Comparison I: Justifiable use of deadly force in Texas; law and philosophical underpinning

Texas Penal Code Chapter 9

Sec. 9.41. PROTECTION OF ONE'S OWN PROPERTY.

(a) A person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

(b) A person unlawfully dispossessed of land or tangible, movable property by another is justified in using force against the other when and to the degree the actor reasonably believes the force is immediately necessary to reenter the land or recover the property if the actor uses the force immediately or in fresh pursuit after the dispossession and:

(1) the actor reasonably believes the other had no claim of right when he dispossessed the actor; or

(2) the other accomplished the dispossession by using force, threat, or fraud against the actor.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994.

Sec. 9.42. DEADLY FORCE TO PROTECT PROPERTY. A person is justified in using deadly force against another to protect land or tangible, movable property:

(1) if he would be justified in using force against the other under Section 9.41; and

(2) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or

(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

Comparison II: Justifiable use of deadly force in Jewish law; philosophical underpinnings and influence on American law

Exodus Chapters 21-22

37 If a man steal an ox, or a sheep, and slaughters it, or sells it, he shall pay five oxen for an ox, and four sheep for a sheep. **1** If the thief is seized while tunneling, and he is beaten to death, there is no bloodguilt in his case. **2** If the sun has risen on him, there is bloodguilt in that case – He must make restitution; if he lacks the means, he shall be sold for his theft. **3** But if what he stole – whether ox or ass or sheep – is found alive in his possession, he shall pay double.

nore so in this case,[2] where a complete
[This does not support him,] for R.
Read, she is stoned.

ORN AND REBELLIOUS SON' IS TRIED
IMATE DESTINY: LET HIM DIE INNO-
)IE GUILTY. FOR THE DEATH OF THE
SELVES AND THE WORLD;[4] OF THE
EMSELVES AND THE WORLD. WINE
ED BENEFIT THEMSELVES AND THE
IOUS, INJURE THEMSELVES AND THE
'G OF THE WICKED BENEFITS THEM-
' OF THE RIGHTEOUS, INJURES THEM-
. THE ASSEMBLING OF THE WICKED
D THE WORLD; OF THE RIGHTEOUS,
ND THE WORLD. THE TRANQUILLITY
THEMSELVES AND THE WORLD;[8] OF
TS THEMSELVES AND THE WORLD.

been taught: R. Jose the Galilean said:
he rebellious son shall be brought before
y because he ate a *tarṭemar* of meat and
e? But the Torah foresaw his ultimate
fter dissipating his father's wealth, he
y his accustomed [gluttonous] wants
go forth at the cross roads and rob.[9]
Let him die while yet innocent, and let

npt her entirely, since strangulation, to which
stoning, the punishment of a *na'arah*. (2) Of
recited the Baraitha, Keth. 45*a*.] (4) It benefits
. (5) For whilst drinking and sleeping they
heir time can be better spent, with greater
others. (7) Being scattered, they cannot take
it gives them the opportunity of devising evil.
lly sinful, very rapidly lead to sin. 'For precept
ransgression, transgression; for the recompense

him not die guilty.' For the death of the wicked benefits themselves and the world; of the righteous, injures themselves and the world. Sleep and wine of the wicked benefit themselves and the world; of the righteous, injure themselves and the world. The tranquillity of the wicked injures themselves and the world; of the righteous, benefits themselves and the world. The scattering of the wicked benefits themselves and the world; of the righteous, injures themselves and the world.

MISHNAH. [THE THIEF] WHO BURROWS HIS WAY IN[1] IS JUDGED ON ACCOUNT OF ITS PROBABLE OUTCOME. IF HE BROKE THROUGH AND BROKE A JUG, SHOULD THERE BE 'BLOOD-GUILTINESS FOR HIM',[2] HE MUST PAY [FOR THE JUG], BUT IF THERE IS NO 'BLOOD-GUILTINESS FOR HIM',[3] HE IS NOT LIABLE.[4]

GEMARA. Raba said: What is the reason for the law of breaking in? Because it is certain that no man is inactive where his property is concerned; therefore this one [the thief] must have reasoned, 'If I go there, he [the owner] will oppose me and prevent me; but if he does, I will kill him.' Hence the Torah decreed, 'If he come to slay thee, forestall by slaying him'.]

Rab said: If one broke into a house, and stole some utensils and departed, he is free [from making restitution]. Why? Because he has purchased them with his blood.[5] Raba[6] said: It would logically appear that Rab's dictum holds good only if he broke the utensils, so that they are not in existence; but not if he merely took them [and they are still intact]. But in truth,[7] Rab's dictum applies even

of a precept is a precept, and the recompense of a transgression, a transgression' (Aboth IV. 2).

(1) V. Ex. XXII, 1. He may be killed by the occupier of the house with impunity. (2) I.e., if his death is punishable. (3) I.e., if he may be killed with impunity. (4) V. *infra*. Not in every circumstance was the house owner allowed to kill him. (5) Since he risked his life, which the owner could have taken with impunity. (6) The Rashal reads 'Rabbah'. (7) Lit., 'Oh God!' —an oath.

JANUARY 18, 2012 · 9:27 PM

The Castle Doctrine and the Halachic Treatment of

The Common Law "Castle Doctrine"

Within the past month, there have been several incidents in which homeowners who shot intruders were cleared of any "Castle Doctrine." The Castle Doctrine is a common law rule that allows a person to use deadly force to defend an attack dwelling. (The word "castle" in the name of the doctrine is a reference to the saying "an Englishman's home is his castle." 18-year-old woman in Oklahoma shot an intruder because she feared for the safety of her child and herself. Similar even and Pennsylvania.

In order to correctly comprehend the Castle Doctrine, it is necessary to understand the context in which it applies. Gene justification to a charge of homicide. One who is threatened with death or serious bodily injury may use deadly force in o However there are various views regarding whether or not one must first attempt to retreat (if possible).

In a number of American jurisdictions, a person threatened with deadly force is not required to retreat. He or she may de regardless of where the attack takes place. In such states, there is no need for the Castle Doctrine, because even outside obligation to retreat.

However, some jurisdictions do not allow the use of deadly force in defense of an attack unless retreat is first attempted. usually a codification of some form of the Castle Doctrine, which sanctions the use of deadly force when defending ones requiring retreat. For example, in New Jersey, the law states:

> [T]he use of force upon or toward another person is justifiable when the actor reasonably believes that such force is im purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> The use of deadly force is not justifiable . . . if . . . [t]he actor knows that he can avoid the necessity of using such force retreating . . . except that [t]he actor is not obliged to retreat from his dwelling, unless he was the initial aggressor.(1)

***Ba BaMachteres*: The Halachic Castle Doctrine?**

Jewish law also has a special rule regarding self-defense in the home, but it functions differently than the Castle Doctrin

There are two laws in the Torah that sanction the use of deadly force in defending oneself. The first is the law regarding attempting to kill someone. The second is the law regarding a *ba bamachteres*, an intruder (literally, someone tunneling necessary to understand the Castle Doctrine within the context of the general American law of self-defense, so too one n approach to a home intruder over the backdrop of the general law of *rodef*.

Someone pursuing another with the intent to kill is considered a *rodef*.(2) In order to save the victim, a bystander can an However, if it is possible to stop the pursuer by injuring him instead of killing him, the bystander may only injure, not ki the victim himself may attempt to kill the *rodef*, but whether or not the he must first try to injure the pursuer is subject t

Besides for the law of *rodef*, the Torah specifically discusses a case of a thief secretly entering the home of another. The T for the homeowner to kill the intruder.(5) The Talmud explains the reason for this as follows: There is a presumption th by while someone else takes his property. Therefore, the thief knows that it is likely that the homeowner will stand up ag homeowner does try to defend his property, the thief intends to use even deadly force to take it. The Torah generally allo another) against a threat to his life with deadly force (*cf.* the law of *rodef*). Thus, the homeowner may kill the intruder.(6

The question then arises: **why does the Torah need to discuss the specific situation of an intruder, since it from the general situation of a *rodef*?** Unlike the Castle Doctrine in American law, which provides an exception to Jewish law there is seemingly no need for a special rule regarding an intruder, since even outside of the home the victim uses deadly force in self-defense.

According to the Divrei Yechezkel,(7) there are two fundamental differences between the law regarding a *rodef* and an in order to save one's life is not only permitted, it is an obligation. However, an [illegible] only expected to kill the homeow protect his possessions; if the homeowner simply hands over the property, the thief would not harm him. Thus, since th

choice--hand over the money or be threatened with death---killing the intruder is only permissible, not necessary. See *rodef* if he is certain that the *rodef* intends to kill, not if he is in doubt. In contrast, one is entitled to kill an intruder unless intruder will not harm him.(8)

For more on this topic, see J. David Jacobs, *Privileges for the Use of Deadly Force against a Residence-Intruder: A Comp the United States Common Law*, 63 Temp. L. Rev. 31 (1990).

Notes:

(1) N.J.S.A. § 2C:3-4.

(2) Sanhedrin 73a.

(3) Sanhedrin 74a.

(4) *See* Mishne LaMelech, Hilchos Chovel U'Mazik 8:10 (stating that the victim need not warn the pursuer or first try to 74a, s.v. VeYachol (implying that the victim must first try to injure the *rodef*).

(5) Shemos [Exodus] 22:1.

(6) Sanhedrin 72a.

(7) R' Yechezkel Berstein, Divrei Yechezkel § 23(10).

(8) *See* Sanhedrin 72a-72b.

2 Responses to *The Castle Doctrine and the Halach Treatment of Intruders*

seraphya
April 30, 2012 at 10:33 am

SELF-DEFENSE AND DEFENSE OF OTHERS IN JEWISH LAW: THE *RODEF* DEFENSE (excerpts)

Marilyn Finkelman†

Some American legal scholars try to determine questions of criminal responsibility through analysis of the concepts of justification and excuse. Issues raised by the defenses of self-defense and defense of others are particularly complex. George Fletcher has examined parallel defenses in foreign legal systems to shed light on how American criminal defenses work, or should work.[1] This Article will acquaint Western readers with the approach taken to self-defense and defense of others in the traditional Jewish law.[2] This Arti-

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1. *See* Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985) [hereinafter cited as Fletcher, *Right*]; Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367 (1973) [hereinafter cited as Fletcher, *Proportionality*].

2. For the benefit of readers who are unfamiliar with Jewish law, below is a brief sketch of the literary history of Jewish law, emphasizing the sources used in this Article. This will provide a historical context for otherwise confusing names of books and authors, and background for evaluating the relative authority of various texts. The names, dates and places are drawn from D. FELDMAN, BIRTH CONTROL IN JEWISH LAW 3-18 (1968) and from A. KAPLAN, THE LIVING TORAH 603-26 (1981). Some of the details may be subject to dispute by historians.

The starting point and supreme authority in Jewish law is the Hebrew *Bible*. For legal purposes, only laws derived from the *torah*, the first five books of the Hebrew *Bible*, are crucial; the legal aspects and implications of the rest of the Hebrew *Bible* are seen as interpretative of earlier ordinances, but not as independent commands.

Accompanying the Hebrew *Bible* is an oral tradition, the *torah sh'b'al peh*, which supplements and interprets the written text. Some of this oral material is considered to be of the same age and authority as Biblical law. In addition, the oral tradition includes homiletical material, Rabbinic legislation, and a common law which applied both Biblical and Rabbinic law to new fact patterns. Thus, all post-Biblical Jewish law is part of the *torah sh'b'al peh*.

The first widely accepted written version of the oral law is the *Mishnah* ("the study" in Hebrew) compiled by Rabbi Judah the Prince (died 219 C.E.). Rabbi Judah, known simply as "Rabbi," selected material, phrased it in flawless and simple Hebrew, and organized it into relatively logical units. Legal material from the

cle should add to the learned discussion by providing access to an

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time of the *Mishnah* that Rabbi excluded is called *bareita*; homiletical material is called *midrash*. Rabbi's organizational structure is the basis for Talmudic material and subsequent commentaries, but the material he selected has only slightly greater legal authority than other contemporaneous material.

Legal discussion over the course of the next four hundred years or so was structured around and began from analysis of the *Mishnah*. As recorded, these discussions comprise the *Gemara* (Aramaic for "the study"). The *Mishnah* and *Gemara* together comprise the Talmud. There were two parallel schools each of which produced a *Gemara*: Palestinian sages authored the *Jerusalem Talmud*; the Babylonian scholars produced the *Babylonian Talmud*. For various reasons, the *Babylonian Talmud* had a vastly greater influence on the future development of Jewish law.

The next important contributors to the development of Jewish law were the *geonim*, the heads of the Babylonian academies through approximately the year 1000. They may have had a hand in the final editing of the *Talmud*. And they wrote responsa, answers to letters requesting religious advice and legal rulings, a literary form which continues in use to the present day.

The period of the *geonim* gave way to that of the *rishonim* ("the first ones") with the shift of Jewish scholarship from Babylonia to north Africa and southern Europe. These scholars, each in his own way, attempted to elucidate areas which remained unclear and to put earlier material into a more accessible form. Among the *rishonim* whose works are relevant to this paper is Rabbi Solomon ben Isaac (1040-1105), known by his acronym, Rashi. Rashi lived in Champagne and made his living as a vintner. Aside from extensive commentaries on the Hebrew *Bible*, Rashi wrote a line-by-line explanation of most of the *Talmud*, elucidating the flow of the argument and the policies and principles behind various opinions. Rashi's commentary is printed alongside the Talmudic text in virtually every modern edition. It is an indispensable tool in understanding the text, and also reveals Rashi's own opinion on the legal applications of various Talmudic statements.

Rashi's physical and academic descendants in the next few generations took a somewhat different approach in their compiled commentary on the *Talmud* called *Tosafot* ("additions"). *Tosafot* sometimes explains and supports Rashi's opinion, and sometimes disagrees with Rashi. It often looks to other Talmudic passages which, by way of comparison or contrast, can shed light on the text at hand.

Perhaps the most ambitious of the *rishonim* was Rabbi Moses ben Maimon (1135-1204), known in English as Maimonides and in Jewish texts by his acronym, Rambam. Born in Spain, he lived most of his life in Egypt. He wrote extensively on medicine, philosophy, and Jewish law. His work, the *Mishneh Torah* (repetition of the *Torah*), is a complete systematic codification of all Jewish law. Rambam intended that his book would displace previous Jewish legal sources for all but the most erudite. In this he failed, but his work remains a model of clear organization, thinking, and expression.

Codes, commentaries, and responsa were not the only types of works produced by the *rishonim*. The very popular work, *Sefer ha-Hinnukh* ("the book of education"), attributed to Rabbi Aaron ha-Levi of Thirteenth Century Barcelona, lists each of the Biblical commandments, explaining to whom it applies, the reasons for it, and some of its legal ramifications.

The last of the major codes of the *rishonim* was the *Arba'ah Turim*, written by Rabbi Jacob ben Asher of Toledo, Spain (1268-1340). His code was based on Talmudic sources, but it cited the opinions of prior *rishonim*, and outlined the extensive disagreements between them. It used a new and original organization which served as a base structure for later works.

Two hundred years later, there was again a need to consolidate newly devel-

approach not ordinarily available to the American legal community. Jewish law may not provide answers to the hard questions, but at least we shall see that the hard questions with which modern American commentators deal have confronted legal thinkers for the past two thousand years or more.

First, let me explain what "Jewish law" is. Scholarship has always been a major aspect of Jewish religious life. Beginning with the Hebrew Bible, Jews have consistently put time and effort into elucidating the ritual and moral rules by which Jews should live. Thus,

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oped material. Rabbi Joseph Caro (1488-1575), a scholar and mystic who lived in Safed, took on the job. He wrote the *Beit Yosef*, a detailed and extensive commentary on the *Arba'ah Turim*, analyzing it and supplying sources. But the literature was too vast for the layman, who needed a decisive conclusion. For them, Caro produced the *Shulḥan Arukh* ("the set table"), a compendium of the conclusions he reached in the *Beit Yosef*. It followed the organization of the *Arba'ah Turim*. He intended that people would review the *Shulḥan Arukh* every month or so, so that they would know what to do and what not to do.

The *Shulḥan Arukh* was not easily accepted. Caro was a member of the Spanish community expelled in the late fifteenth century. This community had developed a somewhat different practice from the Polish-German community, and Caro did not include the Polish-German alternative tradition in the *Shulḥan Arukh*. Rabbi Moses Isserles of Poland, a contemporary of Caro, came to the rescue. He saw a need for a simplified guide, and was sufficiently impressed with Caro's work that, rather than writing an independent work, he wrote additions to the *Shulḥan Arukh*. These glosses, called *Mappah* ("tablecloth"), outline areas where Polish practices differed from Spanish practices, and some areas where Isserles disagreed with Caro. The *Mappah* is printed interspersed in the text of the *Shulḥan Arukh* in all modern editions. With these additions, the *Shulḥan Arukh* attained a predominance it still retains, not as a handbook but as a scholarly work.

The *Shulḥan Arukh* marked the end of the period of the *rishonim*; subsequent scholars are referred to as *aḥaronim* ("later ones"). This was the final transition in a series of perceived changes in levels of competence that began much earlier. The sages who contributed to the *Gemara* did not contradict a *Mishnah* or *bareita* without an earlier source to depend on. The *rishonim* felt bound by the *Talmud*, and rarely took a position that could not be defended as a logical deduction from Talmudic discussion. The *aḥaronim* felt themselves to be of lesser learning than the *rishonim*, and hesitated to take a position that could not at least arguably be supported by opinions of the *rishonim*. This hierarchy is one of respect rather than direct authority; the current scholar, by virtue of his cumulative knowledge of the entire legal development, has full power to make independent legal decisions binding on his constituents.

