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Culture in Our Midst

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I. INTRODUCTION

In this simple statement, Anthony Amsterdam and Jerome Bruner capture the importance of what is at stake in the conversation about law and culture. Culture, like race, class, gender, sexual orientation and wealth is one of many ways in which the law is not neutral. Indeed, as the passage asserts, culture is a source of law. Yet, as traditional legal positivists have

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taught us and this statement reminds us, the law or legal doctrine can prove to be more powerful than culture, often outlasting it.\(^2\)

Law and culture are complex human institutions. Thus, it should come as no surprise that the relationship between these institutions is also complicated. However, some resist the complexity. A reductionist understanding of Amsterdam and Bruner's statement is the mirror image theory.\(^3\) This theory states that the laws of a particular locale reflect the culture of that locale.\(^4\) The law merely serves as enforcement of the common decency, propriety and morality of that culture.\(^5\) Not only is this understanding appealingly simple, it is often invoked by judges and legislators who see the law and their roles in shaping the law as nothing more than an expression of the common sense and morality of their communities.\(^6\) However, as leading scholars in this area explain, this simplistic mirror image of law and culture is not true.\(^7\)

Robert Post identifies two major complications.\(^8\) First, the law does not merely enforce cultural norms;\(^9\) indeed, the law frequently creates new norms which may be contrary to cultural tendencies. Second, culture itself is not stable, coherent, or singular,\(^10\) and thus its malleability challenges the law. Within any culture, there are differences among subgroups, inconsistency and conflict between tenets, variance in adherence, and ever-constant change.\(^11\) In countries harboring a multitude of cultures, like the United States, this second complication is even more palpable. Given multiple cultures, the likelihood of differences in values and moral sensibilities is multiplied. Whose norms should the law reflect? Which values should the law pursue? For those countries that regard their diversity as an asset, "[t]he fundamental challenge... is how to balance

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4. See id.
7. See generally TAMANAHA, supra note 3, at 107-32. See also Post, supra note 5, at 486-87.
8. Post, supra note 5, at 487.
9. Id.
10. Id.
respect for cultural heterogeneity against the need to enforce a distinctive
and hegemonic set of cultural values."  

This Essay focuses on the interplay between culture and the substantive
criminal law. The criminal law has two basic functions: it serves as an
expression of moral condemnation, and it determines formal punishment
by the state. Given the importance of these functions, it is imperative that
the complex interplay between culture and the criminal law is brought to
light and understood, especially in multi-cultural jurisdictions where a
single criminal law is brought to bear upon members of numerous, varying
cultures.

The relationship between culture and the criminal law reflects the
mirror image theory as well as Post’s two complications. For example, the
laws against homicide articulate that in the judgment of most, if not all
cultures, killing another human being, under most circumstances, is
wrongful moral conduct and is therefore, a crime. Such laws are a clear
example of the mirror image theory. On the other end of the spectrum,
other criminal offenses such as marijuana possession do not necessarily
reflect a societal judgment against low level drug use, but instead represent
the need to maintain a distinction between illicit and legal drugs and the
need to deter the abuse of even more dangerous drugs. This is the first
complication suggested by Post at work. Such drug offenses aspire to
create norms, as opposed to reflecting already existing norms, and are very
controversial. As Post describes, this “debate about whether rules of
liability should be fashioned to achieve the instrumental goal of deterrence
or instead to reflect the moral judgment of the community” in criminal
law is “fierce and ongoing.”

The second complication of differences in norms and values due to the
existence of many cultures and intra-cultural conflict is also seen in

12. Post, supra note 5, at 493.
13. I discuss the substantive criminal law as opposed to the selective enforcement of the law.
Numerous other scholars have lambasted law enforcement agencies and the criminal justice system
for being selective in the enforcement of laws. See, e.g., Paul Butler, Racially Based Jury
14. Interestingly, culture also performs these same functions, albeit on a less formal level in
society. Even though culture and the criminal law share these functions, they are not always
working together. At times, the criminal law may be punishing the very behavior that a culture
encourages. “Quite frequently an official or dominant culture tries to punish behavior, which, at the
same time, a subculture rewards or supports. . . . [for example the] Mormons practiced polygamy;
the general government ruthlessly stamped this out.” LAWRENCE M. FRIEDMAN, THE LEGAL
SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 106 (1975).
15. Post, supra note 5, at 488.
16. Id.
criminal law. It usually arises in the context of a defendant who is charged with a crime but then defends his act as an expression of his culture. Whether the criminal law should accept a claim of culture as a defense has been the subject of numerous academic articles; however, very few, if any, jurisdictions have formally considered the issue. Thus, the criminal law, like other areas of law, has a complex relationship with culture. In fact, a complete understanding of the interplay requires a much lengthier treatment than one article. In this initial Essay, I begin the study with the argument that several familiar doctrines in American criminal law are better understood as cultural constructs. These fundamental doctrines reflect the values of the dominant culture in the United States. They are: (1) the rejection of the rule of retreat in deadly self-defense; (2) the defense of habitation; and (3) the defense against forcible rape. These defense doctrines demonstrate simple mirror reflection as well as Post's second complication of changes in culture. By viewing these established criminal defenses specifically as constructs of the dominant culture, this Essay puts forth a selective mirror image theory. The criminal law is yet another source of power for the segment of the population that is in control. Thus, the values expressed in the substantive criminal law are those held by that segment. This view of the law is an important place to begin our look at culture and the criminal law. It achieves two important ends. First, the Essay dispels the myth that culture does not exist or belong in the substantive criminal law. Those who worry that a cultural defense will inject culture where there is no culture have no reason to worry. The current criminal law is already infused with culture. Second, this Essay establishes that it is not just any culture that exists in the criminal law. Rather, it is only the dominant culture that exists in American criminal law. These foundational perspectives about substantive criminal law are critical to understand and accept before going further in the study of the relationship between criminal law and culture.

Part II of this Essay explains two concepts that are important to these foundational perspectives. The first discusses the meaning of dominant 17. See, e.g., Taryn F. Goldstein, Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense?", 99 DICK. L. REV. 141 (1994); Cassandro Turhune, Cultural and Religious Defenses to Child Abuse and Neglect, 14 J. AM. ACAD. L. 152 (1997).
19. See TAMANAH, supra note 3, at 40-44.
20. See id.
21. In a country where the population is no longer predominantly from one culture but instead enjoys a multitude of cultures, is this state of the criminal law defensible? Is it desirable? Again, these last two questions are handled in a subsequent article.
culture, and the second explores the connection between culture and motive in the criminal law. Parts III, IV, and V then explore in detail how the rejection of the rule of retreat, the defense of habitation and the defense against forcible rape are expressions of the dominant culture. Finally, Part VI features some brief conclusory remarks.

II. Conceptual Basics: What? and Where?

A. What is the Dominant Culture?

Due to the success of the Critical Legal Studies movement, writing about the law in terms of dominant and subordinate populations is no longer revolutionary or new. The rallying slogan for this movement is that the law "establishes and reflects domination and oppression." What separates each school from the other within the movement is the variance in the theories on the source of that domination and oppression. Critical race theorists focus on the dominant race (white), while critical feminists look at the dominant gender (male), and critical legal scholars describe the dominant class (the rich). There is very little discussion or disagreement surrounding the identity of the dominant population.

For scholars who focus on the intersection of American law and culture, the identity of the dominant group is more complicated. This complication is, in part, aggravated by the fact that the concept of culture itself can be quite broad and controversial. Anthropology provides a classic understanding of culture. Culture is "a set of established arrangements for joint living, made up of such facts-of-life as kinship rules, systems of exchange, methods of conflict resolution, and the rest."

