A Tendency of the American Mind: No Duty to Retreat

Linda S. Buettner

"The life of the law has not been logic: it has been experience."
Oliver Wendell Holmes.

America's constitutional history was built upon many existing traditions in constitutional government. Americans took these traditions and molded them to fit a very uniquely American experience. The English common law of a duty to retreat when faced with the threat of bodily harm is an excellent example of the molding and changing of an existing tradition.

One of the many influences in the development of American constitutionalism was the old English common law. As early as the thirteenth century, the English government began to develop policies of administration and taxation that would be the beginning of a representative and more limited government.[1] The Magna Carta, drafted in 1215 to serve the aristocracy, functioned as an adaptive document to meet the needs of the colonists in America. They took the notion of no taxation without consent and the idea of limited government in forming their own definitive policies. Americans also used the common law to generate the core of their own bill of rights. Some of these core issues were the right to a trial by a jury of one's peers, the right to a speedy trial, the right to compensation for the taking of private property and equal protections under the law. The idea that a judge should not have interest in any case in which he sits in judgment helped to spark the idea of separation of powers. Twenty percent of America's bill of rights had first been stated in the Magna Carta.[2]

Americans were very selective in the appropriation of common law rights, and these rights were blended with the practices and principles that became unique American laws. Even the common laws that were initially blended were changed or developed differently as America began to grow, change, and expand to the west.

The common law doctrine of duty to retreat is an excellent study of the incorporation of an old English law that subsequently developed and then was changed completely because of the unique development of American growth and constitutionalism. This common law development and change can be traced through the developmental progress of America's notion of homicide and self-defense. In developing into America's concept of no duty to retreat, the deviation from this law is a telling example of the American perception of standing one's ground that has become prevalent in the laws of our society and the manner in which we approach other nations.

English law required that one who was attacked and in fear of death or great bodily harm should retreat back to a wall before killing in self-defense. English common law dealt very strictly with the act of homicide. Sir William Blackstone upheld the centuries-old view

---

[1] Kermit Hall, *Major Problems in Constitutional History, Vol.I: The Colonial Era Through Construction* (Lexington: D.C. Heath Company, 1992), 23-25.

[2] Donald S. Lutz, *The Origins of American Constitutionalism* (New Orleans: Louisiana State University Press, 1988), 67-69.

that all homicides were public wrongs.[3] In England, the burden of proof was on the one who committed the homicide and the presumption was against the accused killer. Blackstone's concern, and the concern of English law as well, was that the right to self-defense could be quite easily misconstrued to mean the right to kill. Two specific tests had to be met in English court before a self-defense plea would be considered. The first was that of retreat or avoidance, and the second was one of reasonably determined necessity.[4] The test of reasonably determined necessity meant that the accused must prove in open court that he killed in order to prevent his own death or serious injury. The logic in this requirement of duty to retreat was that the common law doctrine wished to impress upon the citizen that any quarrel should be handled peacefully or in a court of law. A threatened person was required to retreat from an enemy to a wall at his or her back, and even then a person must prove in court that following this retreat, there was still an existing threat that required a reaction in self- defense. The burden always fell upon the citizen, who was required to prove beyond a reasonable doubt, in a court of law, that the action was one of self-defense.[5]

The state wished to reduce the incidence of murder by shifting disputes from the streets to a court of law. Blackstone noted that justifiable homicide was restricted to the execution of a criminal for a capitol offense, the slaying of a runaway criminal, which was unavoidable, and the killing of one resisting arrest by an officer of the law.[6] Under excusable homicide, there was a slight guilt, but if the accused obeyed the duty to retreat and could prove reasonable necessity, the court would find for excusable homicide for which there was no serious penalty.[7]

The duty to retreat doctrine essentially dictated an avoidance of physical conflict between individuals, and initially many of the new states in America adopted this doctrine. In a few states, some remnants of the doctrine survived for a while, but in the nineteenth century, the nation as a whole rejected this doctrine in favor of the American doctrine of no duty to retreat.[8] This new doctrine essentially meant that one was legally justified in standing one's ground to kill in self-defense. This change took place with a combination of Eastern legal authorities and Western judges who viewed the doctrine of duty to retreat as upholding cowardice. The duty to retreat doctrine was replaced in this country by a tolerance for killing in situations where it might have been avoided if a legal duty to retreat had been exercised.[9] Standing one's ground is an attitude that has permeated the American identity and even the manner in which the country conducts its political and foreign affairs.