The *aḥaronim* used many literary forms: commentaries on earlier major texts, responsa, codes, guide books, and, recently, scholarly articles and books like those in any academic discipline. For example, the *Minḥat Ḥinnukh* was written by Rabbi Joseph Babad of Lvov (1800-1874) as a commentary on the *Sefer ha-Ḥinnukh*. It frequently discussed questions not raised elsewhere in the literature. Because of the author's extreme poverty, he used abbreviations to conserve paper and ink, making the book additionally challenging to read. Another important work is the *Arukh ha-Shulḥan* written by Rabbi Jehiel Michal Epstein at the beginning of this century. It is a restatement of the *Shulḥan Arukh* with extensive additions, and it frequently reflects the very difficult living conditions the Jews endured in Czarist Russia.

an extensive literature developed dealing with legal rules covering every phase of a Jew's life. This literature covers ritual law, matters of prayer, holidays, and such. It also covers all the content areas that Americans consider the domain of "law," including contracts, torts, property, labor law, and criminal law. Study and analysis of this literature is itself a major religious obligation of Judaism. The practical jurisdiction of Jewish criminal law has varied greatly, depending on the political relationship between the Jews and the government.[3] For thousands of years Jews have thought about the right and wrong ways to behave in self-defense and in defense of others, intending this thinking to have practical and sometimes judicial import. This Article will attempt to summarize that thinking.

I. ESTABLISHING THE VALIDITY OF THE *RODEF* DEFENSE

Murder is a capital offense in Jewish law. "If one slays a human being, he transgresses a negative commandment, for scripture says, 'Thou shalt not murder.' . . . If one murders wilfully in the presence of witnesses, he is put to death [by the court] . . . ."[4]

The *Talmud* explains that one is obliged to defend oneself against attempted murder: "the *torah* decreed, 'If he come to slay thee, forestall by slaying him.' "[5] Thus, a defendant charged with murder would be held not guilty if he had killed in self-defense.[6] The defendant's exculpatory claim is called *rodef*, "pursuer," based on its formulation in the *Mishnah*:

> These may be delivered [from transgression] at the cost of their lives: he that pursues [*ha-rodef*] after his fellow to kill him, or after a male, or after a girl that is betrothed; but he that pursues after a beast, or that profanes the Sabbath, or that commits idolatry—they may not be delivered [from transgression] at the cost of their lives.[7]

The *Mishnah* lists three cases where the perpetrator of a crime may be stopped even at the cost of the perpetrator's life: a perpetrator attempting murder, a perpetrator attempting homosexual rape, and

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3. Israel is a common law jurisdiction; Jewish criminal law has only advisory influence over Israeli criminal law. However, matters of personal status for Israeli Jews—marriage, divorce, and the like—are largely determined by Jewish law.

4. MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIM, *Hilkhot Roẓe'aḥ* 1:1 (H. Klein trans. 1954) (quoting Exodus 20:13).

5. BABYLONIAN TALMUD, *Sanhedrin* 72a (I. Epstein trans. 1935).

6. Killing another human being on the Sabbath would normally be a capital breach of the Sabbath laws. Despite this, the defense of self-defense applies even if the incident took place on the Sabbath. It is a defense both to charges of murder and to charges of breach of the Sabbath. SEDER MO'ED, MISHNAH SHABBAT 7:2; BABYLONIAN TALMUD, *Sanhedrin* 72b.

7. SEDER NEZIKIN, MISHNAH SANHEDRIN 8:7 (Danby trans. 1933).

the policy behind the *rodef* defense is primarily a concern for protecting the victim.

Under certain circumstances, a burglar is presumed to be a *rodef* and may be killed because the burglar is presumed to pose a threat to innocent lives. The *Talmud's* discussion is based on Exodus 22:1-2: "If a thief be found breaking in, and be smitten so that he dieth, there shall be no bloodguiltiness for him. . . . [I]f the sun be risen upon him, there shall be bloodguiltiness for him."[69] The *Mishnah* provides, based on these passages, "The thief that is found breaking through is condemned because of [what he may do in] in end," and the burglar may be killed.[70]

The *Talmud*, quoting Raba, explains why the burglar may be killed:

> What is the reason for the law of breaking in? Because it is certain that no man is inactive where his property is concerned: therefore, this one [the thief] must have reasoned, "If I go there, he [the owner] will oppose me and prevent me; but he if he does, I will kill him." Hence, the *torah* decreed, "If he come to slay thee, forestall by slaying him.[71]

The burglar may be killed because he poses a threat to human life; the right to kill him is given for protection of life, not for mere protection of property.

The Biblical verses seem to distinguish the case of a burglar who breaks in at night from one who breaks in during the day. Though some Biblical commentators interpret these phrases as relating to the time of day,[72] the verses are interpreted differently for legal purposes.[73] If the burglar is someone whose relationship with the householder is such that "it is as clear to you as the sun that his intentions are peaceful," the burglar may not be killed; otherwise, the burglar is presumed to be a *rodef*. Specifically, if the burglar is the householder's father, or if the burglar has previously treated the householder as a father treats his son, the burglar is not presumed to be a *rodef*. A general reputation for piety or upstanding conduct on the burglar's part is insufficient; only a personal relationship will do. But all other burglars are presumed to be willing to kill if opposed. Even were the burglar the householder's son, the householder would be justified in killing him. The *Talmud's* assumption that a son

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69. Jewish Publication Society trans. 1955.

70. SEDER NEZIKIN, MISHNAH SANHEDRIN 8:6 (Danby trans. 1933).

71. BABYLONIAN TALMUD, *Sanhedrin* 72a (I. Epstein trans. 1935).

72. For an excellent discussion of these verses, and of various commentators on them, see 2 N. LEIBOWITZ, STUDIES IN SHEMOT (EXODUS) 372-78 (1976).

73. BABYLONIAN TALMUD, *Sanhedrin* 72a-b. *But see* J. EPSTEIN, ARUKH HA-SHULḤAN, *Ḥoshen Mishpat* 358:16 (citing the Ra'avad, who says the presumptions only apply at night, not during the day).

would murder his father but a father would not murder his son is certainly an interesting distinction. But the overall thrust of these presumptions is that the burglar is presumed to pose a threat to the householder unless the householder has such a close personal relationship with the burglar that the householder can be virtually certain the burglar would not hurt him. These presumptions are not conclusive. A father breaking in who hates his son may be killed; a son breaking in whom the father knows will not harm him may not be killed.[74] The householder, then, has a defense in almost all cases of a burglar breaking in.

The phrase "there shall be no bloodguiltiness for him" is not clear.[75] Perhaps it refers to the householder's blood; the householder's life would not be on the line if he killed the burglar under appropriate circumstances. Rashi, in his Biblical commentary on these verses, assumes the blood is the burglar's; since the burglar is the only person mentioned in the verses, the burglar is the only possible antecedent of the pronoun "him." Rashi explains that the burglar is like one already dead, "he has no blood," and so it is not murder for the householder to kill him. Either way, the verses are interpreted to mean that the householder who kills the burglar is not criminally liable for murder. However, the householder kills based on a presumption of threat rather than on an actual threat. Therefore, the householder is permitted, rather than required, to kill the burglar.[76]

It is clear that, despite the specification of breaking in in the Biblical verses, the presumption that the burglar is a *rodef* applies however the burglar enters the premises—whether by breaking in, or through the door, attic, or courtyard.[77] The mode of entry is irrelevant since the burglar is equally likely to kill a householder defending his property however the burglar entered the premises. But the presumptions only apply if the burglar enters a part of the premises where the householder is likely to be. If the burglar breaks in a field or a storage shed, the presumptions are not triggered.[78] If a burglar who broke in is on his way out, or if the burglar is outnumbered so

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74. M. ISSERLES (REMA) (commenting on J. CARO, SHULḤAN ARUKH, *Ḥoshen Mishpat* 425:1); J. EPSTEIN, ARUKH HA-SHULḤAN, *Ḥoshen Mishpat* 425:10.

75. For interpretative material, including that explained here, see N. LEIBOWITZ, *supra* note 72, at 373-74.

76. RASHI (commenting on BABYLONIAN TALMUD, *Sanhedrin* 72a, starting with the words *ayn lo damim*); TOSAFOT (commenting on BABYLONIAN TALMUD, *Sanhedrin* 73a, starting with the word *af*); MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIM, *Hilkhot Geneivah* 9:7.

77. BABYLONIAN TALMUD, *Sanhedrin* 72b.

78. N. GERONDI (RAN) ḤIDDUSHEI HA-RAN, *Sanhedrin*, ch. 8, starting with the words *gemara-hazero v'karpipo minayan*; J. EPSTEIN, ARUKH HA-SHULḤAN, *Ḥoshen Mishpat* 358:18.

he could not harm anyone without being stopped, the burglar may not be killed.

The rules we have seen so far focus on the need to protect the weak from the strong, the innocent from the malefactor.[79] The *rodef* defense requires bystanders to protect victims from rape and murder.

B. Rescuing the Perpetrator

Why do we rescue the victim at the cost of the life of the perpetrator? Jewish law normally forbids taking one life to save another.[80] But the *rodef* is "delivered at the cost of [his life]" according to the *Mishnah*.[81] Delivering the *rodef* speaks to why we choose to protect the victim's life at the cost of the *rodef*'s life.

If a goal in allowing a *rodef* to be killed is to "deliver" the *rodef*, we must ask what he is being delivered from and how killing him delivers him. The most obvious interpretation is, perhaps, that the perpetrator is being saved from Divine punishment, which would be worse if he completed his act than if he were stopped before he could complete it. This explanation seems unsatisfactory; under Divine evaluation, the perpetrator should be equally blameworthy whether he actually completed the crime he was attempting or he was stopped against his will at the last minute.

Rashi, commenting on the phrase "deliver him" in the *Mishnah*, says the perpetrator is being saved from sin.[82] Rashi's meaning is not clear, but he seems to be saying that death is preferable to living after having committed a capital rape or murder. Rape involves rejecting the accepted limits on sexual relations, limits which are crucial for maintaining a stable and moral social order. These sexual mores are broken by force, against the will of one's sexual partner. Murder involves the taking of innocent human life. At least at the moment of the attempt, the intentional *rodef* rejects legal limits on his behavior and lacks appropriate respect for other people. Rashi may be suggesting that the *rodef*, having so totally missed the fundamental messages of God's law, is better off dead.

Under this interpretation, it makes sense to suggest extending the *rodef* defense to cases where one attempting idol worship or breach of the Sabbath is killed. Rambam points out that idol worship and breach of the Sabbath laws involve "basic principles in the religion of Israel."[83] If so, attempting these crimes reflects a drastic

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79. SEFER HA-HINNUKH ¶ 600.
80. BABYLONIAN TALMUD, *Sanhedrin* 74a.
81. SEDER NEZIKIN, MISHNAH SANHEDRIN 8:7 (Danby trans. 1933).
82. RASHI (commenting on BABYLONIAN TALMUD, *Sanhedrin* 73a).
83. MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIM, *Hilkot Roẓe'aḥ* 1:11. It is not surprising that avoiding idolatry is so basic. Understanding why the Sabbath laws are so crucial is beyond the scope of this Article.

sons poses a threat to the other, neither may be killed, as we have no reason to prefer one life to the other. But, perhaps, an innocent person posing a threat to another innocent person where the threat is not reciprocal could be killed. Since we have two different reasons given for Rav Huna's holding in this case, perhaps we should assume that Rav Huna requires both mutual threat and "threat from heaven" to hold that the infant causing the threat may not be killed.

The fact that this issue is framed in terms of a threat posed by someone totally blameless leaves open the issue of someone partially, but not totally, blameworthy, such as a child playing with a loaded gun who is just old enough to know better. Rav Huna discusses a case of a blameless minor. We do not know what he would say about blameless adults. At least one authority seems comfortable with an entirely blameless person being a *rodef*: he asserts that an insane person or someone totally incapable of verbal communication can be a *rodef*; although these people cannot be held to have a criminal state of mind.[113]

We have seen a spectrum of rulings. At the one extreme, the rationale for killing the *rodef* is that the *rodef* is committing a capital crime. The term *rodef* thus applies to someone who is maximally blameworthy. At the other extreme, we apply the term *rodef* to a newborn infant, a completely innocent person. If we restrict the term *rodef* to someone who is blameworthy, it is easier to see why the victim should be protected at the cost of the pursuer's life. But it is difficult to apply this rule in real cases; the bystander or victim often will not know how blameworthy the pursuer is. If we extend the term *rodef* to infants, the bystander has more leeway to act in emergency situations. But it is hard to see why we prefer the life of the threatened individual to the life of the threatening infant. The various solutions we considered attempt to strike an appropriate balance between theory and practice.

C. *Killing the* Rodef *as an Act of Judicial Punishment*

The *rodef* defense seems like a classic example of a self-help remedy designed to protect the innocent. However, the *Talmud* considers imposing an anomalous restriction on the use of the *rodef* defense. It suggests that the perpetrator may be killed only after he is given a formal warning.[114] The requirement of formal warning is part of judicial procedure in capital cases in Jewish courts, but is out of place in the self-help context. The *Talmud* ultimately rejects this restriction on the *rodef* defense.

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113. J. BABAD, MINḤAT ḤINNUKH (commenting on SEFER HA-HINNUKH ¶ 600).

114. BABYLONIAN TALMUD, *Sanhedrin* 72b.

For a Jewish court to order a defendant executed, it has to find that the defendant was warned he was about to commit a crime punishable by death, and that the defendant accepted the warning and acted in spite of it.[115] According to Rabbi Yosi, son of Rabbi Judah, the purpose of this rule is to settle the issue of intent.[116] It insures that there will be capital punishment only if the crime was committed with full intent and full knowledge of the crime's potential consequences for the perpetrator.[117] Other Rabbis disagreed, explaining that this rule insured capital punishment only in cases where the defendant "handed himself over for death."[118] The import of the Rabbis' explanation is not immediately apparent, and further exploration of it is beyond the scope of this Article.[119]

The *Talmud* considers whether, before a *rodef* may be killed, he must be given such a formal warning.[120] Rav Huna's opinion is that no warning is necessary. He states that a minor who is a *rodef* can be killed. Since a minor may be a *rodef* despite the fact that the minor lacks legal capacity to receive or accept a formal warning, it follows that no warning to a *rodef* is necessary.

The *Talmud* argues against Rav Huna's position. It cites a *bareita* which says that if a man is pursuing someone to kill him, the pursuer may be killed if he is warned and says that he is acting in spite of the warning, but he may not be killed if he merely acknowledges by saying, "I know this is so."[121] Apparently this *bareita* requires that a *rodef* receive a formal warning, in all its particulars, before he is killed. Rav Huna offers two responses. First, he claims, this *bareita* is not referring to a normal case of *rodef*. Rather, the *bareita* refers to a case where the bystander is unable to intervene. The bystander gives the warning in order to preserve the capital cause of action against the *rodef*, since if there were no warning, the *rodef* could not later be sentenced to death. Thus, this *bareita* does not prove that a warning is needed before the *rodef* can be killed by the victim or by a bystander.

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115. MAIMONIDES, MISHNEH TORAH, SEFER SHOFTIM, *Hilkhot Sanhedrin* 12:2.

116. BABYLONIAN TALMUD, *Sanhedrin* 8b.

117. According to Rabbi Yosi, this warning rule would have exceptions where the defendant's intent was clear for some other reason.

118. BABYLONIAN TALMUD, *Sanhedrin* 41b.

119. Let me tentatively suggest a possible understanding of the Rabbis' explanation. Capital punishment is seen, in part, as an act of *kaparah*, an act triggering Divine forgiveness. If the defendant, as he commits his crime, recognizes that he is part of a social order that will punish his wrongdoing, he is perhaps more deserving of Divine forgiveness than a criminal who "does not hand himself over for death" and does not take responsibility for his acts as destructive to the social order. This is merely my hunch, not to be taken as in any way definitive.

120. BABYLONIAN TALMUD, *Sanhedrin* 72b.

121. *Id.*

In the alternative, Rav Huna agrees that the quoted *bareita* requires that the *rodef* be warned. However, Rav Huna relies on a contradictory *bareita* that implies that a *rodef* need not be warned. This contradictory *bareita* says that for the burglar breaking in, "breaking in constitutes a formal warning."[122] Rashi explains that by breaking in, the burglar triggers a presumption that he will kill if opposed. Thus, the burglar is a *rodef* and so requires no warning.[123] The act of becoming a *rodef* obviates the need for a warning, either because the perpetrator's intent to kill in spite of the consequences is clear, according to Rabbi Yosi's reasoning, or because in becoming a *rodef* the burglar "hands himself over for death," according to the Rabbis' reasoning.

It is not clear why the *Talmud* even suggests imposing the procedural requirement of warning in a situation where an emergency ensues from a violent attack. Perhaps this suggestion is based on a fear of self-help getting out of hand. Users of self-help will be reminded that self-help may be used only within appropriate limits if users are required to inset legalism into this very nonlegal context.