23. See GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 1046 (2d ed. 1995). "Many hundreds of law review articles and growing numbers of books have appeared by the critical writers." Id.
24. Id.
25. Id.
26. Amsterdam and Bruner describe a fundamental debate within anthropology on the concept of culture. See AMSTERDAM & BRUNER, supra note 1, at 221. On one hand, social-institutionalists believe culture is a set of rules and practices that are autonomous and capable of being observed ethnographically. Id. On the other hand, interpretive-constructivists understand culture to be the negotiated outcome of a people's effort to interpret their experience in living together. Id.
27. Id. at 219.
It is "the corpus of rules and traditional practices that exemplify each society's collective way of being."\textsuperscript{28}

Using this classic understanding of culture, it is fairly easy to name cultures that exist in the United States. As expected, some of these cultures are known by the various countries from where individuals or their ancestors originally came. There is, for example, Italian culture, French culture, Vietnamese culture, Greek culture, Brazilian culture, and others. There are even cultures identified by other markers such as hip hop culture, midwestern culture, and military culture: Which of these, however, is the dominant culture in America?

In the first breath, the answer may come easily: Anglo-Saxon culture.\textit{Anglo-Saxon} is a term whose meaning has changed throughout history. Even in contemporary usage within the United States, the phrase has both a broad and a narrow meaning. Broadly, it is used to refer to "people of English, Scottish and more recently, German, Scandinavian and other people of Northern European ethnicity . . . [in contrast to] the Irish-Catholic cultural group, and French Canadians, and later Eastern and Southern European immigrants and their cultures."\textsuperscript{29} Modern slang has even created the acronym W.A.S.P. which means White, Anglo-Saxon, Protestant.\textsuperscript{30} A more narrow understanding of \textit{Anglo-Saxon} is limited to the English culture.\textsuperscript{31}

Regardless of interpretation, the Anglo-Saxon culture is a sensible choice as the dominant culture in the United States. After all, it was the culture of the country's founders who emigrated primarily from Great Britain. Since the founding, however, waves of immigrants from other parts of the world have landed in the United States. Despite these waves, the Anglo-American culture remains the core culture in the United States,\textsuperscript{32} a phenomenon which is not surprising to critical scholars who recognize that members of the Anglo-Saxon culture continue to control both the vast majority of power and wealth in this country.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 220. Amsterdam and Bruner use the term, \textit{superorganic}, and attribute it to Alfred Kroeber. \textit{Id.} at 219.
\item \textsuperscript{29} Wikipedia, Anglo-Saxons, at http://en.wikipedia.org/wiki/Anglo-Saxon (last visited Oct. 25, 2005) (sub-heading "use of the Term 'Anglo-Saxon' Today").
\item \textsuperscript{30} \textit{See id.}
\item \textsuperscript{31} \textit{See 1 THE NEW ENCYCLOPAEDIA BRITANNICA 409 (15th ed. 1998).}
\item \textsuperscript{32} Juan F. Perea, \textit{Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English}, 77 \textit{MINN. L. REV.} 269, 276 (1992). "The dominant culture in America" ("[Anglo-Saxon culture] . . . was, and remains, the culture of white, Protestant, English-speaking, Anglo-Saxon Americans. This, in the terminology of sociology, is America's core culture." \textit{Id.}
\end{itemize}
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Deeper reflection reveals that even though Anglo-Saxon culture is largely based on British culture, it too has been Americanized. There are numerous instances in which Anglo-Americans have chosen to depart from their British heritage to adopt new alternative values and rules. The rejection of the rule of retreat discussed in Part III is such an instance. Thus, a more accurate statement is that the dominant culture in the United States is Anglo-American, and not actually Anglo-Saxon culture. Members of this dominant culture are white, Protestant and English-speaking. Having articulated what is meant by the dominant culture, I now turn to the exposure of this dominant culture in the substantive criminal law.

B. Where is Culture? In the Motives

In searching for culture in the substantive criminal law, it is helpful to consider again what culture is. Another definition from anthropology defines culture as “a set of shared understandings, whether consciously held or not, which makes it possible for a group of people to act in concert with one another.” Shared understandings refer to the “meanings that they attach to things and experiences.” What separates one culture from another is the different meanings that each culture may attach to the same thing or the same experience.

Meanings that individuals attach to stimuli vary among cultures and are of grave importance, especially when these meanings inspire action. As Gerald Torres explains, “culture provides the meaning of and reason for social action.” In the criminal law, the concept that captures the reason for social action is motive. Motives are “action initiators.” Thus, a
logical place to find culture in the criminal law is wherever motive is manifested in the criminal law.

In an earlier article, I discuss how the criminal law suffers from its commitment to the principle that motive is irrelevant to criminal liability. This longstanding principle evolved as the criminal law developed into a system that defined liability in terms of mens rea. The centrality of mens rea rendered motive virtually invisible. Superficially it appears as if motive is not considered at all in the substantive criminal law; however, appearances can be misleading. Motive, and hence culture, exists in the backdrop of the substantive criminal law in several key places. One such place is in the formal defenses.

This Essay looks at motive and culture as they appear in several justification defenses in the criminal law. Generally, a defense in the criminal law is "any set of identifiable conditions or circumstances that may prevent conviction for an offense." In the mid 1970s, Paul Robinson systematically organized and categorized the numerous defenses that appeared in the criminal law. Despite some misgivings about whether defenses that embody "such complex human notions of fairness and morality" could be systematically analyzed, he nonetheless created his now renowned schema of five general categories of defenses.

One of Robinson's categories is justification. Justification defenses represent those instances in which defendants are not liable despite the fact their actions caused legally recognized harms. These legally recognized harms are justified because, by the same actions, defendants managed to avoid greater harms. Each defendant who claims a justification defense seeks to avoid a greater harm. In other words, they committed the lesser harm in the choice between two harms.

41. See Chiu, supra note 39, at 653-729.
42. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 88 (2d ed. 1960) ("[H]ardly any part of penal law is more definitely settled than that motive is irrelevant.")
43. See HALL, supra note 42, at 81-83.
44. See Chiu, supra note 39, at 663.
45. See id. at 666-69 (describing how motive appears in mens rea, in justification defenses, and in the elements of select crimes).
46. PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 21, at 70 (1984).
47. Id. at IX-X.
48. Id. § 11(b), at 69.
49. Id. § 21, at 70.
50. Id. § 24(a), at 83.
More than one type of justification defense exists. Each type is motivated by the avoidance of greater harm, but also varies from others by what type of harm is avoided. For example, in self-defense, the harm avoided is bodily harm to oneself; with regard to defense of others, the harm avoided is bodily harm to another. Similarly, in defense of property, the harm avoided is harm to personal property.

Stuart Green writes that "[t]he decisions a legal regime makes regarding its justified homicide rules, ultimately, will reflect deeply held societal values." Such an assessment is accurate because fundamental to the concept of justification is the process of weighing harms against one another. Justification is a claim that one harm was committed to avoid a second harm. Is it the case that the second harm was a greater harm than the first one? This process of critically weighing harms implicates the notion of culture. For example, one culture may recognize the avoidance of dishonor as important and accept the avoidance of dishonor as a justification defense in its criminal law. On the other hand, a second culture may disagree and reject such an honor defense on the grounds that the avoidance of dishonor did not outweigh the harm committed by the defendant.

In the United States, the law on defenses, like much of the criminal law, is based on statutes. A statutory basis must exist for a defendant to make a claim of justification. For example, if a defendant shot an attacker to prevent that attacker from imminently stabbing her, that defendant could base her claim on the deadly self-defense statute (assuming the jurisdiction had such a statute). The state legislatures, thus, have the enormous power of determining which harms are the greater harms and which justification defenses are in their penal statutes. Likewise, legislatures also have the power to determine which harms are insufficient to justify an otherwise criminal act, and which justification defenses are not included in their penal statutes.

51. See ROBINSON, supra note 46, § 24(a), at 83-86. There is a sub-category of justification defenses known as "defensive force" justifications. They are those justifications that "arise from a threat to a protected interest in response to which defensive force is then justified." See id. § 24(a), at 84. States further delineate between those threats where deadly defensive force can be used and those threats where only non-deadly defensive force can be used. Deadly force, of course, refers to force which poses risk of death or serious physical injury while non-deadly force refers to force which poses risk of mere physical injury. See N.Y. PENAL LAW § 10.00(11) (McKinney 2005).