The no duty to retreat theme was not recognized as a federal law until 1921, but the beginning of the change from duty to retreat dates back to the American Revolution. According to Richard Maxwell Brown, the Americanization of the common law of homicide parallels the rise of the independent American nation.[10]

The erosion actually seems to have begun with noted English legal commentators. Two of these, Michael Foster in 1762 and Edward Hyde East in 1803, began to undermine the traditional requirement of duty to retreat. Their opinions detailed that an injured party

---

[3] Richard Maxwell Brown, *No Duty to Retreat* (Norman: University of Oklahoma Press, 1994), 1-4.
[4] Ibid., 4.
[5] Ibid., 5.
[6] Frederic S. Baum and Joan Baum, *Law of Self-Defense* (New York: Oceana, 1970), 5-9.
[7] Ibid., 7.
[8] Brown, *No Duty*, 1-5.
[9] Ibid., 5.
[10] Ibid., 6.

could repel force with force in the defense of his person against one attempting to commit a felony upon him. Foster wrote and East upheld that the self-defender was not obliged to retreat, but instead might pursue his adversary until he found himself out of danger; if there was then a conflict between them and the assailant happened to be killed, such a killing would be justified.[11] These opinions failed to cause much controversy in England and did not change the laws at all, but in America, where a new society was forming, these opinions from English legal experts had a very significant impact.

In a Massachusetts case in 1806, *Commonwealth v. Selfridge,* the Foster-East doctrine of duty to retreat was cited and upheld, and legal experts in the eastern United States absorbed the doctrine and incorporated it into influential textbooks. Joel Prentiss Bishop of Massachusetts published the first original American work on the criminal law in 1856, one written for use by lawyers. Bishop followed the Foster-East doctrine in drifting away from the doctrine of duty to retreat. Frances Wharton also incorporated the doctrine in his 1855 textbook, *The Law of Homicide.*[12] The Foster-East doctrine had no impact in England. The English Criminal Law Act of 1967 still retains the duty to retreat doctrine.[13]

The arena of decision with regard to the promotion of the no duty to retreat doctrine did not lie with the textbook writers, but fell instead into state supreme court appellate decisions. Following the massive movement of the country westward, state after state reversed the duty to retreat in support of no duty to retreat and the right to stand ones ground. Two of the most influential state supreme court decisions that set precedent for this turn of events came in 1876 and 1877, in the "true man" and "American mind" decisions of Ohio and Indiana. [14]

The "true man" case was *Erwin v. State*, decided in Ohio in 1876. James W. Erwin killed his son-in-law after much tension in the family regarding property rights. The son-in-law made an attempt to enter a shed where Erwin was working. Erwin warned him not to enter the shed and when the son-in-law entered the shed with an ax on his shoulder, Erwin fatally shot him with a pistol. Erwin was initially convicted of second-degree murder in Gallia County court. He appealed to the Ohio State Supreme Court partially on the grounds that the county judge had wrongfully instructed the jury that Erwin had a duty to retreat.

Judge George W. McIlvaine struck down the decision and reversed the Erwin decision. He found that Erwin himself had been without blame and that the duty to retreat doctrine was negated. McIlvaine found that as a "true man," Erwin was not obliged to fly from his assailant but was justified in standing his ground to fight. McIlvaine, in forming this opinion, ironically used the phrase "true man" taken from a commentary by Sir Mathew Hale upholding the duty to retreat doctrine in England.[15]

Using the views of Foster and the Massachusetts case of Selfridge, McIlvaine broadened the view that there was generally no duty to retreat in the state of Ohio. He surmised that a "true man" who was without fault in a confrontation was free to stand his ground against any menacing assailant, regardless of the consequences.[16]

---

[11] Edward Hyde East, *A Treatise Of The Pleas Of The Crown* (2 vols.; London: A. Strahan, 1803), I: 271-272.
[12] Brown, *No Duty,* 5-9.
[13] Ibid., 7.
[14] Ibid., 12-20.
[15] Ibid., 10-12.
[16] *Erwin v. State,* 29 Ohio St. 186 (1876).

The following year, the Indiana State Supreme Court ruled in 1877 in the case of *Runyan v. State* that duty to retreat was contrary to the "tendency of the American mind." The accused, Runyan, was involved in a political hassle on Election Day, a not unusual activity as violence on Election Day was one of the most common forms of violence in Nineteenth Century America.[17] Runyan feared confrontation because of his political views and his vocalization of those views. This fear, as well as a physical limitation due to a war injury to his arm, led Runyan to borrow a pistol for self-protection on Election Day. After going into town to vote, he was struck several times by Charles Pressnall, a much larger and stronger man and a definite opponent of Runyan's political views. Runyan managed to push him away long enough to pull the revolver out of his jacket and fatally shoot Pressnall in the chest.