In any case, Rav Huna's opinion was accepted, and the Codes do not include a requirement of formal warning before a *rodef* may be killed.[124] Rambam echoes this discussion, saying that, "If one has been warned but still pursues the other person, he may be killed even if he does not accept the warning, seeing that he continues to pursue."[125] Some interpret this to mean that Rambam requires a formal warning in some, if not all, *rodef* cases.[126] But Rambam uses the term "*hazharah*" for warning rather than "*hatra'ah*," the term of art used for the procedurally required formal warning. As the *Arukh ha-Shulḥan* explains,[127] Rambam seems to be suggesting that an informal warning, "Don't do that," will sometimes be enough to deter the *rodef*. If so, such a warning would be required, and using lethal force would be improper. If such a warning did not stop the perpetrator, force could and should be used. Rambam does not seem to

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122. *Id.* (I. Epstein trans. 1935).

123. RASHI (commenting on BABYLONIAN TALMUD, *Sanhedrin* 72b, starting with the words *zo hi hatra'ato*).

124. J. EPSTEIN, ARUKH HA-SHULḤAN, *Ḥoshen Mishpat* 425:5, cites ARBA'AH TURIM as saying no warning is required. *But see* SEFER HA-ḤINNUKH ¶ 600, who seems to require a warning but not require that the warning be accepted.

125. MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIM, *Hilkhot Roẓe'aḥ* 1:7; *see also* M. ISSERLES (REMA) (commenting on J. CARO, SHULḤAN ARUKH, *Ḥoshen Mishpat* 425:1).

126. A. SCHRIEBER, *supra* note 41, at 256 n.5 says Rambam requires a warning. Presumably, he means a formal procedural warning. *Accord* J. ROSANNES, MISHNEH LE-MELEKH (commenting on MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIM, *Hilkhot Ḥovel Umazik* 8:10).

127. J. EPSTEIN, ARUKH HA-SHULḤAN, *Ḥoshen Mishpat* 425:5 (citing J. CARO, BEIT YOSEF).

categorically require even this informal warning, perhaps because there are circumstances where it would clearly be useless, and might even increase the danger to the victim or the protector.

The attempt to impose procedural requirements onto the self-help concept of *rodef* has almost no practical implications, but I found one vestige of it. The *Talmud* explains that the words "that he dieth," in the verse describing the burglar breaking in, imply that the burglar may be killed by any available means.[128] The implied opposing opinion, that the *rodef* may be killed only by using the method that would be used if the death penalty were imposed, is rejected. At least one authority maintains that it is preferable to kill the *rodef* using the procedurally required form of execution. If that is inconvenient, which it almost always will be, then other types of force can be used.[129]

IV. Killing the Perpetrator as a Permitted Rather Than a Required Act

In most cases of self-defense and defense of others, the victim or bystander who kills the *rodef* is doing a required act. There is no question that killing the perpetrator is then justified.

I found three examples in which killing the *rodef* is permitted but not required. The first is the case of the burglar breaking in, which we have already seen. The householder or a bystander are permitted to kill the burglar, but are not required to do so.[130] A normal *rodef* is killed while attempting his crime, whereas the burglar is deemed to be a *rodef* based on a presumption about the implications of his breaking and entering for his future behavior. Thus, the burglar is only presumptively a *rodef*. The presumption permits us to treat him as a *rodef* but does not require us to do so.

The second is the case of the Jews hiding in the bunker from the Nazis. We have already seen Rabbi Efrati's analysis of this case based on precedent regarding a third party threat to a group of people.[131] But Efrati also offers an analysis of this case based on the laws of *rodef*. In the normal *rodef* case, the *rodef* intends to kill an innocent victim. If only one life can be saved, we prefer the life of the innocent victim to the life of the perpetrator bent on murder. Sometimes, one person threatens another's life in complete innocence. If one of the two innocent people might survive, we take no action, because we cannot choose one innocent life over another.[132]

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128. Babylonian Talmud, *Sanhedrin* 72b.

129. N. Gerondi (Ran), Hiddushai ha-Ran, *Sanhedrin*, ch. 8, starting with the words *matnitin ha-ba b'mahteret niddon al shem sofo.*

130. *See supra* notes 69-78 and accompanying text.

131. *See supra* notes 102-104 and accompanying text.

132. Seder Tohorot, Mishnah Oholot 7:6.

to protect the wrongdoer.[148] If the zealot's actions are excused, as Fletcher would analyze, the zealot is acting wrongly, and so the victim may defend himself and a bystander may not assist the wrongdoer.[149] If the zealot's actions are justified because they are tolerable, as Dressler would have it, perhaps this rule still makes sense. If the zealot's behavior is only tolerable, but not affirmatively good, then the wrongdoer should not be required to tolerate it at the expense of his own life; it is also tolerable for the wrongdoer to defend himself. If both the zealot's and the wrongdoer's actions are tolerable but not affirmatively right, a bystander has no reason to prefer one to the other, and may not intervene.

V. CONCLUSIONS

Protecting citizens from violence is a central concern of every legal system. Every legal system must deal with the tension allowing citizens to protect themselves and limiting protection to what can be provided by centralized authority. Self-help comes dangerously close to anarchy, random violence, and disorder; but the orderly central authority may be too far away to help in an emergency.

The *rodef* defense is a balance of the need for self-help to protect the endangered with the risk that self-help remedies will be used to kill the innocent. The *rodef* defense permits use of lethal force to prevent only the most severe kinds of harm. Use of lethal force is primarily permitted where the perpetrator is extremely blameworthy, as where he is committing a capital crime.[150]

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148. J. EPSTEIN, ARUKH HA-SHULḤAN, *Ḥoshen Mishpat* 425:11.

149. Greenawalt, *supra* note 18, at 1900.

150. The topic of informers who turn others over to illegitimate authorities and who are thus dangerous to others presents relevant issues not considered in this Article.

PRIVILEGES FOR THE USE OF DEADLY FORCE AGAINST A RESIDENCE-INTRUDER: A COMPARISON OF THE JEWISH LAW AND THE UNITED STATES COMMON LAW

*J. David Jacobs**

INTRODUCTION

This article analyzes the respective views of current Jewish and United States common law on the legal privilege of a lawful resident to use deadly force in the context of an intrusion into the residence by an intruder who presents little threat of serious bodily injury or death to the resident. A situation constituting little threat exists where a reasonable person would consider an intrusion to pose some danger, in contrast to no danger or clear danger. In this article, the little threat situation is limited to instances in which there is no prior animosity between the intruder and the resident, because a reasonable person would not consider such situations to pose clear danger to the resident. In a little threat situation the resident is not in direct confrontation with the intruder. Rather, the resident has some degree of security *vis-à-vis* the intruder, although this security is incomplete (standing behind a curtain, shooting from the shadows).[1] This article's discussion of the little threat situation is further limited to situations in which, although the intrusion presents less than clear danger, only deadly force suffices to arrest the intrusion. This article will analyze how, in such a context, the two legal systems treat a silent shooting from the shadows in response to an anonymous intrusion. After introducing the theories of excuse and justification,[2] this article analyzes how Jewish law treats the problem,[3] and then presents a majority approach and a competing, largely theoretical, approach to the basis for justification in a little threat intrusion under

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1. By confining the analysis to the little threat situation as herein defined, this article considers the use of deadly force in a situation that is apparently less justified than one of clear threat, more sharply revealing the contrasts and comparisons between the legal systems. *See infra* notes 120 and 125 for a discussion of the defense of habitation. There the article excludes from the analysis cases that entail direct confrontation in which the use of deadly force is justified, even though there is deemed no risk of death or serious bodily injury.

2. *See infra* notes 6-22 and accompanying text for a discussion of excuse and justification.

3. *See infra* notes 23-106 and accompanying text for a discussion of Jewish law on a little threat intrusion.

United States common law.[4] This article concludes with an evaluative comparison of the approaches of the two systems, and argues that Jewish law presents the preferred approach.[5]

I. EXCUSE AND JUSTIFICATION

Before examining the respective approaches of the two systems, it is worthwhile to understand the principle of privilege in the context of self-help. The various defenses of privilege that exist for the charge of homicide rely on two exculpatory theories: excuse and justification.[6]

The doctrine of excuse individualizes the criminal process and asks whether the actor is culpable for having succumbed to the pressure of the specific circumstance, and whether it is fair and reasonable to expect the actor to resist in that situation.[7] Under this doctrine, the act remains illegal, although the actor is not considered culpable because of his or her incapacity to commit the offense.[8]

Justification, however, balances societal benefits and harms.[9] General principles of justification delineate conduct that, while otherwise criminal, is socially acceptable under the circumstances, and that deserves neither criminal liability nor even censure.[10] Justification is an exogenous defense, based on a determination that an act is legal because circumstances negate the validity of the normal rules of criminal liability.[11] Justification assumes that the harm produced by the actor in deviating from the law is less than the societal benefit realized through the actor's conduct.[12]

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4. *See infra* notes 107-44 and accompanying text for a discussion of United States common law on a little threat intrusion.

5. *See infra* notes 145-70 and accompanying text for an analytical comparison of the two approaches.

6. *See generally* Note, *Justification and Excuse in the Judaic and Common Law: The Exculpation of a Defendant Charged with Homicide*, 52 N.Y.U. L. REV. 599 (1977) [hereinafter *Justification and Excuse*]. *See also* Note, *Criminal Law—Homicide—Self-Defense—Duty to Retreat in Face of Felonious Assault*, 41 COLUM. L. REV. 733, 735 (1941) [hereinafter *Felonious Assault*] (duty to retreat with excusable homicide; no duty to retreat with justifiable homicide).

7. *Justification and Excuse, supra* note 6, at 601. Excuse is the basis, for example, of the defense of duress. Duress is invoked when the actor claims that he or she submitted to another person's demands to commit a criminal act. While this other person is the source of the aggression (as with self-defense), the actor harms an innocent third party, rather than resisting the source of the violence. *Id.* at 610. *But cf.* 4 W. BLACKSTONE, COMMENTARIES *183 (homicide in self-defense is excusable rather than justifiable).

8. Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975) [hereinafter Note]. *See* W. BLACKSTONE, *supra* note 7, at *184 (with defense of excuse, actor not absolutely free from guilt).

9. *Justification and Excuse, supra* note 6, at 601. Jewish law largely relies on justification. *Id.* at 617 n.72; 13 ENCYCLOPEDIA JUDAICA *Penal Law* 222, 227.

10. Note, *supra* note 8, at 916. *See also*, W. BLACKSTONE, *supra* note 7, at *182 (slayer who prevented commission of felony "is in no kind of fault whatever, not even in the minutest degree").

11. Note, *supra* note 8, at 916.

12. *See Justification and Excuse, supra* note 6, at 600 (if more benefit than harm to society results, defendant has chosen proper course of behavior and is exonerated); Comment, *Justification for the Use of Force in Criminal Law*, 13 STAN. L. REV. 566, 572, 583 (1961) [hereinafter *Force in Criminal Law*] (primary consideration for justifying use of deadly force is whether society deems

The theory of justification puts defenses for the use of force into two categories: those where the harmed person is not the source of the harm,[13] and those where the harmed person is the source of the harm.[14] In either case, the balancing process required by the theory of justification applies the criteria of proportionality and necessity.[15] Whether or not a certain amount of force is justified depends on the interests at stake according to these criteria. So, for example, the right to defend one's life permits a greater degree of force than the privilege applicable to the defense of property.[16] The societal balancing of benefits and harms, however, occurs on a qualitative, and not a quantitative, scale.[17] Accordingly, the killing of an assailant is proportionate and, therefore, reasonable: the "assailant's act of aggression, accompanied by his culpable state of mind, results in forfeiture of his right to be accorded the same weight as his victim in the justification balance."[18] Stated otherwise, the interests of someone who culpably endangers the interests of someone else are less worthy of protection than those of the innocent victim.[19]

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interest at stake more important than victim's life). At common law, the actor actually must believe that the circumstances exist which purportedly justify the action. Note, *supra* note 8, at 917-18. When the belief is incorrect though reasonable, however, the actor may fall back on the defense of excuse. *Id.* In addition, justification is an affirmative defense. In the absence of the prosecution's evidence indicating that the conduct may be justified, the burden of proof shifts to the actor. *See Force in Criminal Law, supra*, at 607.

13. "Necessity" may be one example of this at common law in that the actor injures others in order to avoid personal injury to him or herself, although those injured are not the source of the threat to the actor's person (e.g., cannibalism among survivors of a shipwreck). *Justification and Excuse, supra* note 6, at 603-05.

14. *Id.* at 607. This category includes the following somewhat overlapping common law defenses: the use of force in defense of one's self or another, in defense of property, and in law enforcement (prevention or termination of a felony, or arrest of a criminal). *See* Note, *supra* note 8, at 930 (most codes enumerate four defenses justifying use of force: use of force in defense of person, property, in law enforcement, and by persons with special responsibility for others). *See infra* notes 108, 123-25 and accompanying text for discussion of the overlapping nature of common law defenses.

15. *See* Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 367 (1973) (common law of the United States and England). *Cf. Force in Criminal Law, supra* note 12, at 572 (justifiable homicide originally based not on reasonableness of resident's force, but on nature of activity it was designed to prevent). The doctrine of proportionality considers whether the actor's response is commensurate with the circumstances which provoked it. *See* Fletcher, *supra*, at 367 (requirement of proportionality means that there are some cases where cost of protecting threatened interest is so great one must surrender interest rather than inflict grievous harm on aggressor). In addition, a response, albeit proportional, will not be justified unless it is necessary or is required in a given circumstance.

16. Fletcher, *supra* note 15, at 369.

17. *Justification and Excuse, supra* note 6, at 608.

18. *Id.*

19. Fletcher, *supra* note 15, at 377. Fletcher examines the breakdown of this culpability-based balancing process in the case of an aggressor free from culpability due to mental illness. *Id.* The issues raised by that set of circumstances are beyond the scope of this article because the aggressor or intruder posited here is not psychotic. Kadish offers a different reason for permission to take the life of another. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 881-88 (1976) (intentional killing of aggressors). All individuals, he suggests, have a right to the law's protection against the deadly threats of others, and an individual does not surrender the fundamental freedom to protect him or herself from aggression with the establishment of state authority.

Where life is not clearly in danger, the principle of autonomy augments the criterion of necessity.[20] This principle extends the moral right of the victim to resist the aggressor beyond life-threats to the protection of facets of the victim's personality.[21] The principle of proportionality qualifies that moral right such that the actions necessary to resist must be in proportion to the nature of the threat.[22] One task of a legal system is to determine the nature and the relative weight of a threat which is not clearly life-endangering.

II. JEWISH LAW

> If a thief be found breaking in, and be smitten so that he dieth, there shall be no bloodguiltiness for him. If the sun be risen upon him, there shall be bloodguiltiness for him . . . .[23]

These few enigmatic words have spawned much controversy. What is "bloodguiltiness"? Is the reference to the sun meant literally, that is, is there any justification for the use of deadly force in repelling a daytime intruder?[24] Are there mitigating circumstances which may rebut these general rules, or are the rules absolute? What must the intruder be breaking into?[25] Who may kill the intruder? To understand the modern resolution of these questions under Jewish law, it is necessary to examine the seminal sources.[26]

Id. at 884-85. The individual has, therefore, a right to resist aggression—a right which the aggressor lacks since the aggressor caused the victim to have the right to kill. *Id. Cf.* W. BLACKSTONE, *supra* note 7, at *223 ("in civil society the laws also come in to the assistance to the weaker party: and, besides that they leave him this natural right of killing the aggressor, if he can . . . they also protect and avenge him, in case the might of the assailant is too powerful"). *But cf.* Wechsler & Michael, *Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 736 (1937) ("We need not pause to reconsider the universal judgment that there is no social interest in preserving the lives of aggressors at the cost of those of their victims").

20. *See* Kadish, *supra* note 19, at 886 (principle of autonomy suggests no limit on right to resist threats to person of actor or interests closely identified therewith).

21. *Id.* at 888.

22. *Id.* at 885-86, 888.

23. *Exodus* 22:1-2 (Jewish Publication Society trans. 1917).

24. Since the biblical verse refers to a thief, *ganav*, the term "intruder" should be understood throughout this article to import the necessary scienter for theft or burglary. This definition excludes a mere trespass or unlawful entry.

25. According to one scholar, the biblical offense of forcible entry referred to breaking into a sheepfold. B. JACKSON, THEFT IN EARLY JEWISH LAW 49-50, 154 (1972). Breaking into a house, which was treated identically, may have developed as a result of increased urbanization. *Id.* at 154.

26. Jewish law is the product of sources which span 4,000 years of Jewish history. The sources include the TANAKH or Hebrew Scriptures (TORAH or PENTATEUCH, NEVI'IM or PROPHETS, and KETUVIM or HAGIOGRAPHA), the MIDRASH, the MISHNEH and its parallels, the TALMUD, commentaries and supracommentaries on the TALMUD, the codes and responsa literature.

The TANAKH, especially the TORAH (composed of the five books of Moses: GENESIS, EXODUS, LEVITICUS, NUMBERS, and DEUTERONOMY) is the authoritative touchstone from which the later sources developed. The MIDRASH, an exegetical literature, was the first gloss on the TANAKH, providing expositions of the TANAKH's rules and concepts. The MIDRASH is generally linked to the individual verses of the TANAKH.

The MISHNAH was the first legal literature or code that existed independent of the TORAH.

The *Mishneh's*[27] comment on these verses is terse. "Someone who breaks in[28] is judged according to his end."[29] The intruder may be killed, not for the initial breaking-in, but for the potential danger of killing the resident.