52. See ROBINSON, supra note 46, § 24(2), at 84-85.


54. ROBINSON, supra note 46, at V-VI.
Certainly there are some justification defenses that are recognized by almost all cultures and jurisdictions. For example, every state recognizes self-defense.\textsuperscript{55} Garrett Epps writes that “[s]elf-defense is seen as a natural right . . . that arises independently of the social context in which it is exercised.”\textsuperscript{56} Although there are variations across the states, basic self-defense is the right to use physical force to defend oneself against physical injury and the additional right to use deadly physical force to defend oneself against serious physical injury or death.\textsuperscript{57} Limitations on the right of self-defense are based entirely on the principle of necessity.\textsuperscript{58} An individual is only allowed to inflict physical harm upon another if that other person has unjustifiably threatened harm and the infliction of physical harm is necessary for self-protection.\textsuperscript{59} Necessity also requires proportionality. The amount of physical harm permitted upon the other person must be commensurate to the amount of harm threatened by that other person.\textsuperscript{60}

Although these basic components of self-defense seem straightforward, state legislatures and courts often confront complications. A common issue is whether to require the existence of additional circumstances before validating an act as legitimate self-defense. These additional circumstances are typically derivations of the underlying principle of necessity. One such example is the requirement that the physical threat one is facing be an \textit{imminent} threat. Another is the mandate that one consider other non-deadly retreat options before using deadly force to respond to a threat. The fifty states vary as to which additional circumstances they require before allowing their citizens to use force against another in self-defense. In Part III, I discuss the rule of retreat and how its rejection by the majority of states is a reflection of the dominant Anglo-American culture.

In addition to the varying requirements of self-defense among the fifty states, the penal laws of the states differ in other ways. Notably, states also vary as to what other justification defenses they recognize beyond self-defense. Numerous states allow one to use physical force, or even deadly physical force, in circumstances when one’s physical integrity may not even be threatened.

\textsuperscript{55} Id. § 132, at 96.
\textsuperscript{57} See ROBINSON, supra note 46, § 132, at 96-97.
\textsuperscript{58} Id.
\textsuperscript{59} Id. § 132, at 97.
\textsuperscript{60} Id.
These justification defenses are unlike self-defense in that they are not universally recognized in all fifty states. Whether any one state recognizes a particular justification defense depends on many factors such as attitudes towards violence or the prevalence of certain types of crime. Ultimately, though, the acceptance and inclusion of some justification defenses in the penal code, and the rejection and absence of others reflects the judgments of state legislatures about which harms, values and norms the law will uphold. Such judgments inevitably rely on the meanings attached by specific cultures. Parts IV and V look at two such justification defenses: the defense of habitation and the defense against forcible rape.

III. REJECTION OF THE RULE OF RETREAT

In early 2005, Florida garnered national attention when its legislature passed a law extending the types of places where one can use deadly physical force against an attacker without requiring any safe retreat alternatives. Prior to the extension, one could use deadly force in Florida without considering retreat options only if one was at home or in one’s car. In other words, under Florida’s old self-defense laws, if one was elsewhere, such as at school or at a park, one would have had to consider and take advantage of any non-deadly safe retreat options prior to using deadly force. The new statute eliminated this obligation to consider retreat for anyone “who is not engaged in an unlawful activity and who is attacked in any other place where . . . [one] . . . has a right to be.” This incredibly broad language was designed so that in Florida, the rule of retreat no longer exists in places such as streets, places of business, in bars or at stadiums.

61. See Post, supra note 5, at 493 n.39. “The problem is to differentiate between those values which are necessary for cohesion and those which may be adjusted to allow for diversity.” Id. (quoting The Law Reform Commission of Australia, Report No. 57: Multiculturalism and the Law 9-11 (1992)).
63. Id.
65. See Royse, supra note 62, at R1.
Although the rule of retreat continues to be controversial, it has been a component of the penal law for centuries. Historian Richard Maxwell Brown writes that the origins of the rule date back to thirteenth century English common law. At that time, because the Crown wanted to maintain a tight monopoly on conflict resolution, courts crafted legal doctrines that would minimize self-resolution by private individuals. In the area of self-defense, the doctrine that sought to reign in the exercise of self-defense was referred to as *retreat to the wall.* This predecessor to the modern rule of retreat held that "it was necessary to retreat 'to the wall' at one's back before one could legitimately kill in self-defense.”

Contemporary statements of the rule of retreat no longer incorporate references to the *wall.* Instead, they use broad language to capture the spirit of the English doctrine. For example, the New York law on deadly self-defense states that one “may not use deadly physical force if . . . [one] . . . knows that with complete personal safety, to oneself and others . . . [one] . . . may avoid the necessity of so doing by retreating.” The broad language allows the self-defense law to adapt to whatever factual circumstances may arise in actual cases.

The obligation to retreat whenever one has an available safe option can have troubling consequences. Consider the scenario that casebook author

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68. *Id.* at 4.

69. *Id.*

70. *Id.* In his book, Brown provides a full dramatic illustration of the rule:

Should your opponent threaten you, you must not defend yourself with violence until you have attempted to get away — to flee from the scene altogether. If you are unable to leave the scene, you may not stand your ground and kill in self-defense. Instead you must retreat as far as possible from your enemy: to the wall at your back. Then, and only then — with the wall at your back and all retreat cut off — may you legally face your opponent and kill him in self-defense.

*Id.*

and noted criminal law scholar, Joshua Dressler, presents to first year law students:

Dina ordinarily walks along a particular street in a residential area as part of her daily exercise regimen. One day Arthur, the resident bully, informs her that if she comes that way again he will kill her. Dina could just as conveniently walk along another street, but believing that "I have every right to walk where I choose," she decides the next day to arm herself with a licensed gun and walk along the now forbidden route with her weapon visible to onlookers. Arthur appears and comes toward her menacingly. Dina shoots and kills him. 72

Under New York law, Dina would not meet the requirements of the right to use deadly self-defense because she chose to ignore at least two completely safe alternatives. 73 Dina could have called the police or walked on another street. Of course, Dina does not have to call the police or walk on another street whenever a neighborhood bully threatens her. However, if Dina contemplates assaulting or even killing Arthur, the rule of retreat in New York imposes the legal obligation to use completely safe options before resorting to deadly force. Failure to follow this obligation is a failure to satisfy a required circumstance for the use of deadly self-defense such that Dina is now guilty of criminal homicide as opposed to merely exercising the lawful right to defend her life.

What disturbs many first year law students is that until the killing, Dina was both legally and morally right while Arthur was legally and morally wrong. Dina had the lawful right to walk on that public street and was even licensed to carry a loaded handgun. Arthur, on the other hand, initiated their violent confrontations by threatening Dina in the first place. However, as I point out to frustrated students, the rule of retreat is not about moral right and wrong; rather, it is entirely about necessity. Its sole function is to serve as a limit on a justification defense. Thus, the rule of retreat is best understood as yet another judgment of when it is legally justified in the balancing of harms to take the life of another human being. The rule of retreat responds that the taking of a life is justified only when there are no other alternatives.