After Judge Robert I. Polk of Henry County instructed the jury that Runyan had a duty to retreat from the danger, Runyan was found guilty of manslaughter. William E. Niblack, Supreme Court Judge for the state of Indiana, overturned the decision and sent it back to the circuit court for retrial on the grounds that Polk had wrongfully instructed the jury. Niblack contended that Polk was in error when he instructed the jury that Runyan had a duty to retreat and stated that Pressnall's homicide was justifiable. He declared that American authorities had demonstrated that the ancient English doctrine of duty to retreat had been greatly modified. In citing the works of Bishop and Wharton as well as the previous court applications, Niblack stated that the doctrine had been modified in this country to a much more narrow application than previously implied in the English doctrine. In the widely quoted passage of this decision to uphold a no duty to retreat doctrine, Niblack argued, "indeed 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—even to save a human life."[18] Niblack's conclusion implied that duty to retreat was a legal rationale for cowardice and that cowardice was un-American.[19]

The American exception continued to serve as a guiding principle in the twentieth century. In the Minnesota case of *State v. Gardner* in 1905, the courts further emphasized that the frontier conditions in the settling of America brought tough, brave men into conflict with deadly weaponry that did not exist in medieval times when the duty to retreat had been formulated. Judge Edwin A. Jaggard, in the decision, further qualified the duty to retreat. He held that the American combination of frontier conditions and lethal firearms made the duty to retreat an outmoded law. Jaggard contended that the origins of duty to retreat were derived in medieval times in England before the general introduction of guns. He stated that it would be folly to require an attempt to escape when experienced men, armed with rifles, faced each other in the open with intent to kill or do bodily harm. Jaggard's conclusion was that any requirement of the duty to retreat that turned self-defense into self-destruction was unreasonable and therefore unacceptable in the course of law.[20]

As Richard Maxwell Brown states, with the "true man" doctrine of Ohio and the "American mind" statement in Indiana, followed by the frontier and firearms contention of Minnesota, Supreme Court Justices across the nation put under siege the notion of duty to retreat.[21]

---

[17] Brown, *No Duty*, 20-25.
[18] *Runyan v. State*, 57 Ind. 80 (1877).
[19] Brown, *No Duty*, 14-20.
[20] *State v. Gardner*, 104 N. W. Rep. (1st Ser.) 971 (1905).
[21] Brown, *No Duty*, 20.

In Missouri in *State v. Bartlett*, in 1902, the court viewed standing one's ground as a sacred right of human liberty.[22] In Washington State in *State v. Meyer*, in 1917, the court found that standing one's ground was more in keeping with the nature of humans than was the requirement to retreat.[23] It was Wisconsin, however, that in 1909 took the highest ground in announcing that self-defense was a "divine right". Standing one's ground, the state contended, was in preference to the flight rule embodying the ancient doctrine of Blackstone. Retreat to the wall may have been all right in the days of chivalry, but in the state of Wisconsin as well as generally in the nation, the notion was definitely abandoned in favor of standing one's ground.[24]

Texas, more than any of the American states, had altered the common law tradition of duty to retreat to the extent that legal scholars began to refer to the Americanized no duty to retreat doctrine as the Texas rule. The Texas penal code provided private citizens with wide discretionary powers to kill their fellow citizens both legally and with impunity.[25] Texas further widened the common law doctrine of justifiable homicide.

The impact in this change of law in America, even prior to its approval finally by the Supreme Court in 1921, has not even been restricted to homicide alone. The impact of the transition from duty to retreat to standing one's ground has become a doctrine related to the American identity. This attitude is evident as Americans deal with their foreign neighbors, because it is not characteristic of America to retreat in any matter; furthermore, it is viewed as a sign of cowardice.[26]

The official Americanization of the common law of homicidal self-defense gained the approval of the United States Supreme Court in 1921 in the *Brown v. United States* case, appropriately from Texas. Justice Oliver Wendell Holmes made official the doctrine of no duty to retreat. His statement in 1881's *The Common Law* speaks of the law not as developing through logic but as developing as a result of experience, and this details the path of duty to retreat. His decision in the *Brown v. United States* case was the decisive abandonment of the notion of duty to retreat.

