

>EVEN DEADLY FORCE

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>

>FULLY JUSTIFIABLE HOMICIDE

>

> VS.

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>BARELY EXCUSABLE HOMICIDE

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>I.

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> The early common law (13th century and before), drew a very sharp,
>bright-line distinction between socially desirable, fully justifiable
>homicide as opposed to socially undesirable, barely excusable homicide.

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> Justifiable homicide occurred when the victim of an inherently
>dangerous common-law felony (arson, stranger burglary, stranger robbery,
>stranger rape), or a bystander thereof, resisted the felony. In such
>cases, the perpetrator of the felony was considered to be what we call now
>a “career criminal,” a “professional criminal,” or a “recidivist criminal.”
> The perpetrator of any of these felonies was considered to threaten
>continuing grave dangers to the community should he be successful or escape
>justice and roam at large. Therefore, the felon had lost his “right to
>life” by engaging in such conduct, so long as it was clear that the felon
>had actually attempted or completed an inherently dangerous felony.
>Therefore, no showing of necessity other than the actual perpetration of
>the stranger attack was needed to justify force, even deadly force, to be
>used to resist the felon. Necessity for using deadly force against the
>perpetrator was presumed in these cases, “even though not in his
>self-defence.” (Because of the change in word usage, we would say today:
>“even though not necessary for his self-defense.”)

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> On the other hand, many later common-law writers, especially those
>writing after the 16th century, believed that if but only if the felon had
>clearly desisted and peaceably surrendered and was clearly in flight, then
>justification for using deadly force to stop him required a showing of
>factual necessity. Thus, even according to those later writers, no issue
>of “excessive force” (modern terminology) arose until clear flight. Even
>according to those later writers, upon a felon’s clear flight, the common
>law not only encouraged but also required the use of force, even deadly
>force, if necessary to prevent a fleeing felon from escaping trial.
>Failure of the victim or bystander to use force necessary for this purpose
>was a misdemeanor, punishable by fine and imprisonment.

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> What I have said concerning the justification rules according those
>“later common-law writers,” regarding the supposed need of showing factual
>necessity for using deadly force to effect an arrest, was not supported by
>the relevant caselaw. To the contrary, I read and understand differently
>the settled caselaw, going as far back as at least the early 13th century
>and cited approvingly until the middle of the 20th century — including in
>Coke’s Institutes. My understanding is that once it was clear that an
>inherently dangerous common-law felony was being committed, the law
>presumed the necessity for using force against the felon if and when the
>felon did not peaceably surrender OR fled. Immediate flight furnished
>immediate necessity. The law did not impose the victim or bystander to
>judge the exact or inexact moment of time at which the commission of the
>felony ended and the immediate flight therefrom began. The common law did
>not set legal traps for innocent victims or heroic bystanders.

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> For example, the common law did not require that, as soon as
>murderous bank robbers were in flight from a lucrative bloody bank robbery,
>a heroic victim or bystander must not shoot the fleeing gunmen unless
>ordered to do so by a police officer who happened to be there. The common
>law did not want these heroic victims and bystanders to be punished or,
>more important, these dangerous felons to escape and prey on other victims.

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>II.

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> The public policy encouraging force, even deadly force, to be used
>against felons in the act of inherently dangerous felonies — such as arson,
>stranger robbery, stranger burglary, or stranger rape — included creating
>“the more against offenders” rather than terrorizing peaceful subjects of
>the Crown. It also included the legal principle that in all these felonies
>the life of the victim “either is, or is presumed to be in peril” and that
>the roles of victim and villain should not be interchanged upon any
>uncertain facts. The law did not presume that the precise details of
>heroic acts could be reconstructed in a courtroom for juries to dissect
>according to their emotional prejudices once it was clear that an
>inherently dangerous felony in fact had been attempted or committed.

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> Indeed, the common law considered thwarting, resisting or preventing a
>clear-cut inherently dangerous felony as “laudable” and worthy of
>“commendation rather than blame.” In addition, the common law considered
>the act of using force, even deadly force for this purpose to be “promoting
>justice, and performing a public duty” and “for the advancement of public
>justice.” The common law justification rules were designed to prevent
>“wicked men from assailing peaceable members of society, by exposing them
>to the danger of fatal resistance at the hands of [their victims].” The
>dastardly felony by itself created the presumption that (1) it endangered

>human life.; (2) it required its immediate termination; and (3) it
>required the immediate prevention of the escape of the felon.