This description of the history of the rule of retreat from its origins to its current form has thus far referred only to an absolute version of the rule of retreat. However, many American states either modify the rule or reject

73. See N.Y. Penal Law § 35.15(2) (McKinney 2005).
it outright. The most common modification of the rule of retreat is to apply it only to the use of deadly physical force in self-defense. Thus, in these states, the rule does not apply to the use of non-deadly physical force.\footnote{Compare N.Y. PENAL LAW § 35.15(1) (noting the absence of a rule of retreat from non-deadly self-defense), with § 35.15(2) (applying the rule of retreat to deadly self-defense).} Indeed, only a handful of states apply the rule of retreat in both deadly and non-deadly situations.\footnote{ROBINSON, supra note 46, § 131(d)(3), at 85.} A second common limitation on the rule of retreat is that it does not apply to the use of deadly physical force at home.\footnote{See, e.g., N.Y. PENAL LAW § 35.15(2)(a)(I) (McKinney 2005) (combining both the castle doctrine and the prohibition against initial aggressors using self-defense).} This limitation is popularly known as the "castle doctrine."\footnote{The castle doctrine onto itself, as an exception to the rule of retreat, has been the subject of much scholarly attention, especially in the context of cohabitants physically attacking one another. See, e.g., Catherine L. Carpenter, Of the Enemy Within, The Castle Doctrine, and Self-Defense, 86 MARQ. L. REV. 653 (2003); Steven P. Aggergaard, Retreat from Reason: How Minnesota's New No-Retreat Rule Confuses the Law and Cries for Alteration, State v. Glowacki, 29 WM. MITCHELL L. REV. 657 (2002).} In addition to these two limitations on the rule of retreat, there are numerous others.\footnote{For example, in the American Law Report entitled Homicide: Duty to Retreat When Not on One's Own Premises, the author categorizes those jurisdictions that eliminate the rule of retreat when one faces a felonious assault that will produce imminent peril or death or great bodily harm. See L.W.B., Annotation, Homicide: Duty to Retreat When Not On One's Own Premises, 18 A.L.R. FED. 1279 (2004) (Section VI. Prevention of Collateral Offense).}

In contrast to these states that impose the rule of retreat only to carve out exceptions to it, the majority of American states simply reject the rule of retreat in its entirety.\footnote{Although there does not seem to be a recent definitive count, many scholars and courts have found that the majority of states reject the rule of retreat. See, e.g., Paul Finkelman, Exploring Southern Legal History, 64 N.C. L. REV. 77, 105 (1985); 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4(f), at 155 (2d ed. 2003); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.03(C)(1), at 203-04 (2d ed. 1995).} In these states, a person "need not retreat, even though he can do so safely, before using deadly force upon an assailant whom he reasonably believes will kill him or do him serious bodily harm."\footnote{See LAFAVE, supra note 79, § 10.4(f), at 155.} The rejection of the rule of retreat by American states is an important development in American criminal law.\footnote{See BROWN, supra note 67, at 5 ("[O]ne of the most important transformations in American legal and social history occurred in the nineteenth century when the nation as a whole repudiated the English common-law tradition in favor of the American theme of no duty to retreat.").} At a minimum, it is noteworthy simply because its rejection conflicts directly with the longstanding tradition of retreat to the wall in English common law. What is the explanation for the rejection? The explanation is cultural and lies in
the dominant culture of the United States or at least in the dominant cultures of particular regions of the United States.

Richard Brown observes that American states first began to reject the rule of retreat in the nineteenth century when their criminal laws were still based on the common law and were determined by state judges. Reflective of their times, these judges viewed the rule of retreat as an affront to the values of masculinity and bravery necessary for a frontier nation. Numerous examples of the language used in their opinions substantiate their perception of the rule of retreat as a rule of cowardice as opposed to bravery, honor, and true masculinity. These latter values would be reflected in the rejection of such a rule. For instance, one Ohio court wrote about how a "true man" was "not obliged to fly" from his assailant while an Indiana court echoed this refrain by stating that "the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed." Inspired by the frontier culture, this new doctrine of "standing your ground" swiftly replaced the rule of retreat.

Richard Brown attributes this remarkable legal transformation to the mighty appeal of the frontier culture that existed at this point in American history. This culture was so powerful that courts began to invoke human nature, individual liberties and even divine law to defend the right to use deadly self-defense, even when safe retreat was possible. Indeed, by 1921, even the U.S. Supreme Court endorsed the cultural values of standing your ground and true masculinity when Justice Oliver Wendell Holmes eloquently wrote: "Detached reflection cannot be demanded in the

82. See id. at 15-16. Brown devotes much of his book to the personal backgrounds and lives of the individual judges who penned the groundbreaking opinions that rejected the rule of retreat. Brown believes that their values and life experiences were crucial to this rejection. See, e.g., id. at 14-17 (providing a brief biography of Judge William E. Niblack of the Indiana Supreme Court who authored the influential and oft-cited opinion in Runyan v. State, 57 Ind. 80 (1877)).

83. See id. at 17. See also CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 77-78 (1989).

84. See BROWN, supra note 67, at 9-10 (citing Erwin v. State, 29 Ohio St. 186 (1876)).

85. Id. at 17 (citing Runyan v. State, 57 Ind. 80 (1877)). Interestingly, this sentiment of standing your ground is similar to the moral instincts of the first year law students when analyzing the Dina and Arthur problem. See supra notes 69-78 and accompanying text.

86. BROWN, supra note 67, at 8. Brown wrote "following the westward movement of settlers from the Appalachians to the Pacific Coast, state after state saw its highest court repudiate the duty to retreat in favor of the doctrine of standing one's ground." Id.

87. Id. ch.1 passim. Brown argues in the remainder of the book that nineteenth century cultural tolerance for standing your ground by killing has contributed to the high homicide rates in the United States and to the aggression of American foreign policy in modern times. See generally id.
presence of an uplifted knife." As Richard Brown states, the rejection of the rule of retreat was not merely a matter of evolving common law, but even more importantly it was "a deeply felt philosophy of behavior with the authority of a moral value — one that . . . grew out of American conditions and lodged in the American mind." Paul Finkelman offers a different explanation for the rejection of the rule of retreat, but it is still one linked to the dominant culture in American history. Instead of focusing on the Western frontiers, Finkelman writes authoritatively about the South's "prevalence and acceptance of violence as a means of conflict resolution" and its influence on state laws. It is "[t]he South's historic subculture of violence and community tolerance of killing in personal disputes" that discourages the prosecution of killers, and ultimately leads to a rejection of the rule of retreat.

Although both Brown and Finkelman concentrate on earlier periods in American history in their analyses of the rule of retreat, the rule has been a recent topic of debate and will continue to be for the near future. Its enduring controversy perhaps speaks both to the importance of the rule of retreat as a restriction on the right of self-defense in the criminal law and to its cultural salience. The question of whether and when a state will require retreat before the use of deadly force involves complex judgments about the competing values of human life, of standing your ground, and of individual versus state resolution of conflict between citizens. Choosing

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88. See Brown v. United States, 256 U.S. 335, 343 (1921).
89. BROWN, supra note 67, at 36.
90. A third explanation is the rise of guns as the weapon of choice in violent conflicts between individuals. In 1905, a Minnesota judge in 1905 criticized the rule of retreat as an ill-suited remnant from medieval times that no longer made sense in the wild, frontier world of rifles and firearms. Id. at 17-20 (describing the opinion in State v. Gardner, 104 N.W. 971 (Minn. 1905)).
92. Id. at 104 (quoting Richard M. Brown, Southern Violence — Regional Problem or National Nemesis?: Legal Attitudes Toward Southern Homicide in Historical Perspective, 32 VAND. L. REV. 225, 231 (1979)).
93. See id. at 105 (noting that a majority of states have adopted the "stand-one’s-ground" doctrine).
94. Since Florida's enactment, twelve more states have rejected or limited their rules of retreat. See Tresa Baldas, 'Shoot First' Laws Hit Courtrooms, NAT'L L.J., July 3, 2006, at 1.
95. Members of the National Rifle Association (NRA) sponsored the recently enacted statute in Florida discussed earlier. Andrew Metz, NRA Targets New York, Other States with 'Stand Your Ground.' Bill, NEWSDAY, Apr. 28, 2005, available at 2005 WLNR 6630917. The NRA has vowed to push for even more states to reject or further limit the rule of retreat. "We will go everywhere, red states and blue states, including New York." Id. (quoting the NRA's executive vice president, Wayne LaPierre).
or balancing amongst these values necessarily implicates the meanings that are attached by culture to things. What does it mean to take a life? What does it mean to use violence? Every culture answers such questions uniquely. Thus, in the United States, where many decision-makers are from the dominant culture, the rejection of the rule of retreat is a mirror reflection of the distinct Anglo-American value of standing your ground.