Convicted of second-degree murder, Brown challenged the idea that he had been under a duty to retreat before killing in self-defense. In a seven to two majority vote, the court stated that Brown did not have a duty to retreat. Holmes stated that the trial judge refused to instruct the jury that if the defendant had reasonable grounds of apprehension that he was in danger of losing his life or of suffering serious bodily harm, he was not bound to retreat. Holmes further stated in this decision, that concrete cases stated in early English law existed in conditions very different from those of the present in America. He stated that the law had grown and had tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills him he has not exceeded the bounds of lawful self-defense. Justice Holmes additionally added that "detached reflection can not be demanded in the presence of an uplifted knife" and therefore, " in this court at least, it is not a condition of immunity that

---

[22] *State v. Bartlett*, 71 S.W. Rep. (1st Ser.) 148 (1902).
[23] *State v. Meyer*, 164 Pac. 926 (1917).
[24] Brown, *No Duty*, 52.
[25] Henry P. Lundsgaarde, *Murder in Space City: A Cultural Analysis of Houston Homicide Patterns*, (New York: Oxford University Press, 1977), 149-152.
[26] Richard Maxwell Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism*, (New York: Oxford University Press, 1974), 38-55.

one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him."[27] Oliver Wendell Holmes, the champion of civil liberties, placed the final proverbial nails in the coffin of the doctrine of duty to retreat. It did not seem contradictory at the time to Justice Holmes because he, as well as many Americans, believed that the right to stand one's ground and kill in self-defense was, indeed, a great civil liberty in America.

Values have been a very critical factor in regard to America's violence and crime. The notion of no duty to retreat became an expression of American values as well as American behaviors. There is a contradiction in America regarding our values of peace and civility and our all too frequent behavior of violence. Violence is the nemesis of the values that Americans cherish, yet there are elements in our value system which not only encourage but also sustain violence. An underlying cluster of values have sanctioned violence.[28]

Thomas J. Kernan, a noted legal scholar, referred to "a jurisprudence of lawlessness" in American practices. Kernan listed certain late nineteenth century and early twentieth century practices that were approved by public opinion and often the actions of juries. Among them was the notion that a wronged husband may kill an adulterous man. Even in current times, juries sometimes refuse to convict a husband who kills his wife's adulterous partner and even sometimes kills his wife. Supported by the doctrine of no duty to retreat, the killer in what is viewed as a fair fight often wins the approval and sympathy of the jury.[29]

In his 1893 essay, Frederick Jackson Turner mentions the "dominant individualism" when he states, "these are the traits of the frontier," or traits called out elsewhere because of the existence of the frontier.[30] American westward expansion contributed greatly to the support of the formation of the doctrine of no duty to retreat. Both the myths and realities of the western gunfighter and the mountain man supported the notion of standing one's ground and the "dominant individualism" that were promoted and accepted as cherished American values.

The ideas of individualism and individual self-determination, which promote the desire to dominate situations, play a large part in the analysis of the westward expansion. Patricia Nelson Limerick stresses the notion of conquest in the history of the westward expansion in America. She notes the principle theme of conquest of the land and the people by the Euro-American pioneers as they spread across America. This notion of conquest correlates with the social theme of no duty to retreat in present day America.[31]

In a study of American values, Turner and Musick emphasize the centrality of individualism as the core of American values. The notion of individual self-determination as a key to American values is underscored with the desire to master their situations and to have a manipulative stance towards the world around them.[32] The impact of the change in common law from English doctrine of the duty to retreat to the American doctrine of standing one's ground is not confined simply to the legal notion of homicide. It has had a

---

[27] *Brown v. United States,* 257 Fed. Rep. 47, 48-49 (1919).
[28] Brown, *No Duty,* 156.
[29] Ibid., 157.
[30] Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt, 1921), 37.
[31] Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W. W. Norton, 1987).
[32] Johnathan H. Turner and David Musick, *American Dilemmas: A Sociological Interpretation of Enduring Social Issues* (New York: Columbia University Press, 1985), 14-21.

strong impact on American activities in civilian life. The strong belief in no duty to retreat goes to the center of what it has meant and still means to be an American.[33]

Richard Maxwell Brown contends that the Americanization of the common law in favor of no duty to retreat helps to explain why Americans have been the most violent among their peer groups of the industrialized democracies of the world. He also contends that the idea of no duty to retreat has become second nature to America and is ingrained in our actions in foreign affairs and military conduct. He cites our actions in the wars and also our containment policy with regard to communism as examples of our nature in standing our own ground and drawing lines in the sand.[34]

Early Americans also selectively kept many of the folkways of their predominantly British cultural origins as American constitutional law developed. These folkways, especially the order ways, cannot be discounted in contributing to the unique American mindset and resulting development of accepted violence in the culture. David Hackett Fischer's extensive work *Albion's Seed* addresses the adaptation of British folkways into American tradition. He defines folkways as "a normative structure of values, customs and meanings that exist in any culture."[35] These folkways additionally contribute to the drift in the old English Common Law as they had an impact on legal decision-making.