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> In some modern and postmodern cases and statutes, the doctrine of
>factual necessity or even “absolute necessity” applies to even clear-cut
>victims of arson, stranger robberies, stranger burglaries, and stranger
>rapes. An International Convention, not yet ratified by the United States,
>adopts this doctrine. As a result, even a clear-cut overt recidivist
>career criminal becomes the “victim” and the initial true victim becomes
>the “actor-[villain]”. Morality turned upside down and inside out! New
>rules based upon highly theoretical speculations concerning irrelevant and
>extreme academic hypotheticals have replaced the wisdom of ancient
>common-law and Jewish law tested by ages of experience. (Parenthetically,
>in both Hebrew and classical Latin, one of the meanings of “religion” is
>“law.”)

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> The social policy encouraging deadly force to be used if factually
>necessary -- or according to caselaw, even if not factually necessary -- to
>prevent the escape of these felons fleeing from the scene was based upon
>the rational presumption that a dangerous felon at large threatens the
>peace and security of society — i.e., the next victims. Immediate stopping
>of the fleeing felon, whether actually or presumably dangerous, was deemed
>absolutely necessary for the security of the people in a free state, and
>for maintaining the “public security.” Parenthetically, notice here the
>striking similarity of concepts and language with those contained in the
>Second Amendment, and in *Presser v. Illinois*, 116 U.S. 252, 264–265 (1886).

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> Indeed, it has been said that the social policy of the common law in
>this matter was not only to threaten dangerous felons and hence deter them,
>but was also to induce them to “surrender peaceably” if they dared commit
>inherently dangerous felonies, rather than allow them to “escape trial for
>their crimes.” The common law did not want dangerous felons to escape
>justice. It did not want to enable them to continue to prowl and roam at
>large. It did not want to enable or empower these criminals to commit yet
>more dastardly crimes, or to continue to terrorize the community, or to
>continue to endanger the public safety and security. The common law
>considered as paramount the social objectives of “promoting peaceable
>surrender” to the legal process and of promoting public peace, tranquility,
>and security.

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>III.

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> Andrew, please rest assured that I am aware of *Tennessee v. Garner*,
>471 U.S. 1 (1985), regarding inherently dangerous nocturnal burglary of a
>temporarily empty home albeit temporarily empty. In my opinion, however,
>based upon my research, the holding of that case as well as its broad

>language rely upon some crucial, glaring historical mistakes of fact; and
>the case contains critical errors and misconceptions regarding its asserted
>earlier public policies. Only in this way did the case result in its
>criminal friendly ruling. Besides, the ruling in that case does not apply
>to civilian arrests.

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> More fundamentally, why should we punish the innocent victim or
>bystander (who stands in the shoes of the victim) for the sins of the
>career criminal? By what moral or legal principle should we be concerned
>with the health and well being of fleeing recidivist criminals at the legal
>and physical peril as well as expense of their chosen victims or their
>happenstance bystanders? These heroic public-spirited victims and
>bystanders deserve “commendation rather than blame.” The felon takes all
>risks of violence resulting from attempts to prevent his escape and to
>bring him to justice, rather than to allow him to prowl and roam at large
>and continue to terrorize the entire community.

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> The Lord rejoices at the premature deaths of the wicked and mourns for
>the premature deaths of the righteous. Why? Premature deaths of the
>wicked prevents them from committing more sins, prevents them from killing
>more righteous people, and hence prevents the wicked from preventing these
>righteous people from performing more good deeds; premature deaths of the
>righteous prevents them from performing more good deeds and from enjoying
>proportionately more benefits in the World to Come. [Talmud, Tractate
>Sanhedrin, fol. ca. 70.]

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>IV.

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> The common law encouraged and required even civilians to use force,
>even deadly force, to arrest and prevent escape of inherently dangerous
>felons at, or fleeing from, the scene of the crime — at which times
>mistakes of stopping the wrong man would be minimal, as opposed to long
>times thereafter. The social policy here was to assure that dangerous
>felons should not continue to prowl and roam at large and thereby create a
>constant terror to the people and danger to the public and social order.
>Instead, the paramount object comprised promoting the public peace and
>public safety, as well as the security of the people. In addition, the
>policy here was that these felons should not escape justice.

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>V.

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> It is important to note that 14th century cases confirming these rules
>were approvingly cited as controlling law by court decisions and common-law
>scholars many times over the centuries both in England and America — until
>Parliament abolished these rules in 1967, and until various times in 20th
>century America. This extremely unfortunate (in my opinion) development

>occurred only after some 19th and 20th English and American commentators
>(superficial and error-prone commentators, in my opinion), as well as
>misguided cases and statutes (again, superficial and error-prone, in my
>opinion) confused or even fused the previously clearly disjoint rules
>governing the fully justifiable homicide rules discussed above and the
>barely excusable homicide rules discussed below. More specifically, the
>new rules foolishly imported barely excusable “self-defense” rules into
>fully justifiable rules. The resulting merger of doctrines was not merely
>a conceptual mess. The previous disjointer had been socially very
>beneficial, if not absolutely necessary for a rational legal system, in
>both my opinion and the opinions of many great and not-so-great 16th
>through 20th century law commentators.