IV. DEFENSE OF HABITATION

In the search for more instances of the dominant culture in criminal law, Part IV turns from self-defense to the defense of habitation. To begin, defense of habitation is a wholly independent justification defense distinct from self-defense. Self-defense creates the right to kill another person who is threatening your life. You can exercise self-defense wherever you are, even if you happen to be in your own home. Defense of habitation, on the other hand, extends the right to kill another person who is threatening your home. In some jurisdictions, you can kill this person even if the person is only threatening your home and not threatening your life. It is critical to understand that the defense of habitation adds the right to respond with deadly force to a threat to your home that does not include a threat to your life. In other words, if the threat was to your home and to your life, the threat to your life would enable you to rely on self-defense to justify your act of killing. It is when the threat to life is missing and all that exists is the threat to your home that you would have to rely on the defense of habitation, and not self-defense, for a justification defense. In this important sense, the defense of habitation goes beyond mere self-defense.

When then should the criminal law allow the deadly defense of habitation? What circumstances must exist before a defendant should be able to claim the defense as justification for a killing? These questions invoke the same process of balancing harms that lies behind self-defense. What harms are greater than the life of an intruder so that the avoidance of such harms is justified in taking that intruder’s life? The rationales of

96. See supra notes 35-40 and accompanying text.
97. In some jurisdictions, defense of habitation is also separate and distinct from defense of premises and defense of personal property. Compare N.Y. PENAL LAW § 35.20 (1) & (2) (McKinney 2005) (defense of premises), with § 35.20(3) (defense of habitation), and with § 35.25 (defense of personal property).
98. See, e.g., N.Y. PENAL LAW § 35.20(3) (McKinney 2005).
99. Like self-defense and all justification defenses, defense of habitation is also based upon the principle of necessity. See WAYNE R. LAFAVE, CRIMINAL LAW § 10.6, at 553 (4th ed. 2003).
the defense of habitation are less obvious than those of self-defense;\textsuperscript{100} nonetheless, I include this defense in this Essay because it is an important product of culture.\textsuperscript{101} Let us turn to the historical evolution of the defense and describe the two main competing versions.

Not surprisingly, the origin of the defense of habitation lies in English common law. Early versions of the defense allowed a defendant to kill another person simply to prevent forcible entry into the defendant’s home.\textsuperscript{102} The defendant did not have to believe the intruder intended to commit an offense or that the intruder threatened the defendant’s life. This original English common law version expressed the judgment that when weighing an intruder’s life against the integrity of the defendant’s home, sacrificing the life of the intruder was a justified choice. The law preserved the integrity of a home by successfully avoiding forcible entry and instead causing the lesser harm of death. I refer to this original version as the broad version of the defense of habitation because it allows the killing of another human being to avoid a broad set of harms.

New York’s defense of habitation is an example of the broad version. In New York,

\[
\text{[a] person in possession or control of... a dwelling... who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling... may use deadly physical force upon such other person when he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary.}\textsuperscript{103}
\]


\textsuperscript{101} Id. at 979. “[There is] a universal judgment that certain interests are so important to the human quality of life that life without them does not deserve the designation ‘human.’... The identity of those interests is a matter of social judgment within each culture, subject to change as cultural values change.” \textit{Id.}

\textsuperscript{102} In addition, the defense of property only applied if the defendant first warned the intruder not to enter and the intruder failed to heed the warnings. \textit{See} LaFave, \textit{supra} note 99, § 10.6(b), at 555.

\textsuperscript{103} N.Y. Penal Law § 35.20(3) (McKinney 2005).
New York requires a reasonable belief that an intruder is committing or trying to commit a burglary. The most minor form of burglary in New York occurs when a person "knowingly enters or remains unlawfully in a building with intent to commit a crime therein."\textsuperscript{104} The burglary law does not specify what acts qualify as a crime. In its general definitional section, New York defines a crime as "a misdemeanor or a felony."\textsuperscript{105} Using this definition you can kill a person in New York who is entering your apartment with the intent to steal a comic book, even though the theft of this item is only a simple petit larceny. Such theft is included in New York’s broad set of harms.

Not every state has kept a broad version of the defense; indeed, the defense of habitation has evolved. Many modern jurisdictions, including Great Britain,\textsuperscript{106} have narrowed the defense such that the law only permits deadly force in defense of habitation when there is also a concomitant threat to life.\textsuperscript{107} In this narrow version, a defendant who is at home can only kill the intruder if his life or the lives of others in the home are also in danger from the intruder.\textsuperscript{108} If an intruder does not endanger a life, the defendant cannot lawfully kill under defense of habitation, even if the intruder still threatens the integrity of the home. Essentially, this narrow version reduces the defense of habitation to a homebound version of deadly self-defense.\textsuperscript{109} In other words, the only thing that separates deadly

\begin{itemize}
  \item \textsuperscript{104} N.Y. PENAL LAW § 140.20 (McKinney 2005).
  \item \textsuperscript{105} N.Y. PENAL LAW § 10.00(6) (McKinney 2005).
  \item \textsuperscript{107} See 40 AM. JUR. 2D Homicide § 173 (2005) (stating that the courts of many American states have ruled against the broad version of defense of habitation). See also ROBINSON, supra note 46, § 134, at 106-07 nn.3-4 (listing approximately fifteen American states, including New York, that have adopted a narrow version).
  \item \textsuperscript{108} "The theory of using deadly force to protect one’s dwelling is not for the protection of the physical dwelling itself; rather, it is for the protection of the individuals therein." 40 AM. JUR. 2D Homicide § 173 (2005).
  \item \textsuperscript{109} Robinson even suggests that in these jurisdictions, the narrow defense of habitation is redundant. There is no need for the delineation of a defense of habitation because the deadly self-defense statutes in the same jurisdictions would sufficiently cover all life-threatening situations that occur within the home and outside the home. See ROBINSON, supra note 46, § 135, at 111.
\end{itemize}
self-defense from the narrow defense of habitation is that under the latter defense, the killing has to occur within the confines of the defendant’s home.

There are clear differences between the broad version and this narrow version. In the balancing of harms inherent to justification defenses, the two versions express very different conclusions. The narrow version of the defense rejects the judgment of the broad version that the integrity of a home can outweigh a human life; instead, the narrow version accepts as justified only those killings that save the lives of those within the home.

What then is the explanation for the balancing of harms in the broad version of the defense? An appealing explanation must exist because the broad version is still the law in a significant number of states. Some states had never changed from the broad version, and still others have recently reverted back to the broad version. For example, since 1963, a

110. There are not necessarily two versions of the defense of habitation. Green uses four categories in his article: (1) Shoot the Trespassing Intruder; (2) Shoot the Felonious Intruder; (3) Shoot the Violent or Forcible Intruder; and (4) Shoot the Dispossessor. See Green, supra note 53, at 11-18. For purposes of our discussion, I am contrasting (1) and (3).

111. Interestingly, in the narrow model, the number of lives saved does not have to be larger than the number of lives taken. Even if the lives of three intruders are taken to save the life of one homeowner, the narrow version of the defense of habitation deems such an act justified. This may seem wrong, especially in a numerical sense. How can the preservation of one life outweigh the intentional elimination of three lives? The absence of a requirement to achieve a numerical gain in lives is nothing new. Many scholars have offered theories to explain it, but usually in the context of deadly self-defense. See Dressler, supra note 79, § 18.05, at 208-11. In deadly self-defense too, it is also the case that taking the lives of three attackers is justified to save the life of one defendant. The most persuasive theory is that the justification does not depend on the number of lives but instead rests upon the relative strength of the moral claim. In both the narrow defense of habitation and in deadly self-defense, the life of the innocent is regarded as a higher value than the life of wrongdoer, that perpetrator is an intruder or an attacker. See id. § 18.05[B], at 208-10. Thus, it is not a simplistic numerical balancing, but also a consideration of the moral values of lives too.

112. Green further dissects the broad version into three similar categories (“Shoot the Trespasser,” “Shoot the Felonious Intruder,” and “Shoot the Dispossessor”) and lists Maine, Pennsylvania, Louisiana, New York, Alaska, and Texas among others. See Green, supra note 53, at 12-18 nn.45, 60, & 70.