The *Talmud*[30] returns to the biblical verses in explicating this rule:

> Rava said: What is the reason for this breaking-in [rule that the thief may be killed]? It is based on the assumption that, given that no person would simply surrender his money [to another], this [thief] would say, 'If I go [towards him] he will stand against me, and not release me. And if he does, I will kill him.' [Given that,] the Bible says, 'If someone comes to kill you, rise to kill him first.'
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> . . . .
>
> Our Rabbis taught: 'There shall be no bloodguiltiness for him—if the sun be risen upon him.' Does the sun shine only upon him? Rather, [this means that] if it is as clear to you as is the sun that the thief has no peaceful intentions toward you, kill him. Otherwise, don't kill him.
>
> Another formulation [reads]: 'If the sun be risen upon him, there shall be no bloodguiltiness for him.' Does the sun shine only on him? Rather, [this means] if it is as clear to you as is the sun that the thief has only peaceful intentions towards you, don't kill him. Otherwise, kill him.
>
> This is problematic. These two anonymous formulations contradict one another.
>
> No, there is no problem. The first formulation refers to a father stealing from his son [where, in doubt, it is safe to assume no threat of the father murdering his progeny]. The second formulation refers to a

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Committed to writing in the second century, C.E., at the time of the expulsion from ancient Palestine, the MISHNAH is a compilation of legal material concerning all aspects of civil and ritual life.

The TALMUD is a multivolume set of treatises, structured loosely around legal and nonlegal expositions of the MISHNAH. One TALMUD was completed in Palestine (the PALESTINIAN or JERUSALEM TALMUD) in the fifth century, C.E. The second and more legally authoritative TALMUD was completed in Babylon (the BABYLONIAN TALMUD) in the sixth century, C.E. The TALMUD and the TORAH form the core of all Jewish legal authority.

Commentaries and supracommentaries explain and interpret issues raised in the TALMUD. Rashi was one of the most significant commentators. Codes developed which formulated the law independent of the talmudic context, similar to the MISHNAH's independence from the TANAKH. Among the most influential codes are the MISHNEH TORAH of Maimonides and the SHULHAN 'ARUCH of Joseph Karo. But just as the TALMUD connected much of the MISHNAH to the TANACH, so commentaries on the codes connected the provisions recorded in the codes to their sources in the TALMUD and the TANAKH. Responsa literature drew upon earlier sources in answering academic and practical questions contemporaneously raised. Responsa and commentaries on the TALMUD, the codes, and their respective commentaries, continue to be issued to this day.

For a more in-depth discussion of the sources and development of Jewish law, see the references cited in *Justification and Excuse, supra* note 6, at 613 n.59.

27. TRACTATE SANHEDRIN 8:6.

28. *Ha-ba ba-mahteret* may be more literally translated "someone who comes [in] by *burrowing*." *See* VIOLENCE AND DEFENSE IN THE JEWISH EXPERIENCE 101 (S. Baron & G. Wise eds. 1977).

29. TRACTATE SANHEDRIN 8:6.

30. BABYLONIAN TALMUD, SANHEDRIN 72a-b.

son stealing from his father [where, in doubt, it is safe to assume the son would kill the father].

Rav said: I would kill anyone who would come against me while breaking-in, excluding Rav Hanina bar Shila. Why [exclude Rav Hanina]? If you say it is because Rav Hanina is a righteous man—why is he breaking in? Rather, he has proven himself to me that he has compassion for me as a father would his son.[31]

In this passage, the *Talmud* begins with Rava's assumption that people will not freely surrender their possessions to a thief. The *Talmud* goes on to consider two alternative presumptions. According to the first, an intruder is presumed to be not life-threatening. Only when this presumption is rebutted does the verse "rise to kill him first" apply, enabling the lawful resident to justifiably kill the intruder.[32] In the other, an intruder is presumed to be life-threatening, and his force may be anticipated and repelled by deadly force. This presumption is also rebuttable.

To untangle this paradox, the *Talmud* offers a context for each presumption. An intruding father is presumed peaceful *vis-à-vis* his son, while an intruding son is presumed life-threatening *vis-à-vis* his father. Because Rav Hanina was not related to Rav, the Rav story suggests that these contexts are only examples.

Questions remain unanswered. Are the alternative presumptions reduced to narrow case studies by the father-and-son contexts, or are those contexts merely examples for a general rule, as the Rav story seems to suggest? If they are examples, which presumption is dominant? While the reference to the sun obviously is to be understood figuratively for clarity, is that understanding exclusive, or is the sun also meant literally? Is the resident not justified during the daytime in using deadly force to repel a clearly life-threatening "son"-intruder? Other sources, codes, traditional and modern commentaries, and responsa answer many of these questions.

The *Mekhilta* of Rabbi Yishma'el,[33] a source parallel to the *Mishneh*, derived rules for a threatened resident from the case of a betrothed woman pursued by a would-be rapist.[34] Both the betrothed woman and the resident are justified in killing in anticipation of the threat.[35] Such justification is available

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31. *Id.* The focus of this article is on the normative law today. Accordingly, this article excludes from primary treatment sources parallel to the MISHNAH and the BABYLONIAN TALMUD which offer other understandings of the biblical verses. For the usage of "the sun" as an image representing not clarity but peace, *see* JERUSALEM TALMUD KETUBOT 4:4; SANHEDRIN 8:8; MEKHILTA, MISHPATIM (ch. 6); SIFRE TATZE (No. 237); and *ad locum* (on BABYLONIAN TALMUD, SANHEDRIN 72a-b), ME'IRI, and YAD RAMAH. The expression "*ad locum*" ("on the place") refers to the supracommentator's discussion of the passage under consideration in the primary text.

32. For purposes of uniformity with the later portions of this article, "lawful resident" will serve as the translation for both "*ba'al ha-bayit*" (literally, "homeowner") and "*ba'al ha-mamon*" (literally, "property/money owner"), the terms widely used in the Hebrew sources.

33. MEKHILTA, MISHPATIM (Horvitz-Rabin ed. 1960).

34. *Id.* at ch. 13, p. 293.

35. *Id.*

equally day or night.[36] In addition, just as the betrothed woman would be liable for murdering a would-be rapist when others can come to her rescue, so the resident would be liable for murdering an intruder when others can come to the rescue.[37]

In his seminal code, the *Mishneh Torah*,[38] Maimonides established the modern law. According to this code, anyone, not only the lawful resident, is justified in killing an intruder who breaks into a residence, day or night.[39] Maimonides explains that this privilege is permitted, even if the thief entered only in order to acquire money.[40] Accordingly, Maimonides has adopted the presumption that the intruder is life-threatening, following the *Talmud*'s reasoning that if the lawful resident rises to prevent the theft, it is presumed that the intruder will kill the lawful resident.[41] Maimonides finds the intruder to be similar to a life-threatening pursuer, a *rodef*, whom anyone is generally permitted to kill.[42]

An exception mitigates this rule.[43] If it is as clear "as the sun" to the lawful resident that the intruder is not life-threatening and that the intrusion is only for purposes of acquiring money or other property, the presumption is rebutted, and the lawful resident is forbidden from killing the intruder.[44] For Maimonides, the father and son cases are obviously only examples of the rule and its exception, and not the exclusive limits of the rule.[45]

Corollaries of the exception fill out the scope of the rule. A thief or intruder who has already left the premises is no longer considered a *rodef*, and thus no

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36. *Id.*

37. *See* TOSEFTA, SANHEDRIN 11:10 (Tzukermandel ed.) (before killing pursuer [*rodef*], someone pursued must first try cutting off one of pursuer's limbs). *Contra* E. Benzimra, *Bloodshed by Necessity in Jewish and Israeli Law* (Hebrew), 3-4 SHENATON HA-MISHPAT HA-'IVRI 131 (permissible to kill intruder without first attempting to prevent anticipated danger by some other means). *But see* Benzimra, *supra*, at 122, 130 (permissible to kill intruder provided there is no other way to prevent breaking-in).

38. MISHNEH TORAH, HILKHOT GENEVAH. Maimonides, of Cordaba, Palestine, and Cairo, lived from 1135-1204 C.E.

39. *Id.* at 9:7-13. *Contra* W. BLACKSTONE, *supra* note 7, at *180 ("Jewish law . . . makes homicide only justifiable in case of *nocturnal* house-breaking . . . .") (emphasis original). This justification applies as well to an intruder found on the roof or in the garden or yard of the residence. MISHNEH TORAH, HILKHOT GENEVAH 9:8.

40. MISHNEH TORAH, HILKHOT GENEVAH 9:9.

41. *Id.* In keeping with tradition, Maimonides favors the TALMUD's second formulation. This conclusion follows the sources cited *supra* note 31. *See* commentary of Rashi on BABYLONIAN TALMUD, SANHEDRIN 72b, "*ben 'al haAv*" (comparing son, and not father, paradigm to any person intruding). Rashi, of Troyes, France, lived from 1040-1105 C.E.

42. MISHNEH TORAH, HILKHOT GENEVAH 9:9. *See infra* notes 68-70, and accompanying text for a discussion of a *rodef*.

43. MISHNEH TORAH, HILKHOT GENEVAH 9:10. Although Maimonides expresses this exception in terms of the lawful resident, it is clear, by implication, that the exception applies to anyone justified in killing the intruder, absent the exception. For purposes of brevity, references to the lawful resident in Section II refer to the lawful resident and to anyone else presumptively justified in killing an intruder.

44. *Id.*

45. This is in accord with the Rav story in the TALMUD and with later commentators.

justification exists for killing the intruder.[46] The threat similarly is neutralized, if the intruder is surrounded, even on the premises, in which case the intruder may no longer be killed with impunity.[47] Finally, no justification exists for killing someone who breaks into an outbuilding, such as a field shed.[48] It is presumed that the intruder's intent is only to steal because owners are generally absent from such buildings.[49]

While the supracommentators and later sources largely accept Maimonides's choice of presumptions and basic ruling,[50] Abraham ben David (Ra'avad)[51] argues in his commentary, *Hasagat Ra'avad*,[52] that the phrase "If the sun be risen upon him" should be understood literally.[53] According to Ra'avad, a thief robs by day to avoid the lawful resident, while at night the thief enters prepared to kill or die, knowing that the resident is at home.[54] Reading the reference to the sun both literally (for "time") and, by implication, figuratively (for "clarity"), Ra'avad reverses the presumption affirmed by Maimonides concerning a day-time intruder. According to Ra'avad, such an intruder may not be killed unless it is clear that the intruder is not peaceful.[55]

The passage of time has relegated Ra'avad's view to that of the dissent. Citing the verse "rise to kill him first," Moses ben Jacob[56] in his *Sefer Mitzvot Gadol* (Semag),[57] reiterates Maimonides's presumption that an intruder is life-threatening day or night and may be killed justifiably.[58] The Semag allows the presumption to be rebutted if it is as "clear as the sun" that the intruder is peaceful, implicitly arguing that the sun imagery was used only figuratively and not literally.[59]

Vidal Yom Tov,[60] in his commentary on the *Mishneh Torah*, *Magid Mishneh*,[61] explicitly rejects Ra'avad's view and supports Maimonides's nonliteral reading of the word "sun."[62] According to the *Magid Mishneh*, as long as the intruder's peaceful intentions are not clear, the intruder may be killed justifi-

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46. MISHNEH TORAH, HILKHOT GENEVAH 9:11.

47. *Id.*

48. *Id.* at 9:12.

49. *Id.*

50. *See infra* notes 51-85 and accompanying text for a discussion of the various commentators' analyses of the lawful resident's privilege to kill the intruder.

51. Ra'avad, of Posquieres, Provence, lived from 1125 to 1198 C.E. The writings of supracommentators are generally not printed as independent works, but rather are printed surrounding the textual subject of the comments.

52. *Ad locum* on MISHNEH TORAH, HILKHOT GENEVAH.

53. *Id.* at 9:8, "*lavo ba-mahteret ba-laila*," ("to break in at night").

54. *Id.*

55. It must be assumed that Ra'avad was not familiar with MEKHILTA, MISHPATIM ch. 13, which reads the sun reference only figuratively.

56. Moses ben Jacob, of Coucy, France, lived during the 13th century, C.E.

57. SEFER MITZVOT GADOL, Lavin (No. 160).

58. *Id.* Moses ben Jacob in the Semag almost always follows the holding of Maimonides.

59. *See id.*

60. Vidal Yom Tov, of Tolosa, Spain, lived in the late 14th century, C.E.

61. *Ad locum* on MISHNEH TORAH, HILKHOT GENEVAH.

62. *Id.* on HILKHOT GENEVAH 9:7.

ably, day or night.[63] Yom Tov expands Rav's father-son examples.[64] A lawful resident may not kill with impunity any intruder whom the resident knows to have compassion (*rahamim*) for him—such compassion as a father would have for a son.[65] Indeed, according to the *Magid Mishneh*, the father and son examples themselves are rebuttable. A father-intruder known to have no compassion for his son may be killed justifiably, while a son-intruder known to have compassion for his father may not.[66]

The *Shulhan 'Aruch* by Joseph Karo,[67] perhaps the most widely accepted code, only discusses the rule of the *rodef* in its analysis of the law of privilege as is relevant to this article.[68] The *Shulhan 'Aruch* defines a *rodef* as someone who, despite having been warned contemporaneously of the crime and punishment for which he would be liable, pursues another with homicidal intent.[69] All Jews are commanded to save the pursued person by any means necessary, including by killing the *rodef*.[70]

The preeminent gloss on the *Shulhan 'Aruch*, the *Mappah*,[71] by Moses ben Israel Isserles (Rema),[72] however, directly deals with the subject at hand. Isserles phrases the presumption, by then well-accepted, as follows, "An intruder who breaks in in order to steal is treated like a *rodef*."[73] Isserles's statement of the exception suggests a slight broadening of the justification.[74] "If [the intruder] is known to have come only to acquire money, and even were the owner to rise against him, [it is known that the intruder] would not kill, it is forbidden to kill him."[75] Unlike Yom Tov in the *Magid Mishneh*, Isserles does not mention a compassion test. Rather, Isserles has returned to the broader formulation of the exception proposed by Maimonides.[76] The *Magid Mishneh*'s requirement of compassion, then, should be understood as exemplary and not exclusive.[77] Both Isserles and Yom Tov would rule that no justification exists for killing an

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63. *Id.*

64. *See supra* text accompanying note 31 for father-son examples.

65. MAGID MISHNEH *ad locum* on MISHNEH TORAH, HILKHOT GENEVAH 9:10.

66. *Id.*

67. Joseph Karo, of Spain, Portugal and Palestine, lived from 1488 to 1575 C.E.

68. SHULHAN 'ARUCH, HOSHEN MISHPAT 425:1.

69. *Id.* Such warning is called "*Hatra'ah*" in Hebrew.

70. *Id.* This rule is distinguished from killing for revenge or punishment in that the *rodef* may be killed even though he or she still has not committed murder. *See Justification and Excuse, supra* note 6, at 618 (any person justified and in fact obligated to kill *rodef*). *But cf.* A. ENKER, DURESS AND NECESSITY IN THE CRIMINAL LAW (Hebrew) 214-17 (1977) (*rodef* rule is based on both effort to save pursued and to effect anticipatory punishment). In Jewish law, everyone has a duty to kill the *rodef*, while under the common law, private persons (as opposed to law enforcement officials) are never duty-bound to take a life. *See* Kadish, *supra* note 19, at 875 (private persons may justifiably take life in same circumstances as law enforcement officials but, unlike officials, private persons not duty-bound to take life).

71. *Ad locum* on SHULHAN 'ARUCH.

72. Moses ben Israel Isserles, of Cracow, Poland, lived from 1520 to 1572 C.E.

73. *Ad locum* on SHULHAN 'ARUCH, HOSHEN MISHPAT 425:1 ("*ha-ba ba-Mahteret*").

74. *Id.*

75. *Id.*

76. *See supra* notes 43-45 and accompanying text for a discussion of Maimonides's exception.

77. *Cf.* Commentary of Rashi on BABYLONIAN TALMUD, SANHEDRIN 72b, "*ben'al ha-'av*"

intruder who is known to be not life-threatening, although he or she bears no compassion for the lawful resident.

One of Isserles's students, Joshua Falk,[78] in his supracommentary on the *Shulhan 'Aruch, Me'irat 'Enayim*,[79] affirms this statement of the rule.[80] If any doubts lingered regarding the validity of Ra'avad's literal interpretation of "sun" as "daytime," Falk attempts to resolve them finally. Falk argues that the term "upon him" ("*'alav*") in the verse, "If the sun be risen upon him," would be superfluous were the meaning of the verse intended literally.[81] Rather, "*'alav*" is included to teach that the term "sun" should be understood figuratively, if it is as clear as the sun that the intruder did not come to kill the lawful resident, but rather only to steal from him, the resident may not kill the intruder with justification.[82] Falk, like Yom Tov in the *Magid Mishneh*, offers examples of circumstances in which this exception would apply beyond the well-known father and son cases.[83] A faithful lover ("*'ohev ne'eman*"), like Rav Hanina in the *Talmud*, is presumed to bear no threat to the life of a lawful beloved resident.[84]

Later commentators added only small glosses to the rule's basic formulation. Jehiel Halevi and Moshe Feinstein affirm the rule that a resident can kill an intruder unless the resident knows that the intruder is not life-threatening.[85] As is to be expected, modern scholars who formulate this rule of Jewish law trace the development of the sources and contribute by filling in interstices.[86]

(resident permitted to kill intruder provided resident does not know intruder to be compassionate toward him as a father toward his son).

