaken], a privilege extended to the private person as well as to the officer, and not dependent upon the existence of a warrant for the felon’s apprehension.” BOYCE & PERKINS, supra note 130, at 1093 (internal citations omitted).


[533] Id. at 116.

[534] Id. at 122 n.31.
There are important differences between the common law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions. For example, whereas the kinds of property subject to seizure under warrants had been limited to contraband and the fruits or instrumentalities of crime [citation omitted], the category of property that may be seized, consistent with the Fourth Amendment, has been expanded to include mere evidence.

In Warden v. Hayden, the Court had justified its departure from this common law distinction regarding the kinds of property subject to seizure on the following grounds: “Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same “papers and effects” may be “mere evidence” in one case and “instrumentality” in another.” 387 U.S. 294, 302 (1967). The Payton Court further noted that its past decisions had extended the prohibitions of the Amendment to protect against invasion by electronic eavesdropping of an individual’s privacy in a phone booth not owned by him, “even though the earlier law had focused on the physical invasion of the individual’s person or property interests in the course of a seizure of tangible objects.” Payton, 445 U.S. at 591 n.33 (citing Olmstead v. United States, 277 U.S. 438, 466 (1928)).

In 1998 the U.S. Supreme Court held that: (1) a police officer does not violate the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender; and (2) only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation. Sacramento v. Lewis, 523 U.S. 833 (1998); see also Bowers v. Devito, 686 F.2d 616, 618 (7th Cir. 1982) (“There is no constitutional right to be protected by the state against being murdered by criminals or madmen.”). Prison officials, however, have an Eighth Amendment constitutional duty “to take reasonable measures for the prisoners’ own safety.” Washington v. Harper, 494 U.S. 210, 225 (1990). Further, a military policeman has a legal duty to protect the president and vice-president, but the police have absolutely no legal duty to protect law-abiding homeowners. Saucier v. Katz, 533 U.S. 194 (2001).


[538] Id. at 195. The DeShaney Court elaborated:

The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process
Clause of the Fourteenth Amendment was intended to prevent government “from abusing [its] power, or employing it as an instrument of oppression.” [Citations omitted.] Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

. . . .

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

_id._ at 195-96. For a collection and synopsis of other Supreme Court cases similarly absolving governmental authorities from any duty to protect citizens from harm, see Dorfman & Koltonyuk, _supra_ note 202, at 393, n.73.

_[539] Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (holding that a State statute providing for “mandatory” enforcement of restraining orders does not give rise to a federal Due Process liberty or property interest or a federal entitlement to such enforcement)._  

_[540] Id._ In particular, the mother sued under section 1983 of the federal civil rights laws, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . to the party injured in an action at law.


_[541] See, e.g., Garner v. Tennessee, 471 U.S. 1 (1985). In that case, Justice O'Connor made the point that Department of Justice statistics showed that: “[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars.”_ _Id._ at 26-27 (O'Connor, J., dissenting) (citing Bureau of Justice Statistics Bulletin, Household Burglary 1 (January 1985)). She added:

> During the period 1973-1982, 2.8 million such violent crimes were committed in the course of burglaries. . . . With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene [because law enforcement efforts after-the-fact fail to result in the arrest of so many violent burglars]. _See_ President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: The Challenge of Crime in a Free Society 97 (1967).
Id. at 27. Sadly, Justice O'Connor's concerns remain valid.


[543] Id.

[544] Luttwak, supra note 506, at A18.

[545] MPC COMMENTARIES, supra note 78, at 119.

[546] MODEL PENAL CODE § 3.04(2)(b).

[547] MPC COMMENTARIES, supra note 78, at 34.


[551] The Court added in a footnote:

A “facial” challenge, in this context, means a claim that the law is invalid in toto—and therefore incapable of any valid application. In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.

Grayned, 455 U.S. at 495 n.5 (internal citations omitted).

[552] The Hoffman Court explained in another footnote:

In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Id. at 495 n.6 (internal citations and quotes omitted).

[553] The Hoffman Court further stated that “vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” Id. at 495 n.7 (internal citations and quotations omitted). The same applies to vital Fourth Amendment protected rights, as this Article explains.
[554] Id. at 494-95.

[555] Id. at 499 (emphasis added).


[557] See, e.g., Seegars, 396 F.3d 1248.


[559] JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 107–08 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). Compare 1 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT THE UNIVERSITY OF OXFORD 1767–1773, at 399 (Thomas M. Curly ed., 1986) (explaining the rationale for justifiable homicide in the following terms: “for in this case as authority cannot protect [her], there is not time for appeal to society”). Robert Chambers was the second Vinerian professor at Oxford; William Blackstone was the first.