113. The title of Green’s 1999 article explains the political inspiration for the recent resurgence of the broad defense of habitation: Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwelling and Vehicles. See Green, supra note 53, at 1. In reaction to a perceived rash of crime in the 1990s, there was a proliferation of “Shoot the Burglar,” “Make My Day,” and “Shoot the Carjacker” statutes. See id.; see also Stephanie Grace, Carjacker Law Debated as Too Much, Too Little, NEW ORLEANS TIMES PICAYUNE, Nov. 8, 1997, at A1; Rick Bragg, In Louisiana, Just Assume It’s a Gun in Their Pockets, NY TIMES, Aug. 31, 1997, § 4 (Magazine), at 5. Even the British are considering a return to the broad version due to a recent spate of homeowners getting convicted for killing burglars and serving significant jail time. See Shot Burglar Case Sparks Debate, BBC NEWS, Oct. 26, 2004 (UK ed.), available at
homicide in New Mexico is justifiable "when committed in the necessary
defense . . . of his property." 114 In Louisiana, a homicide is justifiable
[w]hen committed by a person lawfully inside a dwelling . . .
against a person who is attempting to make an unlawful entry into
the dwelling . . . or who has made an unlawful entry into the
dwelling . . . and the person committing the homicide reasonably
believes that the use of deadly force is necessary to prevent the
entry or to compel the intruder to leave. 115

These statutes clearly state that a homeowner can kill a potential intruder
even if the intruder only poses a threat to the home and not to anyone’s
life. What is the moral reasoning of such a doctrine? How can the integrity
of a home outweigh the life of a human being?

The answer is complex. Stuart Green offers several theories to defend
the broad version of the defense of habitation. 116 In the end, he concludes
that the broad version follows the usual rule of proportionality in
justification defenses.117 These theories are of particular importance to our
discussion because they implicate the dominant culture. The first is that
the ownership of real property, in and of itself, is a value that should be
protected, even at the cost of death. The value is particularly high when the
real property is a dwelling. 118 An example of a statute that exemplifies this
theory is in the Model Penal Code. According to the Model Penal Code,
the use of deadly force may be justified if “the actor believes that the
person against whom the force is used is attempting to dispossess him of
his dwelling otherwise than under a claim of right to its possession.” 119

http://news.bbc.co.uk/1/hi/england/derbyshire/3954033.stm (last viewed on Jan. 27, 2006); Carl
(last viewed on Jan. 27, 2006).

114. See N.M. STAT. ANN. § 30-2-7(a) (West 2005) (latest version of defense of habitation
statute enacted in 1963).

115. LA. REV. STAT. ANN. § 20(4)(a) (West 2005) (deleting references to place of business and
motor vehicle).

116. See generally Green, supra note 53. Green concluded his article by stating that not any
one theory was enough to support the doctrine but conceded that an aggregation of the theories
might be sufficient. See id. at 39-40 (“Even if. . . none of these rationales is sufficient by itself to
justify such a privilege . . ., it might still be argued that some aggregation of these rationales would
be sufficient to support the privilege.”).

117. See id. at 25.

118. See id. at 34 (claiming as an argument for lethal force in defense at the home “such a
valuable and significant possession that one should be able to kill, if necessary, to preserve it”).

Critical to this theory is the requirement that the defendant possess some kind of ownership or quasi-ownership interest in the premises. What exactly is meant by ownership in this context? Some courts have confronted this very question and have either strictly required actual ownership by the defendant or broadly extended the defense even to guests and household employees, so long as the defendant had a greater property claim than the dead intruder. In \textit{State v. Warren}, where a defendant stabbed and killed his roommate, the Supreme Court of New Hampshire affirmed the trial court's rejection of the defense request for jury instructions on the defense of habitation, because the defense requires the superiority of a defendant's property interest over that of the intruder. In \textit{Warren}, the Court explained:

this “defense of dwelling” exception to the general rule that the force used in response to a threat should be proportionate is based upon the defender’s interest in the premises and the assailant’s status as an intruder. Because “implicit in the defense of dwelling defense is the notion that the dwelling is being defended against an intruder,” . . . the exception does not apply where the assailant is a cohabitant.

If the defense of habitation is exclusively about the protection of property rights, then as Stuart Green points out, you can assert the privilege even if you were not actually occupying the home at the time of the intrusion. To the contrary, however, most states outlaw the use of mechanical devices such as spring guns to protect property. Many states point to the lack of human discretion as the reason for their exclusion of spring guns as legitimate defense of habitation. The ban on spring guns indicates that the preservation of property rights is not a complete rationale for the broad defense of habitation.

Stuart Green offers a second theory, which states that the defense of habitation is a “Defense of Dignity, Privacy and Honor.” This theory

\begin{enumerate}
\item[120.] See Green, supra note 53, at 33.
\item[121.] Id. at 32-33.
\item[122.] 794 A.2d 790 (N.H. 2002).
\item[123.] See id. at 793.
\item[124.] Id. at 793 (citing State v. Hare, 575 N.W.2d 828, 832 (Minn. 1998)).
\item[125.] See Green, supra note 53, at 33.
\item[126.] See, e.g., Falco v. State, 407 So.2d 203, 208 (Fla. 1981) (“[T]he use of such a device is fundamentally unnecessary and unjustifiable.”).
\item[127.] See, e.g., id.; ROBINSON, supra note 46, § 134 n.8, at 108.
\item[128.] Green, supra note 53, at 35.
\end{enumerate}
posits that the "violation of dignity that occurs when an intruder wrongfully enters a person's dwelling . . . is so great that the use of deadly force in response . . . [is] both proportional and justified." The value that is being protected in this theory is "the protection of the law abiding citizen's feelings of honour and self respect." Adding to these already powerful emotions of dignity and respect are the expectations of privacy that are attached to the home.

The home is also a source of privacy where the most intimate activities in life are conducted, and from which people seek to exclude the prying eyes and ears of strangers and of the government. . . . When a wrongdoer seeks to enter a person's dwelling, therefore, more than property is invaded. . . . [A] person's primary source of . . . private habitation has been jeopardized.

One final theory to explain the balance of harm in favor of a dwelling in the broad version of the defense lies not in the privacy, dignity, and honor that a home represents, but rather in the physical safety that it provides. In other words, the home is "something peculiarly sacred because of the function it fulfills." This concept of the home as a place of safety and shelter reaches as far back as 1640. A legal treatise from that time states that "a man's house is his castle for safety and repose to himself and family." Wayne LaFave explains that the early English version of the defense was "based upon the English notion that defense of the home that sheltered life was just as important as defense of life itself." Lord Coke, in his famous Commentaries asks rhetorically, "A man's house is his castle — for where shall a man be safe if it be not in his house?" Because the home has the important function of providing safe haven to its owner, this third theory explains that an owner is entitled to protect that safety to the utmost. As the Supreme Court of Illinois held in 1950:

129. Id. at 36.
130. Casey, supra note 106, at 195-98.
131. DRESSLER, supra note 79, § 20.03[A], at 238-39.
132. Green, supra note 53, at 32 (citing the commentary to MODEL PENAL CODE § 3.06).
133. State v. Patterson, 1873 WL 4082, at *8 (Vt. 1873) (quoting Foster's Crown Law § 319).
134. LAFAVE, supra note 99, § 10.6(b), at 555.
We think it may be safely laid down to be the law of this State that a man's habitation is one place where he may rest secure in the knowledge that he will not be disturbed by persons, coming within, without proper invitation or warrant, and that he may use all of the force apparently necessary to repel any invasion of his home.\textsuperscript{136}

Indirectly, this third rationale of the defense of habitation could be viewed as a more subtle restatement of the life outweighing death rationale of self-defense. The protection of a place that provides physical safety is only one step removed from the protection of human life itself. However, I think that this view is too limiting. This third theory is more than that. It recognizes that because of the safety that a home provides, the home itself has become independently valuable. Under the broad defense of habitation, the value is independent of physical safety because you can kill an intruder, even if your life is not at stake at that moment, so long as the integrity of the place that has always provided you safety is jeopardized.