78. Joshua Falk, of Poland, lived from 1555-1614 C.E.

79. *Ad locum* on SHULHAN 'ARUCH.

80. *Ad locum* on SHULHAN 'ARUCH, HOSHEN MISHPAT 425:1, at 6 ("*ha-ba ba-Mahteret*").

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* 'ARUCH HASHULHAN 425:10. According to Jehiel Michal Epstein Halevi, of Belorussia (1829-1908), a lawful resident is not justified in killing an intruder unless the resident clearly knows the intruder would kill, in the event the lawful resident opposed the intrusion. *Id.* Although this formulation seems to reverse the earlier presumptions by making the exception the rule, Halevi immediately nullified this shift, by stating that every intruder is presumed to be willing to kill the resistant lawful resident. All that Halevi really adds is a new example of rebutting the father-case presumption: A son-resident may kill his intruding father when it is clear to the son that the father hates the son and would kill him. *Id. See also id.* at 358:16-17, for a formulation of the rule more in keeping with earlier efforts (any person permitted to kill intruder, day or night, because intruder presumed to be prepared to kill). There, Epstein also rejects Ra'avad's literal understanding.

Moshe Feinstein reiterates Maimonides's comment that the rule applies only to places where the lawful resident is expected to be, for example, the residence as opposed to a field shed. 2 SEFER 'IGROT MOSHE, HOSHEN MISHPAT § 54 (1985). Further, Feinstein limits the rule to resisting a clandestine thief ("*ganav*") rather than an outright forceful robber ("*gazlan*"). *Id.*

86. *See, e.g.*, 1 S. ZEVIN, TALMUDIC ENCYCLOPEDIA *'Ain 'adam ma'amid 'atzmo 'al mamono* 546 (2d rev. ed. 1982) (permission to kill intruder because of Talmudic presumption that a lawful resident would not turn over property willfully); VIOLENCE AND DEFENSE IN THE JEWISH EXPERIENCE, *supra* note 28, at 325 (TORAH and TALMUD cited as condoning self-defense); ENKER, *supra* note 70, at 151 (justification to kill intruder unless lawful resident knows intruder lacks murderous intent); B. JACKSON, *supra* note 25, at 210 (presumption not to kill thief was dissenting position, while trend of rabbinic interpretation was to extend rights of homeowner); J. GINZBERG, *Mishpatim*

Jacob Ginzberg suggests that an intruder who believes no one is present in the residence should be considered nonthreatening to the life of the residents, as the intruder's purpose is only theft and not violence.[87] This may have been the basis for Ra'avad's literal understanding of the term "sun," because most people are not at home during the day. Ginzberg asserts, however, that as long as there is some doubt as to whether the intruder will present a threat to life, the intruder may be killed.[88] Further, this doubt certainly is present in the modern period during the daytime.[89]

Ginzberg also clarifies the scope of the rule.[90] If a neighbor, unbeknownst to the intruder, witnesses a breaking-in, he or she may kill the intruder without warning to obviate any danger to the resident, even though the neighbor is in no personal danger.[91] The neighbor is justified because the act of breaking-in serves to put the intruder fully on notice that one may rise to kill him first.[92]

Some commentators, in response to Maimonides's statement that the intruder is considered to be *similar* to a *rodef* ("*kerodef*"), note a distinction between an intruder and the pure *rodef*.[93] Killing an intruder is only permissible, while killing a *rodef* is obligatory,[94] because there is less certainty that the intruder intends to kill, while it is certain by definition that homicide is the intent of the *rodef*.[95] In a little threat situation then, the lawful resident may decide not to strike, despite the privilege permitting the resident to do so.

One commentator compares Israeli and Jewish law and notes that both require danger to certain interests.[96] Jewish law, however, has a broader set of interests which justify homicide than Israeli law. In Jewish law, anyone, even a stranger, may protect against threats to physical well-being, reputation ("*kavod*"), and property.[97] Israeli law requires a present danger, urgent and immediate, from which there is no escape other than the act of homicide in self-

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LeIsrael: A STUDY IN JEWISH CRIMINAL LAW 169, 339-40, § 73 (1956) (lawful resident exempt from punishment, day or night, where kills person who breaks into or enters through an opening of resident's house).

87. J. GINZBERG, *supra* note 86, at 170 n.319, 340 n.280.

88. *Id.* at 170 n.319. *Cf. id.* at 341 (lawful resident would be liable for murder if it was clear to resident from personality of intruder or circumstances of intrusion that intruder's aim was only to obtain money).

89. *Id.* at 170 n.319.

90. *Id.* at 169-70.

91. *Id.* This is, of course, where the presumption that the intruder is life-threatening has not been rebutted.

92. *Id.* at 170. This concept is known in Hebrew as "*Mehtarato zo hi' hatra'ato.*"

93. Halevi, *The Law of Self-Defense in Our Communal Basis* (Hebrew), 1 TECHUMIM 343, 345-57 (1980). *See* Warhaftig, *Self-Defense in the Crimes of Murder and Assault* (Hebrew), 81 SINAI 48, 49 (1977) (because intruder is not yet an actual *rodef*, but rather only a potential *rodef*, law concerning intruder is less severe).

94. Halevi, *supra* note 93, at 345; Warhaftig, *supra* note 93, at 48-49.

95. Halevi, *supra* note 93, at 345-46. *See* Warhaftig, *supra* note 93, at 49 (because intruder is not actual *rodef*, and only bears presumption of future intent to pursue as *rodef*, anyone witnessing intrusion permitted, but not obligated, to kill intruder).

96. E. Benzimra, *supra* note 37, at 117, 129-30.

97. *Id.* at 129.

defense, as measured by a reasonable person standard.[98] In Jewish law, however, circumstances, like those attending a house-breaking, define a presumption of certain and immediate danger to life, although the danger actually may not be so certain and immediate.[99] Further, Jewish law employs the perspective of the lawful resident, a subjective standard, rather than a reasonable person standard.[100] Under both systems, it is not permissible to kill when there is another means of saving oneself.[101]

In summary, Jewish law permits, but does not require, a lawful resident or anyone else to use as much force as is necessary, including deadly force, against a thief who clandestinely breaks into a residence.[102] This privilege applies day or night, even if there is no actual, imminent threat to the resident's life.[103] The rule is based on a conclusive presumption that the resident will rise to resist the theft and on a rebuttable presumption that the thief will be prepared to respond to such resistance with deadly force.[104] This latter presumption may be rebutted when it is clear beyond doubt to the lawful resident that the intruder's intent is only to steal and not to cause violence.[105] Thus, a thief known to the resident to have compassion for the resident—a father or loving teacher—may not be killed, as no threat of danger to the resident's life exists.[106]

III. UNITED STATES COMMON LAW

> Burglary, or nocturnal housebreaking . . . has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion

98. *Id.* at 130.

99. *Id.*

100. *Id.*

101. *Id.* at 130-31. An example of this restriction is where neighbors are in the vicinity to respond to a call for help. *Id.* at 122, 131. *See also supra* note 37 and accompanying text for a discussion of a resident's liability for murdering an intruder when others can come to the rescue; M. JUNG, THE JEWISH LAW OF THEFT 50 (1929) ("*whenever* self help is used it is necessary that the amount of force used be reasonable, and commensurate to the circumstances of the case") (emphasis added). *Cf.* at 23 (lawful to kill intruder without *hatra'ah, i.e.,* warning).

102. *See supra* notes 38-49 and 93-95 and accompanying text for a discussion of Jewish law's permission to use deadly force.

103. *See supra* notes 36, 39, 58, 63, 88-89 and accompanying text for a discussion of day or night privilege. *But see supra* notes 50-55 and accompanying text for RAVaD's contrary approach.

104. *See supra* notes 31, 41 and accompanying text for a discussion of the presumption that a resident will rise to prevent the theft.

105. *See supra* notes 44, 46-49, 59, 65-66, 82-88 and accompanying text for a discussion of the clear lack of violence exception. *See also supra* notes 74-75 and accompanying text for the ReMA's expansion of this exception. As a question of proof, however, a court may consider the circumstances of the intrusion in addition to the resident's assertions in determining what the resident subjectively perceived.

106. *See supra* notes 64-66, 83-84 and accompanying text for a discussion of the treatment afforded to an intruder with compassion for the resident. Under Jewish law, a lawful resident may kill an intruder whose intent, considered objectively, may be only to steal. The resident possesses this right even when shooting from the silent shadows, provided that the absence of a threat of violence is not fully clear to the resident. Where less severe measures are adequate to arrest the intrusion, only they are justified.

> and disturbance of that right of habitation, which every individual might acquire even in a state of nature . . . .
>
> [T]he malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.[107]

United States common law provides a number of overlapping defenses for the resident where the harmed person is the source of the harm.[108] These defenses include the use of force in defense of a person including oneself, of property, and in law enforcement.[109] The grounds for the defenses, particularly for law enforcement, reveal the character of the justification United States common law provides for the use of deadly force in response to a little threat intrusion.

The defense of self-defense will not prove useful in a little threat situation. A person may use deadly force when that person reasonably believes such force is reasonably necessary to protect him or herself against death or serious bodily injury.[110] Such danger is judged by an objective standard, and must be or ap-

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107. W. BLACKSTONE, *supra* note 7, at *223-24. Early common law defined a burglary as a breaking and entering of a mansion house at night with the intent to commit a felony. *Id.* at *224. Today burglary is defined much more broadly in some jurisdictions to include entries during the daytime and into places other than a house. Breaking is also no longer required. People v. Ceballos, 12 Cal.3d 470, 479 n.2, 526 P.2d 241, 246 n.2, 116 Cal. Rptr. 233, 238 n.2 (1974). *See also* State v. Metcalfe, 203 Iowa 155, 169, 212 N.W. 382, 389 (1927) (burglary is crime of force not necessarily of violence; unlawful opening of door and seizure of personal property implies use of force). *But cf.* Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1009 n.3 (1951) (New York penal law section 402 described as narrower than common law rule).

108. *See* Sledge v. State, 507 S.W.2d 726, 729 (Tex. Crim. App. 1974) (right to defend one's home is coextensive with right of self defense); *superseded by statute as stated in* Rogers v. State, 653 S.W.2d 122 (Tex. Ct. App. 1983); Kadish, *supra* note 19, at 875 (overlapping class of cases where private persons may justifiably take life include killing unlawful aggressor where reasonably appears necessary to avoid imminent loss of life or imminent bodily harm and killing to defend property against violent felony); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 54, at 400-01, 406 (1972) [hereinafter LAFAVE & SCOTT] (deadly force permissible when defender reasonably believes trespasser intends to commit felony or do harm to him or another within home; some courts view defense of property as close to self-defense and crime prevention; defense of crime prevention overlaps with defense of property and defense of self or another). *See also* Note, *supra* note 8, at 930-31 (defenses directed toward use of force in defense of person, property, and in law enforcement are similar and have similar requirements); Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. L. & ECON. 201, 204 (1971) (redundancy of privilege to use deadly force in defense of property in light of privileges of self-defense and prevention of serious crimes); *Force in Criminal Law, supra* note 12, at 575-76 (right to kill in defense of property usually sustained only where victim, in threatening actor's property, also threatened actor's life; no independent right to use deadly force in defense of property); 40 AM. JUR. 2D *Homicide* § 174 (1968) (after unlawful entry has been accomplished, resident's right under defense of habitation to take life of intruder is justifiable only under usual rules of self-defense, or to prevent commission of felony, although there is no duty to retreat); RESTATEMENT (SECOND) OF TORTS § 79 comment d, illustration 3 (1965) (A is privileged to prevent B, a burglar, from breaking into A's residence at night by killing or wounding B since B's entry is not only dangerous to occupiers of dwelling place, but is also a felony).

109. Although the use of force in law enforcement includes both the use of force in the arrest of a criminal and the use of force in the prevention or termination of a felony, this article will concentrate primarily on the latter.

110. LAFAVE & SCOTT, *supra* note 108, § 53, at 391 (amount of force used in self-defense must

pear to be pressing and urgent.[111] The justification disappears once the immediate danger has passed.[112] While there is heated debate about the requirement for retreat,[113] all authorities agree that no one is obliged to retreat from the dwelling.[114] This is known as the "castle doctrine," which is based on the prem-

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be reasonable); P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW: CASES AND MATERIALS 552, 568 (1982) [hereinafter LOW] (deadly force justified if reasonably apparent necessity to protect against death or serious bodily harm); W. KEETON, PROSSER & KEETON ON TORTS § 19, at 125-26 (5th ed. 1984) [hereinafter KEETON] (privilege of self-defense limited to use of force reasonably necessary); W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 114, 120 (7th ed. 1982) [hereinafter PROSSER, WADE & SCHWARTZ] (privilege limited to use of force reasonably necessary for protection against threatened battery); Beale, *Homicide in Self Defense*, 3 COLUM. L. REV. 526, 526-28 (1903) [hereinafter Beale, *Homicide*] (killing in self-defense justified if reasonable and honest belief that action was necessary); *Force in Criminal Law, supra* note 12, at 573, 591-92 (justification defense requires determination of whether actor honestly believed in necessity of defensive force). *See also* Crawford v. State, 231 Md. 354, 361, 190 A.2d 538, 542 (1963) (lawful occupant justified in killing intruder provided resident reasonably believed necessary to avoid immediate danger of losing life or suffering severe bodily harm); State v. Miller, 267 N.C. 409, 411, 148 S.E.2d 279, 281 (1966) (reasonable belief that intruder will commit felony or cause serious bodily harm justifies use of force by dweller); State v. Johnson, 261 N.C. 727, 729-30, 136 S.E.2d 84, 86 (1964) (resident may use force to overcome intruder); Morrison v. State, 212 Tenn. 633, 638-40, 371 S.W.2d 441, 443-44 (1963) (reasonable belief of peril justifies defense of self, even killing); State v. Preece, 116 W. Va. 176, 183-84, 179 S.E. 524, 527-28 (1935) (use of force in self-defense based on reasonable belief in actual and imminent threat of death or serious bodily injury); State v. Sorrentino, 31 Wyo. 129, 137-39, 224 P. 420, 423 (1924) (self-defense justification depends on honest reasonable belief that danger imminent and that action necessary to protect self from loss of life or infraction of great bodily injury).

Self-defense is a statutory as well as a common law defense. *See* MODEL PENAL CODE § 3.04 (1985). The Model Penal Code has had tremendous impact on the many penal codes of the United States. LOW, *supra*, at A.2-A.3. This force has also been permitted to be used against forcible sexual assault and kidnapping. *Id.*

111. *See* Beale, *Homicide, supra* note 110, at 528 (reasonable person standard; threatened danger must be pressing and urgent); Perkins, *Self-Defense Re-Examined*, 1 U.C.L.A. L. REV. 133, 134 (1953) (test is whether reasonable person would have believed force necessary).

112. *See Morrison*, 212 Tenn. at 639-40, 371 S.W.2d at 443 (need present, pressing necessity for use of deadly force); KEETON, *supra* note 110, § 19, at 126 (no privilege to use force once danger has passed); PROSSER, WADE & SCHWARTZ, *supra* note 110, at 113 (threat must be current; privilege not applicable to retaliation); Beale, *Homicide*, *supra* note 110, at 530 (not justified to kill after passing of immediate danger; right of self-defense ends when necessity ends).

113. *See, e.g.*, People v. LiGouri, 284 N.Y. 309, 317, 31 N.E.2d 37, 40 (1940) (establishing New York rule permitting actor to stand ground); KEETON, *supra* note 110, at 127 (one view permits "no retreat" to give priority to dignity of individual; another view requires retreat if possible to give priority to value of human life); LOW, *supra* note 110, at 559-60 (requirement of retreat one of most hotly contested questions in law of self-defense); PROSSER, WADE & SCHWARTZ, *supra* note 110, at 114 (one basic disagreement in privilege of self-defense is whether one must retreat); Beale, *Homicide*, *supra* note 110, at 537-42 (discussing retreat and no retreat rules); Perkins, *supra* note 111, at 143-45 (authorities split on retreat issue); Comment, *Criminal Law—Self-Defense—Justification Needed for Use of Deadly Force*, 69 W. VA. L. REV. 361, 362 (1967) (noting two rules regarding requirement of retreat: "no retreat" and "retreat").

The Model Penal Code also requires retreat when the actor can avoid the necessity of using deadly force with complete safety by retreating. MODEL PENAL CODE § 3.04(2)(b)(ii) (1962).

114. *See, e.g.*, LAFAVE & SCOTT, *supra* note 108, § 53, at 396 (no need to retreat from one's home); LOW, *supra* note 110, at 562 (even jurisdictions requiring retreat recognize exception for person attacked in own home); Beale, *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567,

ise that retreat would leave the resident exposed to attacks which the home is intended to protect against.[115] Nonetheless, by definition self-defense is not applicable to a little threat intrusion. Both in theory and in practice, self-defense is invoked only when there is or there reasonably appears to be danger of death or serious bodily injury to the lawful resident.[116]

Defense of habitation similarly is not applicable to a little threat situation. The right to use force in defense of property is restricted to the use of reasonable, but not deadly, force because society values human life over property.[117] The

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574-75 (1903) (can defend "castle" from felonious attack without retreat); Perkins, *supra* note 111, at 150 (victim of murderous assault need not retreat but may use deadly force if in his home); *Use of Deadly Force*, *supra* note 113, at 362 (no retreat necessary in defense of habitation); *Felonious Assault*, *supra* note 6, at 734 n.6 (duty to retreat does not extend to one's home).