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> Parenthetically, the above-mentioned 14th century cases were not the
>first to lay down clearly the justification rules. The earliest cases that
>I have found on the topic go back to the early 13th century (1220–1230).

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> The rules in force prior to the 13th century are not clear to me —
>perhaps because the rules were so clear that no cases arose, or perhaps
>because the judicial system had not yet been developed, or perhaps because
>cases were not reported prior to 1220, or perhaps because courts then felt
>constrained to go easy on gangs of roving robber barons, led by noblemen,
>who may have been as powerful as the King in those unruly, rough and tough,
>and chaotic times. (Would you want to go back to those days? For some
>time, I have felt that the Revolutionaries, as well as
>post-Revolutionaries, of the 1960’s were the true reactionaries in the
>classical Latin sense of the term.)

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> At any rate, I would seriously doubt that the Crown (or especially the
>Hundred before Henry I) would have punished either civilly or criminally a
>(taxpaying) worker, a fighter-soldier (upon whom the King relied for
>conquest and lucre), or a cleric (the K.’s perceived ticket to Heaven?
>and/or means for instilling awe and fear in the hearts of the King’s
>subject to keep them in line?) for having dispatched a common criminal.
>Rather, the Crown (or the Hundred) would have viewed such a
>felony-resisting chap as a faithful, valiant, and chivalrous subject, for
>his having thereby promoted the King’s peace and the public’s security (the
>peace and security of the Hundred).

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>VI.

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> Many law writers have theorized that the common law developed these
>justification rules at a time when at the common law all felonies were
>punishable by death. These writers therefore conclude that the use of
>deadly force to kill a fleeing felon in those days was merely a premature
>execution of the inevitable judgment of death. The fallacies with this

>theory are legion. For example, the fact is that the judgment of death was
>by no means inevitable:

- > (1) The felon might escape all punishment through successful flight to
>areas of the country where felons were in control;
- > (2) The felon might be found NOT guilty after capture and trial;
- > (3) Even after having been found guilty the felon might, and often did,
>receive a royal pardon as of grace (de gratia) on condition that he serve
>in the King's army for two years;
- > (4) After trial, benefit of clergy averted capital punishment; and
- > (5) After trial, more often than not the punishment was outlawry and not
>death.

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>Besides, common-law judges were diligent in finding all sorts of defects in
>the indictment in cases where they thought that capital punishment was not
>warranted.

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>VII.

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> Summarizing, from the dawn of the common law the crime victim was
>assured that resistance to inherently dangerous felons, including using
>even deadly force against them, would entail absolutely no penalty
>whatever. The common law considered resistance to dangerous felons to be a
>public duty. By stark and critical contrast, in cases of homicide in
>fights or spontaneous disputes where people knew each other or in barroom
>brawls, the common law laid down an entirely different set of rules. The
>common law classified the killing as (barely) excusable homicide, and not
>justifiable homicide, even if the killer had retreated as far as he could
>to a wall, a ditch, or to the sea.

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> N.B. In what follows, for the sake of clarity I will use the term
>“self-defense” to denote only (barely) excusable homicide, as opposed to
>(fully) justifiable homicide discussed above.

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>VIII.

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> In disquisitions on homicides in which the deceased was NOT a career
>felon, a famous difference of opinion existed between Sir Edward Coke and
>William Blackstone. The difference of opinion involved the question
>whether the early common law treated as a felony, punishable by both death
>and forfeiture, any use of deadly force in barely excusable “self-defense.”
>In this context, “self-defense” related to using force in barroom brawls or
>between people who knew each other, in necessary “self-defense” (that is,
>after retreat to the wall, to a ditch, or to the sea). Lord Coke believed
>that homicide in “self-defense” was punished with death as well as
>forfeiture. Here Lord Coke here relied upon the need for 13th century
>Statute of Gloucester, declaring that capital punishment was not to be

>imposed in such cases. Blackstone believed that even prior to the Statute
>of Gloucester, the defender suffered forfeiture but did not suffer capital
>punishment. I recall reading somewhere that Blackstone and his camp
>thought that the Statute of Gloucester was needed only for cases of
>necessary “self-defense” against a Dane (when Canute ruled England, or a
>Norman (when William the Conqueror ruled). What comes to mind here is the
>frequently appearing “Englishry was presented” and “murdrum” terminology
>occurring in pre- and early post- Norman Conquest cases obviously
>indicating the more serious nature of killing a Dane or a Norman than of
>killing an Englishman.