These three theories are attempts to explain the morality of the choice to uphold property over life in the broad version of the defense of habitation. They are also evidence of the dominant culture in the criminal law.\textsuperscript{137} Essential to the logic of their explanations are the values and meanings attached to real property, to property rights, to privacy, to dignity and honor, and finally, to life. What supplies the values and meanings, of course, is the dominant culture of the legal decision-makers.

The obvious culture supplying the values underlying these three theories is the Anglo-American culture. For example, in the first theory on the protection of property rights, the belief in the importance of individuals exerting rights over property, particularly real property, and the state protecting such rights, is fundamental to Anglo-Saxon concepts inherited by the United States.\textsuperscript{138} These beliefs or values are not shared by every

\textsuperscript{136} \textit{Id.}  
\textsuperscript{137} In protesting the broadness of the Model Penal Code's version of defense of habitation, Herbert Wechsler recognized the morality at stake when he failed to convince others of his protests. In admitting the futility of his objections, he stated in frustration that:

the deliberate sacrifice of life merely for the protection of property ought not to be sanctioned by law. And I suppose that this is the kind of proposition that cannot be demonstrated, that involves in the end one's convictions. And one either holds convictions or one does not.

\textsuperscript{138} "Anglo-American legal relationships are, almost without exception, characterized by individual property rights. Indeed, private property is the cornerstone of the Western social order."
culture. For instance, Native American studies reveals that many Native American tribes were nomadic and/or communal societies and hence, did not believe in the individual ownership of real property. \(^{139}\) Certainly, in a legal regime built around Native American cultural values, there would not be a broad defense of habitation that confers a lawful right to kill in order to protect a home.

The second theory about dignity and honor also has roots in Anglo-American culture. Joseph Beale noted the range of triggers that lead to the same or similar emotions.

The feeling at the bottom of the argument [dishonor] is one beyond all law; it is the feeling which is responsible for the duel, for war . . . ; the feeling which leads a jury to acquit the slayer of his wife’s paramour; the feeling which would compel a true man to kill the ravisher of his daughter. \(^{140}\)

Because culture assigns meaning to events and often inspires social action, \(^{141}\) culture is responsible for what triggers the loss of honor and dignity. Although the loss of dignity and honor are emotions that are universally felt, what triggers these emotions will vary from one culture to the next. The broad defense of habitation rests upon the invasion of the home as a trigger and lawfully condones the act of killing upon the loss of honor and dignity. Only a culture that revolves around individual property rights and, in particular, reveres the family home, would allow such a trigger to be the basis of a lawful justification defense. Anglo-American culture is such a culture.


To the Indian, land was not susceptible of individualistic sale and transfer. Techuseh, the Shawnee, said, “Sell a country! Why not sell the air, the clouds, the great sea as well as the land?” Land was an integral, inseparable part of nature that sustained the beings that lived upon it.


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140. Joseph H. Beale, Jr., *Retreat from Murderous Assault*, 16 Harv. L. Rev. 567, 581 (1903) (dismissing honor as a sufficient reason to reject the rule of retreat in deadly self-defense).

141. See Torres, *supra* note 35.
Similar to the second theory, the third theory is also a reflection of the dominant culture because it relies on the romanticized cultural construct of the home. The Anglo-American culture attaches such great meaning to the home such that the integrity of the home is protected in a justification defense, wholly separate and independent from the life of the homeowner.

Whether the first, second, or third theory better explains a broad defense of habitation is not particularly important; instead, the significance lies in that all three theories reflect the values and traits of Anglo-American culture. The continuing presence of the broad defense of habitation in the United States strongly demonstrates the continuing influence of Anglo-American culture in our criminal laws.

V. DEFENSE AGAINST FORCIBLE RAPE

The third example of a justification defense that reflects the values and moral norms of the Anglo-American culture is the right to use deadly physical force against an imminent, forcible rape. States have taken different approaches to the formulation of this justification defense. Some states use a general statement that deadly force can be used to prevent the commission of a felony\(^1\) or a forcible felony,\(^2\) and include rape within their formal definitions of felony or forcible felony.\(^3\) Approximately ten states specify rape as one of several violent felonies in a list of instances where deadly force is justified.\(^4\) For example, New York has a deadly justification defense for forcible rape, forcible sodomy, kidnapping, or robbery.\(^5\)

\(^{142}\) See, e.g., CAL. PENAL CODE § 197(1) (West 2005) (providing that homicide is justifiable when committed by a person resisting an attempt to commit a felony); California defines a felony as any crime punishable by death or imprisonment in state prison. Id. § 17(a).

\(^{143}\) See, e.g., 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2005) (stating that a person is justified in using deadly force if such force is used to prevent a forcible felony).

\(^{144}\) See, e.g., CAL. PENAL CODE § 264(a) (West 2005) (stating that rape is punishable by imprisonment in state prison); 720 ILL. COMP. STAT. ANN. 5/2-8 (West 2005) (categorizing rape as a forcible felony).

\(^{145}\) See ALA. CODE § 13A-3-23(a)(3) (2005); COLO. REV. STAT. § 18-1-704(2)(c) (2005); DEL. CODE ANN. tit. 11 § 464(c) (2005); HAW. REV. STAT. § 703-304(2) (2004); MO. ANN. STAT. § 563.031(2) (West 2005); NEB. REV. STAT. § 28-1409(4) (2005); N.H. REV. STAT. ANN. § 627:4(II)(c) (2005); 18 PA. CONS. STAT. ANN. § 505(b)(2) (West 2005); TEX. PENAL CODE ANN. § 9.32(a)(3)(B) (Vernon 2005). The Model Penal Code uses a third approach, which is to list non-consensual sexual intercourse as one of several harms which can be prevented by deadly force. MODEL PENAL CODE § 3.04(2)(b)(1) (2004).

\(^{146}\) N.Y. PENAL LAW § 35.15(2)(b) (McKinney 2005).
Notwithstanding which approach is used, all these defenses operate independently of self-defense. As with the defense of habitation, the defense against forcible rape does not require any threat to the life of the defendant. In fact, given recent minimization of the amount of force necessary for a forcible rape, a threat of physical injury may not even be required.

Consider the following scenario: Eric is in the midst of having non-consensual sexual intercourse with Marilyn, and the only force he is using is the pinning of her shoulders. Assume Marilyn’s lack of consent has been clearly communicated and will be sufficiently proven in court. Under these circumstances, the defense against forcible rape entitles Marilyn to lawfully kill Eric. Certainly, if Eric becomes more violent, such that there is a threat of serious physical injury or death to Marilyn, she would still be entitled to kill Eric. The only change is that she would now be able to claim deadly self-defense instead of or in addition to defense against forcible rape.

This scenario demonstrates how the defense against forcible rape, like the defense of habitation, is independent of self-defense. Defense against forcible rape is not concerned with the prevention of death or even physical injury, “because rape itself does not necessarily threaten life.” What then is the concern of the defense against forcible rape? The defense represents that in the balancing of harms, it is less harmful to take the life of a would-be rapist than it is to suffer a forcible rape. The harm of a rape is treated as more grave than the harm of death.

To gain insight into the harm analysis behind the defense against forcible rape, the historical origins are once again useful. The right of a woman to kill her almost-rapist is a right that has historically been recognized in Anglo-American law. It grew out of the general defense of deadly force to prevent a felony that long existed in English common law. What is not clear, though, when the specific offense of rape and its

147. LAFAVE, supra note 99, at 555 (illustrating that deadly force is permitted even when the crime does not threaten death or serious bodily harm). This justification defense is entirely independent of self-defense. See People v. Coleman, 504 N.Y.S.2d 949, 950 (N.Y. App. Div. 1986); People v. Wang, 625 N.Y.S.2d 413, 415 (N.Y. Sup. Ct. 1995).
148. LAFAVE, supra note 99, § 17.3.
149. Fabricant, supra note 100, at 951.
150. See Sanford H. Kadish, Respect for Life and Regard for Rights in the Criminal Law, 64 CAL. L. REV. 871, 887-88 (1976) ("[I]n cases of killing to prevent crimes like kidnapping and rape ... one may plausibly argue that the interests protected are comparable to that of the victim’s life.").
151. Fabricant, supra note 100, at 946-47.
152. See LAFAVE, supra note 99, § 10.7(c).
prevention were identified in the language of the law. In New York’s Penal Code of 1881, the statutory sections on self-defense spoke generally in terms of avoiding a threat “to commit a felony,” “to do some great personal injury,” or “to prevent an offense against his person.” By the time the modern statutory effort was undertaken in 1965, however, forcible rape appeared along with other specific felonies.