In the period between 1629-1775 America was settled by four large waves of English speaking immigrants, each bringing particular folkways with them. Their order ways, or ideas of order, ordering institutions, forms of order and the treatment of the disorderly can demonstrate a tendency towards the notion of no duty to retreat. These order ways differed between the four main groups but do contain a similarity in the tendency to punish property crimes with severity and a leniency towards crimes of personal violence.[36]

The backcountry order ways from Fischer's study are an excellent example of the developing tradition of no duty to retreat. Personal relations between the backsettlers were brutally direct. The principle of backcountry justice was *lex taliones*, the rule of retaliation, and supported the principle of retributive justice.[37] A North Carolina proverb, "every man should be sheriff on his own hearth," is actually an old folk saying from the borderlands of North Britain. This idea implies both individual autonomy and autarchy. This system of order helped to create a climate of violence in the American early backcountry and in many of the immigrants that subsequently began to move westward. Fighting was not glorified here for its own sake, but for the sake of winning the battle. Fischer points to Andrew Jackson as the classic example of an instrumental attitude towards violence. He quotes James Parton's statement that Jackson's anger was "fierce but never had any ill effect upon his ultimate purposes." Additionally, he points out that the frame of mind of the backcountry order ways is demonstrated in the instructions of the mother of President Jackson, "Andrew, never tell a lie, nor take what is not your own, nor sue anybody for slander, assault and battery, always settle them cases yourself."[38]

America's conquest of the West required a constitutional adaptation to accommodate the expansion and establishment of organized government throughout the western territories

---

[33] Brown, *No Duty*, 161.
[34] Ibid., 1-5.
[35] David Hackett Fischer, *Albion's Seed*, (New York: Oxford University Press, 1989), 4-5.
[36] Ibid., 768.
[37] Ibid., 765.
[38] Ibid., 765.

in order to keep the nation united and uniform in its progress. Conquest, exploration and discovery are often violent, harsh, and invasive and require a mindset that is conducive to a notion of individualism and survival. The changes in the law followed the discoveries of the West and the dangers those circumstances imposed. The capability of men to be able to mortally wound each other at a distance with a piece of metal made it necessary for America to adapt its laws to accommodate this rapid and often violent expansion.

The American constitutional development of no duty to retreat was not through logic but through the experiences of a new nation coping with rapidly changing times and industrialization as a by-product of these times. The laws adapted as men developed more sophisticated technology to kill one another.

The doctrine of no duty to retreat was a response to circumstances existing uniquely in America at the time. The English common law of duty to retreat was not as logical in the face of a gun in a wide-open space and the wall at one's back became the entire western territory. The gun itself changed the law, however, and the gun also, unfortunately, became another of the heroes of myth and romance in America's developmental years of westward expansion. Its myth and legend corresponded with the ethic of no duty to retreat and the gunfighters were glorified and idealized in fact and fiction in the nation. The gun is also a contributing factor in the high incidence of homicide in America even today.

It is interesting that the presence of the gun in England after medieval times did not provoke the same changes in the laws as the presence of the gun did in America. The rapid expansion in the West can account for the difference because it was America's imperialistic thrust and it occurred on the same continent and much of English imperialism did not take place on English homeland. It was perhaps easier to uphold a duty to retreat on one's homeland that was relatively peaceful and not involved directly in an imperialistic movement.

The transformation of the duty to retreat doctrine of old English common law into the no duty to retreat doctrine of America's legal system and values is an excellent example of how the law changed and developed with the growth of America. America's rapid expansion into the west as the Constitution was developing, and its acceptance and even promotion of the use of guns, helped to develop the doctrine of no duty to retreat. The use of guns in this endeavor promoted the idea of the gun as an acceptable weapon for any "true man" with an "American mind". Along with the spirit of standing one's ground, self-determination and rugged individualism, the ownership of a gun unfortunately remains sacrosanct in America today.

In England, where the duty to retreat still remains a part of the legal system, there has long been a very low homicide rate. It is an interesting contrast to America, where no duty to retreat promotes one of the largest rates of homicide in the World. The law changes as the values and morals of a nation change, and the law in America developed through experience. It is sometimes difficult to discern whether those changes and developments are always logical and in the best interest of all people for all time.