[560] JOHN MILTON, DE DOCTRINA CHRISTIANA [ON THE CHRISTIAN DOCTRINE], BOOK II, translated in 17 THE WORKS OF JOHN MILTON 129 (Frank Allen Patterson ed., Columbia Univ. Press 1934) (1660). Another translation runs as follows: “There is, however, one difference between a thief and an enemy against whom one is fighting. With the enemy the law of war ought to be observed, but in dealing with the thief there is no law either of peace or war that one needs to keep.” 6 COMPLETE PROSE WORKS OF JOHN MILTON 687 (Don Marion Wolfe, gen. ed., Yale Univ. Press 1953) (1660).

[561] JOHN WILDER MAY, THE LAW OF CRIMES 137 (photo. reprint 1985) (1881). Three editions of this treatise were later edited and published posthumously.

[562] CLARK & MARSHALL, supra note 114, at 470.


[564] Responding to the popular revolt against upside-down jurisprudence, the Illinois legislature, overriding the Governor’s veto, recently passed legislation effective November 19, 2004, prohibiting a homeowner who uses a firearm for lawful home defense from being prosecuted under any local ban on possession of the firearm. The legislation, S.B. 2165, became Public Act 93-1048, 720 ILL. COMP. STAT. 5/24-10, which is § 24-10 of the Illinois Criminal Code. The statute explicitly provides that it is an affirmative defense to a violation of a municipal ordinance that prohibits, regulates, or restricts the private ownership of firearms if the individual who is charged with the violation used the firearm in an act of self-defense or defense of another. The legislation was inspired by the case of Hale DeMar of Wilmette, Illinois, who shot a burglar who had broken into his home and was fined $700. The 104
prosecutor had called DeMar’s use of deadly force justified; DeMar was prosecuted solely for the failure to have renewed his firearms ID card. See, e.g., Robert VerBruggen, Self-Defense vs. Municipal Gun Bans, REASON, June 2005, at 40.


A 1999 report to the Home Office states:

In most burglaries with entry, force was used to gain entry, but in a fifth (22%) the offender entered via an open window or unlocked door. In a quarter (25%) of burglaries someone was at home and aware of what was happening. In a tenth (11%) of burglaries violent or threatening behaviour was used. Victims were emotionally affected in 87% of all burglaries.

Tracey Budd, Main Points, Nature of Burglary in BURGLARY OF DOMESTIC DWELLINGS, FINDINGS FROM THE BRITISH CRIME SURVEY (Issue 4/99), available at http://www.homeoffice.gov.uk/rdspdfs/hosb499.pdf (last visited Mar. 18, 2005). Victims do not report all burglaries, of course, for many reasons including the feeling based upon past experience that reporting a burglary is futile. For example, recently a sixty-year-old Gloucestershire woman whose house was burglarized seven times claimed that the police had not even investigated a single one of the crimes. She had a nervous breakdown and, after her recovery, purchased an air rifle, since Britain now bans the home possession of even home defense firearms. The police advised her not to take the law into her own hands. For the online BBC report of these stories, see http://www.htvwest.co.uk/news/01_11_november/burgled_gun.shtml (last visited Mar. 18, 2005).

For another example, English farmer Tony Martin, a victim of multiple previous burglaries, was convicted of murder for killing one burglar and wounding another. Although the murder conviction was reduced to manslaughter, Mr. Martin had to serve jail time and was denied early parole allegedly because the parole board believed that he posed a danger to other house-thieves. See, e.g., Martin Loses Parole Appeal, GUARDIAN UNLIMITED, May 8, 2003, available at http://www.guardian.co.uk/martin/article/0,2763,951953,00.html. (last visited July 4, 2005).

[568] UNIFORM CRIME REPORTS, Crime in the United States—2003, Table 1, available at http://www.fbi.gov/ucr/cius_03/xl/03tbl01.xls (last visited Mar. 18, 2005). David Kopel has convincingly demonstrated the effects of Britain’s prohibitory firearm possession laws in fostering and promoting home invasions. David B. Kopel, Lawyers, Guns, and Burglars, 43 ARIZ. L. REV. 345 (2001). He also shows that the presence of a firearm in American homes serves as a potent deterrent to these invasions. See, e.g., id. at 348-64; see also GARY KLECK, POINT BLANK, GUNS AND VIOLENCE IN AMERICA 140 (1991) (establishing a basis for some of Kopel’s conclusions).

[569] See MALCOLM, supra note 566, at 25.

[570] Id. at 181-87.

[571] MPC COMMENTARIES, supra note 78, at 34.

http://www.saf.org/journal/18/caplan.htm