>

> At any rate, Coke and Blackstone agreed that after the Statute of
>Gloucester the early common law treated “self-defense” as some sort of
>crime punishable by forfeiture and imprisonment. In order to get out of
>prison, the prisoner in these cases had to obtain a royal pardon, which was
>forthcoming as a matter of right, and not of grace, after a lapse of time —
>the length of the lapse of time, and hence the term of imprisonment,
>depending upon the degree of blame as judged by the Crown, or the prison
>term ending upon voluntarily serving in the Crown's army for two years, or
>ending upon payment of a fee to the Crown (bribery? and/or proportional to
>blame?). All agreed, however, that unnecessary “self-defense” –
>occasioned, for example, by a killing in “self-defense” without retreat to
>the wall, to a ditch, or to the sea -- was still a capital offense even
>after the Statute of Gloucester. It later was called “manslaughter.”
>Also, all agreed that neither before or after the Statute of Gloucester was
>killing an inherently dangerous felon on the spot any crime whatever;
>rather it was considered to be courageous, praiseworthy, and protective of
>the entire community.

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> The rationale for punishing necessary “self-defense” included the
>following: (1) some degree of blame should be imputed to both sides of the
>dispute for having caused or allowed it to escalate; and (2) whoever had
>been killed presumably had been a valuable subject of the King's realm. It
>was a case of fights among equals. Not so in cases of justifiable
>homicide! Or today, I may add, in my opinion. And therein resides a basic
>issue of morality and jurisprudence (accent on the “prudence”).

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>IX.

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> I believe that much of the difference between the pro- and anti-Second
>Amendment camps – including between you and me -- boil down to whether one
>likes or dislikes the following principles and propositions.

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> 1. The common law of England and America regarded resisting
>the commission of an inherently and presumably lethally dangerous felony not
>only as “one of the major privileges, particularly as to the use of deadly

>force,” but also a duty of citizenship;

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> 2. Such a privilege is socially desirable and
>indispensable, as well as emotionally comforting; and

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> 3. The common law considered the value of the victim’s life
>to be paramount: the felon had forfeited such consideration when he decided
>to engage in his depredations.

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>X.

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> I would label the perpetrator of an excusable homicide a
>“selfish-defender”; and I would label as a “selfless-defender” the
>performer of the critically important public service of justifiable
>homicide. The great common-law commentators, as well as the not-so-great
>law writers, characterized justifiable homicide by many phrases of
>approbation such as “laudable”; deserving “commendation rather than blame”;
> “necessary, and in the interest of the safety and good order of society.”

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>XI.

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> From what appears above, I hope that you will understand that the key
>to understanding the “origins of ‘self-defense’” includes recognizing the
>critical distinction between “forcible ” stranger felonies for lust or
>lucre and disputes or fights between people who knew each other or among
>barroom brawlers. It is ridiculous to import considerations underlying the
>barely excusable homicide rules into the fully justifiable homicide rules.
>In the former case we have a fight or dispute amongst equals; in the latter
>case, between peaceable citizens suddenly confronted by career criminals.

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> Andrew, I hope that I have furnished you with some interesting and
>useful historical background and that my opinionated comments will not be
>too strong for your taste. Nevertheless, you know, or should know, that
>one of the first, if not the first, writers in English history to champion
>First Amendment values, namely John Milton, wrote that a robber should not
>be accorded even the laws of war, since a robber was worse than a “national
>enemy.” Since you appear to be a First Amendment voluptuary, like Floyd
>Abrams; I thought you would enjoy hearing what Milton had to say on the
>subject.

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> Just a few days ago, my wife and I took a firearm “training course”
>given at a South Florida arms show, the first such “show” that we have ever
>visited. I was saddened but not surprised that most of the course was

>devoted to teaching us when not to shoot, rather than how to shoot. His
>stated rationale included the repeated warning that we must always bear in
>mind that a judge or jury will review our actions with a fine-tooth comb
>and with their emotional prejudices, and that the mutually different whims
>of prosecutors in the twenty-seven different Florida counties will govern
>whether we will be prosecuted. Moreover, during the practice shoot, the
>instructor directed us to fire one and only one shot. By stark contrast, a
>firearm "training course" that I took more than 25 years ago during a visit
>to West Point emphasized the importance of emptying my firearm in as little
>time as possible, with one reloading intervening, for a total of twelve
>shots. Whom are they trying to protect these days? Could this change in
>the law be a potent factor in the burgeoning of violent stranger felonies?
>English stranger felony rates before and after the great 24 H. 8 c. 5 would
>seem to indicate a connection, if for no other reason than the public
>attitudes and criminal behavior patterns thereby symbolized and stimulated.
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