Several jurisdictions have explicitly recognized this rule. *See, e.g., Crawford*, 231 Md. at 361, 190 A.2d at 541 (no need to retreat from danger of attack in own home); State v. McCombs, 297 N.C. 151, 155-56, 253 S.E.2d 906, 909-10 (1979)(no retreat from dwelling firmly imbedded in law); *Miller*, 267 N.C. at 411, 148 S.E.2d at 281 (no need for dweller to flee); *Johnson*, 261 N.C. at 729, 136 S.E.2d at 86 (no duty to retreat in own home if free from fault in causing difficulty); People v. Tomlins, 213 N.Y. 240, 243, 107 N.E. 496, 497 (1914) (law has never required individual to retreat from own dwelling; no duty to take to the fields and highways, a fugitive from one's own home); *Preece*, 116 W. Va. at 183-84, 179 S.E. at 527-28 (settled principles of law do not require retreat from own home). *But see* MODEL PENAL CODE § 3.04(2)(b)(ii)(A) (exception to "no retreat" from dwelling where actor was initial aggressor).

115. *See* Beale, *Homicide*, *supra* note 110, at 541 (doctrine that one need not retreat from house based upon fact that such retreat would leave resident exposed to attacks which house is intended to protect against); Perkins, *supra* note 111, at 152-54 (home originally thought of as place from which not even participant in chance medley obliged to retreat). This is, of course, not an unlimited right. *See Morrison*, 212 Tenn. at 639, 371 S.W.2d at 443 ("The expression, 'A man's house is his castle,' cannot be taken to mean that in any and every case a person may kill another who unlawfully attempts to enter his habitation") (quoting WHARTON, CRIMINAL LAW AND PROCEDURE § 220).

116. *See supra* notes 110-114 for authorities and cases.

117. *See* LAFAVE & SCOTT, *supra* note 108, § 55, at 400 (unreasonable to use deadly force to prevent harm to property because preservation of human life is more important to society than protection of property). *See also* State v. McCracken, 22 N.M. 588, 593, 166 P. 1174, 1176 (1917) (absent attempt to commit felony, no right to use deadly force in order to assert dominion over plot of land); Posner, *supra* note 108, at 205 (no privilege exists to use deadly force in defense of property as such); Annotation, *Homicide or Assault in Defense of Habitation or Property*, 25 A.L.R. 508, 525 (1923) [hereinafter *Homicide or Assault*] (no right to kill to protect property unless necessary to prevent felony); *Force in Criminal Law*, *supra* note 12, at 575 (right to kill in defense of property justified only where victim threatened actor's life as well as property). *See also supra* notes 9-22 and accompanying text for discussion of the principle of proportionality.

For purposes of this article, the defense of property will be strictly defined so as to exclude often overlapping alternative defenses such as the defense of felony prevention. For further support of the proposition that the right to use force in defense of property is restricted to reasonable nondeadly force, under the strictly defined defense of property, *see* MODEL PENAL CODE § 3.06(3)(d)(ii) (1985) (in protection of property, use of deadly force justified only where attacker is attempting to dispossess resident of dwelling other than under claim of right); RESTATEMENT (SECOND) OF TORTS § 79 (1965) (deadly force justified in protection of property only where without such force intruder is likely to cause death or serious bodily harm); Note, *supra* note 8, at 942 (some jurisdictions allow use of deadly force against person both interfering with property and about to use unlawful deadly force, especially where property is a building). *See also*, Comment, *The Use of Deadly Force in the Protection of Property under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1214 (1959) [hereinafter *Deadly Force*] (actor justified in using reasonable but not deadly force to protect property).

narrower right to use force in defense of one's habitation, however, is more liberal and, under certain conditions, may justify the use of deadly force.[118] Defense of habitation stems from the law's early castle doctrine; defense of the home is considered equivalent to defense of life itself.[119] Under this privilege, to prevent a forcible intrusion, a lawful resident is permitted to use deadly force against an intruder who the resident reasonably believes intends to commit a felony or inflict serious bodily injury imminently upon anyone in the residence, provided necessity or apparent necessity is present.[120] No right exists to take

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118. *See McCracken*, 22 N.M. at 593, 166 P. at 1176 (not justified to defend property, other than habitation, by killing for mere purpose of preventing a trespass) (quoting WHARTON ON HOMICIDE § 526 (3d ed.)); LAFAVE & SCOTT, *supra* note 108, § 55, at 400 (limits on use of force to protect other property not always applicable to dwellings where deadly force may be justified); *Deadly Force, supra* note 117, at 1213, 1215 (wider privilege exists regarding use of deadly force in defense of habitation than in defense of property); *Homicide or Assault, supra* note 117, at 509 (if assault on dwelling made under circumstances creating reasonable apprehension of impending felony or infliction of personal injury causing loss of life or great bodily harm, lawful occupant may prevent entry by taking intruder's life).

119. *See, e.g.*, State v. Perkins, 88 Conn. 360, 364, 91 A. 265, 266 (1914) (assault on home regarded as assault on person where purpose is to injure occupant); W. BLACKSTONE, *supra* note 7, at *223 (the law "has so particular and tender a regard to the immunity of a man's house, that it stiles [sic] it his castle, and will never suffer it to be violated with impunity"). *See also Deadly Force, supra* note 117, at 1216 (older common law rule based on view that defense of home justified not as defense of property but as defense of occupants of home); F. INBAU, A. MOENSSENS & R. THOMPSON, CASES AND COMMENTS ON CRIMINAL LAW 209 (4th ed. 1987) [hereinafter INBAU] (defense of habitation from early view of home as castle); LAFAVE & SCOTT, *supra* note 108, at 400 (early view based on notion that defense of home as important as defense of life).

120. *See* INBAU, *supra* note 119, at 209 (resident permitted under castle doctrine to take life of intending trespasser if resident reasonably believes threatened entry is for purpose of committing felony or inflicting great bodily harm upon occupant of house); LAFAVE & SCOTT, *supra* note 108, at 401 (deadly force in defense of property permissible only against entry of dwelling reasonably believed to be for purpose of committing felony, including killing or causing serious bodily injury therein); LOW, *supra* note 110, at 552 (resident entitled under defense of habitation to use deadly force to prevent entry into home if reasonably believes such force necessary to prevent robbery, burglary, etc., though not fearful of death or serious bodily injury); *Use of Deadly Force, supra* note 113, at 362-63 (use of deadly force permitted to defend habitation if such force reasonably appears necessary to protect occupants from commission of felony or great bodily harm); *Force in Criminal Law, supra* note 12, at 575 (common law defense of property provides privilege to kill only in cases involving felonious threat to property with additional requirement that threat also present danger of serious harm to some person). *See also, Deadly Force, supra* note 117, at 1216 (older common law rule based on view that defense of home justified not as defense of property, but rather as defense of owner and members of household; deadly force allowed only if forcible entry made under such circumstances as to create reasonable apprehension that it was design of assailant to commit violent or forcible felony or to inflict serious bodily harm on occupants).

Courts follow the rule that the occupant of a house may use deadly force if he or she has a reasonable belief that an intruder will commit a felony or cause serious bodily harm. *See* State v. McCombs, 297 N.C. 151, 156, 253 S.E.2d 906, 910 (1979). "When a trespasser enters upon a man's premises, makes an assault upon his dwelling, and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry, even by the taking of the life of the intruder." *Id.* (citing *Miller*, 267 N.C. at 411, 148 S.E.2d at 281). *See also Perkins*, 88 Conn. at 365-67, 91 A. at 266-67 (home owner must have reasonable belief that intruder intended to take life or inflict serious bodily injury); Fore v.

life to prevent mere trespass or unlawful entry without felonious intent.[121] Strictly speaking, even assuming more than a mere trespass exists, there is no right to use deadly force under this defense after the unlawful entry has been accomplished.[122]

The habitation defense, then, is an excellent example of the overlapping nature of the common law defenses.[123] The doctrine of self-defense covers the threats of death or other injury in preventing forcible intrusion.[124] The defense

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Commonwealth, 291 Ky. 34, 38, 163 S.W.2d 48, 49-50 (1942) (for defense to apply, intruder must be engaged in attack on home).

A few jurisdictions, however, employ a broader rule, under which the resident may use deadly force to prevent a mere forcible intrusion by an intruder believed to be intending only assault or other nonfelonious violence. *See* People v. Eatman, 405 Ill. 491, 497-98, 91 N.E.2d 387, 390 (1950) (resident may employ all force apparently necessary to repel any invasion of residence); Young v. State, 74 Neb. 346, 352, 104 N.W. 867, 869 (1905) (same). *See also* INBAU, *supra* note 119, at 209 (some jurisdictions allow occupant to prevent intrusion with apparent purpose of assault or other nonfelonious violence); LAFAVE & SCOTT, *supra* note 108, at 400 (early view of defense permitted resident to use deadly force if appeared reasonably necessary to prevent forcible entry against his will after warning intruder not to enter and to desist from use of force); *Force in Criminal Law, supra* note 12, at 575 (some courts have indicated that where property in question is defendant's own habitation, homicide might be justified though victim was not threatening death or great bodily harm to inhabitants); *Deadly Force, supra* note 117, at 1216 (some jurisdictions do not require that threat to occupants create apprehension of death or serious bodily harm; others, seemingly emphasizing protection of habitation as property, have indicated willingness to extend privilege to prevent mere forcible entry).

In a case often cited for the broader rule, Hayner v. People, 213 Ill. 142, 72 N.E. 792 (1904), a 73 year-old resident who weighed 147 pounds shot and killed a 36 year-old intoxicated intruder who weighed at least 180 pounds. *Id.* at 144-46, 72 N.E. at 793-94. The resident reasonably believed that the intruder intended to assault the resident and the other occupants of the house. *Id. Hayner* is a typical example of reliance on this defense, which entails more direct confrontation and less resident-control than is contemplated by a little threat situation, although *Hayner* itself involves perhaps more resident-control than most cases which rely upon this defense. *See infra* note 125 for a discussion of the confrontation element of the habitation defense.

121. INBAU, *supra* note 119, at 209; *Homicide or Assault, supra* note 117, at 512; Annotation, *Homicide or Assault in Defense of Habitation or Property*, 32 A.L.R. 1541, 1542 [hereinafter *Habitation*]. *See* State v. Couch, 52 N.M. 127, 135-36, 193 P.2d 405, 410 (1946) (mere civil trespass upon one's dwelling house does not justify slaying trespasser). *But see supra* note 120 for a discussion of three cases that allowed the use of deadly force to prevent mere forcible intrusion.

122. *See McCombs*, 297 N.C. at 156-57, 253 S.E.2d at 910 (use of deadly force in defense of habitation justified only to prevent forcible entry accompanied by reasonable fear of harm); State v. Sorrentino, 31 Wyo. 129, 137-38, 224 P. 420, 422 (1924) (once intruder gained entry to kitchen, resident had no right to kill; right limited to protection of self and prevention of entry to or felony in bedroom); LAFAVE & SCOTT, *supra* note 108, § 55, at 401 (deadly force justified only when used against entry of dwelling reasonably believed to be for purpose of committing felony).

123. *See supra* note 108 and accompanying text for discussion of overlapping nature of defenses.

124. *See* Posner, *supra* note 108, at 204-05 (no privilege to use deadly force in defense of property as such; privilege to use deadly force in defense of property largely redundant in view of privilege of self-defense and crime prevention); *Homicide or Assault, supra* note 117, at 525 (where preventing threatened trespass on property, life of owner placed in danger and use of deadly force necessary to prevent loss of life or serious bodily injury, such use constitutes nothing more than self-defense, and not strictly speaking defense of property). *See also supra* note 121 for discussion of defense of habitation as a subset of self-defense.

of the use of force in the prevention or termination of a felony covers the threat of an imminent commission of a felony. More tellingly, case law only invokes the defense of felony prevention, and not the defense of habitation, in circumstances of little threat intrusions.[125]

In a little threat intrusion, the defense of felony prevention may justify the use of deadly force by the lawful resident while the doctrine of self-defense and the defense of habitation will not. Under early common law, deadly force was justified whenever its use was necessary to prevent the commission of a felony, because all such wrongs were punishable by death and most involved danger to life.[126] This rationale was upset by the creation of statutory felonies that lacked such characteristics.[127] The modern common law rule limits the right to use deadly force to situations in which such force is reasonably believed necessary[128]

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125. Cases in which the defense of habitation is raised invariably involve some direct confrontation or prior animosity, and therefore, do not approach situations in which the resident would believe the intrusion presents no physical danger. They are thus not little threat situations. This may be seen even in the "closer" cases of mere forcible intrusion. *See supra* note 120 for authorities on use of deadly force to prevent mere forcible intrusion. *See also* Sledge v. State, 507 S.W.2d 726, 728 (Tex. Crim. App. 1974) (resident shot husband of stepdaughter who was breaking in to fight with him) *superseded by statute as stated in* Rogers v. State, 653 S.W.2d 122 (Tex. Ct. App. 1983); People v. Eatman, 405 Ill. 491, 493-94, 91 N.E.2d 387, 388 (1950) (in allegedly physically and verbally violent confrontation between resident, landlady and landlady's bodyguard, resident stabbed intruder-bodyguard); State v. McCracken, 22 N.M. 588, 592-93, 166 P. 1174, 1176 (1917) (resident killed intruder in direct dispute over land ownership); State v. Perkins, 88 Conn. 360, 362-63, 91 A. 265, 265-66 (1914) (mother-in-law killed son-in-law after son-in-law threatened to "cut [her] guts out" in order to be let in, and began breaking down door of house); Young v. State, 74 Neb. 346, 348-49, 104 N.W. 867, 868 (1905) (resident killed intruder whom resident had fired earlier same day and who broke into residence with companion while resident was sleeping); Hayner v. People, 213 Ill. 142, 146, 72 N.E. 792, 794 (1904) (resident killed large intoxicated man who forcibly intruded into residence in course of argument); Brown v. People, 39 Ill. 407, 407-08 (1866) (resident killed intruder who, with resident's brother, broke in resident's door and window in wanton, riotous, violent attack). *But see McCombs*, 297 N.C. at 154-58, 253 S.E.2d at 908-11 (defense of habitation unsuccessfully invoked though no prior animosity). *Cf.* Thompson v. State, 61 Neb. 210, 212, 85 N.W. 62, 63 (1901) (resident mortally wounded intruder who, resident believed, intended to rob, when intruder broke open door and was about to enter residence), which seems more concerned with felony prevention than with defense of habitation. *See infra* notes 126-44 and accompanying text for discussion of defense of felony prevention.

126. *Deadly Force, supra* note 117, at 1217. *See also* LAFAVE & SCOTT, *supra* note 108, § 56, at 406 (deadly force originally justifiable to prevent or terminate felony, but not justifiable to prevent or terminate misdemeanor); *Force in Criminal Law, supra* note 12, at 572, 582 (justification not based on reasonableness of force but on nature of activity designed to prevent). *Cf.* 40 AM. JUR. 2D *Homicide* § 121, at 413 (killing a person to prevent commission of any forcible and atrocious crime considered justifiable from earliest days of common law). For purposes of brevity, the term "prevent" shall be used to cover both the prevention and the termination of the commission of a felony.

127. *See Deadly Force, supra* note 117, at 1217-18 (coherence of privilege to use deadly force disturbed by creation of statutory felonies not punishable by either life imprisonment or death). Although it is a felony to file a false income tax return, "one is not justified in shooting the filer on his way to the mailbox, even though the filing cannot otherwise be prevented." LAFAVE & SCOTT, *supra* note 108, § 56, at 406.

128. Justification lies where the use of any force short of deadly will not prevent the commission of the felony. *See, e.g.*, Tolbert v. State, 31 Ala. App. 301, 303, 15 So. 2d 745, 747 (1943) (victim of attempted rape could have prevented rape by elderly man with measure far less rigorous than stabbing him to death, and thus not justified); Law v. State, 21 Md. App. 13, 27-28, 318 A.2d

to prevent what is reasonably believed[129] to be the commission of a "dangerous" or "atrocious" felony, characterized by violence or surprise.[130]

Thus, there is no longer a right to kill in order to prevent *any* felony.[131]

859, 868 (1974) (shooting melee between resident and police arising from each mistaking other for intruder triggered by resident's lack of reasonableness; no justification to fire "upon everyone who forcibly enters his house, even at night"); Commonwealth v. Harris, 444 Pa. 515, 518, 281 A.2d 879, 881 (1971) (force used to kill milkman who was believed to be intruder not necessary even if milkman was intruder).

Note that little threat situations are defined such that deadly force *is* necessary to prevent the felony. *See infra* notes 134-41 and accompanying text for discussion of whether status as an "atrocious felony" is enough to make justification to use deadly force available.

129. *See* Adami v. State, 524 S.W.2d 693, 697 (Tex. Crim. App. 1975) (resident who killed five Mexican aliens discovered in his abandoned uninhabited shack did not have reasonable ground to believe intent of aliens was to commit theft or felony); *Force in Criminal Law, supra* note 12, at 597 (mistake as to fact that crime is felony could destroy justification).