Despite its gradual evolution, the defense against forcible rape has not drawn much attention in appellate opinions or in scholarly commentary. Indeed, there is very little exploration of its theoretical or moral rationale. In her 1981 article, Judith Fabricant endeavors to spur the discussion. She focuses on the permanency and irreparability of the harms that a forcible rape causes its victims. Because these harms are not reparable, “no subsequent action [by the state] can fully repair the harm” and “only prevention can adequately protect the citizen whose interests are threatened.” Thus, because prevention of the rape can only be achieved in certain cases by killing the would-be rapist, there arises a need for a doctrine like defense against forcible rape.

What interests are being harmed beyond repair? Fabricant offers two accounts. The first sheds light on the historical rise of the defense, while the second seeks to understand its continued existence. In the first account, she looks to the early common law on rape and describes two interests that are being harmed. The first is the chastity of the female victim. Chastity was essential to the social stature of women, translating into “premarital abstinence and marital fidelity.” Once lost, chastity can never be regained or repaired. Thus, for the victim, the loss of chastity was a permanent and irreparable harm.

The second, equally important interest is the honor of the female victim’s father or husband. Women
were generally regarded as property that transferred from the ownership of their fathers to their husbands. If a man raped a woman, then the father and husband regarded the rape as an affront. Likewise, this loss of control and of honor, once corrupted by a rapist, could never be erased. The powerful confluence of both these interests gave rise to the defense against forcible rape. "The interests of both sexes in the chastity of women have held a place of such importance that their deprivation has been viewed as so irreparable as to warrant prevention by homicide."[164]

Due to the feminist movement and the sexual revolution, chastity is no longer a social commodity and women are no longer the property of men.[165] Fabricant recognizes this change in society and provides a second account to explain the continued vitality of the defense against forcible rape. This defense is still relevant today because rape causes permanent and irreparable harm, though the interests being harmed have changed. Today, rape is regarded as an invasion of the body as well as "a deprivation of the victim’s right of choice over her sexual activity."[166] The deprivation of autonomy can lead to "irreparable damage to [a victim’s] ... status as a full-fledged human being, in control of herself, her body and her sexuality."[167] "[T]he rape victim is deprived of her personhood."[168]

Interests such as chastity, male honor, personhood, and autonomy, rely on culture to give them meaning and to provide a reason to value them so much that the prevention of their harm justifies an intentional killing. Anglo-American culture supplies these meanings and values. Defining the loss of chastity of one’s daughter or wife as a property harm to the father or husband is well-settled in past Anglo-American culture. As Fabricant points out, "[t]hat particular form of ‘honor’ which derives from the exclusive possession of a woman has been regarded as an essential element of the definition of a man, comparable to ideals of potency or bravery."[169] Similarly, the value of sexual freedom and personal autonomy resonates in our modern Anglo-American culture centered around individual liberty. Once again, the source of meaning in the weighing of harms inherent in the defense against forcible rape is the dominant Anglo-American culture.

163.  Id. at 958-59.
164.  See id. at 959.
165.  Id. at 970.
166.  Id. at 973.
167.  Id. at 979.
168.  Fabricant, supra note 100, at 978-79. The value or interest that is being protected is an individual’s autonomy, basic liberty, and self-determination. See Diamond, supra note 156, at 746-47.
169.  Id. at supra note 100, at 979.
VI. BRIEF CONCLUSION

In discussing at length three justification defenses, this Essay shows how the dominant Anglo-American culture has exerted tremendous influence over the substantive criminal law. Indeed, that influence occurs in perhaps what is one of the most important contexts in the criminal law and that is, in the intricate balancing of harms to justify an intentional killing. Being influenced by the Anglo-American culture does not mean that the criminal law is a simple mirror reflection of that culture's values and meanings. There are the complications described earlier by Post.7 For example, the fact that some of the fifty American states reject the rule of retreat while others accept it demonstrates variance in the commitment to the right to stand your ground.7 Likewise, the shifting interests being protected by the defense against forcible rape shows how the criminal law can absorb the evolving values of the dominant culture over time.

This Essay does not seek to present a simple picture of the dominant culture and the criminal law. It also does not look to establish the dominant culture as the sole determinant of criminal doctrine. Instead, what it seeks to establish firmly is the fact that the dominant Anglo-American culture is a substantial determinant of criminal law. Upon first glance, this argument may seem obvious and insignificant. After all, the decision-makers who determine the criminal laws are judges and legislators who are likely members of the dominant culture; this observation is certainly not surprising. It is simply political reality that the substantive criminal law reflects the values and norms of its makers and their dominant culture.

Notwithstanding the logic of the political process, this observation about the influence of the dominant culture in the criminal law still warrants our attention. It is significant because many individuals within the criminal justice system, and scholars outside the system, remain in denial about the power of culture. Alison Renteln observes, in her book The Cultural Defense, that “[o]ne major obstacle to the consideration of cultural defenses in homicide cases is that judges frequently consider culture to be ‘irrelevant.’”72 She explains that “the real difficulty defendants have faced in Western legal systems has been how to link culture to the legal categories of crimes, each of which has its own

170. See supra text accompanying notes 8-12.
171. The reasons for these counter-cultural rules are varied and can be far more complex than simple opposition to the dominant culture. For example, in explaining why the British defense of habitation has narrowed, Casey points to the influence of article 2 of European Convention on Human Rights and terms this “the human rights” approach. Casey, supra note 106, at 195-98.
172. RENTELN, supra note 18, at 23.
particular elements." What judges, defendants, and scholars fail to realize is that the definitions of elements, of crimes and of defenses themselves are constructs of the dominant culture. Thus, if a defendant seeks to offer evidence of their own minority culture in a criminal case, that minority culture is by definition irrelevant because the doctrines of the criminal law were created to reflect only the dominant culture.

This phenomenon has been termed the transparency phenomenon by critical race scholar Barbara J. Flagg. Although she describes this phenomenon with regard to race, the same is true for culture. The cultural source of values and norms becomes lost and invisible in the disguise of neutral substantive criminal law. Empowered by this disguise, doctrines are then regarded as universal legal norms. They become "relentless beings" and are no longer recognized as the norms of a particular dominant culture. Indeed, the power of the rule of law is so great that many believe that these doctrines are culturally and racially neutral.

As Barbara J. Flag observes:

Just as whites tend to regard whiteness as racelessness, the transparency phenomenon also affects whites' decisionmaking [sic]; behaviors and characteristics associated with whites take on the same aura of race neutrality. Thus, white people frequently interpret norms adopted by a dominantly white culture as racially neutral, and so fail to recognize the ways in which those norms may be in fact covertly race-specific.

The disturbing result of a failure to appreciate the dominant culture in the criminal law is the imposition of a monolithic code upon all under the fiction of objective standards. By presenting three justification defenses together, this Essay hopes to present a strong rebuttal against the misleading mythology that the criminal law is a-cultural. It is only by admitting this truth about the criminal law that any progress can be made

173. See id.
175. Barbara J. Flagg, Transparently White Subjective Decisionmaking: Fashioning A Legal Remedy, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR.
176. Renteln describes this result as cultural hegemony, where "the dominant culture is imposed on all who reside within its borders" and legal centralism or "the tendency [of judges] to view only state law as valid law." RENTELN, supra note 18, at 18.
towards the challenge of crafting a fair and just criminal law for a multi-cultural society.