130. *See, e.g.*, 1 BISHOP, CRIMINAL LAW, § 853, at 608 (9th ed. 1923) (felonies attempted by violence or surprise include murder, rape, robbery, arson, and burglary); LAFAVE & SCOTT, *supra* note 108, at 406-07 (dangerous felonies involve substantial risk of death or serious bodily injury); LOW, *supra* note 111, at 552-53 (where defense of felony prevention permitted, deadly force justified only to prevent dangerous felonies); R. PERKINS & R. BOYCE, CRIMINAL LAW 1109-11 (3d ed. 1982) [hereinafter PERKINS, CRIMINAL LAW] (deadly force permitted to prevent dangerous felonies). *Cf.* W. Blackstone, *supra* note 7, at *180 (forcible and atrocious crimes inlcude murder, robbery, attempt to break into a residence at night, and arson).

See also People v. Ceballos, 12 Cal. 3d 470, 478, 526 P.2d 241, 245, 116 Cal. Rptr. 233, 237 (1974) (en banc) ("surprise" requirement is redundant); State v. Couch, 52 N.M. 127, 136, 193 P.2d 405, 410 (1946) (citing BLACKSTONE); Commonwealth v. Emmons, 157 Pa. Super. 495, 498, 43 A.2d 568, 569 (1945) (defendant had no right to shoot person she believed was a thief to prevent supposed larceny; killing justified only to prevent commission of felony which is atrocious or by force or surprise). *But see* State v. Metcalfe, 203 Iowa 155, 169-70, 212 N.W. 382, 389 (1927) (force alone is enough, as with burglary).

Where modern statutes continue to define the scope of the privilege in terms of felonies, many courts interpolate a force or violence requirement for the felonies. *Deadly Force, supra* note 117, at 1218. In addition, many statutes now explicitly require force or violence or a risk of death or serious bodily injury. *See, e.g.*, MODEL PENAL CODE § 3.07(5)(a)(ii) (1985) (one requirement for use of deadly force to prevent commission of crime is threat of death or serious bodily harm).

131. *See* LAFAVE & SCOTT, *supra* note 108, § 56, at 407 (right to use deadly force limited to situations where reasonably appears necessary to prevent commission of, or terminate, apparently imminent dangerous or atrocious felony). *Cf.*, W. BLACKSTONE, *supra* note 7, at *180 (no justification for crimes unaccompanied by force, "as picking of pockets, or . . . the breaking open of any house *in the daytime*, unless it carries with it an attempt of robbery also") (emphasis original). *See also* State v. McIntyre, 106 Ariz. 439, 445, 477 P.2d 529, 535 (1970) (en banc) (no "carte blanche to shoot another simply because that other person is committing an act which under the statutes might be considered a felony;" reasonable fear of serious bodily injury required); People v. Martin, 168 Cal. App. 3d 1111, 1118, 214 Cal. Rptr. 873, 877 (1985) (no justification for use of deadly force to prevent wife-beating); Mammano v. State, 333 P.2d 602, 605 (Okla. Crim. App. 1958) (killing not justified to prevent felony of simple assault and battery where defendant was unimpeded in withdrawing from situs of assault) (citing 40 C.J.S. HOMICIDE § 101); Commonwealth v. Emmons, 157 Pa. Super. at 497-98, 43 A.2d at 569 (1945) (no right to kill in order to prevent theft of car by day); State v. Nyland, 47 Wash. 2d 240, 243, 287 P.2d 345, 347-48 (1955) (no justification for killing to prevent felony of adultery—not a crime of violence). *But see* Thompson v. State, 61 Neb. 210, 214, 85 N.W. 62, 63 (1901) (blackmail regarded as robbery since mental suffering can diminish value of existence as much as physical suffering and therefore resident justified in using deadly force to prevent commission of this felony in defense of domicile).

Furthermore, there is some question on the limits of the right to kill to prevent an "atrocious" felony. Although a felony may be classified as an "atrocious felony," is that classification alone enough to justify the use of deadly force, assuming that less than deadly force is insufficient to prevent such a felony? Does the status as an "atrocious felony" carry a presumption that life is in peril, thus justifying the use of deadly force?[132] Or does the defense depend upon a situation-specific balancing of the competing interests, requiring an actual threat of death or serious bodily injury to justify the use of deadly force? Specifically, where an intrusion presents little threat of death or serious bodily injury, but nevertheless constitutes an "atrocious felony," does the felony prevention defense justify use of deadly force against the intruder, where such force is necessary to prevent the commission of the felony?[133] The views on this question vary.

The majority of courts adopt the status approach for residence-related felonies.[134] The status approach posits that, in the event of an atrocious residence-related felony,[135] the resident may rely on the presumption that a threat of death or serious bodily injury is present.[136] The courts base this presumption on the

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132. Such a status approach is similar to the old common law approach. *See Force in Criminal Law, supra* note 12, at 572 (justifiable homicide was not based on reasonableness of force which actor used, but on nature of activity which it was designed to prevent). *See also supra* note 126 and accompanying text for a discussion of the early common law approach. It is also similar to the absolutist all-or-nothing tendency in Jewish law, which largely bases the justification more on the nature of the activity the force is designed to prevent than on the balancing criteria of necessity and proportionality of the force in the specific situation. *See infra* notes 146-53 and accompanying text for discussion of similarities between absolutist approach and Jewish law.

133. *See supra* note 117 for a discussion of the use of deadly force which is excessive.

134. This article focuses on burglary (a residence-related felony) because that crime comes closest to satisfying the conditions of a little threat situation. *See infra* note 136 for a representative sample of cases.

135. A subset of these cases permits the use of deadly force in the context of atrocious residence-related felonies or in *any* common law felony. *See, e.g., Martin*, 168 Cal. App. 3d at 1123, 214 Cal. Rptr. at 881 (statutory justification for use of deadly force against any person committing "any felony" interpreted to include all felonies at common law). State v. Couch, 52 N.M. 127, 135, 193 P.2d 405, 410 (1946) (no distinction between common law and statutory felonies as pertains to resident's privilege to protect self or home from perpetration of felony against self or home).

136. *See generally,* State v. Harris, 222 N.W.2d 462, 466-67 (Iowa 1974) (for atrocious felonies like murder, robbery, rape, arson, or burglary, human life either is, or is presumed to be, in peril); *Couch*, 52 N.M. at 135, 193 P.2d at 409 (right to use deadly force exists when resident believes life in danger *or* when felonious assault made on house, like burglary, arson, etc.); Fore v. Commonwealth, 291 Ky. 34, 38, 163 S.W.2d 48, 50 (1942) (use of deadly force to defend habitation confined to cases of attempted forcible entry for purpose of committing felony or inflicting serious bodily injury, or cases of attack on home with firearms). *See also* Tennessee v. Garner, 471 U.S. 1, 27 (1985) (O'Connor, J., dissenting) ("even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the 'harsh potentialities for violence' inherent in the forced, entry into a home preclude characterization of the crime as 'innocuous, inconsequential, minor or "nonviolent" ' ").

This rule also applies to the grounds of a residence. Brooks v. Sessagesimo, 139 Cal. App. 679, 680-81, 34 P.2d 766, 767 (1934) (resident justified in killing without warning intruder who was breaking into resident's chicken house); State v. Metcalfe, 203 Iowa 155, 170, 212 N.W. 382, 389 (1927) (resident justified in shooting at boys located at his hen house if he reasonably believed he was dealing with two men who had just stolen chickens); Commonwealth v. Beverly, 237 Ky. 35, 39, 34

belief that the intruder is essentially evil and lawless, and that a strong potential for danger is inherently present, regardless of the actual circumstance.[137] The law additionally presumes that such intrusions excite the fears of any reasonable person, who is thus entitled to act on the inference of motive from deed.[138] The resident then is justified in killing the intruder who is committing an atrocious

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S.W.2d 941, 943 (1931) (where resident killed thieves who stole three dollars worth of his chickens from shed (a felony), justified to use deadly force if necessary or apparently necessary to prevent commission of felony on person or habitation); Whitten v. State, 29 Tex. App. 504, 505, 507, 16 S.W. 296, 297-98 (1891) (resident, fifteen to twenty steps from gate, justified in shooting intruder when intruder charged out of corral with resident's horse); Slack v. State, 67 Tex. Crim. 460, 461, 463, 149 S.W. 107, 107-08 (1912) (resident positioned where could not be seen, justifiably shot and killed intruder stealing corn from resident's field); State v. Terrell, 55 Utah 314, 325-26, 186 P. 108, 112-13 (1919) (justification may exist, provided finding of burglary, for resident who having noticed rabbits stolen, slept out near hutch, and shot boy he believed was stealing rabbits).

Some courts have extended the atrocious felony defense to the place of business. *See, e.g.*, People v. Silver, 16 Cal. 2d 714, 716, 108 P.2d 4, 5 (1940) (en banc) (manslaughter conviction reversed for guard who, on 84 foot hill, 288 feet away from theft, shot at three boys stealing gasoline); Nakashima v. Takase, 8 Cal. App. 2d 35, 39, 46 P.2d 1020, 1022 (1935) (justification held to exist for shopkeeper who in anticipation of burglary, hid himself in secure position in store in dark, and, without notice, shot and killed thief who came in line of fire); State v. Sorrentino, 31 Wyo. 129, 137, 224 P.420, 422 (1924) (place of business regarded as dwelling for purposes of use of deadly force in mixed self-defense/felony prevention justification).

137. *See Ceballos*, 12 Cal. 3d at 475, 526 P.2d at 243, 116 Cal. Rptr. at 235 (resident set up spring gun because did not want to come home to find burglar, since "a thief is [usually] pretty desperate"); *Brooks*, 139 Cal. App. at 681, 34 P.2d at 767 (one who is committing a burglary apt to be armed with gun; not unusual for such person to shoot when caught in act); *Metcalfe*, 203 Iowa at 170, 212 N.W. at 389 (property owner at peril when undertakes to protect person and property at nighttime against unscrupulous persons bent on plunder); *Beverly*, 237 Ky. at 39, 34 S.W.2d at 943 (conception of right to use deadly force to prevent felony involving violence or element of potential danger to person, as with burglary, "is in recognition of a law of sublime origin and more imperial authority than any human code"); Howard v. Commonwealth, 198 Ky. 453, 455, 248 S.W. 1059, 1061 (1923) (commission of robbery, rape, arson, murder, burglary, etc., contains element of potential danger to the person and prevention by killing excusable); *Couch*, 52 N.M. at 138, 193 P.2d at 411 (rules of justification intended to prevent reckless and wicked men from assailing peaceable members of society); *Slack*, 67 Tex. Crim. at 463, 149 S.W. at 108 (rule allowing deadly force may seem harsh, "but the character of persons generally who commit theft in the nighttime experience has shown will take life before suffering detection and arrest"). *See also* Tennessee v. Garner, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting) (household burglaries pose real risk of serious harm to others).

Alternative grounds for this justification may be that any common law felony survives the judicial gloss requiring atrociousness. *See Martin*, 168 Cal. 3d at 1116, 1123-25, 214 Cal. Rptr. at 875-76, 881-882 (legislature intended to include in justification all common law crimes then recognized, including nighttime burglary of a residence). *See supra* note 135 for a discussion of the permission to use deadly force in the context of any common law felony. This common law rule is most likely also based on the belief that a residence-intruder is inherently evil.

138. *Metcalfe*, 203 Iowa at 170, 212 N.W. at 389 ("[o]ne should not be unmindful of the . . . peril to which . . . [a property owner] subjects his person when he undertakes to protect his person and property"); *Couch*, 52 N.M. at 139-40, 193 P.2d at 412 (resident could only infer motive from deeds, since he did not know identity of intruder; ignorance serves to increase rather than lessen fear); *Sorrentino*, 31 Wyo. at 141, 224 P. at 424 ("[a] sudden appearance from out the darkness is apt to give at least a temporary nervous shock to the stoutest heart"). *See also* State v. Terrell, 55 Utah at 319, 186 P. at 110 (in case concerning theft of rabbits by boy-thief, resident claimed, "In my judgement, it was necessary to shoot that night under the circumstances, . . . I was under the impres-

felony.[139] This privilege is limited only by general precautions against "wanton slaying."[140]

Some courts seem to require an inquiry into the character and manner of the felony in question to determine if there is actual threat of death or serious bodily injury. These courts apparently hold an implicit presumption against the existence of such danger, which may be rebutted by the resident. These cases, however, do not consider little threat intrusions and thus do not directly upset the majority rule's status approach.[141]

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sion that there was more than one there, that I was going up against somebody that perhaps was prepared to take a shot at me or something, in case I let them know I was there").

139. This justification lasts in the context of a burglary or theft by night as long as the intruder is in the place of the theft or within reach or gunshot from such a place. Whitten v. State, 29 Tex. App. at 506-07, 16 S.W. at 297-98. *See also* Viliborghi v. State, 45 Ariz. 275, 290-91, 43 P.2d 210, 216-17 (1935) (justified to kill to prevent completion of felony or flight from arrest after felony), *superseded by statute as stated in* State v. Featherman, 133 Ariz. 340, 651 P.2d 868 (1982).

140. *See, e.g., Beverly*, 237 Ky. at 39, 34 S.W.2d at 943 (killing not justified if one manifests a "culpable recklessness in his wanton disregard of humanity . . . in taking . . . the life of a fellow human being in order to save himself from a comparatively slight wrong"); *Couch*, 52 N.M. at 137, 193 P.2d at 411 (neither ancient nor modern law provides privilege for wanton slaying).

141. *See Ceballos*, 12 Cal. 3d at 479, 526 P.2d at 246 116 Cal. Rptr. at 238 (burglary cannot be said under all circumstances to constitute a forcible and atrocious crime). A threat was held to be absent in this spring gun case, primarily because no resident was present on the premises when the intrusion occurred. *Id.* at 480, 526 P.2d at 246, 116 Cal. Rptr. at 238. Despite powerful dictum, this case is clearly distinguishable from a little threat intrusion, because no threat was entailed. Interestingly, *Ceballos* suggests that no privilege would exist for an intrusion into a place where no one other than the intruder reasonably would be. *Id.* at 482, 526 P.2d at 248, 116 Cal. Rptr. at 240. This is in accord with Jewish law. *See supra* notes 48-49 and accompanying text for a discussion of the Jewish law on outbuilding intrusions. *See also* State v. Beckham, 306 Mo. 566, 267 S.W. 817 (1924) (killing by spring gun not justifiable; defendant not on premises). *But see* Scheuermann v. Scharfenberg, 163 Ala. 337, 343, 50 So. 335, 337 (1909) (right upheld to set spring guns as protection against burglary). People v. Quesada, 113 Cal. App. 3d 533, 169 Cal. Rptr. 881 (1980), deals with a night burglary of a residence. But like *Ceballos*, no one other than the intruder was present during the intrusion. Accordingly, no justification existed for the resident shooting the intruder two days later. *Id.* at 535, 539, 169 Cal. Rptr. at 882, 885.

In People v. Piorkowski, a conviction of involuntary manslaughter was affirmed where defendant, during the daytime and on the street, stopped three youths who had stolen a wallet from someone in a business establishment open to the public, and during a struggle, shot and killed one of them. 41 Cal. App. 3d 324, 330, 115 Cal. Rptr. 830, 833-34 (1974). The court opined that, although theft constituted statutory burglary, there was no forceful confrontation, and thus no attendant risk to human life. *Id.* at 330, 115 Cal. Rptr. at 834. The court stated that "[w]e do not have here a burglary of a dwelling at night . . ." and that the character and manner of the crime did not warrant use of deadly force. *Id.* at 330, 115 Cal. Rptr. at 834. By negative implication this suggests that, at least for a *night* intrusion of a dwelling, a threat of death or serious bodily injury is *ipso facto* present.

This group of cases is bolstered most strongly by Tennessee v. Garner, 471 U.S. 1 (1985). In *Garner*, Hymon, a police officer, shot a fifteen year old 5'4" burglar as the burglar was fleeing over a fence. *Id.* at 4 n.2. Hyman was reasonably sure that the burglar was unarmed. *Id.* The court required reasonable belief that a fleeing burglar poses physical danger for the use of deadly force to be justified. *Id.* at 18-19. "The fact that [the deceased] was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force." *Id.* at 21. This decision is distinguishable from a little threat intrusion in that the decision was specifically treating only the justification in connection with the prevention of the escape of a fleeing felon and not with rules for felony prevention. *See also* State v. McIntyre, 106 Ariz. 439, 443-45, 447 P.2d 529, 533-35

Most commentators agree that the status approach is inappropriate for atrocious felonies not related to residences.[142] Some commentators approve of the status approach for residence burglaries,[143] while others favor a rule requiring actual danger.[144]

IV. ANALYSIS

The status approach adopted by the majority of courts in the United States

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(1970) (en banc), in which the court affirmed a second degree murder conviction where the defendant had shot the victim, his lover's ex-husband, in the midst of an aggravated assault by the victim. The defendant shot the victim after the victim was incapacitated, and where the defendant, with others, may have been able to subdue the victim without resorting to the use of deadly force. Such circumstances do not constitute a little threat intrusion. The court noted, in dictum, that to be justified in using deadly force, the type of aggravated assault must be one which reasonably creates a fear of great bodily injury, and that no "carte blanche" exists to shoot another simply because the other is committing a felony. *Id.*

142. *See, e.g.*, LAFAVE & SCOTT, *supra* note 108, § 56, at 407 n.32 ("[i]t ought not to be justifiable to shoot to kill to prevent some modern statutory forms of burglary not involving the house, such as 'burglary' of a hen house or telephone booth"); *Force in Criminal Law, supra* note 12, at 579 (status approach leads to absurd results; e.g., because burglary felony includes entering store to steal, literally justifiable under felony-prevention rule for store detective to kill shoplifter about to enter store, intending to steal). *See also* Commonwealth v. Beverly, 237 Ky. 35, 42-43, 34 S.W.2d 941, 945 (1931) (killing solely to protect property or to prevent commission of felony of stealing chickens and not in self-defense not justified).

143. *See, e.g.*, LAFAVE & SCOTT, *supra* note 108, § 56, at 407 (burglary of a dwelling is atrocious dangerous felony; killing justified if reasonably appears necessary to prevent commission of felony); PERKINS, CRIMINAL LAW, *supra* note 130, at 1110 (dangerous felonies, including burglary, which justify use of deadly force either directly involve great personal harm, "or have been shown by human experience to involve an unreasonable risk thereof"); Posner, *supra* note 108, at 205 (broad privilege to use deadly force to prevent certain crimes including burglary of dwelling place, whether or not crime is a dangerous one in circumstances, e.g., burglary of unoccupied dwelling); RESTATEMENT (SECOND) OF TORTS § 143(2) and § 79 comment d, illustration 3 (1965) (privilege exists if felony is of type threatening death of serious bodily injury or involving breaking and entry of a dwelling place); *Force in Criminal Law, supra* note 12, at 578 (some jurisdictions have included in penal laws privilege to use deadly force to prevent any felony, whether or not it involves threat of serious bodily injury). *See also* W. BLACKSTONE, *supra* note 7, at *180 ("[i]f any person . . . attempts to break open a house *in the night time*, . . . and shall be killed in such attempt, the slayer shall be acquitted and discharged") (emphasis original); Note, *supra* note 8, at 933-34 (many states allow deadly force to be used to resist a forcible felony or a felony involving violence).

144. *See, e.g.*, F. HARPER, F. JAMES & O. GRAY, 1 THE LAW OF TORTS, § 3.19, at 386 (2d ed. 1986) (allow privilege only when "the offense . . . is one which threatens human life or serious bodily harm"); F. HARPER & F. JAMES, 2 THE LAW OF TORTS, § 27.3, at 1441-42 n.38 (1956) (right to kill to prevent crime should depend on character, time, and manner of attempted crime, rather than its degree of punishment or its designation in penal code as felony or not); Wechsler & Michael, *supra* note 19, at 740 (common law formula which includes within "violent felonies" crimes against property when threatened under circumstances involving little or no danger of serious bodily injury condemned); *Force in Criminal Law, supra* note 12, at 577, 582-83 (right to kill should be allowed only where interest at stake is more important than victim's life, such as where other lives are threatened and not on the basis of statutory classification). *Cf.* MODEL PENAL CODE § 3.07(5)(a)(ii) (1985) (deadly force permissible to prevent commission of felony provided actor believes there is substantial risk that person whom he seeks to prevent will cause death or serious bodily injury unless crime is prevented).

is similar to the approach of Jewish law.[145] For a little threat burglary, both systems justify the resident's killing of the intruder, provided the use of force is necessary to prevent the commission of the felony. For both systems, this justification rests on a presumption of potential violence. Since this presumption is specific to the context of residence intrusion, it appears that both systems identify the security of the residence with the security of the resident.

Both the United States and Jewish systems tend to favor the principle of autonomy over proportionality. Both are similar to the absolutist approach of the Soviet Union and the German Federal Republic, where the license to use force is triggered not by a subtle balancing process, but rather by the recognition of the presence of an unlawful aggressive attack.[146] Under this approach, such unjustified conduct confers an absolute right on the victim to protect his or her liberty and rights from encroachment.[147] The aggression puts the aggressor outside the protection of the law.[148] Questions of degree are suppressed, and the principle of autonomy overwhelms the principle of proportionality.[149] The rationale of the absolutist approach is that the requirement to perform proportionality calculations calls for excessive caution and undue deference to aggressors.[150] A resident in danger is hardly in a position to reflect on the merits of competing interests.[151] Indeed, according to this approach, the rule of proportionality encourages criminal conduct.[152]

Jewish law and United States common law on little threat intrusions are comparable to the absolutist approach because they ascribe greater weight to the principle of autonomy than to the principle of proportionality. Justification arises in a general category of events, not after a situation-specific balancing process is satisfied. As long as the resident has not clearly established the presence of peaceful intentions, the resident is justified in immediately using whatever amount of force is necessary to arrest the intrusion, including deadly force. The justification stems primarily from the nature of the activity that the deadly force is designed to prevent, and not from the proportionality of the force used.[153]

There are, however, a number of differences between the two systems. First, Jewish law provides an automatic justification when the resident deems the necessary conditions to be present. In contrast to this subjective test, the United States status approach employs a subjective-objective standard.[154] The

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145. *See supra* notes 102-06 and accompanying text for summary of Jewish law.

146. Fletcher, *supra* note 15, at 367, 378-82.

147. *Id.* at 379.

148. *Id.* at 379-80.

149. *Id.* at 381.

150. *Id.* at 382.

151. *Id.*

152. *Id.*

153. *See Force in Criminal Law*, *supra* note 12, at 572 (law of justifiable homicide based not on reasonableness of force which actor used, but on nature of activity which force was designed to prevent).

154. *See supra* notes 134-44 and accompanying text for a discussion of the United States status approach.

resident must *reasonably* deem the presence of the necessary elements for the *per se* justification to exist.[155] Second, while the presumption of threat of death or serious bodily injury may be rebutted under Jewish law, it is conclusive under the United States common law status approach.[156] Finally, another distinction concerns the availability of the justification during the day. United States statutes often distinguish between day and night in applying the defense, and United States common law in practice seems to subject daytime intrusions to greater scrutiny than nighttime intrusions.[157] In contrast, Jewish law affords the resident this justification on a twenty-four hour basis, provided the necessary conditions are met.[158] Thus, for example, where less than deadly force would not prevent the commission of a little threat felony of burglary at night, a resident son may kill his intruding loving father justifiably under the United States status approach, while no such justification would exist under Jewish law.[159]

Subtle differences in the premises of the two systems account for these distinctions. Jewish law focuses on the resident, the resident's presumed readiness

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155. The approaches of both systems of law contrast with the "actual threat" approach which embodies no "automatic" or "*per se*" rule.

156. *See supra* notes 38-49 and accompanying text for a discussion of the rebuttable presumption in Jewish law; *supra* notes 134-41 and accompanying text for a discussion of the conclusive presumption in United States law. Burden of proof questions are not the same as a presumption. A resident may lose the defense because he or she lacked reasonable grounds for believing an atrocious felony existed. *See, e.g.*, State v. Metcalfe, 203 Iowa 155, 165, 212 N.W. 380, 387 (1927) (bare fear of felony is not sufficient); Fore v. Commonwealth, 291 Ky. 34, 37-38, 163 S.W.2d 48, 50 (1942) (owner of residence not justified in shooting and killing intruder once he had departed from residence); State v. Couch, 52 N.M. 127, 135-36, 193 P.2d 405, 410 (1946) (no justification for use of deadly force against mere trespasser); State v. McCracken, 22 N.M. 588, 593, 166 P. 1174, 1176 (1917) (no justification to use deadly force in order to defend property, other than habitation, for mere purpose of preventing trespass) (citing WHARTON ON HOMICIDE § 526, at 783 (3d ed. 1907)). This discussion of the United States common law approach assumes such a crime exists. The Jewish law sources treated *supra* are based on the verse, "If a *thief* be found breaking in" (emphasis added). Thus, the existence of the felony is a given. *See also supra* notes 147-53 and accompanying text for a discussion of the absolutist approach which also assumes the existence of a felony.

157. *See, e.g.*, People v. Martin, 168 Cal. App. 3d 1111, 1120, 214 Cal. Rptr. 873, 878-79 (1985) (case at bench [night] contrasted with other case [day]); People v. Piorkowski, 41 Cal. App. 3d 324, 330, 115 Cal. Rptr. 830, 834 (1974) (burglary by day raises less threat of death or serious bodily injury than one by night); Commonwealth v. Emmons, 157 Pa. Super. 495, 498, 43 A.2d 568, 569 (1945) (no justification for use of deadly force to prevent theft of car in broad daylight); Slack v. State, 67 Tex. Crim. 460, 463, 149 S.W. 107, 108 (1912) (theft by night presents greater dangers to resident); Whitten v. State, 29 Tex. Crim. 504, 506, 16 S.W. 296, 297 (1891) (statute provides for use of deadly force to prevent theft at night). *See also* W. BLACKSTONE, *supra* note 7, at *224 (when there is enough daylight " to discern a man's face withal, it is no burglary"); *Id.* at *180 (no justification for crimes unaccompanied by force such as "breaking open of any house *in the daytime*, unless it carries with it the attempt of robbery also") (emphasis original). *But cf.* State v. Nyland, 47 Wash. 2d 240, 242, 287 P.2d 345, 347 (1955) (justification to use deadly force applies to robbery, burglary, breaking into house in daytime with intent to rob).

158. *See supra* notes 36-63 and accompanying text for Jewish legal sources supporting the availability of the justification day and night.

159. *See supra* notes 108-44 and accompanying text for a discussion of the use of deadly force to prevent a felony under United States law. *See also supra* notes 102-06 and accompanying text for a discussion of the use of deadly force in Jewish law.

to resist theft of property, and the resident's relationship to the intruder.[160] United States law, on the other hand, focuses on the end of preventing a felony, and not on the resident.[161]

Jewish law defers to the resident's subjective judgment, because the resident is the focus of the law's concern. The United States law's subjective-objective test reflects the primary focus on the felony itself. The felony-centered focus of United States law is also reflected by the increased scrutiny subjected to the use of force against daytime intrusions. The fact that the rules of the United States approach depend on distinctions between day and night exposes a primary concern of the system with the operation of the rules themselves. In contrast, Jewish law does not treat the time of day as relevant independent of its significance to the resident's perceptions of threat and security.

The presumption that potential for evil from the intruder depends upon the intruder's relationship to the resident most clearly demonstrates that the focus is on the resident in Jewish law.[162] When the intruder is believed to have compassion for the resident, the resident has no basis for using deadly force to resist the intrusion, because the resident's life is not threatened.[163] In contrast, there is a conclusive presumption under United States law that the perpetrator of a felony is inherently evil, regardless of the intruder's relationship to the resident.

Compared to the Jewish law approach, the United States version of the status approach may be criticized on two apparently countervailing grounds. First, the objective evaluation requirement vitiates one of the goals of a status approach, certainty for the resident. Both systems require the resident to establish for him or herself that a particular status exists. Under the United States approach, however, the objective aspect of the subjective-objective evaluation requirement forces the resident to pause before ensuring safety and determine whether society would agree that the intrusion presents the imminent commission of an atrocious felony and, hence, would approve of the resident's preemptive action. This additional moment, during which the resident potentially must achieve the difficult task of viewing what he sees with eyes other than his own, could mean the difference between the resident's life or death. At this stage of an intrusion, the United States approach overemphasizes proportionality by ac-

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160. *See supra* notes 102-06 and accompanying text for a summary of the privilege for the use of deadly force under Jewish law.

161. *See supra* notes 126-41 and accompanying text for a discussion of United States law on the use of deadly force. *See also supra* notes 131-33 and accompanying text regarding possible limitations to the use of deadly force in preventing a felony.

162. *See supra* notes 31, 45, 64-66, 83-84, 106 and accompanying text for a discussion of Jewish law's focus on the intruder's relationship to the resident.

163. *Cf.* State v. Perkins, 88 Conn. 360, 367, 91 A. 265, 267 (1914) (mother-in-law justified in killing son-in-law breaking into house to gain access to his child); Brown v. People, 39 Ill. 407, 408 (1866) (resident justified in killing intruder when resident's brother and intruder broke down resident's door and window); People v. Tomlins, 213 N.Y. 240, 244, 107 N.E. 496, 498 (1914) (father acquitted after killing 22 year-old son who attacked him in family home); Sledge v. State, 507 S.W.2d 726, 728-29 (Tex. Crim. 1974) (conviction of resident who shot stepdaughter's husband breaking into residence in order to fight resident was voided due to error in charge to jury), *superseded by statute as stated in* Rogers v. State, 653 S.W.2d 122 (Tex. Crim. App. 1983).

cording the intruder in society's balancing of interests value equal to the resident's, despite the intruder having voluntarily initiated the confrontation.

The second criticism of the United States version of the status approach arises once the resident has determined that deadly force is necessary to arrest what the resident reasonably believes to be the imminent commission of an atrocious felony. At this point the resident enjoys the privilege of an absolute rule. The United States rule is ultimately one in which the principle of autonomy is wholly unchecked by the principle of proportionality. Even if society would agree that an atrocious felony is underway, such a rule does not limit loss of life to the fullest extent possible. This rule is dangerous because it affords the justified party, the resident, a carte blanche to kill anyone who satisfies the definitional requirements of an atrocious felon, regardless of the actual danger posed, and does not encourage the exercise of force necessarily calibrated to the exigencies of the intrusion. The value of life, then, is not balanced against the preservation of other life, but rather against lesser interests. This result derives from the rigidity inherent in a focus on the end result of preventing a felony, rather than from the fluidity inherent in a focus on an individual and the individual's varying relationships.

Both status approaches are subject to the same criticisms arising from the "actual threat" camp. First, the law of justification should not be used as a penal device,[164] especially where the intruder's felony is not one punishable by death.[165] Second, even if the "little threat" burglary were punishable by death, it is unfair to subject the intruder to the instant judgment of a one person judge and jury.[166] Third, it is inherently arbitrary to base justification on certain fixed categories of intruder behavior (for the United States status approach, atrocious felonies as opposed to other crimes; for the Jewish law status approach, theft).[167] Fourth, the concerns about the dangers of absolute rules expressed above in criticism of the United States approach apply in varying degree to any system that affords a justification without a situation-specific analysis. Finally, the status approach grew out of threats inherent in hand-to-hand combat. In modern society, where such close range combat is no longer imperative due to current firearm technology, such an approach has outgrown its origins, permitting harsher consequences with fewer risks than were originally contemplated.[168]

Principles of deterrence and feasibility form the strongest counterarguments in favor of a status approach. A bright-line rule deters intruders because it informs them that society consistently values their lives less than residents' interests in security from the commission of even a little threat burglary. This

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164. *See Force in Criminal Law, supra* note 12, at 582-83 (anachronistic to base modern law of justification on outmoded penal sanctions).

165. *Id. Cf. supra* note 69 for a discussion of the use of deadly force as punishment under Jewish law.

166. *Force in Criminal Law, supra* note 12, at 582-83.

167. *See* Tennessee v. Garner, 471 U.S. 1, 14 (1984) (distinction between felony and misdemeanor is minor and often arbitrary). *See supra* note 85 for a discussion of Feinstein's limitation of availability of justification to theft and not robbery.

168. *Garner*, 471 U.S. at 14.

rule particularly deters the little threat intruder, a person not obviously prone to violence, while the "actual threat" approach may seem to grant the intruder a right to flee unimpeded from the scene of a burglary.[169] Moreover, from the resident's perspective, the status approach is more workable. A potential manslaughter conviction could deter a resident from acting quickly enough to ensure safety. The resident could remain quietly and, if not discovered, peaceably behind the curtain, but such inaction prolongs the danger of violence to the resident. Indeed, inaction may intensify that danger because of the increasing likelihood, with the passage of time, that the intruder's prowling will lead to the resident's place of refuge, while a shot from the shadows would extinguish such danger altogether. Finally, in all cases in which it is not as clear as the sun that there *is* threat of death or serious bodily injury, an actual threat approach strips the resident of autonomy and fundamental freedom to preserve him or herself against aggression.[170] The actual threat approach subrogates the most basic freedom of the resident to the security interests of a little threat intruder. The status approach imposes the risk of the intrusion on the intruder, while the actual threat approach places that risk on the resident. Since the intruder is better able than the resident to prevent the creation of a little threat situation of danger, it is more efficient and equitable to have the intruder bear the attendant risks of the intrusion.

The approach of Jewish law is preferable to the United States approach and to the actual threat approach. The analysis permitting the justification under Jewish law is more calibrated to the exigencies of the actual intrusion because of its greater concern with the resident's actual situation and lesser concern with rigid abstractions which can blindly require too much or too little deference to the humanity of the intruder. Jewish law employs a situation-specific focus, but unlike the actual threat approach, only to the extent that such a focus is not at the security expense of the resident.

CONCLUSION

Current Jewish law and United States common law both justify the use of deadly force in the context of a little threat intrusion into a residence. The rule under Jewish law turns on the resident's experience, while United States law focuses on the intruder and the felony. The justification for both is based on a preference of interests of autonomy over interests of proportionality. The two systems differ, however, in the extent to which, and circumstances in which, each embraces this preference. An "actual threat" approach would embrace a reverse order of preferences and thus require demonstration of serious physical danger before deadly force would be justified. Neither system has adopted such an approach, perhaps because both view the security of the resident as closely

169. *Id.* at 29 (O'Connor, J., dissenting) (contrary to majority's focus on importance of person's interest in life, such interest does not encompass right to flee unimpeded from scene of burglary).

170. *See supra* notes 19-22 and accompanying text for discussion of Kadish's theory of autonomy and aggression.

related to the security of the residence. The approach of the Jewish law is preferable because, unlike the United States approach or the actual threat approach, it minimizes the use of deadly force by requiring a situation-specific analysis, but only to the extent that the intruder, and not the resident, bears the risks inherent in such an analysis.